
ICANN Transcription

The Review of all Rights Protection Mechanisms (RPMs) Sub Team for Sunrise Data Review

Wednesday 23, January 2019 at 1800 UTC

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MICHELLE DESMYTER: Welcome, everyone. Good morning, good afternoon, and good evening to all and welcome to the RPM Sub Team for Sunrise Data Review Call on the 23rd of January 2019. In the interest of time today, there will be no roll call. Attendance will be taken via the Adobe Connect room. So, if you happen to be only on the audio bridge today, would you please let yourself be known now? Thank you.

Hearing no names, I would like to remind all participants to please state your name before speaking for transcription purposes and please keep your phones and microphones on mute when not speaking to avoid any background noise. With this, I'll turn the meeting back over to Julie Hedlund. Please begin.

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JULIE HEDLUND: Thank you very much, Michelle. This is Julie Hedlund from staff. To review the agenda today, agenda item is the update to the statements of interest. Agenda item two, we'll continue the survey analysis questions 7 through 12. We've got a request from Michael Karanicolas who has comments on question 9, if we could save that until a bit later on the call because he is unfortunately late in joining.

Item three is also continuing the survey analysis and that is on 3, 4, 5B, and 6. For any other business, we'll add an item as to the next meeting which will be next Wednesday, the 31st January, but we'll have more information on that for you.

Let me ask if anyone else has any other business they'd like to add. I'm not seeing any hands up, so thank you, all, and I believe I'm turning over to Greg Shatan, co-chair for today's call.

GREG SHATAN: Thank you, Julie. Can you hear me okay?

JULIE HEDLUND: I hear you loud and clear, Greg. Thank you.

GREG SHATAN: Good. Okay. So, we are starting with our analysis of a summarized starter question 7, which has two parts. An SMD file to be used for sunrise period registration activated and canceled over a vote, and B, how prevalent is this as a problem? I guess

the “they” refers to the registration of the underlying trademark, I believe, not the SMD file itself. But that could be [inaudible]. Anyway, let’s see what people have found.

It looks like we have comments from George, Kristine, Susan, and Scott, all of whom agree with each other that there wasn’t anything in the survey, and at least Susan and Scott agree with Kristine that this question was answered by the TMCH, but again, nothing in the survey. So, are there any comments on this before we move on to question 8?

Seeing none, we can move on to summarize starter question 8, which comes in three parts. This is on limited registration period, approved launch programs and qualified launch program. Questions being are limited registration periods in need of review vis-à-vis the sunrise period? Approved launch program, qualified launch program. Are the ALT and QLT periods in need of review and what aspect of the LRP are in need of review?

So, we start with a comment from George that [inaudible] of the registries and registrars tablets, [various unanticipated issues] including lack of clearly displayed eligibility information, overly generic streams in the TMCH, lack of understanding by the public, [inaudible] locally protected terms and TMCH.

I see that Kristine in response to that says, “I generally agree with George’s assessment [inaudible] but have a caution with respect to what George notes about cell F52’s data. A registry cannot decide if a TM in the TMCH is valid or not. Assuming marks in the TMCH are valid, the question is how will RPMs handle the [balance] between protecting marks that are also [inaudible],

balancing preventive versus curative rights? How many times was this an issue and was it a big enough problem that policy should address it? And how do we address TLDs with a limited audience? With respect to the comment that registrars did not clearly display eligibility criteria, it seems like an issue for the registry to solve when [inaudible] registrars stipulate that certain criteria need [inaudible]. This is not a policy problem for the RPM group to solve. Out of scope.”

George, I see you have a hand up. I was about to go back to your next part of your comment, but go ahead, please.

GEORGE KIRIKOS:

Yeah. I had a comment on Kristine’s comment about cell F52. Cell F52 is simply just reporting what the registry said, and if you kind of look at how trademark holders view that data, like Kristine literally said, a registry cannot decide if a trademark in the TMCH is valid or not, that’s kind of a very binary view of the world. It’s either a trademark or it’s not a trademark. It doesn’t say anything about the strength of the trademark or distinctiveness. There’s no degree besides they’re black or white.

So, if you look at how other people, non-trademark owners, can add to the survey as far as registry, they’re always kind of not looking at it in a binary way, so that’s something I did want to point out, that there’s a distinction between how trademark holders are looking at the world and how other people are looking at the world. Whether it’s valid or not, we can discuss later, but I wanted to highlight that. Thank you.

GREG SHATAN: Thanks, George. Kristine, I see your hand is up.

KRISTINE DORRAIN: Thanks. Yeah, George, I'll clarify. So, to be clear, what I used was valid. So, you're right, trademarks are there or they're not. I did not reference the distinctiveness or the arbitrariness of the mark there. I just said to your comment, you said cell 52 of the registries and registrars tab was various unanticipated issues, including lack of clearly displayed [inaudible], which I guess I had [inaudible] and overly generic strings in the TMCH. My point is registries and registrars are not in a position to opine on whether strings are "overly generic". It is binary. It's in the Trademark Clearinghouse as a valid trademark, or it's not.

My point is let's not devolve into is it a valid trademark in the clearinghouse. That's a different issue. But, assuming it's a valid trademark, it's an actual trademark, it's in the clearinghouse for legitimate reasons, it's not a registry or registrars call to determine if it's truly a trademark. It is in the clearinghouse binary, yes or no. Provide the claims notice, provide summaries, whatever it is you have to do here. I forget which group I'm in.

But, my point here is that the registry and the registrar cannot make a determination. It is going to be up to the policy development people to do something, or as I [inaudible], not do something because the balance is already [inaudible]. Yes, we talked in the last call about the [inaudible] of the good. We know some people, bad people, might get in. Good people might not get

names. There's going to be a certain amount of collateral damage. What's the threshold of collateral damage that we're willing to accept in the favor of balance?

My point is that a registry or registrar that tells you a mark in the clearinghouse is "overly generic" is not their call. Now, they might believe that one of their clients has the right to register a mark because they believe that client has a non-infringing use, but that's a different issue and that's my point is let's not give what a registry or registrar says about the marks too much weight. So, hopefully, that clarifies things.

GREG SHATAN: I'm curious. I don't actually have that cell in front of me. Does anybody know exactly what the text is in that? I'm trying to pull it up. I don't have it at the moment.

KATHY KLEIMAN: I [inaudible].

GREG SHATAN: Thanks. If you could ... What does cell 52 list?

