

**ICANN
Transcription ICANN64 Kobe
GNSO Review of All Rights Protection Mechanisms Part 3
Monday, 11 March 2019 at 12:15 JST**

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record.

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page
<http://gnso.icann.org/en/group-activities/calendar>

Julie Hedlund: Welcome, everyone. This is the Rights Protection Mechanisms PDP Working Group and it's the Sunrise Sub Team meeting today on Monday, 11 March, 2019. And thank you all for joining us today. Just again as a housekeeping note there are sandwiches in the room for working group and Sub Team members. We will ask those who are not in the working group or Sub Team to please wait I would say at least 15 minutes to make sure that those who are here for the working session are able to have a lunch.

And with that, and oh by the way, I'm Julie Hedlund from staff, and with that I would like to turn over to Kathy Kleiman who is the PDP Working Group co-chair. Kathy.

Kathy Kleiman: Hi, everybody. Kathy Kleiman. Thank you so much for joining us in the Ruby Room today. I hope the library books are all law books. And now I'd really like to welcome everyone who's here at the table, which are working group members and Sunrise Sub Team members and everyone in the chairs who've come to listen and also to provide input if you'd like in our conversations, so thank you very much. And of course we encourage you to

join the working group if it's appropriate to do so because we have some people back there who are interested in joining us and helping share what we are doing, which is awesome.

So this is our third of four sessions, face to face sessions and so the marathon continues. But we've been doing great work as we - I'm just going to give an overview for anybody who doesn't know what we've been doing which is that we've been looking at data on the sunrise period and data on trademark claims. We had divided of course into Sub Teams to review this material and we will continue now in our second deep dive session on the sunrise period and I will turn this over our wonderful co-chairs, Greg Shatan and David McAuley.

Greg Shatan: Thank you, Kathy. Greg Shatan for the record. Since we have a short session we'll join with no further ado. The question we'll be turning to next is Question 2. I will note that this is a question on which the registries, who have been representatives or members who have been participating in our group would have a lot to say.

Unfortunately both of them are conflicted with this meeting, Kristine Dorrain and Maxim Alzoba. And while they would like to be here, they need to be somewhere else. So we may or may not want to, you know, I think we can start in on this question and see how far we can go and then get their comments and the comments of others on the record. So let me go forward rather - or rather on the email list.

So Question 2 starts with a threshold question, "Is registry pricing within the scope of the RPM Working Group or ICANN's review?" and the two actual questions in Question 2, "2a, Does registry sunrise or a premium name pricing practices unfairly limit the ability of trademark owners to participate during sunrise?" And, "B, if so, how extensive is this problem?"

So we have, you know, a bunch of data that - and information that was collected that speaks to this and as well as obviously experiences of many on all sides and even regrettably the side of the registrars isn't sitting at the table right now. So I will look to take a queue and people like to try to hazard and answer to these questions and from there determine whether any preliminary recommendation should come out of this question.

I see Griffin first followed by George.

Griffin Barnett: Thanks, Greg. And hi everyone. This is Griffin Barnett for the record. I'll take a stab at putting forward a possible answer to this question and its various subparts. So I have it in front of me. So the threshold question is, you know, is pricing - is registry pricing within the scope of the RPM Working Group or ICANN's review?

I think it may not be specifically within the scope of the RPM Working Group but I do believe we can address it regardless because I think we can come up with a recommendation if necessary to put the issue before the SubPro Working Group if necessary. I think it's at least within their purview to discuss pricing issues.

And, you know, moving onto the subparts, I would say I think based on the data that we've seen pricing practices do - there is evidence that pricing practices do unfairly limit the ability of trademark owners to participate during a sunrise and that it is sufficiently extensive that it may require a recommendation to try and address it.

Greg Shatan: Thank you, Griffin. We'll turn to George Kirikos next.

George Kirikos: Excuse me. George Kirikos for the transcript. I would agree with Griffin's analysis as to the threshold question. We discussed this a little bit yesterday I think whether if we answer the charter questions - the A and B sections - whether the SubPro group would then go on and take that into account when

they do their recommendations. So I tend to agree with Griffin's analysis on that.

The key part of Part A is the word "unfairly." I think we can agree that it - that the premium and the sunrise pricing practices limited the ability but the question is whether it was unfair or whether it was just something that was uniform for everybody so whether it was a fair economic model to have a premium pricing and it didn't necessarily discriminate between trademark holders and others who want desirable names. So I guess that's the question for the unfairly section.

We also do need to distinguish between the two different aspects, the premium pricing could be entirely legitimate but we did have quite a few comments, for example, on the dotSocks and a few other TLDs where I guess their models were a little bit controversial. But the thing is we did also see some of the dot - or some of the larger companies, mainstream companies like I think it was L'Oreal with dotMakeup or some of the cosmetics domains had really high prices, so that could be pointed to as a counterargument.

The fact that we had limited responses in terms of, you know, only hearing from the - basically the largest brand holders makes it kind of unrepresentative sample so that we're kind of hearing from the people that, you know, are the multinational companies that have, you know, that tend to want to get those sunrise registrations because they want to register the names in all TLDs. So it probably isn't a factor for the smaller trademark holders that we haven't really surveyed. So I guess I'm saying that I need to be convinced by others, but I just thought I'd share my input. Thank you.

