

**ICANN
Transcription
Review of all Rights Protection Mechanisms (RPMs) PDP Working Group
Wednesday, 13 December 2017 at 18:00 UTC**

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at: <https://audio.icann.org/gnso/gnso-rpm-review-13dec17-en.mp3>

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Attendance is posted on agenda wiki page: <https://community.icann.org/x/pwxyB>

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page <http://gnso.icann.org/en/group-activities/calendar>

Coordinator: The recordings have started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening. And welcome to the All Rights Protection Mechanisms RPMs in all gTLDs PDP Working Group call held on the 13th of December, 2017.

In the interest of time, there will be no roll call as we have quite a few participants. Attendance will be taken via the Adobe Connect room. At this time on audio only I show J. Scott Evans and Brian Beckham. Anyone else on telephone only at this time?

Rebecca Tushnet: Rebecca Tushnet.

Terri Agnew: Thank you, Rebecca. Hearing no more names, I would like to remind all to please state your name before speaking for transcription purpose and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this I'll turn it back over to your cochair, Kathy Kleiman, please begin.

Kathy Kleiman: Thank you so much. This is Kathy Kleiman. And it looks like we've lost Berryhill – no it looks like he's back. That's great. Well welcome to our members and also observers to a special meeting today. Today we are going to be going through the URS rules, the rules of the Uniform Rapid Suspension. We went through the procedure in Abu Dhabi at ICANN 60. And staff has recirculated those slides. And of course the procedure and the rules work together to give us both the substantive and procedural rules, although ironically a number of the substantive rules are actually in the URS procedure, just a quick note on that.

So today we're going to be going through – we have a number of slides and we're going to be going through the URS rules. And we're going to be doing it with some expert guides. We've got Doug Isenberg and John Berryhill with us today. And these are both very senior attorneys operating in the area, not that they're old, just that they've been involved for a very long time.

Both Doug and John go back to before the days of ICANN working in the domain name dispute arena. And they worked under the old Network Solutions domain name dispute policy and so they were around at the birth of the UDRP and both have actively been involved in UDRP and now URS proceedings. Doug also serves as a panelist for WIPO, the Forum the Czech Arbitration Center and the British Columbia International Commercial Arbitration Center and John works with ccTLD domain name disputes for dotUS, dotUK, dotEU and others as well as for gTLDs.

We've got bios and pictures so that you can associate pictures with the voices, and I just want to add something that's not on the bios that Doug is very famous for his GigaLaw blog which a number of us read on a regular basis to keep up with news in the Internet world. And John Berryhill is almost as famous for his tweets as President Trump. So we are very happy to have both of these individuals with us today.

The format for today's discussion – oh it sounds like you're getting static on my line, I hope that's – let me just pause. Is there still static on my line?

Terri Agnew: Hi, Kathy. It's Terri. Yes, there certainly is.

Kathy Kleiman: There's a lot of – okay, I will call back in after I introduce the first section of the slides. And so let's – can you hear me well enough to wait for another minute or two?

Terri Agnew: Yes, Kathy, we can.

Kathy Kleiman: Okay terrific. Then the format today is that staff is going to take us through the URS rules with slides, but we're not going to do all the slides at once, we're going to do a section by section, we're going to pause for comments and feedback from our guests and then open to questions section by section from members and observers who want to interact and ask questions of these two individuals who have so much experience in this area. Okay, staff, let me turn it over to you. And I will dial back in.

Mary Wong: Hi, everybody. This is Mary from staff. And as Kathy said, today we're going to focus on the URS rules. After the call today of course we'll have the usual recording and transcript. We will be posting these slides to the working group wiki space as well alongside the slides that we used at the session in ICANN 60 where we also presented a similar overview on the framework for these rules that is the underlying URS procedure.

So while these slides are fairly text-heavy, the intention is that these slides, like the ones on the URS procedure will serve as informational reference points, so we probably will not be reading or, you know, touching on every point today, instead we will provide a general description of each step in the URS process and invite Doug and John to share their comments and insights as we go along.

So just some preliminary notes on the URS rules to start with, the effective date, June 2013, and I think as everyone knows, but it's worth pointing out, these rules apply to all proceedings brought under the URS procedure but like the URS, applies only domains that were registered in gTLDs delegated under the current new gTLD program.

In addition to the procedure these rules there are also supplemental rules that defer in some respect from provider to provider. At the end of these slides we have included references to the current set of providers as well as links to each of the supplemental rules. And of course we do have representatives from some of the providers as participants in this working group so I'd like to invite them to jump in with comments as well as we go along.

So we just start with the first step in the process, and again, please read these slides in the context of the overarching underlying procedure. We had noted previously that the complaint is to be filed electronically in the English language. There are filing fees that are set out in the providers' supplemental rules in each provider as to what that is. And those have to come in with the complaint because if they are not submitted within one business day then the complaint is automatically dismissed.

The rest of this slide sets out exactly what must be in the complaint which are fairly obviously and self-evident, so I'm not going to go through them all. But in addition to specific requirements that need to be in the complaint form, there needs to be an agreement to submit to jurisdiction in at least one mutual jurisdiction and mutual jurisdiction is defined as you see here similar to the Uniform Dispute Resolution policy, as a matter of fact.

So there are certain specific elements that have to be filled into the complaints form, and in addition to those specific elements of information, there is the possibility of providing some freeform text in the form of an optional explanatory statement but that is limited to 500 words. So essentially the way the complaint form is set out including this additional option, is in line

with the intention behind the URS for it to be a rapid procedure that's fairly lightweight.

At this point, perhaps we can pause because the next step is what happens after a complaint is filed and the provider has to notify the respondent. So it may be appropriate for me to stop at this point and invite Doug and John to see if you have any comments on filing a complaint or suggestions.

Doug Isenberg: Sure, this is Doug. I'll just make a couple of quick comments on some content from the slides. But first I'll just add to the introduction just to be a little more thorough. I have filed – I took a look before is call – about 25 complaints under the URS that total involve about 175 domain names so obviously a number of those URS complaints have included multiple domain names. I think the largest was about 85 domain names.

And as was mentioned, I do serve as an expert as well and have issued about 20 determinations but happy to share my thoughts really in my experience in filing complaints. And one thing I would just note a slide that was a slide or two back, the note on the slide that said that the URS applies only to the new gTLDs, I think as this group probably knows that's not exactly correct. There are a handful, I believe, about six other gTLDs as well as one ccTLDs that have adopted the URS as well. Not that we've seen many determinations with respect to those other top level domains but that is accurate I believe as well as there is another policy that I'm sure everybody is familiar with which is the USRS which is a variation of the URS that applies to the dotUS ccTLD.

And just one other quick comment based on the slides themselves, there was a note I believe I saw about the English language requirement for the complaint itself and I believe, Mary, you'll address these in later slides as we go through the rules, but it's not quite as simple as it may seem because the complaint may be in English – as the complaint must be in English there are

some additional rules that apply to the response itself, which certainly affects the entirety of the proceeding.

