
ICANN Transcription
Review of all Rights Protection Mechanisms (RPMs)
Tuesday, 21 July 2020 at 13:00 UTC

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UNIDENTIFIED FEMALE: Good morning, good afternoon, and good evening, everybody. Welcome to the Rights Protection Mechanisms PDP Working Group on Tuesday, the 21st of July, 2020, at 13:00 UTC.

In the interest of time, attendance will be taken by the Zoom room only. I don't see anyone connected via the phones.

I'd like to therefore remind you all to please remember to state your names before speaking for recording purposes and to keep your microphones and telephones on mute when not speaking to avoid any background noise. As a reminder, those who take part in the ICANN multi-stakeholder process are to comply with the expected standards of behavior.

With this, I will turn it over to Phil Corwin. Please go ahead, Phil.

PHIL CORWIN: Good morning, afternoon, and evening, everyone. I'm going to be chairing today. If I'm a little disjointed on this call, it's because I was just drafted into chairing in the last few minutes. It was Brian's term, but Brian has a new baby at home. We all understand (those

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of who've been parents) what he's going through and the demands on new parents. So I'm going to be chairing this.

We have a very full agenda for this call—an agenda that will be challenging in the 90 minutes we have allotted. In regards to the discussion that's taken place since yesterday afternoon on Trademark Clearinghouse Proposal #7.

Hold on. I just lost my Zoom room. I'm going to switch—you're going to have to bear with me—my Internet access to something more reliable. It's going to take a moment. I can't be chairing if my window keeps closing because of broadband issues.

... to exploring a limited system for reviewing TMCH records, perhaps through an accredited access system. So there may be a way forward, but without something specific to discuss that provides for oversight of the integrity of the database without full public disclosure, I believe we would just be spinning our wheels today and chew up a lot of time without reaching any conclusion.

I'll open it for brief comments on the procedural issue, not the substance of TMCH #7 or how it should be addressed. Can you hear me?

JULIE HEDLUND:

Phil, unfortunately, when you were first speaking, you were on mute. So we missed probably about two-thirds of what you said, unfortunately.

PHIL CORWIN:

All right.

I'm told that, when I rejoined on more reliable broadband, you missed a lot of what I said. I'm sorry for the rough way this meeting was started, but as I said, I was just drafted to chair shortly before it started.

All right. So on TMCH 7, there's been a robust discussion on the working group e-mail. I don't see it bringing us towards a point where we have something specific to discuss that we might find some agreement on. I noted the INTA comment where they said they might be open to some type of accredited oversight mechanism, but we need something far more specific. We have a very full agenda today.

So, so far as TMCH #7 goes, I'll open it for a two-minute discussion just on procedure. The Co-Chairs need to discuss this with staff to see how much substantive discussion there was in the prior meeting and whether we believe further discussion would be productive. Meanwhile, people on both sides of the issue will have time on the e-mail list and any other way they want to communicate to see if they can develop a specific middle-ground proposal for the working group to discuss. But we're not going to get into it on this call. We have a very full agenda already, and we'll be challenged to complete the published agenda in the 80 minutes we now have remaining. Is there any comment on that procedural decision?

Jason?

I'm not hearing you, Jason. I'm hearing something very low and distorted in the background. Maybe we can do a callout to Jason if we can put his telephone number in the chat.

I see Michael's hand up. So, Michael, why don't you go ahead while we're waiting for Jason to have a connection.

MICHAEL KARANICOLAS: Hopefully, this works.

PHIL CORWIN: I can hear you loud and clear.

MICHAEL KARANICOLAS: Wonderful. I'm 100% on board with pushing that discussion forward, but I do feel very strongly that it needs to take place. So, if we're going to put that on the agenda next week or the week after, that's fine with me. I think that this certainly needs to be on the agenda insofar as there has been new proposals that were made as part of the comment period that I don't think have been explored. I think that that's the exact purpose of what we're supposed to be doing here: discussing any new ideas that were raised. We have a new idea that was raised, and it needs to be robustly discussed. Thanks.

PHIL CORWIN: Okay. Thank you, Michael. As I said, we're not saying there won't be any more discussion. We're saying we need more groundwork to have any further productive discussion on that question, on that

individual proposal. We don't have that this morning, so we're giving everyone involved more time to tee that up properly.

Have we been able to contact Jason? I don't want to cut him off since he's the one ... Yeah. I see your hand, Jason. Can we hear you?

JASON SCHAEFFER: Phil, can you hear me now?

PHIL CORWIN: Yes.

JASON SCHAEFFER: This is me on the mobile. Thank you. I'll be brief. [I agree], Phil. I just wanted to clarify for the record that the intention of the e-mail was to do just that. I believe firmly that, had we had this discussion last week, we would have found that middle ground because I'm aware and others are aware that there were other options that were out there, short of the open database, although we don't need to debate the merits of whether it should or shouldn't be open. The point was is that we should have a discussion about the merits of what we can do as a group to ensure that the TMCH is operating properly and efficiently. That was my point. I do not believe that there was any intention, certainly by myself or others, to offend anyone in the e-mail or make any accusations. The point is I think we can do better and we should be doing better. I'm welcoming the discussion on the

merits to see if we can find a solution as a working group. Thank you.

PHIL CORWIN:

Thank you, Jason. Again, maybe there is a little ground where those opposed to a public TMCH database ... My personal point of view, not ruling as a Co-Chair, is that we're unlikely to get consensus on a wide-open, publicly-examinable TMCH database, and yet the people opposed to that may well want to make sure that the database has integrity and meets the requirements of the URS. Maybe there's a way to conduct oversight toward that end that doesn't raise their concerns. I would encourage you and Michael and those on the other side to work toward putting something together concrete that we can discuss.

I see Susan saying, "We've discussed that before."

I'll say, personally, Susan, I'm not sure what we've discussed before. Co-Chairs have not had a chance to review the transcript or discuss this with staff. That's why we're deferring any further decision on this until we have that opportunity.

So, unless someone else feels a burning desire to comment quickly on that procedural decision for today, we're going to go back to our published agenda, which is quite robust.

