

ICANN

**Moderator: Brenda Brewer
December 1, 2015
1:00 pm CT**

Greg Shatan: This is the DTI PR call for December 1, 2015. I think for this call we'll be primarily dealing with two documents. One is the Google Doc.

And I've sent to the DTI PR list just a couple minutes ago the - a download of the Google Document in both Word and PDF format.

Unfortunately it loses the identities of the commenters to some extent preserving some colors but not names. And also we will be dealing with portions at least of the Sidley document that is currently in the chat.

I'd like to actually start with the Google Doc. And it's probably easier for everyone to actually look at the Google Doc rather than at the Adobe Connect window to do that.

Let me circulate the link in the chat of the Adobe just in case there's anybody here. Oh (Grace) you're faster than me. So we can kind of meet over at the Google Doc and then we can turn to the Sidley document.

Andrew will be appearing in the Google Document as an alter ego.

Andrew Sullivan: Greg, for the uninitiated could you give the titles of the documents? I've got them in my phone actually.

Greg Shatan: Sure. Well the Google Doc at this point is just entitled DTI PR Draft of Potential Principles and Requirements for Owner of IATA Trademarks and Domain Names.

What was circulated to you when you joined the group is probably obsolete since the Google Docs has moved on as Google Docs tend to do.

Andrew Sullivan: Okay. I've got the one that you - the title that you just read.

Greg Shatan: Okay.

Andrew Sullivan: I can see all the comments.

Greg Shatan: Okay great.

Anyway why don't we more or less begin at the beginning although the first comment there is about the Sidley analysis. I'd like to come back to that.

But, I think that will take some time. But I'd like to also see if we can make some headway with the document a lot of - or a lot of headway with the document as a whole.

So why don't we go down to Section 2 of the rather I should say Section 1, Subsection 2 of the Google Doc which is now entitled What Does It Mean for the Owner to be Neutral?

As discussed before we kind of - I split this into narrow and broad alternatives rather than the whole laundry list. But I've also made some other section changes. So why don't you just take a moment to take a look at this please.

Okay so I assume had enough time to at least look at kind of sections that I don't - that haven't split up into ownership and control and then operations. Because I think those are really two concepts that we're kind of getting mushed together in terms of neutrality.

So that the first issue really I think went more to kind of ownership and control of the owner. And I've split it into what we're calling the narrow alternative. Does neutral mean that the owner should not be captured by or be under the sole control of the IFO or any affiliate of the IFO?

And then a broader alternative does it mean that the ownership not be captured by or be under the sole control of any of the three operational communities?

Any comments on either of these whether there's, you know, first whether there's drafting issues putting aside for the moment which definition of neutral one might prefer? Milton?

Milton Mueller: Yes, I'm not quite understanding the operations part of this. In other words yes the trust - I understand the BI. But I don't understand the issue under it. In other words the quality control issue I don't understand how it relates to neutrality and nondiscrimination. Can you explain that?

Greg Shatan: Sure. Well under, you know, first in terms of operation as I view that as being different from ownership and control by operations I mean how the owner would carry out its activities which I presume the meetings that the owner will

be neutral and nondiscriminatory in how it carries out its activities. At least the term nondiscriminatory has been brought into the conversation. You know, it's part of the ICG document.

And I think this language is the rest of I was taken from I think Milton was one of your comments that the trust will license the trademarks and make the domain available to whoever the relevant OC tells them to.

Milton Mueller: Right. That's right, yes. I don't understand how the quality control gets into that.

Greg Shatan: Well as a first, you know, generically looking at what trademark owners need to do, trademark owners need to be responsible for the quality of activities carried out by we're not - need to be sponsored for monitoring and keeping to a particular level of quality any activities carried out by their licensees. So the relationship between the owner and the IFO is a license or a licensee relationship. So that quality control requirement extends to choosing who your licensees will be. So that is where the issue arises.

If the owner...

((Crosstalk))

Greg Shatan: ...has discretion in choosing who its licensees will be but the operational communities need to have the discretion to choose who their IFO will be how do we manage those two concepts simultaneously?

Milton Mueller: Yes I - okay. I see what you're getting at there. So your...

Greg Shatan: I'm not saying it can't be done. I'm just saying how would we do it? Can it be done?

Milton Mueller: You think that there's a distinction or contradiction between making the domain available to whoever the relevant OC tells them to and the quality control aspect of it although not many other people seem to share that concern.

Greg Shatan: Well I think that's a generic concern of that arises under trademark law. So I'm not sure how it can be shared as a concern.

Whether anybody cares to follow trademark law requirements or preferred would prefer not to is I think a slightly different question. But I don't think we can get away from them as long as what we're dealing with is, you know, at least in party trademark list.

Milton Mueller: Okay. So I had one other comment about this part. And I was under the impression that the broad alternatives had been eliminated as a consideration. Is that still alive in anyone's mind?

Greg Shatan: I think it is in large part because the group is so small. I think we need to present alternatives to the larger CWG.

This is not supposed to be a decisional group in any event. So what we're presenting in all these cases are potential requirements to be adopted by the CWG.

So I think that where there are competing considerations they should be brought out. And I think if we had 30 people on this call that I'd be a little bit

more comfortable about eliminating options. But given that we don't have that I think we need to keep options in here for consideration by the full group.

Milton Mueller: Oh, I guess I thought these design teams were actually designed to narrow the options presented to full group rather than just setting them out. I thought we were - actually were a decisional group.

Greg Shatan: No. That's not the way I take it. And I think each one of these has to be kind of run under its circumstances.

I think that, you know, clearly we are trying to define a limited universe of options. You know, I don't think we have any - we have some that are, you know, truly off the wall but I don't think we do. I don't think anybody's proposed any. You know, then we can eliminate them.

But I think, you know, trying to take options off the table that are I think relevant I think it's premature to do that without bringing them to the full CWG.

And that's not just with regard to this one statement, you know, regarding a thing, you know, number of these. I just don't think we have close enough to a Plenum to deal with anything on a, you know, truly on an elimination basis.

Scott Austin: Greg I'm the newbie here so I apologize if I ask a question that's already been answered on a previous call.

Greg Shatan: Go ahead. Why don't you identify yourself because I know that you joined...

Scott Austin: I'm sorry.

