

**GNSO Transcript
Special Trademark Issues : URS
04 December 2009 at 15:00 UTC**

Note: The following is the output of transcribing from an audio recording of the Special Trademark Issues meeting on URS held on 04 December 2009 at 15:00 UTC . Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at:

<http://audio.icann.org/gnso/gnso-sti-urs-20091204.mp3>

<http://gnso.icann.org/calendar/index.html#dec>

Participants on the Call:

gTLD Registries Stakeholder Group

Davis Maher - Chair

Registrar Stakeholder Group

Jeff Eckhaus – Registrar

Jon Nevett- Registrar

Commercial Stakeholder Group

Paul McGrady - IPC

Mark Partridge – IPC

Zahid Jamil- CBUC

Non Commercial Stakeholder Group

principle participants

Robin Gross -NCSG

Kathy Kleiman – NCSG

Konstantinos Komaitis – NCSG

Alan Greenberg - At Large

Olivier Crépin-Leblond - At Large alternate

ICANN Staff in attendance:

Kurt Pritz

Liz Gasster

Margie Milam

Amy Stathos

Glen de Saint Géry

Apologies:

Wendy Seltzer –NCSG

Jeff Neuman - RySG

Glen DeSaintgery: Good morning, good afternoon, good evening everyone. We have on the call today Jon Nevett, Mark Partridge, Zahid Jamil.

Coordinator: Excuse me; Paul McGrady now joins.

Glen DeSaintgery: Alan Greenberg, Olivier Crepin-Leblond, Kurt Pritz, Konstantinos Komaitis, Kathy Kleiman, Jeffrey Eckhaus, David Maher, Paul McGrady. And for staff we have Margie Milam, Amy Stathos, Liz Gasster, and Kurt Pritz whom I mentioned previously, and Glen DeSaintgery.

Man: Thank you David, over to you.

David Maher: Okay. Thank you. We - I can now see the screen so we're back in business. The first issue is the mandatory issue. Last time we moved that to the end. Does anyone feels strongly about doing that again or can we...

Man: Yes, please.

David Maher: Are we close to (unintelligible)? Kathy, you said...

Kathy Kleiman: You can move it to the end. That would be great. We're really close to (unintelligible), thanks.

David Maher: Okay. I'll accept that suggestion. We'll move it right on then to the elements of the complaint. Who wants to open the discussion on that, Mark?

Mark Partridge: Thank you. We had a very productive call this week and I think what we have a consensus on, and I would say certainly in principle, is that the statement of elements within the URS policy would be based - would be the UDRP element, supplemented with the section of the (nominate) elements that specify what for lack of a better term we've called the Safe Harbors for Registrars.

The reason we try to do this is that, you know, both the UDRP and the (nominate) are known quantities rather than coming up with something new that might have unintended loopholes. And the value of the (nominate) Safe Harbors is that they address issues that were not addressed or not foreseen, you know, ten years ago or more than ten years ago when the UDRP was created.

But reflect what the case law and courts, and what is the cases that have come up in the UDRP in dealing with various issues. And then finally I think, you know, referencing the (nominate) factors is probably useful in bringing - in indicating that this is not just totally U.S. Centric point of view.

David Maher: Okay.

Mark Partridge: So I think with that we came to agreement on that principle and we've circulated a draft. There might be some slight wordsmithing left on that draft but I believe we also have, you know, at least broad consensus

on that within our working group. And Kathy can certainly, you know, comment and confirm or deny what I've said.

David Maher: Okay, Cathy?

Kathy Kleiman: I actually agree with everything Mark said and appreciate him presenting and appreciate everyone's time on Wednesday getting together and really thinking about the UDRP and (nominate). Just wanted to add the little factor that that the current version I believe is the one Jeff Neuman circulated with some revisions to the text.

And that would be the one we might want to post, if that's possible. But this was a group effort and it really I think the creates a balance within the URS and something people can refer to, examiners can refer to, to make quick rapid decisions.

David Maher: Okay. We have a document up on the screen now; is that the correct version?

Woman: Yes, I put up Jeff Neuman's version, so.

Kathy Kleiman: Yes.

Mark Partridge: Yes. So I could go back and comment on what everybody seen. The first paragraph, second paragraph, and third paragraph are the existing UDRP elements. So, you know, that's the known quantity that people are comfortable with.

Then when you go below that you have a section headed Safe Harbor. That may not be the right way to phrase this in the formal document

but the concept is there. And then these elements comes from the (nominate) policy.

Kathy Kleiman: Mark, may I add they come from Section Four of the (nominate) policy titled "How The Respondent May Demonstrate In It's Response That The Domain Name Is Not An Abusive Registration." We did...

Mark Partridge: That might be a good phase for it to replace the Safe Harbor word. Something along that, well I guess it's there and...

David Maher: Okay. Zahid?

Zahid Jamil: Yes, I just wanted to say that even (unintelligible) this approach I think this is a good effort that you or (Nicole) is trying to get this done and we would also support it. I particularly think the language we saw which is up there now Jeff's is very useful and would support that one as a final version. I think there's some wordsmithing. I agree with Mark but pretty much this is fine with us.

David Maher: Okay. Thank you. Then I think we can move on. We'll have to come back to the strawman proposal.

Woman: Holdup again, sorry. Okay. (Unintelligible).

David Maher: Okay. That brings us to the format of the complaint. I believe we have had consensus on that. There's no comment we can move along to the Standard For Evaluation. This is what I believe formerly was known as rule defects.

Do we have, Zahid, I think you were working on this. Do we have a document or do you want to speak to this?

