
ICANN Transcription
GNSO New gTLD Subsequent Procedures Working Group
Thursday, 21 November 2019 at 20:00 UTC

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JULIE BISLAND: Good evening. Welcome to [inaudible], the 21st of November, 2019. [inaudible]. There will be no roll call. Attendance will be taken via the Zoom room. If you're only the audio bridge, would you please let yourself be known now?

I believe Juan Manual Rojas is only on audio. I want to remind everyone to please [inaudible] and please keep phones and microphones on mute when not speaking to avoid background noise.

With this, I will turn it over to Jeff Neuman. You can begin, Jeff.

JEFF NEUMAN: Thanks, Julie. Can I ask if people can hear me? Because, Julie, you came in and out. So am I okay?

CHRISTOPHER WILKINSON: I can hear Jeff actually better than I could hear Julie just a minute ago.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

UNIDENTIFIED MALE: You're fine for me, too.

JEFF NEUMAN: Okay, thanks. Cool. Thanks, everyone. The agenda is up on the screen right now. I think we'll probably just get to 2 and 3. I don't think we'll get to 4 today. What we have to talk about today is we're going to finish up the contractual compliance section and then go straight to talk about CCT Review Team recommendations – where we are in those and what did we still have to address – and then, if we have time, we can get to the string contention mechanism of last resort that we started at the ICANN meeting or that we were supposed to talk about at the ICANN meeting.

With that, let me just ask if there's any updates to any statement of interest or anything that anyone wants to cover under Any Other Business. Let me know now.

Okay, not seeing anyone. Let's go back to where we left off, which was talking about the last issue of contractual compliance. As we're doing that, I'll just note from Paul McGrady in the chat that he's no longer on the GNSO Council, that he termed out. So congratulations, Paul, I think. Thank you for letting us know.

If you look up on the screen now, this is where we left off the last time. I didn't want to give it short change on the last call because I do think this is an important topic and it does also relate in a way to one of the CCT Review Team recommendations but it's not identical. It's tangentially related.

As part of the CCT Review Team report, there was an INTA (International Trademark Association) study that was done on experiencing with the rights protection mechanisms in the 2012 round. As part of that, there was feedback that was sent to this group, as well as the RPM group, that they believe that there was arbitrary and abusive pricing for premium domains that targeted trademark owners and that there was the use of abuse names to circumvent sunrise and operating launch programs that differed materially from what was approved by ICANN.

Because there was that study – I’m trying to remember what work track initially discussed this issue – basically we put it in an initial report as a request for feedback. We started talking about it in that work track and we’re really searching for evidence of this abuse, other than the INTA survey. So we put the links to the survey in the initial report and asked for comment on that.

The other thing we did, by the way – this goes back a little ways – is we had corresponded with the RPM PDP and jointly decided that this particular issue was more in the jurisdiction of [our] PDP as opposed to the RPM PDP. In fact, I think this one was actually referred from them over to us.

So what comments did we get back? INTA states there their survey pointed to examples. There’s also examples in the full comment that INTA submitted. Then they say reports that INTA has been raising concerns about pricing and other practices, which appear to be calculated to circumvent RPMs and for which little or no action appears to be taken by ICANN Compliance ... Sorry, there’s some beeping in my background, so if you hear me

cut out, someone is trying to cut in on my phone. Sorry about that. So that was INTA's comment.

IPC agrees with the fact that there's evidence and says that numerous trademark owners with unique and non-generically used names have been affected by this. The names of such trademarks can not be given as examples without permission of the affected parties. By using a non-English trademark, as an example, one Japanese trademark holder holds a unique name that is not used in any generic standard, first/last name, or any fashion fathomable outside it's associated use with the brand. Numerous time this trademark holder has attempted to register a name in the new gTLDs only to find its name reserved or assigned premium pricing with the registry. The trademark owner is a [advent] protector of its trademark rights and therefore known to register domain names and believes that this is attributed to the nature of, basically, that this is a common registries to have done and to assign premium pricing to those particular trademark names.

[Lamaritt] agrees with the fact that this happened and then says, "Clients with TMCH records in the first round that their string was part of a reserve names list and excluded from sunrise. The terms were not generic nor extremely short and support regulations for domain names and matching a mark recorded in the TMCH as part of a premium list suggest prohibiting non-generic terms which have a TMCH record from being on a reserve names list suggests releasing under auction generic terms which have a record in the TMCH recommends a limit of the allowed number of reserve names."

Neustar says that they're not aware of any evidence. The Registry Stakeholder Group also says that they're not aware of any evidence and believes that this is unsupported. It also believes that, if these activities are occurring, there's existing mechanisms that are sufficient to address them.

So those are the comments we get. Again, this is in the contract compliance section that we got these comments. There's nothing in the contracts, either in the registry agreement or the terms that were used for the sunrise process – that's made up of the stuff that was in the guidebook as well that, separately, ICANN had published rules about the sunrise process that was, I believe, finalized actually well after the guidebook and even after applications were submitted.

So throw that open to the group. Should we do something up this. I know that there's some groups out there that say that there's no evidence. There's some groups that say that there's evidence and they do point to a couple examples. What are your thoughts?

I see Christopher Wilkinson and Alan Greenberg. Christopher, please?

CHRISTOPHER WILKINSON:

Good evening, good morning, good night. Good night? Thank you, Jeff. I'm just recalling things that I think I've already put onto the PDP mailing list in recent months and years. I'm opposed to premium pricing, per se. I see from time to time people advocating innovation at the level of gTLDs. Well, to be frank, premium pricing is not the kind of innovation that we

want. Actually, I know that there are economic rents for certain names, but I seriously think that it is the registrant who should benefit from the rent of a good name. I see no justification whatsoever for the registry trying to scrape part of that rent through premium pricing.

I think the starting point is a ban on premium pricing. For the rest, it becomes interesting to see how to protect particular rights holders through sunrise or other mechanisms. But premium pricing? No. So I have no sympathy whatsoever for this option. Thank you.

JEFF NEUMAN:

Thanks, Christopher. So that relates to all premium pricing. Then let me go to Alan for your comments.

