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**ICANN Transcription**

**Review of all Rights Protection Mechanisms (RPMs) Sub Team for Trademark Claims  
Data Review**

**Wednesday 13 February 2019 at 1700 UTC**

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ANDREA GLANDON: Good morning, good afternoon, good evening. Welcome to the RPMs Sub Team for Trademark Claims Data Review call held on Wednesday the 13th of February 2019 at 17:00 UTC. In the interest of time, there will be no roll call. Attendance will be taken by the Adobe Connect room. If you're only on the audio bridge, could you please let yourself be known now?

KATHY KLEIMAN: This is Kathy Kleiman.

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ANDREA GLANDON: Thank you, Kathy. I will make note of that. I would like to remind all participants to please state your name before speaking for recording purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this, I will turn it over to Julie Hedlund. Please begin.

JULIE HEDLUND: Thanks, Andrea. I will just run through as usual a few of the administrative items and the agenda, and then I'll turn things over to Roger Carney who, as subteam co-chair, will be chairing today's meeting.

So on the agenda, we have review of the agenda, statements of interest. Item two, review the Analysis Group independent review of TMCH services and Analysis Group's responses with respect to the claims charter questions, and that's questions one through five. And you'll see them there with the links. And then Any Other Business.

May I ask if anyone has Any Other Business? George Kirikos, please go ahead.

GEORGE KIRIKOS: Yes. As I pointed out on the mailing list, I continue to have issues with the purported deadline of today for the submission of additional data. I'd like to talk about that. I did formulate the section 2.7 appeal, which I've not had an opportunity to be heard on that. So I want to either have the deadline extended – on today's call we have two of the three co-chairs here and we have other members here. I've posted more than 40 data sources that

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would be suppressed if the deadline isn't extended, and given that these data sources aren't even going to be considered next week, the request to have a reasonable deadline is reasonable in itself. There's no reason for an early deadline except to suppress data sources. So I'd like to have that on the agenda. Thank you.

JULIE HEDLUND: Thank you, George, but I'll just note that this is the subteam call, this is not a working group call. Those are subjects for a working group call and with the full working group, not the subteam. Thank you for the reminder that we do have updated deadlines as were sent out earlier concerning the timeline, and I was going to briefly mention those, but I don't know that I need to know that you have done so. But this will be a call for the subteam work, which is primarily, as you see in agenda item two.

GEORGE KIRIKOS: May I quickly respond to that?

JULIE HEDLUND: Please do.

GEORGE KIRIKOS: Yeah, the co-chairs have eliminated all main working group calls up until the one scheduled at ICANN 64 in Tokyo, so if I'm not being provided an opportunity to raise this topic, what's the appropriate forum? It's unreasonable.

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JULIE HEDLUND: Thank you for that, George, and I think you've already availed yourself of the appropriate form, which is in the absence of a working group meeting, there is the list. So we'd certainly encourage you to continue to use the list to bring up any issues you may have with working group matters.

And thank you very much, I'd like to go ahead and turn things over to Roger Carney for agenda item two. Please, Roger.

ROGER CARNEY: Thanks, Julie. Alright, let's go ahead and jump in. We've got quite a few items here to review. Let's go ahead and jump onto charter question one. I think we'll start with anyone that's provided comments, want to add anything or help make people understand why you picked those items, and then we'll move on to people with additional comments. So I'll open it up to Kathy, Susan or Rebecca if you have any additional comments that's not already in the document.

Alright. Comments were pretty self-explanatory, so that's good. Is there anybody that has additional comments they want to add to the claims charter question one? George, please go ahead.

GEORGE KIRIKOS: Yeah. As I noted on the mailing list, I intentionally didn't fill it out this week to give other people the opportunity to shine, but I still did do the homework, and on this question, I would have added the 93.7% abandonment rate, which is on page 16 page, also on 17 to 18 on table four. That's a very important piece of data for this charter question. Also, the 113.2 million unique download

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requests on page eight. Combine that with the high abandonment rate, and that helps to answer this question.

And also, on page 18, there's a table which shows that there were 113,338 non-disputed registrations, only 346 disputed registrations, and 1,696,862 abandoned registrations. That's an important piece of data for this question.

And also, in the appendices on page 64 to 65, it talks about the fees and costs being too high for registries and trademark holders. So I think these are all on topic for this question. Thank you.

ROGER CARNEY: Thanks, George. Alright. Anyone have any additional things? That covers a lot. George added a lot to that. So, any additional comments on this? Kathy?

