

ICANN

**Moderator: Brenda Brewer
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9:00 am CT**

Jonathan Robinson: So let's get going with the meeting then and see what we can sort out. Hi, Sharon. Thanks for joining us.

So, Greg, Lise and Martin, myself, had a quick chat yesterday, an informal chat ahead of this to try and figure out what we thought were the issues. And we thought it would be very useful to meet with you ahead of the CWG meeting, as per my email, which I sent earlier and is now up available in - essentially the content of which is in the notes to the right relating to effectively the agenda.

And as you know, with the IANA trademark and related issues that was somewhat of a topic in Buenos Aires. And we wanted to talk with you about that. We also wanted to flag that we could see a potential issue with the bylaws and how we effectively work with the CCWG on whether those will be drafted within the CCWG or with us, flag that with you.

And then that we will be starting to think about what if any help we need from you beyond all of this or how that - how you'll be integrated within the implementation work.

So, Sharon, I don't know if there's anything you would like to say on the back of - we haven't spoken since the ICANN meeting in Buenos Aires. Maybe it's useful just pause and see if there's anything you would like to introduce to us at this point prior to bringing you up to speed with where we are on the trademark and domain names issue to look at discussing that.

Sharon Flanagan: Thanks, Jonathan. I think the topics you have on the agenda are the two items I feel are the items that'll need more work, IP and then also bylaws. I also note that the CCWG is continuing their work very actively and they'll be meeting in Paris I think next week. And so they're, you know, they're trying to decide on a model. And I think the hope is coming out of Paris that a decision is made.

I think it'll be really important for the whatever the implementation work is for CWG in particular on the bylaws to understand where the models comes out so that we can then work within that framework. I don't - it's very difficult without knowing what the model is obviously create the right bylaws. But I just note that that work is very actively going on right now and that's all I have.

Jonathan Robinson: Okay thanks, Sharon. So I think the question on the bylaws element will be really a matter of whether, you know, how - whether we as the CWG sign off on the bylaws produced via the work of the CCWG and say, yes those are criteria. And we may need your help in doing that.

Or whether we in some way offer a proposed draft of the bylaws to the extent that they pertain to our output. And that's - that I think is the question that we don't yet know the answer to but I think just from my point of view, and I hope from the Client Committee's point of view, it seemed to make sense to flag with you that that was potentially a topic of discussion or interest that we

don't have resolved - sort of process point really that we don't have yet resolved.

And to the extent that it becomes clear to you or you have a view on that how that could best be handled most effectively, if you like, and at the same time we will continue to discuss with the co-chairs of the CCWG. Go ahead, Sharon.

Sharon Flanagan: And maybe I'm taking this a bit out of order on the agenda but let me just answer that question at least from my perspective. I think the CWG should - I think we should draft the bylaws that are CWG-specific. I think on the CCWG side I think Sidley and the Adler team, the two firms, I think will want to be drafting the bylaws there as well.

And so there's overlap. And obviously we're working all together so in some ways it's kind of a distinction without meaning. But I do think the people who know the CWG best should be really leading the charge on those bylaws. I think we need to understand the model so that we're working the basic framework is understood because it's very difficult to draft bylaws without understanding what the, you know, the basic structure is.

But I do think CWG should advance a set of bylaws that it thinks meet its needs at least for the very specific CWG items. There are obviously pieces, dependencies, like we need some measure - some mechanism for the community to veto. And that I don't think CWG needs to do. But the things like (create) the PTI, you know, the IANA function review, those things I think are very detailed. And I think CWG is in the best position to offer up those bylaws.

Jonathan Robinson: Yeah, that's interesting, Sharon. So in a sense those two - they segment into two categories then, in - if I understand it correctly. It's really those that are specifically related to the work of the CWG, as you mentioned; and then those mechanisms upon which we will rely sort of overarching mechanisms of which we will rely and which we would not expect to be taking the lead on drafting but we would be expecting to have a role in reviewing for their adequacy I suppose. So that's helpful.

And I think for me this is what I hoped we'd get out of this conversation so we could take this kind of, you know, your thoughts or advice based on that discussion we have with you back to the CWG when we meet later today and say on the back of this discussion this is our proposal to the CWG and then in essence seek instructions to go ahead along those lines.

