

ICANN

**Moderator: Nathalie Peregrine
February 5, 2016
4:00 pm CT**

Greg Shatan: And please start taking your seats.

Oh, why don't we begin this next session which we've entitled Third Rail Issues. I realize after discussing these things as someone who grew up in New York I know exactly what a third rail is.

And some of you may not know the New York City subways run on electricity. The cars run on two of the rails where their wheels go. The third rail has a massive amount of live electricity which powers all the trains.

And you can imagine that powering a train of ten cars with maybe 200 people in each car requires quite a fair amount of electricity so that if you touch the third rail you will be fried instantly.

So third rail issues are issues you wouldn't want to touch even for moment. But in my role as the dark lord, for remote participants I'm wearing a T-shirt that appears to say Satan on the back. It actually says Shatan which is a old-school pronunciation of my name but all other resemblances are strictly coincidental.

So in any case I thought it would be a good idea -- maybe I'm the only one of thought it would be a good idea -- to see if we could talk about areas of traditional disagreement or recent disagreement and either try to understand positions better at a minimum but maybe even as a positive outcome to find areas of agreement and common understanding, ways that we can move forward to accomplish more and accomplish more by working together rather than across purposes, in other words a win-win solution which Satan is not normally in favor of.

But in this case that's only a persona for this purpose and not the actual goal in my day job as the Intellectual Property Constituency President. Well I also do a little legal work on the side but...

Tapani Tarvainen: Yes thank you. The idea is simply not to find issues that are not really so bad that we end up dead but something that are controversial enough to be with some - to be a bit afraid of anyway.

So I'll try to keep the set here under control unless it gets too close to the gates of hell.

Greg Shatan: So one is a third rail issue that we identified and some discussions on the commercial side are really more on the Intellectual Property Constituency.

For some reason as much as we like to talk about ways to disagree when you actually ask for a topic where you might want to throw it out under that subject matter people all of a sudden can't think of anything.

But one issue is freedom of expression which it's hard to be against freedom of expression and be freedom of expression is at the root of creativity and the

root of - and creativity in turn is at the root of a lot of intellectual property and furthermore, you know, consumer protection and free commerce which is what, you know, is essentially, you know, kind of a hand maiden of trademark law.

All do better in free societies and where there is free expression yet somehow it seems like those words become an area of disagreement. And it may be that we mean different things by freedom of expression or may mean that we're trying to accomplish different things when we champion freedom of expression or it may be that we actually have an agreement that we can discover around freedom of expression at least in certain circumstances and under any uncertain areas of policy so that I'll throw that out as a topic for discussion.

Tapani Tarvainen: Yes and freedom of expression as in many things often so and the devil's in the details as it were that people agree on general terms and when you start deciding what exactly does this mean in certain context then we find that we don't agree at all.

So we might want to find out what are those little details we don't agree on in this context.

Greg Shatan: We'll take a queue.

Tapani Tarvainen: I see that Phil Corwin at least has his hand up. Maybe you want to start.

Phil Corwin: Well I think we - I like to get discussions like this from the amorphous general to the more specific and particularly within the ICANN context what are we concerned about?

Are we talking about technical interference with free-trade that is what some type of technologically abetted censorship of certain Web sites that have particular content or are we talking about a contractual enforcement that might somehow impinge free expression?

And I don't know if we're talking about either but I think we're talking about free expression and the whole world talking about free expression within the ICANN context in ways that ICANN the corporation might impinge on free expression. So I think it'd more useful to focus in on that and be more specific about concerns and whether they are real or not. Thank you.

Tapani Tarvainen: Yes thank you Phil. I think we can talk in both senses but in particular in ICANN context how so more likely the contractual things.

And I see that Ed Morris has his hand up. Go ahead Ed.

Ed Morris: Thanks Tapani. To get this going I'm going to actually draft to people on an issue that I know they disagree on but hopefully can do so nicely. Hi Robin.

Fair dealing fair use online, if we could have comments from Greg and Robin. That should get things going a little bit.

Robin Gross: Thank you Ed. Okay so I know one of the issues with regarding freedom of expression that we've had a bit of disagreement on is how fair use fits into ICANN and to free expression into what we do here within the policy issues that we work on.

And from our perspective I think it's pretty clear at least that fair use is a subset of freedom of expression that courts have held that fair use is the

breathing space that allows copyright law, intellectual property right law to not conflict with freedom of expression.

So it is having these two important goals that sort of play off each other and with respect to copyright intellectual property right and free expression they're sort of two sides of the same coin.

And so that's why fair use has come in there because fair use allows people to use intellectual property rights, intellectual property without the permission of the owner in certain circumstances.

And it is different internationally, it gets worked out different internationally. But by and large this is the general principle.

So I know our stakeholder group has been very concerned about protecting fair use and people's rights to be able to criticize trademarks to be able to refer to them without getting cease and desist letters and you know having to go to court to defend your right to comment on a trademark or a trade name.

So this is an issue that our stakeholder group has been very concerned with. And I really do try to understand the perspective that the intellectual property rights constituency comes from as well.

My day job is as an IP attorney so, you know, it's really trying to find a balance between when a particular, any particular situation how it falls on that line whether it falls on the side of fair use and free expression or if it falls on the side of restrictive speech and often for legitimate reasons.

So that's my sort of quick and dirty take the relationship between fair use and free expression and ICANN. Greg, over to you.

Greg Shatan: Sure, a couple of different responses.

First fair use is, you know, certainly part of the United States copyright law. It's enshrined I think in Section 107. And there are - it's a complicated balancing test but one that needs to be done on a case by case basis.

And there are - it does allow for the use of copyrightable works for purposes of comment, criticism, certain creative efforts and the like.

And it balances out, you know, a number of factors such as the amount of the work taken and the amount of the work takes base relative to the work as a whole and whether the use is transformative or not and a number of other things.