Zahid Jamil: Yes, thank you David. Yes, a document, I tried to work on some language then Konstantinos had made some changes to that slide 1 and I think his version is the final one. We both agree on it and if anybody has any comments there'll be fair to take them up right now.

David Maher: Mark?

Mark Partridge: It's there.

Man: Yes, I just add that I think this is good and I support it.

David Maher: Okay. Fine. In that case back to the strawman and we'll move along.

Woman: So there's consensus on this as well, just want to clarify that?

David Maher: Yes, as I understand it. I don't see any hands raised.

Woman: Great. Great work guys.

David Maher: Oh, Zahid?

Zahid Jamil: No, that was just an applause, sorry. I'm bringing it down.

David Maher: Okay. So we need the strawman again. The speed of light has slowed down a bit today. Oh, well.

Man: Can...

David Maher: Okay.

Man: It is Friday.

Man: Yes, that's true.

David Maher: (Unintelligible) notice, oh, longtime we've had consensus on that.

Man: I'm sorry.

David Maher: Oh. Go, Mark, go ahead.

Mark Partridge: Yes, I'm sorry. I guess I would like to go back to the last thought and have a what I hope might be a friendly amendment to the language that I missed the first time. There's a point at where it says, "That the evidence shows that it is an infringing domain name." And I'm not...

Kathy Kleiman: Do you want me to pull that back up so you can see it?

Mark Partridge: Yes, and I think infringing is the wrong word in that spot. If you go down sort of toward the section begins that if the examiner, no it begins, "This means that the complainant.

Kathy Kleiman: Okay. Yes, I think I set it so you all can scroll yourselves.

Mark Partridge: Yes, and the phrase, "Being used abusively to infringe the trademark." I would suggest it's being used abusively in violation of this policy.

David Maher: Alan?

Zahid Jamil: This is Zahid.

Mark Partridge: Yes, sir. Yes, just in point A at the beginning I think yesterday we changed substantial validation to substantial something else. Whatever it is we should be consistent.

((Crosstalk))

Mark Partridge: I don't remember what word we used but I think we changed it from validation to something else.

David Maher: Substantial review.

Mark Partridge: Review, okay.

David Maher: Thank you. Then Zahid, did you want to comment on Mark's (unintelligible)?

Zahid Jamil: I just wanted to say that we absolutely agree with that.

David Maher: Are there any disagreement with that?

((Crosstalk))

Liz Gasster: Sorry, it's Liz, being used abusively in violation of policy or are you proposing more differently (unintelligible)?

Mark Partridge: No, that's the language I'm proposing.

Liz Gasster: Okay, thanks.

Mark Partridge: And the reason behind it is that infringed of course is a legal issue that is different from it although very much overlapping is different than the issue here.

David Maher: Kathy?

((Crosstalk))

Kathy Kleiman: I want to go back to that in a second because I'm pulling up the UDRP policy, but I think the term was substantive review, not substantial review.

David Maher: You're right, it is substantive.

Kathy Kleiman: And Mark, let me comment. The evidence that the domain name was registered and being used in violation of the policy, isn't the UDRP term is being used in bad faith, right?

Mark Partridge: Yes.

Kathy Kleiman: Was registered and the evidence that the domain name was registered.

Mark Partridge: And is being used in bad faith.

Woman: Yes. Why don't we, can we go back to the language?

Mark Partridge: Use that in bad faith in violation of the policy.

Kathy Kleiman: Okay.

Man: Isn't that a circular definition?

Mark Partridge: Yes.

David Maher: But does it matter to me abuse in violation of the policy ties it down to this policy.

Man: Okay.

David Maher: There might be an abuse that was outside the policy.

Kathy Kleiman: So registered being used in bad faith and being used abusively (unintelligible) against the policy?

David Maher: I mean...

Man: In bad faith.

David Maher: And is being used abusively in violation of the policy, period.

Kathy Kleiman: Now I'm trying to put back in the words and it could be used in bad faith.

Mark Partridge: You like in bad faith, so is being used in bad faith in violation of the policy?

David Maher: Oh, okay.

Kathy Kleiman: Great. Thank you.

Mark Partridge: I'm okay with, you know, that I think that word.

David Maher: Zahid?

Man: Do we want, oh, sorry.

Zahid Jamil: Sorry, thank you, David just wanted to point out Mark says a quarter down on the next page as well there are two instances where infringing or actually non-infringing is being used. Is that all right or would you like to sort of look at that as well?

Mark Partridge: No, in the first context where it says the use of the domain name in question is a non-infringing or fair use of the trademark, that's appropriate I think. And the next section.

Zahid Jamil: That's fine.

Mark Partridge: Is non-infringing, yes. Because...

Zahid Jamil: Okay.

Mark Partridge: The thing is that infringing is sweeps in more than a violation of this policy. But if it is non-infringing it is not within the policy.

Zahid Jamil: Thank you.

David Maher: Thanks. Margie?

Margie Milam: Oh, I just had a point about do we want to refer to it as a policy since in the UDRP it makes sense to refer to it as a policy, but something else (unintelligible) rules.

Mark Partridge: Whatever it turns out to be called is what we should call it.

Margie Milam: Okay. I don't know what I'm calling it yet but I'll put something in the report and you guys can comment.

David Maher: Okay.

Margie Milam: Would this procedure be good?

David Maher: I don't like procedure that well.

Margie Milam: Process?

David Maher: Process?

((Crosstalk))

Mark Partridge: How about the URS?

David Maher: That's probably a good suggestion.

Mark Partridge: Is a violation of the URS.

David Maher: And violation of the URS.