Lise.

Lise Fuhr: Thank you, Jonathan. And I must say I agree with you, Sharon, that we have bylaws that are very specific to CWG and bylaws that are specific to - that are more, what do you call, in coordination with the accountability team. But I also think we have some bylaws that are in between that you can either choose to make specific CWG bylaws or bylaws that is together with the accountability.

And here I'm thinking of actual - the IANA function review team and those, do they belong to the CWG or CCWG bylaws on reviews or should they be specific to the IANA stewardship bylaws? So - and I was wondering if we should try and make a kind of a matrix of these and see where they belong and find out how to deal with those - or not a matrix but a schedule of where do we think those belong.

And a second point I have is - and I expressed this concern with the Client Committee with Greg and Martin and Jonathan, do we step on any toes by doing our own bylaws? What is your sense of this within the accountability group? Because I sense that the creation of the bylaws is a very sensitive issue too. Thank you.

Jonathan Robinson: Thanks, Lise. Yeah, I think that schedule - that idea of a schedule is a good idea and maybe we should let Sharon respond before going to Greg. It also ties into something which I'd like to come back in a moment to and that's the sort of the way in which we work, the nature of perhaps proposing a scope of work indicative cost because one of the other themes was - that came out in BA was the issue of effective management of costs.

And for your information, Sharon, we've had a discussion as the chairs with ICANN Legal and Finance as to how we best manage costs as well. So that may be a way to do it along the lines Lise suggests some form of schedule or proposed work, and then it becomes clear - and responsibility and who's responsible for that work, is it, you know, Sidley and CWG versus Adler Sidley and CCWG.

Sharon, your hand is now down. So let's go to - or did you want to respond, Sharon?

((Crosstalk))

Sharon Flanagan: I'm sorry, I did.

((Crosstalk))

Sharon Flanagan: I'm sorry, I did, yes. So I think the schedule is a great idea. It'll just give us some discipline and just putting on paper exactly what the bylaws are that we need and all the different categories. I think that's a really good idea so we can undertake that. On the sensitivity issue, I suspect that the CCWG - I think they are very, very keen on doing the governance related bylaws. I think that it really important to that group and their work.

I don't think they're particularly interested in our more technical issues. You know, they're mindful and they say yes we want to make sure we're meeting your needs and objectives but I don't - it's just not an area that they've been, you know, they've been really kind of weighing in on from their own group standpoint. They're really deferring to CWG.

So I would think that they're not going to be that concerned if we want to take the lead on the technical PTI, IFR, those types of bylaws.

Jonathan Robinson: Okay great. So what - just to be clear on process here, Sharon, this is a preparatory call effectively, for us to have the CWG meeting later. We will come back to you with clear instructions based on both this call and our CWG call. But in essence, it's clear where we think we're going, we'll just come back to you with clear instructions after this and that includes the preparation of a schedule if we do go down that route, seems to be very logical but just to be clear on where we're headed for this.

Okay, Greg, go ahead.

Greg Shatan: Thanks, Jonathan. I've also been participating fairly heavily in the accountability group since I'm a glutton for punishment. And I agree with everything Sharon says in terms of kind of where the line would tend to be drawn. And I think basically anything that we have, you know, created by our

report will probably end up on our side of the line. I think once we do the schedule that's been suggested I think it will become self-evident in nearly every case kind of where the primary kind of responsibility for drafting and review and sign off lies for each of the bylaws that we need.

And I don't think there's anything to be gained by taking a bylaw that we have proposed that's needed and that's been kind of expressed in detail in our group and somehow asking the CCWG to breathe life into it. I would say that they're already dealing with many, many issues and that would not be - there would be no need to think of that as stepping on toes to keep, say, the IANA function review team bylaw as one that we need to drive.

I think they'll - there's obviously going to need to be a collaboration and the fact that we're all, I think, you know, much the same group of lawyers will help a lot. Ultimately everything will have to lock together into a single set of revised bylaws but that I think is several steps down the line. Thanks.

Jonathan Robinson: Okay, thanks Greg. It sounds like we're in pretty good shape there in that topic. I'd like to suggest we switch topics then and touch on this trademark point then providing there's no additional comments on this. Greg, if you could just drop your hand if that's - that point is now done. Thanks.

