
ICANN Transcription

Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP WG

Wednesday, 10 October 2018 at 1700 UTC

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MICHELLE DESMYTER: Thank you, Ann. Well, welcome everyone. Good morning, good afternoon and good evening to all. Welcome to the Review of all Rights Protection Mechanisms in all gTLDs call on the 10th of October, 2018. In the interest of time, there will be no roll call. We have quite a few participants online today. Attendance will be taken via the Adobe connect room. If you happen to be only on the audio bridge today, please let yourself be known now. Thank you.

As a reminder to everyone. If you would please state your name before speaking for transcription purposes and please keep your phones and microphones on mute when not speaking to avoid background noise.

With this, I'll hand the meeting over to Kathy Kleiman.

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KATHY KLEIMAN:

Hello, everybody. This is Kathy Kleiman. Good morning, good afternoon, good evening. I note that my two co chairs are not on the call today as Brian Beckman and Phil [Inaudible Speech] are both in Geneva. I'm just double checking to see if they did come in. They're both in Geneva at a [Inaudible Speech] demo panelist session that was taking place yesterday. So Phil's probably on his way back now.

So they did ask me to chair this call when it is my pleasure to do.

I wanted to remind you that today this week we have two meetings both at the usual time. This time 1 p.m. eastern today and Friday. I believe they're both scheduled to be 2 hour meetings. However, it may not take that long on Friday.

So this is an exciting week as we begin our countdown to Barcelona meeting which I hope you'll be attending if not in person, then remotely. Remote participation has gotten so much better in recent years. So I hope you'll be coming in one way or the other.

Actually, let me pause for statements of interest. Does anybody have anything to update for us regarding statements of interest?

Okay. Then we move on to yet another marathon session of individual proposals which I want to share that we as a [Inaudible Speech] deeply appreciate because we know they take considerable time and effort to prepare and present. So we think everyone who submitted individual proposals and we note that now some of them are being revised and coming back. And we

may be able to get to some of these revised and consolidated proposals in some cases two people are consolidate proposals on Friday and also at our first meeting in Barcelona.

A preview of coming attractions at the start of our meeting next week I'm sorry, on Friday. We'll be talking in detail about the Barcelona meeting and how we'll be using the four sessions and which ones will be analysis groups and which ones will be individual proposals and initial reports.

But I've been asked not to do that today because we have so many proposals going forward. Let me just remind you of the rules of the game which is that the proponent of a proposal will be accorded 5 minutes and 5 minute clock is already up to present proposal rationale and supporting evidence. The floor will then be opened to other working group members to comment on the proposal for maximum of 2 minutes each with a total discussion limited to 20 minutes. If we indeed have to go that far and at the end of 20 minutes, the proponent will have up to 4 minutes to respond. Traditionally we've been holding questions until the end. So people who ask questions during their 2 minutes, the proponent will respond at the end. And that's the way we do it.

George Kirikos, I hope I'm pronouncing your name right, George, has a number of proposals on the table, as well as Maria [Inaudible Speech] whose proposals will be presented by staff because she was not able to make it and join us. And we tried really hard to find a time where she could.

So George, proposal number 5 is on the floor. Would you like to take us through it?

GEORGE KIRIKOS: Thanks, Kathy. George Kirikos for the transcript. Yeah, I want to preface my remarks by saying that some of them are controversial proposals from both sides. Probably not going to be able to reach consensus on their own but folks may want to keep in mind that when we ultimately try to reach consensus, some proposals might be bundled and packaged together. So proposal A and B might not be able to reach consensus on their own but A plus B together might be able to reach consensus. So if your natural inclination might be to oppose a proposal, try to keep an open mind and allow these proposals to go forward to public comments because keeping them alive means that some of the proposals that you might personally favor could be bundled with an offsetting proposal to get what you want. Have a little give and take. Anyway, proposal number 5 if it could be put in the pod that might be helpful for those who are on Adobe.

The three word summary of this is the statute of limitation proposal. So the URS policy should be amended to introduce a limitation period for filing complaints. The IRT could decide the exact length but for the purpose of the proposal I propose that the limitation period be two years as measured from declaration date of the domain name.

And the rationale of this proposal is that thinking if the URF didn't exist, disputes would be governed by the national laws of the jurisdiction and most jurisdictions have a statute of limitations period limiting the period in which a dispute can be filed. So you can get to a scenario where complaint can be brought but because there's no limitation period currently but the underlying

court would not allow that dispute to be brought. Which would deem that you have greater rights in the URF than you do under the national laws that are supposed to be really deciding what the expected outcome of the dispute can be.

So this proposal attempts to eliminate that absurdity and trademark owners sleep on their rights by not bringing complaints in a timely manner should lose the ability to use the [Inaudible Speech] procedures.

And so these procedures exist to provide a faster and cheaper route to that expected outcome that would occur in a court of law but not to provide a better outcome, greater rights for trademark holders. So implementation of the limitation period would be consistent with the reality that ICANN is not the place to create new law but merely a venue that respect and reflect existing laws in a conservative manner using recognized principals. So absence of limitation period in the current policies must be corrected to be consistent with underlying national laws. And so these policies were designed to remedy clearly abusive [Inaudible Speech] registrations but over time the policy have morphed and tend to be exploited for situations that are no longer obvious cyber swatting. And this is particularly the case for older domains where the rate of false positives or controversial disputes more suited to the courts tend to be higher. So by refocusing the policy only on relatively created domains which are of the vast majority of simple disputes, that makes the policy basically more focused and tailored to the vast majority of cyber squatting exists.

Most cyber squatting is on throw away worthless domains. Not on domains that have been renewed for 15/20 years. If you think

about it, the trademark system in the United States once a trademark application is published, opposers only have a 3 day time limit to oppose those applications. And those can be extended to up to 90 more days.

So these limitation periods exist throughout the law and even in the trademark system themselves. So, and measure from the publication date of the trademarks [Inaudible Speech] or once they're excepted by the staff at the UFPTO but not fully registered yet. So, obviously countries have specific time periods. Two years is the time period for Ontario, Canada which is my jurisdiction.

And trademark holders themselves are benefiting from limitation periods. If somebody wanted to challenge a trademark holder after 5 years, their trademarks are incontestable. So domain name holders as holders of intellectual property themselves deserve equal protection under the policy. And so the false positive rate would go down because most of those involve really valuable domains that have been registered for a long time. So those would no longer be handled by [Inaudible Speech]. Thank you.

KATHY KLEIMAN

George, thank you for that proposal. This is Kathy of course. So now we open up the floor for those who want to speak in favor, to raise concerns, as well as to raise questions. Anybody who would like to speak about this limitation period proposal. John, go ahead please.

JOHN:

John [Inaudible Speech] for the record. So interest proposal, George. There are a few things that's you stated that are just not correct under US law but, you know, maybe it does bear looking into other jurisdictions as well. So one of the things is that there is so statute of limitations for bringing up a trade lay on that claim. There's no statute of limitations in that. And actually what there is is a doctrine of latches which is what's currently applied. At least in the EDRP. As Greg Shatan pointed in the chat, the URF is so new there would be no statute of limitations issues going on with respect to that.

The other thing is that the publication periods in perfect analogy in that even if you don't oppose an application, you still can cancel it after registration for any time for up to 5 years. And lastly, statute of limitation in the United States works on a standard of new or should have known. What I think you're suggesting is more like a statute of ultimate repose which is just an absolute bar at a particular time. That's more like, in the United States, 10 years, 20 years. Not 2 or 3 years.

So I think just to conclude, we do need to be careful in making proposals and making statements that it's founded in the law without making sure that we've completely, you know, discussed that and verified it to be true. Thanks.

KATHY KLEIMAN:

Great. Thank you, John. Greg, go ahead.

GREG SHATAN: This is Greg Shatan for the record. First just to add a couple things to add to what John said. Cancellation proceedings in addition can go on any time after the 5 year period. Potentially hundreds of years if the contestability is not claimed by the trademark owner. Contestability is claimed, there are remaining two grounds for cancellation. Just fewer of them. That can be used at any time during the life of the mark. So there's no absolute bar at any time to cancel a US trademark registration.

Second part is merely a question. How does this proposal deal with issues of a continuing harm or with changes in factor circumstance and [Inaudible Speech] talking about latches. The statute of limitation, how does it deal with the issue of as John put it, moral or should have known? As opposed to just time from the point of registration which is [Inaudible Speech].

KATHY KLEIMAN Thank you, Greg. Appreciate it. Michael, go ahead please.

MICHAEL KARANICOLAS: Michael Karanicolas for the record. Yeah, I think this proposal is worth getting public comment on. People have mentioned that the URF is only for relatively new domains but, you know, I think it's obviously that's going to change over time and as there's been other proposals to extend the URF to legacy TOV's. If those kind of discussions are on the table, I think it's very important to consider aspects that are going to be problematic. So I think it's very relevant to consider to open up for public comment via statute of limitation case. Thank you.

KATHY KLEIMAN: Terrific. Thank you, Michael. We're certainly moving a number of issues forward to public comment from these individual proposals. Zak, go ahead please.