Looking at the chat, we don't even have an agreement on what's been discussed before, which is why it wouldn't be productive to get into this now.

Let's go to TMCH 4 and 5, which are related. I believe that's our first order of business today.

Can staff refresh my memory? I believe we've discussed both of these to some extent already and we're picking back up. Can staff assist me in noting exactly where we are on this discussion?

ARIEL LIANG: Hi, Phil. This is Ariel. Where we stopped is when Paul Tattersfield, Rebecca, and—well, sorry—one other member proposed a consolidated proposal to consolidate Proposal #4 and 5. There's new language being circulated in the mailing list. So perhaps we can look at that. But—

PHIL CORWIN: All right—

ARIEL LIANG: Sorry. Just one other note is that Rebecca did ask ... We started discussion by asking whether there's a chance to get consensus because a lot of commenters were picking between TMCH Proposal #4 and 5. So that's where we stopped.

PHIL CORWIN: Okay. Can we display that? So we have a proposal put together by several members of the working group which they believe will bridge #4 and 5 and has a chance of getting consensus. Let's take a look at it.

All right. I'm going to skip the prelude and look at the actual language. The language is to change 3.2 of the URS/to strike the word "any" and just have "wordmarks." So this is the standard of inclusion on the database. "Wordmarks" ... We're striking "any," and then, [are there] marks and indications that constitute intellectual property[?] Then, for 3.26, there's new proposed language, which I think is the heart of this proposal: "Protections afforded to wordmarks protected by statute or treaty do not extend to geographical indications and designations of origin." I'm not sure why the terms "geographical" and "of origin" are in brackets. It seems to me they're the most important part of this proposed language.

So basically—I'll stop in a moment and open the floor—I think one of the proponents of this language should be allowed to further explain it before we get into deeper discussion. It seems to me that the heart of this proposal is to clarify that GIs cannot be registered in the TMCH database, that geographic indications, even when protected by statute or treaty, would not allowed to be registered in the TMCH.

Let's open this for discussion. Paul, Rebecca, or others who participate in this, do you want to speak to it and make a case for why the working group should go with this?

Well, I don't see Mr. Tattersfield, and I don't see Rebecca. So it appears to me we don't have—

REBECCA TUSHNET: Uh—

PHIL CORWIN: Yes?

REBECCA TUSHNET: I do have my hand raised. Sorry.

PHIL CORWIN: Oh, Rebecca?

REBECCA TUSHNET: Yes.

PHIL CORWIN: Okay. I missed you. When you raised your hand, you jumped to the top of the list, and I was scrolling down. Go ahead, Rebecca.

REBECCA TUSHNET: Thank you. I do think there's room here. So I think it's true, and hopefully we'll hear from them. There are people who support putting GIs in sunrise and getting notices. I don't think that was the intent. I think, obviously, Deloitte wants them in because it makes them more money, but I'm not sure that that reflects what I understood to be the other agreement among most of the stakeholders: that GIs are distinct from trademarks. But hopefully we'll hear from the other side of that and get a sense of whether this can move forward. Thank you.

PHIL CORWIN: All right. Thank you, Rebecca. Kathy, go ahead.

KATHY KLEIMAN: Hi, Phil. Thank you for chairing today. One of the key questions that's been on the table is, is there enough support across the two Trademark Clearinghouse proposals (#4 and 5)? I did a quick review of that. If I read it correctly—the essence of #4 and 5 appeared to be similar and appeared to be reflected here in this improved simplified language, brought together by the proponents of both—what I see is support for #5 from INTA and the BC. What I see is support for #4 from the Non-Commercial Stakeholder Group, and CPH (Contracted Party House) supported without further comment. Then CPH further did not oppose #5.

So between 4 and 5 in terms of support, it looks like we have a full house—INTA, BC, Non-Commercial Stakeholder Group, and the Contracted Party House—for the essence of the combined concept which seems to be recognized here. So I just wanted to show you that. I don't know how often we work with the full house, but that's how I read the stakeholder groups on this one. Thank you.

PHIL CORWIN: Thank you, Kathy. Mary, I see your hand up. Please go ahead.

MARY WONG: Thank you, Phil. Hi, everybody. The staff obviously have no position or comment as to Proposal #4, Proposal #5, or even as to the question of geographical indications, designations of origin, or

appellations of origin. We definitely applaud the working group's effort to try and bring together potentially different positions that have some basic similarities, and we will support that effort.

What we do want to say is that, to the extent that these proposals and the working group's discussion seem to be coalescing around the theme that the Trademark Clearinghouse should be to protect trademarks and not necessarily those other forms of intellectual property, which may include GIs and so forth, then our suggestion is to make that as clear as possible. So, even in a proposal for other marks that constitute intellectual property, as is currently the language in 3.2.4 or any other formulation of 3.2.4, the working group make clear that distinction so that there is no confusion going down the road as to what the TMCH does or does not include or for what purpose.

The other thing we will stay from the staff perspective is that, in considering that path, there are definitions out there in treaties and so forth for GIs, for appellations of origin, etc., but there may well need to be consideration as to whether there is going to be an obligation on whoever the TMCH provider might be in the future or ICANN Org or any other body to make a distinction as to what is or isn't. That may be a substantive evaluation.

So our suggestion really just is to be very clear if you're distinguishing between trademarks as trademarks and other forms of intellectual property that might include GIs. Thank you, Phil.

PHIL CORWIN: Thank you, Mary. Mary, may I ask a question. You indicated some concern about 3.24 as presently written. Did staff have any suggestions for making the distinction between trademarks and other marks and indications clearer?

MARY WONG: To respond to that, Phil, we don't yet have any language because we think that the working group is still in the process of discussing this. Paul had offered his language as a way to move forward. We will certainly be happy to work with you and anyone on that.

I do note that Proposal #4 does include—Rebecca can probably speak to that more clearly—a way to treat these other marks that's different from trademarks. That may be a direction to go into if that is the working group's agreement.

PHIL CORWIN: Okay. Thank you, Mary. Paul McGrady?

PAUL MCGRADY: Thanks. I'm not hearing anybody being opposed to this concept, and I think that's right.