Margie Milam: Yes, that works.

David Maher: Okay. Then back to the strawman unless anyone else.

Mark Partridge: No, not yet.

David Maher: Alan?

Alan Greenberg: Yes. We have the examiner, we had the examiner must and now it's the examiner should. Is there a rationale for changing must to should?

Mark Partridge: Where is that Alan?

Alan Greenberg: Just after A, B, C, D. First read in the document, almost the first read.

David Maher: Interesting question, Kathy? You had your hand up?

Kathy Kleiman: Not on this issue so I'll be happy to wait until this is resolved.

Alan Greenberg: I'm not sure of the reason for changing that word there. I wonder if the reason was to give the examiner some level of leeway. I don't know how that word changed.

David Maher: Yes, neither do I. It seems to me that must is more appropriate so in this context.

Alan Greenberg: Do we remember who did this rework?

David Maher: I think Jeff Neuman.

Zahid Jamil: I'm sorry this is Zahid.

David Maher: Oh, I'm sorry.

Zahid Jamil: And that was me. I'm sorry, that's fine. It was me and if it needs to go back to must but one of the reasons was to give some sort of sculpt to the examiner but if there's some consensus to bring it back to must, that's find. I would a thought that shall would be better than most, but should it gives a slight bit of leeway to examiner but it's up to the discretion of the (unintelligible).

David Maher: I like shall.

Mark Partridge: Shall is a good word there, yes.

David Maher: Yes. Any objection to "shall?" I don't, okay so then we'll change it to shall. Okay any other issues on the, Kathy, you have your hand up?

Kathy Kleiman: Yes, thank you. There was, it's something I like to move from the URS element document that the group that I was part of created and I think it belongs properly here. And I just wanted to share. I know we can't have both documents up at once so let me read it.

It was at the very end of the document we circulated. And it said or text was, "The following shall be added by ICANN staff to the URS policy as additional guidance to the U.S. examiner." This is a direct quotation from the IRT report.

"And it's just the instruction that where there is any genuine contestable issue as to whether a domain name registration in use is an abuse of use of a trademark. The complaint will be denied terminating the URS process without prejudice or further action e.g. a UDRP or court proceeding. The URS is not intended for use in any questionable proceedings but only clear cases of trademark abuse."

And I like to recommend that that paragraph, which has been kind of been hanging out in limbo be added to this section.

David Maher: Any objection to that?

Man: No, it overlaps slightly with the last paragraph we have right now but we don't need to do final wordsmithing here. So I have no problem moving it.

David Maher: Okay.

Liz Gasster: Excuse me, it's Liz. Can you just state where it's getting moved from so I can capture (unintelligible)?

Kathy Kleiman: Absolutely. This is the Jeff Neuman, he was the last one to edit it. The URS element and examination document.

Woman: Okay.

Kathy Kleiman: Final paragraph.

David Maher: Okay. I think...

Liz Gasster: And where are we moving it to?

Kathy Kleiman: The end of the document currently up on the screen.

Liz Gasster: Okay.

David Maher: And back to the strawman.

Woman: All right.

David Maher: All right. We have now moved down to contents, notice contents. I believe we have consensus on that. The effect of filing complaint.

Alan Greenberg: Yes, David, it's Alan. On notice I think the language wording needs to be refined but we don't need to do it here and I'll look carefully at what ever Margie produces and comment at that point.

David Maher: Okay. Then moving along to the "Effective Filing a Complaint." Any comments on that? Moving along then, "The Time to Answer." We have a consensus with - can we have consensus on the ITC tying it to maintaining expedited commencements, is that an agreed-upon element or still a separate view?

I don't see any hands raised so let's make that the full consensus.

Woman: (Unintelligible).

David Maher: Moving along then to the "Commencement of the Evaluation." We appear to have consensus there. Again moving along to the number of

examiners there's consensus. Then we get to the assignment of examiners where we may still have an issue.

It's noncommercial issue, Kathy do you or Konstantinos?

Kathy Kleiman: I think we were waiting for staff to report back.

David Maher: Oh, Mark, could you (unintelligible)?

Mark Partridge: Yes, I believe it's the case within the SDI that we have a consensus on how this would work and the only remaining concern is the one voiced by the staff that there might - that current providers might not be happy with this.

David Maher: Yes, I think that's correct.

Mark Partridge: But I think we should still make the recommendation as to what we view as the appropriate thing to have happen.

David Maher: Kathy?

Mark Partridge: Asking providers to comply.

Kathy Kleiman: And I think the strawman I think whoever phrased this I thought did it very, very well. The principle is right. They captured it. The provider required to work with all certified examiners with reasonable exceptions -- and I'll skip the parentheses -- to avoid cherry picking of examiners that are likely to rule in a certain way. And that is exactly the point, that's exactly the goal so I appreciate that being captured so clearly.

David Maher: Okay. Good. There is nothing else on that we'll move along to evaluation or...

Mark Partridge: So we have full consensus on that? I like to add one more thought that I think we've discussed and had consensus on it not completely reflected here is that required to work with all certified examiners with reasonable exceptions. We've talked about two kinds of exceptions.

One is exceptions based on language and jurisdiction. And the other is for malfeasance and we might want to reflect that.

Man: Good point.

Amy Stathos: This is Amy. May I speak to that as well?

David Maher: Sure.

Amy Stathos: And I think both of those are fine, Mark. And I also think though we do need to leave in the option as it does say that staff is, you know, is going to be communicating with the providers to see if they identify you know, the options that they want to use to not work with somebody that may not be deemed cynically malfeasance. You know, just depends on how you define malfeasance.