KATHY KLEIMAN: Yes. Hi, Roger. I'm experimenting with Skype to have a clear connection. Could you tell me if this is [inaudible]

ROGER CARNEY: It sounds good.

KATHY KLEIMAN: Great. Good. So, I think it may be beneficial – there's a lot of stuff in today's table and a lot of people did some good research. So I just wanted to share that relative to questions – we're looking at kind of umbrella questions here in one, but is the trademark claims

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service having its intended effect? And is it having unintended consequences?

And even in the summary sections and then further in into the detailed questions, the Analysis Group in this report finds – and I'll just summarize that – that the claims service and matching criteria may help deter rights-infringing registrations that are exact matches to trademarked strings, but it's also possible that some good faith registrations are also being deterred by the current claims service, and may be detrimental to the registration activity non trademark holder domain registrant.

And we'll see a lot of discussion, particularly in the more detailed questions, about that issue of the deterrent effect. So I just wanted to highlight that we are seeing that the Analysis Group is showing us likely unintended consequences here. Thanks much.

ROGER CARNEY: Thanks, Kathy. Alright, Susan.

SUSAN PAYNE: Yes. Hi. I made this comment in some of the tables. I probably didn't make it in all of them, and I'm not going to be [a kind of cracked record] on them or anything, but I really do think when we're looking at this Analysis Group report, we have to take into strong consideration their own statement about the poor data that they have, the inability for them to form firm conclusions on practically everything, and the fact that their findings shouldn't be used for policy development.

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Now, having said all that, obviously, this is information, this is data we can bring into the mix, but a lot of these so-called findings by Analysis Group, when you actually read what they say [inaudible] they're kind of [assumptions] that they've drawn based on pretty much no evidence whatsoever but just like, "Oh, it might be this, it might be that."

So we really do have to take that into account, and for example on this, it might have deterred good faith, it might have deterred bad faith. They're completely on the fence. They've got no real evidence to support either claim.

So I just wanted to flag that. I'm not going to say that on every single question that we go through.

ROGER CARNEY: Okay. Perfect, Susan. Thank you. Rebecca, please go ahead.

REBECCA TUSHNET: So, let me speak in partial agreement with Susan. I think it's correct to say that we don't know anything about the proportions of bad faith registrants, and we don't know anything about whether bad faith registrants are being deterred, in part because we've been prevented from getting the underlying data.

So if we saw 50,000 attempts to register Microsoft, we could probably do a little bit better on our expectations on whether or not that was bad faith or not. But that doesn't mean that no policy conclusions follow. In fact, we do have the most queried list of

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these common terms, and we have other evidence, so we can say that what we don't have is evidence of the policy working.

You can then – a lot of things might follow from that, including like let's have a standstill, you can make arguments to get rid of the policy, you can make arguments to expand the policy, but I think it is important to say we just don't have any evidence of how it's working, and we don't have any evidence of the effect on bad faith registrants specifically. That's useful information. Thank you.

ROGER CARNEY:

Thanks, Rebecca. And I'll point everybody to the chat that's going on. There's some good stuff going on between Griffin and George as well, meaning, yes, the data's great, we just have to put it together and make our conclusions from it. So, anybody else have any comments on charter question one before we move on? No? Okay, we can move on to question number two.

And again, I'll open the floor up to the commenters to see if they want to add anything. Kathy, Susan, Rebecca, anything as we get started? Okay, I'll open it up to everybody to see if anyone has comments on charter question two. Kathy, please go ahead.

KATHY KLEIMAN:

So here, charter question two is what about the trademark claims notice? [And I'm summarizing.] Should it be adjusted, added or eliminated? Should it be extended, shortened, mandatory? Etc.

And here, we do have some pretty strong and clear statements from the Analysis Group of the sunrise – and I've put in the full

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quote because I didn't think people had to put down what they were doing and go back to the Analysis Group report. So the [quotes are here] with the page numbers, but the Analysis Group says, "Expanding the claims period or expanding the matching criteria used for triggering claims [service] notifications may be of limited benefit to trademark holders and may be associated with costs incurred by other stakeholder groups.

And they go through a number of [inaudible] where they try to determine what would happen if the claims service period was extended. This is exactly what we're looking for to help answer this question. And they actually find that registration activity among other things declined after the 90-day claims service period ends, so any additional month added to the claim service period will likely have diminishing value, and some other things.