Greg Shatan: Thank you, George. We've got a queue building and then I'll go back to Griffin followed by Kathy and Michael.

Griffin Barnett: Thanks, Greg. Griffin Barnett again for the record. I think I take George's points and I think the key thing that he mentioned was discriminatory. And I think, you know, at least in my mind the issue is not necessarily about high pricing kind of in an absolute sense but whether the pricing practices are such that they discriminate on - against brand owners compared to other categories of registrants or possible registrants.

And so I think that is where we kind of need to focus on the practices in terms of the pricing issues. It's more about trying to address predatory models, pricing models, that is and then similarly in the - with respect to the premium names designations that lead to that type of kind of discriminatory or predatory pricing scheme. Thanks.

Greg Shatan: Thank you, Griffin. We've got Kathy and Michael.

Kathy Kleiman: Kathy Kleiman. And I did run into Kristine Dorrain, who's a registry, in the hallway and I asked her when I mentioned we were starting on question 2 and found out she couldn't be here I asked if she had any message for the working group.

And she'll of course, you know, deliver it for herself on the list but she said, yes, she said to the question, "Is registry pricing within the scope of the RPM Working Group or ICANN's review?" The answer is "no." She says it's not within our purview or within ICANN's purview; pricing is outside of ICANN's bailiwick. But so I wanted to let you know that.

Greg Shatan: Thanks, Kathy. Michael.

Michael Karanicolas: Yes, Michael Karanicolas for the record. I sort of originally raised my hand to say something similar and so far as - and I guess it builds on something that you alluded to at the outset insofar as I know Maxim specifically has been very active when this discussion has come up in the working group

previously so I don't want to channel him, but I know that he has expressed a few times that he thinks this is out of scope.

And I did also want to mention, you know, I'm not sure if I would - I don't feel strongly personally on this issue but I'm not sure that the use of the term "discriminatory" is - is quite accurate insofar as, you know, I think that you would expect that the domains that brand owners are looking for are often going to be more valuable as a result of market forces. So I think that that's, you know, for them to be more expensive seems kind of natural to me.

And I do think it's a bit challenging to say that ICANN is going to be, you know, when you talk about whether the pricing is unfair, the implication there is that there's a fair price that ICANN should be aiming for and I think that's a challenging thing to try to parse out. Thanks.

Greg Shatan: Thanks. Greg Shatan. Before I move on in the queue, I think we might need to now or at some point define the problem more specifically because what we're talking about right now are largely a number of abstract terms which could characterize quite a range of different occurrences, some of which may be discriminatory, some of which may not be, some of which may be issues, some of which may not be, some of which may be in our purview, some of which may not be.

So for instance, I believe there were instances where in sunrise extremely high prices were put on or higher prices than others for other domains were put on well-known brands. So let's say there's a hypothetical brand Bookface, and you go into a domain and find that well while you could buy Cookbook for \$100, Bookface is \$19,000.

And that it's clear that this is not a coincidence and is an intentional and this I think is where we're getting to the issue of discriminatory. If everything is priced at \$19,000 that may be a different issue but that's not discriminatory within the TLD. That's a marketing decision and that's - I don't think we need

- I don't think we get to that discussion or at least if we do we probably leave it behind.

So I think maybe what we're discussing is narrow this question of targeted pricing within sunrise that's aimed not just at what might be seen to be high value generics but at things that are specifically have a brand value and for which it seems like that's a reasonable assumption or maybe, you know, using Occam's Razor, the least - the most likely and simplest explanation for why that pricing was chosen on that especially perhaps compared to generics that don't have a trademark aspect like business could be seen as a premium generic but, you know, not a single well known company that's known as Business as far as I know.

So if that's the question we're talking about, the discussion might be more narrow. Right now we're talking broadly about things like pricing and pricing levels and so it might help as we go around for people to name or describe more specifically the issue that they are talking about.

And just one last niggles only because I started out life as an antitrust lawyer, let's use the term "abusive pricing" rather than "predatory" - let's just not use the term "predatory pricing" but - predatory pricing actually refers to pricing below market, a very low price, in order to drive out competitors and claim the field for yourself and then raise the prices. So whatever we're doing here, it may - there may be predation involved but it's not, quote unquote, predatory pricing. Just - just indulge me on that one.

Thanks. And I'll turn it over to Susan Payne.

Susan Payne: Thanks, Greg. I was going to say something similar to you so I'll expand on one of the problems then. But I would - but first of all I would just say I agree. I understand the principle concept that, you know, pricing per se is outside of scope, it's not for us to tell a registry what they can sell their names for; I get that.

But it's about the situations where pricing was fixed in such a way as it inevitably circumvented or sought to circumvent the rights protections that had been instigated - implemented.

And so for example if you have, you know, a general availability, you know, standard name price of \$100 but during - only during the sunrise period names are \$2000 or \$24,000, well then that is - that's an attempt to make the sunrise so unattractive because it's so pricy that you circumvented the right that was given to have this prior registration period. And so for my mind, that is one of the issues. And we did have some experience, you know, there were some examples of that.