But that relates to copyrightable works, has nothing to do as trademarks.

So, you know trademarks generally speaking putting aside trademarks that are graphic and logos and the like, you know, are not generally also, you know, copyrightable.

So trademark fair use is a, really a different concept than copyright fair use. So you really have to separate the two of them out if you're going to talk about fair use in a legal fashion and really in any fashion. So trying to apply copyright fair use standards to use of trademarks is not appropriate.

Furthermore in the copyright side while, you know, US has a, you know, broad and robust fair use process it's generally quite inconsistent with the handling of other regimes.

So trying to institute some sort of a global fair use standard is, you know, something that there'd be a number of long steps that one would need to take to try to figure out how to do that in the ICANN context, you know.

And clearly, you know, none of this - at the same time we do want to, you know, encourage free speech but, you know free speech, you know, using trademarks really in - then you get back to really the trademark fair use.

And when you're talking about that you're really talking about its nominative use of the trademark which is to use the trademark to refer to that thing when there's no better way to refer to that.

And the trademark keep in mind is, you know, really an adjective and not a noun. So you're really referring to for instance Kleenex brand tissue, not the Kleenex.

So there are, you know, limited circumstances under which it's appropriate to use a trademark in nominative fair use. So it's the idea that you can apply copyright fair use standards to trademark use has already kind of, you know, put us in a dead end because you're combining, you know, two largely separate areas of law.

Tapani Tarvainen: You want to reply to that Robin or there's somebody else? Okay over there.

Alex Deacon: Hi. My name is Alex Deacon.

I think clearly fair use is a third rail issue. But is it a third real issue for ICANN? I mean I've been involved for a whole two years three months. And I - this is the first time I've heard it in this forum.

So I just want to make sure that if we have this debate and I don't want to squash it but if we have this debate that we do so because it's an issue within ICANN.

So if there was - if someone could color the reasons why fair use would be in ICANN a third rail issue I would appreciate it.

And if it's not then perhaps it's not an issue that we should be discussing here and there's more important ones that we could discuss.

Tapani Tarvainen: Yes I see that Klaus Stoll has some ideas about this.

Klaus Stoll: Yes Klaus Stoll for the record. I think it is a third rail issue and it isn't. I think we need to be much more aware about the fundamentals of trademark and copyright in the IP.

We need to know as a community as a whole much, much more about the details and understand it. Because I've got the feeling that a lot of us including me are talking or trying to talk about things without really understanding them.

And I think we - what we before we're making this a third rail issue what we should do is first to get some kind of educational process throughout the community that we actually understand what the issues are and then we can go into the details.

Otherwise I really feel it's like watching paint dry and listening to Robin and Craig - Greg. I understand exactly how important that is but I did hardly understand anything about what you were talking about.

So help me out with that. Teach me what I need to know but don't ask opinion from me about something which I have no understanding of.

Tapani Tarvainen: Thank you Klaus. Phil you seem to have your card up.

Phil Corwin: Yes focusing in on the trademark as number one, you know, ICANN has existing policies. They've got the new - or the RPMs for the new TLD program and then we've got the UDRP.

Both relate to a rather narrow definition of infringement where the domain name is identical or confusingly similar to like trademark and then other factors, different burdens of proof. And all of this is going to be reviewed probably. The council will engage this month on a motion and charter for a PDP on a review of all RPMs and all gTLDs which will be a multiyear process.

I haven't seen fair use arise much if at all in UDRP defense. It's not generally an issue. I imagine it might be in some situations, just haven't seen it.

Beyond that there can be Web sites where the name of the Web site has no relationship to any trademark and yet infringing goods, counterfeit goods are being purveyed on the Web site. And that gets - that's not a UDRP or RPM issue.

That's an issue basically under the air RAA where the registrars have certain obligations when they get - and I know there's ongoing debate, you know, what their obligations are.

What - but again I'm trying to define exactly what we're talking. Are we talking about within the ICANN context? Are we talking about the RPMs, the new ones like URS and the clearinghouse plus the traditional UDRP?

And we're talking about cases where there is nothing to do with the domain name but there may be actual infringement going on through counterfeit goods and one involves right protection mechanisms and we're going to have a PDP on that where all of this can be discussed in a very open and fair way?

And the other one relates to contract enforcement and obligation of registrars. So we need to differentiate between those two cases as we discuss all this.

Greg Shatan: This is Greg Shatan for the record, just a general reminder for everyone to say their name unless they've been kind of directly called on and even then to just say their name at the beginning for the transcript.

I think, you know, what we've heard so far is that there are perhaps, you know, buzz words like fair use that are thrown around as being wedge issues.

But we often don't get a chance to really explore them fully but yet we feel that we can get, you know, shock a few thousand volts out of that if we touch it. And then we start to discuss we found out A, it's more kind of arcane and technical legal, not technical technical and B, that there, you know, our need - there is a need to explore and define it in, you know, more narrow ways and that things that may seem like, you know, disagreements are more kind of just received wisdom as being disagreements not saying that we agree.

And I think maybe, you know, to answer Alex's question I think the question is when fair use is being used as a justification for certain policy viewpoints on intellectual property rights or use of trademarks, you know, what is meant

and what's the basis for that and what's really trying to be - what's one trying to accomplish and does it really have any, you know, clear relationship to legal standards or is it you know, trying for some other, you know, for basically a policy shift, you know, with a - and attaching a name to it?

So I think it is important to try to be as ultimately as crisp about both defining the problems and defining what standards we're looking at as we discuss these things.

Tapani Tarvainen: And maybe I'll pick up a bit more concrete case here when talking about freedom of expression and trademarks and conflict in ICANN context consider .sucks or may be a hypothetical .boycott would you consider that have an agreement that basically you are not supposed to give those names to that corporate trademark or it's - only to somebody else because it would be misleading to take into what - okay. I see that I've got a few hands up at least. Sam?