ALAN GREENBERG:

Sorry. I'm never going to quite be used to having to unmute myself on Zoom and on my phone. I'll start off by saying I have no particular interest in it and not a lot of experience in this, so I'm just reacting to what I'm reading in the comments. I can see that, for some TLDs, the concept of premium pricing may well have merit. But what I'm reading here are very contradicting views. They're contradicting in ways that facts should be able to distinguish which is correct or not.

I can't contest that the registries have seen no evidence, but the earlier comments say there is specific evidence. I think we need to go back to the people who made those comments and get the specific cases.

Now, maybe they are isolated cases. Maybe they're not. But I think we really need to understand, is there an issue we need to address policy here? Or is there not an issue? I don't think we can control pricing in a global sense, but I think we do have an obligation to make there's a certain amount of fairness associated with the overall system.

So I really think we need to understand. Is there a problem? It may be anecdotal, but get examples and then try to gauge whether we need policy for it or not because, just based on the comments here, we clearly have people who are disagreeing with each other, and I don't think, with what's been presented in the discussion today – as I say, I'm not an expert, with no history in this – we've been presented with something that we can have a rational discussion about. Thank you.

JEFF NEUMAN:

Thanks, Alan. I can't remember if this group was ever – obviously we were forward a copy a long time ago of the INTA survey. Steve, Julie, Emily, do we have a copy of that? I remember seeing it in the RPM group, but I was just observing there. Do we have a copy of that? I think it was linked to in the initial report.

So I'm just waiting for a response. While they're responding, they're looking for what Paul McGrady says in the chat. "What's the harm if we protect against it? What's the harm of doing that, especially if there is nothing going on anyway?"

I can tell you that I do remember at the time that there certainly were a couple of examples where, as a corporate registrar – I'm

putting my corporate registrar hat on – we did come across some cases where the marks that they wanted to apply for during sunrise were on a premium list and therefore either were not available during sunrise or they were available but at a much higher price. I understand the problem that the INTA is referring to simply because I know that we couldn't get permission from our clients to publish who they were.

But let me go to Greg and then to Christopher Wilkinson. So, Greg, please, and then Christopher.

GREG SHATAN:

Thanks. First, I think, if we're going to go back and ask people things, we might also want to ask Neustar and any of the other registries what evidence they would expect to have found that would support this assertion because the fact that they don't see any evidence doesn't mean that there isn't any evidence there. It just means they're not seeing it. So we need to at least take into account that, if we have some parties who say they are seeing evidence and that are people are not seeing evidence, the first party is not hallucinating and the second party is being honest but may not be in a position to actually see any significant amount of evidence.

I can recall, certainly in .[sux] and .top, going through and finding trademarks that were exorbitantly priced. While I don't necessarily agree with Christopher Wilkinson's blanket prohibition, I would say that, where the registrant or potential registrant has created the value in the string, it's particularly irksome to be charged a premium for the value that you yourself have created. If Facebook

meant nothing to anybody, how much would it cost? The fact that Facebook is a premium name is due to what Facebook did to make it premium and should not then be gouged for that.

So I think, if we want evidence, too, and we don't want to get into the issue of client confidentiality, we should just ask for all of the premium name lists to be given to the working group so that we can inspect them and come to our own conclusions. Thanks.

JEFF NEUMAN: Thanks, Greg. Let me go to Christopher.

CHRISTOPHER WILKINSON: Hi. Look, Greg, in this context I would characterize myself as a strict trademark man – i.e., trademark law and policy are not extras. In this context, you're completely right. The innovation that creates the value of a trademark accrues to the registrant. It has nothing to do with the registry. That is wrong. The whole point of sunrise is – we did a big one for .eu. Well, actually, [Mark] [inaudible], whose colleagues did it after I'd written the general principles down. But this purpose of sunrise is to grant the innovator who has the rights – or for that matter, in my opinion, the people who live in the geography that have the rights – the opportunity to reserve the name, obtain the name, and protect themselves against future speculation. So this business of premium prices for trademarks is quite shocking. If you're going to do that, then you don't need sunrise. Just rip everybody off. Thank you.

JEFF NEUMAN:

Okay. Greg, your hand is up but I'm not sure if that's left over or new.

Okay. Let me go to the chat while people are thinking. Elaine states that, "The TMCH has every single ASCII letter and number. Trademark owners gamed the TMCH, and the argument over what's a brand and what's generic isn't for registries to decide."

Paul responds to Donna's e-mail about the benefit, stating, "Much more legitimacy for ICANN's New gTLD Program. It suffers from the perception that it was based primarily on the hope that brand owners would show up and financially support it. The premium domain names that correspond to brands were not available in sunrise. They just appear predatory."

Right. So just something – sorry, I should finish reading Paul's. "The ICANN Board's unwillingness to do anything about it just made them look complicit. ICANN needs all the legitimacy it can borrow right now."

One of the arguments from the trademark owners that I've heard and I've seen with INTA report – it's what Paul is saying in his note – is that it is true that a number of registries put a bunch of names on the premium list or on a reserved list and therefore, when a trademark owner went to try to get it in sunrise, they were unavailable. Then, when they tried to get that during the general availability, those domains were often considered premium. So that's certainly what's in the INTA study, although admittedly the INTA does not reveal the actual brands that submitted these in order to ensure that they had a survey that their members would

actually do because their members did not want to be outed for complaining. So we have to deal with that.

Then there is a recommendation – we’ll get back to this, to another aspect of this, when we start talking it a little bit of the ccTLD team findings and what their recommendations are because one of them does have to deal with pricing and with trademark owners and using their rights protection mechanisms.

In trying to come up with something in the middle, is there something we could say that might satisfy both the trademark owners and the registries’ concerns that, if something is what some people call a dictionary word and it wants to be used in a dictionary sense, that may legitimately be a premium name if, of course, we accept the notion of premium names.

I’m trying to see if there’s something we could do that would thread that line. Creating a generic-brand-type test I think is difficult, but is it worth it? Some have suggested, for example, do we just allow having a sunrise without allowing the registry to reserve any names so you automatically do a sunrise? The other proposal I know that trademark owners have made is that, if there are any reserve names that, once they’re released, you need to do sunrise before you can release them to another owner.