So I just had those couple of comments to begin with and I don't know if John has anything else to add.

John Berryhill: Yes, I just had one minor point. There is a trap for the unwary built in here where down – it says, “The complainant must state the goods or services for which the mark is used including evidence of use, which can be submitted directly with the URS complaint with the sign mark data record from the Trademark Clearinghouse.”

The problem with that that I've see complainants have is that the sign mark data from the Trademark Clearinghouse is just sort of a receipt saying that a record was filed with the Trademark Clearinghouse. There's actually no way for the panel or parties to verify anything in the Trademark Clearinghouse. And in one URS that I was, you know, defending, you know, the panelists even pointed out that while, you know, submitting this receipt that you got from the Trademark Clearinghouse is great, but it doesn't provide this panel – it doesn't provide the URS panel with evidence, you know, or even a way to verify evidence of anything.

So, you know, on the complainant's side it's you know, if you have a Trademark Clearinghouse record, that's great, but if you just submit that as the evidence of your trademark use it's going to be – it's going to be deficient because there's no external way to actually, you know, verify a Trademark Clearinghouse record as opposed to, say, you know, a normal public trademark registration.

Kathy Kleiman: This is Kathy, hopefully on a clearer line. Let me just check, is this a clear line? Okay, I'm hoping it is. Thanks, Doug and John. Does anyone have any initial questions right now about the complaint? Otherwise we'll continue to

the next portion of the slides. Thank you, Terri. I'm glad that's a clearer line.
Okay, terrific. Thanks, and back to Mary.

Mary Wong: Thanks, Kathy, Doug and John. And as Kathy notes, we will be stopping after each section so if you have questions feel free to ask them then although of course we will have time at the end for discussion and more questions.

George, I think I – you just raised your hand. Do you have a question about the complaint step in the procedure?

George Kirikos: Yes. George Kirikos for the transcript. You know, what was the logic behind the language being in English given that a very high proportion of registrations in new gTLDs turn out to be in China. Thanks.

Kathy Kleiman: Doug or John, do you want to respond to that?

Doug Isenberg: I don't know the background on that so, no I don't know that I'm in a position to address that.

Kathy Kleiman: Okay.

John Berryhill: Yes, same here. It's a good question. I think part of it was because it runs on such a rapid time scale and there is a – I don't know how to put it sort of a common denominator language among at least the panelists that there may have been some concern about getting a panelist in the appropriate language quickly.

Of course, you know, that doesn't – that doesn't help a respondent who doesn't speak English and who has, you know, 14 days. But I'm not aware of the particular rationale.

Doug Isenberg: The only thing I might add to that, and this is anecdotal as I don't have the statistics in front of me, but I believe it's correct, that the overwhelming

majority of UDRP cases in which there is a different language requirement, which refers generally to the language of the registration agreement, I believe most UDRP proceedings are conducted in English so at least historically English has been the predominant language in domain name dispute cases.

John Berryhill: Well one other distinction that you could make is – and it's a subtle one, the difference between URS and the UDRP is that the UDRP is a registrar-level policy that is the registrar is going to determine whether to transfer or not transfer a name. The URS operates at the registry level that is the – it is the registry which implements the decision, the registrars are actually kind of left out of the loop. And many of the, you know, many of the registries operate in English. So it does run independently of the registrar agreement.

Kathy Kleiman: Phil Corwin is asking a question in the chat room. So let's see, Doug or John, if you know. "How rapidly is the complaint translated where the translation would be warranted based on the registry's domicile?"

Doug Isenberg: I'm not sure I've had any experience with a URS proceeding in which there has been a translation. And I'm not sure exactly which rule, Phil, maybe you can clarify you're referring as far as where a translation would actually occur? I'm not sure where that would take place.

Phil Corwin: If I can – this is Phil – if I can just, since you asked me. I was just wondering, let's say URS is filed against a registrant in China who has to respond to it if they're going to respond rapidly. How quickly would such a registrant get a translation to understand the nature of the complaint against them?

Doug Isenberg: I don't...

((Crosstalk))

John Berryhill: He would be noncompliant.

Phil Corwin: Or do they have to request a translation I guess would be another aspect.

Doug Isenberg: Well I – I suppose like everything I'll say during this call, subject to my taking a look and correcting myself, I don't think a translation is provided as – or contemplated as a part of the URS proceeding itself and the burden would be on the registrant to obtain its own translation.

John Berryhill: Yes, I mean, they do specify English and you know, I would imagine that most – at least the NAF would probably just reject it as noncompliant absent an English translation. In the UDRP context sometimes the language issue gets, you know, batted around for about a week or so, but I don't think this is – I don't think it's even come up in the URS.

Kathy Kleiman: This is Kathy. As Mary has noted, there is a translation – Mary – that – there is a translation of the notice that's provided for the URS rules and some provision for responses in other languages by the respondent – by the registrant, but I think you're right that the complaint itself is not translated by the provider. So that's an issue for us to think about.

I think it's back to Mary to continue in the slides.

Mary Wong: Thanks, Kathy, and everyone. And actually this next slide does fit in with the discussion somewhat. We also note that we can go back and look at the background to the reason why some of these rules are the way they are.

So it's already been explained I think just by Kathy too and Ivett in the chat, that there is no obligation on the provider to translate the complaint on anyone, however, in terms of a complaint being notified this slide sets out what it is that the provider must do and when. A lot of this under the actual procedure itself that we covered briefly at ICANN 60 so what we've done here is provide a summary of the specific timelines and obligations and who is to be notified.

The registry operator for locking the domain within a certain period of time, and of course I think the notice to the registrant with those requirements under the procedure as to it requiring to be clear and understandable and how it is to be sent.

This is supplemented by the rules and again, we come back to the language issue. And here is where the notice must be translated. And we've reproduced the actual language of the rules here to show you what the obligation is. And I note there's been a comment in the chat about predominant language.

In terms of actually transmitting the notice in these languages, the provider is required to employ reasonably available means that are calculated to achieve actual notice. We have provided the links to the actual rules so it would be helpful I think for folks to look at the rules themselves. There is actually a full section in the rules, I believe it's Section 9, that talks about language. And you'll see that as Doug mentioned, there are different requirements with regard to the language of a complaint, the language for notifying a respondent of a complaint. And then when we get to it a language in terms of a response that a registrant may wish to provide.

So there's only this one slide on the notification step. Again, I'll pause and see if Doug and John wish to make comments and as well as invite questions from folks on the call.

Doug Isenberg: I've never encountered any notification issues in my participation so far in the URS process so I don't have anything to add on this slide.

Kathy Kleiman: John, did you want to comment on this as well?

John Berryhill: Yes, I – yes. You have to consider notice issues. I mean, there are a lot of defaults and there are lots of reasons why there are defaults under the URS. And I don't think most of them are due to lack of notice.

One of the things about the URS since it is, you know, relatively new and has been applied to the new gTLDs is that you have a lot of fresh registrant data that is these aren't people that have, you know, registered a domain name several years ago and then moved several times and, you know, the upper most thing on their mind upon moving wasn't changing the Whois in their domain that's been working fine for years.