So the issue here - we're all familiar with, there were two existing proposals one of which proposed to deal with the trademark in a certain way, the others didn't object to dealing with it in that way. And then we came along with what seemed like a strong assertion but we've now clarified was really just a - in effect placeholder text that we hadn't given serious consideration and hadn't had the opportunity to give a lot of time to.

Since then we've made that clarification and we've also had the ICANN Board - and, Sharon, I don't know if you've had the benefit of seeing this and if you haven't we should copy that into the notes page or onto the share screen for your benefit.

But essentially the board came out and said that they wouldn't, in any way, interfere with the future use of the mark should there be a future separation; they would make sure it was available.

When I've looked at that what my personal interpretation of that is it also says, you know, ICANN is the current holder of the mark. And in so doing essentially asserts, you know, that ICANN is the current holder of the mark, will not do anything in the future to hinder a separation should that be decided.

But implicit in it seems to me that ICANN will continue to hold the mark and has no intention of placing the mark elsewhere as far as I can see. But I don't know that; it just seems to be implicit in what's said. So I guess the question is really from a CWG point of view, and we can't really decide this here obviously, is whether we remain silent on the mark - on the issue of the mark and the domain name but I don't think we can do that because it seems that if we are silent on it our proposal is, in effect, incompatible with the other two proposals.

So the question is, how can we either make our proposal consistent with the other two proposals and/or provide an alternative proposal as to how to deal with the mark and the domain names such that all three proposals - it's a satisfactory solution for all three proposals - for three proposers or respondents.

And one idea is that certainly that if we ask for Sidley's help, which it's starting to feel like we might have to, to come up with any thoughts that you have at least in an initial proposal of some sort, that you'll probably need to talk to ICANN in doing your research as to - and possibly even as your first port of call since they're the current holder of the mark, to make sure, A, that you know their position and, B, that you don't do unnecessary work when that information - any primary information could come from ICANN.

So there it is in front of us, Sharon. I'm not sure if you've seen this already, say that ICANN currently holds the domain name and the mark for the benefit of the community. And the assurance that it - should the functions be transferred away ICANN won't hinder their use. Sharon, let me hand over to you if - I hope I've set that up clearly and correctly and any thoughts you've got at this stage as to how we might work as a group and work with you to try and get through this.

Sharon Flanagan: Thanks, Jonathan. So the fact that they hold the mark that makes sense. They're the only entity to hold the mark right now. And it does - I just am reading this right now, I hadn't seen it before. But it does suggest at least some preference by ICANN to continue to hold the mark but that they're open to making sure whether through maybe transferring the actual ownership of the mark or licensing they want to make sure that they give the right to use to any future IANA function operator.

It seems like, you know, maybe one of the questions from a CWG perspective is there seems to be three possible scenarios with the mark. One is it stays at ICANN; the other is that it goes into PTI and the third is that it goes into a trust. I think that was what one of the other proposals suggested it move into a trust, maybe the IETF trust I think.

And maybe one question is do we care? I mean, does CWG - would all three of scenarios work equally well? And if so, you know, perhaps CWG just says we continue to be neutral. And we could look, if the CWG wanted us to, we could look at that issue which is of the three scenarios is there one that's better or are we indifferent and I think with the main idea being what allows and ensures that if there's ever a change in operator that that can be done seamlessly and that the new operator has all the rights it needs and there's no dispute or question about those future rights.

So that would be one way to approach it is to have us look at the three scenarios or any other scenarios that you're aware of. And in terms of talking to ICANN we can, you know, that would certainly be helpful but I suspect they'll just tell us - we'll hear, yes we hold it from a legal standpoint. Maybe they'll tell us - they could give us more information on how it's used currently which would be interesting and useful so maybe factually that would be good to hear.

And those are kind of my thoughts at this point.

Jonathan Robinson: Thanks, Sharon. That's helpful. They may be able to give a part or some perspective on the history as well. Certainly that seems interesting. I wanted to make a point before going to Greg, and three scenarios and your perspective, assistance with those. All right, let me go to Greg and then I'll just remember what that made me think. Go ahead, Greg.

