
ICANN Transcription

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

Wednesday 10, April 2019 at 1800 UTC

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ANDREA GLANDON: Good morning, good afternoon, good evening. Welcome to the RPM subteam for sunrise registrations call held on Wednesday, the 10th of April 2019 at 18:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Adobe Connect room. If you are only on the audio bridge, could you please let yourselves be known now? Thank you. Hearing no names, I would like to remind all participants to please state your name before speaking for transcription and recording purposes, and to please keep your phones and microphones on mute when not speaking to avoid any background noise.

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With this, I will turn it over to Julie Hedlund. Please begin.

JULIE HEDLUND:

Thank you, Andrea. I will just run through the agenda before turning things over to David McAuley.

Action item one is the usual statements of interest update, then we'll go on to item two, development of preliminary recommendations. And just noting, as was also included in the agenda [inaudible], in addition to looking at the charter questions, we'll be looking at the individual proposals now relating to those charter questions, and there was a link to those individual proposals for your reference [in order] to bring up the relevant proposals as they're discussed in the Adobe Connect room.

So we'll be looking at individual proposals relating to question three, and then beginning discussion of preliminary recommendation and individual proposals for question four. And let me ask if anyone has Any Other Business they'd like to add to the agenda. I'm seeing no hands.

Then back to agenda item one, let me ask if anybody has updates to their statement of interest. Seeing no hands, then let me turn over to David McAuley for agenda item two. David, please.

DAVID MCAULEY:

Thank you, Julie. Hi, everybody. I will chair the meeting today. I will ask for Craig's assistance to the extent that things come up that were touched on last week, because I was absent last week. Let me just mention briefly before I get started, I heard a couple

dings after we took the roll call of people that were on the phone only and not on Adobe, so my question is if anyone joined who's not in Adobe in the last few minutes and has not let themselves be known, could they do so now?

Okay, not hearing any, let's move forward, and I'd like to begin today with some brief introductory remarks about the schedule and the timeline, things like that. And the point I want to make as one of the co-chairs is that we have a great deal of work to do between now and May 15th to wrap up these recommendations. So I'm basically making that point, underscoring that point and asking for focused attention between now and mid-May so that we can wrap up our work on these recommendations.

In order to do that, I'm asking this group to plan for and to look for and to implement themselves aggressive and focused use of our mailing list. we need to supplement what we're doing here on the calls with the mailing list, and that's my intent. And I will repeat what I'm saying now, I will repeat it on the list in a day or so, because there's a number of folks who are not on the call.

And along these lines of using e-mail, we're thinking of creating e-mails threads [per charter question] or perhaps related questions. And hopefully that will be a focus forum for comments and propose recommendations, etc., and also keep in mind that staff is going to encapsulate potential recommendation language following discussions on the call. So you'll see those starting to roll out and that should be helpful. And we'll have the e-mailed homework as usual with links. So please pay attention to that.

With respect to our work, keep in mind that we will only be sending forward the subteam proposals that have broad support, so even though that may not be many, that's really our job.

So the one thing I'd wanted to mention, it has been taking a long time. This might seem like a ten-hour car trip, and you ask, will this ever end? I have the feeling that we are in the eighth or ninth hour, and surprisingly, it may end very soon. And that's our goal, to allow for and to encourage full and fair discussion, but also focus. Another aspect is for focus. So between today and the middle of May, we have six meetings, including this one. When we do AOB today, we'll be asking the group how you feel about moving to 90-minute meetings in the next five weeks, all of this with a view towards moving on.

So let's move now to the agenda. We're going to pick up on question number three. I'm going to read it briefly, and then note that Susan Payne has a couple of recommendations in this respect. Question three is back to that question, should registry operators be required to create a mechanism that allows trademark owners to challenge the [decision] that a second-level name is premium or reserved.

Should registry operators be required to create a release mechanism in the event that a premium or reserved name is challenged successfully? And what concerns might be raised by this approach?

In this section, we have amongst the individual proposals two from Susan, and I could summarize them, or Susan, probably preferable would be to ask you if you want to mention specifically

number ten which deals with question number three. So I'll give you that opportunity. Otherwise, [inaudible] talk briefly about that proposal, which is a procedure for trademark owners to challenge the designation of a domain name as premium. Susan, do you have a preference?