And then the other one is the one that Greg alluded to, which is, you know, you know, the other part of my company is a corporate domain registrar and we did have examples of clients who were told that, you know, their name was, you know, which, you know, which had no - I'm going to say generic meaning in the context of the registry in question. You know, their name was a well-known brand and, you know, it's \$4000 for you because we've put it on our premium list.

You know, so the BBC would be on some premium lists, and maybe it was done deliberately or maybe it was done because they put all three letters on the premium list. But the truth is that - and this is not a real example necessarily - but, you know, if `bbc.news` is \$4000 then is that fairly put on a premium list when there's a, you know, that's the thing. And I was going to use the term predatory, that's the wrong term of art, but it's that that we're trying to address, this kind of abusive pricing in order to circumvent the ability of rights holders to protect their brands.

Greg Shatan: Thanks, Susan. And I don't know if you were searching for this concept and I apologize if you were or you weren't, but sometimes it's been said that in the case of BBC, the reason it might be, quote unquote, premium is that the

value that's been brought to it by the potential registrant only and, you know, although there may be potential other uses for BBC for a domain, second level domain, that could be popular, it's, you know, unlikely especially in dotNews if there's any reason why anybody would find any value other than the one.

And I'm thinking a little bit when we get to the talk about discriminatory I'm thinking almost about like housing discrimination where, you know, an apartment is for sale for - or apartment is for rent to one couple that walks in and is mysteriously not on the market for the other couple or is, you know, \$1200 a month for one couple and \$1800 a month for the other or the, you know, one couple has to put down two months' deposit and the other one doesn't have to put down any even if their economics are on the same.

Anyways, that's what I'm thinking about in terms of discrimination, but I'm yammering. So I will turn it over to Michael Karanicolas.

Michael Karanicolas: Thanks. Michael Karanicolas for the record. Just to respond to the discrimination discussion, in my mind I think it is worth noting out that when you have well-known brands they can also generally afford to pay more. So the difference between the example that you gave in terms of housing is you're not necessarily pricing people out of being able to use the system. In my mind when you talk about unfairly limiting the sunrise, the relevant question is, does it preclude participation?

So I think that the ability of well-known brands to pay that toll is relevant. And again, to me it really does - it - as I look at this it seems like a natural market phenomenon insofar as, you know, to take your non-hypothetical hypothetical, Facebook is a valuable domain as a result of the commonality of that word, that brand in the public consciousness. It's a very valuable brand which leads to it being a valuable space.

Now I think I'm sympathetic to complaints that it's unfair that Facebook having done so much to build this brand now is sort of held captive and has to pay more to protect it. Like I get why that - I get that that seems unfair. But I do think that in - the fundamental question in terms of whether the - whether the pricing structure is unfair in the context of the RPMs is whether it is making them nonfunctional precluding participation. And there I think the data is what we need to go back to and I think that's the central question.

Greg Shatan: Thanks, Michael. Just to ask a follow up, you seem to have created a binary preclusion non-preclusion. Do you think that making it more difficult to participate or more costly, because even if, let's assume, a brand can pay once, there are, you know, 1000 generic domains, and let's say they all adopted a premium pricing strategy where Facebook was \$1 million in each one.

At some point the - everybody's budget runs dry and putting aside the issue that some brands are bigger than their companies, in other words, there are some well-known brands that are actually run by very small companies, so you can't necessarily make an assumption and say Ted Baker, I work for is, you know, well known clothing company but it's just not that big.

Michael Karanicolas: Yes, sorry.

Greg Shatan: So there - so I guess the - my question is whether there is a spectrum or whether there's really a binary.

Michael Karanicolas: Yes, obviously it's not a binary question. But at the same time pricing is always going to impact levels of participation insofar as pricing impacts every decision that a company makes. If it was free they would probably take all of them. If it was \$1 they would take all of them. If it was \$1 million, they wouldn't. So, I mean, that idea of a spectrum is - I think it's, you know, it's obviously correct. But again, you know, the operative question as I see it is

whether the systems are not functioning as intended as a result of the pricing, that's how I would frame the question.

Greg Shatan: Thanks, Michael. That takes us to George Kirikos.

George Kirikos: George Kirikos again for the transcript. Yes, I think from the registrar's point of view, sorry, the registry operator's point of view what a lot of them have done is a trial and error of different business models. So it was kind of to be expected that some people would try this because registry operators are essentially UDRP-proof, as long as the name doesn't resolve they can charge whatever they want and they could never be subject to a UDRP with, you know, the pricing aspect being an element of bad faith.

And so in essence the pricing on it, from their point of view, it almost becomes a negotiation, you know, this is our asking price, you know, if it was a cyber squatter doing that they'd be, you know, hit with UDRP or URS, whatever. But as a registry operator they have a bit of immunity to that. So I think that's an issue.

But on the other hand, on some of the domains, you know, like Facebook.sucks, you might have somebody who really thinks Facebook sucks and is willing to pay that amount. And so that could be the market value of that domain name. And I think the - some of the registry operators are kind of exploiting the fact that some brand protection registrars are advising their clients on a very risk-averse basis.