On the other hand, as people are thinking about that, I’ve also been on the other side, where I was involved with a geographic TLD where they wanted to reserve police.geographicTld and there was a trademark for “police” in there for the band. In that case, the registry did not want the trademark owner to have that because of the utility of having the actual police department having it. But I do

know that ICANN also released an amended set of rules that were specific to geo-TLDs that helped with that.

Donna says, “This is a business decision by the brands to register their name in a TLD. Weren’t there other mechanisms in place, such as URS, to allow trademark owners a quick way to address a legitimate registration?”

To that, Donna, I would say there is no mechanism to challenge premium pricing of the registry. So, if you have a registry that’s refusing to sell it except for a premium price, then the only way to get that is to pay the premium price. If someone else pays [for] the premium rights and they don’t have rights to it, then obviously you could do a URS afterwards.

Anticipating what the next argument is, before I get to Alan, if it’s a premium price, then chances are no one is going to pay for it. But I will tell you what that .feedback did, which is one of the reasons for the complaint that was filed against the, which I had no part of, just to be clear and on the record. The complaint filed against .feedback was that they were charging trademark owners more but, if you weren’t a trademark owner, you could play less for the name. So that was an issue.

Alan, please?

ALAN GREENBERG:

Thank you. I was just going to comment that we certainly can’t outlaw reserved names. There’s lots of valid reasons for them and you gave some of them. Having a reserve name and a premium price associated with it I think has – I’ll say it bluntly – a smell to it

I don't like. So I don't think we can regulate pricing in general. At least I don't believe we can. I'm not quite sure how to handle this, but there sounds like there are issues that somehow we have to come to grips with. Thank you.

JEFF NEUMAN:

Thanks, Alan. Some have raised the point – I take your point that we should not be regulating pricing, per se. I think the comment that's made here – I think it was made here – was that many trademark owners felt that the pricing that registries assigned to names were designed to circumvent the rights protection mechanisms. So, while we shouldn't be in the game of setting pricing, because that's not our goal and that's not our business, perhaps pricing that was designed to circumvent a rights protection mechanism could be something. I see that there's [mention] Greg says about the PDDRP. Perhaps that could be a factor in a PDDRP against the registry if there's a pricing scheme that's either designed or has the effect or impact of circumventing the rights protection mechanisms. We could discuss adding maybe some sort of cause of action. I think that's what's Greg is suggestion.

Let me go to Greg, who's in the queue.

GREG SHATAN:

Thanks. Without wanting to open a can of worms, I don't think this is the type of pricing that we need to stay away from dealing with anti-trust purposes. I spent a happy twelve years of my career doing primarily anti-trust law. While I'm not giving legal advice and

you shouldn't take it from me as legal advice when there are discussions about not dealing with pricing in order to avoid, say, a Sherman Act violation under U.S. anti-trust law for horizontal price-fixing, this is not that. I'm fairly confident in that. Obviously we'd want a more formal opinion on that, but I think it clearly is intended to have secondary activity. But I think, even if you're beyond the issue of circumventing the RPMs, I think, on its own, it's something that we should deal with. Thanks.

JEFF NEUMAN: Thanks, Greg. Let me go to Alan and then Paul.

ALAN GREENBERG: Thank you. I'll make the comment I was going to make and then I'll make the argument against it. If a registry is increasing the price or putting special prices on things that are in the Trademark Clearinghouse, that's almost using the Trademark Clearinghouse as a cheat sheet for who may pay more for a domain and setting the price high.

The problem, of course, is one can register a trademark almost trivially, put it in the Trademark Clearinghouse, and therefore, if we had a rule against putting any premium pricing on anything that's in the Trademark Clearinghouse, you could register any generic word you want as a trademark, put it in the Trademark Clearinghouse, and then make sure the pricing can't be increased on it.

So people are going to be gaming this on both sides of the fence, so I'm having trouble figuring out how we can formulate something

that prohibits it. But clearly you shouldn't be using the Trademark Clearinghouse as a method to understand who's going to be able to pay your more and capitalizing on it.

I note Elaine's comment in the chat that legitimate TLDs don't do that. But I don't think we have a label we can put on TLDs, saying this one is legitimate and the other one isn't. Thank you.

JEFF NEUMAN:

Thanks, Alan. Paul, please?

PAUL MCGRADY:

Thanks. I guess I'd like for us to parse it down a little further because we seem to be talking about two different things in chat, which is premium pricing as that appears during a sunrise, and premium pricing that appears in conjunction with a reserve names that is only made available for registration after sunrise is closed. I think, up until recently, I thought we were only talking about domain names that are reserved that then having premium pricing put on them after the sunrise is closed, which I don't view as a pricing issue. That is, from my point of view, about whether or not the sunrise is being honored. If a term goes through a sunrise and the trademark owner doesn't care enough to get it and then it's put onto some reserve list and offered later at some point when it might have more value, I guess that does me as much as going on a reserve list. The sunrise opens and closes, then it's suddenly off the reserve list and for sale at a big chunk of money.

So I want us to parse it out and least say, "What is it we're talking about?" Are we talking about pricing regulations during a sunrise?

Because that's a completely different issue than saying that the sunrise has to be honored. With regard to the price after a sunrise has come and gone, I don't think we should be in the business of that at all. And I don't view it as a pricing issue. I just view it as implementing the Trademark Clearinghouse in sunrise.

Sorry this was so long, but I'd like to figure out which one of those two we're talking about. Thanks.

ANNE AIKMAN-SCALESE: Jeff, it's Anne. Can I get in the queue, please? I'm only on the phone right now.

JEFF NEUMAN: Okay. Thanks, Anne. I've got Greg, Christopher, and then you. Greg, please?

ANNE AIKMAN-SCALESE: Thanks.