And then also on page 17, farther into the report and farther down in the table here, they also again talk about expanding the claims service period, and they say they find no evidence that bad faith registrations are trying strategically to avoid triggering claim service notification, and so again, extending that period probably wouldn't be of additional value or much additional value in what we're talking about.

So I just wanted to point people to these quotes that I added and hope people will take a look at them. Thanks.

ROGER CARNEY:

Thanks, Kathy. George, please go ahead.

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GEORGE KIRIKOS: Thanks. Yeah, going to charter question 2C, should the claims period be mandatory? I think that chart table four on page 18 is still relevant, 113,338 non-disputed registrations with only 346 disputed, and the 1.7 million abandoned registrations.

Also, as I mentioned, for question one, there was the fees and the costs being too high for the registries and trademark holders. Pages 64 to 65 are still relevant to this question. And also, on pages 14 through 15, trademark holders want longer claims, whereas registrars find it costly and oppose that. So that could lead to different views depending on which one takes. Thanks.

ROGER CARNEY: Thanks, George. Alright, any other comments on charter question two? Alright, perfect. Let's move on to charter question three. And again, I'll open it up to the commenters. If Rebecca wants to say anything on her note, please go ahead. Otherwise, we can move on to anyone else who has any comments on charter question three? Alright, Kathy, please go ahead.

KATHY KLEIMAN: So, since charter question three [inaudible] trademark claims notice the domain name applicant meet its intended purpose, and particularly [inaudible] I think one of the big findings that we had here months ago when we initially looked at this was how many of these – was that a large number of these trademark claims notices appear to be going out for common dictionary words. What Rebecca says is common words for [large classes of legitimate] economic and social activity.

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And this is not, I think, what many people intended when these original rules were drafted. I think we're going to be seeing some additional data that sheds light on the fact that some of these are not famous trademarks at all or globally known marks. So there is a suggestion in the data, in the clear data that we're looking at, of the substantial risk when applicants get the notice, that they will be driven away from registering things in good faith that the trademark notice was actually designed to kind of encourage or allow.

That's a complicated way of saying it, but I think we really have to look at what's coming through on the trademark notice [inaudible] ordinary words that a large number of ordinary words from this data of the Analysis Group that trademark registrants are getting, and we have to consider that as we're redrafting the trademark claims notice in this process. Thanks.

ROGER CARNEY: Great. Thanks, Kathy. Susan, please go ahead.

SUSAN PAYNE: Thanks. Yeah. Just really quickly, I don't dispute Kathy's conclusion at all that we need to bear this in mind when we're redrafting the claims notice language. We talked about redrafting the claims notice language now for some years. I don't think there's anyone in this group who actually thinks that doesn't need to be done, so I'm completely on board with that. But just to kind of flag or stress that this within ICANN – it's not our role to be making determinations about whether trademarks are valid. You can look

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at those words and form your own determination if you think they shouldn't have been issued, but the trademark office in question who issued the trademark applied the law that they apply and granted those trademarks. And it's not our job to be re-judging that or finding that particular trademarks are inappropriate. That's not ICANN's job.

But I'm not disputing that we want to minimize the chance that some registrants might be chilled if the terminology used in the notice is insufficiently clear to them.

ROGER CARNEY:

Great. Thanks, Susan. Rebecca, please go ahead.

REBECCA TUSHNET:

Thank you. So this isn't a question of the validity of the underlying mark. Actually, I think it goes directly to the unintended effects of how this particular system, which is set up to send out notifications based only on a textual match to a common term that's only a trademark under certain circumstances, it goes out to everyone, and that is just something that we need to take into account now that we know that in fact, the biggest triggers of these notifications are common terms that aren't actually marks like Apple but are in fact things like "cloud." I'm sure it's a valid mark for pens in the Netherlands. Nonetheless, if triggering a lot of notifications that are more likely than a notification for Microsoft to have negative, unintended effects. So that's something we need to take into account. Thank you.

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ROGER CARNEY: Great. Thanks, Rebecca. Brian, please go ahead.

BRIAN BECKHAM: Thank you. And I want to be clear here, I'm not speaking in any chair capacity. I wanted to echo Susan's comment, and I think Rebecca raises relevant considerations, but I think we do want to be mindful that there are different national and international trademark regimes, and they have different requirements, whether that goes to specimens of use or whatnot.