Man: How about with reasonable exceptions for example?

Amy Stathos: Yes, I think that's probably good. And again, what we'll certainly start, you know, we are going to be exploring this and, you know, if things

come up that really seems like the providers are just not going to be any give we'll certainly come back.

But I think if they have a reasonable option to deny because of some kind of past history or current history I think that should work.

David Maher: Okay. Kathy?

Kathy Kleiman: Great, nope. That answered my question, thank you.

David Maher: Okay. In that case we'll move along to the evaluation on the merits for it appears we have consensus. Then we get to remedy if successful on the merits. Paul, you did some work on this. Do you want to address this?

Paul: Sure, thanks. Sorry about that. I couldn't figure out where my mute button was. I took a look at the CSE report and we wanted to look at that data about which successful complainants kept domain names and which didn't. And, you know, there was a significant fraction that either did not renew them and they are eligible now for re-registration or they did not renew them and they've been registered by some third party.

I think it was 15%, it was certainly less than 20% of folks who did that. And so I don't know what that tells us other than most people who view the UDRP take full advantage of the transfer protocol but not everybody. So again, I don't know how it informs the debate but it was interesting to track down.

David Maher: Yes, thank you. Alan.

Alan Greenberg: Yes, I just wanted - I think we should probably break this into two because we do have consensus on what it says in the strawman proposal. We don't have consensus whether there should be an additional option of transfer.

David Maher: Yes, I think you're right on that. Any comments on that, Zahid?

Zahid Jamil: I think that's a good approach and I think it would highlight also the transfer issue so that's fine by me.

David Maher: Okay. We're still not in agreement I gather on the transfer possibility?

Zahid Jamil: This is Zahid. Yes, I mean from the (unintelligible) perspective if it's something that we would as we've said it was the final negating issue.

David Maher: Kathy, I'm sorry were you leading the other approach to that? Is there still a disagreement?

Kathy Kleiman: Yes, I'm afraid there is still a strong disagreement on this and I urge others to speak as well. And that is going back to the principles of the URS and what the URS was created for. And that all along we understood this as a suspension mechanism and not a replacement to the UDRP.

And the distinction is a very valuable one. It was a distinction in the IRT and it's a distinction we think is critical to maintain here as well.

David Maher: Okay. Jon?

Jon Nevett: Yes, thanks. One point. I don't think we have consensus on that last sentence. I think there was some - that was offered as a compromise between two proposals. One being the IRT proposal rather it does transfer or just do the regular deletion cycle and aspiration cycle.

And the proposal that the BC is pushing on transfers. So that was a middle ground position offers try to reach full size.

Mark Partridge: Jon, are you talking about the extension?

Jon Nevett: Yes, I'm talking about the extension.

Mark Partridge: Okay. Thank you.

Jon Nevett: The one you, yes exactly. So I want to say that was offered as a compromise and it had some folks aren't sure if that is the right compromise or not so but that's one way to (unintelligible).

David Maher: Okay. Alan.

Alan Greenberg: Yes, two things. Number one, that was - I'm the one that put that in and that was not offered as a compromise. That was put in to cover the case where the domain is expiring just around about the time that the URS is take - is being handled.

Jon Nevett: Absolutely, Alan. Alan, actually I put that in the strawman when we first put it in.

Alan Greenberg: Okay. Then I take back the attribution of but I know I certainly mentioned it and it has been mentioned a number of times to cover the

case just like there is a provision in the UDRP for the complainant to extend a life to make sure it doesn't expire.

And weird things happen to it while the process is going on. It does also serve to extend the life which is, you know, addresses partially addresses the transfer issue. My main point was from our point of view we can live with it either way as long as it's reasonably implementable.

And if there is a transfer it's not done so soon that the registrant loses the ability to come in with a late response. Other than that it's not really a major issue to us.

David Maher: Okay. Mark.

Mark Partridge: I agree with Alan's point of view on this but I think it is an important issue that we should support. It's not the position of the IRT, that's correctly said but from a dispute resolution and efficiency point of view most of the cases that go through the UDRP are, I'm sorry, the URS are also going to be clear violations of the UDRP.

And it's, you know, it's inefficient and to the system as a whole to then require additional time and expense. I think Alan's suggestion to transfer after a reasonable period for appeal if none is taken after 60 days, 90 days or whatever.

Man: Or expiration.

Mark Partridge: Yes, that would make sense. That then it could be transferred, that would be a more efficient cost dispute resolution system and a good approach for this to take in my personal view.

David Maher: Okay. Zahid.

Zahid Jamil: Sorry, yes. I think that for us the extension has two purposes. One that Alan mentioned because it needs to be standard for, you know, in case it's going to be expire anyway. So it needs to be there but it's a bare minimum. What we're discussing is whether there should be a full transfer.

So our position is at a bare minimum, which we understand I think it has to be there. But what we're requesting is a transfer provision option. So looking at the statistics that were mentioned earlier by Paul some of them want a transcript, some of them don't. Given the option that's what we're suggesting.

David Maher: Okay. Jeff Eckhaus.

Jeff Eckhaus: Okay. First off I just - I'm trying to figure out I guess from Mark's statement where he's, you know, where you're saying most of the URS cases are going to be clear violations and certain things are going to happen. We don't have any of this, we don't know and I think you can't make the assumption because certain UDRP cases are a certain way that URS cases are going to be a certain way because they're completely different.

As we see, well, what the idea is that there would be a completely different ways of fighting the trademark infringement. So we can't make an assumption that every URS case is going to be clear infringement so they're going to win the UDRP.

