

**ICANN  
Transcription  
Review of all Review of all Rights Protection Mechanisms (RPMs) Sub Team for  
Trademark Claims  
Friday, 28 April 2017 at 16:00 UTC**

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Coordinator: Excuse me, recording has started.

Michelle DeSmyter: Great. Thank you so much, (Jay). Well good morning, good afternoon and good evening. Welcome to the RPM Sub Team for Trademark Claims on the 28th of April, 2017. In the interest of time there will be no roll call, attendance will be taken via the Adobe Connect room. If you are only on the audio bridge, would you please let yourself be known now? Great, thank you.

Hearing no names, I would like to remind all to please state your name before speaking for transcription 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 back over to our cochair, Michael Graham. Please begin.

Mary Wong: Hi, everyone. This is Mary from staff. And thank you, Michelle, for kicking us off. I note, from the Adobe chat, that Michael's audio has just dropped and that...

Michael Graham: Yes, I'm back on, Mary.

Mary Wong: ...and that he's calling back in.

((Crosstalk))

Mary Wong: Oh there you are. No problem. Take it away, Michael.

Michael Graham: Okay good morning, good afternoon and good evening. Michelle already called roll on who was on the call, Mary?

Michelle DeSmyter: Michael, I did not do a roll call, but would you like me to go ahead through the roll call?

Michael Graham: Oh yes, would you please?

Michelle DeSmyter: Absolutely. We have Allison Simpson, Brian Winterfeldt, Griffin Barnett, Louise Marie Hurel, Philip Corwin, Roger Carney, Scott Austin, and we have Kathy. And from staff we have Mary Wong, Julie Bisland and myself, Michelle DeSmyter. And apologies from Beth Allegretti and Kristine Dorrain who might be joining us later, and Amr Elsadr from staff. You may continue.

Michael Graham: Great. Thanks very much. Good morning, everyone. Sorry I'm a little bit in arrears, it's been a long morning and a long week. What I think we want to do, unless anyone has new business, is to jump right into the questions that we were looking at, some of the suggested revisions to them. And see how far we can get with these.

Just to go back over at the end of our conversation last week, we decided that what we wanted to do was to consolidate a number of these questions into some overriding questions which were the large ones, and then to clarify that within those larger questions there might be some ancillary questions that we'd want to follow up according to what the answers of those large questions were. And by large questions I'm basically referring to the questions that we were specifically chartered to ask and then move from that according to those answers what we might want to explore.

And I guess the best way to is to begin with the overriding question that we were looking at defining for the group and moving back to the PDP as a whole was this question Number 3, the original question being, "Does a trademark claims period create potential chilling effect on genuine registrations? And if so, how should this be addressed?"

And there were several other questions. I believe it was 1, 3, 5 - were those the ones that went together, Mary, I'm trying to recall now.

Mary Wong: Hi, Michael. I'm looking at the numbering which seems to have been slightly messed up, possibly by me, apologize, if that was the case. But what we did do on the staff side was we did batch them according to the discussion from last week. So, on that first overarching question that you've just noted, you see in the last column on the right hand side that, yes, the Questions 3 and 5 from the original list have been consolidated.

And what we've also tried to do is to suggest a overarching general question which you see as the first bullet point with a few specific sub questions that Kristine Dorrain has also made a comment on which, like I said earlier, does not show in the PDF but shows in the Google Doc version. So that's kind of where we are in terms of this first batch of questions.

Michael Graham: Right, and I'm sort of wondering, Mary, what might be the best way to go forward since, as you say, you know, pointed out, we have the PDF version

here; we do not have the Google Doc version in front of us that shows the changes, the balloon notes and such. If that's something that you could have open to clarify as we are going through the PDF? And my understanding...

Mary Wong: Actually that was what I was going to suggest.

Michael Graham: Okay. And my understanding you had pointed this out but if we could just note it again, this PDF photograph, this is as of what - when?

Mary Wong: This is as of 30 or 40 minutes before today's call.

Michael Graham: Okay. So this is the most recent that we have from the Google Doc. And as inept as technology as I am, I pointed out to Mary ahead of time that I had attempted to enter some changes and they did not show up so we're not stuck and trapped with the PDF but we now have, you know, put in some ideas and let's go ahead. I'm sort of thinking what we should do is to take a look at the suggested rewording and look back for reference at the additional comments which contain some discussion of some of the proposed changes.