SUSAN PAYNE:

Thanks, David. Yeah, I'm happy to speak briefly to this. I should preface this by saying that – and I mentioned this on the previous call, so apologies for those who've been on the claims call already, but I've put this proposal in because the timing and the deadlines for putting in individual proposals was very early, and at the time, it wasn't very clear to me how the individual proposals interplayed with the recommendation or preliminary recommendations that the subteams were going to be coming up with.

So bearing in mind that the deadline was coming up, I put this proposal in, this first one being a challenge mechanism for a domain name that's premium. And I'm envisaging a challenge mechanism during the sunrise period. This is the sunrise group after all. I'm not necessarily proposing that there's a perpetual challenge period.

But I do think that within our discussion on this charter question, we had talked about this quite extensively, and staff captured [inaudible] as far as I know various proposals and suggestions that were coming up during the course of this discussion.

So it may well be that we've had our discussion on this, and bearing in mind that we have many charter questions that we haven't talked about at all, that we shouldn't spend a whole call talking about this topic again.

Obviously, I'm happy to talk about it, but I just wanted to flag that [to my mind,] we've had quite an excellent conversation about challenge mechanisms.

DAVID MCAULEY:

Susan, thank you. Thank you very much. I agree. And actually, one of the reasons I use the analogy of a ten-hour road trip where we may be on hour nine, let's say, is that there have been many fruitful, informed and [cogent] discussions about a number of things. So I think reserved names, premium names, is one of those topics. So I have a feeling that we could wrap this up fairly quickly.

The only thing I do want to say is – and this is sort of consistent with what I said before about us creating threads for shorter questions.

UNIDENTIFIED MALE:

[inaudible].

DAVID MCAULEY:

And could I ask that people mute who are not speaking right now? I'm toggling between the individual proposals and the Adobe, so I'll be back in Adobe in a minute to see whose hand is up. But I do

want to note, Susan, that your proposal number ten is an actual procedure for trademark owners to challenge a designation of a domain name as premium.

So in that thread, we will put a link to that proposal, and we will summarize that proposal and ask people to speak to it. Susan said this, but a lot of discussion around this, I think we ought to be able to wrap this one up fairly quickly, or at least have a full and informed discussion to supplement what we've already done, and get it wrapped up.

So, having said that, I see two hands in the queue. One is Jason, so Jason's first. Why don't we go to you, Jason? You have the floor.

JASON SCHAEFFER:

Thank you. Hi. And yes, I do agree this is a topic that's been discussed extensively. I just wanted to make – and I want to speak to Susan's proposal a bit, and also make sure that staff has a sort of record, because I did make some comments a few calls ago that I don't think were captured.

My concern here, what I'd like to see is obviously to the extent that there needs to be a recommendation and solution, I would hope that we as a subteam could come up with a solution that may be tailored and appropriate to the purported harms.

I still believe that it is an outlier situation where certain registry operators may have engaged in behavior that could be characterized as something that would be troubling. I don't think it is the vast majority of registry operators.

I did go through some of those points that I think Susan had put in her question ten proposal. Yeah, it looked like there were situations with the XYZ registry perhaps and dot-top.

I guess one of my concerns is I would like us to avoid overengineering a situation, and also, I am concerned about how registry operators can effectively address this. If we present a formal mechanism that would have some sort of appellate process, it might be something that's not really needed and very costly.

I will say directly from experience with a couple of registry operators, and I think this was also captured in one of the comments, I'd like to make sure that staff has this, is, where you have generic words or where you have, for lack of a better term, non-fanciful or famous marks, that's one case. Where you have a fanciful or very famous mark, that's certainly another case. I think without tailoring this, we might get into a situation where everybody is second guessing the business practices of a registry, which I think we should all want to avoid, and certainly, registry operators don't have insight into this when they're making their premium or reserve lists. And then the final point to be clear on is that registry operators in many cases – and we'll loosely say that the good operators, the scrupulous operators, usually have a basis, a case for why they are placing a premium pricing or reserve on a certain name. And most cases, I would argue, and my experience is not to abuse the trademark holder, and in some of those cases, actually to protect the trademark holder from cyber squatters coming in and registering names at \$10 or some low price.