Sam Lanfranco: Thank you to Tapani, Sam for the record. I think we need to parse out things here so that we're not engaging in a kind of scope creep.

The fair use policy for the most part is set at the national level. We've had changes in Canada in the last little while but there contentious and we struggle back and forth around that and the kind of earlier discussion here about that.

But there are other cases where it does come up. And last year both NPOC and I think the IPC made representations to the European Council, European Commission -- whichever unit was handling it in Europe -- where they were attempting, they were going to introduce legislation where strings within a URL if something inside the URL was a string that actually was a copyrighted word somewhere else there was a possibility they could prohibit the use of

that particular URL because it had within it a string that was copyrighted. It had nothing to do with what the URL was to be used for.

So we made representations there. We made them on behalf of our constituencies. So I think there's some very narrow and specific ones where yes it's in our domain.

The other ones about sort of fair use and freedom of expression in Canada if you're criticizing what you think is a terrible author. I think that's outside our domain. And so we need to parse this out a little more carefully so we don't end up going into areas where we have strong opinions but it's really outside our remit.

Greg Shatan: Lori?

Lori Schulman: Hi, Lori Schulman for the record. To Sam - some of Sam's points I want to say too I think it's hard at least on the IPC side to understand that the wider community may even have difficulty understanding the different complications of IP.

For example the terms that we were talking about in Europe were actually about strings of trademark terms because copyright deals with content right? And trademarks deals with brands.

And I think there is I mean of fundamental issue is a constant confusion between when attorneys are talking about trademarks, brands and copyright content.

And both have a place in the discussion within ICANN particularly when it comes to talking about how do we get at bad actors, you know, how do we get

at bad actors who use domain names to sell counterfeits? Does that become content or is that more about brands? And in fact it may include both categories. And to the concerns of associations like Alex where and you may have a trademark term for a motion picture you're really concerned about the content. You know, it's about the piracy online and how do we get at that and how do we get at that in a way that's cost-effective, understandable to the community?

It's very and I'm asking people who aren't IP lawyers in the room can we educate in a way that makes it understandable, accessible, human?

Because I think - and I do get tired - it's not even a thought. I get really tired of seeing posts particularly in the open meetings that say "Oh, well ICANN has been completely co-opted by US trademark attorneys," when in fact we constitute a very small percent of the community.

And there has been community agreement and understanding regarding that we do need some mechanisms to protect our names. And the UDRP is the principal mechanism for that and that we ourselves don't want such a broad - and to Sam's point about the comments about the letter strings in the European Union I mean the last thing we want is to be letter string so bound up that our own clients are precluded from creating new names, new marks, new products because of some prior existing strings that may or may not be relevant to whatever our clients are trying to do.

So it's not a straightforward issue and I think that's a big why it's become such a third rail issue.

Did that help or hurt? I can't (unintelligible).

Greg Shatan: Well to pick - this is Greg Shatan. I'll pick up on a couple of Lori's points there and wonder whether we can do something useful with the coming out of this discussion.

First point when referring to MPAA and, you know, Web site saying you know selling, you know, infringing and counterfeit bootleg movies or whatever it's really the conduct not the content that's the issue. It's the content is not offensive. The content is not disturbing.

Nobody wants to control what content can or can't be seen because of the opinions or the subject matter. It's the ownership. It's the fact that it's stolen. That's the issue. So the content itself is almost irrelevant except for the fact that it has an ownership right attached to it.

But going to Lori's other point an educational effort and maybe a bipartisan educational effort, I know there's more than, you know, a couple of people in the NCSG who are intellectual property attorneys and could we come up with a primer?

I mean on the one hand I think that the IPC will be happy to come up with a primer on IP law but one might, you know, suspect the source had, you know, skewed it in some ways. And of course dealing with Jones Day we know that lawyers can skew things in a lot of different ways and more. You know, I say that with respect.

But on the other hand I'm saying if we did have a bipartisan effort where, you know, we've kind of got tried, you know, call each other on it and play the ball right down the middle of the fairway in terms of at least you know, common legal concepts just to kind of a real 101 sort of thing could that help at least as we discuss this thing not have Klaus say I don't understand half of

that which you know is entirely understandable that or have Sam refer to copyright when he meant trademark.

You know, these are if we can at least have a, you know, common vocabulary and a starting point that's not the basement that I think could inform better discussion. And even at the end if we agree to disagree we at least know what we're disagreeing on as opposed to disagreeing on definitions and disagreeing on because you know we're more like ships passing in the night than, you know, attacking the same point from two different angles.

So that's just a thought I know in our copious free time that it might be a challenge to do so. But something like that could help kind of elevate the discourse.

And indeed, you know, in the IPC's chartering document we're supposed to not only, you know, be representational but we're also supposed to be educational and provide expert advice and not merely, you know, advocate for a stakeholder.

So it'll be certainly within our remit to do so. But I think doing it in a across the aisle sort of way might result in something where at least people can say, "You know, I trust that this is at least giving me the right information and, you know, we can then disagree based on that, you know, common understanding." That's my suggestion.

Tapani Tarvainen: Okay Lori wants to speak again.

Lori Schulman: Yes I wanted to actually answer your question Tapani about should we not grant if we're going to have criticism sites we agree that it's a good public policy within ICANN to have criticism sites and promote and allocate top-

level domains like .sucks or .feedback or .whatever regardless of the business plan which, you know, we in the IPC have a lot of questions about the business plans.

I wouldn't or I thought there was an agreement in the community through the Sunrise program that brands do have first cut, first shot at whatever is allocated and when the registration periods opens we get the first bite.