KATHY KLEIMAN: Hopefully, you can hear me. Cell 52 is kind of a pivotal cell here. If I could, I'll give the bigger view because it has one, two, three, four responses. This is registry operator's response. The question [inaudible] is: did you encounter any unanticipated issues with these programs? So, LRPs [inaudible] ALPs and [2LPs]. And then

please share your thoughts on how the programs could be changed to avoid the issues that you encountered.

So, it appears we have [inaudible] seven people ... Four had problems and seven did not. Then, some of the comments are one about eligibility information not being displayed by the registrars. Two – and this is a direct quote – there were some overly generic strings in the TMDB, the Trademark Clearinghouse database, like [inaudible] that interfered with the ability to run a proper TLD.

Then, there's a long comment which is really interesting. We reviewed internally ICANN terms of the pre-launch program and decided that it imposes high uncertainty and financial risk of not being able to deliver services until ALP is approved under the process which lacks clarity. Experience of [core] showed us that our estimation was correct. We had to create special limited registration period after the sunrise to ensure protection of the local communities, for the trademark service mark holders protected under the legislation of the [Russian] Federation. Our trademark [inaudible] is registered in Moscow. Rights holders [and the] use of private [origin] applications in Moscow and/or Moscow region. Non-profit organizations established under the laws in effect in the Russian [inaudible] and registered in Moscow. And it goes on. I'll let people read that [inaudible].

Then, the last comment is people don't understand sunrise, [GA, land rush]. So, after GA, after general availability, some people think the TLD is reserved to companies or local public entities or [inaudible]. People don't understand the [inaudible].

So, this could be a lot of discussion on this stuff, but I thought it was worth reading. Thanks. Back to you, Greg. [inaudible].

GREG SHATAN:

Thank you, Kathy. That's very helpful. I assume that what they mean ... When they say overly generic strings in the TMCH, a trademark that would be overly generic would be too close to the service or good being offered that it essentially is the name of that service for the trademark holder. I assume that's not what they mean. They just seem to me that it's a word in the dictionary that they wish wasn't somebody's trademark. Unless they did the analysis to determine whose trademark it was and determined that it was perhaps [inaudible] granted because it was overly generic. If I register web for [inaudible], that is not in any way generic. But I assume they're referring to the term itself. I suppose the way they found this out was in running programs and not being able to delegate certain second-level domains that they thought they would be able to because they didn't take it in sunrise. Kathy, you have a hand and Susan has a hand as well. Being on a tablet, I don't know which order you came in, but I think I saw Kathy's hand up first.

KATHY KLEIMAN:

It's a comment.

GREG SHATAN:

Go ahead, please.

KATHY KLEIMAN:

So, obviously, whoever responds may or may not be a trademark attorney. We're not assuming you have to be a trademark attorney to be a registry or registrar, [inaudible] trademark owners are.

So, what I wrote down is the [inaudible] of some of the other comments we were getting, including the [inaudible] about conflicts between – they might be in the global trademark clearinghouse database and that might be registered have a valid trademark in the Russian Federation for a geo and that's what we're talking about here. [inaudible] people think the registries are complaining about the validity of the [inaudible] Trademark Clearinghouse and [inaudible], but rather [inaudible] generic which [inaudible] example that they're complaining that this is not according to [inaudible]. It's not globally famous or unique. It's a basic word. [inaudible] conspiracies and [inaudible].

What I think we're hearing, and I flag it because we were really concerned about this in 2009, is that nobody is arguing the protection of a [inaudible] term, but this idea of inserting broad marks that may be registered as a trademark in many categories of [inaudible] services as well as open to anyone for non-commercial use and future, [inaudible] this was a [inaudible]. So, it's interesting and valuable I think to see it playing played out and the data is it's creating conflict between valid usage and we're seeing registrants on the registrant sheet turning back under registrant data from the Analysis Group. And now we're seeing registries complain about this as well. So, let's flag it, [inaudible] data. Thanks.

GREG SHATAN: Thanks, Kathy. Susan?

SUSAN PAYNE: Yes. Hi. I think we're perhaps getting a little bit bogged down on this overly generic strings comment. I think, as other people have been saying, what that's talking about is dictionary terms, but in the context of this particular question, where this [inaudible] thinking about is limited registration periods, approved launch programs and qualified launch programs.

And that particular example, the web example, seems to me to be kind of an irrelevant [inaudible]. What we're really thinking about here is those types of registries that have a particular aim, intention, intended target audience such as a [inaudible] or something, a [inaudible] or something like that, and whether they need some slight changes or different rules in relation to something like [inaudible] because of the nature of that registry.

So, the web example isn't particularly relevant or helpful to this and I think we don't need to get too bogged down on that.

I think some of the comments, the other comments, the ones that get very detailed, it's a bit difficult to follow, but the comments about [Moscow] maybe are relevant and we know that [Amadayo] made some comments in detail when we were at a meeting and those were referenced in one of the registry operation responses, so that's obviously some relevant information for us to be looking at.

I think it's all quite relevant to the [inaudible]. Again, in the registry/registrar [inaudible] 54 which is the question about how

are you able to reconcile your plans for a limited registration period and approved launch program or a qualified launch program with the ICANN requirement? You can see some examples there. There's one person who says it's very hard, but there were four other comments from people who said they can't wait to deal with it. One said we established a permanent claims period. Another one said first we did a summary, then we did we did [inaudible], then we did the [inaudible] period where went to [inaudible]. Someone says by this point ICANN had published information about running a [QLP] [inaudible] someone who initially there was an issue, but the qualified launch program procedure got published sometime after the application window for TLDs to close. I can't remember the exact date. But by the time this registry went to launch, [inaudible] was okay because the [QLP] process was in place is how I read their comment. And another one says it was easy to design a launch program that was compliant with the requirement. So, we've got the final one [inaudible]. I think we have to look at that box as well, where there's a lot of people saying to us, "Yeah, there were some issues, but we did find our way around them." Thanks.

GREG SHATAN:

Susan, I think I have a hand from Mitch.

MITCH STOLZ:

Thank you. Regarding this issue of generic terms, forgive me if I'm saying something that we all know, but the idea of a generic term in trademarks depends heavily on context. Apple is a generic term for fruit. It's not a generic term for computers. But when we're

talking about the scope of the entire space of new gTLDs, the context there is very broad. So, any common dictionary word has the possibility of being generic, except maybe in very particular circumstances and very particular gTLDs. And that is absolutely relevant to this question of LRPs, QLPs, and so the specialty domains because in those limited contexts, that calculus will be different. I just wanted to make sure that was recognized.