ZAK MUSCOVITCH: Zak Muscovitch for the record. First of all, thank you George for making the proposal. I want to let the working group know that all had of George's proposals are going to receive support from me to be put into interim floor for discussion. I think they met that very low burden if that applies to all of the proposals that we've heard from so far and that we will hear from.

Regarding this issue we've heard some thoughtful comments so far. Both pro and against this particular proposal. That to me is an indication that further studies required. Further feedback is required and that's something that I would like to do as well. Particularly because if we even look at the [Inaudible Speech] consensus view on UDRP says panels have recognized that the doctrine or defense of latches is such not generally apply under the UDRP. And so latches has gotten sporadic support amongst some panelist, most panelist in fact in the UDRP. And where does that leave us with the URS? Well, as Greg pointed out, the URS domains are new, but as Michael pointed out, we're drafting a policy that could be in place for another 20 years. And so at some point some consideration some be given to where we draw the line to say, listen, we have a really simple and effective procedure set out for trademark owners to take down websites and suspend them when there's clear and convincing evidence of cyber

squatting. But that's the kind of simple and useful tool that you should avail yourself of immediately and not wait 25 years to bring it on 14 days notice to a responder. Thank you.

KATHY KLEIMAN: Thank you, Zak and thank you all commenters. I don't see

CLAUDIO DIGANGI: This is Claudio. I'm on audio only.

KATHY KLEIMAN: Oh, Claudio go ahead, please.

CLAUDIO DIGANGI: Sure just to take off on a couple of points that John [Inaudible Speech] and. Also thank you George for putting this forward. So my initial comment is just if we're going to be citing references to national law, I don't think the working group has undertaken an effort to survey national law. That might be something worthwhile for us to do. I'm just a little concerned if language like that goes into the proposal which may not be accurate. So that's my initial point.

Second point is concerning the basis of the proposal which is restricting a case being brought after 2 years. [Inaudible Speech] use in these cases. So I think if I understand this correctly, this would create an exception that would blow a hole through the entire policy because a registrant could register a domain, wait 2 years and then engage in [Inaudible Speech] use. Because their

trademark owner is going to need evidence of [Inaudible Speech]. And so if you base this strictly on registration date, then you could have a scenario where the registrant merely waits 2 years, engages in [Inaudible Speech] use and the trademark owner would be barred from bringing an action.

And I thought I had a third point. I'll just stick with those two for now, Kathy. Thanks.

KATHY KLEIMAN: Thank you, Claudio and thanks for telling me you're on audio.
Nat Cohen, go ahead please.

REBECCA TUSHNET: This is Rebecca. I'm also on audio.

KATHY KLEIMAN: Okay. After Nat if that's okay. Great, Nat and then Rebecca and probably back to George. Go ahead, please.

NAT COHEN: I'm following up on Claudio's point about use. That's a concern of mine as well. If I understand that, you know, I see that as a good point and that both the statutes start when the infringing use starts. So, you know, I think that's a point well taken. I also see the latches issue of somebody using it in a consistent way for many years and then many years later facing a URS. So I feel that my view is that there's merit to the underlying notion that George is

raising. If not necessarily all the specifics. And therefore worthy of review and discussion. Thank you.

KATHY KLEIMAN: Thank you very much. Rebecca please.

REBECCA TUSHNET: Hi, Rebecca Tushnet so I think this is something that really needs to be put on the table for discussion. Especially if we continue with the idea of possibly expanding this into consensus policy. For legacy people who already have domain names to expose them to, you know, limited potential. The challenge going forward seems to be a very bad idea and would trip up any expansion into consensus policy which I'm inclined to support if we can deal with people who have already acquired rights within the system. I also think it's worth notice that there are plenty of provision in trademark law that do start their clock ticking not on a [Inaudible Speech] basis but simply to make the procedure work. So for example with registration in the US after 5 years incontestability of various sorts kicks in when you knew or not. Certain defenses or certain grounds of validity are cut off. There are a couple European countries that have similar, slightly different provisions. But it's actually worth thinking about situations where we might cut off the cheapest, easiest no fuss method based on the thought that people are likely to have developed rights while still leaving them with more complicated remedies. Just as, you know, after a registration issues, things change if you try and cancel it then verses if you try to oppose it earlier. That's just a matter of the clock ticking. It's not a you should have known. Thank you.

KATHY KLEIMAN: Thank you very much, Rebecca. This is Kathy. I'm going to draw a line under Michael Graham. Nat Cohen, I'm assuming that's an old hand but if not, let me know. I'm going to draw a line under Michael Graham because correct me if I'm wrong I think we're at our 20 minutes for discussion of this. So Michael, go ahead please.

MICHAEL GRAHAM: Thank you Kathy. Michael Graham for the record. Just a couple of quick things. Obviously this is ripe for discussion. One of my concerns with putting a statute of limitation on this is that in a number of these cases, they're brought URS a number of registrations some of which come at different times in the process. And so the egregious activity might include those registrations of domain names that occurred before or outside of the statute of limitations. But those should still be included.

And then just a clarification of what I believe Zak was saying. No, the proposal is 2 years from the creation of the domain name. So that if your understanding is that it would be 2 years from the creation of the domain name or from the establishment of a website whichever came later, that would be a change in the proposed terms. I just wanted to point that out. Thank you.

KATHY KLEIMAN: Michael, thank you and thank you everyone for a very thoughtful discussion on numerous points.

It is back to you. I think it's a 4 minute clock. George, it's back to you for wrap up.

GEORGE KIRIKOS:

George Kirikos for the transcript. Kathy, I want to thank everybody for the very thoughtful comments. It was just an initial proposal and I welcome all the feedback that our members and the public common period which I hope this will go to. Just to address some of the individual points that were made. One of the reasons why I didn't make a latches proposal was that it's somewhat more complicated to prove. Whereas a hard time limit is a lot simpler administratively because this procedure doesn't have discovery, doesn't have cross examinations, doesn't have the due process that would allow one to make good arguments for latches and more complicated arguments. And so this is trying to keep it simple.

So while the 2 year time period might not be agreeable to everybody, we can obviously change that to perhaps make the policy more agreeable to all. I think it keeps it a lot simpler by doing it that way. As for the idea about serving national law which Claudio brought up, I 100% agree that would be very useful in the next stage after we receive public comment if this is something that people want to move forward on. There was the suggestion made that somebody might have a submarine registration where they just leave it inactive for a couple of years and then once the time period elapsed they would suddenly activate it and go mental and engage in lots of cyber squatting and abuse. True that's a theoretical possibility, but in the interim, they have to be paying all the renewal costs. So there's a real cost to doing that. And

furthermore, a lot of the domains don't have to be used. They can be so clearly abusive that they have no potential good faith use. So the pass of holding a domain like Google login 2018.horse or whatever is clearly abusive and even if it's not being used for anything, I'm pretty sure a panel would order it suspended or transferred to the URP. And so that's not necessarily a high hurdle.

And we have to keep in mind that this is just a limitation period for the URF [Inaudible Speech] down the road. People will have a require to the courts for all the other disputes. So this is trying to go to the, you know, 80/20 rule, the [Inaudible Speech] rule. Simplify the procedure for the very clear cut and obvious disputes. Not the disputes that are 10 or 15 disputes involving domains that have been registered for 15 or 20 years that are more complicated and are really unsuited for procedure that doesn't have the due process of the courts with no discovery, no cross examinations et cetera.

I hope that addresses the concerns and we can go on to the next proposal.

KATHY KLEIMAN:

Great. Thank you, George. This is Kathy. Hold on [Inaudible Speech]. You are the next proponent of proposal number 7 coming up. And I just wanted to encourage people to talk with George it sounds like he's receptive to changing time periods and other features and other research. So as other people are talking on other proposals in the background, please feel to approach him on this one. We're now up to the next proposal.

Proposal number 7 which is direct policy recommendation and George, this is yours as well. Your open for 5 minutes.

GEORGE KIRIKOS:

George Kirikos for the transcript. Yeah, I just echo Kathy concerns. I'm happy to take questions on all these proposals on the mailing list or after this call by phone if people want to discuss.

This is a very simple proposal. I can summarize it in four words which is legal contact in who is. So this proposal is to is for the ERF to be changed to require that providers provide notification to a registrant's legal contact in addition to but not replacing the current notification to registrants at the implementation stage of this policy change who is or its successor RDAP or whatever its going to be called would be augmented to add that legal contact on an often basis and to reduce costs. Notices from the URS providers to the legal contact should be by e mail and fax only and not courier. So it would be very cheap to make this implementation change. And so for example, if I own math.com which I do and Zak Muscovitch is one of my lawyers, I can have Zak Muscovitch in the who is as a legal contact. So a potential complainant could see that in the who is and even before filing a URS or ERP, they could know that I have a lawyer, they can reach me to settle things before the URS or ERP. But in the event of an actual dispute is filed, the provider would just need to provide any additional notification by e mail and by fax to the legal contact in addition to the registrant. So the underlying problem is that in civil litigation, the clock really starts ticking when actual notice of the complaint is achieved by a process and according to the rules at a

local jurisdiction or by the [Inaudible Speech] convention if you're serving the process outside your country.