So before we jump and create something that may not be needed, one suggestion I have is to try to create a less formal mechanism to allow that dialog to occur where that TMCH holder can contact the registry, help present the question, and resolve it. Because again, in my experience with a couple of registry operators, if a trademark holder wanted a name that was somehow reserved or on a higher price, in most cases – and this was dealing with the corporate registrars though. Corporate registrars would call up and question was presented, issue was resolved.

I'm happy to hear other opinions on that experience, but in most cases, I've had positive experience in registry operators trying to do something right and do it appropriately. Again, there are bad actors out there that do things that are inappropriate, and sure, we need to be attentive to that, but I think I just want to caution that there are other bases and rationales for what is being perceived as a problem.

DAVID MCAULEY:

Jason, thanks. Before I go to Phil, [you] made a suggestion of a less formal approach, which I think – thank you for those comments. And I'll also note Ariel's note in the chat that staff will encapsulate the comments. But I would like to ask folks – and please look for these charter questions quite soon – if you have specific suggestions that you can make concisely, please feel free to do that on the e-mail list with actual language that could help inform the discussion.

Thank you for that. Next in the queue is Phil. Please take the floor, Phil.

PHILLIP CORWIN: Thank you, David. I'll be brief. One, I want to point out again that with premium names, the issue is pricing. The name is available to the mark holder, but it's been designated at a price that they feel is more than they want to or would like to pay. So we do have the issue of how far we can go on this without getting into the jurisdiction of SubPro, since it's a pricing issue.

Having said that, cueing off the other remarks, an informal mechanism like recommending that it be a registry best practice to have a clearly defined contact person or contact e-mail where a trademark owner with a mark recorded in the TMCH can raise a question about the designation of a premium name, that that be available, if we're going to get to something more formal for the purpose of soliciting community feedback on an initial report that I think frankly we need to put some more meat on the bones in terms of would this be available for all premium names or just fanciful names not the dictionary names, what standard, if any, would be applied, should be applied, who would be the decider, would there be any appeal from a registry's decision to say, "Sorry, but we think it is premium, it's fairly priced and that's it?"

So if we can go with something informal, a best practice recommendation, that's one thing. If it's going to be more of a procedural thing that's available to a trademark owner, I think we need to provide more details to get meaningful public feedback. Thank you.

DAVID MCAULEY: Thank you, Phil. And I'll just [inaudible].

PHILLIP CORWIN: And those were personal views, just to make clear. Thank you.

DAVID MCAULEY: Thanks, Phil. I'm actually going to make the same point as I react. This is a personal view, not as chair or co-chair, is that what Jason said about an informal approach and what you said subsequent to that makes sense to me. Informal sounds ideal if it's possible to come up with a realistic approach on this matter with an informal approach. So thank you both.

Maxim, you are next in the queue. You have the floor.

MAXIM ALZOBA: Okay. I have three points, and one of those might help us [inaudible].

I think the clarification might remove some of the misunderstanding from the registries side [bad thing] might happen when sunrise has [premium domains.] For example, word A has different price than word B. Not going to details of particular words.

So maybe suggestion for that, sunrise shouldn't have tiers. Might work. For example, that all sunrise prices should be equal, because TMCH sunrise is for protection for trademark holders where they can go and try to register something, [is the first item.]

So basically, it's the suggestion that the sunrise shouldn't have different pricing. So it's TMCH sunrise, [inaudible], TMCH sunrise price. Yes, formally it's regulation of pricing and [inaudible] but it's something like suggestion for best practice.

The second item is if we're talking about trademark owners, actually, from formal point of view, [inaudible] to registries, because [inaudible].

DAVID MCAULEY: Maxim, can you hear me? I think we may have lost you.

MAXIM ALZOBA: Do you hear me?

DAVID MCAULEY: Yes, I hear you now. At least at this end, I lost it for about 15 seconds.

MAXIM ALZOBA: Okay. I will speak slower. The registries prohibited from looking into TMCH, so there is no way to distinguish trademark owner who is a subscriber to TMCH services from for example some trademark owner who decided not to go there and formally cannot have all protections provided by RPMs.