Greg Shatan: ...(unintelligible) everybody else does.

Scott Austin: Sure. Scott Austin.

The question I have - and it goes back to before operations. It goes into the prior section that you asked us to look at and term captured by.

Is that something we were blessed with by some prior draft or where did that language come from? I'm just - I'm trying to equate it with either dominated by which appears later on in the documents or I know there's reference to sole control. There's also reference to affiliates.

I mean I've been doing corporate law a long time. I'm trying to figure out where captured by fits in that.

Greg Shatan: Well I would say that that comes kind of from ICANN jargon rather than corporate jargon. You know we're how we spend a lot...

Scott Austin: Yes I understand that. I understand that. I just wondered if that term has ever been given any further precision in a different context.

Greg Shatan: I think it's probably been discussed a whole lot. Whether it's been given further precision in this or any other context I don't know.

I think it's essentially it has to do with whether it's decisions and actions would be so influenced or taken over by one particular stakeholder group or in this case community that it couldn't be seen to be.

Scott Austin: Impartial.

Greg Shatan: Or in this case, you know, the IFO - the IANA Functions Operator, if it's self-controlled to the owner could the owner be seen to be making its own decisions or essentially is, you know, just inhabited by its host so to speak?

Scott Austin: Okay. Well I mean if everybody else understands what that means and that it deals with partiality and it's not trying to figure out whether it's a 10% interest or a 51% majority owner or, you know, in terms of what control really means there that's all I was trying to get at. If everyone understands...

Greg Shatan: Yes I don't mean as to a kind of equity definition of control if you will or a kind of owners, you know control in that corporate sense but more control in terms of, you know, if you will voting control or control on a decisional basis of...

Scott Austin: Do we mean political influence? I mean do we mean sort of wink and nod kind of influence as opposed to an actual vote?

Greg Shatan: Well yes, I think that actually would be. I mean one of the things that I captured, you know, more broadly speaking is that it's insidious.

Scott Austin: Right.

Greg Shatan: And it's often kind of goes below the radar screen, you know, due to conflicts of interest. Here it's probably less so than in more traditional ICANN context.

For some reason I keep hearing the voice of Alan Greenberg in my head when the word capture starts getting discussed at length but putting that aside for a moment here I think we have fairly identifiable players.

We have the IANA functions operator which is currently ICANN and will be PTI but under the, you know, again control of ICANN.

And then we have the three operational communities, two of which are fairly easy to define, which are the numbers community and the protocol commanders parameters community.

The names community gets a little harder to define not because it's undefinable but because separating the names community from the ICANN community from ICANN Inc. becomes a little bit complex.

But, you know, that was a - that's something we walked into I guess before my time when ICANN was set up and kind of, you know, represented, you know, both ends of the stick so to speak. So that's kind of my musings on capture.

Andrew I see your hand is up.

Andrew I'm not hearing you and your hand has gone down. And I see you've turned into the Beatles.

And so I think we've probably covered unless there are some other points on this section will call it 1, 2a and B.

That brings us down to what's now C looking at the board's own statement regarding neutrality which was that ICANN is prepared to transfer full ownership of the IANA related trademarks to a neutral third-party mutually agreed among the operational communities.

Now mutual agreement can be whatever the three operational communities agree to so that - putting that aside. I mean I don't know that we know what ICANN, the ICANN board meant by a neutral third party. I'm not entirely sure to what extent - to what we should give that particular weight.

I guess we do in a sense because if we don't meet their definition of neutral third-party then ICANN can say that they are - the transfer that they're prepared to make has not been - the conditions for it has not been satisfied.

So I think there is I think some need for clarification of what the board meant by a neutral third-party so that we can make sure that whatever we do design and hope to implement will trigger the statement by the ICANN board without the - without question.

Or if there are issues between our definition of a neutral third-party and the ICANN's board definition we're not dealing with them down the line but rather dealing with them now.

So I guess what I'd like to do is to certify or, you know, find a method to ask the board. And I guess we'd address this to Steve Crocker in the absence of anybody else since I think it was his, you know, statement came out under his name that we would need to kind of clarify that.

So maybe we can note that as an action item (Brenda or Greg to clarify to get clarification of what the board meant by neutral third-party in their statement of August 16. Andrew I see you've solved your microphone problems.

Andrew Sullivan: Well let's see. Have I solved to them?

Greg Shatan: You have.

Andrew Sullivan: Okay. So I am the - presumably I'm the call in user who has not shown up but I'm - I am dialed in.

So I want to go back to this previous item because what has occurred to me is whether we have settled amongst ourselves what it means for the owner to be neutral. And I think it seems to me we can define this term. That's what the design team can do.

And I just want to hook up with something you were saying earlier Greg about the difficulty of having an operational community be able to pick it's operator and yet have the owner be able to enforce its discretion in terms of licensing.

I think the answer here if we've settled on the idea that it can't be any of the operational communities themselves which I don't think we've exactly settled but that it can't be the operator itself then it seems to me that the owner under those circumstances is necessarily going to have to undertake some kind of agreement that says well it we use that input very, very strongly when exercising its discretion. And then the operational communities are necessarily going to have to accept that discretion. You know I don't actually understand how there's any other possible way to do this.

So unless there is something else that we could even conceivably recommend it seems to me that we can - we should finalize that.

Greg Shatan: Andrew I'd say I think it needs to be almost the opposite of that because I think, you know we have we've stated that the operational communities need to be able to choose their IFO.

So if the owner has broad discretion to say, you know, that one - that a community's IFO is inadequate that I think defeats the capacity of the operational communities to choose their IFO.

So I think...

Andrew Sullivan: Well let's be very careful with our terms here. So it - what it does is it prevents the community's selected IFO from using the trademark or domain name which is different from being able to select the IFO right?

Greg Shatan: Well I think that's technically yes but...

Andrew Sullivan: Okay.

Greg Shatan: ...I clearly understand for the lifetime of ICANN, and I think for anybody's idea of the future, the IFO is going to be identified by IANA and use the iana.org domain. And if that's not the case that would be, you know create a great disturbance.

I mean I think we can also - we can add to this document a question about whether it's a - should a requirement that the IFO be able to use the - that any new IFO chosen by the community be able to use the IANA trademark and the domain name. But I don't want to be entirely presumptuous but, you know.