So let's just assume they're going to win, they're going to get the transfer anyway so let's just hand it to them in the first place. So caution against making statements about what the URS is going to be and what the claims are going to be like.

And the other part here is I think I'm still trying to understand from the people who are really pro the transfer here. If we have the UDRP in place why is it so critical that the transfer happens in the URS or are you just - is this just saying hey we want to get the domain, here's a quick way of doing it.

So we don't have to go through the policies that's currently in place that to me is like hey, let's have a shortcut to get the domain transferred to us instead of going through the UDRP we could just do this a lot quicker in the URS and get the domain to us.

If we have the UDRP why do - and the transfer option why is it so critical that we have the URS? Where if somebody wants the name in the transfer they can file the UDRP after, you know, the name suspended and the trademark infringement has been taken down?

David Maher: Well, the quick answer to that is the UDRP is far more expensive but, Paul go ahead.

Paul McGrady: Can I propose a compromise and suggest that we have a transfer option only after the domain name in dispute goes past it's expiration date? So that it's not re-released to the wild for re-registration. At that point the brand owner say that they would like to take transfer of the domain name?

Jeff Eckhaus: Paul, it's Jeff. Can you repeat that one more time? I'm sorry, I just - I missed part of that. Could you please repeat that?

Paul McGrady: Sure. If the transfer option that only kicks in if that domain name goes past it's expiration date. In other words, if the losing respondent in a URS proceeding fails to renew it. That way the domain name remains in active through its lifespan.

And then at the end of its lifespan instead of being released for re-registration by any third party the brand owner can exercise its option to transfer at that time.

David Maher: Okay. Mark.

Mark Partridge: I think Paul has a useful suggestion there. We do have a problem that's been identified as the revolving door problem. And it would be good for us to find a solution to that, and not just ignore it. The other point I wanted to make I guess you've made David, is my particular concern Jeff, about having the added transfers is not to prejudge how these cases are going to come out.

But that, you know, if in the event that there are cases that are clear cut and are going to be violations of both it's more efficient and cost effective to have the option of the transfer remedy at some point in the process without having the added burden of expense the data described. That's my point.

David Maher: Okay. Konstantinos.

Konstantinos Komaitis: Yes, I feel uncomfortable with the transfer for the simple reason that we're not asking the panel to deliberate on whether the domain name should be transferred or not. In three days we're asking the panel to deliberate on whether the domain name should be suspended or not.

Under the UDRP this is a very - the transfer is based on a very substantive review of what is happening. Needless to say that we are assuming that once the domain name goes into the pool and is re-registered we are working under the presumption that the new registrant is going to be (unintelligible), which we don't know.

And it's not necessarily the case. So I think that we have the UDRP which yes in comparison to the URS might be more expensive but it's still relatively cheap. So if a trademark corner really wants to get transfer of the domain name he or she should have the opportunity to go back to the UDRP and claim the transfer. Thank you.

David Maher: Okay. Zahid.

Zahid Jamil: Hi. Sorry. We're trying to propose something. In case of a situation where a respondent does not answer and there's a default what could happen is that the new if you want the domain name you have to file the UDRP. And then that respondent would probably file an answer in the UDRP.

I see that that as a slight problem because then if you're looking at some re-judgment proceedings you don't give a respondent a second chance to file an answer usually. It's sort of, you know, they either filed an answer or they didn't. It's default and you move on and then once

you do the trial if there is any or isn't you actually have a judgment at the end of it.

So here let me propose this. What if we were to add the further safeguard in what Paul has suggested which is that in case there is no default and there has been an answer the transfer option would not exist. But in cases where there was a default of finding an answer then the option of transfer would exist.

Man: Could you repeat that?

Zahid Jamil: So in cases where the respondent doesn't file an answer at all ever and there is default and he's not interested. It doesn't make sense that we file another UDRP and give him another chance to file an answer. So I would like to make a distinction between cases where there has been default in filing an answer in the URS.

And if there's been a default the transfer option should exist. And if there hasn't been a default, fine, then the trademark holder has to go to second round and do the UDRP.

David Maher: I see it from a legal standpoint. I see some problems with that. The two procedures, URS and UDRP are different. It's not as if there's a single cause of action in a court. I have to say I'm not persuaded by that argument but (Robyn), you have your hand up.

(Robyn): Yes, thanks. I have a problem with it as well. First of all, these evaluators are going to be evaluating based on one person's use. So now if you're saying we're going to transfer that domain name such

that nobody else can have it based upon one bad actor's misuse doesn't seem fair at all.

Because the next person's rights are not being considered here. The next person's intended use are not being considered here and that's what's been taken away. The next person's right and ability to be able to register that domain name.

If you give an automatic transfer based upon one guy's misuse so I feel like we're not thinking about this properly because the evaluation is always going to be based upon this particular use. And so you can't decide all the other uses are going to be bad based upon this one use based on that. That's all.

David Maher: Okay. Kathy.

Kathy Kleiman: (Robyn) has made the point that I was thinking of as well that we're envisioning here the discussion is about the good faith complainants. But what about the bad-faith complainant.? Does the URS become a quick and easy way to game the system to get ordinary dictionary words based on the trademark for a generic term that may be generic in some uses and may be trademarks in other uses.

And this becomes a quick way to get it. And that's not what the URS was intended for. In fact if I remember correctly, and correct me if I'm wrong, I thought that the IRT even envisioned the ability of a registrant to correct the Website. To take down something that was infringing.