I just had a technical question about 3.2.6, where it says, "and designations of origin." I've heard the term "appellation of origin," and of course I've heard the term "geographic indication." I'm a little worried that "designation of origin" could mean anything. In fact, trademarks themselves are often viewed as designations of origin. Do we mean "appellation of origin" here? What's a

designation of origin that's not a trademark? Maybe someone can explain it to me, or we can fix it if I'm not completely off base. Thanks.

PHIL CORWIN: Thanks for that, Paul. Greg Shatan. Go ahead, Greg.

GREG SHATAN: Thanks. I have a few ... maybe we'll call them problems, maybe suggestions, with regard to the proposals as it's currently on the screen.

First, in listening to what Mary Wong had to say, I think one of our problems overall is the use of the word "mark." I would suggest that we use the term "trademark" and drop a footnote the first time and make sure people understand that it includes service marks and collective marks if we need to have some sort of catchall for other things that are actually registered in trademark registries. I think if we said "trademarks" throughout, we wouldn't be in the pickle that we're in today.

Secondly, the term "wordmarks" harkens back to some of the lengthy discussions we had before about marks with words but other matter. I don't think we ever settled that discussion. So I'm concerned that this is an attempt to narrow that without having a real discussion or without having completed the discussion we had before.

3.2.4, I think, probably should just leave entirely. It's getting worse. The addition of the word "indications" is now taking out of

Trademark Land or even Mark Land entirely, which is just a huge trip in the wrong direction. I think, again, if we were to use the word “trademark” as a properly-defined term in 3.2.6, we wouldn’t even need it because it would be clear that what we’re talking about are marks where a statute or treaty creates protection for a trademark and not this idea that this is the neighboring rights and wandering by-rights that seem to have been added in purposefully or unintentionally over time.

So I think this is problematic for several reasons. I could support it with the changes. But without that, I think it’s just another individual proposal that should stay in the boneyard. Thanks.

PHIL CORWIN:

All right. Greg, let me ask you a question. I’m thinking about this. This is from 3.2 of the URS rules. I haven’t looked at the rest of the rules for this discussion, but I’m suspecting that the word “mark” is used through the rules and, if we’re going to put the word “trademark” in here to clarify them, to be consistent, we’d have to amend the rules throughout so that it’s consistent in using the word “trademark” rather than “mark,” perhaps with a definition somewhere. I don’t think that’s an impediment—doing that—but I just wanted to raise that as a consideration if we go your way.

Any response on that?

GREG SHATAN: Yeah. I would say that, if we're going to define a term, we could always define the term "mark" but define it properly so that it is centered on and really no broader than the generally-accepted-within-the-legal-community term mark, which is essentially a trademark with the idea with the idea that trademarks embrace service marks and collective marks and certification marks. So, rather than changing "mark" to "trademark" everywhere, we could just come up with some true boundaries around the term "mark" so it's not spilling into things that would never be called trademarks. Thanks.

PHIL CORWIN: Okay. Yeah. I'm suspecting—we're going to have to work with staff on this if we go this way—that it may be a little more complicated than that because, in several places in this rule, the word "mark" is modified by the word "word." So it's "wordmark," and, in other places, the word "mark" is used on its own or modified in another way. For example, in 3.2.5, we have a reference to marks without/within any opposition period or registered marks that were the subject of ... So we've got not just mark but different modifications of the word "mark." So it's a technical issue, but I don't want to belabor that.

Rebecca, back to you.

REBECCA TUSHNET: Thank you. Phil, I think you're completely correct about the pervasiveness of the term within the rules. I think it is also correct to say that a single definition could probably deal with that. I

actually do think that adding indications points us in a better direction in 3.2.4 because indications is a recognized term limited only to geographic terms. We could add in appellations, too, to make that clearer and help distinguish what we recognize as the difference between trademarks and geographic indications generally.

I just wanted to object to this characterization. I think we all understand that, right now, Deloitte is taking anything that has a word component. I think we all understand that, in order to change that, we would have to reach agreement—something that has, as of yet, not happened.

So this is not an attempt to smuggle in some narrower definition of “wordmark.” It’s not an attempt to remove “wordmark” or alter it. Let’s not look for hidden meanings, especially when we know that Deloitte, especially in the end, is going to try to take in as much as it can under the rules that it has because that’s its incentive. Thank you.

PHIL CORWIN:

All right. I’m going to call on Massimo in a minute. I note that there’s some useful comments in the chat. There’s some disagreement about whether indications are or are not supposed to be in the clearinghouse.

Go ahead, Massimo.

MASSIMO VITTORI:

Thank you, Paul. Sorry. I’ve just joined a bit late.

PHIL CORWIN: I'm Philip, not Paul.

MASSIMO VITTORI: Ah, sorry. Sorry for being late. I don't know, but probably I missed some of the discussion. I just wanted to reiterate my point that I made by e-mail that. My main point is that some of your position we have, both to Individual Proposal 4 and 5, in my view, not only origin but if you look at marks and ECTA, which is also an organization representing trademarks ... Their position is also on the fact that GIs would be excluded from the Trademark Clearinghouse. So I don't see the reconciliation as a way of taking into account those remarks because, in that case, an [ancillary] database will not give any legal certainty in terms of having some specific rights recognized to GIs.

As to the fact that GIs equal trademarks, this is not true. I agree with the people that say GIs and trademarks have different natures. I think someone has sent a message about the way the U.S. thinks and conceives geographical indications. The only way to protect geographical indications in the U.S. is the certification mark way in the sense that, if you want some level of recognition of your GI in the U.S., you go through the certification mark scheme. This has been considered and is widely recognized compatible with the TRIPS Agreement. So while geographical indications are not equal trademarks, I think some similarities are there because we are talking about distinctive signs.

So all of this is to say that, in my view, these individual proposals do not have enough support and also a lot of legal support to be reach the consensus stages. Thank you.