And see if we agree with this phrasing of the questions. And I think our goal for today should be to try to come out with the questions that we want to - that we believe cover the grounds appropriate in regard to the claims service to send back to the PDP for the full discussion.

So the first general question, I'm just going to read it from the PDF is as follows. "Is the mandatory 90-day trademark claims period having the intended effect?" And there is a footnote to that, and I presume that footnote would then point back to the documents or to the specific charter, is that correct, Mary?

Mary Wong: Hi, Michael. With respect to this particular footnote, I think this is a reference to try to incorporate some of the discussions from last week, which is, you know, bundling basically a series of questions into a general question. And

the note here simply says, you know, refer to the historical documentation that lays out essentially the evolution and the operation of this question.

Michael Graham: Okay. So the question stands as it is, as a clarification. And then there's a question - the second part of the general question is, "If not, if there are unintended consequences, what should be adjusted, added or eliminated?" and does anyone have any comments on this as a general question? And I note that it is a compound question now and perhaps that's a place where we might start. I'm sort of thinking that the general question overriding is the first one which is, "Is the mandatory 90-day trademark claims period having the intended effect?"

And then the second part of the question, "If not, or if there are unintended consequences, what should be adjusted, added or eliminated?" which seems to me, to be better placed with the specific questions. And I'll go ahead, Kathy, you've got your hand up.

Kathy Kleiman: Yes, I'm not certain what the difference is between the general and the specified question, but certainly the wording of the first question, is a general question was extensively discussed last week. And is designed to encompass the question that we see on the left column, the original charter question which is asking us about chilling effects and if they're there then they're probably not an intended effect but an unintended consequence. And so this wording was extensively discussed last week. So I support it. Thank you.

Mary Wong: Hi, all. This is Mary from staff. I think Michael is changing his phone so he will have to dial back in. And in the meantime, thank you, Kathy, you're right as in the extensive discussion from last week and this general question is an attempt to rephrase, as it was to capture that discussion. In terms of the specific questions, again, that refers back to the discussions from last week, because there was some sense that while the general question is actually something that does capture what we want to try to get to, there was some

specific points raised we should also be asking the full working group to consider.

Thanks, Michael. Welcome back. I was just noting that the specific questions add to the general question in the sense of giving the full working group specific aspects to review and to consider.

Michael Graham: Yes, correct. And that was - I take it that was Kathy's question, I'm sorry, Kathy. So does anyone - do we think that that - the first half of the general question would be the appropriate overriding question that we are asking for the answer to in our consideration of the PDP? And I'm not seeing - you know what, it would be easiest in this sort of thing why don't I just ask when I have a question like that if you would indicate either using the green or the red indicators instead of the hands up just indicate whether or not you agree or not, that would be a good way of going forward.

Scott, you've got your hand up. Go ahead.

Scott Austin: Yes, Michael, this has already been discussed significantly in the prior meeting. Please forgive me but I just wondered words like "intended effect" was that defined? Has that been addressed someplace else in terms of expressly stating what that means?

Michael Graham: Thanks, Scott. Michael here. I think that's a good question and that sort of goes along with the question that I had raised with Mary. Mary, you want to go ahead and answer that?

Mary Wong: I'll try. Because I believe the sub team had asked us last week, or the week before, for staff to go back and look at the historic documentation, hence the footnote that we referenced in the general question, to see what statements there might have been from the IRT and the STI as to the intent behind a 90-day trademark claims period.

We did prepare a short document that we circulated that I can redistribute. The long and the short of it is we did not find that many specific statements that said here is our intention, but we did find some principles and we did find in the recommendations, at least from our perspective, you can pretty much clearly what the intention was. And so since the actual phrasing of this question was suggested last week, we felt that with the historic documentation, it would not necessarily be as unclear.

Michael Graham: Michael here. Mary, thank you. I'm thinking and going along with what you just asked, Scott, to bring - before we bring these back to the PDP, I think that might be very good either that we define the term in the same way that the larger group is defining some of the terms for example, in connection with our design trademarks, or attach, as you say, that document that was prepared, Mary, including what information we have so that we do understand what it is that we're being asked to review. I think that's a very good question, Scott, what is the intended effect.

And I would hope from those documents that we would not need to go back and redefine it, but I guess that's something that we should do before passing on the question. At this point what I would say is presuming that we do - are able to derive a clear understanding from those documents, that this question would go forward but it would go forward with that footnote.