So I, you know, obviously I don't hear about a URS proceeding unless someone has, you know, obtained notice and come to me for advice on responding or not responding or how to respond. You know, the other end of this though is that in the, you know, in the URS one can actually default and then show up with, you know, an explanation for the default and a substantive response.

You know, and part of that's due to the fact that, you know, in the UDRP the domain name is going to be transferred and there's not a good way to transfer it back. But under the URS since the domain name is turned off, you know, whether the respondent receives notice or, I mean, they'll certainly – and, you know, obtain notice if their domain name is disabled presumably if they cared, so, you know, the lack of notice issues don't have the same sort of gravity under the URS that they do under the UDRP since the ultimate result is, you know, it's just a matter of turning a domain name back on if there was, you know, some horrible miscarriage.

Kathy Kleiman: Great. Thanks, John. Thanks, Doug. Let me ask you both there's a question in the chat, do you know how the providers send the hard copy? Is it courier or some other way? Do you have experience with that, the hard copy notice.

John Berryhill: Yes, I don't have experience with that in the URS. I know that WIPO has taken to sending out a – and the UDRP side you know, a postcard or some kind of paper notification which through international mail, you know, typically shows up a day or two the response is due or I've seen them arrive even

after the response is due. You know, it's difficult to run an international policy on a 14-day timescale and, you know, count on delivery of anything, you know, physical being a reliable method.

Doug Isenberg: Yes, and I just would add I agree with John. I don't – I'm not aware of the – a delay in physical delivery of notice becoming an issue. But without – or perhaps to put representatives of some of the providers who may be participating in this call on the spot, maybe they can clarify if they would like to do so how that physical notice is actually provided.

Kathy Kleiman: Good point. Good point and we will be having providers on the call later on as Mary notes. J. Scott, one of our cochairs asks, "Do either of you have any examples of this being an issue?" And I'm assuming "this" is notice, J. Scott, if not please let me know so of notice being an issue.

Doug Isenberg: I'm not aware of any.

John Berryhill: No, no, over the years I've heard from people and in fact I heard from someone just recently that lost the UDRP case and never knew it was – didn't know it was going on. You know, that happens in the UDRP. Under the URS I wouldn't (unintelligible) I mean, you know, the registrant at the time of registration you know, presumably provided accurate contact information. Now there could be all kinds of issues with, you know, delivery of email but again, since it applies to the new gTLDs and that registrant data should be relatively fresh then, you know, there's a higher confidence in the email addressing being accurate than say, a domain name that's been registered for, you know, a number of years.

Doug Isenberg: That's a good point. But just to reiterate, John, I think what you'd said a minute ago because presumably – well perhaps the URS will be around for a long time and at some point we'll have domain names registered 10 or 20 years ago that are subject of a URS proceeding, anything is possible, that unlike the UDRP in which the transfer decision can be implemented, perhaps

without the respondent having received notice if there's inaccurate contact information maintained.

In the case of a URS proceeding you said respondent who does not file a response and loses the determination will have its domain name suspended which will be an obvious sign that obviously something has occurred especially since the notice indicates the domain name is suspended as a result of a URS determination and will then have, as I think we'll get to in a few slides, an opportunity to still file a response and reactivate its domain name while the case is sort of re-pending.

Kathy Kleiman: And J. Scott asks, "Do you know of any cases where respondents have come forward seeking," in his words, "seeking to redress due to lack of notice or perhaps asking for an appeal based on a default?"

Doug Isenberg: No, I'm not aware of any.

Kathy Kleiman: John, do you know of any cases?

((Crosstalk))

Kathy Kleiman: Okay. Great. And last question and then we'll move onto the next slide. Paul Keating asks, "Is a late response stating that they did not understand the language of the complaint considered as a valid reason?"

Doug Isenberg: I think a late response can be filed for any reason.

John Berryhill: Yes. Yes, you have to set the (unintelligible) I believe.

Kathy Kleiman: Great. Thank you very much. Thanks for the back and forth. Back to Mary.

Mary Wong: Thanks, everyone. And again I'll just try and go quickly through these slides and leave the time for comments and questions. We have two slides on filing

a response. And again, this is framed by the requirements under the procedure and Doug's already mentioned part of this that while initially there was a 14 calendar day period from the date of the notice of the complaint, it's possible to have extensions of this period and it's also possible to file a response even after a default determination, for example.

There is a provision for a fee but that is where the complaint is for 15 or more domains. So again we've covered these previously and the rules here enhance those requirements under the procedure by basically providing that you have to submit a response request for extension in accordance with whichever provider it is and their supplemental rules. It's also possible for the parties to stipulate to an extended response period.

And just as with the complaint, there are certain elements that are required in a response. First of all, there is a word limit that's specified under the procedure and the rules go into some detail as to what the response should include. The main point here at the end of this I think again we all know this, that if no response is submitted and again, there is that initial 14 calendar day period, then the complaint proceeds to default determination by the examiner, and we'll look at that next.

So again, over to Doug and John for your comments.

Doug Isenberg: Well maybe the next slide will address so forgive me but just to be clear, a default determination is not necessarily a determination in favor of the complainant to suspend, instead the expert still has to issue a determination based on the merits of the proceeding.

John Berryhill: Yes, one thing (unintelligible) is a sharp-eyed observer may have noticed that the complainant is allowed 500 words and the respondent is allowed 2500 words. And just to review the rationale for that, you know, this policy was designed for, you know, those sort of no-brainer cases, right, the ones where you look at, for example, the WIPO UDRP pending list and, you know, you

can look at most of them and say oh, okay, well, you know, we know where that's going to go.

So to file a complaint say, you know, this is my trademark, here's what the Website is doing, you know, it was in the TMCH and they had notice of it, you know, it's fairly simple to say, you know, clearly you know, here are the facts making out a claim of abuse of registration.

The problem with that is, you know, when you get into defenses like, you know, demonstrable preparations to use the domain name and so forth you'll have to, you know, go through exhibits, here's, you know, where it was – where we contracted for the Website operator and so forth. So it's – should be, you know, these should be clear on their face. And so it's very simple to make an accusation that here's my trademark, there's the domain name, here's a webpage, you know, it's violating my mark.

Whereas the – explaining those circumstances can sometimes take a little bit more in the way of evidence and explanation to make it clear where, for example, I had one on the word "hello" that I was defending. Now, you know, I don't know how much detail or – you need to provide to, you know, express the fact that "hello" is a common word. But, you know, I like to back up assertions with evidence, so, you know, I don't take it for granted that, you know, necessarily someone's going to believe that hello is a common word without evidence of it.

So you know, the reason for that asymmetry is in a case designed for, you know, extremely clear claims of abusive registration it shouldn't really take a whole lot to make that claim but, you know, some of the defenses sort of invite a longer explanation of things like, you know, demonstrable preparations to use or, you know, evidence of my preexisting business, you know, using the name and so forth.

Doug Isenberg: And...

John Berryhill: Before anyone, you know, notices that and cries “foul.”