Like if you see some of the domains that are registered on a brand protection basis, a lot of them to me don't make sense because they don't get traffic. But I guess that's a sign that they're very risk-averse. So amongst the most risk-averse brand operators, sorry, the most risk-averse brands that's who they're exploiting.

For somebody that's actually neutral, they don't really care because that high price actually will deter the cyber squatter too because they're not going to be able to get that domain probably in general availability if they were changing that high price.

So there are - it's kind of like a cat and mouse game that's going on so but the damages can ultimately be limited by doing a UDRP right after if it's abusively registered. The high price will kind of just keep it out of circulation for everybody. Thank you.

Greg Shatan: Thanks, George. And just in terms of defining the parameters of our discussion, you mentioned at one point that Facebook.sucks or Facebook.sucks or facebook.sucks.ninja might be, you know, of interest to some third party who might find they'd want to use it so it's not only about Facebook. I don't disagree with that but that's not a sunrise question because at that point we're beyond sunrise when we're talking about what a third party other than the brand owner might be willing to pay for a given domain. So I think we need to stick to kind of sunrise - pricing during the sunrise. Phil.

Phil Corwin: Yes, thanks. Phil Corwin for the record. I'm speaking in a personal capacity, not in my co-chair capacity. Just a few thoughts. One, I agree that what we could communicate concerns to SubPro; pricing controls are not within the jurisdiction under our charter.

And it would be - I think we all recognize it would be an uphill climb to get ICANN as a result of SubPro recommendations if they were so inclined to do anything about this because historically to the extent ICANN has ever imposed any pricing controls on any registry it is a reflect that government policy, not ICANN policy. ICANN has no competition policy, no bureau of competition, no economists, no standards for defining markets, etcetera.

Second, this is basically when a trademark owner, whether they have a generic word as a valuable trademark or unique word, whether it's Facebook

or Apple, it's an economic decision. They decide okay, the sunrise price for our name - for this mark that we've already put in the Trademark Clearinghouse, we've recorded it there, it's \$1000, okay we'll buy it; \$20,000, not worth it. It's less expensive to just monitor it and to bring a URS or a UDRP or litigation if someone abuses it.

The whole point is to prevent cybersquatting by a third party but there are other RPMs available as well as legal process available to deal with that. And if it's a unique mark, a unique word, well one, anyone registering in the sunrise period or any other period will get a claims notice putting them on notice that it's trademark for certain purposes so they'll have a hard time if they go onto use the domain for - to profit from the mark saying that they didn't have bad intent because they were on notice that it was a mark.

And so there are other remedies available. So I think it'd be difficult to know what to recommend - well we could communicate to SubPro concerns about certain practices we've seen at registries. At a certain point if registries are abusing the pricing power, they're not going to make the sale and a third party who might buy it either in sunrise or in land rush or general availability will be on notice and will be subject to RPM processes or legal processes if they engage in trademark infringement.

So you know, those are thoughts I think we should consider as we further explore this question. Thank you.

Greg Shatan: Thanks, Phil. I guess if there was a purchase in sunrise it could only be by a trademark holder who had an SMD file for that so not a third party.

Phil Corwin: You're correct. I apologize for that...

Greg Shatan: There are trademarks that have multiple entries for different companies, unrelated companies, in the TMCH so it is possible that, you know, company called Essex, which I know there are least - were at least two in there

unrelated, that one would get it and one wouldn't, but I don't think - at that point I don't think it's a case.

So I think before we move on I think it might help to kind of think about some limited - yes limited instances we're talking about. I think we've identified two maybe three. One is where only - within sunrise only well-known brands or the pricing seems to be at different levels based on the brand. Second is where every sunrise price is just very high regardless.

And then there's kind of a variant on that where the sunrise's price is high but it drops precipitously in GA so the chance for a third party to get it at that point or for that matter the brand owner you know, becomes much less costly. So those are kind of I think three models. And if there are more maybe people can think of them because I don't think we can solve undefined problems. I think if there are defined we can decide whether we have certain defined problems and whether we can solve them.

I'll go to Susan and then Michael and Kathy and then in the room I've got John and George, I'm not sure in which order, and we do not have Paul or Ringo.

Susan Payne: Yes thanks. Hi. It's Susan. I put my hand up just to kind of comment on what Michael was saying. I am really troubled by what you were saying if I understood you correctly that effectively, you know, kind of brand owners can afford it so, you know, if they get, you know, if someone shoves a high price on their brand well, you know, they can, yes, they've got deep pockets, they can pick up the cost. I mean, that seems to me to be fundamentally abusive.

And I'm also troubled by your suggestion that kind of these domains are valuable because these brands are valuable. That's again you know, that's going - that's turning the investment that the brand owner has made on their brand back on its face and saying, well you built up, you know, you built this

up until it cost a lot. And so now you have to pick up the price when, you know, if you ever want to buy a protective domain to help protect that brand.