PHIL CORWIN:

Massimo, thank you for that. You joined us late. I would say—this is my impression—that, until you spoke, every other speaker, while suggesting ways to improve the language of this proposal—clearly we’re in a very complex legal and technical area here (the distinction between GIs and trademarks) and one that’s controversial—seemed to be generally for the position that the TMCH database, other than with the possible exception of ancillary services, which is addressed in Proposal #4, should not be in the TMCH. So that doesn’t mean your position is invalid, but it’s whether there’s enough opposition to the basic concept of keeping GIs out to prevent consensus agreement on that, where folks opposed to that would have a right to file a minority report.

I’m going to hear from Professor Tushnet now and then see if I can sum up and suggest a way forward. Rebecca, go ahead.

REBECCA TUSHNET:

Thank you. Clearly, Massimo and I are not going to come to full agreement. I just did want to address one point that he made, which was that accepting Susan’s amendment would make pretty clear that any GI that was also registered, really, anywhere or recognized in court anywhere as a trademark would be entitled, through 3.2.1 or 3.2.2. So it's not impossible. Obviously, that is easier in the United States. Thank you.

PHIL CORWIN:

Okay. The two hands I see up are from people who just spoke, so I'm assuming that, Massimo and Rebecca, those are both old hands.

Let me try to sum up my impression of where we're at. As I just stated, other than Massimo, all the other speakers seem to be of the view that geographic indications as a general matter should not be eligible for registration in the Trademark Clearinghouse database and be eligible for generation-of-claims notices and sunrise registration rights. But I've also heard concerns and suggestions for further amending this language of feeling that this language is not yet ready for primetime and for being adopted.

So I would suggest—we're at the 40-minute mark into the call, and we have many other issues to discuss—that the proponents of this proposal—I thank them for putting this on the table; I think it spurred a useful discussion; that would be Rebecca, Claudio, and Paul Tattersfield, as I understand—review the transcript on this matter from this call and perhaps you reach out to some folks who have spoken to this and expressed various concerns and made suggestions for improving the language and see if you can't agree on a further distillation of this language that meets those concerns that we can look at in the future call. I don't think we're going to be successful in wordsmithing this to something we can reach consensus on in this call, but I do sense that there's a way forward where we might get consensus, recognizing that there may be objections. Objectors on issues where there's consensus always have a right to file minority views for the information and education of both [council] and the ICANN Board.

I'm reading the chat.

So this Chair is going to rule that we move on to another issue now and that we encourage the proponents of this to work amongst themselves and others to further refine this proposal into a form that addresses some of the concerns and suggestions that have been made over the course of the last 30 minutes. Then maybe we can have something that's ready for adoption by the working group. But I don't think we're going to get there today. I think it's something that needs to be taken offline and developed further. Maybe, two or three calls down the line, we can come back and look at something we can reach consensus on.

There's a lot in the chat, as I've noted. This is a very technical area. There's different ways we could go. Maybe the way to go is just to focus on saying the clearinghouse is just for trademarks with a tight definition and not try to distinguish between all these other types of marks that Mary notes in her latest post. But we're not going to get to agreement on this call. We need further work offline to further develop this language.

With that, I'm going to ask staff to move on to the next issue.

Massimo, I see your hand up again. Is that old or new?

MASSIMO VITTORI:

It's new. 30 seconds just to say, since we will have much more time to think about, to everybody that there are at least 15,000 registered GIs in the world. A lot of economic actors rely on GIs for their business.

So I think, when we think of a solution, it would be a pity somehow to exclude an economic reality which serves to identify specific goods. At the end of the day, we're giving information to consumers. So I think that distinction is more philosophical than really technical. So I think also that it's a pity for a working group that wants to increase their legal certainty in the domain names environment to exclude a reality that is there. Whether you like it or not, it's there. So I think it would be a pity.

Also, Deloitte, in their comments, have mentioned that, so far, they have not encountered any problem in managing the registration of geographical indications. And they have not gone against any of the preestablished ICANN rules in doing so.

So I think it would be a pity that we are here to increase the legal certainty. We're just removing a legal category, which might not be identical to trademarks. But it ensures, for sure, the same goal of informing consumers. Thank you.

PHIL CORWIN:

Thank you for that, Massimo. I certainly understand your concerns. I would note that, wherever we wind up on this, neither ICANN or this working group had any ability or intent to strip GIs or any other marks that are protected by various laws of those legal protections. They're still available. We're just discussing whether marks other than trademarks should have first-in-line to register those marks in a new registry and to generate a warning in the form of a claims notice to someone who's planning to register an exact match of that GI or other non-trademark indication. So all the legal rights that GIs are entitled to in various

nations would remain, and the holders of those marks, however we refer to them, would still be able to exercise their legal rights. But we'll be coming back to this, I suspect.

Let's go to Overarching Charter Question #1. Let me read it and then I'll repeat what I said last time I chaired and this came up. We've got, I believe, three overarching questions and three additional overarching questions. One of them is on whether any of the RPMs should become consensus policy, which is really a discussion of whether URS should become consensus policy. But that is not on the agenda for today's call. That's something that requires some type of yes or no answer from this working group. But all the other questions are of the nature of Question #1. Let me read it and then comment and then open the discussion.

The question is, "Do the RPMs collectively fulfill the objectives for their creation, namely to provide trademark holders with either preventative or curative protections against cybersquatting and other abusive uses of their legally recognized trademarks?" In other words, have all the RPMs in the aggregate been sufficient to meet the objectives, or do new or additional mechanisms for changes to existing RPMs need to be developed?

So that's the question. This is a very broad question. We've all been aware of this and the other overarching questions. Since the first day this working group met, they've been referred to at various points in discussions by the working group of various proposals to readjust the RPMs in some ways. We have some members who feel that the RPMs are falling short of providing trademarks with adequate preventative or curative protections against cybersquatting and other abuses. We have other

members who believe they've gone too far. We've seen proposals to expand them. We've seen proposals to dial them back. So this and the other overarching questions have been on our minds and have colored our discussions over the past four years.