Doug Isenberg: I think John makes excellent points and we sort of glossed over that a few slides back about the word limits in the complaint itself. So yes, there’s certainly asymmetry, as John says, between the 500 words allowed in the complaint and the 2500 words allowed in the response.

But just to maybe sort of highlight how limiting both of those are, the – under the UDRP by comparison, the service providers in their supplemental rules set limits on the filings and at the Forum there are page limits rather than word limits. So I think actually making a comparison to the WIPO supplemental rules for UDRP is maybe the better comparison. And there the word limits for both complaints and responses are 5000 words.

So you can imagine that a filing that is half of that or a tenth of that makes it challenging for parties to include all of the factual and legal arguments that they would like to make especially when you consider, for example, it’s appropriate and common to cite precedent that is previous domain name dispute decisions which themselves often account for many words when you simply look at the style name of a case, you know, a party that may be a few words versus the name of another party that may be a few words and, you know, Forum claim number and then the number itself, you know, you’ve eaten up a relatively large number of words just citing to one particular case. So it’s – it’s a significant restriction, the word limits that exist in the rules.

John Berryhill: Yes, and again that takes into account the fact that, you know, it’s got to be, you know, something of a no-brainer, I mean, you know, a guy walked up the street – up to me on the street, stuck a gun in my face and took my wallet and, you know, here’s a picture of it occurring, you know, doesn’t require a whole lot of, you know, lengthy legal argument to understand that that’s, you know, some form of armed robbery.

And, you know, 2500 words can be a little cramped for a response. The – you gain a certain efficiency in the responses because of the number of affirmative defenses that are expressly built into the URS and encapsulate you know, certain common UDRP type scenarios, but we'll pick up those later.

Kathy Kleiman: Great. Thank you both. And right so harkening back to the – that this was a faster, cheaper proceeding, we have the fewer words and the constraints that those offer. I don't see other questions in – are there any questions, I don't see other questions in the chat room. I don't see hands raised. So thank you for the discussion, and, Mary, let's move on with the slides.

Mary Wong: This is Mary from staff again. And we did think it would be helpful to include the next slide, a single slide, pointing out the rules about communications. We've already talked a little bit about the languages and you see that in the last bullet point and sub bullet points here where we've attempted to summarize what language the complaint, the response and so forth is in.

We note that there is a requirement that the examiner to be appointed has to be fluent in English and in the language of the respondent, although he or she has the discretion to decide the language in which to issue the determination. The rest of this slide just talks about how the communications are to be made, for example, electronically, and essentially the time and date stamp for each type of communication.

So again, Doug and John, do you have any comments on these rules?

Doug Isenberg: No, I think the language issue is an interesting one but we've already addressed it and frankly I don't have experience in any proceedings where it has become an issue.

John Berryhill: Yes, it – one minor nit that comes along is that the providers have taken to using, you know, online platform where in the initial email to the respondent

there is some, you know, login token or code which can be a little bit difficult when the – engages counsel to file the response, tracking down that code and making sure that code is actually not the respondent but the respondent’s counsel can be a little – just annoying. But you know, there’s nothing here that I see that’s particularly fodder for controversy in the context of this proceeding.

Doug Isenberg: John, your comment actually does remind me of one other thing, sorry to jump around a bit and feel free to get me back on track if necessary. But one other issue we did not address in the filings are the exhibits or the annexes which is not the communications and language slide that’s on the screen now but was a few slides back when we were talking about word limits.

There are some but the portal I think, John, that you're referring to that in particular the Forum uses and I think it’s worth noting that the Forum is far and away the most active provider of URS proceedings. And so I think that’s probably why we talk about them more frequently than the others, not for any other reason. But there is a very rigid system not only for submitting that sort of free form text of the 500 words in the complaint of the 2500 words in the response but also for the submission of the annexes as well, for example in a complaint I know there are three specific annexes that – and only those three that can be uploaded through the online filing portal.

John Berryhill: Yes, and regardless of the, you know, and even if this wasn’t primarily run in English, you know, in UDRP for example, regardless of the language of the proceeding that portal runs in English.

Kathy Kleiman: Okay, this is Kathy again. We have some – speaking of going back a few slides, we’ve got some questions in the chat room. Let’s see if we can kind of run through them fairly quickly. I’m working backwards. “Can a single complaint against a single registrant be joined by multiple complainants? So a consolidation of plaintiffs.”

Doug Isenberg: I see where Mary has quoted from the procedure itself, I'm not sure which paragraph it is but I think that's very helpful. I'd also note that the rules speak specifically to defining complainant as "the" party which perhaps implies a single entity. But again, I just have not seen this arise in practice as an issue.

Kathy Kleiman: Okay. Back to translations, "Without translations of the complaint, how are respondents expected to engage with individual claims?" This may be asked and answered.

Doug Isenberg: Yes, I don't think I have anything further to add than what we've said before.

Kathy Kleiman: Okay. And, J. Scott asks the question for Doug, "Have you ever felt that the word limitation caused you to be unable to set a prima facie case?"

Doug Isenberg: I don't know that I would go so far as to say "unable." But it makes for some awkward 500-word reading sometimes. And certainly a slightly larger number of words, doesn't have to be 10 times as many as common in a UDRP proceeding, but a few more words would enable I think more appropriate – would be more appropriate to allow for arguments to be made more clearly.

Kathy Kleiman: Great. And let's...

((Crosstalk))

John Berryhill: Also, you can look at the numbers at the NAF, there have been a – just back of the envelope around 679 complaints with I think only 58 (unintelligible) and you know, there are a lot of reasons for that, obviously, you know, if it works the way it's supposed to for clear cut claims you'd expect them all to be granted. But that is a, you know, that is a substantially higher success rate for complaints than the UDRP. And I think demonstrates I think a general that IP attorney get that this is a, you know, sort of a narrower ask.

And so, you know, but given that, you know, over 90% success rate it doesn't seem to be – it doesn't seem to have handicapped them.

Kathy Kleiman: I will say this, I think as we have a little bit of maturity with the URS, perhaps the 500 word limit becomes a little bit less of a challenge than it was in some of those first cases a few years ago when everybody was sort of going into the process a little bit blindly and therefore trying to make some arguments. But on the same hand, the determinations that we typically receive in URS proceedings don't provide a whole lot to cite anyway as far as facts or legal arguments, so as far as actually URS filings citing previous URS determinations, there's to a whole lot to go on.

Kathy Kleiman: Terrific. Thank you both. Thanks to the people putting questions in the chat room. Back to Mary to continue with the slides.

Mary Wong: Thanks, Kathy. And the next slide is a single slide on the examination I'd mentioned previously, the language issue in relation to the – to the examiner himself or herself. And some of this is in the procedure, and again the rules basically explain and enhance that procedure so I won't go through all the rules here because there are certain things in the rules though that talk about the powers of the examiner.

And I'm not sure that I need to do more than to leave the slide here for folks to look at and perhaps ask John and Doug about their experiences with particular cases or examiners and so forth.