Again, that just seems to me fundamentally abusive. And to me then that is the answer to the question is, yes, that's interfering with the ability of the sunrise to do what it was intended to do.

Greg Shatan: And that brings us back to Michael.

Michael Karanicolas: So I agree that the argument that well brand owners have money so they can pay is unsatisfying and that that's not the way that I would necessarily frame it. But, you know, I guess I would analogize it to property taxes where, you know, if you spend a lot on a property and you build it up and it becomes much more valuable, you then have to pay more taxes based on that. That's not something that's unfair to the person who's built that up, that's just a consequence of success.

So I don't necessarily see it as being, you know, that problematic. But, you know, I think that I would be interested to know, you know, more information about the actual calculation that's going on and whether or not - the idea that brand owners are not participating to the fullest extent that they would if prices were lower, to me is not that indicative insofar as that's always going to be the case.

But, you know, I think that this is more of a global question and if it goes to the degree to which sunrise is being utilized. So, yes, I guess that - I would look at it more broadly in terms of the functioning of the system as a whole as opposed to whether it's unfair to a particular brand.

Greg Shatan: Michael, just I want to take your analogy and move it somewhere slightly different which may be more analogous to the situation. We'll take the company that built up a lot of value in their property and in their business, now they want to buy a new property. And let's say it's not contiguous to their

property, let's say it's, you know, far away so it doesn't have any, you know, unique value to them. Do you think then they should be charged one price and the startup should be charged another? And maybe the answer is yes, I don't know.

Michael Karanicolas: Let me match your analogy with yet another analogy. Which is imagine a store is in a building and they're incredibly successful, bring a lot more traffic into the building, as a result the value of the building goes up and the landlord raises the rent on that store of a result of their success. I think that that's a close analogy. And I think that that's market forces operating.

Greg Shatan: Thanks. And that's why there are so many vacant storefronts in New York City right now. I think we have Kathy next and then...

Kathy Kleiman: And I have Griffin and George.

Greg Shatan: Let's see who do we have, I have John and then George.

((Crosstalk))

Greg Shatan: So I have Susan's hand up, everything, yes, everything changed. First I thought I had Michael followed by Kathy and...

((Crosstalk))

Greg Shatan: Susan, go ahead.

Susan Payne: Okay, I think the big difference and the big reason why your analogy doesn't work is because in this particular situation someone's invested in the real estate if you want to use that term, and then whole new real estate got created which is, you know, it's like someone building extra floors on top of the building and then going now you have to pay extra to have those floors.

You know, you thought you owned the building but now there's more on top of it and you've got to pay extra because, you know, because we have the real estate and then ICANN created a whole new real estate that the brand owner needs to protect in and you're saying but now because you're an important brand you have to pay all this extra money in the real estate that didn't exist.

Michael Karanicolas: Can I - well I was only going to say I think that the analogies are getting a little...

((Crosstalk))

Michael Karanicolas: And maybe this is my fault because I started us down the analogy road, but yes.

Greg Shatan: Let's try using metaphors next time. So we'll go to Kathy, we're skipping your hand? Your hand is still in the - I'm...

((Crosstalk))

Greg Shatan: Okay. John.

Kathy Kleiman: So we've got the hands in the room and the hands in the...

Greg Shatan: Yes, okay.

Kathy Kleiman: So I'm willing to wait until after the hands in the room.

Greg Shatan: Okay Georges Nahitchevansky.

Georges Nahitchevansky: Georges Nahitchevansky for the record. So two points, so the first thing is, is there data that you have developed that shows that people in the sunrise period a brand owner was charged X amount that was a significantly

high amount and then it dropped? And to what extent does this happen in the general availability? I mean, I really don't have a sense.

Do they, for example, say this is a premium name and I'm going to sell it for \$5000 and then in general availability it's \$5000 if someone wants it as well? Or is it like \$5000 during the sunrise and then drops to \$100 and it was your third bucket that you mentioned, Greg, that I really don't know what the data that you've developed shows.

Second point is I think you have to keep in mind, putting aside all these analogies is that you're really dealing with two buckets of names here; you're dealing with a bucket of names where it's, you know, a completely arbitrary name, the (whatchamacalitoomf), you know, mark which, you know, only one person in the world uses that and then you have all these words that also are brands like Delta.

So for example, like, you know, I could see saying, okay, Delta by itself might be a valuable name to have as a generic component, but at the same time has a trademark meaning. So is that unfair if you then price that because it has a generic meaning to it? So in our conversations we keep lumping all the brands together into one and I really think that you're talking about a small subset of where there's predatory pricing when there's a mark that's truly unique and doesn't have that generic component.

Greg Shatan: Thanks, Georges. John.

John McElwaine: Thank you. John McElwaine for the record. I think getting back to what Griffin said and what Phil said, you know, I don't think anyone in this room believes that we should - registries should be able to use pricing to circumvent RPMs. I think we can all probably agree on that.

The second thing I want to dispel something that there are pricing terms in the Registry Agreement that specifically address discriminatory pricing. Now

it occurs in sort of a bait and switch manner. It says, "In a renewal a registry is not allowed to charge a discriminatory or abusive price." So what they want to try to avoid in that situation is you get a person in at \$9.99, they build a business on it, it's successful and then the next year it's \$9000 or whatever.