There's been an agreement in the community about this policy. And so it's really not about whether or not the owner should have it or not particularly if it's a criticism site. It's that we've been granted an opportunity through rights that we have to validate that we get a shot first.

And if we decline that shot, if my brand whatever my brand is doesn't want lori.sucks right I think as the brand owner, I've given up the right to .sucks. I didn't register for it through the Sunrise period. So someone else can register lori.sucks and they can write yes, Lori really sucks and she gives terrible service and she's a bad lawyer and blah, blah, blah.

Or but what they can't do is they can't misrepresent me either and say Lori says she's really a lawyer and she's not or whatever. So the point - and that goes to a fair use argument. So we get two different levels about rights.

And a fair use right I think is a fairly complicated and arcane argument that is difficult to understand.

But I think what's easier to understand is that the community has agreed that Sunrise periods are generally good, that trademark owners should have basic rights within the Sunrise period. And in terms of the pricing I'm going to leave the pricing off the table at the moment okay, although pricing I know is

important to brand owners and the fact that brand owners have been charged 100 to 250 times more what the public would of been charged buying the same domain name.

Greg Shatan: Avri?

Avri Doria: Thanks, Avri speaking. I put my flag up several times and kept taking it down saying I'm not sure if my rubber boots are good enough for the discussion.

So but I decided to put it up as the owner of a .sucks and a couple questions.

First of all I like my genuinely.sucks. Now hopefully nobody had a trademark on genuinely that I stepped on but nobody's come to get me yet. But then again I haven't really used it yet.

Then I created a something.genuinely sucks as a new blog. But, you know, I haven't done anything with it yet. I'm lazy and part of it is I'm trying to figure out what to do with genuinely sucks.

Because I would like to leave it open for free use. But do the things you say about the second layer also apply to me at the third? Should they? Do I have to worry about that? Certainly there is no trademark clearinghouse for the third level.

Now of course everybody knows nobody pays attention to third level. So I guess it's okay to use it at the third level.

But if it really is okay to use it at the third level I don't understand the argument about the second level. What makes the second level so special?

So I guess when I listen - and that's why kept taking my flag down because I'm really confused. And I will do something with genuinely sucks. I will probably do something that's fair use.

Although the question was would I be willing if I did something with genuinely sucks to let the trademark user have it? I don't see why not.

Because I can, you know, the way commercials go these days I could definitely - somebody's coming up with a marketing campaign that, you know, said this brand of beer, my brand of beer genuinely sucks and building a commercial that twists on the humor of that.

So as I say the more I think about these and the more I've been playing with genuinely sucks and trying to figure out how do I - how do I navigate that interpretational line between what you said and what Robin said?

And that's all I could tell is that there was an interpretation. Well maybe it was, maybe it wasn't. So I think you said it'll be confusing for others. I think it's confusing for me.

Lori Schulman: Say, I think it's confusing generally for lawyers too. I'm not going to say that we have the answers on this because particularly with fair use determinations it's fact specific.

And that's the problem with policies in general surrounding by names. Because trademark law while there are laws when you go down to the determining factors they are absolutely fact specific. And that definitely gets into some of the confusion about to your point what's acceptable.

And my only answers as an attorney would be I got to see what you've got up there. Are you telling the truth? If you're telling the truth it's acceptable. If you're not telling the truth, not acceptable.

You know, and in a very high level analysis of something generally .sucks it is your opinion. So it would be more towards the context. And that's where we get into this whole issue are our strings anything more than strings?

And the Intellectual Property Community says yes strings are much more than strings, strings in certain combinations and certain contexts are brands -- brands, brands, trademarks.

Greg Shatan: If I could follow-up on that, Greg Shatan again. I think, you know, not to sit here and try and do an on the spot legal analysis but in your case, you know, genuinely is a word in the English language you may be using - is not using it in the trademark context or to refer to a company called genuinely. You're using it in its plain English context. So, you know if you - there are obviously you know, trademarks come in different flavors.

There are those that are fanciful or made up words where clearly you have, you know, Exxon which has no meaning any except to refer to that company or as the brand and identity of that company genuinely is not that sort of thing. So that kind of is, you know, a helpful distinction to make.

And then now if you started putting brands at the third level uber.genuinely.sucks and if it's first off it doesn't - it's outside the realm of the UDRP. It's outside the realm of ACPA, I believe the Anti-Cybersquatting Protection Act.

But it may not be outside the realm of other laws if it's, you know, being used and perceived as a domain name and not just as a page or a section it's kind of you're using it - it's whether you're making a trademark type use of it. At that point you arguably are.

And there are, you know, some third level type operations. There's C-O.N-O, co.no which is it seems like the Norwegian version of say co.uk but it's not operated by the registry. It's operated by some guy who you know at the dawn of Internet times was smart enough to get co.no and now sells third level domains to businesses, you know, budweiser.co.no because Norway has a very strong residency requirement. You can't have a local presence. You actually have to really be Norwegian to do have a .no but at the third level you don't.

So but if you were to go in there with my client's domain at the third level I would have an issue with that and in fact I believe has a dispute level resolution process at the third level for that particular one. I think, you know, there are others like that.

So and we may have beaten this horse down a bit. I think it might actually be good to switch back to freedom of expression as a subject so that we can kind of explore that.

And one of the things that when we're sitting around batting this around on kind of our side of the table or the aisle so to speak kind of what is meant by freedom of expression? What do they mean by freedom of expression anyway?

And I'd be kind of curious to hear from, you know, noncommercial stakeholders who have - believe that there, you know, that freedom of

expression is important and something that they need to deal with and then about what they - what do you all mean when you're referring to it? Just that - I'll throw that out.

Tapani Tarvainen: Steve DelBianco wanted to comment.