So if we decide to investigate further into this question, I suggest allowing registries to be able to verify the third party versus TMCH. Not looking into TMCH for any name, but when this

happens, they need to be able to verify the person against TMCH subscribes list.

And the third thing, since this thing is quite powerful, it needs some safeguards. For example, to distinguish trademark owners who protect their business, their ventures, from those who actually register trademarks based on the frequency of how the name in dictionary is used. Because I'm not sure that it's the kind of business we're going to protect.

For example, if party lost too many UDRP cases, maybe it's not eligible for this kind of protection. Thanks.

DAVID MCAULEY:

Thank you, Maxim. And when you see the encapsulation of discussions come out, feel free to concisely and [inaudible] moving forward purposefully to add to it, to comment on it, but to make that point again on the list.

Let's stop for a minute before I go to Greg, and ask Julie just to mention what we're putting up on the screen right now if she can.

JULIE HEDLUND:

Hi. Thank you very much. So what you see is an updated summary table. We've unsynced it so you can scroll to it. For instance, if you want to scroll to question three, you'll note that there is a section of the text that is shaded in pink or red, depending on what your screen is showing, which his labeled tentative answers and preliminary recommendations. What staff has endeavored to do is capture the discussion thus far on

question 3A and B, and suggest a possible answer to the questions, and then also suggest text for a recommendation. And this is not text that staff has created, this is text that is meant to capture the various proposals, suggestions and discussions in our meetings using the transcript and the recording.

So that's what you see there. We'll send this around and welcome comments on it, and of course, we'll capture any of the discussion from today's meeting that may adjust this language here. Thank you.

DAVID MCAULEY: Thank you, Julie. Another important tool for us. Next in the queue is Greg. Greg, go ahead. You have the floor.

GREG SHATAN: Thanks. Just briefly, I stepped away for a couple of minutes. I may not have picked up on all of the nuances. I'm a little concerned about the idea of a soft or informal process. I think ultimately, we're looking to make policy here, and I'd like to concentrate more on the actual levers of the policy, including the safeguards as Maxim noted, and then think about what it means for the policy to be – to use a word that we're using a lot lately – enforceable, or generally speaking, best practices, kind of get into the issue of best practice for who? And if the very people who would not be likely to follow that practice are the ones who are most likely to be the concern.

So that's my concern of a soft guidance there. But I think we're discussing the right inputs and levers, and recognize that this is

not a simple thing to do. We can try to replicate other [DRPs,] but clearly, there are issues here around what actually is the offence, so to speak, and what isn't. That really are going to be, I think, unique to this fact set, and we need to kind of dig down on those. And the ancillary processes could be perhaps a little more generic and borrow from other mechanisms that already exist. Thanks.

DAVID MCAULEY:

Thank you, Greg. Next in the queue is Susan. Before I go to Susan though, I would like to sort of draw a line on this conversation after her comments. If you feel that there's something urgent you want to say, then perhaps we'll do that. But there will be the list, and there will be the summary table that we can work to, and so we maybe can move to question four. But in any event, Susan's next, so Susan, go ahead. You have the floor.

SUSAN PAYNE:

Thanks, David. I don't need to say much. I wanted to just react to Maxim's suggestion about the pricing tiers and the suggestion that perhaps an alternative way to address this – I'm not arguing against my suggestion, I'm just saying another way to skin this cat potentially might be a consideration of that idea about sunrise pricing and that there shouldn't be differences of pricing during the sunrise period, which would at least put all brand owners seeking a sunrise registration on the same level playing field. That might be a useful additional add-on.

CLAUDIO DIGANGI:

David, can I make a brief comment?

DAVID MCAULEY: I'm sorry, I couldn't quite hear that. Is that Claudio?

CLAUDIO DIGANGI: Yeah.

DAVID MCAULEY: Yes, please go ahead.

CLAUDIO DIGANGI: Just on the thread about whether to have some sort of middle ground on this, the thought that I had was that there is some existing language in the registry agreement about how the registries need to be transparent with the registration policies and that they should be generally be nondiscriminatory.