But pricing uniformity in discrimination is part of the Registry Agreement. So I think it is definitely something we could forward over to Subsequent Procedures to look at those types of rules with respect to the sunrise and any other pricing issues that would be applicable for running a registry. Thanks.

Greg Shatan: Thanks, John. And I'd leave a question whether if it's something that relates only to the way RPMs are working whether we need to refer it to SubPro. I've got Phil next unless - Kathy, at some point you should come back in.

((Crosstalk))

Kathy Kleiman: Thanks. Okay, so Kathy Kleiman. Several things, first if we send anything to SubPro let's send them the data as well, you know, any background data. It'll save time. They're a steam engine, they're moving forward very, very quickly. And so anything we can send them the better.

Second to the question, "Do you charge large companies more for real property?" Yes, all the time, that's why third companies work through - that's why big companies work through third parties when they're buying real estate. Amazon just did this in Northern Virginia where they bought the real estate in Crystal City and they did not do it. We did not, you know, it was not known that that was Amazon that was buying those pieces of property because they would have been charged a lot more.

Okay, Phil. That was my understanding of how that's handled. So you're next. Hold on. But anyway even if that's not exactly what happened - I mean, they work through third parties because I've seen it happen with a number of purchases in my law firm where we're acting as third parties.

So but the larger question, looking at the system as a whole, I wanted to ask a question of people who have been involved in sunrise. The idea that you could go into the sunrise period, try to register a mark that is in the Trademark Clearinghouse and be told no, you can't get this during the sunrise, my sense is that's what's happening. Now that could be because it's on a premium price list in which case - if someone could just explain to me what it is - yes please.

Susan Payne: I think there are different scenarios. I mean, I think the scenario you're thinking of then is the notion of reserve names where, you know, some registries had - well most registries had lists of terms that they reserved. And they might reserve for various reasons. I mean, there were some that ICANN told them they needed to reserve, there are some you know, that in the Registry Agreement, you know, there were certain, you know, country and territory names for example had to be reserved.

They also may have reserved because they wanted to have them for sort of internal purposes or whatever. And sometimes they reserved them because perhaps they perceived them as being very valuable and wanted to kind of have a targeted program of release. I don't know how to describe it. But so there may be scenarios where someone tried to register something in the sunrise and were told it was a reserved name.

But that's not really what we're talking about here. Here we're talking about the use of the pricing within the sunrise period or being told that, you know, because you're a big brand your brand in our registry is something we're viewing as premium and so the price for you is \$10,000. But we're not really talking about the situation where someone's told you can't have it because I've reserved it. I think we talk about that later.

Greg Shatan: Over to Julie and then to Phil.

Julie Hedlund: Yes, and this is just an administrative thing. I think that, you know, to the extent the working group and Sub Team members have had sandwiches if you haven't please go make a mad dash but we're going to go ahead and open it up to everybody else who would like to have a sandwich. It looks like there's quite a few left and we don't want them to go to waste so help yourself, folks.

Greg Shatan: Phil.

Phil Corwin: Yes, Phil again for the record and again speaking personally. One, just to - Kathy, you were correct that major companies when they're negotiating for real estate, including digital real estate like domains, use brokers just so they can hide who they are because if the party knows who they are they will probably seek a higher price if they know they have deep, deep pockets.

But in the case of Amazon in Northern Virginia, Amazon said we're going to set up a separate headquarters, a second headquarter and they were openly negotiating with state and local governments for a package of incentives in exchange for bringing tens of thousands of jobs, so that was not that case, just to correct that record.

Now the two thoughts I want to share, one while it's not directly related to sunrise it does relate to the question of abusive pricing or fair pricing. As an alternative to sunrise we know that many copyright owners have agreed to domain blocking programs like DPML...

Greg Shatan: You're referring to copyright owners or trademark owners?

Phil Corwin: I mean trademark owners, sorry. Because they have calculated that it's less expensive to protect themselves from potential cybersquatting by blocking the registration of certain marks they put in the Clearinghouse, then to go through buying the domains whether in sunrise or in general availability. So you know,

I'm not suggesting whether we should consider whether that's fair or abusive or should be controlled but it's another thing to think about.

The other thing I would say just as a general matter for everything we're going to address, not just this issue is that when we think about problems we've uncovered or think we've uncovered we should think about the practicality of remedy. We've had and discussion here and if we're going to communicate anything to SubPro I think we have some responsibility to recommend some type of general approach.

So we talk about a lot of complexities, should we recommend different pricing policies for generic words versus unique trademark terms? Should we recommend different pricing caps for marks trademarked by small business versus companies worth \$1 billion versus companies worth \$1 trillion? Should we have different policies for dictionary words which are valuable to only one company or words like Delta and United and other words which are valuable to quite a few major companies?

So and that would become a very complex recommendation and one that ICANN would be - probably be quite reluctant to adopt given that their starting position is that we're not in the price control business and don't want to be. Or we could adopt a simple recommendation such as sunrise pricing should be no more than X times general availability pricing across the board.