So what I suggested on the last call, which I happened to chair when this and the other overarching questions came up, is that, if we're going to try as a working group to formulate an answer by the working group to this question now, we could spend a very long time on that and maybe not have great prospects of achieving agreement on the language. I suggested that the real review we want to do here now is to consider and hopefully affirm that we have considered this question in a wide variety of contexts as we've discussed various working group and individual proposals and shaped them, which I think we certainly have. To the extent we believe or will agree on revisions of the RPMs, that's our suggestion for how to make them better. But, beyond that, really all we need to do is reach agreement that we have considered this overarching question throughout the four-year course of our work and checked that box [of that] it would not be productive to try to reach agreement on a paragraph of the final report that addresses this question because we're going to have people who think they have fallen short and others who think they've gone too far. Those views have been expressed in the debates on various proposals.

I'm going to stop there and open it up to discussion, which is really of what our approach should be to addressing the five overarching questions on our agenda.

Kathy, go ahead.

KATHY KLEIMAN:

Thank you, Phil. I agree—here it's as a member of the working group today—which most of the approach you laid out. I do think it would be worthwhile to maybe ask staff, if we look at a general overarching charter question and it's raising a burning issue that needs a decision or that flags something that is burning. I think we have to address it.

But to the extent that it repeats, and the public joins us in repeating positions that are well-balanced or that shows the right compromise may have been cut originally and currently, then I think it would be useful to put together a summary (maybe we can ask staff to do that)—a summary of ... In this case—I'm switching my screen now back to my own screen—we've got the organizations that believe that the new gTLD RPMs are sufficient to meet their objectives, and I think we should summarize that [aim] in the BC [and] a number of other organizations, like the ALAC. The RPMs have been sufficient to meet their objectives. And GBOC.

But there are a number of organizations that think it's insufficient, so one question I think is, does the core and academics and non-commercial organizations and individuals think we might have gone too far? Do we want to act on that? If not, that we should discuss. But, if not, we should certainly summarize it, I think, so that we have a balanced and comprehensive response to the GNSO Council, which gave us the questions.

So in summary—sorry, long response—even if we're not going to act on the overarching question, even if it doesn't point us in a

direction of action, we should well-summarize the responses. And I don't think we have to do that as a working group. Thanks.

PHIL CORWIN: Paul McGrady, if you could hold for a second—since Kathy addressed a question, staff [and] Julie Hedlund has her hand up—I'm going to call on her and then get back to you, Paul. So, Julie, go ahead.

JULIE HEDLUND: Thank you, Phil. With respect to a summary, staff has already summarized the comments received. It's not only that summary and the donut, but if you prefer not to look at the donut, you can look at the tagged information in the [complete] donut. We've actually organized them in this way as well, so that, as you see, we have "sufficient to meet objectives"—so we've summarized all of those together—the "insufficient[/]non-TM holder interests[/]unbalanced." All those comments are summarized and grouped together. Then, in the text, [inaudible] to provide protection against cybersquatting [inaudible] [again, summarized and gathered together, insufficient URS ineffective,] summarized and gathered—

PHIL CORWIN: Julie, we're getting multiple comments in the chat that people are having difficult hearing you. Can you get closer to the mic?

JULIE HEDLUND: Very sorry. I'm trying to speak as loudly as I can. I'm wondering if Ariel can ...

ARIEL LIANG: Yeah. Thanks, Julie. I think it's just your volume is slightly low, but I think you covered what we have. We want to say, from a staff point of view, that the summary has already been provided. If the working group doesn't want to focus on the actual numbers in the donut chart, the title associated with the slices provide the summarized information based on our review of the public comments. So we believe we have already provided that summary, and it's for the working group to deliberate on them.

PHIL CORWIN: Okay. Just to clarify, Julie and Ariel, to make sure I understand you correctly, I believe that what you're saying is that staff, when we look at the final report ... that the provisions of the final report that contain these overarching questions, which are of a broad nature, not requiring or susceptible to a simple yes or not answer, that there will be language in the final report summarizing the views and pointing out that some members of the community felt that they were sufficient or that they went too far in favoring trademark owners, and others felt that they were insufficient and could go further.

I'm reading Mary's language in chat no. "The final report will no doubt have some text about the working group's deliberations about [that] these are their overarching questions but that the

current tool already summarizes the positions and comments.” I would agree with that.

So I’m hearing that we’re going to have language to look at in the final report of a general nature—a paragraph or two for each of these overarching questions—that confirms that we, in the course of our work over more than four years, had these overarching questions in mind, we addressed them in the context of various questions of various proposals, and that there’s no overall agreement within the working group and the community about what the answer is.

With that, Paul McGrady and then Kathy after him. Paul?

PAUL MCGRADY:

Thanks. I think the good news is we’re all saying the same thing, which is that the reaction to the question, which would have been a fine diagnostic question three-and-a-half years ago, is that there’s not much to do with it now, other than to note, as both Kathy and staff have done, that there were a variety of opinions on this. Some thought this, some thought that. The bottom line is that we are suggesting changes as a working group, so there must be some there there in terms of things needing improvement. Then we leave it at that.

It’s hard to haggle over the specific language that staff is proposing without actually seeing it, so I don’t know that we need to spend gobs more time here, but I just wanted to say that it sounds like everybody is generally in agreement that that’s what you do with a question like this. Thank you.

PHIL CORWIN:

Thank you, Paul. Certainly, the last part of this question about whether we need new or additional mechanisms, well, we've answered. We haven't agreed on any new or additional mechanisms. Changes to exiting RPM: we have agreed on some proposed changes that appear to be on the path to becoming final consensus recommendations. So the answer is, to a large extent, in the output from the working group. In other cases, we just couldn't reach agreement on the examples I'll give. We had trademark owners who wanted registration [in] the database, the TMCH, and claims notices to be generated not just by exact matches but in any domain name that contained the mark, and we didn't have consensus on that. On the other side, we had folks saying the sunrise should only be available in TLDs, under some standard, [that] are related to the goods and services protected by the marks, and we didn't get agreement on that.

So we considered many variations of how to change these, and we've agreed on a small number and rejected a larger number. That's where we're at. We're going to have final report language addressing each of these questions to discuss a little bit down the road. So we will come back to that.

But, unless I see further hands, I'm going to assume there's general agreement that our approach to [revealing] these overarching questions should simply be to affirm that we had the overarching question in mind as we did our work over the last four years and that any further discussion will be put off until review the staff's proposed language in the final report.