GREG SHATAN: Thanks. Just briefly, I would note to Alan Greenberg that we are, in the RPM Working Group, well-aware of this issue of essentially gaming the trademark office in order to game the Trademark Clearinghouse in order to get essentially specious ability to use the sunrise. It's something we are looking to deal with. We probably should be some communication between the groups on that, at least on this issue. But it is a known issue. There is a TMCH DRP, but it needs to be fine-tuned so it can try to get at

some of these very issues. I think there are enough efforts here that there should be a way to at least sort most of the wheat from the chaff. Thanks.

JEFF NEUMAN: Thanks, Greg. I want to make it clear – then I'll get to Christopher and Anne – that we are not to talk about in this group whether we like what's in the TMCH, what should be in the TMCH, what should not be in the TMCH. That's all for the rights protection mechanisms. What we're really talking about here are whether we believe that there are things registries are doing that either were designed to or to have the effect of circumventing the RPMS and, if so, what can be done about it.

Christopher then Anne.

CHRISTOPHER WILKINSON: I defer to Anne on her telephone.

JEFF NEUMAN: Okay. Thanks, Christopher. Anne, please?

ANNE AIKMAN-SCALESE: Thanks, Jeff, and thank you, Christopher. A clarifying question first, Jeff. It was my understanding that the terms of the registry agreement currently contain a type of prohibition on ICANN regulating pricing. So when we talk about – I could be wrong as to under what circumstances that could be done. Perhaps if everybody agreed on a consensus policy that ICANN can regulate

pricing, that could be changed. But I really doubt that's going to happen. I don't think it's an anti-trust issue, but, as far as a I know, it's not practical to approach this from the standpoint of regulating pricing. You probably know that RA a lot better than I do and the RAA.

Secondly, for that reasons, it sounds to me as though we would potentially need to approach this from the standpoint of dealing with reserve names and/or the PICDRP cause of action, if you will. Thank you.

JEFF NEUMAN:

Thanks, Anne. I think – before we get to Christopher – if we refocus this discussion not on pricing but on efforts that either are designed to or have the effect of circumventing the RPMs, whatever it is ... Pricing is used as an example here, but I suppose there can be other ways to that. In the feedback case, The PDDRP Panel came out and said they believe that there was fraud committed by the registry but, at the time, fraud was not actionable under the registry agreement.

Now, we already do have – we discussed this a few weeks if not months back – a recommendation to include a prohibition on fraud in the registry agreement, so it should take care of that individual problem. But I don't think it takes care of the whole issue in general.

Let me go to Christopher.

CHRISTOPHER WILKINSON:

Hi. Thank you again. Geez, there are some strange thing emerging from this conversation. The first that I've noticed is that, to the best of my knowledge, to defend a trademark, it has to be used. The idea that ICANN will accept in the trademarks protection mechanisms just a registration that's entered to block or undermine a legitimate trademark is extraordinary. A trademark has to be used, and it's inconceivable that we indirectly protect or give opportunities for abuse by trademark registrations which are purely on paper for the benefit of trademark database. No, no, no.

Secondly, the fact that registries can play this game and try and charge premium prices for certain strings does tend to confirm that the registry exercises a degree of monopoly power over the use of the particular string. In the extreme case of .com and .org, it's quite clear that this filters down to a very practical level at the micro level in the domain name system, which is why, from the anti-trust point of view, we should have a policy not necessarily of regulating prices across the board but definitely a policy of preventing abuses in the pricing system. I don't have to hand – it was a problem for [ccTLDs] – all the data that would be necessarily to work this out in practice and in detail. That's what we've got a large ICANN staff for. But—

JEFF NEUMAN:

Okay—

CHRISTOPHRE WILKINSON: What we're listening to here today is at the limit, inconceivable. Thank you.

JEFF NEUMAN: Thanks. I have a couple concrete recommendations. Number one, I think we could make a recommendation that says that neither a registry nor registrar that has access to the TMCH should download a copy of all of the strings in the TMCH for purposes of putting together a reserves name list, period, that that's not a proper use of the TMCH, essentially. We can figure out exact wording later, but I just want to see if there's agreement on that.

The second concept is – Elaine notes that there's a sunrise dispute resolution mechanism, but unfortunately that doesn't cover this type of case. But we can modify the dispute mechanism to include it.

So we could try to take this back, figure out what, if anything, can be changed in a sunrise dispute resolution policy, or what could be added to a sunrise resolution policy that would address the kind of behavior that we're worried about.

So I think it's a combination of those two. It's either the sunrise dispute resolution policy or the PDDR itself (Post-Delegation Dispute Resolution policy). It's one of those. I'm just not 100% sure which one it would go in.

Does that sound like, if we asked a couple people to work on that, a good way forward to at least ... Because it doesn't sound like, from anyone on this call, we think downloading the list of strings from the clearinghouse should be acceptable for this purpose. It

also sounds like someone that's trying to circumvent the RPMs ... It doesn't sound like that's a desirable behavior. So, if we can figure out at least how to address those two things without talking about pricing, then perhaps we are getting to some sort of recommendation.

Going back to the chat, Greg says, "Sunrise dispute resolution policy has only limited cause of action." I agree with that, Greg. "TMCH issues are [inaudible] through the TMCH, not the sunrise DRP." Elaine says, "Jeff, I think the terms of use of TMCH limit access to [inaudible] solely for the claims notification or verification of name in the TMCH." Yeah, I think it does, but that's only between the registry and ICANN. It doesn't allow a third party to bring any kind of cause of action based on it. What we're talking about here is a third party being allowed to ask Compliance to do something, either through the PDDRP or through a sunrise dispute policy.

Jim says, "Is the sunrise dispute resolution mechanism something the RPM group is looking at?" I don't think they are. Actually, I take that back. I don't know. It's been a while since I've actually been to an RPM group. So that's a good question. We certainly will ask that.

Greg, is that why you have your hand raised?

GREG SHATAN:

Yes, that's why I have my hand raised, and I have my hand raised with the hat of Co-Chair of the Sunrise Sub-Team of the RPM Group, along with David McAuley as my co-Co-Chair. In any

event, we did in fact look at the sunrise DRP, and recommendations regarding fine-tuning the sunrise DRP will be forthcoming. In addition, it should be noted that individual registries have the ability to add additional causes of action to their sunrise DRP. So there's both a base set of causes of action and an optional that might fit any business model, for instance.