Jeff Eckhaus had use the example of somebody putting up a Rolex model believing that because they were selling Rolexes they could use

that logo and the related domain name. We don't have any opportunity for correction here. These domain names get suspended for the remainder of there period which could be, you know, ten years. So...

David Maher: Okay.

Kathy Kleiman: Again I think what about the bad-faith complaint? The other thing I wanted to restate was that I don't think we're at an end here. This is really a beginning. We're creating, we're rapidly creating a new process and as we envision it there will be review.

There's unfortunately not going to be sunset but there's going to be review, there's going to be evaluation and hopefully there's going to be a PDP with integration of the URS and the UDRP. And that would seem to me the right time to integrate the full range of remedies.

David Maher: Okay. I think we're rapidly approaching a point where it's clear there is lack of consensus and whatever happens we're going to see separate opinions, separate positions filed. We have to well, now it's Alan's hand up. Can we, Alan, do you have something further to say?

Alan Greenberg: Yes, I do. Sorry, two quick comments. Number one, (Robyn)'s statement saying that we shouldn't take a domain name away one use doesn't really hold water because that's exactly what the UDRP does. So I think there is a precedent for that should we choose to do it.

The second is I'll suggest another alternative. What about a transfer provision let's say at the end of the domain life if this is the second successful URS with that domain name. Does that address some of the problems that people have?

Jeff Eckhaus: It's Jeff Eckhaus here. Let me just jump in here and say that technically that becomes a nightmare scenario. To have to - you have to build a huge amount of functionality into the domain and say oh, it's got, you know, like one URS against it. It's got a second, then this would happen.

That would be an enormous amount of work for that.

Alan Greenberg: I don't agree. I think both the combination of the URS provider and the trademark holder can easily provide that evidence.

Jeff Eckhaus: Oh, they could provide the evidence but what happens is from a technical standpoint having to build that functionality in and to know what would happen say if this is the second URS then it would be transferred. You would have to be up to the URS provider to effect that transfer to make sure it happens.

It would be, I don't know if you'd be able to do that save for the costs that we decided that if we would be able to do that.

David Maher: Okay Zahid.

Zahid Jamil: I would agree with Alan. I don't understand a technical issue there because the point is that as long as there is an arbitration award effecting that's what it is. If a URS provider issues an order saying well this is a second repeat offense and so the remedy is hereby allowed.

That is exactly what is done in a UDRP where a (unintelligible) provider or panelist issues that sort of decision. So I don't see the technicality issue just complying with the order.

Jeff Eckhaus: So, let me clear that up. It would be I guess I'll just to clarify that. It would be a huge amount of manual work to do it and I'd say you could do it manually and you couldn't build it in technically but then the point is it would become a huge amount of manual labor.

And then would the URS providers and the others still be able to do this at the low cost that they wanted. You know, that it want to be done and then they're saying, and then the thought is hey if we have to do all this manual labor for transfers we're going to have to raise our prices.

And then somehow it becomes the same prices as the UDRP so that's what I was saying on the technical part that it would be a huge amount of work to build technical if you wanted to take away the manual part of it.

Zahid Jamil: Yes.

David Maher: OH.

Zahid Jamil: This is Zahid, can I respond to that?

David Maher: Okay. Go ahead.

Zahid Jamil: Yes, I mean that's fine if there were a lot of UDRPs because there are going to be a lot more UDRPs and a lot more decisions you're still

faced with the same atmosphere of manual problem. So I'm having difficulty seeing the distinction.

David Maher: Jon, you have a comment I believe.

Jon Nevett: I agree with Jeff. I think there is a real issue about the amount of work that would need to be done to accomplish that, you know, from my personal knowledge of registry registrar operations. Mark, you have your hand up.

Mark Partridge: Well, my thought was Jeff mentioned that there would be additional costs. I think the costs would be at the election of the brand owner who chooses to take that remedy and that could be - there could be a surcharge for that. And I would think the surcharge would be cheaper than having to go through the UDRP process so overall it would be a cost effective way to deal with this.

David Maher: Okay. We - I don't see any other hands raised. I think I'll go back to my statement that we need separate statements. I don't think we're anywhere close to a consensus on this. Mark.

Mark Partridge: Yes, I think I'm looking at the language that's on the screen where it says, "There's a consensus on the remedy and consensus on strawman proposal except for extension." What I was hearing is that we do have a consensus on the extension unless I've missed something.

David Maher: Kathy.

Kathy Kleiman: I was thinking exactly the same thing as I read through the notes as well. We have no objection to the extension and understand the reason for it that there may be other options. In case - as I understood the rationale for the extension in case it's close to the expiration period of the domain name the complainant might want to extend so that they have other options including court and UDRP.

David Maher: Okay. Thank you. Okay. Then let's, let Jon.

Jon Nevett: Yes, I just got a note from Jeff Neuman who I don't think is on the call. And registrar concerns I don't think we have consensus at this point on the extension but I would want to call that consensus position at this point. And it was offered as a compromise to transfer (unintelligible) that's being advocated for a year and the IRT proposal was where no transfer, no extension.

David Maher: Okay. Thank you. Okay. Moving along then the next box is the effective filing answer after default, and is there further comment on that. Okay. Then we come to the Appeal of Decision and I think the issue well, looking at this I'm unsure whether there is still an issue. Do we have any comments on this, Kathy.

Kathy Kleiman: The only issue that we still have was picking - we had agreed to take the question of fees back to our group and we agree as you would all expect the appellant to pay for the appeal.

David Maher: Is there any objection to that? No, can we declare I take it that we can declare consensus?

Woman:: You've got hands raised I think.

David Maher: Pardon?

Woman: You've got some hands raised.