I'm not seeing any hands up, so I would suggest we close out #1 and move on to, I believe, Overarching Charter Question 3. Is that our next one?

Okay. Overarching Question #3 is, would changes to one RPM need to be offset by [time] [inaudible] changes to the others and, if so, to what extent?

My personal observation is that I don't recall—maybe others can—that we've made a lot of tradeoffs saying we're going to adjust this RPM this way and modify that one the other way to link them together.

I noticed that there was a comment yesterday from one of the working group members. Just let me check. Yeah. That was from Nat Cohen—he's with us today—suggesting horse trading. I have found in my Washington work that horse-trading can sometimes be a path forward, where two different propositions are linked, and one side accepts some modifications of one in exchange for some changes in the other. We haven't done a lot of that. It's certainly something we may engage in in this final consensus stage, and it might be useful if it gets us across the line on some proposals.

But, again, I think we've had the possibility of doing that. I don't recall that we've done that a great deal in this working group. We've tended to address proposals on their own and not link to tradeoffs on others. But we're not barred from doing so. But I think we've had that possibility, and the answer to this question is, once again, contained in the final output of the working group.

Does anyone have any comments on Overarching Question #3?

KATHY KLEIMAN: Phil, I raised my hand. This is Kathy.

PHIL CORWIN: Go ahead, Kathy.

KATHY KLEIMAN: Just asking the question, really, of, is there anything here in this confusing question, I found, that needs to be especially highlighted back to the GNSO Council? That's my question as I go through it: is there anything we thought about or some kind of new insight that may help us explain this to others like the council? That's my only real question right now. Thanks.

PHIL CORWIN: All right. Does anyone ... Let me check the time. Let's spend a minute just scrolling this. Does anyone see anything new in here that would need to be noted? Let's just scroll down through the answers.

KATHY KLEIMAN: You have two hands up, Phil: Paul and Mary.

PHIL CORWIN: Okay. I'm going to take Mary first for staff's perspective and then go to Paul. Go ahead, Mary.

MARY WONG:

Thanks, Phil. Just real quick. In terms of these general overarching questions, specifically this one particular one— Question 3—these were in the charter in that section as general overarching questions simply because this PDP was to review the RPMs. In Phase 1, it was the 2012 RPMs. So one reason why the group postponed discussion of these questions, as you'll recall, is that the answer really depends on the review of the RPMs. So, if there is or was going to be significant changes to one or more of the RPMs, then the intent behind this particular overarching question was to make sure that the working group considers the RPMs in relation to one another. So the answer to this question pretty much depends on whether or not your ultimate agreement is to change significantly one or more of the RPMs. That's really why it's here. Again, this is something that we can include in the final report in some text to indicate that you have discussed this. Thank you.

PHIL CORWIN:

Okay, Mary. Thank you for that. I would just respond that I don't believe we've made any radical changes to any of the RPMs. We've mostly made changes around the edges for general improvements.

I'm going to be quiet and call on Mr. McGrady.

PAUL MCGRADY:

Thanks. I'd like to give us a get-out-of-jail card on this one by declaring victory. I think this answer is much like the one above it, where we say, "Yes, we made changes and, in that process, they

were give-and take among all the RPMs that we looked at and, as a result, our report is not a binary “Yes, everything needed to go,” or “No, everything could stay.” We’ve done our job. Thank you. Sincerely, the working group.”

I think that, again, this would have been an interesting diagnostic question three-and-a-half years ago, but right now, I don’t think there’s anything to do other to tell the world that we did our job and that of course there was give-and-take and that’s why the report looks like it does. Thanks.

PHIL CORWIN:

All right. Any further comment on Overarching Question #3? If not, we’re going to move on and just note, as for #1, that we’ll be discussing, at some point down the road [brass tacks] language, specifically providing some consolidated summary of the community’s views on this question and a notation that it was in our minds as we did our work, but, especially given Mary’s contextual reminder, since we haven’t made any major changes to any of the RPMs, we’ve never gotten into a discussion of whether such a major change needed to be offset somewhere else.

Let’s move on to the Additional Overarching Question #1. I don’t know why some are general overarching and some are additional, but that’s the way it is.

MARY WONG:

Phil, this is Mary again. If I may interject, the reason why there are different kinds of overarching charter questions is that the ones that we have marked “general” are the ones that were in your

charter as questions the council put in the charter. These additional overarching questions are questions that came from the compilation of previous comments from the community that did not belong as charter questions in either the TMCH or the URS, etc. So we felt that we needed to preserve the distinction between the general overarching charter questions that were put in the charter by the council and these additional questions that came from a different source but that did not fit into the consideration of individual RPMs.

PHIL CORWIN:

Okay. Thanks for that, Mary. On this one, let me do something here. Staff, can you scroll down a tiny bit so I can read fully—yeah, right there is good. Let me just review this with some comments and then see if there's further discussion. We've got two parties: [Marks] and IPC. One said that they were questioning what's meant by "registrant protection" and there's no evidence to suggest that the RPMs have caused any issues that would not protect or strip away registrant protections. The IPC said the RPMs don't mention registrant protections, and ICANN is not in a position to become a transnational legislator.

Let's look at the comments of those who felt that we didn't adequately—no, don't scroll down any further. Please go back up so I can read the summary. You'll see what my intent here is in a moment. Okay. Let's look at each of these individual comments.

First one: "Do not adequately protect freedom of expression or fair use." I don't recall a great deal of discussion on that, but, then again, I'm not sure how the rules around a domain name as

opposed to the content at a domain would really greatly inhibit freedom of expression and fair use, that, if one domain name that a party wanted to register contains some legal risk or would actually constitute trademark infringement, it wouldn't prevent that party from registering a different domain name and saying anything they wanted within it.

"Secrecy of the database." Well, we started this meeting with a discussion of that exact topic, and we may well come back to it. So it's something we've been looking at.

"Not attaching the sunrise period to categories of goods and services to the trademark owner." As I just noted a few minutes ago, we had a proposal to restrict sunrise and claims notices in that manner. It didn't gain consensus. So we discussed it.