Also, one of the things we've clarified is that, if there's an issue with a bad entry in the TMCH, that's dealt with at the TMCH DRP level. Thanks.

JEFF NEUMAN:

Thanks, Greg. So it's clear that certainly something bad in the TMCH is dealt with [inaudible] and then that's in the RPM. The sunrise dispute resolution mechanism I thought was only for challenging a mark that got a sunrise registration as opposed to challenging someone's registration policies. In other words, if a registry had these unfavorable policies as part of their sunrise, I don't know if that's – let me ask the question instead of ... Would that be actionable under what you're discussing in the sunrise dispute resolution policy?

GREG SHATAN:

If I recall correctly, an issue of a wrongly granted sunrise registration that did not result from a bad TMCH entry is one of the things that can be dealt with under the sunrise DRP. I'd have to go back and look overall. We looked at what others had done in terms of sunrise DRP and make some comments with regard to that.

But the history of the sunrise DPR is that it was actually created before the TMCH was finalized, so it essentially ended up being redundant of things that were done to allow for TMCH challenges. So we basically pruned it back. Thanks.

ANNE AIKMAN-SCALESE: Jeff, it's Anne again. Can I get in the queue?

Hello?

JEFF NEUMAN: Sorry, Greg. Yes, Anne, please?

ANNE AIKMAN-SCALESE: Just one comment and one question primarily I guess of Greg. The comment relates to Christopher's comment that trademarks have to be used to be protected. But that is clearly not the law worldwide. For example, in the EU, you cannot cancel a registered trademark until a period five years after its registration. That is an acknowledgement of the fact that people develop business plans. They need clear trademarks in order to develop those plans and to get their market research out and go into business, spending money associated with that trademark and the development of the business. So it's untrue that trademarks are not protected unless they're used. Certainly in the EU they're protected for five years.

Secondly, I'd like to ask Greg whether the sunrise RPMs committee that he co-chaired if they considered the possibility that reserve names should not be able to be reserved during sunrise,

that there is direct conflict there between reserving a registered a trademark that's in the TMCH during the sunrise period? How did those deliberations go?

GREG SHATAN:

If I recall correctly, there were felt there was some jurisdictional issues with this group. It didn't allow us to necessarily delve into those completely. I'd have to go back and look, but I think there were concerns. We did address several different kinds of early action that in essence would allow for reserving names and how that would interact with a sunrise. So it's a more nuanced discussion which hopefully everyone will get to read shortly when the report is issued.

Last, I would just want to note that, for sunrise, at least you do have to put proof of use into the TCMH, even if you didn't put proof of use in to get your trademark registration. Thanks.

JEFF NEUMAN:

Thanks, Greg. Just on the narrow issue of whether a registry can reserve names prior to the sunrise period, that is not something that the RPM group is talking about. As you rightly said, that was referred to us. So, on the narrow issue – I guess I want to come back and summarize and go onto the next topic – I think we're all agreed that strengthening the prohibitions on downloading a copy of the TMCH names for the purpose of reserving those strings or charging premium pricing I think is something that we don't think is a good thing.

Also, the notion of whether reserving names prior to the sunrise for purposes for the purpose of either circumventing the RPMs is also something that is not a good thing. We just need to figure out where the best place to file that type of challenge or do that type of thing is. So I'm asking if we can just take that back, figure it out, and make a recommendation as to where we think it sits. But I just want to make that people are okay on this call with the desired outcome that we're looking for.

Paul says, "From a decision, applicable dispute, the registered domain in a TLD would be subject to ..." Okay, so he's citing a sunrise policy, which, again, is whether a name is properly delegated during a sunrise period or not.

Before I continue, Julie put into the chat – there's someone with that telephone number on there? If we can identify who that is, or maybe that already got taken of and I'm just behind.

Christa, please?

CHRISTA TAYLOR:

Just one comment. I've done a lot of premium name lists. One of the items that you're recommending there is on preventing the downloading of the information. Usually at the end or during the process, a person such as myself would overlap those lists to make sure and to reevaluate the pricing on any of the terms to ensure or minimize some of the issues that we're discussing here. So, for myself, I wouldn't want to get in trouble because somebody saw that I downloaded and then saw a premium price on

something afterwards, when I'm actually using that data for better purposes.

JEFF NEUMAN:

Thanks, Christa. I think certainly we need to look out for that. We're not trying to stop the legitimate uses of it. I would say that's the opposite of what we're trying to prevent against. So that I think is a good comment. Let us take that back and we'll see if we can find a something that we think that could address both of those.

As we then go to the CCT Review Team document, I do want to go straight to – which I think might be the first one anyway – the other intellectual property RPM recommendation that was given to us by the CCT Review Team as a prerequisite.

Actually, let me take a quick step back and then we'll get back into it. The CCT Review Team has put out a number of recommendations, as everyone knows. Some of them have been accepted by the Board. Some of them have not been accepted by the Board, or some have not been accepted yet by the Board. The Board has also a paper out for comments on their planned implementation of the recommendations that they've already accepted. So we're not talking about any of that.

What we're talking about specifically here are the recommendations that were specifically targeted at this policy group. So some of them have may been targeted at us and another part of the ecosystem, so we first need to decide whether we think it's proper for us to address that or whether it's really meant for another group. If it is for us to address, we need to think

about whether it's already been addressed in the work that we've done and, if not, what should we be doing to address it.

So you'll see a bunch of columns on here. For this part, we're going to focus on the prerequisites and the high priorities, although you'll see a couple in here that aren't that high up, I think. So we'll talk about those. That's what the columns are for.

Karen says, "The comment period is complete." Okay. I knew it was ending at some point soon. I just didn't know when. So it's over already, so you can't comment on that anyway if you wanted to do. So I guess ICANN is analyzing it.

Let's see ... okay. I think Paul is still commenting on another topic and we can keep going. One of the CCT recommendations – it was Recommendation 9 – states that the ICANN community should consider whether the costs related to defensive registration for the small number of brands registering a large number of domains can be reduced. If we go across, there is a comment in there. I don't know if we can – I know, Jim, had made a comment and then I did as well. Okay. So what else needs to be done?