So what I was wondering is I think it would be helpful if we could get some input from Compliance to get their perspective on whether the existing language enables them to take action in certain cases, and if it doesn't, maybe what they think would be necessary for them to be able to get involved, because maybe we could come up with something where we could alert Compliance or have some mechanism to put Compliance on notice about any potential actions that might be inconsistent with the general provisions that are in the registry agreement. So I'm not sure if we can invite them to a call or have some interaction with them, but it's just a thought. Thanks.

DAVID MCAULEY:

Thank you, Claudio. Susan, is that an old hand? It's gone. Okay. Before we move on, I don't see it anymore but I saw Kathy's question in chat. We're looking at new text, and read, "Hard to grasp it on the fly," which is a fair point. "When will we have a chance to discuss it?"

I guess I have two points. Maxim, I'll come to you in just a second. One is – it's a fair point, the thing that Kathy raises, but part of the discussion [is the list,] as we're emphasizing, and so feel free, please do use the list. And we're hoping that between now and mid-May, we can actually use the list more aggressively than we have heretofore.

So that's one opportunity. On the other hand, as we get close to the end of this process, we would probably, I would think, on the calls, do sort of wrap-up discussions. Not free flowing discussions that we've had, but wrap-up discussions where people will have a chance to make concise points about the language that they've had some time to reflect on. So thank you. At least that's the way I see it.

Now, Maxim, go ahead, please take the floor.

MAXIM ALZOBA:

I'm going to be short. ICANN Compliance can enforce only things which are either in contract or in any documents surrounding the contract, like [inaudible] in the contracts and GNSO policies, and temporary policy which [inaudible].

But in the contract language of registries and registrars, pricing is something which has special protection. Even if we have GNSO

policy, for example our PDP group sends recommendations to GNSO council and it votes for and it goes to board, and even if it goes to become GNSO policy on pricing, it's not enforceable on registries and registrars because of special protection. Just clarification. And inviting Compliance will not help. Actually, it's quite a typical question for which they have to close cases. Thanks.

DAVID MCAULEY:

Useful clarification. Thank you, Maxim. Not seeing any further hands, I'd like to move to question four, which I'm going to read briefly and see if we can generate some discussion on that. Before I start, I'll just mention, Susan, your proposal 11 gets to question four, so I'll just mention to you now, but when I'm done doing this, I'll probably turn to you and see if you want to say anything. But here's roughly question four.

Are registry operator reserve name practices unfairly limiting participation in sunrise by trademark owners? Secondly, should section 1.3.3 of spec one of the registry agreement be modified to address these concerns? Parenthetically, let me mention that I will shortly summarize section 1.3.3.

Next question, should registry operators be required to publish their reserve name lists? What registry concerns would be raised by that publication, and what problems would it solve?

And then finally, should registry operators be required to provide trademark owners in the trademark clearinghouse notice and the

opportunity to register the registry operator release it? What registry concerns would be raised?

Now, there's a reference to section 1.3.3 of spec 1, and basically, let me just say what that is. And Kathy, thank you very much for sending this forward prior to the meeting.

This is just a summary; this is not all of the spec 1. Consensus policy shall relate for one or more of the following, it says in section 1.2, and then it lists a number of things that consensus policies relate to.

And then in section 1.3, more importantly, it says such categories of issues referred to in section 1.2 of the spec shall include, without limitation, and then 1.3.3 says, reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to, one, avoidance of confusion among or misleading of users, two, intellectual property, or three, the technical management of the DNS or the Internet, for example, the establishment of reservations of names from registration.

That is that spec. And so that roughly is question four, and I'll open the floor for comments or suggested recommendations on this, and I'll begin that process by noting that individual proposal number 11 from Susan is partially responsive to this charter question four. Susan, do you want to say anything about it?

SUSAN PAYNE:

Yeah. Thanks, David. This seems like a good opportunity to do that.

So my proposal was seeking to address sort of a number of these issues in a way, and I was mindful of the numerous conversations that we had where people – Maxim in particular and others – expressed concerns about our ability, or indeed ICANN’s ability to regulate pricing.