Steve DelBianco: Thank you. To bring this into a more practical realm where the discussion, the question that Greg posed can be applied a lot of us worked over the last four years on the new gTLD program and remembering Specification 11 that made its way into the registry contracts the Public Interest Commitments or PIC Specification. So it's usually abbreviated as PIC Spec.

And in there is a recitation, a requirement that the registries include a provision that every registrar will tell every registrant that there are certain prohibited activities, abusively operating a botnet malware fishing piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to law and to have suspension procedures available for those complaints and for suspension of the domain name.

So that's in the contract for all of the new gTLDs. There's been precious little enforcement but there's been plenty of debate about whether that took ICANN over the line into the regulation of content.

And that was a big discussion on how we were going to rewrite ICANN's mission statements to more tightly constrain things like that.

A lot of you know the PIC Spec was something that the GAC came up with as part of its safeguards. But the Business Constituency where I live was

supportive. And a plain reading of these bad activities is hard for someone to say that those are activities that we should not be concerned about.

But I know there are plenty of folks in this room who are concerned with the way in which the chain, the custody of responsibility from our registry contract which is the registries had to sign, a registrar agreement and then registrant warnings.

We haven't seen any enforcement of that yet. But if we were to do so does the NCSG, does everyone in this room understand that it would be end up being very spec fact specific as to whether that was a trademark or copyright infringement or whether someone was operating a botnet or doing piracy or trademark infringement and that should we be prepared for a battle over the enforcement of the PIC Specs or do we think that things like a PIC Spec, Public Interest Commitment Spec like I just read they are appropriate in the context of our next round?

So, Greg may not be exactly where you wanted to go in terms of a theoretical discussion because not being a lawyer I - I'm lost in your theory and I'm focusing more on the practical implication about things like copyright infringement and whether that's going to be in the next round or is that something we will take out of the next round.

Tapani Tarvainen: Maybe this issue is too much of the third rail because nobody seems to want to do anything, really heavy lifting here.

But let's throw a few more bites in the air. I noticed that there is no ICANN.sucks and I presume ICANN has been using its privileges to prevent that from happening.

Man: (Unintelligible).

Tapani Tarvainen: Yes I know. That basically that's being in the guide book basically means ICANN is using its place position here to prevent that from happening.

((Crosstalk))

But of course Avri could - I can tell you (unintelligible).

Avri Doria: It's not because it's in the guidebook. It's because it's a reserved name.

Tapani Tarvainen: Yes, but either way. But either way it's been reserved.

So but I might argue it in the restriction of freedom of expression that you can't get ICANN.sucks.

Greg Shatan: Heather?

Heather Forrest: Sure thanks Greg. On back to the topic let's say picking up on your point Greg about what is freedom of expression it - that I think is a discussion we could usefully have.

And forgive me for having the law professor voice here but the concept of freedom of expression is so different based on cultural norms. So I do think it would be useful to have that discussion that you're proposing Greg.

What are we talking about? Freedom of expression as I understand it in lots of countries means not free speech at all costs.

There are limits and in some countries those are constitutional limits and in some countries those are common law limits. And in some countries they're statutory limits. But I think in most places there are limits to it.

What are those limits seeing as how we've traveled lots and lots of miles and come from different places? In the spirit of a multinational organization let's talk about it. Thank you very much.

Greg Shatan: Anyone want to confer on this topic or this version of freedom of expression?

Martin?

Martin Silva Valent: Yes, Martin for the transcript. I agree with Heather. In Latin America we have a whole scope of expressions. We have our (conversion) and we have both judges, laws and they change from five years to five years.

Is this - if we want to end the discussion it's a really big, big discussion. I'm not saying that this is the place to do it. But I just want to confirm what others have said. It's not an easy topic nor obvious topic and we can definitely not use charter definitions that we know from the other states even if they're the most known other.

Lori?

Lori Schulman: I was just wondering in terms of expression if we go to back to expression if they concerns are sort of conflating or political expression with commercial expression.

I mean it's expression takes many, many forms. And let's not even look at it in a legalistic way.

I think there's a very legitimate concern that I support about the privacy of those who mount Web sites that are politically motivated that are sending a political message.

And people are consistent and constantly asking me well Lori, you know, given the positions you taken on privacy and my own position is that I favor - and I'm speaking of my personal capacity now and is that I favor a gated access, a very strong gated access.

Because I think privacy concerns are super important in the broader scheme of life in general and that political expression and issues of political expression should be paramount to issues of commercial expression.

With that being said I think that a lot of the third rail debates about expression follow along that line. You know, when does the commercial cross into the political? What happens when you have sites that are politically motivated but maybe at the same time they could be selling counterfeits, they could be doing something nefarious? So what trumps what?

I think it's very well-known and criminal circles that certain illegal activities are consistently funded by counterfeiting. But they may also have, you know, these political or political entities that we may not see as friendly or freedom loving put up very controversial Web sites but at same time there's activity funding those Web sites that go to counterfeiting, that go to brand abuse. It's a very complex issue.

Tapani Tarvainen: Thank you Lori and it occurs to me that this is actually a good point to take of a little of a (tongue) in here because freedom of expression frequently collides

with privacy. And there are number of privacy related issues as well in ICANN.

So if we don't seem to be willing to engage in serious freedom of expression principal discussion maybe we could pick on some of the privacy concerns like the next generation Whois has privacy concerns most obviously and other things. Somebody want to take on that way, that line?

Stephanie surprisingly raised your hand.

Stephanie Perrin: Thanks, nice segue Tapani, Stephanie Perrin for the record.

I actually would like to bring up a - well it wasn't really of PDP. It was an implementation committee that just closed on the whole Whois complex with law procedures.

And many around the room may be completely innocent of knowledge of this proceeding. But basically it was a review to see if accommodations could be made for registrars who find themselves having difficulty meeting the policy requirements of the Whois complex with law policy which is about ten years old I think and which basically says ICANN says if you want out of your Whois requirements bring us a letter from a data protection authority that says you're violating the law.