What we have in here is that ... I think there was maybe one conversation we might have had on this, but I don't think we ever closed the loop on this at all. So this is just some general thoughts. It's our thoughts. It's not necessarily – "ours" being staff. Hold on. [inaudible] please turn off your mic. Thank you. So this is our thought, meaning leadership and staff. So it's not an official working group position yet. So we just wanted to prefill it in just to start it out.

What we said in this column here is that the recommendation appears to be directed more at RPMs, with the text stating that uneven distribution and costs and defensive registration through a small number of trademark holders may be an unanticipated event of the current RPM regime. So we're thinking it's likely beyond the remit of the SubPro PDP to affect that RPM regime. So we may just discuss with the RPM group to see if they're going to tackle this.

Jim, if we can go back to the comments that were in that section. Jim says, "But doesn't pricing come under our remit?" My response is, having read then whole section in the CCT Review Team report, it was clear that the CCT Review Team did not fully understand who this should go to, which is why they put both us and the RPM and we're saying, "Okay, one of you address it."

This is my comment again. At the end of the day, it relates to reducing the amount of defensive registrations because, if you look at the success metrics ... My opinion was that there's no way to address this recommendation other than through an exhaustive look at the RPMs themselves. So, if you look at the full text, which I've put into that comment, and you scroll down to the bottom, it's got that success metrics part. The CCT Review Team defined success of this recommendation as being reducing the number of defensive registrations overall and, in particular, a reduction in the number of defensive registrations per trademark by the registrants with the most defensive registrations without causing an increase in the number of UDRP and URS cases.

To me, this recommendation ... There was nothing else in the report on this, unfortunately, other than looking at the INTA and

some other surveys. So it's very hard to address this actual recommendation because there's very little data, there's ... Not all registries are connected to this centralized pricing mechanism, so, even if there are trademark owners that got a high percentage of registrations in certain TLDs, that doesn't mean that they have higher registrations in all of the TLDs. Then how you would establish a global discount program of unrelated and unconnected registries actually seems like an impossibility.

Now, if this is something the TMCH wants to consider as far as perhaps lowering the cost of putting marks into the clearinghouse or giving some sort of discount, I suppose the RPM group can look at that and do whatever it wants with respect to that. But it just doesn't seem like this is a feasible recommendation for us. But I really want to hear others comment on this because I can't really think of a way to address that because every registry is not connected with every other registry. Therefore, there's no way to do a global discount program because each registry runs its own sunrise.

Greg is saying, "Maybe RPMs and SubPro should form a joint CWG." We have gotten together with the RPM group. RPM's suggestion was that we handle this. But I'm being honest: I don't see how we can do that.

Let me go to Paul.

PAUL MCGRADY:

Thanks. Jeff, help me understand because I'm not smart. The suggestion is that, [since] there is a small group of particular

brands that are consistently targeted in the domain name space, there would be cross-sharing across all registries? Is that what the suggestion is? Is that what it boils down to or am I misunderstanding?

JEFF NEUMAN:

I would say it's almost the converse. There are a small number of trademark owners that register a large percentage of the defensive registrations, at least as of the time that that study was done. This was in 2016. So, by that, who know is those names have actually renewed? But at the time they looked at the data, what the CCT Review Team said is, "Look, there's not too many registrations in this TLD (sunrise registrations), but, when we look at the registrations, it looks like a majority or a large portion of these registrations are from a very few trademark owners." So some trademark owners were buying lots and lots of defensive registrations, while other trademark owners weren't buying any. Or most weren't buying any. So the CCT Review Team said, "Well, let's look to see if there's a way to not have this happen in the future." In other words, what is causing these few companies to register in every single sunrise and others not? So they were trying to get at that these few trademark owners are paying the lion's share, so is there a way to lower the cost for them?

PAUL MCGRADY:

Got it. Unsolvable. Some of these brand owners may be registering defensively aggressively because they're getting advice to do that. Others may be defensively registering aggressively because their business model is entirely dependent

on Internet traffic, where other business models of [well-known] [inaudible] plans are not at all dependent on Internet traffic. I just don't know how in the world we could possibly make the domain name marketplace so bland and milquetoast that it would result in a uniform defensive registration pattern across all the famous trademarks of the world. An interesting thought, but I don't see any way forward on this one. Thanks.

JEFF NEUMAN:

Paul, thanks. The other comment I'd make – then I'll go to Jim – is that – I'm taking off my Chair hat and putting on my cum laude registrar hat – there are some clients I know that we have worked for that may have initially registered a lot saw what was going on in the industry and hen may have deleted or not renewed those. So the fact that they may have registered a lot of names initially in the sunrise doesn't necessarily mean that they kept those names. So renewals could tell a whole different part of the story. And I'm not talking about any one client in particular. I'm talking about a bunch of our clients.

Let me go to Jim.

JIM:

Thanks, Jeff. I guess two points. One, when we're trying to figure out how to do something, have we considered actually asking members of the CCT-RT Review Team if they had any thoughts on how this might actually be accomplished? Because obviously they deliberated for quite some time in coming up with these recommendations. So I'm sure, as part of that process, they may

have had some game-playing scenarios or potential solutions that they were talking about.

Just to go back to your “I’m not a sunrise expert, like you and others on this call are,” I agree with you that registries are not connected to each other, so sharing that information between registries may be a challenge. But, if I’m not mistaken, every registry was required to submit a startup plan that did include sunrise and other RPM material before they actually launched. So the common nexus there is ICANN, and they can serve as that conduit. Just a thought. Thanks.

JEFF NEUMAN:

Thanks, Jim. That’s a good thought. Let’s consider that. On the – sorry, I was talking about the ... Well, all of it is a good thought. All of it’s great, Jim. On the part of, have we talked to the CCT Review Team? I went back on this particular one. I think Avri might still have been a Co-Chair with me at this time. We went and talked to the CCT Review Team about this particular recommendation. I asked them the same exact question that, Jim, you said. I looked at the recommendation because they had a whole list – this was just as their initial report had come out. The response I got was, “We don’t have an answer to this. We just noticed this data correlation and we don’t have any suggestions for you. This was just something we thought you guys should consider.” That was the response I got. I’ll try to find that.