Doug Isenberg: I'm not sure what to add here. Again, I don't have any experience with anything on the slide ever becoming an issue.

John Berryhill: Well, you know, one set of numbers – in picking up on what Doug said about how we reached a certain level of maturity with the UDRP, and you know, I think what Doug means is, you know, those who've had it had a lot of experience with it. And, you know, there is a list of examiners and their

qualifications, at least in terms of you know, what their professional qualifications are. There don't seem to be a standard set of qualifications to be an examiner.

And going back to sort of the idea of the URS, the simple idea, which of course always gets complicated by the time we run it through the ICANN process, was to take care of no-brainers, you know, the simple – very simple clear cut, yes, that's the trademark, yes, that's the domain name, yes, that's the Website and it's obviously, you know, relating to the trademark or the trademark itself is, you know, inherently distinctive and there wouldn't be any non-infringing use for it.

One of the things I did notice in the run of UDRP cases, and again not to pick on any particular provider, it's just that the NAF provides a really good search function for, you know, doing kind of a statistical look at these. Of those 679 decisions, 198 of them, 29% of the NAF URS decisions were assigned to an examiner who had really no experience with the UDRP prior to doing URS cases.

So what I had done was, you know, taken a look at the distribution of cases assigned to examiners at the NAF for URS proceedings, and you can go from a high of 34 cases to a low of around 10 or 11, there's a few that have just done one or two URS cases with a sweet spot around 15 or 16 cases per panelist thus far. For example, Doug has had 17 cases and is kind of in the middle of the pack on that.

So then I looked, well, what is the, you know, how many UDRP cases has this panelist done, and I only searched NAF so granted, there are a couple of URS panelists now on the NAF roster who had previously not done UDRPs. But I was very surprised at the prevalence of examiners who were apparently assigned to do URS cases with actually no prior experience with the UDRP.

And when we talk about sort of a run of the mill UDRP no-brainer case, I know that means something to me, Doug and probably most of the people here who have experience with the UDRP. But, you know, what sort of impression one gets of a clear and convincing case sort of under the run of the mill experience that we have all had with domain disputes, you know, maybe something to question when you have, you know, panelists that really had no prior experience and were given these.

And of course one could say the other way that if they're that clear how much experience do they need? But it was kind of an interesting thing to notice that there were a lot of, you know, new names showing up in a substantial chunk of URS cases. You know, I'm not saying that that has had any substantive outcome on the cases because again, it appeared thus far that URS has been used primarily for you know, what are no-brainer cases, but it's where you have interesting cases where, you know, what exactly are the objective qualifications for examiners and particularly assigned to the URS where the parties don't get to provide a whole lot of input or education to whatever panelist might be appointed to it.

You know, there the potential for, you know, perhaps a relatively inexperienced panelist to be dealing with issues that, you know, many UDRP panelists have seen time and time again but which may be, you know, new to this panelist.

Kathy Kleiman: Thank you. Thank you both. There's a question from J. Scott in the chat whether you know how many of these cases were appealed.

Mary Wong: Kathy, this is Mary from staff. And yes, I see that Berry's just put the answer in chat, and based on the data that we have collected on the URS to date.

((Crosstalk))

Doug Isenberg: Let me just ask though – I'm not sure...

((Crosstalk))

Doug Isenberg: ...if J. Scott's question was how many of all URS cases have been appealed or how many of the cases to which John was referring...

John Berryhill: Oh, oh, oh...

((Crosstalk))

Kathy Kleiman: Right, and J. Scott's added "from the popular examiner that you were talking about."

Doug Isenberg: Yes, so I think a different question was answered than was asked.

John Berryhill: Oh okay. The incidents of appeals is itself relatively low and the run of cases I think is fairly mundane. I haven't seen – and that's why I was careful to say I have not seen panelists experience at least in the data I have, you know, to be, you know, an apparent issue either in terms of appeals which, you know, are very low, and so, yes, the – of the – most popular examiner, the one that has 34, about twice the level of average, you know, I haven't picked through to see if he got it right or got it wrong and we all have opinions about that.

You know, but there have been no appeals on the most popular examiner – not popular, most frequent examiner. And I haven't seen any correlation between – actually of panelists who have either been involved in appeals or have had decisions go to appeal, there is – yes, I mean, there's only like onesies and twosies, I think there's only two panelists that have two. So it's, you know, it's – there's not enough data to really get any kind of, you know, any kind of trend out of that.

And again, it only gets interesting when the case itself is interesting so that's why I said it was a potential issue of an experienced panelist, but I haven't seen any, you know, I haven't seen anything break as a result of it.

Kathy Kleiman: Terrific. Thank you, John. And Berry Cobb, who's our data specialist from ICANN staff, has noted that he'll be updating the URS data that was presented as an initial draft in Abu Dhabi. John, maybe you could share some of the data that you've been generating, share it with Berry and perhaps we could, you know, if appropriate include it in our next round of materials.

And I don't see any...

John Berryhill: Sure, yes.

Kathy Kleiman: Terrific. Thank you. I don't see any more questions so back to you, Mary, to continue with the slides.

Mary Wong: Thank you. So now we move onto the determination itself at that stage. We have two slides on this and noting some comments earlier about using the word "default." Just a reminder here that there still is a determination even if no response was received. There are some requirements under the rules that a notification must still go to the registry operator for the provider so that the content and Whois information is not changed. And the overall procedure itself also provides that a notice of default should be sent to the complainant and also to the registrant and through what means.

Then we go back to the underlying procedure that specifies, you know, that it's one examiner who has to be trained and of course I think everyone knows that the burden of proof under the URS is clear and convincing evidence. And there is a timeline that's provided in the procedure, not the rules, that presumably was intended to mirror the fast nature of the URS as it was intended to be.

So if I can go onto the next slide? The examiner is required to provide a written determination in all cases. Therefore whether it was a default case because no response was submitted or whether because there was a response and therefore there needs to be a final determination, or indeed if there is an appeal that results all cases require written record of the determination.

There is guidance to the examiner as to how to make the determination and here it does say that it has to be framed within the procedure, the rules as well as quote, “any rules and principles of law that the examiner deems applicable,” close quote.

Of course the reasons have to be stated and there are some specific instances perhaps if there is a finding of harassment that that needs to be stated as well. And the written determinations have to be published by the providers on a publicly accessible Website. So again I’ll pause here and over to John and Doug.

Doug Isenberg: I would just add that the rules also state that the determinations shall provide the reasons on which it is based. And many determinations, if you’ve read them or if you want to take a look are very short and I think that is by necessity or at least by design given the short time period in which experts have to write their determinations. And so unfortunately there just is – I said a moment ago there’s not a lot of meat in a lot of the determinations.

John Berryhill: Yes, and again, it’s, you know, it’s – doesn’t really necessarily mean a whole lot – need a whole lot of meat and particularly you know, in – I can’t remember what the TLD was but, you know, doing a dispute on the word “hello” or doing a dispute on the word “finn” – F-I-N-N – for like a webpage that had, you know, travel to Finland, you know, what constitutes, you know, harassment or just kind of a silly claim is a matter of difference of opinion I think sometimes.