And it also says and then the next registrar in the same jurisdiction will have to do the same.

As a privacy advocate I actually fought hard against this and we were told of course that we weren't - it wasn't within the scope to talk about the policy.

We were trying to find other ways and coming up with a letter from a data protection authority saying you've broken the law. Because of course from the registrars point of view they've broken the law, they're subject to fines, it's bad for customer relations, they could find themselves in a court, yada, yada -- could lose business.

I think some of the debate we engaged in on the committee demonstrated the very sharp distinction between data protection law as a frame of law -- and I'm not a lawyer so you're invited to beat me up on how I describe this -- vis-à-vis copyright and trademark law which is a little clearer in most cases.

Obviously there's some gray areas in terms of domain names but, you know, it's a lot easier.

Data protection law's a matter of interpretation. It is clear that not all data protection authorities might view the publication of Whois data as an infringement of law.

But in this case we had a letter from all 26 data protection authorities in the European Union saying we'll make this easy for you. They all need a waiver and ICANN ignored it.

Now I understand that I believe our two groups are on opposite sides of the substance on this issue. But as a piece of stupidity on the part of ICANN I think we have to look at that. Is this the kind of policy to be setting and putting in place and refusing to review if we are a mature organization?
Thanks.

And Steve Metalitz of course participated in this and I'm sorry he's not here. Maybe he's on the Adobe chat.

Tapani Tarvainen: Thank you Stephanie. Does anybody want to argue against or otherwise comment on this, make some very good points but maybe they are too hot topics that nobody wants to touch them.

Greg Shatan: I - this is Greg Shatan. I would just note that while Steve Metalitz did join us yesterday he's not joining us today at least not at this point.

And just secondly that others in my group have spent a lot more time on that particular subject I was not in the groups that you're talking about. So I feel I'll be going off a little bit half-baked to touch this particular one but if anybody else wants to, you know, feel free.

Stephanie Perrin: Well in that case can I make a further point? I don't mind talking to myself, do it all the time.

One of the reasons that I think that this procedure and policy are - bring disrepute on the organization. I made that remark in the committee and got quite a few laughs. I guess there's lots of things that bring ICANN into disrepute.

But in this regard they have thoroughly annoyed the data protection authorities which puts the registrars at risk.

Now I realize that's a different group but quite frankly I don't think it's fair to hold them hostage and put them at risk of enforcement action just because we refuse to move on this.

It - the only way out of this conundrum as long as ICANN is going to have their lawyers send a legal letter to the Article 29 group which is the European

communities duly vested according to the directive authorities saying you're not a legally binding body so we're going to ignore you. If that's the way we're going to behave there only mechanism left is to start enforcing the law on the hapless registrars.

And I just don't think that is fair and a mature responsible way for this organization to behave.

Even if I weren't a raging privacy advocate which I am I don't think that's any way to behave. It's just unacceptable to put another group at that kind of risk. Because we're talking real money here. And that's what's going to happen. Thanks.

Greg Shatan: I think, you know, from my view ICANN is being very tactical there. And in terms of ICANN's general legal tactics over the years not going to comment but that doesn't seem inconsistent with their approach whether that's good for privacy advocates or for those who want to, you know, seem responsible but, you know, usable use of data information under appropriate circumstances.

You know, having ICANN be our protector can be a double-edged sword. And so we might actually be able to unite on the idea that ICANN's approach is not perfect.

Beyond that as I said before this is, you know, not my kind of - we all have our issues where we go deep and long other's where we that we kind of let other people take care of. And this is one of the other people issues for me. So seems like we're not getting too much going here.

And maybe the - this shows that we don't disagree on that much after all or that we prefer to do with the things in working groups for 14 months rather than in a conference room for a little while.

So I don't know if anybody else wants to throw out someplace where they believe there's a perceived difference to be worked at? I see Marilyn Cade.

Marilyn Cade: I have a possible third rail issue in a totally different direction.

When we set ICANN up we had four staff people. And there was discussion about whether the CEO/President should be a board member, a voting board member or some other arrangement such as being president and being the non-board - but it's a very different environment. We had no money. Mike was taking a lot of risk by doing this. We've come a long, long way.

We've heard some comments today in the previous board review discussion there was discussion in the community about having a nonvoting president of ICANN who was a ex-officio member of the board but not a voting member of the board. That's very much a major change. But I'm wondering if it doesn't deserve a little discussion about - and it probably is a third rail issue.

Let me just say one other thing. As an example ISOC, the Internet Society has a president that is a nonvoting member of the board.

Tapani Tarvainen: I don't see anybody wanting to comment on that. Maybe that is really so third rail that you don't want to touch it.

Okay Avri?

Avri Doria: Avri speaking. Just a quick comment to say I think it's a really good idea to consider.

Tapani Tarvainen: Now that doesn't sound like a third rail issue we get immediate agreement.

Does somebody want...

Marilyn Cade: I don't know, it only got immediate agreement from one person so far. And I know Avri and I are really influential but...

Tapani Tarvainen: Well but I don't see anybody wanting to disagree. So we get two to zero in favor of a second.

Does...

Avri Doria: It's a consensus. There's no strong opposition.

Tapani Tarvainen: So a third rail issue turns into an instant consensus, that's nice.

Do we have of other third rail issues? Maybe we'll open up anybody want to identify any other third rail issues?

Greg Shatan: I'll throw one out just in the spirit of the guy with the word Satan on his back.

Is there a view within the Non-commercial Stakeholder Group that we are better with a contracted party's house chair than a chair from the Commercial Stakeholder Group?

Is there a reason why it's good? Is there reason why it was good at this time? Because perhaps, you know, standing up to the GAC was important or certain elements?