As Cheryl is saying – she was with the group at the time, but not as Co-Chair ... So that was the response we got on this.

The other one was the applicant support. When we get to that, there's a recommendation for us to define the metrics. I said to them. "Well, what were you guys thinking? Did you guys through around some suggestions?" They said, "No, we didn't have any data. We didn't really know what it should be. We didn't talk about what it should be. We just think that you should do it."

So, unfortunately, with a lot of these recommendations, we're stuck. But we could still send these questions to see if they have anything different, since this has been a while since they made these recommendations. So I think it's still a good idea. I'm just sharing what we initially got back from them.

Paul has in there what he said, so I think, Paul, that was already read. Elaine says, "Several registries offer a domain mark protection list." Right, a blocking service. So you could pay a small amount and block the registration across many TLDs. Greg says, "Shakespeare" ... Okay, never mind. Sorry. So there's a little banter there. Thank you for that. You got to understand, I'm going to read everything because it takes me longer to digest a comment than to just read it out loud. For those of you have seen the movie, Anchor Man, if you put it up on the chat, I'm probably going to read it. So don't put anything up on the chat you don't want read out loud.

Anyway, anyone have any thoughts on this one? Do people – Jim has brought up ... Let me go back to that. Jim brought up that maybe there's a way, when registries file their startup plan with ICANN, that ICANN could coordinate something. I'm just not sure what that something would be in terms of trying to get discounts offered. As Elaine said, some registries have these other

mechanisms to deal with RPMs, like blocking, where you could pay presumably a fee that's cheaper than registering in all the spaces for their block. I know that CentralNic has one. In fact, I think even the Trademark Clearinghouse has established a service where they'll go in and block.

Christa, I don't know if that's a leftover hand from the last question or that's a new hand.

CHRISTA TAYLOR: It's a new hand.

JEFF NEUMAN: All right. Cool. Christa, please?

CHRISTA TAYLOR: At [LMX], we have an adult block product. It is cheaper than registering the names first. Secondly, we have different variations through the homoglyphs that also provide that protection. Then it also gives the option to the trademark holder, if they want to ever use that name in the future. And, if it happened to be, say, a generic premium name, it blocks it at no additional cost. So in case that helps in developing some kind of solution.

JEFF NEUMAN: Thanks, Christa. I think it does help. I think there's a couple things we might want to say on this, but please do give me feedback. What I'm thinking, just from hearing the discussions, is something that's a theme with all the CCT Review Team recommendations

anyway: there's a thirst for data out there. So one thing we could recommend is that certainly there is new services that have come on the market since when the original studies and the CCT Review Team report was done that need to be looked at to see if it helps.

The second thing is that, now that it's been through a few cycles and we've been through some renewal cycles, what have trademark owners learned for the next round in terms of, are they going to register the same amount of names that they did, seeing what happened in the last round?

So, those combined, we could say that we recommend that certain types of data should be collected by ICANN so that this particular issue can be studied to see if it really is an issue going forward.

So how does something like that sound? It's not like I'm trying to punt it, but I'm not sure what else we could do. Thanks, Greg, for the shout out there: if you're going to put some banter, please put it in the text format that Greg has there. Paul is saying, "Forcing discounts is a form of price control and we should steer clear of that," which I agree with.

So do the two things that I recommended sound okay as just an initial thinking to work on recommendations that say that, since the study has been done, we think there's a number of market mechanisms that may supersede something like this, that creating a discount program globally is not something that we can or have the ability to do at this point, and, now that we've been through a bunch of cycles, let's have ICANN collect the data, including

pricing information, to see if this continues to be a problem in the next round? Part of me believes it's not going to be as bad of a problem in the next round, simply because we now have years of experience of 1,200 or at least several hundred new open TLDs where trademark owners have now participated in [above] sunrise.

Not hearing any comments, either you're bored or you're okay or both. The next, if we can just close that comment, recommendation is – sorry, can you scroll over to the left? Yeah. This was an interesting one, too, and we've started conversations on this. But we have not thoroughly finished this, where it's the recommendation that we create incentives and/or eliminate current disincentives that encourage gTLD registries to meet user expectations regarding, one, the relationship with content of a gTLD to its name, two, restrictions as to who can register a domain in certain gTLDs based on implied messages of trust conveyed by the name of its gTLDs, particularly in sensitive regulated industries, and, three, the safety and security of personal and sensitive information. These incentives could relate to applicants who choose to make public in PICs, or whatever we end up calling them, and their applications that relate to these expectations and ensure that applicants for any subsequent rounds are aware of these public expectations by inserting information about the results of the ICANN surveys in the Applicant Guidebook.

So what the CCT Review Team did here is they used a Nielsen study or they used Nielsen to conduct the study, and the study said that there was more trust for the regulated TLDs in terms of consumer expectations than there were for the open ones,

especially if they knew that they were validated or verified top-level domains. So this was something that the CCT Review Team thought was a good thing and thought that we should help create incentives or not create disincentives or take out disincentives.

So we have talked about this. We actually put some of this out for comment. The responses we got back were mixed in the sense that some said that this relates to content and we shouldn't really be making ICANN content regulators. Others said, "Yes, but we don't know what those incentives could be. Is it just a reduction in ICANN's fees?"

As Paul says, what could these incentives and disincentives be? This is another one, Paul, that we asked that very question to the CCT Review Team. In the report itself, it talks about fees to ICANN. But that's the only one that they could think of, and then they punted to us to create other incentives or disincentives.

Now, one could argue that our discussions on whether those in verified top-level domains should have a right to object to other applications for similar TLDs that don't have those types of restrictions ... could be an incentive: to have your TLD be verified. But that's a very weak one or there's not a big connection between that. So, Paul, again, this is from the CCT Review Team, where they don't really tell us what else could be incentives. They just punt it our way.

Thoughts on this one?

GG, please?