So I'm not suggesting we should recommend that but I think when we're thinking about problems and thinking about potential solutions we should think about the practicality and the ability to implement anything we might recommend. Thank you very much.

Greg Shatan: Thanks, Phil. I've got Griffin followed by Heather and Kathy.

Griffin Barnett: Thanks, Greg. Griffin Barnett for the record. I wanted to go back quickly to the point that John McElwaine raised earlier, and this also kind of speaks to the

point that Phil just made, but I wanted to dig into that point just with a little bit more granularity and the point to Specification 11 of the Registry Agreement which is the Public Interest Commitments, Specification Section 3c relates to - I think John actually helpfully put the actual sentence in the chat so I'll just read it quickly.

"Registry operator will operate the TLD in a manner transparent..." - or "in a transparent manner consistent with general principles of openness and nondiscrimination by establishing, publishing and adhering to clear registration policies."

And I think that's kind of the hook in terms of potentially referring this issue to SubPro with respect to their view of PICs. And, you know, clearly this a discussion that we'll need to have but clearly whether, you know, the nondiscrimination under registration policies can encapsulate pricing issues I think arguably it can.

And if you look actually at dotFeedback PIC DRP, which helped to interpret the meaning of this specific section of the Public Interest Commitments, you know, they found that self-allocating and reserving domains that correspond to the trademark owner's marks during a sunrise period constitutes a failure to adhere to certain registration and launch policies.

And according to these policies sunrise period is exclusively reserved for trademark owners and nothing is said in relation to self-allocation and was contrary to the object of the sunrise period itself. And I think we can analogize it, there's a parallel there to basically achieving the same goal through pricing practices.

Greg Shatan: Thank you, Griffin. Heather.

Heather Forrest: Thanks, Greg. Heather Forrest. Griffin, you've made my comment easy because I was going to head the same direction you are. I'm concerned that

we've been rather glib in this discussion around predatory pricing and discriminatory pricing and not born in mind the fact that Griffin just pointed out from that PIC DRP which said sunrise is for trademarks.

It - we're not competing with other marks, with other identifiers in this period. So to the extent that we - back to Susan's point earlier - there's two possibilities here, one is singling out certain marks in that cohort, and another one is the pricing practice overall which Griffin has just very eloquently made the point of. So really at this point just to support what Griffin has pointed out. Thank you.

Greg Shatan: Thank you, Heather. This is an abbreviated session so we only have 10 minutes left. I think we have gone from kind of the general and somewhat glib to some - at least more specifics and more data and more facts about things like the RA and the actual - the PIC DRP for dotFeedback so that I think is useful as kind of the funnel is working here a bit.

I don't know that we've come to - certainly I don't believe we've come to an answer to this question per se but just to go back to the question one more time, A, does registry sunrise or premium name pricing practices unfairly limit the ability of trademark owners to participate during sunrise? And second part is, if so, how extensive is this problem?

I don't know that we necessarily have data on how extensive it is although we have answers to the survey at least for trademarks and brand owners that where they believed it was extensive and the INTA survey as well. But we do need to kind of work toward answers to these questions and preliminary recommendations. Heather, please go ahead.

Heather Forrest: Thanks, Greg. Honestly I take your point that, you know, the object is to answer these questions. If we speak to this question in particular I'm not entirely sure we're capable of answering this question. Are we capable of answering the question, "Does registry sunrise or premium name pricing

practices limit the ability of trademark owners to participate during sunrise?" I think we could only answer that at best potentially giving consideration to all the points that have been raised here about some participants in the sunrise have more money than others. Obviously.

Is higher pricing a limited factor? Yes. I don't care who we talk about the cohort being, higher pricing is always potentially a limiting factor. I just don't understand that we the data to answer, as you've pointed out, Greg, B, but I'm not convinced that we have the data to answer yes in a helpful way other than to say does it potentially limit? Does it have the ability to limit trademark owners from participating in sunrise? The answer has to be yes.

Greg Shatan: Thanks. And I think that takes me back to something Michael was saying earlier which is there is limiting and then there's unfairly limiting. And limiting may be - may be a problem or may be an imbalance but it may not be a problem that we would solve, whereas unfairly limiting, which gets to the issue of discrimination and to issues that were raised in the, you know, current RA language. So maybe our kind of head-scratcher for the moment is, is there a difference - what is the difference between limiting and unfairly limiting and is it something that we can get to?

Clearly any higher price limits but at some point it may not be unfair. If you charge \$10 during the main period and \$50 during sunrise, well that may limit but is it unfair? But what if it's \$50,000 during sunrise? Maybe that's a different question. So I think that's - there may be points where it becomes more or less clear that what we're dealing with is unfairness and other times it's just you know, the market working in a way that, you know, limits folks.

Griffin.

Griffin Barnett: Thanks, Greg. Griffin Barnett for the record again. And I kind of typed my comment in chat but just a - to your point, I mean, I think this is sort of like an interpretation question of how we're interpreting the wording of the question.

And I think if we look to some of the broader contexts that we have available in particular for example the preamble question about whether sunrise is actually achieving its intended purpose then that perhaps helps inform how we interpret what “unfair” means in this context.