Andrew Sullivan: No, no. I think that that was - that is the force of the numbers community's point. That's in fact exactly why the numbers community came up with this requirement because they were concerned about the possibility that if the ownership resides with the incumbent IFO then if they change things they've got an additional disruption.

So I agree with you that the - it is among the - that the operational community's decision be influenced implemented by the owner. But my understanding from everything that you have said is that there isn't actually a formal way to require that because if the owner owns it then the owner has to have the discretion.

Greg Shatan: No I think there are ways to implement this. I mean we have a particular set of circumstances here and essentially the owner is being, you know, put in business by the three operational communities to hold the domain name and operate and trademark and operate them for the use of the three communities.

You know, this is not - we're not putting the owner in business to do entirely as it pleases so this is an unusual circumstance.

Now there would be a number of ways to implement that. They may or may not be popular with, you know, one or more sectors of the community.

One way to implement that would be to have a joint board or joint set of trustees or joint advisory organization at least dealing with the IANA IPR.

They wouldn't need to deal with any other trust assets if we're dealing with an existing IETF Trust. But they could deal with the issues, decisional issues around the IETF trust. Another way to deal around the IANA IPR, another way to deal with that is by setting -- and this is not mutually exclusive -- by setting objectives criteria considerations to be taken into account so that the quality control is based on criteria not merely on unlimited discretion by the owners. You know, quality control can have and should have understood parameters generically but especially in this circumstance.

So, you know, if there was - if there were criteria that were set out in advance and a proposed IFO failed to meet them, you know, that would be one type of issue.

But if there were no criteria and the owner whoever it might be were to say I just don't like this new IFO or I prefer not to license to them because I think there are going to be quality control problems or because it's my discretion that would be a much bigger problem. So I think...

Andrew Sullivan: Right.

Greg Shatan: ...you know, further two ways of dealing with the issue.

Scott Austin: Greg I'm sorry, I got to raise my hand because I'm doing (unintelligible) my cell but Scott Austin.

Question is I see the word owner in initial cap used frequently but I also see the word trust. I thought from the context in your discussion that those are one and the same?

Greg Shatan: I think we'll need to look at the document. But yes I mean the assumption first is that the owner, the new owner will be a trust.

Scott Austin: Yes. I saw that...

((Crosstalk))

Greg Shatan: And...

Scott Austin: ...(unintelligible). So where I'm going with this is just that first of all if it is a trust and I have a problem with the signing of the document chooses a defined term for the same thing in different ways at different times we usually go with owner/trust or just trust or whatever.

But my point is if it is a trust that means there's a trust document which it seems to me other than, you know, inherent fiduciary duties you just - there would also be criteria within that trust document like you're talking about with - is that correct?

Greg Shatan: There certainly could be. And or there could be an additional document adopted by the trust for this purpose, you know, as an addendum to the trust document so there's a common understanding.

Scott Austin: And this trust is a new trust so to speak or is IETF just moving into...

((Crosstalk))

Greg Shatan: Well that's the \$64 question or maybe the \$64,000 question which is first for just to kind of set the stage, you know, in this document we're trying to set forth principles and requirements for judging and accepting a new owner. There are basically two alternatives, maybe more but two alternatives.

One is the IETF's trust which has been in essence nominated by the Numbers Community as an acceptable alternative in the document which then made its way into the ICG document.

And the IETF itself has agreed that it is willing and able to have the IETF trust used in that capacity. You know, the other alternative is that a new trust would be put in place to do that.

And then there's the question of what if any changes are contract or other things would be adopted by either the new trust or the IETF trust to meet the requirements of the names community and hopefully - and then worked out with the other two communities so that we have a single plan. So that's kind of where we're at.

Scott Austin: Well does the IETF trust (unintelligible)...

((Crosstalk))

Milton Mueller: In the interest of time (unintelligible) here?

Scott Austin: Yes sure. Sure.

Greg Shatan: Milton you want to jump in?

Milton Mueller: Yes Greg so I just want a - I'm a little bit frustrated with the slow pace of these deliberations. And I want to get rid of issues that we can get rid of.

So one of them is this business of what ICANN means by a third, neutral third party.

If you go to the ICANN statement of 15 August it's pretty clear that ICANN will consider an acceptable neutral third-party anybody that the operation community so designates.

And they say they support the ICGs proposal. They say that they support the CRISP proposal and they support the CWG proposal all of which basically the penultimate sentence of that statement says, you know, we commit the

transfer within 120 days after the neutral third party is identified by the operational communities.

So I think that, you know, we have the ability to say for example in the IETF trust is our neutral third party and that's it. I don't think we need to be spending a lot of time worrying about them using that as some kind of technicality not to transfer the trademarks.

Greg Shatan: Thanks Milton. I, you know, I was looking at the full statement. I guess I'm not as confident as you are that they mean - that whatever we consider to be neutral automatically meets their criteria.

I don't think it would be a technicality. As a matter of fact I would hope that they would not invoke it as a technicality. But if they had a substantive concern the third party was not in fact neutral that, you know, that would be an issue but not as a mere technicality.

Milton Mueller: But the term neutral third-party is qualified by mutually designated by the operational communities so it's who whatever we decide it is.

Greg Shatan: I guess you're reading it differently than I am. I don't see that just the idea that we can necessarily say that any third party we want to say is neutral as long as it's not the IFO and that there duty-bound to accept that as a definite condition of neutrality.

I just don't read that in their statement I don't see the harm in asking them. If in fact that's correct we'll get an answer. And if that's not correct then we have an issue we need to resolve.

So I don't think there's any harm in getting an answer to the question.

Milton Mueller: Well I think my...

Greg Shatan: ...is in mind is the question.

((Crosstalk))

Milton Mueller: ...(unintelligible) essentially telling them that they do have the discretion side that they don't like our choice of a neutral third party.

Greg Shatan: I think that it's in fact it's neutral I don't think they have discretion. But I guess the question is what do they mean by neutral? And I think that's where they potentially have discretion is to say what we meant by (unintelligible) is X, Y or Z and that within that admission of neutral and they have no - they should have no discretion and that's what their statement said.

Milton Mueller: Ask them whether they consider the IETF trust to be neutral then.

Greg Shatan: That is one question. I think we can ask them what they meant by that and we can ask them if the IETF trust meets their definition of neutral.