And I guess my question would be, does anyone have a better idea or a better suggestion in terms of ensuring that when we ask the question of the PDP, the PDP now does not spend the following three months discussing what the intended effect is that we're asking about.

Scott Austin: Michael, this is Scott again. I'm just suggesting that perhaps we should make that explicit in the question itself, you know, intended effect as suggested in or make some - because I thought perhaps that's what the footnote had was the reference, and frankly it's a little small from where I can see it on my desk, for me to be sure, you know, whether or not it was a link so perhaps we

need to make a reference in the question itself. So, I mean, legislative intent at least is always extremely difficult to divine from disparate documents, I guess. But if Mary's summary does that then that's terrific and it should be - but it should be referenced.

Michael Graham: This is Michael. Scott, thanks. And I think so basically the footnote, and I've gone back, is very short and sweet and it says exactly what Mary said it said which is it says, "Refer to historical documentation including IRT report and STI recommendations," which means we do have a reference to where this intent is discussed but we do not have, one, a link to those documents, or the portions of those documents that would be relevant; and, two, we do not have a clear definition.

So I'm thinking that in terms of asking the question, we're sort of at a point where it may be a work item to actually provide or propose an appropriate definition for intended effect or how that's referenced in this question, again, back to the PDP. And I wonder if anyone else has any thought on having that be really a work plan between now and next week which hopefully would be doable.

Kathy Kleiman: This is Kathy. Can I join the queue?

Michael Graham: Yes, Kathy, go ahead.

Kathy Kleiman: Yes, I'm afraid - my personal thought is that it may take us a while to do that. I think the intended effect, in some ways maybe in the eye of the beholder on this one a little bit, which is why we need to talk about unintended effects because those may be in the eye of the beholder too. So we may be able to bracket it or describe it but I'm not sure the intended effect, that may - Scott, I understand why you want to do it, I just think it may take us a long time to get there. If we could at all.

Michael Graham: Yes, thanks, Kathy. This is Michael again. Susan.

Susan Payne: Hi, yes. Sorry, apologies, I came late so maybe I'm missing something or maybe there was some scene setting that I didn't get. But if I understand you correctly then, Kathy, you just said it would be impossible or it'd take us forever to work out what the intended effect of the claims was. But you were supporting having this language. That seems pretty inconsistent to me. I'm obviously misunderstanding what you're saying. Would you mind clarifying?

Kathy Kleiman: The language of the intended effect was proposed by J. Scott so in his mind it's very clear. And the language of the unintended consequences was proposed by me. And in my mind that's very clear. We could sit down and try to quantify all of that or we can go back to the original charter questions. But I just - I don't know how we're going to get to absolute definitions of any of these things. I think there are broad understandings and I think Mary may have suggested that, you know, IRT and STI have broad understandings of this and maybe there are ways to bound them.

But in terms of the intended effect - capital T, capital I, capital E, yes, I think I'm not sure - I think it would take us a while to kind of...

Susan Payne: ...okay.

Kathy Kleiman: ...drill down. Thanks.

Susan Payne: Okay well then why don't we just, you know, the question says is there a chilling effect?

Michael Graham: Is that Susan?

Susan Payne: Yes. I'm sorry.

Michael Graham: Okay. So you're looking at...

((Crosstalk))

Michael Graham: ...you're looking at that first specific question, correct, when you say that? I think you're in and out, oh you're on mute. Do you - you had your hand up ahead of that question.

Scott Austin: Yes, just a real quick comment, I totally agree with Susan and thank you for jumping in, only because - and Kathy, I'm not trying to make it difficult, I'm just actually having the same difficulty in determining what's unintended when I don't know what is actually intended or what the scope of that is, the limits of that. I don't want to - because as you just said, both intended and unintended can be in the eye of the beholder.

So and without - I don't claim to have the history on this that someone on the IRT or the various other historic committees, but we're dealing with this now and it seems to me that we need to have some of that wisdom shared expressly so that those of us who are trying to use our time to make valuable or meaningful comments can be on the same page.

Michael Graham: Thanks, Scott. Mary, you wanted to say something?

Mary Wong: I did. And I did have one suggestion in the chat. I don't know if it's going to make it better, but maybe it's kind of less emphatic, instead of having "the intended effect" which may presume or assume there's one main big only sole effect, I've just said, "its intended effect" which refers back to the claims itself. That's one specific suggestion.