And I'm going to put in the chat, I think in some respects, maybe another way to look at it is, "Okay, we have a problem in front of us, which is, which marks are allowed in and on what basis do they either trigger claims notices or can be used for sunrises?" And so what I'll put in the chat is a proposal from July of 2017 where I had suggested that maybe a more productive way to address this – which I think is a tough question, again, we're looking at different national and international trademark regimes – would be to address this at the level of the sunrise dispute resolution policy. So I'll put that in the chat and wanted to propose that as a possible way forward. Thanks.

ROGER CARNEY: Great. Thanks, Brian. Kathy, please go ahead.

KATHY KLEIMAN: Yeah. Responding to Brian, I just wanted to share that the sunrise dispute resolution policy from everything I can find was premised in part on the openness of the trademark clearing house, which

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was the original premise when it was passed by the council, so it's not usable by a number of groups that might want to engage in those types of complaints or challenges. Thanks.

ROGER CARNEY: Thanks, Kathy. Brian, please go ahead.

BRIAN BECKHAM: Thank you. I want to just – this may betray a degree of ignorance on the claims notices, but Kathy, is it the case that there would be an opportunity to see the underlying mark that's being invoked when a claims notice was received? So in other words, is it necessary to know in advance the trademark rights that are being invoked, or would there be an opportunity once a person has given a claims notice to then understand the scope of protection and possibly to invoke the SDRP process? And when I say that, I mean in a possibly amended form as well. Thanks.

So again, I don't know the answer, but if it is the case that registrant would know the trademark rights being invoked once they receive a claims notice, that may go to your question, Kathy.

KATHY KLEIMAN: May I respond?

ROGER CARNEY: Yes. Please go ahead, Kathy.

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KATHY KLEIMAN: Okay. First, I think [inaudible] general availability and [inaudible]. I think in general, you're outside the scope of the SDRP. I think it was intended to allow people to challenge during the sunrise period, and I think it has a limited window that maybe would not be allowed to use after they got a trademark claim. But also, it wasn't supposed to just be limited to the trademark claims notice. And that's a hard time to think about challenging something, kind of understanding [on one foot] looking at a notice.

But I think we should [inaudible] dive into this, Brian, because I think [inaudible] just about useless right now. Anyway, thanks.

ROGER CARNEY: Great. Thanks, Brian and Kathy, for that. Susan, please go ahead.

SUSAN PAYNE: Hi. Yeah. Thank you. I probably [inaudible] but I'm not quite sure why we're talking about the SDRP in this context given that this is the claims subgroup. And of course, the very fact that claims notices were being generated on these particular marks means that to a large extent, they weren't [being utilized the trademark owners for the ] sunrise. Because if the sunrise – if the mark has been utilized and led to a registration [inaudible] sunrise, then there [inaudible] be a subsequent opportunity for anyone to register it.

So I'm just not quite sure why we're talking about the sunrise dispute resolution process here, but I'm probably missing something.

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ROGER CARNEY: Thanks, Susan. Brian or Kathy, you want to talk to that real quick, or not? Okay. Alright, any other comments, questions about charter question three?

Again, a lot of talk going on in the chat, so if you're interested, please read through [inaudible] discussions. Okay, no other comments. We'll move on to charter question four.

George, please go ahead.

GEORGE KIRIKOS: I see Kathy's hand was first, so she might want to go ahead of me.

ROGER CARNEY: Okay. Thanks, George. Kathy, please go ahead.

KATHY KLEIMAN: Sure, though I'm happy to wait for George. Okay. So here, the charter question is, is the exact match requirement for trademark claims serving the intended services for the trademark claims RPM. And then [they] asked about IDNS and Latin-based words, which I don't think – unless I missed something – the Analysis Group talks about IDNs and Latin-based words, [so we're in the] English ASCII system.

And then the charter question is asking, is there evidence of harm under the existing system, and should the matching criteria for notices be expanded? And here, we do have some really clear

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answers from the Analysis Group that based on their research – and let me see if I can read it – and I've read this earlier, but it applies here as well. “Extending the service claims period or expanding the matching criteria used for triggering claim service notifications may be of limited benefit to trademark holders and may be associated with costs incurred by other stakeholder groups such as registries, registrars and non-trademark holder domain registrants. And so we'll see that there are tables, table ten in particular, talking about kind of analysis that they did relative to expansion, and finding that [dispute rate –] as seven has already pointed out, [inaudible] but the result, this result indicates that – and here I'm quoting – “Expanding the matching criteria would not help to deter many bad faith registrations that would be disputed by trademark holders. So they kind of look at and they investigate expansion of the matching, and at least we have some data on this now, which is good. Thank you very much. Back to you, Roger.