David Maher: Jon, I think those were left over.

Woman: Okay. Okay. Thanks.

David Maher: Okay. Well then we can move along to the Evaluation of Appeal and I think we have consensus there. Kathy.

Kathy Kleiman: Except that I think it was a recommendation that both options be available so let me recommend some wording if I might. "That the URS provider shall have a standing three-person, instead of panel," because it's confusing with the UDRP. It's called the appeal board. So starting over, "The U.S. provider shall have a standing three person appeal board or three panelists, one appointed" and then no change to the rest of the language.

With one appointed by each of the parties, so the URS provider shall have a standing three person panel. I'm sorry, I guess the wording is "And also offer the option of a party selected appeal board with one person appointed by each of the parties as follows."

David Maher: Okay. Mark.

Mark Partridge: I'm just - I'm wondering Kathy do we really need to see that they have to have the three panel appeal board? I thought what we were saying is you have to do one of either of these but you don't have to do both.

Kathy Kleiman: I thought we At talked about this at length last time. It's very important to us from a registrant perspective going out and finding panelists is very, very difficult. I get contacted about this all the time. It's difficult, it's time consuming and so having the standing three person panel is much more consistent with the rapid process that we tried to do under URS.

Man: Kathy, who would you think, who would you be the choice of either or?

Kathy Kleiman: The appellant.

Man: Okay. I guess.

David Maher: Okay, Konstantinos.

Konstantinos Komaitis: Yes, just to add on what Kathy was saying about the standing three person panel. This is an experience it normally does well. They have an internal appeals process and the panel is always obtained. So I would like to offer that (unintelligible) to the group.

David Maher: (Tammy).

(Tammy): Yes, just a clarification. I'm wondering if it's just three people and those three people never change or would it, could it possibly be a larger group of people that then rotate say maybe 20 or something like that. I'm just trying to give some flexibility when we talk to the providers about having these panels. If anybody has any thoughts on that?

((Crosstalk))

David Maher: That seems like a good factual suggestion. Kathy.

Kathy Kleiman: The original idea had been to have kind of a balanced panel of different perspectives. I don't know if there's still consensus on that but a person with extensive trademark law experience, a person with extensive trademark law experience coming in from the Fair Use Perspective may be mostly registrant experience.

And then it had been posed as an academic or even a very senior technical person as a third person. So kind of not any three people but expertise in I think you definitely have to take into account language. So I like that idea of perhaps having a larger pool but something that could be put together very, very quickly and very, very balanced.

David Maher: Okay. I think there was some consensus that that was enormously complex, but - Mark.

Mark Partridge: I'd say, you know, having more - having a pool of people who are a standing panel that seems okay. If there's the option to do the collecting of the party sort of the AAA, America Arbitration Association method. If the appellant has the option of one of the other, that to me seems reasonable.

But I agree with you David that trying to have - trying to identify and put people into certain categories of qualifications I think is not something that we have a consensus on; I don't support it.

David Maher: All right. (Elton).

(Elton): Yes, I was just going to say that the - a single three-person panel is not likely to be practical. It's not going to be a full time job and therefore one has to worry about availability at any given instance. So working from some larger pool and, you know, we need some words to describe that is probably a much better concept.

David Maher: Zahid.

Zahid Jamil: Thank you, David. I was just thinking a regular - as Mark mentioned the regular arbitration mechanism where the parties get to choose. There's a pool of people and they can look up their CVs and look up their expertise and that expertise is available so they can read it.

And so if it say a registrant or a free speech activist they know that a certain person has a certain qualification, et cetera may be (unintelligible) they can pick them. And that's probably what a lot of people do in commercial arbitration.

So rather than the district resolution provider categorizing them or saying that we will appoint the people - you know, one as a technical, one as a, you know, trademark attorney and one as a free speech attorney, et cetera. Let it be up to the party to do so. And, you know, there can be one sort of forcing that (unintelligible) an umpire et cetera.

David Maher: Okay. Kathy, do you have your hand up?

Kathy Kleiman: No, I'm sorry let me take that down.

David Maher: Okay.

Kathy Kleiman: Appreciate the discussion and like the option of either or as both being available to the appellant when you put it that way. And the appellant having the choice of the (nominate) model or the American Arbitration Association model.

David Maher: Okay. Then we can move along to the Abuse of Process. Any further comments on that, Alan?

Alan Greenberg: We've talked a lot about the abuse by the claimant's, by the mark holder. We haven't talked very much about whether we need something on abuse on registrant side. And although the registrant is not the one who could be prohibited from filing a URS because they're aren't the ones who do it. We can play with fees and things like that to address it.

For instance, we've said that they should be no additional fees for a late registration, for a late reply. On the other hand if someone is continually being cited in URS's and they always strategically have a late reply because they get more, you know, paperclip time that way one could alter the fees.

And I'm just raising the issue do we need to consider or at least note here that perhaps there needs to be some consideration of abusive registrants in addition to the abuse of claimants. It's a bit late to come up with a solution but should we not?

David Maher: I think it's very late. I think that's the subject of a separate statement if you wish. Konstantinos.

Konstantinos Komaitis: Yes, I would just - I really do not understand what Alan means because the registrant cannot really abuse the system. The registrant cannot initiate a complaint. In any case, so if there is an abusive registration the URS will deal with it and the registrant will lose the domain name because it will be suspended.

I mean, I think that is enough. I don't understand how a registrant can abuse the URS considering the fact that he cannot even initiate a complaint.

David Maher: That makes good sense to me. I thank you. I think we can move along to the review of be URS and UDRP. I don't think we have a full consensus on this would anyone like to?