Man: This way?

Is this plugged in?

Man: Here we go.

Greg Shatan: We've own always only had a contracted party chair except for I think one time of Avri was chair. But that was during her period on the council as the NCA so technically not quite the same thing.

So, you know, it's - I'll just kind of throw that out as a topic. And if that one causes tumbleweeds then maybe it's time to start talking about things we agree on because maybe we'll find we disagree about those.

Ed Morris?

Ed Morris: Thanks Greg. I have to stand up a bit.

First James Bladel is very strong against the GAC. I don't agree with James on everything but in that issue he's good.

This may be a little bit controversial in this room but the NCSG often has more in common with the SGs in the CPH than we do with our federal fellow house companions. I think that the entire house structure is a bit artificial.

So...

((Crosstalk))

Greg Shatan: That's not a third rail issue. That's another point of agreement but thank you anyway.

Ed Morris: That doesn't mean I don't like the support group structure. If you want a third rail issue it could be the role of constituencies and the role of SGs in the ICANN governance structure.

But in terms of we have a problem to elect a chair from our side. Invariably - I'll give an example.

There are some folks in the CSG in the Business Constituency that I would love to have seen to have been nominated and accepted to have become a chair. I don't think you guys would have supported them.

You - within your own SGs. Excuse you, excuse you. Would you like to say excuse me or...

Woman: No.

Ed Morris: No, okay. But within your own SG I think there would be - I'll use a name. I like (Bill). (Bill)'s a good guy. I'm not sure the IPC would be...

Phil Corwin: Ed, you're wrecking my reputation.

Ed Morris: Sorry about that. I love working with Phil. That's why, you know, we've been able to work together with the on BC. But I'm not sure and I could be wrong that if Phil wanted to be chair I'm pretty sure I could get the support within

the NCSG for Phil. I'm not certain you could get the support in your community for Phil.

So it's not just within the SGs. We're so diverse on the NCPH it's very difficult for us to agree on any candidate which allows the other guys to basically have a monopoly on the chair. Is that necessarily bad?

I don't know. I don't know. I love Heather. You know that. Greg knows that. Heather knows that. I think Heather would've been a fantastic, a competent chair. She certainly would've been more effective at time management, which is something James had a bit of trouble as he grows into the position.

But I think this whole concept that we nominate one person from either side we may want to consider doing away with. What about having two candidates but being nominated by any two SGs from either side? Maybe that's something we could look at.

Greg Shatan: Thanks Ed. I see Steve and then Phil Corwin, Steve DelBianco.

Steve DelBianco: I was going to go for another topic. So why don't you continue in the queue on this topic?

Greg Shatan: I assume Phil Corwin wants to speak to the Phil Corwin topic.

Phil Corwin: Well, let me say two things here. One, you know, I wasn't going after the chair position. It's a big job. I'm not sure I even have the time to devote to it. It's such an all-consuming job. But if you're going to do it right.

But and I don't know what the overall support within the CSG would be. I know that within the BC when I first - when the Internet Commerce

Association first applied to join the BC and Marilyn was chair and we got pretty well interrogated to prove that we were, you know, legitimate folks.

And a lot has changed since then to the point where, you know, I've been appointed, I've been elected to a full term on council by the BC. And the members of the executive committee asked me the middle of last year when Elisa Cooper had resigned to take over as interim chair. But it's not about me.

I do think a board - a GNSO council chair should be an administrative office. It should be it should be the person who makes the place run on time and efficiently and handles the way it considers issue in a fair and evenhanded way.

And if that's the way it's handled I would personally favor rotation so that one house or the other doesn't control the chair position all the time.

And, you know the current arrangement of the two houses and the CSG and NCSG being together in one has some problems. But I think whatever the future may hold we have to live with it right now. And we should try to operate as a functional house.

And I think a lot of that can be - we're not going to agree on everything. We don't even agree with in the CSG on everything. But we need to improve the communication so we don't surprise and blindside each other.

And if we can - I think the problems can be dealt with through procedure which will at least when we disagree on the substance we can do so in a much more agreeable and less problematic way. Thanks.

Greg Shatan: Thank you Phil. Anything further on this topic or we'll go to Steve DelBianco who's going to throw us in another direction.

Steve DelBianco: Hey thanks Greg. It may not be a third rail but probably is. It's a question we all have to debate over the next year and a half which is whether there's any special treatment in the next round for some concept that we call closed generics.

And it was something that Kathy Kleiman and I and the BC brought up in 2012 as a concern. So for those of you who are new to it would be a new top level domain that's just a generic word dictionary word tires.tires.

But if the applicant were company in that industry which was the case Goodyear was an applicant for .tires and then they were to run.tires as a top level domain in a way that implied it was an open.tires but the content and the registrations were pretty tightly controlled to favor that company.

And you know if it's obvious and Goodyear's logo is at the top Kathy Kleiman and I and several folks around the table thought that was fine.

But it with that was subtle and biased both in the search and the content in which domains went to its people a closed generic could present competition and consumer deception concerns.

And there's one school of thought that says who cares. If it ever becomes a problem consumer protection authorities would take action and not worry about it.

Another school of thought and this was at Intersessional two years ago here in this town. And Kathy and I went in that with the general counsel to discuss it

because we said ICANN is setting itself up for a significant problem if we don't come up with a policy about it.

So I believe that the board at the top management level is looking at well what should we do about closed generics.

And what's the level of interest in this room at taking hat on as part of our planning for the next round versus just leaving it to the authorities?

Tapani Tarvainen: And I see Carlos Gutierrez.

Carlos Gutierrez: I will go a step further Steve in terms of generalization of these new segments. This is a new segment of course regulated areas like (back) and health is another segment geographies another segment that has to be dealt with.

So I fully support this one but there are other I don't know how to call groups or so that also require consideration. Thank you.