Milton Mueller: No I would prefer to just ask them whether the IETF trust meets - is an example of what they consider a neutral third party.

I don't want their definition of neutral. I think we defined neutral, not them.

Greg Shatan: That's not the way I read their statement. So I don't - I think that, you know, despite the temptation to kind of just skip all the steps and just anoint the IETF trust that's a temptation that we should not just give into because that's

not within our decisional basis, not really what this design team was set up to do. So...

Milton Mueller: Well I'm not sure I even agree with that but I don't think by having a more specific question for example if they say no we don't consider that IETF trust to be a - an acceptable neutral third party then we have something to work on.

If - but if they give us a definition of neutral I mean does that mean we have to accept their definition?

Greg Shatan: Not necessarily. We have - then we have an issue that needs to be worked out.

((Crosstalk))

Greg Shatan: And I think there's also the issue of whether we're dealing with the IETF trust as it currently is or is the IETF trust will be, you know, set up even contractually or by additional documentation they're just discussing even if none of the current documentation changes to be the steward of the - and owner of the IANA IPR.

So I think the IETF trust as it is a trust set up to hold IETF assets for the benefit of the IETF or at least, you know, with the IETF as a - as the beneficiary. So that's - now I think I don't see - I think we can ask both the general question and the more specific question. I don't have a problem with that.

But I think kind of skipping the general question would be a mistake.

Milton Mueller: Well I just told you why I think it's a mistake not to skip it that you're basically letting them define what a legal third party is and that then we have to negotiate a definition if we don't agree.

I think we define what is a neutral third party. We don't ask them what it means. They are in fact this memo from ICANN is in fact responding to the CRISP team and the deliberations within the CWG.

It basically says fine you guys are right, the IFO should not control the trademarks and we're willing to play ball with that. Now it's up to us to define, you know, what the criteria are.

I - and unless he had some reason to actually believe that they will not transfer it to the IETF trust which is the only known candidate at the moment but, you know, like I say if they say no to that then we have something to talk about but if - I am really not interested in their definition of a neutral third party.

Greg Shatan: Well I think that in terms of understanding their statement we need to understand what they meant by neutral third party. And if they say we mean whatever was met by the three operational communities then, you know, that's an answer that we can live with. That's probably the easiest answer to live with.

But I don't think we can presume...

Milton Mueller: We've already said whatever is meant by the operational communities. We've already said that anything mutually that designated by the three operational communities will transfer it to.

Greg Shatan: That's not what it says.

Milton Mueller: We've already answered them. You know, I am just not going to agree to any procedure which involves asking them to define neutral third party, I'm not.

((Crosstalk))

Greg Shatan: Well that's okay. We can agree to disagree and we can bring that - the options to the CWG if we don't want to decide, you know, between, you know, in this group.

And we can see what other people think about that but ultimately I think that, you know, the issue of asking ICANN what it meant by this statement and clarifying the statement to me, you know, is a gating factor in our work.
Andrew I see you've got your hand up.

Andrew Sullivan: Yes thanks. So in keeping with this line of trying to closeout issues I still would like to go back over this item to and decide what neutral means for this group. Like we're writing the document, we get to define this. So do we want the narrow one or the broad one?

Greg Shatan: Well we can go back to that but again I think that in terms of making decisions among the, you know, half-dozen of us for the group I'm again wary of doing that.

I think we want to define and refine the options but in terms of...

Milton Mueller: This isn't an option. This is a meaning of the word for the purposes of the document. I think we can - I - like if we can't make that decision then there's no point in having a (unintelligible). We - like because we can't write anything.

Greg Shatan: I disagree.

Andrew Sullivan: We need to define the terms in our document.

Greg Shatan: Well I think we're trying to define what the principle requirement of neutrality means. And we have two different options. But I think they're both viable options but clearly they have - they are different.

Andrew Sullivan: Well right. So all right, maybe the problem is that we are approaching this from - because I feel like we are making no progress at all on coming down to a meaningful document that we can present to the CWG such that they can make any decision at all, like we're just going to have this entire discussion in the CWG. If we're going to do that we might as well go have it there now.

So let me try another tack to see if were on the same page.

From my point of view speaking as somebody who has to worry about this problem from an operational point of view the thing that I actually care about is the domain name.

The trademark is not a thing that I care about except that for reasons lost in the midst of time ICANN accepted the idea that trademarks apply to domain names in ways that I think are absurd.

So we're stuck with the trademark as a thing that we've got to put up with. But the fundamental problem is the domain name because that has real operational consequences for me.

Now it is just factually impossible for more than one operator to run the domain name. So we're going to - if we've got the case where we have multiple IANA function operators we're going to have to find a way of carving out separate subdomains underneath the iana.org name. That's the only practical way to do it I believe. Does that...

((Crosstalk))

Greg Shatan: That would have been my first thought as well is to use subdomains.

Andrew Sullivan: Okay. So does anybody disagree with that to begin with?

Greg Shatan: Well with the use of subdomains or your statements about trademarks and domain names being absurd and all that kind of...

Andrew Sullivan: No, no, just that the practical functional question is not especially the trademark in terms of how you operate a IANA registry but the domain name. And that the only practical way to do this in the face of multiple IANA operators is automatically going to be the rights to use a subdomain underneath iana.org.

Greg Shatan: I agree with the second point. The first as to the importance of relevance of the trademark I don't particularly agree with. But I see, you know, in terms of the operational use of the registry and the domain name, you know, clearly what it's, you know, it's important.

And relatively speaking, you know, more important. I don't think that eliminates the trademark concern.

Andrew Sullivan: Well it can't eliminate the trademark concern because the trademark (unintelligible). So because I'm going to be using a name underneath iana.org therefore I automatically have to be able to do the trademark even if all of the other considerations like for instance being able to present myself as an IANA operator were not a consideration.

I - given that there's this existence of the trademark there's no way to work around that. So every IANA operator has to be able to get a license to the trademark right?

Greg Shatan: Right. So if you end up with protocol.iana.org and you're the operator of that branch you should have a license.

Andrew Sullivan: Right. Okay so it seems to me that these are two fundamental operational principles that we could right now we could say these are definitely things that these are the things that we have to be able to achieve. Does that seem like worth doing?