Greg Shatan: Thanks, Jonathan. It's Greg. I'll try to keep this high level since we only have a few more minutes and since this is what I do for a living - I could go on forever which would be to nobody's benefit right now. I would just say that there's probably at least a fourth scenario which would be some sort of other trust or a mutual - a trust that was set up for the mutual benefit of all the

communities since the IETF trust is set up for the sole benefit of the IETF, at least as far as I understand its charter or trust documents.

And I think that you put the - you mentioned the two things which I think are key to any analysis, which is how is the mark used both by ICANN and by the other operational communities? And, you know, why would we care, which I think goes more to separation in terms of why we would care functionally or operationally in terms of the CWG's plan.

I think the other thing that we would need to have a clear understanding is the ramifications of any proposal including the ramifications of the proposal of putting into - it into a trust which is not by itself actually an IANA operator. I think there's just a lack of general understanding in a lot of the members of the CWG of anything having to do with trademark law.

But since I'm a combatant and not a neutral I can only go so far in helping to explain what I know before people think I'm saying things because I want an outcome which actually I don't, at least not without, you know, the analysis that I've mentioned. And I'd rather, you know, have that analysis done by someone who's a neutral expert rather than trying to do it myself which might be identical but would not be taken as identical by anybody who disagreed with any conclusion that I happen to come to. Thanks.

Jonathan Robinson: Thanks, Greg. A couple of remarks and Sharon may want to come back on that then. First of all, in terms of the three scenarios I would expect that they would evaluate sort of their impact as well as describing the scenario, I would expect them to evaluate and roll out to the CWG.

What I heard you say was the prospect of moving the mark to a trust - and I would expect that the IETF trust was a subset of trusts. So I think your 3 and 4

would be covered by that. I'm not sure we'd need a fourth scenario but, you know, it's possible. But I heard three scenarios one of which would be a trust and under that third scenario being the trust scenario the IETF trust would be evaluated for it - from our perspective for it as it - for its neutrality or usefulness and so on.

The other thing that Sharon talked about was specifically that we might be concerned about post separation. Well, yes, in principle that's the point at which we become most concerned that we retain use of the mark. But it feels to me like we would want to be assured that we - and you might say this is self-evident given that PTI is a wholly owned subsidiary of ICANN, but we don't presume that the mark stays with ICANN. So I think regardless of the scenario we would want to be assured of unfettered use in the near term, i.e. the PTI situation, and in any post-PTI scenario.

So it feels to me like those are the two scenarios. You know, what are the three scenarios and how do we guarantee use now or post transition and in the event of any future separation. Sharon, I don't know if you wanted to respond to any of that or if that's consistent with what you were saying in any event? Go ahead.

Sharon Flanagan: Thanks, Jonathan. That is consistent. I suspect - I'm looking at the areas of risk - highest risk. I think you're right, we need to look at during and we need to post. But I think during, while ICANN is the controlling entity, I have less, you know, fewer concerns other than perhaps this trust scenario which takes it out of both ICANN and PTI's hands.

And so, you know, we would look at it on the basis of immediately post transition and after and then also in the case of an actual separation. And the things, you know, we would look at would be just ensuring rights to use, you

know, risks around bankruptcy of different entities, you know, just all the different ways it could go wrong and, again, to use our term from before, stress testing or scenario planning to see how does it work in these scenarios.

And then hopefully we come to a place where as we look at these three alternatives the group can decide that maybe they all work as well and maybe one works clearly better, you know, maybe one doesn't work at all. And that can help inform, you know, a decision.

Jonathan Robinson: Okay that's helpful. And it feels - I don't want to be premature about this but it feels like we've got the right parameters to talk with the CCWG based on these two points. And on the third I don't know that we need to go into anything in any detail yet other than to flag with you this is something we need to work on, in other words, what if anything might be an implementation other than in these topics we've discussed here now.

Greg, go ahead.

Greg Shatan: Not to get too much into substance but I do want to mention that, you know, there have been assertions on the list by those involved at least in the numbers community that their use of the mark is such that they believe that they actually require ownership, which implicitly would mean that if they don't have ownership they would need a license. They have neither now.

So that's I've kind of brought up the issue of use by the other communities whether their use is tantamount to a trademark use, in other words, the use that an owner or a licensee would make or which would be infringing in the absence of that or some other form of permission.