So it was an attempt to come at it from a different angle. There are various – what brand owners would perceive to be bad activities, or unacceptable behaviors that have taken place in the past, and I think brand owners who have a tendency to address those, particularly attempting to dress it to date by the ICANN Compliance route, or even by bringing currently a PIC DRP has generally had an unsatisfactory experience.

But I am a firm believer in the idea of public interest commitments, and I think they can serve a really useful purpose in both kind of focusing registry operators’ minds on best and appropriate behavior, and also potentially giving an avenue for recourse. So this was a proposal for a sort of PIC that would address the cavities that might seek to circumvent the rights protection mechanisms.

And those kind of behaviors could be setting your sunrise pricing at \$20,000 and your general availability at \$500 or \$50 or whatever. Some massive discrepancy between the sunrise pricing and the general availability pricing, which seems designed to circumvent the ability of rights holders to take advantage of the sunrise, for example, or reserving names which match trademarks in order to withhold them from release.

And we did see at least one registry do that where they registered names to themselves that were well-known brand names, and it was reasonably well publicized.

So it seems to me that this might be an avenue for giving a recourse which is not ICANN saying you can't do this and you can't do that about pricing, but is just saying we develop these rights protection mechanisms to give brand owners some protection and to give the public some protection, and if it appears that the registry's behavior is clearly intended to undermine that, then there's at least a sort of avenue for attempting to challenge that.

DAVID MCAULEY:

Thank you, Susan. I would encourage all to take a look at her proposal number 11. Maxim, your hand is up. Please go ahead and take the floor.

MAXIM ALZOBA:

Actually, if we're talking about looking at price protection from different angle, it might be – and most probably will be – perceived as circumvention of picket fence. It's not going to be well perceived in contracted parties house, and I'm not sure if it's going to be voted for. But it's just comment.

And the second thing, talking about public interest, if we speak about geo TLDs who represent public of cities [you're counting in millions,] most – some of well-known trademarks, for example Paris, there is no reason to give it to the [inaudible] where the

security agency is protecting public interest for the benefit of the city and the individuals living there.

So we have to be careful not to kill the whole idea of delivering the services to public. Thanks.

DAVID MCAULEY: Thank you, Maxim. Next in the queue is Greg. Go ahead, Greg.

GREG SHATAN: Thanks. I spent some time trying to get a deeper understanding of the picket fence and the question of price, and I think it's something that we probably need to further clarify. My understanding after that look through is that there can be price-related provisions in the registry agreement, and in fact there are and have been, and so it's kind of a unilateral price regulation in a sense [if] not agreed to, may cause issues. And there's also the issues of horizontal price fixing and various kinds of antitrust and competition law problems that come when you have a lot of competitors making decisions together about how their market works. And we certainly want to stay away from antitrust violations. But I don't think necessarily the issue is any particular price, that \$1000 is good but \$1200 is bad. It is in this sense a little bit softer, or it's indicative of if you have a high-priced TLD that everything is going to be high-priced, then that'll be reflected in every way. It really goes back to the abusive and discriminatory use. So I think we shouldn't be doing something that kind of goes around the back of pricing or picket fence issues, which, I agree that if it looks like we're being too cute, that's not going to be well-

received. But I think what we need to do is make sure that we are doing something that passes muster, and so if the decision could be made on the merits and not on the idea that somehow we've ended up on the wrong side of the picket fence. Thanks.

DAVID MCAULEY: Thank you, Greg. Maxim, I take it that that's an old hand, or I'll treat it that way, because I think it is. And Jason, you have the floor now. Go ahead.

JASON SCHAEFFER: Thank you. Hearing everyone's comments, listen, I do agree that it would be nice to find a workable solution. As we speak to this point -and [we've] jumped into the now reserved names, what jumps out at me is that as our subteam, even if we endeavor to come up with a more formal process, just what we're saying right now in these preliminary discussions screams that this is going to be a highly subjective process, and I can't imagine us – I'd like to, I'll give us a lot of credit here and I think we could all together figure it out, but to I think Phil's point earlier, what is the standard, how are we adjudicating these? Are we going to be doing it on a one-name basis per registry? Registry X did one thing, registry Y did another? One priced it at \$1000, one priced it at \$20,000? Where are we drawing the lines here? How are we even going to come up with this?