But, you know, there have been so few I think I mean, there are obviously, you know, one can argue about, you know, this individual case or that individual case but there have been really few that, you know, I think where anyone could, you know, raise an eyebrow and say well, you know, that doesn't look like it went the right way.

Kathy Kleiman: Terrific. Let's see, Paul, do you want to come on and ask your question online? And, so let me ask, are the determinations – are you finding the written determinations sufficient to understand the basis of the decision?

John Berryhill: Yes, that's probably a better – that's probably a better question even if you disagree with the outcome, I think the reasoning is clear enough.

Kathy Kleiman: Okay. And we have a question from Paul McGrady, "Can the ADR providers," I guess we're talking about the URS providers, "address the process they used to select panelists and explain why John's information indicates a disproportionate selection of panelists." Oh, Paul Keating – I – you guys can see the question in the chat. I'm not sure what Paul's getting at here.

Doug Isenberg: Well I think the question...

John Berryhill: Yes.

Doug Isenberg: ...how examiners are actually assigned which is not specified, I believe, in the rules.

John Berryhill: Yes, I'm trying to paste a column from the spreadsheet into the chat. And it lost all the spacing so the distribution at least in terms of assignment of cases to panelists at NAF is, I'd say really flat. There's this really one or two panelists that, you know, have gotten a disproportionate number of cases. And again, and you have to know the fees in this are very low, the timescale is short so in assigning these to panelists, you know, you have to have someone who's, you know, ready to go for peanuts at a moment's notice.

So, you know, I imagine that that, you know, the fish that rises the fast of the tank quickly are going to be getting those.

((Crosstalk))

Doug Isenberg: I would also add that WIPO which is – still accounts for I think the most – more UDRP cases than any of the providers, is not a provider under the URS. So you've got a – while there's an overlap of examiners or panelists between providers, you've got potentially a large pool of potential examiners who are UDRP panelists at WIPO which is the busiest domain name dispute provider who are simply not able to participate because – for reasons that I'm sure are not appropriate to get back into in this discussion. WIPO chose not to become a URS provider.

Kathy Kleiman: Another question from the chat, "Are the determinations translated in the same vein as notices?"

Doug Isenberg: I don't think so. I think they're in the – in whatever language they are written in, which in most cases is English but as we've talked about before, could be in another language.

Kathy Kleiman: And a question directed to you, Doug, but of course John can answer as well, "Do the fees payable to panelists reasonably compensate them for preparing a proper decision that is of use to subsequent panelists and parties?"

Doug Isenberg: Well it depends how you want to calculate that. Is it comparable to what an examiner's hourly fee is when engaging in private practice of law? Certainly not. But are there other reasons why that same attorney may choose to be an examiner and therefore find it worthwhile to do so? Certainly yes. So and similarly I would say UDRP decisions while panelists are compensated certainly at the Forum and at WIPO more generously than URS proceedings,

UDRP proceedings typically require more time and effort from a panelist than a URS determination does.

So I think the way John described it, examiners in URS cases have to be ready to go at a moment's notice for peanuts was an excellent way of capturing...

((Crosstalk))

John Berryhill: Yes, well and on the flip side in that, one of the conversations that we had during implementation of the URS was that if you need to spend more than 10 minutes thinking about it then it's probably not a good URS case. So again these are supposed to be you know, sort of the obvious no-brainers to, you know, someone that knows one when they see it. And so there shouldn't be a huge time investment and I know there's a certain amount of template-driven – template-driven response – or decision writing that certain UDRP providers use that can speed that up a bit.

Kathy Kleiman: Great. Thanks. And before we move on, John, could you just explain very quickly the numbers you just put into the chat?

John Berryhill: Oh, yes. Those are the – those are the codes for the nuclear missiles. No, those are the number of cases assigned to each URS examiner at the NAF which I think I made – that 121 there is an error, the last numbers should be 11, 5, 4, 4 and 3. I was just putting spaces in because when I copied and pasted out of my column. So, I mean, yes, there's, you know, one panelist that's gotten a few and – but, you know, by and large it's fairly flat, you know, most of the URS examiners have seen, you know, anywhere from 12-19 cases which on these numbers is, you know, it reflects a – what Renee said, it appears to reflect that there's not any, you know, particular bias.

And again with that one examiner that's gotten the most of them, and – yes, I haven't like, you know, reviewed the cases or anything like that, that doesn't

seem to stand out in terms of, yes, 100% complaint granted, but that's, you know, that's true of quite a few of these. And again, it – that's not necessarily reflective of anything.

Kathy Kleiman: Terrific. Thank you both. Mary, back you. I think we're moving onto handling final determinations following response in a default case.

Mary Wong: Yes we are indeed, Kathy. And being mindful of time, you know, my suggestion is that for this slide and for some of the remaining ones I believe we have something like four left. This one, as you said, talks about final determinations. The next one is about remedies. But some of these either relate back to the procedure or go into quite specific detail. Like for this one we actually just provided the information to make clear that, you know, where you have a final determination but there was – there was a response, what happens, this just lays out some of the potential consequences where that is the case.

So maybe I will just leave it there and remark really quickly too that in the next slide where we move onto remedies, obviously the remedy is prescribed in the procedure. So the rules really just make clear what actually happens mechanically and what information is displayed and changed. So maybe I'll just lump those two together. I don't know if Doug or John have comments on perhaps the final determinations in a case where there was a response that came in after default and any comments that you may have on handling of remedies as well.

Kathy Kleiman: Before we turn it over, Mary, could you go to the next slide? Just to emphasize something that was mentioned before that the remedy is very narrow under the URS. It is suspension for the balance of the registration period and the complainant has the option to extend that suspension for another year by paying the applicable fee. And one of the reasons that was put in was in case you were right at the expiration time of – and then the

thought was it could expire and the same person could re-register and you'd be back in the same URS proceeding.

Doug, John, over to you. Any thoughts on remedies?

John Berryhill: Yes, I want to pick up on Claudio's comment. The – I mean, that's, you know, that's kind of a feature, not a bug. And I think that the reason why you see a much higher complainant success rate in the US is that the idea was that well, okay if we're going to have sort of a UDRP-like quick and dirty and fast and it didn't turn out to be necessarily as nimble a procedure as was envisioned.

But the idea was that if these are going to be just sort of quick look determinations where the domain name is not going to get transferred but the, you know, the registrant is going to get fair warning if there's some counterfeit situation going on that's going to get taken down, you know, in fairly short order. That, you know, that was sort of the – the lack of transfer as a remedy was sort of the price you pay for the quick and dirty procedure itself.

Certainly I don't think anyone's gone back yet and taken a look at, you know, how often a URS suspended domain name has, you know, been expired and then reregistered and so forth, and, you know, in a lot of the TLDs the – in some of the TLDs, the balance of them, the pricing is really not favorable for someone to just, you know, step up and do it again.