And I think the data that various people have referenced just now on the call here is illustrations of this problem. Thank you.

GREG SHATAN:

Thank you, Mitch. It looks like we have no other comments. Obviously, we can't read all of the answers in the grid in full, especially because this one is quite full, but it seems at a high level what people are trying to put forward is first a better understanding of what the LRP, ALP, and QRP are, at least from our standpoint of trying to examine policy and then looking at how sunrise, especially timing of sunrise, may interact with those and whether that is a problem and what level of problem it is.

I think that we can put a pin in this. We will be talking about recommendations soon, so we should make note of this, but we are, at this point, primarily identifying where the useful data will come from. So, I think George identifies cell F54 and A5 and A7 of the registry as well and then Kathy in part talked about trying to figure out what these things actually are, these programs. It's all the same questions I think as George did on [inaudible] issues and the like. So, I see Kathy's comment [inaudible]. We can all make note of that. But primarily at this point, we are trying to

identify where the results may be helpful as opposed to making a case for particular interpretation of those results, but we obviously will get there.

Does anybody else have any other comments on question 9? Kathy, I see your hand is up. I'm assuming that's a new hand.

KATHY KLEIMAN:

Yes, that is a new hand. Thanks, Greg. Very briefly. The members of our working group, of our sub-team, that knows much about this is Maxim and unfortunately is not with us today. So, I just wanted to read his comment, if I might. It's very short.

He says, "I agree with George's assessment of the data [bug] and want to emphasize that ALP needs to be redesigned to allow geos to use the mechanism intended for them to ensure protection of local communities, local trademark owners, and local public services."

I just wanted to add that happily, and thanks to everyone who designed these questions, happily these [inaudible] questions – questions under A, B, and C – do seem to have data and answers, whatever we think about the quality or quantity, do seem to have answers in the data and that's a wonderful thing. Back to you, Greg. Thanks.

GREG SHATAN:

Thanks, Kathy. This is useful to point out Maxim's argument and his comments about how to interpret that. If there's nothing else on number 8 – and I know that Michael Karanicolas has asked us

to hold off on number 9, so for that purpose, we'll move on to number 10 since Michael isn't with us yet.

So, question 10, mercifully, is simple without any subpart, although it is a broad question. Explore use and the types of proof required by the TMCH when purchasing domains in the sunrise period. Seems more like an assignment than a question, but it is what it is.

So, here we have George pointing to cell F14 and 15 of the trademark and brand owners tab. [Have] responses on proof of use. But proof of use, if I'm not mistaken, use of types of – proof of use is required to participate in the sunrise. Not to get into the TMCH, if I'm not mistaken. I see George and Susan's hands up. Again, I'm not sure who was first. George, why don't you go ahead?

GEORGE KIRIKOS:

Yeah. I think Kristine and Susan interpreted this differently than I did. That's why I said yes with an asterisk next to it. If you go to cells F14 and F15 of that trademark and brand owners tab, it's kind of limited data [inaudible] how many of the trademarks did you submit proof of use for and we have various numbers, like 1% submitted between 250 and 500, 1% submitted more than 500. Then, the next question is, "Why not?" Well, remember we did [inaudible] questions. Approximately how many trademarks that your company or organization has according to TMCH has your company or organization submitted proof of use in order to take part in sunrises? That was the numerical data. Then, why not? So, it says not planning to make sunrise registrations, cost of

submitting proof of use is greater than the benefit, blah-blah-blah. So, that was just raw data that kind of just gives an overview of people that submitted proof of use.

I think the way Kristine and Susan interpreted the question, they interpreted it slightly differently. They were saying the types of proof that were submitted or proof of use, so maybe that's why they didn't [find] the data. But it is there or not. I think we need much more data than is present in the survey to answer the question. So, to that extent, I agree with them. It's not really great data, but it's kind of on topic. Thanks.

GREG SHATAN: Thanks, George. Susan?

SUSAN PAYNE: Thanks. Yeah. I guess I did interpret it a little bit different, George, as you say. I note his comments and I can see that there's a little bit of relevance, but it didn't seem to me to be greatly relevant to answering this particular [inaudible] question. But, I just wanted to flag, as I put in the document, that there was quite a bit of input when the staff was preparing their staff report. There were some inputs on that on particular issues around some of the types of use and [inaudible] problems that people encountered when they submitted certain forms of sample difficulties that they had with getting them accepted, that kind of thing.

So, I had interpreted this question in that way and was referring us, just reminding us, that there was some input there in that staff report, and indeed the submissions to the staff report.

GREG SHATAN: Thank you, Susan. I guess I see that more as a TMCH issue than a sunrise issue. It's definitely worthwhile noting that the issue exists. I'm just not sure how it would apply to this question. I'm not exactly sure what this question was intended to get at, frankly, but this was [inaudible]. So, if anybody has any further comments on this one, happy to hear them. Kristine?

KRISTINE DORRAIN: I'm going to call on people that were actually in the calls in the original work sub-team a long time ago. Was this the work team for those people who remember, for the sub-team where we did sort of start to devolve into discussing [MCH] considerations or maybe keep pulling ourselves back from the brink and try to draw a line between the Trademark Clearinghouse piece and the sunrise piece as sub-elements. I feel like I have some murky recollections of that and I wonder if this isn't sort of a vestigial charter question. Not that we don't necessarily have to answer it, but the fact that it got bucketed here with sunrise might have been sort of an "we don't know where else to put the stepchild". Just a question. I think that might be where we're at.

GREG SHATAN: Kristine, I'll note that there's a clarifying note in the instructions that says this agreed charter question was not directly included in Analysis Group's development of the survey. It is nevertheless included in the sub-team review, as the survey results may be

relevant to answering [inaudible] charter question. So, it's a variation on what you said.

I see a bunch of hands up. Again, I see George and Kathy. I think Kathy was up first.

KATHY KLEIMAN: Yeah. [inaudible] with Kristine. Maybe this is one we want to [inaudible] sunrise period in it, that we should [punt] back up to when we get around to the Trademark Clearinghouse structural question. Thanks.

GREG SHATAN: Thanks, Kathy. George, please go ahead.