I'm not saying no, but I am saying that we are going to be spending an exorbitant amount of time if we're going to try to come up with a formal system that would fairly adjudicate these,

and not to mention – I have to bring it up – we all know that these systems have been abused in the past by certain trademark holders, certainly the TMCH has been abused, as we know. This would also be ripe for that, unfortunately.

That doesn't mean we don't act, but whatever we design, we have to be prepared for that and guard against abuse of that system. So I think the subjective nature of this is going to make us run into some trouble, which is why I was hoping and suggesting that we try to find a different approach. But those are a couple points I want us to be wary of.

DAVID MCAULEY:

Thanks very much, Jason. Susan, before I go to you, I'm going to go to Kathy because I've asked her to join the queue and her hand didn't go up, obviously. So I'll ask Kathy to go ahead.

KATHY KLEIMAN:

Sure. The question I asked David is whether we could run down the subparts of question four. David, would that be appropriate? Because I think we're coming to an end – I think question four walks us through kind of a logical path that Susan has provided one answer to, Jason has provided one answer to, and maybe we should be looking at it all in context. Maybe that would help frame it. Would that be useful?

DAVID MCAULEY:

That would be fine with me after I run through the queue here.

KATHY KLEIMAN: Okay. Thank you.

CLAUDIO DIGANGI: Can I get in the queue at some point? Thank you.

DAVID MCAULEY: Yes. Claudio, I'm going to call on Susan, and then you're next.
Susan, go ahead, you have the floor.

SUSAN PAYNE: Thank you. I just wanted to kind of react to Jason. I hear what you're saying about the TMCH having been abused by some people, and I suppose that's conceivably possible if there was some kind of a PIC challenge process. but I'm not sure that they're on a par. If one were to have a public interest commitment in a contract, the PIC DRP challenge process is quite a big deal. It's not something that gets you lightly, and so you really do feel that there is significant bad behavior before one would embark down this path. There have been, in total, only a couple of PIC DRPs in relation to new gTLDs to date, so I'm not sure that it is particularly ripe for abuse.

And that is the reason also – you know there is an independent panel there who are determining whether there has in fact been a breach of the PICs or not. So it is a process that is there in order to adjudicate independently. It's not simply a brand owner saying,

“There's been a breach of my rights here” and they win the day. It doesn't work like that.

So I'm not so concerned about the notion that it could be as abused as you are. I suppose if you could envisage why it would be abused, I'd love to talk about it further. But it doesn't seem to me to be that big a risk. As I say, it's not a process that's undertaken lightly.

In terms of it being highly subjective, well, I guess so, yes. But there already are some PICs in the contracts, and there have been some PIC DRPs, and the PICs themselves are pretty brief and the panel has to make a decision. I'm not aware of them being given chapter and verse of this scenario will be a breach and that scenario will not, in relation to the PICs as they currently exist. So I don't think this is something we need to overengineer personally, but happy to try and engineer something as well.

DAVID MCAULEY:

Susan, thank you, and I see Jason's hand is up, but I did promise Claudio I would go to him, Jason, and I feel that you'll be answering Susan's question, so we'll get to you in a moment. But first, Claudio, you have the floor. I note that we have eight minutes left in this call and we're going to need at least two, I think, at the end for AOB. Claudio, go ahead, please.

CLAUDIO DIGANGI:

Thank you, David. Yeah, and just to kick off on this discussion and some of the points that Jason raised, I think there are cases, and I think Susan was alluding to this, in the law when you develop a

sort of standard or a test where it involves a level of granularity, and I think often the standard that is use is one of [inaudible] and that is one that takes into account the overall totality of the circumstances. So you might have a situation where perhaps a registry went to auction and it cost them \$100 million to get a TLD and maybe their pricing might be different.

So I think we probably could come up with some [inaudible] to try to set forth what that standard might be, and it might involve some degree of reasonableness about what the registry is doing. And just wanted to mention, I support the approach [inaudible] was mentioning earlier, some sort of middle ground, and I think the [PIC] kind of goes along those lines. Thank you.

DAVID MCAULEY: Thank you, Claudio. Jason, go ahead. You have the floor now.