And so, the URF hasn't attempted to measure actual notice but instead starts the clock immediately upon the notice of complaint being sent but not necessarily received by the registrant. So this proposal attempts to address this deficiency by adding a new contact, a legal contact, who would supplement but not replace existing contacts and thereby increase the likelihood of early actual notice registrants regarding the dispute as we all know there's a high default rate in these dispute registration procedures. This would help improve notice and perhaps reduce that number of defaults that take place. So registrants who are on holiday and misses a notification, goes to their Spam folder, et cetera is less likely to default if their legal contact is already is going to receive the notice of complaint in parallel. So early notification to legal contact also allows more time to respond without the lag that occurs waiting for a registrant to receive the notice, find a lawyer, et cetera if they don't have a lawyer. And this would actually reduce the incidents of frivolous complaints because potential complainants would think that a registrant might not have legal representation could know that this registrant has a good lawyer. They're not going to be bullied, et cetera. And where there's actually a legit complaint against a registrant who has hundreds of thousands of domains where one might have squeaked through. Having that legal contact might encourage fast settlement without resorting to a URF or an ERP. Which saves everybody time and money and that's the proposal. I'm happy to take questions.

KATHY KLEIMAN: George, thank you very much. This is Kathy. So Zak is in the cue and I'm going to add myself into the cue with a question.

ZAK MUSCOVITCH: Zak Muscovitch. There was some difficulty in hearing me before I saw in the chat. I hope that's not the case now. Once again, I support this for inclusion in the interim floor because it is deserving of further examination, study and feedback including by myself. This potentially by my initial review can assist both complainants and respondents. Complainant can see we have recourse for sending cease and desist or for service of URS process to a registered agent. This applied to corporations and companies in many jurisdictions. The registrant there's a bunch of potential benefits as well in terms of ensuring that the registrant receives notice of process and ensuring that the world knows who you're representative is for such a process.

On the other hand, there are complications and issues that arise in terms of how this interacts with who is and whatever form it takes in the future. And so it needs further study but I support inclusion in the interim. Thank you.

KATHY KLEIMAN: Thank you, Zak. Okay, I'm next in the cue and then Susan.

So first a little bit of background on the legal contact issue. I'm taking off my co chair hat and I'm putting on my who is hat because I've done many people in this working group know I've done who is work for many years. And then a question for George which he will answer at the very end. Obviously there is no legal

contact right now in the who is. There was one recommended by the expert working group as maxim noted in the chat, there was controversial over that because the expectation of a legal contact from a physical person is a bit high. So the requirement of a legal contact for everyone just for some of us meant that the individual is putting their own personal data forward in a public place. But certainly there are groups that want legal contacts.

So George, I'm not sure of our ability as a working group to specify terms in the up coming registration directory service database, the successor to the who is. But would you, you know is it possible to revise your proposal to say if a legal contact is required, without getting into the mandatory or optional because someone else is going to be looking at that question in that case and then that legal contact if available should be used, dot dot dot. So that's the question. Rather than making it a requirement which might be outside our scope, to put it in if that term exists.

Let me hand this to Susan Payne. Go ahead please.

SUSAN PAYNE:

Hi. It's Susan Payne. Just a quick comment. Kathy you really touched on it. I don't have strong feelings about this one way or the other. I can see where there might be circumstances where it's useful. I guess to caution that given where we are with state of who is and the various work that's going on in other parts of the ICANN community, it just seems to me that this is one where we're going to struggle within the working group to be making recommendations that other parts of the community on topics that other parts of the community are working on at the moment.

That's not to say that as you suggested, if there becomes an appetite for this in other groups, then it could be beneficial and helpful. Maybe we need to just be careful with the crossing of the proposal when it goes out for public comment. To make it clear we're not trying to under mine work of others.

KATHY KLEIMAN: Terrific. Thank you, Susan. We still have more time on this issue if anyone does want to talk. I will take my hand down. Going once

CLAUDIO DIGANGI: This is Claudio, Kathy. Just to add color to the discussion. You know, I think the way the ICANN community functions, there are often cases where working groups will provide recommendations. One that recently came to mind was the consumer trust review team. They developed some thoughts into recommendations on [Inaudible Speech] protection [Inaudible Speech] issues and staff recently circulated those around. You know, so I think what Susan mentioned and what you touched on Kathy are fair points but I just wanted to note that I don't think it necessarily makes it outside of scope. I think if we're looking at an issue and we have recommendations on it that they then go into the ICANN community and they will be there for future reference for either current groups or future groups. Thank you.

KATHY KLEIMAN: Terrific, Claudio. Thank you. Anyone else on audio? George, we turn it back to you for the 4 minute wrap up. Thank you.

GEORGE KIRIKOS: Thank you for the thoughtful comments, everyone. Just to be clear, this is proposing that the legal contact be totally opt in. So somebody that really wants to be reached when they're on vacation or is paranoid about missing a notification could have an extra field in the who is which lists their lawyer. This could probably also apply to large corporations who go on to miss a notification or want to make sure the notification goes to the correct place. The contact might not necessarily be the same as legal department in some large organizations. So this is meant to, you know, not force anybody to have a legal contact that doesn't want it. This allows people improve notification. We could have people put in their twitter or Facebook account or other notification methods. We have fax machines as one of the mechanisms right now. This is another means of notification. Another contact person. So hopefully it's not too controversial to mandate not mandate but permit registrars who want to offer that as a potential who is element to, you know, have that in there. The only compulsion would be upon the providers to actually make the notification in the event of a complaint. And the way I proposed it, the cheapest method, you know, fax and e mail so they wouldn't have to courier it for the extra \$20 or \$30 that the courier cost.

And there was actually a potential revenue opportunity for lawyers most of which you are. So if you have clients, you could offer the service of being the who is, the designated who is contact for legal disputes. So some of you might see this as revenue opportunity to make extra bucks a year to have to be the contact that receives the complaint in parallel to the admin act, et cetera. So hopefully

this is a friendly proposal and implementing wouldn't be technically hard. It's just an extra contact field. So I guess we can move on to the next proposal. Sorry, I'm not necessarily following all the chat comments but I'm going to review the chat afterwards and perhaps respond in writing. Thank you.

KATHY KLEIMAN:

Terrific. Thank you, George. Thank you everyone for an interesting and useful and valuable discussion on number 7. Fleshing out those existing questions, past questions that have been raised. Very interesting.

So number 7 is finished. We now move on to proposal number 8 which is again George's proposal. I just want to remind everybody that George moved a number of proposals from phase 2 to phase 1 which is why they're all kind of coming in in a sequence now. George, number 8 please. Go ahead for 5 minutes.

GEORGE KIRIKOS:

George Kirikos for the transcript. So this is proposal number 8 which could be summarized in 4 words as the duration of the response period. And so right now there's a one size fits all response period of 14 days in the URS and 20 days in the ERP for the URS in phase 1. So the proposal is that the response time be adjusted by adding 3 additional days for every year that is elapsed since the creation of the domain in dispute up to a maximum of 60 days in total. And so the rationale is that deadlines and civil litigations are typically measured from the time of the actual notice of the complaint the actual notice being served by the civil

procedure. The ICANN develop policy is don't even attempt to measure actual notice but they start the clock immediately.

And so we have a problem with high default rates and people not responding. But there's less urgency to a dispute once involving an older domain name. So this policy proposes to take this into account by giving this an extra 3 days for every year that the domain is registered. So if the trademark holder wants to take 5 years to bring a complaint, this would be balanced by having an extra 15 days to respond for the registrant over the current period.

And so, this proposal reduces the burdens on respondents of complaints not being brought in a timely manner by adjusting that time period. If there's actual urgency, there's also the recourse through the courts at the option of the trademark holder. But if it's not an urgent complaint, given that it's taken years to bring, then this counter balances that by giving the registrant more time to respond. I guess there's not much more to say beyond that. So I'll leave it open to comments.

KATHY KLEIMAN:

Thank you, George. Again this is Kathy. Again not with my co chair hat on but echoing what Christine is saying in the chat. This is a creative idea and all the years we've been discussing UDRP and URF's, I don't remember anyone talking about this. So a creative and interesting idea. Who would like to speak? Renee? Good. Please join us for 2 minutes, please.

RENEE FOSSEN:

Hi, thank you, Renee Fossen for the record. I guess my concern or statement would be that I don't know what this proposal does that doesn't already exist in the URF. There's 6 months to a year that registrants aren't using that they have additional time to respond. Now this is in connection with UDRP we're not really talking about that right now. And the working group did extensively look at the stays and extensions that were granted in these cases also which is another way to address the concerns for time to consult with attorneys and advisors. So I guess I don't really understand how the 3 days would necessarily equate to anything more than what they already have the opportunity to do within the first 6 months to a year.

And also the issue with actual notice, if a respondent hasn't checked the e mail already and fax and mail, I don't know the longer you drag it out the notice is going to be achieved with those extension of 3 more days for each year. Those are just my concerns. Thank you.