Greg Shatan: Yes I'm following you I think.

Andrew Sullivan: I'm just I'm trying to get some like I'm trying to narrow down the scope of all of the things we have to consider so that we always focus on what are the specific things that this organization - that this thing has to be able to do?

And that anything that is outside of those operational realities we can just say not a relevant problem and set it aside.

Greg Shatan: Well I think we need to deal with the trademark as a trademark. I think those are - I don't think we can set aside all trademark concerns.

But I think if we, you know, let's run with the operational concerns around the domain name. And I think - or the domain.

One of the concerns or one of the issues that was raised is that I think it may even be in the ICANN statement that it wants operational control of the iana.org domain as long as ICANN remains the IANA functions operator.

But if you're looking, you know, past that point at least in part. Then the question is who has operational control of the domain putting aside the subdomain? That's...

Andrew Sullivan: Right...

Greg Shatan: ...another issue.

Andrew Sullivan: So exactly right. So that becomes an issue that needs to be satisfied. Maybe the answer for the - for ICANN is that over time the subdomains are the things that are on risk control and somebody else has operational control, I don't know but we like we're clearly going to need to go through these things.

I - it just it seems to me that what we're doing is we're starting - we've been tackling this problem now for a couple of weeks on the basis of here are the problems the trademarks raise and then trying to solve those.

And I'm not sure that we're making the kind of progress that is necessary given that, you know, our original deadline was like three weeks ago.

So I'm just concerned that we need to be able to show, you know, back and certainly I know I am under pressure in my operational community to be able to report back that we are making some progress.

And I don't - it doesn't seem to me like we're doing that so I am trying to see if we can get some urgency around the operational problems that somebody trying to do this would have and if we focused on that maybe we would move a little faster.

Greg Shatan: And I certainly don't mind, you know, trying to approach this from a different vector so to speak and then kind of seeing where that leaves us to some extent in the trademark discussion. I think that's a worthwhile one.

I do think we have made good progress. I think the document, you know, has a lot of value. I think the neutral - the neutrality question is an important question but I don't think it's the only issue that we've resolved.

But I think you're right in that in terms of progress making sure we don't screw up the trademark is kind of to my mind the first principle with regard to the trademark.

But operationally what we need to be able to ensure is that access to this domain name and potentially creation and operationalizing subdomains is really where the rubber hits the road.

You know, this is an operational problem with a trademark issue not a trademark issue with an operational problem.

So Andrew are you still there?

Andrew Sullivan: Yes, sorry I am. So okay so look why don't we - so we can move on from the neutrality of the in these terms because we're just going to leave that open as these two possibilities.

Greg Shatan: Right.

Andrew Sullivan: Since we focus on the (unintelligible)...

((Crosstalk))

Greg Shatan: (Unintelligible) brand owner. But let's think about this more as a domain name owner as the registrant of the domain name and...

Andrew Sullivan: Right.

Greg Shatan: ...the admin and whatever...

Andrew Sullivan: So what I see under operations is that we've got two different kinds of things. We've got cases for subdomains and we've got cases for domains.

So I hereby offer to take a - to take the action to suggest some new text for that later this week under Item 2B the, you know, the operation of the domain name itself and the operations of any subdomain and how we would handle that. Is that agreeable to people?

Greg Shatan: I for one would give that a green tick. I...

((Crosstalk))

Greg Shatan: ...yes that sounds good to me. Anybody else? I'll take silence as consent. So and I see a green tick so that's not just silence. You have active agreement from Milton.

But I think that makes sense and I think we do need - and from (Nicholas). So I think that makes great sense because we really - as I said this is, you know, we need to approach this from the operational end.

The trademark I wouldn't quite agree with you that it's kind of, you know, some vestigial thing. But it is clearly the tail and running the domain is the dog. So we don't want the tail to wag the dog but we can't let the tail drop off but anyway enough bad metaphors. And I see a green tick from (David) so I think you have broad support Andrew.

Andrew Sullivan: Okay. I'll try to get that out. I'll send a note to the list when I've done it and then people can beat that up so that we can iterate on it both before our next meeting.

Greg Shatan: Sounds good, so you'll drop it right into the Google Doc then?

Andrew Sullivan: Yes.

Greg Shatan: Okay. And I'm not sure if that should be in 1-1-2 or kind of domain name operation should be its own section. But I'm not concerned about - I'm more concerned about text at this point than organization so just put it wherever you think it's right.

Andrew Sullivan: Okay thanks.

Greg Shatan: Thanks Andrew. I think that's overall a very helpful discussion. I think it does help us to refocus on, you know, that while we have an IPR question what we really have is a question about, you know, being able to continue to operate with the IANA which, you know, primarily is operation of iana.org and also the operations the people that are currently at ICANN.

But, you know, it all and it essentially comes down to iana.org into the registries database there.

Getting back to the document and recognizing that we don't have a whole lot of time...

Scott Austin: Greg I have a question.

Greg Shatan: Yes?

Scott Austin: Scott Austin. I have two questions.

Greg Shatan: Yes go ahead.

Scott Austin: Will there be more than - it looks like in the document it anticipates multiple IFOs? Is that correct?

Greg Shatan: Well in the short run we contemplate a single IFO which is ICANN. But under the CWG's overall - well under all three organizations have reserved the right one way or the other that if the current IFO ICANN is no - is not performing or for whatever reason the community decides that ICANN should no longer be the IANA functions operator for its community that it will have the option exercised differently in each community to go out and find another IANA functions operator whoever that might be.

It might be Scott's Domain Services. So yes there would be in essence a fracturing of that potentially. You could have as many as three presumably.

Scott Austin: The reason I bring it up is and I know Andrew comes from a back operational background and I come from a trademark lawyer background so my bias is exposed as is his.

I question whether the trademark really is as little as we think it is if in fact it was the factor because would it be the equivalent of a certification mark? That is the public and/or the government body could trust these parties that serve as IFO's essentially have been certified to have the ability to serve in that capacity?

Greg Shatan: Well yeah, not - without getting into the nuances of when a market's a certification mark rather than a trademark I think in essence it - there is that element, you know, whether, you know, exercised through quality control that the owner essentially is putting the new licensee in business and that it represents a reputation goodwill and a standard that has...

Scott Austin: (Unintelligible).