GG LEVINE: Hi. I guess my question is, does this working group have to determine what exactly those incentives or disincentives would be in order to recommend that there be such a provision in place?

JEFF NEUMAN: GG, do we have to? No, but someone has to. If it's not us, it'll be the implementation team. So, if we think this is a good idea or there are some examples, it's probably for us to mention what those incentives could be that an implementation team should consider. So I guess it's a part-yes-part-no kind of answer.

GG, do you want to add anything?

GG LEVINE: No, that's helpful. I guess that that would be a lot for – oops. Can you hear me okay?

JEFF NEUMAN: Yeah, you're good. We can hear you.

GG LEVINE: Okay. It seems like that would be a lot of discussion to arrive at with what those incentives could be and how to go about implementing them. It seems like there would be a lot of decisions that would need to be made and a lot of discussion that would need to go into that.

At this point in the process, are we able to undertake that process?

JEFF NEUMAN: Thanks, GG. This is a recommendation to our working group because I think the CCT Review Team recognized that this is really a policy. Do we really want to provide these types of incentives? That's a policy decision. So, in theory, we could agree with the CCT Review Team or we could disagree with the CCT Review Team. We don't have to adopt it if we don't want to. I know it's hard with review teams because it seems, especially with certain comments, there's a lot of people believe that, if a review team makes a recommendation, it has to be adopted and we have to move forward with that recommendation. The reality is that something like this, which is policy, we could adopt. We could not adopt it. We could adopt it with modifications. So we have all those options and it's really for us to talk about.

Let me go to Alan and Paul because I – oh, sorry, GG. Finish.

GG LEVINE: So can we recommend that there be such incentives in place, or do we have to recommend specifically what those recommendations would be?

JEFF NEUMAN: We could do either or both.

GG LEVINE: Okay.

JEFF NEUMAN: We have that, but recognize that somewhere someone down the line, if we recommend, is going to have to make that.

GG LEVINE: Got it.

JEFF NEUMAN: So, if we have a tough time figuring out ... Let me throw it over to Alan and then to Paul. Alan, please?

GG LEVINE: Okay.

ALAN GREENBERG: Thank you. This is certainly one I strongly support. The implementation, as you've noted, is somewhat problematic. I'm not even sure one could recognize a verified TLD in the public interest. What if someone has verified drug dealers? Do we want to reward them? No. That may fall under the illegal activities and is not relevant, but you get the idea.

So I think, at the very least, we have to make a recommendation that it has to be considered. I strongly agree with you, Jeff, that, if we could make a substantive recommendation that's actually implementable, we'd be in a much stronger position. I'm not quite sure how we do it. Certainly, registry fees are one of the ways that one could do it. I'm not sure it makes a huge difference, although clearly registries that have not been doing well have asked for lower fees. So I guess it does impact their bottom lines.

So I don't think we can ignore this one. The whole concept of the CCT Review Team was to look at issues of trust. This is one of the recommendations they came up with which is directly linked to consumer trust. From my perspective, certainly it is also directly linked to things that are in the public interest associated with new gTLDs.

So I don't think we can ignore it. I think we have to take some action, and I would dearly love to find some action that's actually implementable and specific. Thank you.

JEFF NEUMAN: Thanks, Alan. That's what we're doing now. We're considering it. So, Alan, what you're saying is that we should definitely approve something like this and then see if we can come up with examples.

ALAN GREENBERG: Yeah.

JEFF NEUMAN: Let me go to Paul.

PAUL MCGRADY: Thanks, Jeff. This is a really nice idea, but my only concern is that the registry agreement is already super convoluted enough. So I think, if we're going to pursue this and we're going to make recommendations, we have to figure out how to make whatever the incentives are somehow exist outside of the RA amendment

mechanism and all that good stuff. At least that's my initial impression, that that document is so confusing.

There may be incentives that only last for a certain period of time – the first five years after launch or whatever. I don't know. I'm just really concerned that – like I said, it's a good idea, super worth discussing, but, with whatever implementation mechanisms we can dream up, the simpler the better. Thanks.

JEFF NEUMAN:

Thanks, Paul. It would be simple to do something like a lower ICANN fee, as Elaine has in there. That would be a fairly simple one. Other incentives I think would be a lot more difficult.

Let me go back to GG and then Christa and then we have to wrap up the call.

GG LEVINE:

Hi. I'm [inaudible] but what if we treated them similar to a community application, where, if you say you get two applications for the same string – one of them is a verified TLD – they would win the contention, basically? Thanks.

JEFF NEUMAN:

Thanks, GG. That's a possibility and a good idea. That would also help with verified TLDs because, naturally, running a verified top-level domain certainly costs more to run and it also tends to have less registrations than open TLDs. So it does also come with less of an ability to, let's say, do an auction and less of an ability to pay

higher ICANN fees. So doing something like that would certainly be an incentive.

Christa, please?

CHRISTA TAYLOR:

Hi. Two parts to it. The first part is, I guess, support for the registry, but also you could support the registrars because the registrars are the ones who have to implement it into their systems, making it more difficult for the registries to sell their names that have those extra steps that are required to them. So providing some other tools there or some assistance with them makes it, say, more valuable to the registry. So just going a little step further in the terms of support that we could provide.

JEFF NEUMAN:

Yeah. We have a couple good suggestions. I see what's going on in the chat and we do have to wrap up this call. Let's continue this on e-mail and maybe spend a couple minutes – but only a couple minutes – on the next call because we do have a bunch of other items to work through on the CCT Review Team stuff.

We do not have a call this Thursday because this Thursday is a U.S. holiday. Because it is a time rotation of 03:00 hours, which would be Sunday for a lot of people if we did the call on Monday, we are actually doing the call on Tuesday. So it'll be Tuesday, November ... oh, sorry. Yeah, we have a call Tuesday – sorry, today is Thursday – but not a call next Thursday. So we have a call Tuesday, November 26th. No call that Thursday because it is Thursday today. Thank you. I'm out of it. I'm already on vacation.

Anyway, we'll talk next Tuesday, 03:00, 90 minutes. Thanks,
everyone.

[END OF TRANSCRIPTION]