GEORGE KIRIKOS: Yeah. Looking at my answer again, I now know why I said yes with an asterisk. People weren't saying that the cost of submitting proof of use is greater than the benefit and the time and administrative work required is greater than the benefit. So, I think that's why I was trying to capture with those cells that perhaps the type of proof required is administratively hard for the people that own trademarks to submit proof of use for. I think that's what the survey was saying. It wasn't [inaudible] talk about types of proof, but maybe just the burdens and that was hinted at in the survey data. Thank you.

GREG SHATAN:

Thanks, George. I think whether it's here or when we're talking about the TMCH issues, looking at the issues of proof of use and whether they – it was hard or easy in cost and benefits are something we should be looking at. Again, I don't think it's directly a sunrise question. I think that proof of use is only required if you were going to participate in sunrise. I guess that's why it's kind of a summarized question. I will note anecdotally that I had proof of use that was acceptable to the United States Patent and Trademark Office rejected by the TMCH. So, based on that particular experience, I would say it was at least a little harder to prove it, but that is neither here nor there and it frankly wasn't great proof that was rejected and that probably was right to be asked to put in better proof. But I digress.

Anything further on this point or can we go back to number 9 since we have Michael Karanicolas with us?

Seeing no objection, we'll go back to number 9. So, sunrise question 9 is in light of the evidence gathered above – wherever above is – should the scope of sunrise registrations be limited to the categories of goods and services from which the trademark is actually registered in [inaudible] the clearinghouse? So, the question is do we have survey results that assist in answering that question or providing data that assists in answering that question.

We have a number of responses here. So, broadly speaking, George mentions cell F52 which we already discussed again, and again with the web example given, and cell F53 that mentioned gaming concerns. Again, I'm not sure if we want to look at cell F53, we can look at that now or we can look at it when we're trying to look at recommendations. But I'm not sure what cell F53 says.

So, let's move on. Cell G74 for registries and registrars that includes responses that data [inaudible] those with legitimate interests and domain names [inaudible] in a different class and talks about dictionary words and generic terms.

Cell F15 for trademark and brand owners had a response stating that they'd focus on those relevant to their business and services. And cell E14 for actual and potential [inaudible] had a response that domain name was generic and the combination of [inaudible] branch and the Nice classes the trademark is registered for do not match. George's view is that the document legitimate competing demand for certain terms that are in the TMCH but in different categories of [inaudible].

John McElwaine who is with us, with respect to cell 53, I believe that the "gaming" that was referred to is not gaming of the sunrise which cannot really be gamed from an eligibility perspective, but instead the registry operators referring to gaming of its own QLP or [inaudible]. Kristine agrees with John on the interpretation of F53 and goes on to say that she doesn't believe the data here really answers the survey question. The scope of summarized registration necessarily implicated some third-party determination as to the target audience for a TLD and many TLDs have no special specific eligibility requirements and are considered open and generic. Believe the question is flawed, don't think the survey can help answer it.

Kathy, on the other hand, says, "Definitely. A bit buried in the fine print. We receive registry/registrar responses noting dismay of customers in response to 'too many generic terms in the TMCH'."

And the much-discussed ALP, QLT issue and again the web comment that George referred to. Kathy notes that both are pointing to a complaint that we – or I guess they, whoever was around in 2009 anticipated that categories of good and services and trademark registrations is one well-developed way of protecting overlapping highly [inaudible] use of word, as if that doesn't really go to the data. So, we'll kind of park that for the moment.

Michael says results are difficult are [inaudible] the structure of the survey. He believes there is evidence in the survey. Apparently, the trademark holders are taking a broad shotgun approach to registration. I'm unclear. Maybe Michael can talk about whether he's talking about domain name registration or trademark registration which seems to support claims, concerns that there is gaming going on.

Only four of the response to question 8 reported having more than 50 marks in the [TMCH] while 12 reported registering more than 50 domain names during the sunrise period, including three who registered more than 500 according to question 9A.

Two respondents in Q8 registered more than 250, reported having more than 250 marks in the TMCH, which Michael believes means that at least one of the respondents was registering at least five domains during the sunrise for every single registered mark.

We know the system is open to being gamed due to the fact that trademarks registered anywhere accepted as global [inaudible] and the number of [inaudible] have been included in the database. Again, I guess that means dictionary terms.

This additional information bolsters the [inaudible] that sits under [inaudible] trademark protection beyond what might be permissible under domestic legal context. And Michael goes on to make a suggestion that registrations and the [inaudible] combined to the categories and applied on those grounds. I'm not sure if that goes to the question of how this applies when we do sunrise, which is not necessarily germane entirely what we're doing with this. It all kind of connects, I guess. Susan, I see your hand is up.

SUSAN PAYNE:

Yes. Thanks. Just to quickly react to Michael's comment. And just to say, first of all, this is an example of why on the previous, on the claims call that we had just before this one, I [inaudible] the challenge in dealing with the [inaudible] when you can't follow an individual's response through from one answer to the next because of the way that the survey results have been presented to us.

So, Michael drawing lots of conclusions from the survey data, which may be correct but we don't know if the guy with 50 marks was one of the people who registered 500 names in the sunrise or not because we don't know and we have no way, so we have to guess.

But there's a point at which Michael says only two respondents on Q8 reported having 250 marks in the TMCH which means that at least one of the respondents was registering at least five domains during the sunrise for every single registered mark. Now, maybe that's correct. As I say, I don't think we can know one way or the other.

But, even if they were, I would say that isn't gaming. It very much depends on what your [inaudible] field of operation is for the brand owner and also on their level of [inaudible].

There were somewhere around about 600 and something open generic TLDs that were not dot-brands. A number of them were in particular business areas. So, if you were a fashion company, for example – and apologies, I don't have the list of TLDs in front of me, so I'm slightly guessing. But there's a dot-clothing, there's a dot-footwear, there's a shoes, there's fashion, there's shop, there's shopping, there's onlineshopping. There are IDNs.

So, frankly, depending on what business area you're in, what your brands are, how concerned you are about the online [inaudible] and your determination to try to protect against confusion across the ones that are most relevant to your business area, and also the ones perhaps that are more non-business specific terms but dot-online, dot-web, although that one hasn't launched yet but you take my point. [inaudible] domain registrations in sunrise is really not gaming. That's really not very many depending on how thin you are, how many brands you have, what your field of activity is. That is not germane. That's actually the point of the sunrise is to allow for that and for brand owners to form that level of protection around – a level of protection they think is appropriate, so the protection of their brand and their consumers. I'll stop. I can go on.