KATHY KLEIMAN:

Thank you, Renee. I appreciate the input. Would anyone on audio like to speak? And anyone else in I'm not going to summarize the chat. Although staff has promised to look at all of these chats as they prepare the initial report. Anyone else? It looks like its back to you George for a 4 minute wrap up, thank you.

GEORGE KIRIKOS:

George Kirikos for the transcript. Yeah, to address Christine's point sorry was that Renee or Christine? Whoever spoke before

me. Even though there are abilities to appeal within the URF mechanism the fact remains that after 14 days the dispute would be in default and the panelist would make a decision not hearing from both sides. So you would have a scenario where, you know, a person went on a 3 week vacation, finds their domain name suspended not having made the complaint. The actual damage would be done because there would be a suspension. And so especially a concern for domains that have been registered for a long time. You're not expecting these complaints. So having that initial time period would reduce the incidents of default and also suspensions where most big cases that are in default end up with suspension end up with 90%. So that's an important counter balance. This is an alternative to having the statute of limitations. It's not as harsh upon trademark holders. Instead of killing their ability to bring the dispute entirely within the URS, it would give the registrants more time to respond which is perhaps an equitable tradeoff. I notice Susan has her hand up.

KATHY KLEIMAN:

You can retain your time. 2 and a half minutes left. Susan go ahead please.

SUSAN PAYNE:

Susan Payne. I put my hand up and I was too late. George was already speaking. I do have a lot of concerns with this. I know George says this is an alternative to limitation period but to me it's a limitation period because there's a pretty we're talking about the URF here. It's a pretty short time period for responding to the URF. You don't have to add too many three days before you

created a de facto pointless exercise because it no longer is a URF. It's meant to be rapid. I think the reality to me it seems like if something is if the domain has been sitting there being used for many years, it's highly unlikely that someone would use the URF anyway. But even just based on what we currently have before us in terms of the research that we did within the sub teams. There was really no evidence that there was a problem with people missing the notices, with multiple numbers of people going down the kind of appeal route saying I wasn't aware. I wasn't informed. Now I'm back from my holiday. I know we've already had this running for a little time but we haven't seen any evidence in the work that we've been doing for months now that there's a problem here to be fixed.

Very quickly my real concern is this takes the R out of the URF.

KATHY KLEIMAN: Thank you, Susan. I appreciate your raising those concerns and the context for them. George we go back to about 2 and a half minutes for you.

GEORGE KIRIKOS: George Kirikos for the transcript. Susan kind of hinted at my response by saying that after 2 or 3 years they're not necessarily going to bring the complaint. So the idea that the procedure is meant to be rapid, that seems to only happen at the whim of the trademark holder at the present time. They can expect a rapid procedure after 5 or 10 to bring the complaint. The word rapid doesn't mean rapidity in terms of them bringing the complaint. So

there's a small penalty for them taking their time to bring a complaint. Three extra days for every year that they have waited does not seem to me to be an atrocious penalty for having waiting years and years to bring the complaint.

As for the evidence, we do have some evidence. The fact that there's such a huge default rate in the first place. The registrants were never contacted. The only people that we've contacted for research is the providers and the trademark holders. The important stakeholder is the registrants. And the registrants haven't been contacted for research in this [Inaudible Speech]. And so that's a big issue. We'll probably see that in the comment period especially if this report is widely publicized that registrants can see some of the problems that they experienced at least with the [Inaudible Speech]. Not too many with the URF yet. They probably aren't aware that if URF is expanded to legacy TLD's they would have to respond within a short time period and in that time period understand the complaint, understand the procedure, possibly obtain a lawyer. That's a lot to expect from a lay person, let alone a professional who might be on vacation or might be at a conference for 10 days. Thank you.

KATHY KLEIMAN

Thank you, George and thank you Greg and thank you everyone. I appreciate the substantive discussion on proposal number 8. We're going to give George's voice a rest now and staff is going to present Marie [Inaudible Speech] number 13 proposal. Go ahead please.

UNKNOWN SPEAKER: Thank you very much, Kathy. This is Julie [Inaudible Speech] from staff. We'll note that staff will just be reading out of the proposal which you see here in the Adobe connect pod. It is on sync for you to follow. And then what staff will do is collect from the chat room and the transcript the various comments and the discussion about the proposal and we'll convey those to Marie and she will respond on the list.

So, just to then move down here, the recommendation what is the URF recommendation or proposing that [Inaudible Speech] respondent cannot reregister the same domain name once it is no longer suspended. The rationale for the proposal is where respondent loses the case relating to specific string it should not be permitted to simply reregister that name once it is no longer suspended. This would help to prevent gaming of the system and unnecessary [Inaudible Speech] of the providers workload of vexatious cases. The evidence is from the super consolidated URF topics table and the practitioner sub team section F2. In some cases losing respondent is able to reregister a domain once it becomes available. And after the lock the cyber squatters just renew their name the domain name. Pardon me. And where and how this issue has been addressed?

Also from the super consolidated URF table section F2 of the practitioner team. That's actually the same comment as the response to Q5, question 7. Does the data collected and reviewed by the sub team need to address this issue and develop recommendations accordingly? The practitioner sub team considered the issue and put the recommendation only goes to effect equal operational rather than policy fix. However, the

document sub team draft policy recommendation is that the question of adequacy and scope of remedies be deliberated among the full working group.

And then for response question 8 she says see above.

So, that is the proposal. And I will turn it back over to you Kathy. Thank you.

KATHY KLEIMAN: Thank you for walking us through that. George and then Michael. George go ahead please. I thought you were going to rest your voice?

GEORGE KIRIKOS: George Kirikos for the transcript. Yeah, I'm not opposed to this proposal. I think it has good intentions however I think it will be problematic to implement because like from the other proposal there's no registrant verification taking place. So technically it would be nearly impossible for a registrar to handle it on their own, let alone industry wide having all registrars potentially block one registrant from registering the relevant domain name at the other registrar. So I'm not sure how technically feasible this will be. Perhaps it will come out in public time period but that's too bad that Marie isn't here to respond and give her ideas on how she intended to overcome those technical problems. Thank you.

KATHY KLEIMAN: Thank you, George. Michael, go ahead please.

MICHAEL KARANICOLAS: Hi, thanks. Michael Karanicolas for the record. Yeah, I think it's a shame that Marie isn't here because I would be interested in digging more deeply into the evidence that's presented and whether this is necessary. The proposal mentions that a loseant is able to reregister a domain name once it becomes available but is it happening? Does it hap often? Can they point to a single specific instance where it has happened? I would be interested to know that.

It would be good it seems to me that if you have a stammer who loses one misspelling of Mercedes or one misspelling of Adidas, rather than waiting for the suspension period to lapse and then reregistering, they're far more likely to just turn around and register a different misspelling. You know, I was at a conference about people designing anti Spam software and they said they found 10,000 different ways that people spell Viagra. So you know, in terms of the value of this, I'm a little skeptical and would love to hear whether this is an actual common practice of people reregistering domains that have been suspended. Thank you.

KATHY KLEIMAN: Thank you, Michael. Zak and then Michael. Is there anyone in the cue from audio?

CLAUDIO DIGANGI: Claudio.

KATHY KLEIMAN: KATHY KLEIMAN Okay. So Zak, Michael, Claudio. Zak, go ahead please.

ZAK MUSCOVITCH: Zak Muscovitch. In my view this proposal has sufficient merit to be further considered in the interim report. I contrast this proposal with an earlier related one that proposed to give a complainant a right of first refusal over an expired name following suspension. This strikes me as a more moderate proposal in comparison to that and is therefore worthy of further consideration. I'm not sure how it could be implemented from a [Inaudible Speech] standpoint. I would leave that to others in the feedback period and/or during implication.

KATHY KLEIMAN: Thank you, Zak. I wish we had Barry on the phone. I'm just going to pause for a second to see if Barry Cobb is with us because I think there is some factual information about this. If I recall correctly and anyone can correct me, only one registrant has reregistered in the data that we had of all the cases in the URF but let's make a point to ask Barry about that and then go on to Michael and Claudio and then Christine. Michael.

MICHAEL GRAHAM: Michael graham for the record. I agree with Zak's comments. I think this is worth going forward. I think there are implementation issues but I don't think those are for us to consider at this time. The fact that there may have been only one instance that we can document at this time of a losing registrant coming back and

reregistering after the suspension period is not a reason not to impose this.

Certainly there are work arounds for respondents registering under a different name and such but I think this is a reasonable limitation going forward and to be specific with Zak's comment this seems to be a fairly benign rule that acknowledges the fact that it was brought in a situation where there was clear and convincing evidence of misuse or abuse and does not necessarily put the trademark owner who may have brought the action first in line but prevents the wrongdoer for registering again. Thanks.

KATHY KLEIMAN:

Thank you, Michael. Claudio I think you're next.

CLAUDIO DIGANGI:

Thank you. Thanks to Marie for putting this together. I think it's creative proposal. I agree with the comments about implementation challenges. I think generally speaking we need to distinguish challenges implementation challenges from policy challenges or substantive because many not many but a good number of the proposals have implementation challenges and putting it out for comment is a way to get more information from the contract parties and other players in the effort to address those issues.