Greg Shatan: So you're breaking up a bit.

Scott Austin: I was saying (unintelligible) was what I was thinking of but it's just a thought and obviously trying to give some weight to an original concern about the mark still being relevant to this (unintelligible) and to the (unintelligible).

Greg Shatan: Right, no I think that's a good counterpoint and Scott for some reason you're probably wherever you are currently you're hard to understand.

But I think, you know, it is a valid point that it, you know, what a trademark ultimately represents is not just - its reputation and that the reputation and goodwill and secondary meaning will be associated with any license and that

the licensor has and owner has that - make that capability to essentially assert that they're - they endorse the licensee. So it does function as a certification mark in that sense.

So, you know, I don't think we - we're not going to lose sight I think of the trademark issues. But I think, you know, we do need to look at operationally how this will work and to what extent the owner of the trademark and the brand and the domain name will be able to influence or not how the domain is use as well as how the trademark is used and how the services offered under the trademark are used or controlled.

So I - without, you know, worrying too much about a hierarchy of issues I think we have spent a lot of time in this group thinking about the trademark aspects of this and not much if any time concerned about the kind of domain name operations aspect of this. So at least make sense to rebalance ourselves without, you know, getting into a competition of which issue is, you know, "more important."

Any way to get back to the document I think where we kind of left off we were discussing that the board's neutral third-party issue and I think, you know, we may need to further revisit that, we have difference of opinion on how to ask the board what it meant and whether the IETF trust is within their definition of a neutral third party.

But I think if we - I eliminated 2-D. I felt like it didn't add anything at this point as we're discussing principles and requirements.

So that brings us into three. And here I think the changes are primarily cosmetic but so I would kind of go through this although I think when we get to the issue of separation I think we've kind of covered the issue of what

happens when the - when an operational community decides that the current IFO will no longer be their IFO.

And we do need I think to some proposals about how to balance the needs of the operational community versus the needs of the brand owner.

But I think that one of the reasons Andrew was doing what he's doing was to try to see if we can approach that issue from the other end and see how that informs the trademark discussion.

So I think we can kind of go past that for the moment and come back to it in the context of what Andrew's suggested text will be.

Section 5 there was some suggested text here from Andrew that set in that the trademarks in talking about how the IANA trademarks and domains names are different than a normal commercial entity I've tried to clarify what I take from what Andrew was saying here.

So I guess questions were there any objections to the revised text here? See Andrew has typed in WFM. I'm not sure what that stands for.

Andrew Sullivan: Oh sorry, Works For Me.

Greg Shatan: Okay. I wasn't sure. I thought it may stand for wait a fricking minute but works for me, works for me.

Okay good. So that brings us to Page 3 there was a little...

Milton Mueller: Watch that language. My hand is up.

Greg Shatan: Milton?

Milton Mueller: Can you hear me?

Greg Shatan: Yes Milton.

Milton Mueller: Yes.

Greg Shatan: Go ahead.

Milton Mueller: I wanted to find out whether that language works with if there are multiple IFOs?

Greg Shatan: I think it works if there are multiple IFOs. I mean there - I did add a reference to potentially one or more IFOs. You know, it indicates basically the owner itself was not going to exploit the trademark or license it for kind of traditional - in a traditional licensing manner with a apparel and fragrances and footwear but that essentially it's being licensed to the IFO or to each IFO for the operations related to that community. But to my mind it works. I was thinking about that (unintelligible).

Milton Mueller: Are we talking about the domain or the trademark here Number 5? I thought it was a domain?

Greg Shatan: It's really talking about both.

Milton Mueller: Okay so...

Greg Shatan: (Unintelligible). It talks about both.

Milton Mueller: Operational control. So what we want if there are multiple IFOs is for the trust to have operational control of iana.org and sub delegate third level domains to these. Is that what we're talking about here?

Greg Shatan: Well I think in five we're really talking more about generally the - well are you on Roman 5 on Page 4 or Numeral 5 at the bottom of Page 2?

Milton Mueller: I'm on Roman 5.

Greg Shatan: Okay we were actually on bottom of Page 2 but we can...

Milton Mueller: Oh I'm sorry about that. Okay. Just ignore me.

Greg Shatan: Okay. Well we'll come back to you and it when we get to Roman 5. So now we're at the very bottom of Roman 1. There was some discussion about outside trademark counsel to my mind the discussion is resolved but I'll leave it up for another day before I eliminate it.

And then in Roman 2 there's been no change. Roman 3 I did split this out a little bit because we seem to be tripping over terminology a little bit between quality control over licensees and policing and enforcement which goes to dealing with unauthorized third parties.

So not really any major changes to the text but I did in what's now Roman 3 Number 1. Roman 3 Number 2 is new.

I guess at the very end of Roman 3 Number 1 there's a question there and it kind a goes back to the discussion that's now in the margin between Andrew and myself with regard to how has IETF trust exercised quality control of licensees?

So in terms of looking at IETF trust to see if it, you know, how it meets the requirements or if it meets the requirements. The question was whether IETF has exercised quality control over licensees? And the answer largely seemed to go to AMS which is the current IETF Secretariat.

So since the secretariat primarily exists to provide services to the IETF or into the IETF trust it seems like that quality control kind of isn't an issue if you're basically the largest consumer, maybe the sole consumer of services.

But the question still remains whether there has been if there's an answer to this question about how IETF trust is exercised, quality control with licensees that are kind of operating more by in terms of giving services to third parties under the IETF brand as opposed to offering services to the IETF...

((Crosstalk))

Andrew Sullivan: So I can answer that. The - there's been a few occasions where people have done things in association with the IETF, you know, like printed a T-shirt or something like that. So there is an example.

Some - normally what happens is we have sponsors for meetings. And one of the things they do is they print the T-shirts for it. And then as part of the, you know, as part of the contract of the meeting the use of the logo and so on is included in that like how, you know, how you're allowed to do it and so on.

But every now and then we have a meeting that doesn't have a sponsor. And, you know, the IETF being made up of geeks they feel like really deprived if they don't get a T-shirt.

So then people decide to make their own T-shirt and then they have to get agreement on this. And so that's an example where, you know, the IOC has to step in or the trust rather has to step in and have a look at how this happens.

And what normally happens is we tell Ray Pelletier who is the IETF Administrative Director, you know, make it so and monitor this and that'll be it.