GREG SHATAN:

Thank you, Susan. I guess, just before I go on to Phil, I guess the math on at least five assumes a non-lumpy distribution. It could be that somebody with 50 trademarks has 10 that are really valuable

and registered them and more than five and then the other ones were registered in less than five. So, I guess it's five on the average, but not at least five. Phil, go ahead.

PHIL CORWIN:

Yeah. Thanks, Greg. Phil for the record, speaking on a personal capacity. I wanted to say a couple of things here. One, I'm not sure that data answers the question or that any data can answer the question. Some policy questions are just judgment calls and people will look at the same set of data and disagree on what the policy should be. The second thing I'd like to say is that my recollection is that we talked about gaming in the Trademark Clearinghouse way back in the early days of this working group. We were talking about the registration and the clearinghouse, kind of suspect or dodgy trademarks where the intent was not really to use them for commercial purposes or probably to hold them for resale because they were often valuable generic words or perceived to have some value.

Finally, to me – and this is a judgment call – the virtue of the current system is that it's self-selecting. A trademark owner has a mark, a new TLD comes on the marketplace a sunrise period, the trademark owner looks at it, says, "Well, that's kind of related to the goods and services I'm selling, or the market for them, or the type of entities are sold through," whatever connection they believe is valid. Then they look at the price and they say, "Okay, at that price, I'll take it," or they'll say, "No, too expensive. I'll just monitor that one and take action if someone infringes on my mark." Which leads to if we were to deal with a proposal to limit the sunrise period for clearinghouse registered marks to only

relevant TLDs, well, TLDs don't match up exactly and kind of amplifying a point Susan just made, with goods and services and the terms for goods and services differ by different trademark regimes, so you can't just say an exact match to list a good and service somewhere.

So, who's going to make the determination of whether a particular TLD has to offer a sunrise registration period to a particular mark, and if the mark holder, if dot-whatever opens and the mark holder believes that it has a compelling need for a sunrise registration in that TLD and the registry operator is saying, "No, you don't," are we going to create an appeals mechanisms?

That just illustrates the point that if we go from open self-selection now to something more restrictive, it gets more complicated.

Then, the final complicated question is whether, for generic top-level domains, kind of wide open, not a goods and services category. Does that mean that every TMCH mark gets the sunrise period or that none of them do? I don't know the answer, but those are all issues we'll have to grapple with if people believe either based on the data or for other reasons that we should narrow the scope of sunrise. Thanks very much.

GREG SHATAN: Thanks, Phil. We have Michael.

MICHAL KARANICOLAS: Thanks. I take Susan's point insofar as I don't think the data itself is completely dispositive on this front and that's what [I put in my

first line]. The idea of Facebook wanting to register Facebook across a bunch of different domains, I don't think that that's necessarily evidence of gaming the system.

But my broader point was that the way that the numbers are clustered in the boxes that I mentioned – I think 8 and 9a – with three people as being registered, three people as being shown as having registered more than 500 domains with only one person having registered 500 trademarks. And if you look at the top end of the spectrum generally, there is a clustering at the high end for the people registering domains that isn't there for people registering trademarks.

So, I do think that that is suggestive of a broad approach which in conjunction with the other evidence that has been mentioned, and the fact that we know the system is open to this kind of gaming, I think it is suggestive of the need for this kind of a solution.

Just in terms of Phil's point – and I do also agree that this is something that would require more conceptual work in terms of implementation. I think that the idea of what to do with more generic type TLDs is a challenging one. I think that there's scope to argue whether Apple computers should get an inside track on getting apple.blog given there's so many other legitimate uses for that. I think there's room for that debate, but fundamentally, I think that the fact that this lends itself to this kind of abuse, the fact that we know that there's generic words, dictionary words, that have been registered – and I think that some of these results do provide additional evidence that there could be a problem there and together I think that this does make a strong case for the need for

a categorization approach that should be incorporated into the way this operates. Thanks.

GREG SHATAN: Thanks, Michael. Before going on to the next, can you explain, especially in light of what Susan said, why you'd call this gaming and abuse?

MICHAEL KARANICOLAS: In what I said just now or in my written thing?

GREG SHATAN: In what you said right now? Although I think it overlaps with what you said in your written thing.

MICHAEL KARANICOLAS: So, in my mind, if Apple Computers was to use their [inaudible] in the TMCH to register apple.food, I think that would be an abuse of use of the rights protection mechanism framework because if you walked into the trademark office and tried to get a trademark for Apple for selling apples you would get laughed out of there. This is not an accepted scope of trademark protection and it goes far beyond any traditional understanding of how trademarks are supposed to work, how trademarks are protected, certainly in Canada, and I think that it goes into fundamental principle where you get protection or particularly categories of service, but you can't register a completely generic word that's just reflective of the type of business that you're doing.

GREG SHATAN: Michael, before you go on, what's your basis for concluding that apple.food would be used by Apple to sell apples?

MICHAEL KARANICOLAS: Because the TLD is dot-food.

GREG SHATAN: Is that limited to selling apples? I don't know what the rules ... For selling food – I don't know the rules of dot-food.

MICHAEL KARANICOLAS: I also don't know the rules of dot-food, but fundamentally, I think that you should understand that this is ... Well, alright. If you disagree with me, you disagree with me, that's fine. But fundamentally ... You asked me why I think that this is abuse and I think with this expansive use of trademarks which goes vastly beyond their actual function in commerce, I think that's abusive. So, you asked me for my opinion and that's my opinion.

GREG SHATAN: Thanks. Just so you know, I wasn't agreeing or disagreeing with you. I was trying to understand your reasoning. Especially when it comes to assumptions. And I'll say the same to anybody who makes assumptions and try to bring out reasoning. I think it's often helpful to have people bring out their reasoning because it may actually strengthen their argument. That's what I think one of the roles of chair is to do is to try to help connect the dots for folks.

MICHAEL KARANICOLAS: I look forward to you taking a similar approach when IP folks say the same thing.

GREG SHATAN: You will. George, why don't you go ahead, please.

GEORGE KIRIKOS: Thanks. I have several different points to make, but the first point was a simple one regarding the Nice Classification System. Michael had mentioned that in his comment and I was curious how many ... Do we know whether the entire world uses the Nice Classification System or are there countries that don't use that? Then, I have another question, but if people know the answer to that, that would be helpful.