The other point I wanted to mention was regarding the fact that the domain I work with clients who have brought URF cases and the registrant has lost the case. Unlike this proposal, they haven't reregistered the name but they renewed the domain name. And so

you create a scenario where it creates a tremendous cost in [Inaudible Speech] the trademark owner because they have to monitor the domain for the rest of the life cycle to see what can happen. And so even if we haven't seen many of these domains be registered, the fact that they [Inaudible Speech] register creates the scenario where the trademark owner has to continually monitor the domain once it reaches the expiration date. Thank you.

KATHY KLEIMAN:

Great. Thank you Claudio. Christine and Maxim. Christine.

CHRISTINE:

Hi, thanks. This is Christine [Inaudible Speech]. Amazon registry services 52 [Inaudible Speech] domain registry. This is a practical impossibility and I strongly oppose putting out any proposal for public comment that are unicorns. I think that you can dangle something because we all agree the problem you can't dangle something in front of a public like wouldn't this be a great idea when it's absolutely impossible to implement. I mean, we're not just talking about some implementation concerns. We're talking about you cannot at this point you cannot distinguish between registrants even within a registry or registrar. Assuming they create a whole new account with a whole new personae. And there's evidence that there are cyber squatters that have thousands of accounts. And they account hop from place to place to place and then they can account hop even between registrars. So I think that even George pointed out in the chat that if someone is actually fraudulent information in like Google or Amazon how

that prevents those people from being register the domain name. So I'm being very generous in my inclusion and I think that most of these proposals whether I agree with them or not should be put out for public comment and this is the first time so far that I've raised my hand to express a strong disagreement.

I do not believe we should be putting unicorns out there for people to make a wish list when they are not practically implementable. Thank you.

KATHY KLEIMAN:

That was a strong statement. Thank you Christine. Maxim, over to you.

MAXIM ALZOBA:

Maxim Alzoba for transcription. There are two issues with this proposal. First [Inaudible Speech] where a trademark is not [Inaudible Speech] anymore. As I mentioned in the chat, it would create gaming opportunities for trademark owners like [Inaudible Speech] for one year [Inaudible Speech] [audio interruption]. Talking about registrars, [Inaudible Speech] there are almost no way to identify a person behind something. If we are talking not about law abiding citizens and companies but about bad guys, sometimes you can't understand what person is behind the Internet. If they're providing registration of domains. It could be a good guy [Inaudible Speech] could be stolen and used for bad things. So the registrars [Inaudible Speech] they cannot share information with those parties outside of the law. For example, law

enforcement can ask about [Inaudible Speech] but not necessarily other registrars or URF providers. There's a limit.

Maybe we could discuss it to understand if something limited could be implemented like limitation of registration of this name for like 1 year if it's still [Inaudible Speech] and still trademark phase. Thanks.

KATHY KLEIMAN: Thank you, Maxim. Julie, I will pause to see if you want to come back on to respond which I don't think you do but I thought I would pause.

JULIE HEDLUND: Thanks Kathy. I feel I am unable to impersonate Marie at this time. But I can tell you that staff will capture from the transcript and the chat and provide that to Marie to respond.

KATHY KLEIMAN: Terrific and I hope some members of the working group, particularly those maybe Christine can reach out to Marie and let her know and others let her know what some of the thoughts were here and some of the concerns and maybe she has thought through some responses or can do that before Barcelona. I don't know if she's joining us in Barcelona but that's where revised proposals will be set forth.

Thank you. Thank you for the discussion of proposal number 13. We now return to George for proposal number 12. George, please.

GEORGE KIRIKOS:

George Kirikos for the transcript. So this proposal aims to settle a long standing ambiguity in the policy. As policy makers it's up to us to make an unambiguous policy so that we're the ones that we're the ones that are defining the policy and not leaving it up to the panelist to interpret those ambiguities according to their own personal biases.

And so, as we know the three prong test of the URF and the [Inaudible Speech] you have to show similarity to the trademark [Inaudible Speech] and the third prong of the test is to show that the domain name was registered in bad faith and used in bad faith. And so that part registered in bad faith is somewhat ambiguous. Some people would want it, like myself, to be the creation date of the domain name. That's the earliest possible time period that the domain name was registered. Others this is the octogen analysis which was thoroughly discredited by panelists later on fought to have registered mean renewal. So every time the domain name was renewed, that the domain name was considered to be reregistered and that would keep pushing that date of registered in bad faith into the future year by year.

And what panelist have settled on over the years on their own has been to interpret that ambiguity to mean that when it was most recently acquired by that registrant. So if they weren't the original creator of the domain name, the domain name gets reset at the

relevant time, gets reset when they as an entity acquired that domain name. And so this proposal aims to eliminate that ambiguity to make it unambiguous that the relevant date should be the creation date and as the registration date.

So you have to prove bad faith creation of the domain name. Not necessarily at the time that the domain name was acquired. And so I have spoken to how that ambiguity has arisen because the policy has allowed for ambiguity has allowed for interpretation and in my view, this has been consistently wrongly interpreted by panelist over the years and it's really a procomplainant policy that just because you acquired a domain name from somebody else that that new acquisition date should be the relevant time period.

And we know from other intellectual property like copyrights, trademarks themselves, patents. The relevant dates don't get reset once you transfer that ownership to somebody else. This is the concept of a success and interest and you pass along all of the attributes of that asset, including the priority date which was the creation date at least for registrants.

Back when this policy was created in 1990s and early 2000s this might have been an innocent mistake by panelists but the meanings themselves are considered very valuable and it's still really unacceptable to treat domain names as second class assets that are somehow inferior to long standing trademark, long standing copyrights, long standing patents. This should be allowed to be assigned to anybody and not be penalized for that transfer of ownership. And these penalties having the date reset can have a profound effect because it can effect the succession planning for a business, succession planning for families, passing a domain

name from a parent to their offspring. What happens after the death of a domain name owner? Individuals die. Companies die and get reorganized. And so having that date reset just because the domain name was transferred that has been a very deep policy error. It's because of that ambiguity in the policy. And so this proposal aims to reduce the harms to registrant of ownership transfers thereby protecting registrant rights. Just on an equal level of copyright, patents, trademark themselves who retrain that priority date when they are transferred.

And if we look at the data, we know what the [Inaudible Speech] panelist views are. I won't go over that again but there actually was one case which was over an adult domain name. A typo of wire.com which was correctly decided in my view that the respondent was determined to have registered the domain name as of the original creation date as a successor [Inaudible Speech]. Not the acquisition date.

And that covered all the points that I wanted to make. Hopefully even if people don't agree with the proposal that they leave it open to public comment so that this ambiguity can be eliminated in the policy. Thank you.

KATHY KLEIMAN: Perfect timing. We only have one person in the cue but I have a feeling that may change. Susan, go ahead.

SUSAN PAYNE: Thank you. There's a lot of information going on a lot of conversation going on in the chat about this. So I don't want to

duplicate that but I think it's important to look at that in terms of us considering the difference between these types of dispute and others.

I'm trying to work out where to start really. I'm strongly opposed to this as you probably could gather. The challenge that we have as George talks about things like trademark that when they get transferred the clock doesn't reset but the reality is we're talking about trademark and very different circumstances because there isn't that registered and used in bad faith element in those cases. If you transfer a trademark to a new owner and they start doing something different with it, then the clock on liability for infringement does reset because there was never that reference back to the date of registration in the first place.

I don't think I'm really explaining this very well but I don't think there's any ambiguity in those rules. I think it was entirely intended and the interpretation that has been given is entirely intended and absolutely correct. I'm going to stop because other people have their hands up and I suspect they're going to be much clearer than I'm being.

KATHY KLEIMAN: I thought you were very clear, Susan. It's a complicated proposal. Michael, go ahead please. Is there anyone in the cue on audio?

REBECCA TUSHNET: I'd like to get on. This is Rebecca.

KATHY KLEIMAN: Thank you, Rebecca. We'll put you after Nat. Michael, go ahead please.

MICHAEL: Hi, Michael Karanicolas for the record. Yeah, I agree with George. I think this proposal clarifies a fundamental misapplication from procedures that's been going on. I pointed out in the chat the very next provision the URF mentions registered or acquired. So I think it's inherently problematic to be conflating those two and clearly not in a spirit in which the language was drafted. But looking in the chat right now and on previous discussions and seeing all kinds of war game and how particular scenarios could be problematic from one side or the other or what happens in this scenario or that scenario. At the very least I think this proposal illustrates a very serious issue to consider and I think that the ambiguity there and the controversy there means worth the comment to solicit further input. Thank you.

KATHY KLEIMAN Thank you, Michael. I want to point out the colorful language that's being used. I appreciate it. War gaming, unicorns and 10,000 variations of Viagra. This is interesting conversation.

Nat, go ahead please.