The other is an observation that we've tried to capture this notion of a chilling effect, for example, and what might be some of the consequences noting that in the general question we do say not just if not, what are the unintended consequences, is if not, or if there are unintended consequences, we did that to try to not cabin the discussion or to force a definition in any way, but in the specific questions I think we do try to make reference to the fact that chilling

effect, let's try to unpack that, what is it? Where does it come from? And how do we deal with it in duration or otherwise.

So it may help to look at the general question along with the specific questions is what I'm saying. Thanks, Michael.

Michael Graham: Thank you, Mary. And I did see your posting about changing "the" to "its" which I think probably is a good way to go language wise. And in terms of our discussion, I have a very quick proposal and that is that we go ahead and review these questions and the specific questions with the following presumption; we will presume that we understand what "intended effect" means.

That then we will put on the side and following the creation of the questions, before we pass that back to the committee as a whole, we will have a group that will go into the documents and dig out or prepare a definition of, quote unquote, intended effects that we can utilize and understand in asking this question. But if we go from now just say, we understand what intended effect is, what's the next question? I think we could move it and put together these proposed questions with that understanding.

So if that's the case, and I think, Mary, I think your explanation too of phrasing to avoid any sort of presumption one way or another is a good way to view this. So I think if we have one, a general question, is the mandatory 90-day claims period having the - having its intended effect, and go ahead, and then from that that's either a yes or a no answer it seems to me out of which would be more specific questions.

And perhaps the second part of this, if not, or if there are unintended consequences, what should be adjusted, added or eliminated? That might be more a (conclusory) sort of question it seems to me after we go through the question, one we answer if it's having the intended effect, and then from there if it's a no it's addressed; if it's a, you know, let me go back here. If not, so

that is presuming that the answer to the question might be no, in which case we would answer the second part of the question.

But it sort of cuts off then the question of unintended consequences, which I think might be the second question, whether or not it had any unintended effects. Kathy, you've got your hand up.

Kathy Kleiman: Yes, the joys of word-smithing and wording. So I think it's not a binary; it's weird the way it's phrased. But if not, or if there are unintended consequences, what should be adjusted, added or eliminated? So even if it's having its intended effect, I think what we discussed last week, but I was getting dropped all over, I was in DC and I was getting dropped all the time off the call.

But I believe what we concluded, and certainly what I was concerned about is you could absolutely be establishing your intended effect but still have - but still have unintended consequences which is where the whole chilling effects questions are coming from is the unintended question - unintended consequences. I don't think we intended chilling effects. That wasn't our goal, but that's certainly something we've been asked in a number of questions to look at. So sorry, Michael, I think it's not - and maybe we want to rephrase it to make it clear, but it just says if there are, you know, are there unintended consequences and if so maybe that makes it easier so that it doesn't look like it, you know, it's - I'll turn it back to you for better word-smithing. Thanks.

Michael Graham: Thank you, Kathy. And I don't know that phone calls are really great with word-smithing, although I love working on definitions on them. I think you've got a great point there, and I think what basically as I understand it so this initial question, I'm sticking with it because it's down here, "Is the mandatory 90-day trademark claims period having its intended effect?" One, there's a yes/no answer to that. And if it's yes, great. If not, then it seems to me that you follow that up with what could be adjusted, added or eliminated to enable it to reach the intended effect.

But then there's a second general question and I think you're right, it's not really an under question, it's a second overriding question, which is does the mandatory 90-day trademark claims period have unintended effects? If so, what are they? And then again, the question if so, what should be adjusted, added or eliminated to avoid those unintended effects? Does that sound like an approach to you? And I see you've got your hand up, I'm not sure if it's back up, Kathy? I guess it's down. Susan, you have hand up.

Susan Payne: Yes thanks. Hi, it's Susan Payne. I don't understand the concern, I think. I mean, it says, "If not or if there are unintended consequences," so that "or" means that - you could be having the intended effects and having unintended consequences and you'd still be looking at this.

I honestly think that this is a level of tweaking of language and word-smithing that is completely unnecessary because we all know what we need to ask ourselves and that all we need to do is we just need to make sure that the question that people know what the question is and it - I don't think, I mean, this is just the question, remember, this isn't - this isn't our report, you know, where, you know, the precision of language is absolutely key. But having said that, I think this language is perfectly precise and does exactly what Kathy wants.