GREG SHATAN: I believe nearly every country in the world uses it. Canada didn't. Canada was one of the rare holdouts, but I believe that has changed. John says Canada does not yet. So, Canada, our neighbor to the north and my father's place of growing up is not Nice, but fortunately every other place is. Kathy, [inaudible].

GEORGE KIRIKOS: I have more points.

GREG SHATAN: Go ahead, George.

GEORGE KIRIKOS: I think it would be helpful if people go to the trademark owner in Q10 tab which has some data on what trademark holders themselves are saying was an important factor in registering domain name sunrise and that could help inform – and I referenced that in the comment. It would say, for example, that the new gTLD relates to their businesses, good or services, very important or important. So, that would kind of ... Another one was trademark as a core business brand. That kind of gives you the legitimate reasons why people are going for sunrise registrations.

And in terms of gaming, I think one way to look at it is that binary versus nonbinary nature of a trademark registration in the TMCH, that it doesn't really place a score on the risk that that trademark space is in the real world or its monetary risk.

So, no one would begrudge, for example, PayPal or Citi Corp registering their trademark in all TLDs, given the high risk associated with those brands. So, if we're going to assign a risk score to say every TMCH [inaudible], that's a kind of brand that would probably have a score of 100 out of 100. Or, say, some of these – I think [inaudible] would agree are gamed TMCH entries. But terms like hotel, they would have a very low risk score in terms of potential abuse. So, I would give those, say, a rank of 5 out of 100 or 1 out of 100.

So, I think the gaming aspect is that these low-risk score TMCH entries are having a disproportionately high number of sunrise

registrations attached to them. I think that's the point that Michael K and others are making, and that goes to that non-binary nature of the trademark itself, as opposed to how its represented in the TMCH as a binary yes or no entry.

So, whether we agree later on to make it non-binary is something that's a policy debate, but I think that kind of highlights that [inaudible] food for thought on how people are answering these surveys differently. Thanks.

GREG SHATAN:

Thanks, George. Before moving on, you mentioned what you call low-risk score trademarks and it seems you have graphs, seen evidence or drawn a conclusion that they disproportionately or you had some idea of how common it was for Dutch marks to be registered in many sunrises. Is there some data point that we can point to or is that [inaudible] function?

GEORGE KIRIKOS:

I there was nothing in the survey data, per se, but just an observation. If you look at companies that use MarkMonitor or CSE or some of the top brand-oriented registrars, they tend to register 50 to 200 strings in almost every sunrise. So, those are probably non-gamed. They're representing Microsoft, Apple, PayPal, all the biggest companies. Whereas, the gamed registrations probably are using more minor registrars. But it's just an observation. No data in the surveys themselves. Thanks.

GREG SHATAN: Okay, thanks. You mentioned in your view hotels was gamed. What was your reason for saying that?

GEORGE KIRIKOS: Yeah. I posted an analysis of the top ten TMCH registered terms last year or the year before. I could dig up that link. It was clear that those were gamed sunrise registrations because all the domains were immediately put up for sale. It was the guy from dot-berlin, I think, Dirk or somebody else had registered those in the TMCH with the category of domain name but then was signing them in all kinds of other TLDs that are not related to domain names.

GREG SHATAN: Okay. So, it goes back to what Phil was saying about potentially dodgy trademark registrations that weren't really intended to represent use in commerce. I believe hotels, or at least hotels.com was an Expedia trademark, but clearly if that was their trademark, they wouldn't be selling it to third parties after registering it in sunrise. So, there is that issue of gaming the TMCH, so to speak, by basically [inaudible] trademark registries. Kathy, I think you're next.

KATHY KLEIMAN: Yes. If I'm connected, I'll be back on. It's important, but don't wait.

GREG SHATAN: Yeah. You're breaking up a lot.

KATHY KLEIMAN: I'm sorry, go ahead.

GREG SHATAN: I was saying that you're breaking up.

KATHY KLEIMAN: Okay. I'll [inaudible]. So, a fundamental impact and it would [inaudible] background. There is data here illustrating problems with the use of words that are generic, that are broad, that are dictionary words that are being used during sunrise, and actually throughout the process to stop what appears to be other people's legitimate use of that overlapping term. We see it from the registries and I just think the registrars [inaudible]. I have some other data.

But, what happened was, in the past, there were registrations of trademarks, but they were single gTLDs opening. Dot-biz and dot-info I believe both had sunrise periods where you could pre-register your trademarks as noted earlier is a very broad mark, so almost any business would have – if they wanted to pre-register with Neustar affiliates, they could do that and then be part of the sunrise or the pre-launch services.

When we created the Trademark Clearinghouse database, we knew that this was going to be a problem, that you could put in a word that your trademarked for X, however narrow X was, whatever narrow category goods and services, and then use it for Y and Z, something completely unrelated, a sunrise completely

unrelated. Only half of the trademark owners would exercise a degree of responsibility and not do that, that Fox Media would not put fox into fox.animal, that Smith's [inaudible] would not put Smith into dot-lawyers because there's so many lawyers with the last name Smith.

To the extent that we're seeing data – and I want to go back and I want to look at it. I'm hoping Michael will add fields that he's referring to into the chat, into that section, that column, when these files reopen. But I wanted to dive deep in the data – I think we all should – but to the extent that we're seeing that overstretching of a trademark and concerns and complaints that new gTLDs really aren't opening up that new space we expected, I think that's an issue. I think Phil raises a very interesting appeal.

But I want to provide some background. Gaming is not a negative term. There is a degree of responsibility associated with this process. Thanks.

GREG SHATAN:

Thank you, Kathy, for explaining your position. I think we have another hand. I believe it's a new hand from George. Go ahead. Are you there?

GEORGE KIRIKOS:

Yeah. I was just going to say that's an old hand. Thanks.

GREG SHATAN: Okay. Very good. I see in the chat Susan said you have absolutely no evidence that trademark owners have done that. That is pretty offensive to those brand owners [inaudible] have to be personal. I'm not sure if their mark isn't that personal. Susan says [inaudible]. So, that's all rather interesting. [inaudible] Kathy? Kathy, a question for you. Do you believe that defensive registrations are irresponsible?

KATHY KLEIMAN: Defensive registrations. How do you define a defensive registration?