NAT COHEN: Yeah, I'm going to say much what Michael just said. Is that my looking from the EDRP there's a lot of ambiguity as to what creation date really represents. For years we didn't really know

whether a transfer of ownership would be treated as a new registration by panelist and eventually we learned that it was going to be and there is also ambiguity as to whether the creation date if the domain is deleted and reregistered by domain auction and then you have a new registrant would that reset the clock in a way that a transfer of ownership where a sale might not reset the clock according to George's proposal as I understand it. And then there's some panelist that will look at the current use and look back and say because of the current use we can infer a registration that they not looking at evidence at the time of the registration. So there's all sorts of ambiguity around how to measure the right start point in terms of determining that registration. Again, whether George has exactly got it right with his proposal it does seem like this is an area worthy of further discussion. Thank you.

KATHY KLEIMAN:

Thank you very much. It sounds like a move towards the initial report which is a way of continuing further discussion. Interesting proposal. Let's go to Rebecca and then to Maxim.

REBECCA TUSHNET:

Rebecca Tushnet. So I think this is interesting but needs further development. I have to say my specific experience makes me concerned with the situation just described where say a domain name expires because small business aren't the greatest about keeping that up and is sold to someone who starts using it for infringing purposes. I actually know of a UDRP of an adult site where this is exactly what happened. And I would be interested to

see thinking on how one might distinguish different events rather than just a blanket statement. Thank you.

KATHY KLEIMAN: Thank you Rebecca. Maxim, please.

MAXIM ALZOBA: Maxim Alzoba for the record. My suggestion is I'm not sure how to use [Inaudible Speech] because currently the [Inaudible Speech] the history of [Inaudible Speech] with the current domain. [Inaudible Speech]. How many times it goes through [Inaudible Speech]. When it was [Inaudible Speech] in the previous cycle. The idea is the domain [Inaudible Speech] life cycle. [Inaudible Speech] you will see some [Inaudible Speech]. Either it exists or not. [Inaudible Speech]. If we add some [Inaudible Speech] describing the history, it will not be possible to add what happened to the [Inaudible Speech] domains [Inaudible Speech]. 15 years of history. So I'm not sure how to [Inaudible Speech] in reality. Thanks.

KATHY KLEIMAN: Thank you, Maxim. George it's going to go back to you in just a second. I want to make a note that a lot of interesting points have been raised and one question which I would love to hear the answer in your 4 minutes is would you be receptive to working with some other group in the group to further refine that.

4 minutes. Go ahead, George.

GEORGE KIRIKOS: George Kirikos. Yeah, I would definitely be amendable to hearing all the public input from public comment period and people on the mailing list as well as in the chat. Just to address some of the points, the over riding concern is that if we try to amend this thing is we want to have the safe harbor to identify legitimate transfers that shouldn't be setting the dates. Lawful transfer from a parent to their child shouldn't have to trigger a reset or loss of rights or loss of priority of that domain name. And it doesn't happen when you assign a copyright. It doesn't happen when you assign a patent. You don't get extra time for refining that patent to somebody else. You don't lose time for assigning that patent. Nothing changes. It's the creation date is the determining factor. And so that's how it should have been for the domain name but it's been long interpreted in an incorrect way. I do take Rebecca's point seriously that conceivably a domain name could drop through the drop cycle to an auction house and not actually be fully deleted. So perhaps those domains need to be marked separately then putting real transfers where there's perhaps a real assignment as opposed to a pseudo assignment to the various expiring domain names.

But this issue of a priority date is fundamental to the value of a domain name and that asset is being diminished if you have to reset and look for all trademarks that have been created since the creation date of the domain name. If the domain name was registered in good faith, it really should have been a safe harbor at that time.

Furthermore, this policy proposal is not required if we actually go forward with the statute of limitation because obviously the statute of limitation would be an even more effective way of handling the problem without having to bother with transfers being reset, et cetera. The statute of limitation would presumably be a short enough period where the cases would go to court anyhow.

And just to as an over riding concern we have to remember that people can always go to court. So we're not saying that people are being hampered in some way. They just can't use the stream line procedures for these kinds of more complicated disputes. Both disputes are really intended for really should be going to the courts and not to these processes that have no cross examination, no discovery process, et cetera. They really shouldn't be suited for these simple procedures that are aimed to address the vast majority of clear cut cases. Once you have transfers of ownership over 10/15 years and so on, really they appear to be unsuited for this procedure. So there should be that better safe harbor that this proposed interpretation of the policy or clarification of the policy would achieve. Thank you.

KATHY KLEIMAN:

Thank you, George. I'm going to thank you for the presentation of the proposal as well the response. I'm going to urge you to check the chat room that's going on while you were speaking. There are a number of interesting ideas that were proposed there while you were talking. So that may offer some alternative options, wording, et cetera.

Terrific. That does proposal number 12. We're at the 1 hour 20 minute mark. So I want to thank everyone for their patience today and the marathon as we run through I think it's 8 proposals all together. And we're down to the last 3. Proposal number 18 again goes back to George for presentation.

GEORGE KIRIKOS:

George Kirikos for the transcript.

Okay the next three proposals are actually attempting to solve the same underlying problem. So I'm just going to outline the underlying problem hopefully once. If we get through all three of these today instead of having to repeat the underlying problem before each of these proposals. So here's the underlying problem: As discussed at length in November, when these policies were being created, there was the assumption that both sides can always go to court and have the dispute determined by the courts regardless of the outcome of the URS or EDRP. It turns out that that assumption is incorrect. In some jurisdictions, example in the United Kingdom and perhaps in Australia, the courts have found that there's no cause of action for a registrant to bring a case that disputes the outcome of a URS or EDRP. That has only been determined in terms of the EDRP but presumably would happen for a URS if it was ever brought to court. So it needs to be handled for both policy eventually.

And the yoyo.e mail case is the one that's been widely discussed and [Inaudible Speech] wrote an article on circle ID. And so obviously that's a huge problem. On the Richter scale this would be like a 9.9 because it would deprive registrants of that recourse

through the courts which is so important in keeping these policies accountable because you could make the policy as one side in favor of respondents as you want but as long as registrant can go to court and get the correct outcome, that effectively acts as a check and balance upon a system. And so not having the ability for the court to determine this disputes isn't a problem with the court. It's a problem with the underlying assumption in the poly themselves which kind of assumes that both sides can go to court. And the reason why this error happens is pretend that the ERS or the EDRP didn't exist, what would happen? The trademark holder would be the complainant in a court action and the registrant would be the defendant.

So what happens though in the case that the trademark holder files a URS complaint or the EDRP complaint, the complainant is still the trademark holder and the respondent in the URS is still the registrant. But now the proposer registrant wants to challenge the outcome. So they go to court under the current system and suddenly instead of being the defendant as they would be if the URS or the EDRP didn't exist, now they are complainant. So now there's this role reversal where naturally they would be the defendant and have all the defense available to them defending a trademark lawsuit, a trademark infringement lawsuit. But now they're the complainant. And as the complainant it's a fundamental thing that you need a cause of action to bring a complaint. And those UK cards are saying you don't have a cause of action. Case dismissed. So that's a fundamental problem because the people who made these policies didn't consider the idea that the cause of action would exist in all the relevant jurisdictions.

So how do we follow this role reversal problem? There's three separate proposals. I'll go through proposal number 18 first.

That proposal is to actually copy another jurisdiction's method where after the URS is decided, what would happen is either side can simply file a notice objection and pay a relevant fee a fall fee ideally the same size as what it would cost to misshape the case in the court. That would prevent gaming. And once they file that notice objection, the other side can simply in this case the trademark holder can file the complaint in court with a clean straight. There would be no effect from the URS or ERDP complaint. So this notice of objection allows the dispute to proceed to courts with a clean slate without having the interference that's been caused by this kind of [Inaudible Speech] process. So obviously the trademark holder would still have a caution of action. Trademark infringement, cyber squatting, et cetera. The registrant would still have a defense. And so both sides would be in the same position they would be. This proposed alteration of the procedure which is the appeal process by making notes of objection would completely solve the underlying problem that plaguing registrants in some jurisdictions. Thank you.

KATHY KLEIMAN

Thank you, George. Without speaking to the merits of the proposal which I don't want to do. I can confirm what George said that when we were writing the UDRP and the URS we did think that both the complainants and the registrants would have access to the court in the case of an appeal or review. And we're surprised to find that those were closed in certain countries. So I

can confirm that. I look forward to the discussion on this very interesting proposal. Maxim, go ahead please.

MAXIM ALZOBA:

Maxim Alzoba for the transcript. The issue is we cannot simply say that you're a stakeholder and [Inaudible Speech] a good example. Registrants and registrars [Inaudible Speech] have to follow. [Inaudible Speech]. So I suggest this to be reworked completely. It's not a good idea to inquire that some jurisdictions have issues and that's all registrant and registries around the world have to follow this new idea. I'm not sure it's applicable and [Inaudible Speech]. Thanks.

KATHY KLEIMAN:

Okay. Sounds like a concern being voiced. Strong concern. Does anybody want to speak to this? Zak, go ahead please. But first anybody on audio want to turn the cue? Okay, Zak go ahead please.

ZAK MUSCOVITCH:

Zak Muscovitch. The only reason I happen to know a little bit about this area is that it was extensively extensively argued about in the context of another working group. The INGORPM working group. And it's a tremendously complex area of law. There was Heather who is one of the co chairs along with Bill will attest to, it was [Inaudible Speech]. Can you hear me?