I think what you have in a lot of these, and in a lot of the UDRP is that you have – what's going on with many of these cases is just you have people that are either somewhat ignorant or believe they've reinvented the wheel on, you know, oh, hey, this famous trademark is available and I can register it. And then, you know, it's sort of – they probably learned their lesson, you know, in this one.

Obviously if you've got large scale cyber squatters going on of, you know, say, you know, Zuccarini variety, cyber squatters going on that plays itself out in the UDRP. But given the short timescale, the fact that you could come in after a default, you know, I didn't get notice or whatever reason and you don't have to worry about the mechanics of transferring the domain name back, I mean, the point was if we make the procedure a little bit less onerous then the remedy is a little bit light.

But and you have a tendency I think on all – in a lot of ICANN debates to come up with these, you know, with these (unintelligible) and so if, you know, yes, is it possible that someone can reregister them? Yes. I used to reregister UDRP cancelled domain names just for fun. I got to prove what a silly thing I thought that was and people still do it. But to say well, you know, hypothetically someone with some evil master plan to, you know, waste another \$30 on a stupid gTLD domain name, yes, they could do it, but it'd be more interesting to go and see if anyone's actually done that or if it is a problem before, you know, looking for monsters under the bed.

And that was my point about panelist experience, you know, does it appear to have been a problem? You know, no, just from the amount of cases. Is it a potential problem? Yes. But, you know, saying oh well someone could go reregister the name, if they're dumb enough to do that and, yes they're probably dumb enough to do that. But part of the point with not having transfer was there was a large contingent in the IP Constituency and my favorite line I think was Sara Deutsche famously said, "I got 40,000 domain names I don't want."

And that the ability to turn them off without having to pay a registration fee, etcetera, and caring, feeding and nurturing of the domain name and to have that URS decision out there to refer to in the event that someone did pick it up again, was a little bit more of a convenience than running around with 40,000 domain names you don't want.

Doug Isenberg: On the issue of extending the suspension for an additional year, there's a bit of ambiguity. The procedure simply says there shall be an option for that and then the rules state that the complainant shall contact the registry operator directly regarding this option. Yet, when you file a URS complaint at the Forum, at the time of filing the complaint there's a requirement that you make an election at that time whether – if you prevail and get the domain name suspended, you wish to extend that suspension period for that one year.

And I'll say in my own experience there's been probably one of the larger challenges has been getting URS decisions – determinations actually implemented sometimes let alone communicating with the registry operator and who's going to do that whether it's the complainant or the service provider for the one year extension.

Kathy Kleiman: Terrific. Thanks. We're going to go to David McAuley and then to the questions in the chat. David, please.

David McAuley: Kathy, thanks. David McAuley speaking for the record. And I have an overall question I thought I better jump in no before times runs out. But it has two facets, first of all, John and Doug, thank you very much for your presence. And I'm asking you as practitioners if you can tell us whether there are any general protections for registries, that's the group I come from, from legal liability to registrants. And I say "registrants" purposefully because I see that the rules require the complainants to waive claims when they sign their complainant form.

But that actually leaves to the second facet of the question, how good are the providers in hewing to the URS rules and procedures? So I'm interested in general liability protection for registries from the registrant side and, you know, how well are the providers sticking to the rules and procedures?

Thanks very much.

John Berryhill: Well, that was the point of all of this right, was that, you know, when the ACPA and the UDRP were being drafted in parallel, you know, Saint Philip of Sbarbaro as on drafting committees and yes, the point was to – at that time protect the registrars, and that's why I mentioned that this is a, you know, this policy operates at the registry level.

The, you know, this is the mechanism by which registries can wash their hands of any liability either way because the alternative is for, you know, registries to be making the calls on these things and I think that would be a worse situation than, you know, than any criticism of dispute policies. So, yes, I mean, the only issue for registries is making sure that your staff, you know, knows them when they come in because part of the problem with, you know, accreditation of various providers is that, you know, people get (unintelligible) kinds of sources.

You know, I advise a number of – a couple of registries and a number of registrars and, you know, the first time a registrar, you know, even a – well these are rare, you know, all of these domain dispute procedures in terms of the day in day out operations of domain registration are rare. And so I have seasoned registrar compliance people say, we got this email, do we have to do anything about it? You know, and it just happens to be the first time they've seen a UDRP come in from the ADNDRC.

I mean, one of the – probably one of the only challenging, you know, things for the registry is that because there are so many emails that come from so many places that people, you know, buy into when they register a domain name or operate a registry, you know, it would be fairly easy to spoof notices coming in from UDRP or URS providers, so you want to make sure your compliance people, you know, know one when they see one and are responsive to it. But that's about the only area where you get into trouble.

Kathy Kleiman: Terrific. Thanks for the question, David. Thanks for the response. Question from J. Scott in the chat, and a quick note that we're at the 10-minute mark

and we still – like Mary, I'd love to get through the slides today and make sure that we can pick your brains about appeals and the handling of abusive complaints, which is some of the topic ahead.

So unfortunately we only have 10 minutes so quick answers please. Okay, so J. Scott asks a two-part question. "What about a remedy that's suspended for a year and then allowed the complainant to transfer at the end of the suspension period?" He says, "Part 2, or turn off the domain name at the end of the suspension with a procedure for a party to turn back on for non-infringing use?"

Quick thoughts on that, please.

John Berryhill: Yes.

((Crosstalk))

John Berryhill: Or what about...

((Crosstalk))

Doug Isenberg: I would say it's a fascinating concept. It's not a part of the URS as it exists today. I certainly think a lot of trademark owners would like to see something like that.

Kathy Kleiman: John, go ahead please.

John Berryhill: Yes, well what about fries or a large Coke? I mean, I've given up on, you know, the career of suggesting what the policy should be, but that's – those are certainly great things to discuss for this group.

Kathy Kleiman: Great, thanks. Maxim, quickly please.

Maxim Alzoba: Maxim Alzoba for the record. I have a question to the way URS rules are written. If you check URS technical requirements, some legal obligations are hidden there. I think we should make a note it must be like – be reviewed on that the particular parts of text are moved to URS rules PDF itself and not being hidden in technical part of the document because for example, the allowance to review domain only for one year is hidden there. Thanks.

John Berryhill: I agree completely. And yes, there is a problem when bits and pieces of policy get, you know, hidden in other places. For example I always tell people there's a piece of the UDRP that's hiding in the expired domain deletion policy with respect to, you know, names that expire during the UDRP. And, yes, in the course of advising registries and registrars on compliance and implementation of some of this stuff, you sometimes just have to be lucky to know where some of the requirements are.

That is an excellent observation that the – it would be helpful if the policy itself included reference to the other technical implementation details just so that there's one place where people can point to and refer to it and, you know, not get into overheated arguments with, you know, lawyers on telephones yelling at people at the registry, well you're supposed to do this or that would be extremely helpful.

Kathy Kleiman: Thanks, John. I'm hoping Doug is back. Maxim, is that a new hand?

Maxim Alzoba: New hand. Just a few seconds.

Kathy Kleiman: Okay.