That's something I think that needs to be looked at only because it's already been raised by the other communities. And I think is at least implicitly foundational to the numbers proposal that it be taken to the IETF trust.

But then again, I don't think anybody who's a trademark lawyer has looked at it for the numbers community; it's more just a feeling they have which is, again, why I like a neutral expert rather than somebody who's neither neutral nor an expert to come to some conclusions at least about - conclusions may not be quite the right word, which is why I started stuttering - about what's going on here in the during part of things.

And I agree that we really need to separate the during and the after. And I think to some extent the arguments about the during were really made to put things in the right position for the after. So again I think there's, you know, a few things to be looked at here in any case that's what - I'll stop here. Thanks.

Jonathan Robinson: Okay, Greg. Thanks. There's a couple of questions in the chat just to point out we have the CWG at 1700 UTC. Sharon, correct, we are not currently anticipating you being on that call? I think the purpose of this call was to prepare - normally the way in which we've worked with the Client Committee is (unintelligible) CWG got the instructions and relayed those through the Client Committee.

Here we felt that as a Client Committee we needed to be better informed in updating the CWG which is why we wanted to have a preparatory call with you so that's okay.

As to Martin's point about the importance or not, these marks and so on, I think Lise puts it right, we need to have a solution that's common and acceptable and commonly - and acceptable across the different communities.

And at the moment we have a problem in the sense that we haven't said anything in effect about the mark; we've made no assertions about it. And arguably the direction in which the other communities are going may be in some way incompatible or imperfect with respect to our requirements in that they have suggested effectively that it's going to go to the IETF trust.

And absent any counter proposal that's what - that's the proposal but we haven't said anything. So we need to either accept that outcome or propose an alternative it feels to me. I'm not sure we can remain silent which is why I think it'd be very useful.

And what I think we're potentially agreeing on this call and go back to and propose to the CWG that we move ahead with working with Sidley on reviewing the three potential scenarios, the marks (unintelligible) stays with ICANN, the IP transfers to PTI or the IP moves to a trust and that Sidley analyze those from a CWG point of view and give us, you know, some kind of traffic light type outcome as to whether that from our point of view should be acceptable or not.

And then similarly, as I understand it, what we've agreed with respect to the bylaws is what I think we are looking at is potentially asking Sidley to prepare a schedule of work which might look more broadly than our own but essentially should highlight what work they propose to do on our behalf on behalf of the CWG to assist and dovetail with the work of the CCWG such that we get a coherent set of bylaw proposals out of all of this.

And then, Sharon, for your information I suspect we'll be coming back to you with - if we agree those two routes of work with the CWG we'll be coming back to you and saying that this is what we think we'd like to do please can you come back to us with an indication of the scale of that work in terms of

hours and costs so that we comply with the newer ways of working that are being developed to just more - or more effectively manage both the use of your resources and the associated costs.

Thank you, Sharon. Greg, did you want to make a final point or was that an old hand?

Greg Shatan: I'm good.

Jonathan Robinson: Okay, good. Thanks very much. Well I'm going to just pause for one moment in case anyone wants to add anything. But I think that was an efficient call and very useful. And personally I feel better equipped now to go and talk with the CWG. I hope the other members of the Client Committee do as well. Anything else to add from anyone?

Okay, thanks very much. So, Sharon, we'll be coming back to you shortly. We'll meet with the CWG today, we'll propose these two routes of work with them and then we'll be coming back to you with an intention to give you instructions based on what we've agreed with them and probably following an initial indication of scope and cost.

Good, thanks very much, everyone. Greg, your hand has come up now so just before we close please go ahead.

Greg Shatan: Yeah, I'm just confirming we're not going to have Sidley on the CWG call? Sharon asked that in the chat.

Jonathan Robinson: I don't expect. I had already addressed that. I addressed that previously I thought but, yes, that's my understanding, we will not have Sidley on the call at this stage.

Greg Shatan: Fair enough. That gives plausible deniability among other things. Sounds good.

Jonathan Robinson: Thanks, Greg. Thanks, Sharon. Thanks, Lise. Thanks, Martin. Talk to you all - well all except Sharon at 17 UTC.

Lise Fuhr: We will. Thank you, Jonathan. Bye.

END