KATHY KLEIMAN: Zak, I'm afraid if you can yell. Sorry about that.

ZAK MUSCOVITCH: Can you hear me better? Okay. Let me back up. What I was saying the reason I was saying I think about this is it was extensively argued and studied without actual unanimous agreement in another working group, the IGOINGO RPM working group and there was a final report that was put out from that and there was a law professor who was retained because this contained complex issues of conflict of law, et cetera. It's really hard to get one's mind around this issue just from reading these proposals. It's something that before anyone can take a position on would have to further study and look into it. Including me having gone through part of that other IGO working group. I've got 20 seconds left. In short, there's a real problem if the policies are worded so that complainants and rerespondents are supposed to be able to go to court for independent resolution and courts aren't allowing it in some cases. So the policies should be looked at from that perspective to see if anyone can be done in terms of a revision to the policy for those parties intended rights.

KATHY KLEIMAN: Zak, if you want to take another few seconds, we know we talked in the chat room. We know you lost time if you want

ZAK MUSCOVITCH: That's okay but thank you.

KATHY KLEIMAN: Thank you for your comment. Michael go ahead please. Michael if you're speaking we can't hear you. Is there anyone who would like to join the cue while Michael is coming online? Susan go ahead please.

SUSAN PAYNE: Susan Payne. I'm not sure what [Inaudible Speech] the bar for inclusion in the initial report. [Inaudible Speech]. I imagine we already have hit that. We're offering time to create [Inaudible Speech] for yet another one of these wheres the problem. There's no real problem here that we've seen. This is an out liar case. It's the UK [Inaudible Speech] this is an embarrassment frankly. It was very badly the claim was badly created and drawn up. I'm not convinced that they could not have drawn up a better claim that would give them a cause of action. But it was all irrelevant anyway and was not well argued because the randomness exceeded on the merits in getting summary judgments. So everything about this was overter in terms of the judgment that refers to this particular effect. But it also didn't get a proper airing due to inadequacy in which it was claimed and the fact that it wasn't necessary to give it a proper airing because the registrant lost regardless. I really do think we're trying to create a solution to an out liar case. Thanks.

KATHY KLEIMAN: Thank you, Susan. It's very interesting to have background on that case. Michael go ahead please.

MICHAEL: Can you hear me now?

KATHY KLEIMAN: Yes we can.

MICHAEL: Yeah, so looking at this proposal and the next two, I'm not sure I would be in favor of those changes as the current state. I think in all three cases there's procedural challenges to implementation. But I think that all three touch on a legitimate challenge if the system was designed in a particular way with a particular protection in mind and that protection or the understanding of that protection is not actually working itself out in practice. So, you know, I think that it would definitely be worth getting community feedback on these potential issues.

Certainly given the geographic scope that we're talking about and every country is going to approach this differently. Maxim is saying in the chat that there's a constitutional right to appeal in Russia but it may work differently or with different degrees of challenge that are possible in certain jurisdictions.

I think it's worth going out to the community and saying here's a potential issue. What are some thoughts. So definitely I think there are procedural challenges but I support going out. Thank you.

KATHY KLEIMAN: Thank you Michael. I'm going to draw a line under this unless we have any other comments. Anything on audio? Okay. Back to you on proponent number 18, George.

GEORGE KIRIKOS: George Kirikos for the transcript. There were questions in the chat and on the speakers that there's no real problem. There might be one anomalous case. I don't think that's correct. I think there are at least two cases in the UK. If I didn't post them on the mailing list, I'm trying to find them again and post them later. The problem is also experience in Australia apparently. As Zak mentioned had come up in the IGO PDP as well. It wasn't the appropriate time to handle it in the IGO PDP but that PDP it was brought up in the context of immunity of IGO's that where IGO's are complainants they obviously give up their immunity when they bring a complaint in a court but if the roles are reversed like what happened here under the URS or the EDRP where it's a registrant challenging the outcome and then becoming the complainant, then suddenly the IGO becomes the defendant and can suddenly claim immunity and assert a defense it wouldn't have had when it was the plaintiff. So kind of summarize it mathematically, if you have an underlying dispute between parties A and B, A is suing B is not the same as B suing A. There's some little quirks that can happen and this can happen in the EDRP and URS context because of that effect of the underlying cause of action or the immunity case for IGO's. And it's actually the benefit for IGO's. This was actually proposed in the IGO PDP too late. It was actually called option number 7 and we didn't deliberate it. But it would have been superior to the adopted proponent which is coming up next because this proposal has the

advantage that it's very simple. People don't have to go to court and argue whether who the plaintiff should be and who the defendant should be and whether that cause of action arises. This process is improved by design because either side loses simply pays the fee and decides the decision period. So that fee represents what they would have had to put up in fees had they actually brought the case before the court. So they're not gaining or anything. They're just paying the fee to set aside at the URF provider level and then when the matter goes to court they get that fee refunded and proceed in the court as they wanted to because they were the losing side and they wanted the case to proceed to court.

And so this would be more elegant than the next proposal which required that both sides fight it out and then have the cause of action problem be exposed and then try to seek another resolution afterwards. So by design this makes the trademark holder always be the complainant, makes the registrant be always the defendant and so you have the natural roles of the parties not reversed. So they're in their natural roles at the URS stage and they're at their natural roles before the courts.

And this we saw in the YouTube procedure for handling the DMCA complaints. There was no role reversal there either because YouTube wouldn't decide the dispute. They would just let the parties send letters back and forth and dispute what was happening and then ultimately YouTube would raise their hand and say go to court and decide this. So I [Inaudible Speech] create a policy that makes assumptions in the courts. We should make the process itself more robust to avoid the problems

entirely. And this proposal does that by design. It's really elegant and matches the procedure exactly from the British Columbia civil resolution tribunal which is a real [Inaudible Speech] court. Thank you.

KATHY KLEIMAN:

Thank you, George. This is interesting. The preserving of the roles of the parties to continue to preserve a right of action. Interesting. A lot of comments have been raised. A lot of questions have been raised. I hope you will take them into account. You did say that 18, 19, 20 overlap as different proposals to attack the same problem. So one of the questions I'll ask whether you want to use it during your proposal time or not is it an and or an or? Are you proposing all of these to be and and have each of them included as policy or ors, one solution and you're giving people three options. You can address that when you like. We're now moving on to our second to last proposal. Proposal number 19. And go ahead, George.

GEORGE KIRIKOS:

George Kirikos for the transcript. These are or proposals. These are not and. These are all alternatives to one another. I won't need much time to go over this proposal because we talked about what the underlying root cause was. And so this proposal is simply to adopt the solution that was decided in the IGO PDP which is to find that if you go to court and the court decides that the registrant has no cause of action, then at that point the URF decision or the EDRP decision once it gets to phase 2 would be set aside. It would be abrogated so that the decision is meaningless. It's set aside. Then the complainant the trademark holder can file a

case in court if need be thereby restoring the natural roles of the trademark holder as a complainant and the registrant of the defendant. So this is basically another way of accusing the same access to the courts solution just in a different manner. It's a little bit less elegant than the prior proposal which, you know, made it by design have the complainant the trademark holder and the defendant be the registrant.

But this would, you know, force the complainant force the registrant to go to court as complainant first and then if the court throughout the case says there's no cause of action then they'd have to go back to the registrant saying look at what happened in the court. They couldn't get a good hearing of my case on the merits. The policy has been thwarted because I couldn't do that. So because the procedure is flawed, we need to [Inaudible Speech] the URF decision so that the complainant can then so both sides are back in the same position they would have been had the URF or ERDP cases not been decided and then the trademark holder can bring the lawsuit as they would have done had the policy not existed. So different way of achieving the same solution but in spirit to the prior proposal that I put out there because it was the solution that was adopted in the IGO PDP. The other reason /RAPS it survived was the prior proposal was given too late. Thank you.

KATHY KLEIMAN:

Okay. We now open to discussion. I know we're all getting tired. It's been a long day. There's things in the chat about consolidation and rephrasing. On this specific proposal number 19 and this particular approach, does anybody want to say anything? There

are no hands in the chat room. Anyone on audio? Zak, go ahead please.

ZAK MUSCOVITCH:

Thank you, Zak Muscovitch. I just have one brief observation about this particular proposal in that from one perspective it does address the concern amongst some working group members and they're quite correct with this concern is this ICANN and this working group or what URS policy says cannot decide what case a court will a national court will hear or not hear. Of course we can't do that. With this proposal as I understand it would nevertheless effect how courts deal with subsequent court actions following the URS. So the way I would look at it is this. Is that we put in pretty clear language not we but Kathy and the original drafters but in clear language about the EDRP that party's are entitled to independent adjudication before, during or after a UDRP decision. And Susan is correct in that yoyo case was an outlier. It's testament that that fact make bad law. But if we're trying to draft a policy to last for if not the ages but a considerable period of time and we have some indications that some courts might say that, you know what Mr. Complainant, you're stuck with that arbitration decision that you got in URS or UDRP and the same to the registrant. You're stuck with it because you had an arbitration and you have no right to go to court under our national law. This particular propotional [Inaudible Speech] takes away the URS decision from consideration by the court because it's automatically vishiated. We being the court with no decided arbitration court to point to to say it's already being decided. That's really the way I look at it. It's very complex and interesting as I

mentioned before. The law professors in this group and outside the group have a ball with this stuff. As I saw in the IGO. Thank you.