Michael Graham: Okay thank you. Do you agree, Kathy, that if we keep this language as it stands in the first general question that that does address what your concern is?

Kathy Kleiman: I do. I agree with what Susan said. What gives me pause is that you don't, that you read it a completely different way. And so could you stop at the "if not" so it makes me think we might want to clarify if that's the way people are likely to read it and expand it. But I could go either way.

I thought it was clear but I actually leave it to you, Michael, if you - the way you rephrased it is also clear, which is, you know, is it having its intended effect? No, if not, you know, what do we do to, you know, to change that or if Susan thinks it's clear and I had thought it was clear, if not, maybe we put dashes in or something, if not, instead of a comma, dash, dash, or if there are unintended consequences, dash, dash, just to really point out that there is really two questions being asked here.

But again, this is all word-smithing. As long as we reach the unintended consequences question I think we're there. Thanks.

Michael Graham: Thanks, Kathy. I note that Justine has entered an inquiry which is the other side of the question, yes, what's unintended in the minds of the person answering the question. Having started to watch the series, Genius, I am all about relativity, so I think those are valid questions.

And I think I don't want to lose sight of the fact that what we need - what we want to do and as I understand our role is to put together the questions that came to us in a way that is meaningful for the discussion going forward in answering those questions so that we can stop trying to figure out what the questions should be.

So in that regard, yes, I'm either way with this. It's difficult looking at a living document like this to determine where to go, where we've made a good number of changes. Now the specific questions, and I'm going to sort of jump ahead and presume we keep this language for now. Then the specific questions, it seems to me, that we're really looking at two different areas of inquiry.

One is at unintended effects, whatever those maybe, and I do have one suggestion with the language of that that I'll come back to. And then the second is whether or not if it's not meeting the intended effect, of whether there are other things that should be considered that would enable the claims

service to do so, and that's looking beyond the unintended effects and looking at helping it make the intended effects.

And, Phil, you've got your hand up.

Phil Corwin: Yes, thanks Michael. I was just going to suggest that if we're going to consider rewording none of the suggested rewordings deal with the text, they all seem to deal with the length of the term in which the notice is generated rather than language of the notice, which I personally think is probably more - is what - if it's causing abandonment of what would be good faith and good use registrations, that's what we should be looking at. So we might want to include in those a question about the wording of the Trademark Clearinghouse notice as received by the perspective registrant and whether that should be adjusted. That's it.

Michael Graham: Good point, Phil. Thank you. Kathy.

Kathy Kleiman: And great minds think alike. I actually added the question farther down, I'm not sure what page, maybe Mary can tell us, I think it's the fifth page, there is a blue question that says, "New" on the left hand side. And says, "How should..." because I had the same thought, that we had talked about the trademark claims notice a lot in the chat of the main working group list. So I just threw out some starting language, "How should the trademark claims notice be made more understandable and less intimidating?"

But the idea that that might move up to this section of questions is the reason I raise it because, you know, there's some language there for us to start with and I like that idea of rearranging it up to the top. Thanks.

Michael Graham: Thanks, Kathy. Yes, I saw that. I think that as introduced as an additional question if I'm not wrong. Let me see.

Kathy Kleiman: Yes, an additional question, I'm trying to see. Under Number 2...

Michael Graham: You know, Luddite that I am I have it all printed out so...

Kathy Kleiman: Oh very good. I don't think that's luddite, I think that's good chairing, because that's what I do too, because it's really hard to look at multiple screens when you're on the call. So if you see Question Number 2, "Should the trademark claims period continue to apply to all new gTLDs?" It's at the bottom of the next page.

Michael Graham: Right, so what we've done in the drafting - this is sort of going through - is we combined Questions 3 and 5. And 3 specifically looked at - it was asking the question whether or not the period - the trademark claims period created a chilling effect on registrations. And if so how it should be addressed.

And then the fifth one - question - was "What is the effect of the 90-day trademark claims process?" Looking down here. And, Mary, any help you can give - I'm looking at the document. So I think, you know, they really were sort of focusing on that period, and I think adding the period to the 90-day is where that focus came in. So I think, Phil, I think your point is good.

And also the fact of looking at language which wasn't an original question, which I did notice was - has become the subject that certainly would be a sub-inquiry, I would think, underneath whether or not it's having its intended effect and - or unintended effects. And then, you know, what could be done to ensure - well to help it have intended effect if it is not, if that's the answer. And if it's - the answer is it is having unintended effects, then how that might be addressed.