"The claims notice has a clear and broad chilling effect." We've discussed that. In fact, we're recommending that it be rewritten in a way that it doesn't have that type of effect.

"Inconsistency between panel decisions." I believe we're making recommendations for much clearer guidance to panelists, and more transparency of the decisions, in requiring the panelists to provide a clear rationale for URS decisions. So we've addressed that.

Abusive complaints is another topic we've discussed in regards to the URS.

"Case law." Again, we've discussed an overall guidance for all examiners. I believe we're making a recommendation on that point.

Consensus view. Similar concept.

“Eliminate URS.” There’s no consensus for that. It’s a very small minority that wants to eliminate it.

“System tilted heavily in favor of established trademark interests. Registrants lose out.” Well, we made some adjustments, but the view is what it is. We’ve discussed it. Some people articulated it.

“Trademark owners only can prevent others from using their trademarks as strings in domain names to limited circumstances.” Well, that has come up in various proposals where trademark owners wanted to expand the circumstances. We haven’t reached consensus on doing so.

So my point here is that, in one way or another, we have, in the course of our work, addressed all of these concerns—maybe not to the satisfaction of those who voiced the concerns, but we’ve checked all these boxes. All these topics have come up in our discussions in various proposals. I’m not sure what more we can say on this, other than that the recommendations we do make—I see your hand up, Michael; I’m going to stop in ten seconds ... For those who want to say more on this subject, they always have the right to file minority views on the final report to express their dissatisfaction with whatever we’ve done on this topic.

With that, I’m going to call on Michael to comment. Thank you.

MICHAEL KARANICOLAS: Thanks. I’m not really sure what we’re supposed to do with this. You mentioned that all of these issues that people have raised

here have also been raised elsewhere, and that's certainly true. I think that's what you get with these overarching questions: people bundling all the concerns that they've seen elsewhere. It's not accurate to say that these concerns have all been addressed. They've all been discussed. You say, "Well, there was an issue that was there and we just didn't get consensus on it." That's not addressing the problem. The fact that people are standing in the way of fixing a problem or don't agree that there is a problem doesn't mean that the ... You can't then say, "Well, we addressed that." Now, I agree that you don't necessarily need to belabor it further, but I also don't necessarily say that it's accurate to say, "All right. Great job, everybody. All this stuff has come up."

But the fact that we're not making progress on these issues is not something we should be congratulating ourselves about, but I'm also not sure what the purpose of this question is to begin with in the sense that I don't think it advances the discussions that are happening elsewhere. So I'm not really sure what we're supposed to do with it.

PHIL CORWIN:

Thank you, Michael. Kathy, I see your hand up. I'll get right to you. Just in response, all these questions are very difficult to respond to because they came up in the context of various concrete proposals that we either did or didn't reach agreement on. I'm sure we have trademark owners who believe that we haven't adequately addressed the shortcomings in the RPMs as they view them. They may file minority statements to that end. And we have people, like Michael and others, who think we haven't adequately addressed what they see as overreach by these RPMs. But we

weren't able to reach agreement on their proposals. So we're going to have dissatisfied working group members on both sides of all the concrete questions that addressed the issues' overarching questions, but we're not going to reach new agreement on them at this point.

So I think this exercise is just to make sure that we've really taken these overarching questions into account as we've conducted our work. I think, so far, is the answer is: we have. We just haven't been able to agree in many cases on what the proper answer is.

With that, I'm going to call on Mary again, then Kathy, then Cynthia. Mary?

MARY WONG:

Thank you, Phil. One additional note on this additional set of overarching charter questions, as distinguished from the general overarching questions, is that, for these additional overarching charter questions, the actual language and text of the question was preserved from the original comments that were submitted. In other words, neither the council, when it chartered the PDP, nor the working group, when it first encountered these additional questions, refined/alterd the text that you see on the screen. I don't know if that's helpful, but we thought that we should offer that as a full explanation for these questions. Thank you.

PHIL CORWIN:

Thank you. That's somewhat helpful, Mary. I note comments in the chat that sometimes progress is made by recognizing there isn't enough consensus. That's both protective in some ways, if

you don't want a certain recommendation to be adopted if they think it goes too far, and it's frustrating in other ways.

I note Griffin's comment that we were given a somewhat messy charter. Noting that we spent about six months consolidating and rationalizing the questions, that's evidence. And the work of GNSO Council on the PDP 3.0 rules so that that type of charter doesn't recur, based on our experience, is also noted.

Kathy and then Cyntia.

KATHY KLEIMAN:

Sure. Coming off mute. What strikes me hear as a little different than the other charter question we looked at is that there is concern here. So do the RPMs adequately address some of the registrant protections, such as freedom of expression and fair use? What we find is that, actually, of those who responded—there was a lot of no responses—more said no than yes. 21.8% said yes. 1.8 said “yes with some significant changes.” 30.9% said now.

Then, when you look at staff's summary that you took us through—I'm glad you did, Phil—in the summary box where it says, “No, RPMS do not adequately address issues of registrant protection,” staff starts it with, “Due to the extensive comments.”

So what I would suggest here is that our summary might reflect that there is—what's the French word?—an [enkiatude]/a concern that we've tried very hard to try to address some of these, like the inconsistency between the URS panel decisions but that, for the GNSO Council and also for the future reviewers who will follow us

in a decade or two decades, I think this is an interesting question. I think we can reflect this accurately and fully with no cost to anyone. Thanks.

PHIL CORWIN: Thanks, Kathy. Cyntia?

CYNTIA KING: Hi. I just wanted to point that the overarching questions were raised in our subgroups. I'm not sure about the subgroups that I wasn't one, but, in the two subgroups that I was on, we definitely pulled the overarching questions into the discussion purposefully to make sure that, as we moved forward, we incorporated the message/thoughts/evidence that we had about the overarching questions. I want to thank Susan Payne, who was especially good at doing that.

But the subgroups did consider the overarching questions. I don't think there's any question that they weren't considered or that we've given it short shrift. It's incorporated into the very fabric of what we've been doing. Do we feel that there is more that needs to be said? Possibly. But to intimate that we didn't fully consider these as we move forward would be a mistake. Thank you.