KATHY KLEIMAN: Thank you, Zak. Personal note, I understand it better through your eyes. Susan go ahead please.

SUSAN PAYNE: All right. I just want to make one other point is that I think this is to address the concerns that we should have the poor registrant have no recourse to justice because they have lost their URS case and they can't go to court. But it should also [Inaudible Speech] that in the URS at least and not in the EDRP but in the URS there's multiple avenues for appeal in terms of they are drafted in the rules. So the registrant does have avenues for recourse. I think he also if he drafts his case properly has avenues in the court as well. But to go back to the actually rules. There's recourse in the rules giving him multiple opportunities to argue his case all over again. This is one of those looking for a solution to a problem that doesn't exist.

KATHY KLEIMAN: Thank you, Susan. Zak I'm going to consider that an old hand unless you tell me differently. Anybody on audio or would anybody like to join? Okay. George, back to you and if you want to do a quick wrap up on 19 and take us rapidly into 20 hopefully stuff will restart the clock when you leave 19 and going into 20. We can restart the proposal clock.

GEORGE KIRIKOS: George Kirikos for the transcript just to address Susan last point that there are multiple appeal mechanisms in the URS. That's not fair to say because these aren't the same due process protections that exist in a real court. The real court has discovery, cross examinations. There's much more protective scheme for both sides in terms of procedures that don't exist in the URS. It's like saying we have a kangaroo court and then we have an appeal mechanism within that kangaroo court. It's still a kangaroo court from the point of view from the point of people who are opposed to those providers. And we've seen circumstances that where there's all kinds of scandals. You need the courts to correct those cases. And with that recourse for the courts it would actually encourage the providers to become more extremist in their views. Imagine if the providers knew that their decisions couldn't be appealed?

That's kind of scary because they could make these crazy decisions and have that become the final verdict. At least the courts provide that check and balance that reins in these ludicrous decisions that are happening in some cases. And so we need that external check and balance which is the courts. I like to remind people that this is a mandatory policy for registrant. If this was like an opt in policy where both sides agree to it as an arbitration where both sides opted in to have the URS or the EDRP be the final word then I would say let the two parties decide that this is an arbitration decided upon the rules of an arbitration and live with whatever they get but because of all the forum shopping and other flaws, we need this external balance and that's represented by the courts. So designing procedures to ensure that both sides have

access to the courts. At least in this case it's the registrant who are suffering. It's an important problem that we're trying to pretend doesn't exist but it is mentioned in context of Australia as well. It's not just the UK in one case. It's a bigger problem.

Now I might as well go into the next proposal which is proposal number 20. If somebody can put up the slides. The same underlying problem and this solution was actually proposed by [Inaudible Speech] who isn't here but he might recall that this was on the mailing list or mentioned in chat at the time. But his proposal for both solution which I'm making formally as a proposal is an alternative mechanism is that the permitted mutual jurisdiction be expanded to always allow a lawsuit to proceed in the United States as a potential jurisdiction. Because there we know that people with bring a case and have a cause of action. So allowing parties to bring a case to the United States would be basically the third possible solution to the problem.

It's kind of bias in the sense that why should everybody be allowed to bring a case in the United States as that jurisdiction. Why not Canada or Germany or whatever. It was a solution put out there. It would solve the problem. Not as elegantly as the first option but I wanted to put it out there for completeness to see whether people would support that as another root to solving the problem. Thank you. We've got 10 minutes left.

KATHY KLEIMAN:

You do. Thank you taking us so quickly into proposal 20. Let's see any hands up? This idea of creating mutual jurisdiction in the United States? Is it even possible? But Giffin says the U.S.

[Inaudible Speech] take no issue with this particular proposal. Does anyone can anyone talk to this on a legal basis how doable this is or provide some background on this.

GEORGE KIRIKOS: Maybe I can expand? I'm not a lawyer but I think major registry operators are located in the United States. So usually having that jurisdiction match the jurisdiction of the registry gives somebody a connection that would allow the case to proceed in the United States. Having it part of the policy itself would be a way to connect it to that jurisdiction. For the legacy TLD's if it's extended to .com, net, org, obviously those are all in the United States. All the [Inaudible Speech] registries are in the United States as well. At least for now. For a tax advantage or whatever. It might effect some of the smaller TLD's that are outside the United States like the Chinese ones, et cetera.

KATHY KLEIMAN: George, in the chat people are saying that [Inaudible Speech] contract as well and the terms of the contract particularly regarding choice if there's litigation that courts will often honor that choice. So interesting. Thank you for the information. Anyone else want to speak to this? Provide background information? Questions or concerns?

Anybody on audio? Then be are at the end of quite a marathon day. George, it goes back to you. You've done an outstanding job of presenting a lot of proposals that you worked very hard to

develop. We thank you for that. Can you go ahead and wrap up proposal number 20.

GEORGE KIRIKOS: George Kirikos. I appreciate all the feedback on this. Hopefully we can solve the underlying problem. It might require adjusting three proposals based on the public feedback but there is a deep underlying problem that we need to address. I would rate this as a 9.9 on the Richter scale. You know, as long as it's mandatory policy that people can't opt out of, we need to make sure that both sides have access to the courts. Thank you.

KATHY KLEIMAN: Terrific, George. Thank you very much. Thank you to everyone for such a long meeting. I think I'm going to give you back about 5 minutes of your time in just a second. It's been a very, very long meeting. A real marathon session but we did exactly what we set out to do which means we're on time and on schedule as we prepare for Barcelona. Our next meeting will be on Friday. Let me turn it over to staff. Tory put it in as normal time on Friday. Meaning the same time as today. Also for 2 hours but there's a good chance we won't go for 2 hours. We don't have nearly as many proposals. George, is that your hand?

GEORGE KIRIKOS: George Kirikos. Zak and I submitted our revised proposal this last week. So I think we'd be ready to present it on Friday if need be. I think there was somebody mentioned it could be presented at Barcelona but we can knock those out before then.

KATHY KLEIMAN: Actually, I'm glad you asked. I think there will be time to present it. I think staff may have it on the schedule which of course is not circulated to the full working group for Friday. So yes please consider yourself on deck for that. There may be I think Claudio submitted a revised proposal. So Claudio there may be time on Friday to present that. If there are further revisions of proposals including today, George, based on some of the chat room discussion, please submit. What we can't cover on Friday, we will cover in Barcelona I think at the first session. Any other comments? When we do the revised proposals, it will not be pursuant to the original rules. We don't have to give them the same amount of time and the co chairs will be working on an expedited presentation of the revised proposals. It's going to be under slightly revised rules.

Does anyone else want to share anything? Thank you so much for your time today. George is that an old hand or a new hand?

GEORGE KIRIKOS: Should it necessarily be revising proposals at this stage or just putting it out for public comment and then revising it after getting the public comment? The other point was I forgot what I was going to say. That was the point. I'll remember later.

KATHY KLEIMAN Ideally we would have all the co chairs on so that answer is a really good question but with my cochairs hat on but without the opinions of my other chairs, I would say that there are a lot of

really excellent comments both on the phone and in the chat room. Huge chat of really really important comments. So to the extent that they can help clarify, complain, expand or otherwise make the proposals stronger the better we put something out for public comment if indeed we are putting it out for public comment, the better the proposals, the better the comments are that we're going to get. So I recommend that all proposal writers take into account what they heard and see if they can come up with a modification or consolidation that makes it even better. George, I would say if you heard something that makes sense to you, take the feedback and revise before we put them out for public comment. I think that's good advice.

GEORGE KIRIKOS: I remember what I was going to ask. The public comments are going out after we review the TMCH proposals I believe?

KATHY KLEIMAN: Yes.

GEORGE KIRIKOS: I guess between then and March or whenever these are due to be published we'll all have time the 30 plus proposals that were made to polish all the proposals and make them in a standardized format?

KATHY KLEIMAN

No. No. We are on a really tight timeline. We're going back to the TMCH in fact two of our meetings in Barcelona of the analysis group coming back to us on TMCH questions and kicking off our next our return to the TMCH. We are absolutely hoping to put the URS to bed in Barcelona for the initial report. Certainly for the framework and the proposals. We're not hoping to be working on it for the up coming months. We do have to return to the TMCH and that will take all of our attention. So please consider Barcelona to be really where we're closing the book. We may have to extend a little bit but please consider Barcelona where this discussion ends according to our time line but let me turn that over to Julie. Am I right about our time line and please let me know what you think.

JULIE HEDLUND:

That's correct. The time line finishing up the working discussions on all the proposals and revisions to proposals in Barcelona. And then switching over to TMCH, sunrise claims recommendations.

KATHY KLEIMAN:

Thank you, Julie. I think that wraps up everything for today. Thank you everyone for two hours. Enjoy your Wednesday and Thursday. We'll see you again on Friday. Take care.

[END OF TRANSCRIPTION]