Susan, I think you had your hand up first.

Susan Payne: I did. In the end I kind of - I typed it in the chat what I was wanting to say, and I'll say it anyway because I'm on now. I think that there - this original charter question was about chilling effect, if we look at the suggested rewording

we're talking about unintended consequences and mitigating them. I think this - the redrafting of the claims notice which is something that's been talked about a lot on full working group calls or at least it's certainly been alluded to and on the list, is there definitely needs to be - that needs to be captured somewhere. It seems to me it's captured here.

I don't really support having a new question per se because I think then we're - I would - I'm not sure how we're proposing to deal with our revisions is part of my concern. And I suppose I'd like us to be dealing with them in the same way that the Sunrise Sub Group is proposing to deal which is not to edit or replace or delete an original charter question but to have a sort of - the suggested rewording as effectively some notes to that.

And if - assuming that we're using that basis, I'd like to see this wording about redrafting the claims notice being a note in this section.

Michael Graham: Thanks, Susan. And by this section, you mean in response to the question regarding unintended effects?

Susan Payne: Yes, yes. Yes.

Michael Graham: Okay. Thank you. Mary.

Mary Wong: Thanks, Michael. I was going to say some of the things that Susan said, and it is clear that I think Kathy's new question does capture, as Phil noted, an aspect to this topic that we're talking about that isn't currently captured in the questions. So in looking at it this morning, I was thinking it might make sense, because it's almost like a logical flow, to have that kind of question in the specific questions list possibly after the third bullet point. And there's a couple reasons why I'm making that suggestion.

One is that if you notice, the first bullet point on the specific questions actually doesn't just say "claims notice" because I think it was Griffin last who made

the point that when we talk about claims period, claims service, claims notice, sometimes it covers both the pre-registration claims notice as well as the post-registration notice of registered name. Sometimes we just mean the pre-registration claims notice.

And much of this question is actually directed at the pre-registration notice. So we've tried to make that very specific in this first bullet point and the specific question. So we do a logical flow through. Kathy's point that maybe it's not just about duration, it's about redrafting, that the note - and Susan's language about redrafting the notice maybe necessary to mitigate the consequences whether they're chilling effect or unintended ones, seems to me to be a way within the logical flow.

Michael Graham: Thanks, Mary. And as you were saying that I was not having an epiphany but sort of an understanding of a way of approaching this. And from what Susan said as well so that actually some of the things that appear to be raised and as questions, such as in a 90-day period an appropriate length? Is the 90-day period too long? Let's see, should there be a rewording of the claims notice document itself? A lot of those seem to be - I don't know if I'd call them notes but sort of proposals of approaching.

So if the question were "Is it having its intended effect?" And say yes, that those (unintelligible). If it says no, then again we're back to the question of well, what could be considered to enable it to have its intended effect, other question. Is it having unintended consequences? Under that sort of not a sub question but possibilities, is it having a chilling effect on pre-registration applicants.

And these are not so much questions as the possible answers to that and directions we might go. And I suppose it could be phrased as questions and we would have to come up with as many possibilities as we could for it to be an accurate question, otherwise you know, by asking one question and not another we're limiting the field of consideration. And I think what we want to

do is to give examples to the group that when they're addressing the actual questions, they consider these different possibilities as ways of approaching it.

So should there be a shorter period for notice if there should be a notice. Should there be no notice, let's see, so I'm just sort of thinking. And again, I'm afraid I'm back at a level of reorganizing how we set up these questions and answers for passing onto the PDP as a whole. And I'm just trying to take a look now at Kathy's conversation, same place, feel free to move up. New question, up to the top, you know, what is that new question, Mary?

Kathy and Phil, I have a new found respect for trying to hold...

((Crosstalk))

Mary Wong: Hi, Michael.

Michael Graham: Yes, Mary, you were going to say?

Mary Wong: I think that comment from Kathy referred to the discussion we were having about redrafting the claims notice, and basically rather than having it as a separate question at the end, move it up as part of this discussion about intended effect, unintended consequences and chilling effects.

Michael Graham: Sorry. This is Michael. I also notice now that I can actually take a moment and look back that Phil actually proposed what could be seen as a definition of understanding of intended effect of the trademark claims notice. And which he writes, it was "to deter intentionally infringing" in parens "as in cybersquatting" end paren, "domain registrations and domain..." and then he goes, "and the main unintended effect is to deter and cause abandonment of substantial numbers of registrations that were neither intended to infringe on trademark rights or that would have constituted bad faith registration and use if completed."