And it's a one-time thing so the T-shirt's made, you know, one time. It's a single run and, you know, you're not allowed to make more and so on.

And that's normally how those things happen. So normally what happens is, you know, we look at those things.

Now the question is, you know, are there cases where there's an ongoing sort of responsibility there?

Well it seems to me actually that the way that the IETF secretariat works with the IETF is exactly analogous to the way the IANA is going to work.

Because really the people who are talking to the IANA are two groups of people, the people who are consuming the output of the IANA for inclusion in other things such as, you know, hardware vendors including protocol parameters and their - in their product or people downloading the root zone file - whatever -- on the one hand.

And on the other hand the people who are, you know, pushing this data up who it turns out are a significant percentage of the consumers of that as well right?

It like the consumers and producers of IANA stuff are - there's a large subset of the consumers who are also the producers. And that's true of the IETF as well right?

There's all kinds of people all over the IETF, all over the world who are using IETF products. And, you know, we have to be aware of the Web sites and so on and how they're using these things. And we need to make sure that, you know, we're presenting this consistently.

But because we also happen to be the people because a large percentage of those consumers are also people who are producing them we have a sort of built in enforcement community that can, you know, report any of these things back.

Now I suppose the argument is well that's not sufficient because you also need to have somebody, you know, policing this. And that is in fact what we have in the case of Ray.

So he monitors those agreements in the case with AMS and therefore monitors, you know, the way that the thing continues to be used.

And I would expect that the same thing what happen, you know, we would just add to the responsibility, the additional responsibility of making sure that the one, two, three or however many IFOs there were.

I mean in principle for instance the registry operators for the IETF who are not currently ICANN but there are some could also in some sense be considered IFOs so maybe they also would get to use IANA. I don't know.

But that seems like another example where, you know, you would just have to have somebody make sure that they're continuing to use it just as we do with AMS.

And really my point is that because the community of users and the producers have a significant overlap in the set you've got a sort of, you know, built-in source of data from, you know, for the enforcement arm.

Greg Shatan: Thanks Andrew. That's helpful. And I think, you know, that in terms of the value of what I sometimes like to call eyes on the street, you know, that's important that there are, you know, in many ways we're dealing with a relatively small, you know, community of users, you know, even the end-users of both IETF protocols and, you know, the larger issue.

But I guess what - where the issue comes in to my mind that may be different although not necessarily is where the IANA functions operators output if you will goes - and their services goes out to the somewhat larger world and not back up to IETF or to its members.

You know, where - how does IETF ensure that if somebody's offering that if the offerings ultimately kind of meet its standards or is it really they're all really being undertaken by the IETF at this point? So there really isn't that issue. There's not quite the same issue as when a third-party is kind of acting using your name and...

Andrew Sullivan: No, no. I think that maybe I wasn't clear enough that the situations are I think exactly analogous that is AMS for instance operates ietf.org.

If you go to look at ietf.org and you download, you know, the RFCs from there or you look at the current data tracker for instance that is where the IETF

conducts all of its business which contains all of the RFPs on which all of the, you know, protocols that work on the Internet how they - how they're codified you're talking to AMS. You're not talking to the IETF which doesn't even exist, you know, in a sort of legal sense.

Greg Shatan: Right.

Andrew Sullivan: So that is - that's exactly the sort of case we have with iana.org right? There's this finite really a very small number of consumers of the output of iana.org. Because it's the - on the one hand it's people who need to look up current protocol parameters which is essentially people who manufacture devices or operating systems and other such things.

You've got the people who need to look up top level IP allocations or AF numbers. But mostly people actually go to the IRRs for that because most of that stuff is well known in advance.

So it's really only like who is implementers and such people who have to look that up. And I guess they'd have to look it up in real-time sometimes in the future if we switch over finally from Whois.

And then finally the only people who really look up the root zone from IANA are the root zone operators, right? Like nobody actually talks to IANA for the root zone unless they're a root zone operator. Everybody else talks to one of the root zones.

So for instance if you want to get the - if you want to run your own private route on your network which people do sometimes you want to get your own private copy of the root zone -- you can do this because it's signed so it's safe

to do that -- you don't actually get that from IANA. You normally you get that from somebody else.

So very frequently you happen to get it from the same people who are IANA. But it's actually the root server operator portion of ICANN rather than the IANA portion of ICANN.

Greg Shatan: Right.

Andrew Sullivan: So it's a small number of people who are taking this and they're all both producers and consumers of the content.

So to me it's a very, very similar sort of situation. And this is part of the reason that I thought it was useful what (Constantino) said. You know, this is not like a normal IP situation. That's exactly right and that's what I thought it was important to include that step.

Well we're not going to try to exploit it for other purposes. It's this narrow function.

And within that narrow function actually there's a policing problem and your licensing and enforcement problem is actually narrower because you can, you know, it's a bounded problem. It's not like the entire universe of people because there's a small number of people who need to care.

You do need to worry about who, you know, other representations and so on. And obviously you need a staff member who's going to, you know, regularly check to make sure that these other representations are being - aren't happening and so on. So that's a function. But I think it's exactly the way the IETF, the exact problem that the IETF has here.

And again I want to emphasize like we've got no dog in this race right? The IETF trust doesn't essentially want this job. It's just we said we've already got this thing set up so we're willing to do it.

But the point is we've got running code that, you know, is highly analogous to the situation so it would be useful to incorporate that experience somehow.

Greg Shatan: Right. I guess the last thing and this is kind of more being forward-looking is that the names community and the numbers community use IANA as well both iana.org and the services of the IANA staff in order to get things into iana.org.

And certainly in the CWG as you know as you know we've set up they group that will, you know, look regularly at key performance indicators and SLEs and all those sorts of things to make sure that it's functional.

And I guess, you know, we just we need to create kind of a feedback system so that that experience kind of feeds back to the owner.

I don't see that as a huge challenge. But clearly if the names community is very unhappy with performance that's something that the owner would also need to take into account in determining quality control.

Andrew Sullivan: Yes I completely agree.

Greg Shatan: That's kind of an operational side issue and I don't see any, you know, big tension in trademark law and doing that as long as it's kind of just written out correctly.

Anyway let's get off of this point because I think we've beaten it into a fine cream by now.