ROGER CARNEY: Great. Thanks, Kathy. Alright, George, please go ahead.

GEORGE KIRIKOS: Yeah, I agree with the nuggets that Kathy, Susan and Rebecca identified on this question. There was an additional one I found on page 28, which was a fair statement of them saying, “We find no clear evidence that expanding the matching criteria will outweigh the potential cost of doing so.” But they kind of repeat that everywhere else. So that's another instance that could be added to the list of relevant tidbits. Thank you.

ROGER CARNEY: Okay, great. Thanks, George. Susan, please go ahead.

SUSAN PAYNE: Thanks. Just to follow on what George said, they also do make multiple references to the fact that they've made no cost-benefit analysis whatsoever. Thanks.

ROGER CARNEY: Thank you. Yes. Okay, any other comments, questions on charter question four? Okay, excellent. Let's move on to the last charter question, charter question five. It doesn't look like anybody had anything directly from that, so I'll open it up to whoever has comments on this. George, please go ahead.

GEORGE KIRIKOS: Yeah. I did actually find a couple of examples that might be relevant to this question. Page seven, they noted that 97% of the marks were in Latin script, which might be a useful piece of information in terms of IDN TLDs for example. And also, it was noted that there were only 1700 users – this is still on page 7 – with a great preponderance or dominance from the United States of America, and so that might be relevant information for geo TLDs outside the United States. We might not want to give claims notices or sunrises when we get to that topic to American mark holders if it's a dot-Moscow for example. Thank you.

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ROGER CARNEY:                    Alright. Great. Thanks, George. Okay, any other comments? Okay, great. I like that we made it through this nice and quickly. The homework was probably not quite as quick, but at least we were able to get through this smoothly. Anyone else have any other comments they want to bring up outside of this? Okay, then I'll turn it back over to Julie.

JULIE HEDLUND:                   Thank you very much, Roger. We just wanted to take a moment to suggest a homework assignment for next week, and to our online folks that we have an extension for the meetings to go over the previously collected data through to the end of February. So we have two more meetings, the meeting on the 20th and the meeting on the 27th.

And the homework assignment we're suggesting for next week, in coordination obviously with the subteam co-chairs, is the INTA survey, which there's actually two slides associated with that. So we thought we would suggest that, unless folks have any other ideas that they would like to suggest with respect to homework.

Oh, and one other thing I should mention also is that we will open the documents back up for the previously assigned sources, so if you should have other comments that you would like to add that you've not been able to, say for instance when the documents were closed, you can go ahead and put comments in on the previously assigned sources. In particular, I think George Kirikos, you mentioned that you had some additional comments. You're free to add those as well.

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Kathy Kleiman, I see you have your hand up.

KATHY KLEIMAN: Thanks, Julie. Question about the INTA survey. The packets that we're looking at, I think – correct me if I'm wrong – are slides. Is it possible to get the link, for those of us who are gluttons for punishment, to the underlying survey itself?

JULIE HEDLUND: Thank you, Kathy. I think we can do that. We'll certainly look into that, and I assume it's probably linked on the Wiki somewhere. But actually, let me retract that for a moment, because I'm not sure if that survey data is something that we were privy to in the working group.

So let's take that back under advisement and see whether or not that's something we can get. And we can always ask Lori Schulman as well, but we'll first look back and see what we originally provided. Thank you. And any other comments on homework?

I'm consulting with staff here just now on the question about the survey. I'm not sure that actually we had the raw survey result, but we can go back and check with CCT support staff and see if there's anything further that they can provide. And Kathy, we'll definitely do that and pick that up as an action item.

So other than that, we'll just meet at the usual time next Wednesday, the 20th at 17:00 UTC. And I don't see anything else, so I think that looks like we can let this call end a little bit early,

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which is good, because some of us and some of you are going to be joining the sunrise claims call that will start about five minutes past the top of the hour.

I'm just looking again. And happy Valentines Day indeed. Happy Valentines Day to all of you. Thanks a lot, and Andrea, we can go ahead and adjourn the call.

ANDREA GLANDON: Thank you. This concludes today's conference. Please remember to disconnect all lines and have a wonderful rest of your day.

**[END OF TRANSCRIPTION]**