JASON SCHAEFFER: Thank you. So Claudio, I do agree with you to some extent, and Susan, I hear you clearly. Sure, PICs are not something that people file lightly. I guess what's jumping out here is now we're getting into, did the registry have a valid basis from a market standpoint? "Oh, they've paid \$100 million for the TLD in an auction," and so that's now a defense. It sounds like we're about to jump down a hole where we're really going to be trying to regulate decisions based on a multitude of factors that maybe the free market should handle. In the end, obviously if you're abusing the system or doing something improper, we don't want anybody to be doing that.

Again, as I said early on in the call, I'm not against finding a way to do this, and I do agree that bad actors should be thwarted and stopped. My concern is how we come up with a standard, how we apply it, how we figure out, do we take into account, like you just said, registry X has invested a tremendous sum of money and they need to price their names high?

Just saying that sounds – we're now getting out of legal discussions and getting more into business discussions, which we shouldn't be doing. If there's a trademark basis for this, if we could agree on a standard, then perhaps, but again, we might be just delving into something that's overregulated and not going to be used very much if we do it right. That's fine, I'm for that. If we do something that's easy to use and less of a barrier to entry, then for sure there'll be abuse.

The UDRP is abused. The URS we thought may have been abused. Doesn't look like it is. So all of these processes have risk of abuse. That's all I would say. If we can ensure that a bad actor on the other side is not going to abuse it and insulate against that, I'm for it. And yes, the TMCH has been abused. Again, is it widespread? No, but we're talking about improper behavior that shouldn't have happened. We all know, we don't need to get into it. And I bet you if we interviewed registry operators, every one of them could probably articulate a colorable reason for why they chose to do what they did. Maybe a couple of the outliers wouldn't be able to justify it and come up with a defense.

So that's all. Happy to spend another two calls and many more hours trying to flesh this out, but I'm just concerned about how we use our time. Thank you.

DAVID MCAULEY: Thank you, Jason. And we will pick up next week again in the middle of question four. We're not done with it, obviously.

UNIDENTIFIED FEMALE: [inaudible].

DAVID MCAULEY: Sorry? Oh, we will pick up if we're not done with it. Let me just say two things. I'm going to give the floor to Julie in just a moment for AOB and specifically discussing 90-minute calls, but Kathy asked that we look at question four sub-questions.

Question A which deals with unfairly limiting participation in sunrise, I think is more general. But B, C and D all are specific, and so we'll probably pick up with those.

But let me ask Julie to go ahead and comment now on meeting time.

JULIE HEDLUND: Thank you very much, David. The suggestion is to move to 90-minute calls beginning with the next call, so next week Wednesday. That would be at this same time, but extending to 90 minutes.

Let me ask if there are any objections to that. We can also ask that question on the list, but we would need to get the meeting invite out probably by tomorrow to get it on all of your calendars.

You all can see these discussions do seem to take time, and it's very good and constructive time, but we do have a deadline to try to meet. Let me just look for any objections for those who are on this call. I'm just looking at the list. I see Maxim is for 90-minute calls.

And the other thing, while people are typing, let me note that staff will assist in setting up homework assignments for the next call. We'll do that in coordination with the subteam co-chairs and the workplan for the next call, so you should see something, I would say by tomorrow, and we will also assist in doing that and setting up threads on charter questions and recommendations so that you all can start doing work on the list as well.

And to Maxim's question we don't know of any conflicts if this call is extended to 90 minutes, but certainly, if you know of any, please do let us know. And I'll stop there, David.

DAVID MCAULEY:

Thanks, Julie. I will just take my own advice and come to the list with the reminder of the administrative notes we went through at the beginning, and also, please look at the list as supplement to these very vibrant and full discussions. I appreciate everybody's participation today. Thanks to Julie and staff. And that's all I have, Julie.

JULIE HEDLUND:

Thank you very much, David. Thank you so much for chairing, and thank you all for joining. and I hope you have a nice morning, afternoon, evening. Thanks very much. Bye.

ANDREA GLANDON: Thank you [inaudible] please remember to disconnect all lines and have a wonderful rest of your day.

[END OF TRANSCRIPTION]