And let me go back, I think I would propose it might be very useful if we adopted as simple and direct a definition as Phil proposed in that first part of that sentence as our understanding going forward. Kathy.

Kathy Kleiman: I was going to comment on something else, Michael, so let me - let me stop and my hand will be raised when we're ready to go onto another issue.

Michael Graham: Okay great. Great, I'll come back to that. But I wonder, does anyone have any strong thoughts, one way or the other, in terms of defining the term, and we could actually submit this as part of the question so that the terms in our questions as we're finalizing the drafts of them, are defined terms. They may or may not be accurate but they are the terms we are using and what we understand when we're asking these questions.

So that I would think - and I agree, Phil, I think that's probably the overall intended effect was to deter intentionally infringing domain registrations. From my standpoint, having worked with some folks before I came out West, there was also the effect of - or the intended effect of giving notice so that the determination by applicants could be made whether or not to proceed. And so the - that was the sub-one was - not the sub-one but the one that I understood a few of my clients at that time were interested in.

Kathy, I'm going to figure that's still your hand up, and Phil, you want to jump in?

Phil Corwin: Well, yes, thanks, Michael. Phil for the record. Just a quick comment, yes, it was to, you know, it was to cause the potential registrant who in the midst of their registration process - the claims notice pops up to think about whether they want to complete the registration.

And to the - we don't know - we have found that we don't know what number of registrations that generated a claims notice were either not intended to go

to completion, that were gaming the system for some reason or other, just to see if they would generate a claims notice and identify a mark that was in the Clearinghouse, what percentage were by intentional cyber squatters who when they saw the notice said, gee, it's not worth going through with this, they're just going to hit me with a URS or UDRP right away, and what percentage were by ordinary folks who, you know, got the notice and say, oh gee, the cops might show up at my door, I need to talk to a trademark lawyer and it's not worth it and they just throw in the towel.

So we know it's - for the bad actors we know it's having a good deterrent effect because it's 94% abandonment, but we don't know what percentage of attempts they represent. So I'll stop there.

Michael Graham: Thanks, Phil. Susan.

Susan Payne: Thanks. Yes, hi. I sort of - I only partially agree with you, Phil, about, you know, we know it's having a deterrent effect. I mean, agree, it probably is, but just because there's a 94% abandonment rate, as you - we actually can't really form any conclusions because we don't know. And frankly, it doesn't matter how much we want to know, we aren't going to get that information. Analysis Group were the ones being paid to conduct a review of the Trademark Clearinghouse operations and they couldn't get that information. So we are never going to get that information and we need to just find a way to move on without it because we aren't going to get it.

Michael Graham: And I see Rebecca, you've got your hand up.

Rebecca Tushnet: Hello. This is Rebecca Tushnet for the record. So I appreciate Susan's comment, but I think that's actually not completely true. That is there are a number of well-recognized ways for determining what people are doing, I mean, we could ask them, or we could even, you know, do surveys and, you know, create an artificial environment as trademark lawyers do all the time, to try and get an idea of what's going on in the real world .

And this is something I've mentioned a couple of times on the discussion list, but, you know, we should do some consumer research. So I don't think that there is no way to get this information. And I certainly don't think that we should not be talking about it just because there's - there's no data from the Analysis Group other than the circumstantial evidence which I - as I've indicated, I think actually is kind of important here when we look at words like "cloud" as the ones that are most often being returned. Thank you.

Michael Graham: Thanks, Rebecca. Kathy.

Kathy Kleiman: Hi, Michael. And let me follow up to Rebecca, I like the idea of consumer research. I think we've got two kinds of data gathering that we could and should be proposing to the full working group. One is there is circumstantial evidence that there's a problem. No one expected a 24% turn back rate, no one who was involved in the drafting of this. If we had known that we would have done other things.

So let's go out, I mean, let's find out who has better understandings, we've gotten some of it in outreach sessions where we've heard some, you can call it anecdotal, I call it evidence, of people who are turning back who were exactly the type of registrants that the registries wanted like (unintelligible), so we should - I think we should be proposing data gathering on that.