Greg Shatan: So I guess then we need to remind ourselves what the intended purpose of sunrise is. Kathy.

Kathy Kleiman: I was wondering about next steps because we're going into the last five minutes. And whether we would be asking the Sub Team chairs to - because we are missing some of the people who might want to be involved in this discussion. So would the summary of this really important and interesting discussion and kind of the division that you created, Greg, of kind of the three categories that we're looking at, would that be something that you could do as the Sub Team cochairs? Should we be asking staff to do that?

So that we have kind of a package when we go on and talk about this next. And do we want to be floating anything to the SubPro people? We have our liaisons to SubPro. I think Susan is a liaison. I mean, do we want to be floating anything to them about what might be within their purview that we could kick across the field?

Greg Shatan: Thank you, Kathy. All good questions. I know that Julie has been taking notes so why I don't turn to Julie to discuss kind of where - how our process might work?

Julie Hedlund: Thanks for that. Yes, I have been taking notes and tried to get these particularly the sort of the three buckets that you mentioned, Greg, but also all the various discussion points noting that this is, you know, not a transcript, there will also be transcripts of this as well. But this will be able to be something that Sub Team members who weren't here would be able to look at.

I mean, it might be better, before making - since it seems like we're not actually at a decision point perhaps, there isn't really anything maybe to convey to the SubPro Working Group at this point. Maybe we might need a little bit more discussion on this.

And noting too that as I think George Kirikos pointed out, Question 3 is related to Question 2 or seems to be at least in some - a little bit of a crossover. So anyway I'll stop there.

David McAuley: Thanks. I'm going to make a point as a co-chair, David McAuley speaking for the record, and it has to do with next steps and immediate next steps. And George did make a good point, Question 3 is related to Question 2. Question 3 is getting at not so much the pricing issue for premium names and reserve names but should registry operators be required to create a challenge mechanism that trademark owners could use? And so it's very much related.

And some of the discussion will be predicated on what we talked about today. It may be abbreviated because of what we talked about today. But the most immediately it sets the table for the next sunrise call. And the point that Julie just made and George made yesterday in the email, and that is to give people chance - these are tentative decisions that we reached yesterday - people that weren't here in the sunrise team need to have a chance to weigh in.

And so what I'm going to ask is if anybody knows they're not going to be on the next Sunrise call please weigh in on Question 3 on list and that may help us on the call to sort of as a catalyst to that discussion. And so that's - I think so I agree with what Julie said, what Greg just said and Kathy said and that's what I would ask for a lead-in to the next call. Thank you.

Greg Shatan: Thank you, David. Good points. I've got Kathy, Susan and George in our two minutes left.

Susan Payne: Okay, Susan then. Well I put my hand up before but now I'm a bit concerned about, I mean, David, what you were suggesting is you seem to be talking about Question 3. I agree they're related but that seems to me to suggest that we feel we've finished the discussion on Question 2 and we're moving onto 3. I hope that's not the case because I don't think we're finished.

David McAuley: I'm sorry, I didn't mean to imply that.

Susan Payne: Good. Thank you. And then the other thing I just wanted to say was yes, I am one of the liaisons between the two groups but I've made it clear to the chairs of both groups that there's never been given any formal status to that position and I'm not invited to leadership calls of either group. Very occasionally I'm invited to a joint group call but that's, you know, once in a blue moon.

And so I'm able of course as a participant in the SubPro Working Group to be passing things on. If I'm tasked with this group with passing something on in a more formal way then I will do, but, you know, the liaison throughout or the liaisons throughout have had no real status or really role. So I just wanted to make this point because everyone keeps assuming that there's some wonderful liaison going and there isn't.

And then to make the point that Julie was making that I think if we've got something where we've come to a kind of conclusion or a preliminary conclusion, then yes, we can be forwarding that to SubPro but I think - you know, if I were to go to SubPro and say we had a, you know, a long and detailed conversation about abusive pricing, what are they going to do with that? Nothing.

Greg Shatan: Thanks. I think at this point we just need to think about if we were to package something for SubPro what that package would look like and not anything further on that. I've got George's hand and then - George Kirikos.

George Kirikos: George Kirikos for the transcript. Yes, I think we're close to running out of time so I'll be brief. But I think when we look at Question 3 we'll be able to really be able to see whether we can answer Question 2.

I wanted to go back to that earlier point about the UDRP aspect how registry operators are basically UDRP-proof, if we think about the passive holding standard test for UDRP I think that would be the mechanism we would look at for Question 3 which would then go back to see whether the registry is being really abusive and discriminatory against the brand owner. And I think that might be a path forward. Thank you.

Greg Shatan: That sounds like another analogy for us. Kathy Kleiman to close us out.

Kathy Kleiman: Yes, okay. Well first a huge thank you to our Sunrise Sub Team chairs and to the Sub Team. I just want to let everybody know we reconvene at 1:30 in this room to continue the discussion. We'll be moving on to the Trademark Claims Sub Team. Thank you very much for a great discussion.

Greg Shatan: We are adjourned.

END