Woman: Dave, I have a question for you. I have a question for you. I'm sorry to go back to abuse of process issue. We were trying to make sure we understood it. Could you repeat what this?

David Maher: I believe we - the consensus is the statement as it's (unintelligible) out there on the left hand...

Woman: Okay. So no change to the strawman language?

David Maher: That's right.

Kathy Kleiman: Okay.

Woman: Thanks.

David Maher: Zahid, you had your hand up.

Zahid Jamil: Yes, thank you. Sorry, just referring to the point that you just went forward. I was taking my time to go through the (nominate) thing that Konstantinos is well aware of and we discussed this on our call earlier. There is a provision for a mutual registration of the complainant approves the respondent has been found to have made an abusive registration on three or more DRS cases.

So there is a three strikes you're out provision in the (nominate) one which the MCS actually sort of seems to be, you know, okay with. And that may be something we can emulate in this. I'd just like to put it out there.

David Maher: Okay. Konstantinos.

Konstantinos Komaitis: I'd think yes, there is a provision like that but I think it is a separate issue. I think this provision refers to (unintelligible) which in any case it is tackled within the URS. So if you have a registrant that is registering abusive domain names over and over and over again like the famous (Top Hand) registrant then yes.

I mean, we are talking about (unintelligible) and I think we have incorporated and correct me if I'm wrong.

Zahid Jamil: And so could we put that into the, you know, the evidence of abuse and create a presumption against the respondent then?

David Maher: I'm not sure I understand that.

Zahid Jamil: Create a provision basically just copy paste (unintelligible) to some extent saying that if the complainant is sure that this is a repeat offender then the presumption of the abusive registration will be held against him. And so the burden actually is on the respondent to show that he was not abusive. This is what the (nominate) (unintelligible) says.

David Maher: Any comment on that? (Unintelligible)

Woman: Yes, I mean, this seems a little late in the game to be adding these kinds of provisions. I mean that seems a little a bit extreme of a remedy from my standpoint.

David Maher: Yes, I think that is really a whole new subject. I don't think we should let that upset the incentives that we already have and I suggest that that a separate subject or separate comment. Well, seeing no hands raised I think we come finally to the review process.

We have the strawman mandatory review. No sunset requirements to publish statistics, are there any comments on this? Cathy.

Kathy Kleiman: Would it be appropriate to all to add some kind of hopeful language that in the future the URS and the UDRP will be reviewed together and perhaps integrated into a single policy?

David Maher: Any comment on that? Mark. Mark, go ahead.

Mark Partridge: I'm sorry, I was on mute. I'm reluctant to have that put on the table now. We've...

Kathy Kleiman: Okay.

Mark Partridge: We've had further talk earlier about how it really tying this to the UDRP review is outside the scope of this process and, you know, would more appropriately be raised separately and I think that's where we ought to remain.

David Maher: Yes. I have some concerns speaking personally that trying to mix the URS and the UDRP and at this point is very premature. We know that the UDRP itself is trying to initiate a new procedure. We are not sure what that's going to look like. Alan, go ahead.

Alan Greenberg: Yes, I mean, short of the board making the decision to initiate a PDP on the UDRP there really is no process other than the GSO deciding and the threshold for the stakeholder group to initiate that kind of thing is pretty low. I really don't think it's within our mandate to make this recommendation here.

Woman: Okay.

Woman: Okay.

David Maher: Okay. Kathy is agreeable with that.

Kathy Kleiman: That's fine, thank you for the discussion.

David Maher: No, thank you. I don't see any other hands raised and Kathy.

Kathy Kleiman: There is one more issue. Is it timely (unintelligible) issue number one?

David Maher: Mandatory, you're right. Pardon me.

Kathy Kleiman: Okay.

David Maher: Okay. Going back to the mandatory issue. Kathy do you want to speak your peace?

Kathy Kleiman: I do, I do. I wanted to thank everyone across all of these weeks and all of these discussions for the extensive consideration of our concerns, of NCSG's concerns. We really believe that a considerable amount of fairness and balance and due process have now been built into this rapid response system into this CRS and we will vote for mandatory.

David Maher: Well, thank you. Any other comments? I see no hands raised. I see the chat room has says hurray and the DC thanks you.

Kathy Kleiman: Thank you.

David Maher: And the Chair thanks you. We - I think we can declare victory. First does anyone else have any other issues to raise or questions, comments?

Man: Is there any merit in talking about of course clearinghouse issues now or do we just want to go home for the weekend?

Man: I believe Margie to - and leave Margie to her writing.

David Maher: Yes I think we've closed the book temporarily on the clearinghouse. Okay. Thank you all.

Kathy Kleiman: Wait, hold on.

David Maher: And we'll - oh, go ahead.

((Crosstalk))

Woman: Yes, before we close. And so I'm drafting - I'm going to send it out in sections since I started on the clearinghouse first when I finished that I will send it to you guys. One question I do have though is and I know we asked this yesterday.

But do we not want to schedule any calls for next week or do you just assume that we'll do everything online and if we need a call we'll set up a doodle next week?

David Maher: Well, my preference was for doing this by e-mail unless it appears that there is something to be accomplished by further calls. I think we should leave that to next week. I rather see your draft report before making a decision on that.

Woman: Okay.

David Maher: Okay. Well in that case again thank you.

Man: Thank you David.

Man: Thank you very much, David. Thank you all.

((Crosstalk))

Woman: Thanks David.

Man: Thanks for everything David. Have a nice day.

David Maher: Goodbye.

Man: Bye-bye.

END