And I like the consume research, that Rebecca is talking about both in terms of what's happened already and also in terms of whatever the new trademark claims notice is that we draft to go out and test that as well. We certainly did not have time to do that the first time; we were under unbelievable time constraints in trying to move the new gTLD program forward and get these rules into the Applicant Guidebook. So consumer research now and consumer research later when we redraft the trademark claims notice.  
Thanks.

Michael Graham: Thanks, Kathy. Mary, you have your hand up and I think it's going to point out what I'm looking at here. Go ahead.

Mary Wong: Michael, I'm not sure about that. But I did want to follow up on this topic and what Rebecca has also been typing in the chat. And as she noted, I did circulate the process information to the full working group about how we might request for there to be some funding, for example, to get this kind of additional external research. So this may be something to take back to the chairs as well as the group.

And since we have two of the chairs on this call I think one, what I would like to make note of from the staff side is something pretty obvious that we can never know up front for any working group whether there's a need for research, surveys, or any other kind of additional external expert work and when that might come up.

So while there is some allocation in the budget for next financial year for this kind of work, there may really not be a lot because we do have a number of groups going forward rather big projects at that. So what I would suggest for this sub team is as you go through the questions really make a note of what are some of the gaps or topics that you, as a group, feel need that kind of external research work, take that back to the working group and then the cochairs of the full working group could either prioritize or come up with a list.

And as Kathy says, we can say to the GNSO Council here are the things that we'd like to get some research on, we don't need them all done at the same time. I think that having a list that we might be able to add to or modify later on rather than going to the Council with ad hoc requests is probably a much better approach. Thanks, Michael.

Michael Graham: Thanks, Mary. Actually what I was referring to was looking down at my clock, which is now saying 9:57 and my understanding is we scheduled this for 60 minutes. Correct?

Mary Wong: That's correct, Michael.

Michael Graham: Okay. So what I wanted to do, and unfortunately we did not get very far, and I apologize for that. I think one of the difficulties for me is just in the way that we've prepared the table, which I think is informational, but is difficult to deal with. And this is what I propose is that we take the suggested rewording as it stands within this table and if we could just put it into a single document without the context and discussion and consider that and the order of the questions with a note towards having - well, let me back up.

What I'd like to do is to take these questions and I think they really need to be put in a way that visually enables you to see a decision tree type of question to answer to the next question and that I would, myself, volunteer and I could work with staff to put that together to get out to the list before Wednesday of next week so everyone would have a chance to take a look at that. And it would incorporate the questions that we now have in here, the suggested rewording, also Kathy's suggested question and how those might fit together, there may be additional ones that we think of to propose.

But once we have the decision tree put together, and I call it the decision tree, let's call it a question tree, I think it would be a lot clearer for us taking a look at it if we want to make any adjustments to that or if we can pass that back in terms of a series of questions which would look like the actual questions that we had before but would be based on one of these question or decision trees. And that's what I would propose, since we have one minute.

Is there anyone who would like to either say great idea, terrible idea or agree to that going forward? And you can do it by just posting a little plus symbol or a negative symbol if you'd like by your name if you're online. Okay, since I need to give you all back to your day and myself as well, I've got at least three people, Justine, Rebecca and Roger who said yes, I'll presume that - I don't see any no so we're in the midst there.

So I will work with Mary and Mary, we can do email back and forth to organize this, but I'll take a first stab at it for you. And we will again, before Wednesday, get up a draft for everyone to take a look at and then I think once we have that we can move forward and hopefully get those questions looked at. And I think - thank you very much everyone and thank you for addressing the definitional issue, and I think also thank you, Rebecca, for bringing up the need for more data and information and unfortunately that seems to be an ICANN theme this year.

So if there's nothing else, I'll thank you all for helping out and moving this. And the next meeting will be May 5, correct? Oh I see you're putting it up there. Same time, same place, Mary?

Mary Wong: Hi, Michael. I believe so because folks had indicated this time works for them. So presuming that we will need another meeting next week where we should have the simplified table, we will set the meeting time for same day, same time, same duration.

Michael Graham: Okay great. Thank you, all. The other thing that I'll try and do with you, Mary, is I'll try and identify terms that need to be either understood or defined, okay? Great. Thank you all. Talk to you next week.

Mary Wong: Sure, Michael. No problem.

Michael Graham: Bye.

Mary Wong: Thanks very much, Michael, for chairing. Thanks, everyone.

Michael Graham: Thank you. Turn off the recording, by the way.

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