So just briefly before we get to Roman 4 at the bottom of Roman 3 I've just added, you know, a couple of points here that explain what kind of policing requirements, policing and enforcements requirements would be when dealing with the evildoers, potential evildoers, the unauthorized users. People can take a look at that.

Section 4 there is some comments about whether this is a duplicate of Section 1. I don't think it is. But I think rather than taking time on this call to compare the two let's see how they develop and see if we - what we still need out of four.

And I know that Milton was about to talk about Roman 5. And so before we kind of lose everybody we might as well go to Roman 5 here where the question is, is IFO operational control of the iana.org domain name one of the principles and requirements for the names community?

And this kind of comes back to here this is how we're really talking really about the domain almost exclusively and not about the trademark issue.

So I don't know if Milton if you want to now that we're back to this do you want to come back to the group with what you were thinking?

Milton Mueller: Okay. Yes I was just wondering if we did have split IANA function operators whether it would be the IETF trust with operational control of the iana.org domain and then it would sublicense the use of, you know, food.iana.org or names.iana.org protocol or would we keep using just iana.org in some way for each of the separate registries?

Greg Shatan: Yes I think let's kind of see what Andrew comes back with because I think it kind of speaks to the same issues. But the way I see it is that iana.org without the subdomain would essentially there wouldn't be much there and all the action would be taking place under the subdomains if we get, you know, to that point where we're now in a state of separation.

And each of the three maybe one or two is still ICANN. But the third or two are not ICANN are really primary operating in the subdomains. And then they would need a license and they would also need essentially operational control of their subdomain. But I think that is what this means.

I guess the question is whether ICANN wants operational control of the prime domain without even if it's no longer the only IFO. But to my mind that doesn't seem to be an entirely realistic position.

And I think as long as ICANN is the only IFO they can operate iana.org as they currently do unless people disagree with that. And then when separation comes really kind of has the whole game tends to change at that point.

And really the operation of the subdomain becomes what's relevant. But clearly someone at that point it probably does make sense for the homepage so to speak of iana.org to be under the control of the owner and not of one of the two or three IFOs.

Andrew Sullivan: Yes this is Andrew. So if I may the - what I imagine purposing here is that I'll - we've got an initial state which is essentially the domain name is registered and it's technical contact includes - its technical contact is the IANA department at ICANN. And that's the, you know, starting state.

And that naturally has to happen because the registrant needs to be changed because that's what the - that's what the tokens, you know, the registration relationship and so that's the owner.

But what I imagine is that in the future there might be a division of these things and the individual IFOs would have to, you know, would have to be carved out from there.

And I imagine a transition period -- and I'll lay out some options for this -- a transition period where there was a redirection probably at AGP level.

And that redirection would have to come out of iana.org. So somebody would need to be the operator of that in the interim. So it would probably be wise to do that early.

And at that point then, you know, after some interim period you'd actually end - you could break those links. And IANA.org becomes what is called in the DNS an empty non-terminal. That is it's not the last - it isn't a thing that resolves on its own. It's got things underneath it but there's no things to resolve at iana.org itself.

So I can lay that out sort of trivially. And I will do that is part of the other work that I agreed to.

Greg Shatan: Sounds good. I guess from my own, you know, semi my view probably want to have a landing page at iana.org that would bring you to the three different places but, you know, if you want to go here, you know, click here. But that's a small issue.

You know, what you'd want to have kind of if you just put in iana.org I don't think you'd want a 404 error but...

Andrew Sullivan: You would actually get a 404 so that's part of the stuff that I will lay out though...

Greg Shatan: Okay.

Andrew Sullivan: ...of the issues yes.

Greg Shatan: Fair enough. So I think that's good enough. Now we have Romans 6. The - and this was an area was a little controversial. We only have about five minutes here.

So basically this goes to issues of disputes between the owner and the operational community and whether there - what type of dispute resolution procedure might have a - and maybe that's giving it too fancy name for a method of solving disagreements.

There may be disagreements but among VOCs that - but then there are also disagreements between the owner and one or more of the operational communities.

And here I think unfortunately started to use the word separation again to mean something entirely different which is always a bad idea in a document which I'll change.

But, you know, the worst case scenario if the owner is no longer meeting the operational communities needs as kind of the steward of the domain and the

brand maybe we need to look at those instances slightly differently. You know, what do we do and how much of that do we need to resolve right now?

So I think, you know, some of this is kind of new text here. So I think rather than try to deal with it on line in two minutes or rather on the call in two minutes kind of ask people to look here at Romans 6 as well as kind of the remainder of the document.

So I think that's probably now time to wrap up which is and I think in terms of action items maybe we should move this - we have Andrew who is going to provide us with some text which we'll see later this week all things, all stars remaining aligned.

And then we have the question of what question or questions we would put to the board as to the neutral third party referred to in their statement.

And I think maybe we need to move that to the list just to see if we can kind of come up with something that is a mutually acceptable formulation of a question or questions.

And then just to continue to kind of try to work on the document and let's - I'll try to make changes in the document earlier in the week and not get distracted.

But if other people could also go and continue to spend some time in the document we can deal with that.

But, you know, certainly while I'm not as - I think that the issue of what type of neutrality we're talking about is important that's not the only thing and it shouldn't distract us from, you know, trying to close other issues in the

document. Maybe other issues are more or less starting to close which would be good.

So finally just need to think about what we're going to say and again I think we need to deal with this kind of on the list between now and then how we'll come back with an update to the CWG and look at the meeting schedule and try to decide, you know, how much time we're going to spend with the CWG on Thursday I think it is on this and then how we're going to essentially at this point I think try to wrap up, wrap this up in time I think for the next meeting of the CWG after that time and hopefully have a stable document well in advance of that next meeting some - that we can bring back to CWG for finalization.

So I think those are - that's kind of the task as I see them. So I'll ask for kind of any other comments?

Seeing none I think I will - I think we have kind of our action items in front of us and we will continue to work on the Google Doc and on the list.

And I thank you all. And in particular Andrew I think you for volunteering to create, you know, a good block of additional text.

So unfortunately we did not get the action items listed in anywhere but I'll send around an email shortly as possible on the action items so we can kind of just keep the ball rolling here.

So thank you very much. I think we can - this is now adjourned and we can stop the recording.

END