Maxim Alzoba: Registries' obligations are about the inclusion of particular text to registrar contracts are also hidden there. So not the party trying to complain is confused but registries confused too so I suggest from this perspective to that we suggest change of formatting, I'd say. Thanks.

Kathy Kleiman: Maxim, thank you. Confusion is not what we want, fair notice for everyone is what we want. Mary, it looks like we're quiet for a second in the chat so let me throw it back to you for – to take us through the rest of the slides. Thank you. And let me just pause for a second, Doug, are you back with us? Okay, we may still be waiting for Doug. Mary, back to you, thanks.

Mary Wong: Thanks, Kathy. I think Doug is dialing back in. And in the interest of time, as you noted before, the remaining slides deal with a couple of things that we can probably get through this part quickly and turn over for questions and comments. It's a clear principle that having a determination under the URS does not affect the availability of remedies under either the UDRP or filing of judicial proceedings.

One of the things that we thought we might highlight for the group in respect of this topic is that the examiner does have a certain amount of discretion here, not just about parallel ongoing legal proceedings but as you see in the last bullet point here, where the parties obviously agree to settle or if it becomes a unnecessary or impossible to continue. And we've reproduced the actual language here.

So it's interesting that the examiner does have some discretion that's all stated in the rules. And this actually does allow us to then look at the appeals stage where again it is the procedure that specifies the timeframe and the timeline and the rules just enhance and explain some of that.

The rules also go onto specify the mechanics of what has to happen so if an appeal is from a determination that was in the respondent's favor, you know, what it is that the providers and registry operators must do. And in addition, there is clarity as to the limit of the remedies available on appeal that we've listed in this next slide, affirmation, overruling of the initial determination or the examiner's finding.

And there is the requirement we stated earlier to publish the determination of the appeal as well. So I see that Doug is back but if you'll just flash the next slide which is really the last substantive slide. We've mentioned in a few places that there is the possibility of abusive complaints. What constitutes abuse or deliberate material falsehood were matters that we discussed briefly in a prior session because these are defined in the underlying procedure.

So again, as with other steps in the process, the rules basically explain what can be done, the mechanics, if certain consequences happen, for example if there is a finding of abuse. So I'm going to unlock the slides here so that folks can go back and forth and hope – I don't know, Doug and John, if you have comments about either abusive complaints or how appeals are handled or the examiner's discretion to terminate URS proceedings, which is what these last few topics have been.

Doug Isenberg: I've never been involved in a proceeding with an allegation of an abusive complaint. And frankly I'm not aware of any. I would love to be corrected if there have – if that has ever been an issue in a URS proceeding.

John Berryhill: Yes, I don't know that it has been. I haven't seen it either. I haven't looked at all the cases but, you know, there are sometimes situations where you know, the – a complaint is very silly. And the UDRP panelists have a variety of different, you know, approaches to that. There is the – well the complainant was, you know, was too dumb or inexperienced to know what they were doing, you know, there's sort of a – of a too much of an idiot to have, you know, filed a competent complaint in the first place, which, you know, is kind of odd because most of the time that's the story on the respondent side.

But, you know, it's sort of a little, you know, kewpie doll at the carnival, so a URS examiner said it was abusive. Now you can leverage that and, you know, further civil proceedings after a domain dispute case but there is – regardless of what the rules, you know, say an abusive complaint is or is not, there's going to be a difference of opinion on, you know, was this just frankly

so silly that we should, you know, penalize the complainant on the way out the door.

And there is kind of a principle that while, you know, where you have a procedure where complainants can, you know, choose the provider and they pay the fees, you know, there's some kind of a question as to how much, you know, how much discipline you want to apply to your own customers. But I don't get excited over the – those things too much.

Kathy Kleiman: Great. Thank you, John. Thank you, Doug. Anybody with questions about appeals, termination or abusive complaints? In that case, we have come to the bottom of the meeting. And I would very much like to thank staff for preparing excellent slides and Mary for taking us through them. And for Doug and John for sharing their expertise, deep expertise and an hour and a half of their time more for all the preparation needed in preparing for the meeting. We really appreciate the discussion. And unless I get a “no” can we invite you back for more discussion if appropriate?

John Berryhill: Back for more. Yes, sure.

((Crosstalk))

John Berryhill: Actually I did have one other comment to make on abusive complaints because there is something of a – there is a tie-in to the new gTLD (unintelligible) where you know, if someone has abused the URS or the UDRP more than three times then they can get a new TLD or something like that. And no one's ever come close. One of the interesting issues about the way that that's phrased in at least the tie-in to the new gTLD program is who is it that has been, you know, who is it that really was the abusive party in a domain dispute proceeding where there was a party that was represented by an attorney who obviously, you know, counseled this person to go ahead and do that.

And if it was abusive itself, you know, do we look at the complainant or do we look at the attorney who did it because there is a – you know, junior associates can do fairly easy work and going through, you know, client trademark portfolios and upselling clients on domain dispute proceedings. And, you know, there do seem to have been a few firms that, you know, have repetitively, you know, filed abusive UDRP complaints. These, you know, it's not clear in the tie-in to the gTLD program, you know, who we're looking at here or – in terms of disqualifying them from filing other domain dispute proceedings or so forth whether we're looking at the party represented or the attorney who counseled filing a proceeding that was deemed abusive.

One other point I did miss and then I'll shut up is on the supplemental rules thing where there was a note to the effect that the URS overrides any conflicts with supplemental rules, it's the providers who – it's the provider who's going to be making that determination as to whether or not their supplemental rules do or do not conflict with URS. And I'm certain there is no provider that would say there is a conflict.

And likewise, there – the supplemental rules sometime the differences can be substantial. You know, it is a very different – in the context of the UDRP it is very different scenario when I'm dealing with, say, a UDRP at the CAC, the NAF or the WIPO and you have to be sensitive to you know, those differences in rules. But there does not seem to be any particular review mechanism, I mean, there shouldn't be a conflict between the supplemental rules and the domain dispute policy rules. But there is no review mechanism for provider supplemental rules such that anyone would catch a conflict if there were to be one.

Kathy Kleiman: Interesting. We haven't gotten to supplemental rules yet but the idea is a review mechanism to make sure they don't contradict the URS rules make sense, at least to me. John, thank you. I'm going to call those your concluding thoughts since we're at 2:33 but I don't want to log off and I know people are leaving. Doug, would you like to share some concluding thoughts as well?

Doug Isenberg: No. Given that we're over time...

Kathy Kleiman: Okay.

Doug Isenberg: ...and hopefully it looks like we were able to get to all of the questions. And I would just add that, you know, I think the process is still just not frequently used and therefore it's one that many are still learning about.

Kathy Kleiman: And we are learning from you so thank you both for sharing so much time and information. Thanks much and thanks for everybody, we had a great crowd today, thanks for everybody for attending both members and observers attended this meeting. And that's it from the working group. Thank you very much. Bye-bye.

Terri Agnew.: And once again the meeting has been adjourned. Operator (Harvey), if you could please stop all recordings. To everyone else, please remember to disconnect all remaining lines and have a wonderful rest of your day.

END