PHIL CORWIN: Okay. Thank you for that. I think we've had a good discussion. We've got ten minutes left—actually, nine minutes. We'll come back when we look to the staff-proposed paragraph or two in the

final report responding to this Additional Overarching Question 1. I don't see any benefit from further discussion.

Let's move on to #2 and see if we can't at least wrap that one up before the end of the call. "[In the recent and strong] ICANN work seeking to understand and incorporate human rights into the policy considerations of ICANN relevant to the UDRP or any of the RPM ..." Basically, this is an open question on whether human rights are relevant to the UDRP, which is not a subject of Phase 1 or any of the new TLD RPMs.

Looking at the donut, I only observe that two-thirds of those who responded otherwise to our additional report had no response to this question. Of those that responded, the majority said it has a relationship to RPMs and should be incorporated somehow.

Can we scroll down and see if there are any specific ... We see a number of comments all saying, "Yes, human rights considerations should be incorporated." Anything below that? Some thought it was outside our scope. Some thought that no changes were needed.

I would note that I don't believe in those comments that said it should be incorporated, that there were specific suggestions for how it should be incorporated. I must say, as a Co-Chair, I don't recall a great deal of discussion in the context of any specific proposals we discussed of human rights considerations.

With that, I'm going to open it up to discussion. But, other than saying that some members of this community said it should be incorporated and somehow considered by this working group, that

there's much more to say on this, of those same individuals, I don't recall many or most of them bringing up human rights concerns on any of the proposals we discussed or more generally.

Cyntia?

CYNTIA KING:

Hi. That's an old hand, but I do want to say that I do think we didn't give this question as much attention as we could have. There was some discussion about how to protect registrants when their governments may not have their best interest at heart. But we didn't give this as much attention as we possibly could have. I would love to do something more with it. I just don't think that we have the time to do that. Thank you.

PHIL CORWIN:

Thank you, Cyntia. Kathy, go ahead.

KATHY KLEIMAN:

Thanks, Phil. I agree with Cyntia on this one. Also just that, of those who responded, the vast majority saw the overlap that human rights are relevant to the UDRP and RPMS.

I note that, as I've been told many times and taught many times, human rights go far beyond free expression. So I think this is important to note because I think it will link into Work Track 2 and some of the new human rights work is going on.

So I think we should report that, of those who responded, although it was 23.6% of respondents, the vast majority of them saw the

overlap here. So I think we've brought that back. [Let's] see what ICANN does with that in the future. Thanks.

PHIL CORWIN: Okay. We've got four minutes left. I'm going to call on Griffin and then see if we can close this out. Griffin?

GRIFFIN BARNETT: Hi. Thanks, Phil and everyone. I just want to reiterate something that I posted in chat that I think is worth saying, which I that I understand people are saying, "Well, maybe we didn't consider "human rights" in our [inaudible]," but I don't think that's necessarily true because, if you actually drill down into what human rights real large encompasses, it's things like, as others, I think, have noted, free expression, privacy rights, protection of IP rights, and things like due process. I think those concepts are all things that we have discussed in various contexts throughout our discussions.

So, even though we might not have used the terms "Human Rights"—capital "H," capital "R," or whatever—I think a lot of the actual individual concepts that are captured under that header have indeed been woven into our discussions through the process. So I just wanted to add that. Thanks.

PHIL CORWIN: Thanks, Griffin. I'm going to call on Mary, but first I'm going to observe that, certainly, of everyone who commented on the initial report that human rights should be a consideration in review of the

RPMs, many of those commenters have been members of the working group and have been free to raise human rights concerns generally regarding any of the RPMs or in regard to any proposed recommendations, whether working group recommendations or individual. Maybe I'm forgetful, but I'm not recalling a whole lot of human rights concerns being expressed in the course of our four years of discussion. But that option has always been open to any working group member.

Mary, go ahead.

MARY WONG:

Thanks, Phil. Just more context in specific relation to this charter question. Again, the text here is preserved from the comments that were submitted, but we want to note that those comments were submitted before the completion of the accountability work that was done around the IANA stewardship transition. I think, as some folks in this working group know, following the completion of that work and several ICANN Board resolutions, a human rights core value, as well as the framework of interpretation that was developed by the Accountability Working Group is now indeed part of ICANN's bylaws and core values. So whether that's relevant for the working group's deliberations in Phase 2, it's now a fact that human rights is part of ICANN's core values. So, to that extent, policy development work would have to abide by that core value, too.

PHIL CORWIN:

Okay. Thank you, Mary.

Paul McGrady, no you're not reading that right. Staff is just showing the very last answer. There were lots of responses to this question, most of which says human rights considerations should be incorporated in our work but didn't go beyond that with specific concerns and suggestions.

So I think, once again, we have an overarching question where we're going to have another chance to review the draft staff language summarizing the community response, but beyond that, there's not much for us to do at this point in our work.

Does anyone have any last comment on this or anything they want to bring up before I end today's call?

Susan Payne?

SUSAN PAYNE:

Thanks, Phil. Just really, really quickly. To the extent that staff's language doesn't reflect any kind of assessment of a certain volume of respondent support—this “answered yes to this question—could we please avoid the use of percentages? Because, as we've discussed on so many calls, those percentages are truly meaningless. So could we just have some language that indicates in very general terms? Personally, I feel, if we're going to do that, we should also reflect that the vast majority of respondents, if we're going by volume here, appear not to give a damn about this. Most people either had no opinion or no response.

PHIL CORWIN:

All right, Susan. I'm not sure we're going to have language in the final report that says the majority doesn't give a damn about human rights, but I think the staff should just stick to summarizing the comments. As we had a lengthy discussion last week about what weight, if any, should be given to the donut summary, which is just a summary of discrete responses and not an attempt to weigh the responses, I think we all agreed on that, that we should probably avoid any characterization by staff to try to go that next step in assigning weight to the summary of responses on one side or another of any questions.

With that, I'm going to thank everyone. We didn't complete our agenda for today, but we got about three-quarters done. We'll see you all again Thursday. Hopefully, you can participate. Thank you, and good luck on the rest of your day.

[END OF TRANSCRIPTION]