GREG SHATAN: A defensive registration is a ... Well, do you not know or do you want my definition? I believe the broadly accepted definition is a registration that you make an order that it won't be abused by a third party but in which you may have little interest in actually using it as an active TLD, but you have a great interest in not having it being used to [inaudible] rights. Sorry?

KATHY KLEIMAN: I don't think I can [inaudible] on one foot. We do have examples in the data abuse of generic terms in databases that they don't seem to apply, of trademark terms that are generic or dictionary terms. [inaudible]. That's all I want to say. And it's not personal. It's just that there is some data here. Thanks.

GREG SHATAN: Okay. But there's not a problem I guess then with [inaudible] marks being registered everywhere, only with [inaudible].

KATHY KLEIMAN: Hypotheticals on [inaudible] are not fair to any lawyer.

GREG SHATAN: I'm just trying to understand. I'm trying to tease out your position because there are pieces to it I'm not quite getting. There were claims that went to the state of mind, if you will, or characterizations of what other people were thinking when they were doing things. Phil, I think your hand was up next.

PHIL CORWIN: Yeah. Was Mitch [inaudible]? Mitch was ahead of me.

GREG SHATAN: I see. Sorry, I'm on a tablet. The tablet doesn't organize people in chronological order. So, Mitch, [inaudible].

PHIL CORWIN: I don't want to jump ahead if Mitch is ahead.

GREG SHATAN: And as you shouldn't. Mitch, go ahead.

MITCH STOLZ: In response to this back and forth here and the colloquy that we're heading in [inaudible], defensive registrations can be abusive if they are limited to trademark holders because, again, [inaudible] bring forth something that we're discussing in the chat. Non-commercial interests that non-brands have, legally speaking – and I would argue policy speaking – an equal right to register a name. The right to participate in sunrise is itself a superior right. To the extent that that's brought to ... Broadened through the use of defensive registrations across a broad range of TLDs, it really does start to [infringe] on the speech rights of others.

GREG SHATAN: Thanks, Mitch. Phil, why don't you go ahead?

PHIL CORWIN: Yeah. Let me say a couple of things. Again, a personal capacity speaking only for myself. Just clearly we're into some kind of policy discussion beyond the data because I think there's general agreement that data is inconclusive and then there's judgment calls here.

I'd like to ask one question and then make one point. The question is let's take two terms that are related – Microsoft which is a very unique, non-dictionary word identified in major software and computer-related products and services company based in Seattle, Washington and Windows which is the generic dictionary word for its most famous software product.

Are the people who believe that defensive registrations can be abused and who have been talking on the call, are they equally

concerned about Microsoft and Windows or are they much more concerned about windows? I would note that Microsoft, when it makes decisions – and of course, I don't know, I'm just guessing that Microsoft and Windows might be registered in the clearing house. All of this comes at a cost. Even corporations have fiscal limits, so there's costs of registering marks and renewing those registrations in the clearinghouse and costs of annual renewals and initial registrations and annual renewals and new TLDs which can range from \$0.99 to \$1000 or more per year. It just depends on the TLD. So, they're making that subjective judgment call right now.

The other point I wanted to make is what's related to a particular brand may not be that obvious. Let's say there's a brand that's a maker of boots in Texas. There's quite a few examples you could think of. One would say if one believes that they should only be allowed to use sunrise in TLDs that relate to their registered goods and services. Well, they've got a right in dot-shoes, dot-boots, maybe some retail-related TLDs. But they say, "Oh, no, we also want to register in dot-horse and we want to register in dot-motorcycle because those are areas where people buy a lot of our boots." And let's say they say, "Hey, we want a sunrise right in dot-berlin because, actually, we have a huge following in Berlin, Germany and our boots are kind of a cult item there and we don't want that term to be infringed there."

I am interested in the answer to my first question and I wanted to make the point that what may seem unrelated to an outsider may seem to a trademark owner to be a very relevant term, even though [inaudible] in which the need to make a defensive

registration to avoid the cost of the subsequent UDRP or lawsuit may not be obvious to others who don't have a full knowledge of what their market is and where their products or services are most consumed. Thank you.

GREG SHATAN:

Thank you, Phil. I think we have definitely strayed far away from the data on this question, so we'll bring this to a close and move on to question 11 since we have two more questions to cover in 15 minutes.

So, sunrise charter question 11 asks (a) how effectively can trademark holders who use non-English scripts and languages able to participate in sunrise including IDN [inaudible]? And (b) should any of them be further internationalized, such as in terms of service providers, languages, [inaudible]? A little grammatically challenged, but ...

George notes cell A7, the registry, on question 29A indicates problems with TMCH and IDN, that TMCH does not support transliteration of the trademarks from the IDN, which is one of the local longstanding business ideas. Such trademark owners did not register their trademarks using transliteration, or at least I guess not through the TMCH.

Sell F56 [inaudible] registries and registrars have indicates one registry operator received at least one IDN sunrise registration and that none of the [inaudible] registries that responded in cell F57 offered a special IDN-only registration period. George notes it's a very limited data. Kristine agrees [inaudible] to the data cited

and [inaudible]. Maxim says, “I agree with George’s assessment of the data, with a note about F57. Q24 was not clear enough. For example, for a TLD which has IDN-only policy, there was no need to have a special period of IDN since all registrations were IDNs.” So really, in reality, it was a period with IDN registration.

That’s all we’ve got here, so unless anybody has any comments on this one – I think it speaks for itself – we can move on to question 12.

So, let us move on to question 12. Question 12 asks: why on this night ... No, sorry. Should sunrise registrations have priority over other registrations under specialized [inaudible] TLD? Should there be a different rule for some registries such as certain types of specialized gTLDs, [inaudible] community or geo-TLDs based on their published registration/eligibility policy? Examples include `police.paris` and `police.nyc` for geo-TLDs and `windows.construction` for specialized gTLDs.

I don’t recall the specialized gTLD has a particular meaning, so I guess just taking some kind of a generic meaning, so to speak. So, first, we have George noting several cells. Cell F52 [inaudible] regarding what some call overly generic strings. Also, the issue of conflict between locally protected terms and TMCH. Cell F53 on eligibility. Again, another to ask Amadeu Abril’s comments of [inaudible] TMCH registration is overkill for those looking to register in just the locally targeted gTLD. And several comments about whether QLT and ALT worked in certain ways.

At cell F54 the registry has mentioned the response that had summarized before QLT. Cell A5, [inaudible], registry should have

a degree of freedom to assign domain names with specific interest groups. Cell A7, [inaudible] again Q29A asserts that small local businesses are now protected well due to high cost of TMCH registration.

George also notes an overlap between this question and summarized charter question. Kristine says, "I generally agree with George and also note my comments on the link he provided is the same I provide here." Maxim also agrees with George. Kathy has reposted some of the data we have seen in response to other charter questions. I think [inaudible] cell numbers for the registry/registrar tab B51 and 52 and F51, 52. This goes back to the Moscow issue, if you will, and other issues that we've gone over before.

Kathy also notes that questions 12 and 12A – I believe that's the ... I'm not sure which tab that is. So, the ICANN [inaudible] policies like sunrise [inaudible] be altered to better accommodate community or geo-TLDs and that responses here were germane to this question. So, these are 30, 30 and F30, 30. Again, issues of non-trademark rights to satisfy local law or local trademarks or local [inaudible] name. No better right for [inaudible] since their trademark [inaudible] issues of local specifications, history, culture, which I think this is all in the data, so just note the tab, where it goes to.

Susan says limited feedback from registries. Some of the responses were for the geo-specific regions for reserving particular names. Geo-TLD has to provide services for benefit of the local government to represent public interest of the citizen.

The set of names was reserved for public services, signature locations, names important for the capital.

On the other hand, another set of items was added to prevent propagation of [inaudible] language into the geo-TLD file zone. Notes working with local administrations, worked on history of the region, work with cultural and historical agencies that have registry, registrar tab [inaudible] 729.

Susan also refers to question 22, how we were able to reconcile your plans for LRP, ALP, 2LP with the ICANN sunrise claim. And answer (a) establishing permanent claims period. We first did sunrise and QLT. Then, the claim period when going to GA. Another answered ICANN had [inaudible] information about running a QLP. Another answered it was easy to design a launch program that was complying with the requirement law. Another said it was very hard. Again, a small number of responses and a mix of views, but three quarters appear to be saying they were able to work with in the rules established for the less renowned. So, that's kind of the data as we have it out of that question.

It's now 2:23. If there's anybody who has comments on this one, although again I think the data is relevant and it kind of tended to speak for itself, especially since we're covering, in some sense, a well-trodden ground. So, I think we should take a few minutes to make plans for our next week's call where David will be the chair and I unfortunately are most likely to be absent due to a conflict with a speaking engagement for [inaudible]. So, I see a hand from Kathy. Please, go ahead.

KATHY KLEIMAN: Thanks, Greg. I'm sorry that you won't be here next week. Could you [inaudible] that page 30-31, F30-31. You read it through but it does have a direct answer to the question that we're asking. The question is should the ICANN grant protection policy [inaudible] sunrise claims be altered to better accommodate community or geo-TLDs? And response was, yes, [inaudible] 9 responded. That's a lot. So, we do have some data here, and as you were reading, they do go into some detail about what they're thinking about. So, this question relates to others, but how do you create that room for people who have trademarks or non-trademarks [inaudible] first or last names. Trademarks or non-trademarks, how do you create more room for them and do we need more room? And certainly we've got some data on that. Thanks.

GREG SHATAN: Thanks, Kathy, for pointing that out. That was a registry, registrar answer. So, in terms of next week's call, I was going to turn to Julie whose hand is up. Julie, please go ahead.

JULIE HEDLUND: Thanks. This is Julie Hedlund from staff. I'm just noting that while we've gotten through question 12, there were additional inputs and comments that were received since last week on question 3, 4, 5B, and question 6.

So, you have a [inaudible] call next week and we also will note the change from the draft procedures that had been sent around previously to the full working group that indicated a full working group call for next week. The sub-team co-chairs have suggested,

and the working group co-chairs agreed, that rather than having a full working group call next week, the sub-teams will instead submit their status report on their analysis of the survey data against the charter questions to the working group via e-mail to the list, and instead will retain this time the 18:00 UTC time for this sub-team meeting, sunrise sub-team and this previous time for trademark sub-team.

So, staff suggests perhaps that we can ask [inaudible] for people to review the comments, the further comments received on questions 3, 4, 5B, and 6 and perhaps at the start of next call, we could spend a very brief amount of time on any possible additional comments or questions or clarifications on those comments, rather than reading out the comments since people will have had yet another week to review them, but just ask if there is anything additional that people want to say and then go into the analysis of previously collected data for which staff will provide prior to next week's call a tool to enable the sub-team to do that work and also send some Google Docs as well, similar to what you have all been using for the survey data. I'll pause there. George Kirikos, please go ahead.

GEORGE KIRIKOS: Will we have a link to all that past data in a single place, so that we don't have to go looking for it? Thanks.

JULIE HEDLUND: The data will indeed be presented and linked in the tool that we'll provide so that you will have it in one place. Ariel is responding on

that as well. We will try to make this [inaudible] complete for you as possible. Any other questions?

GREG SHATAN: You probably will do this anyway without my even saying it, but for 3, 4, 5B, and 6, we should put that out as homework in a link attached document for folks to look at, the same way we've done homework in the past, so that people find it with a minimum of [inaudible], especially those who were not on this call or left early.

JULIE HEDLUND: Thanks for that, Greg. We will indeed put that out as homework. But just noting that this is homework for people to read. We're not asking for people to make additional comments. The comments and input should have been provided for this call. If we open these up again for additional comments, we really don't have time to go over any new information next week. Really just if there's any clarification from what's already there. But we will indeed include links to those documents.

GREG SHATAN: Thanks. I guess that means that we will not be reopening the documents for further comment.

JULIE HEDLUND: That's correct.

GREG SHATAN: They'll stay locked. So, this is just to basically continue today's discussion.

JULIE HEDLUND: Precisely. What we would have gotten to today is just being carried over, so not new input.

GREG SHATAN: Okay. Very good. It's like completing a suspended game in baseball. I won't go into baseball analogies. Anyway, it is exactly 2:30 and we have reached both I think the end of our call and the end of our time. Thank you, all, for participating and for your good comments and a lively discussion. We'll be meeting at this time next week with David McAuley as your trusted guide. I will say thank you and this call is adjourned. Bye, all!

UNIDENTIFIED FEMALE: Thanks, everyone. Bye-bye!

[END OF TRANSCRIPTION]