Tapani Tarvainen: Anybody else on this topic?

Greg Shatan: Would you consider straw poll where folks would indicate how many think ICANN should deal with it explicitly versus not at all? That would help a little bit.

Tapani Tarvainen: Yes, I see Phil Corwin.

Phil Corwin: Yes. One on the question of whether ICANN should deal with it. I mean it dealt with it, you know through a, I forget the exact mechanism. It did deal with it for the first round. I think we need to be clear about what the rules are for the second round. We're going to have a PDP on new TLD subsequent

procedures which is different than the one on the RPN. I think it would fall into the subsequent procedures.

My personal view is that where a company - where the applicant does not own a trademark in a specific word distinguishing let's say I wouldn't have a problem with Apple went for .apple and, you know, that is their trademark company name.

I do have a problem if a Goodyear, Bridgestone or Michelin goes for .tire and wants to control the entire space.

The concerns arose in the new TLD in the first round. My recollection is that Amazon just about all or perhaps all of their applications were for closed generics where they would control .this .that .everything for retail sales at the top level of the DNS.

I think Google had a mix where some were plan to be closed generic, others were not.

But I just don't think ICANN should be - I think there's a competition issue where ICANN should not be facilitating corporations owning a word at the top level of the DNS to - for their exclusive use because I think it has an impact on competition.

But I think it's a legitimate issue for debate within the subsequent procedures PDP but that it ought be addressed clearly for the second round because it's clearly an issue that came up in the first round. It would be silly to think it won't come up again in the second round if it's not addressed clearly one way or the other.

Greg Shatan: Got Susan Payne followed by Ed Morris.

Susan Payne: Yes Susan Payne really briefly. I'm not going to express a view on whether that should or shouldn't be closed generics. I've got clients on both sides of the fence on that one.

But it's a very definitely within the scope of the subsequent rounds PDP as Phil's just been saying.

And also the ICANN board has written to the GNSO Council and told them to address it or asked them to address it. So I think it doesn't matter what we think in this room. It needs to be addressed.

Ed Morris: Ed Morris. Yes I agree both Susan and Phil. As a point of information the end CSG is sometimes rather bitterly divided on this issue.

Greg Shatan: Thank you Ed. Anybody else on this topic?

I'll throw out an entirely different topic. Do people think intersessional's are worthwhile and how about this one?

I see Susan followed by Kiran.

I see Kiran followed by Susan. I see Kiran and Susan. You two duke it out.

Susan Payne: I'm going to go first. Okay. I think intersessional's can be useful. I would favor having clear agendas at the outset and a clear understanding and agreement amongst the participants of what we might like to try to see as outcomes.

I'm not suggesting that should have some kind of a Net.Mundial statement that's drafted before we even arrive. But I think we have to know why we're coming here and what we're going to talk about and that we're making a commitment to try and make some progress on particular issues or something.

What kind of outcomes do we really think we're going to have?

Because otherwise we just got, you know, funded by ICANN for a holiday in the sun for two days and we came out of it with almost nothing.

Greg Shatan: Thanks. We did get the sun. Kiran and then I see Heather and then I'm going to put myself in the queue.

Oh sorry. I saw Kiran but it's really Chris Wilson.

Kiran Malancharuvil: It's Chris and Kiran.

Greg Shatan: Chris and Kiran. The two of you harmonize.

Chris Wilson: So Chris Wilson for the record. You know, as someone who's - so I'm the chair of the business constituency but as of only just a month ago and so I'm - I come to the ICANN community relatively recently although I interacted with ICANN tangentially for a few years. But now I'm sort of taking the deep dive.

So I come to this point is that actually I found these two days to be quite helpful as a relative newcomer to ICANN and therefore think it's a worthy effort to continue to do these meetings.

I agree with Susan that with any meeting that involves travel for anybody and especially I mean for those that have traveled outside from the United States which I really applaud them for doing the more planning and focus the better.

I do know that in the - as part of the CSG folks that were helping to plan this it was challenging in and of itself just to find the right time, the dates to do this because of a variety of schedules and of course with Marrakesh as well.

And I think the accountability work that's been going on that's just sucked up so much oxygen and time - I'm looking at Steve DelBianco in particular, I think that's distracted a lot from focusing on the day to day work that is important for all of us at ICANN.

So I just have to say I think hopefully next year's Intersessional will be even more productive than this one and we'll have other things to talk about no doubt. But I for one think they're great.

I've had a chance to meet people I haven't seen before or at least only seen only seen names on emails and now I can see faces and vice a versa. And I think that we should continue those dialogs. Thank you.

Greg Shatan: Kiran finally?

Kiran Malancharuvil: I guess I would sort of add my voice -- this is Kiran -- to Susan's that we need to do a better job as participants in the Intersessional at setting clear goals for the meeting and then trying our best in our agenda to actually serve those goals.

I think we would be well served not to do a NetMundial type statement where we're trying to come to a specific substantive outcome but things like let's

plan for this meeting to come out of it with five concrete election criteria for example which is actually something we did make some progress on at this meeting or, you know, have an idea that we want to come up with an NCPH statement on X or whatever -- sort of these sort of smart goals.

Because I do feel like there was a lot to feel that we were talking around the issues and we were venting here at this meeting which frankly is not a good use of any of our time and certainly not a good use of ICANN's money.

But I think last year's Intersessional was actually very useful. And so I think this meeting has potential.

Last year those of us who attended will recall that we did come out with an official NCPH statement. I think it was about accountability. And it was a very like general statement but it really up to the collegiality - is that a word -- feel in the NCPH.

I don't see us coming to any of that here at this meeting. And I am kind of bummed. and so I do feel like I came out here certainly not for a holiday, more like a hostage situation but, you know not useful either right?

So I do think we need some work in figuring out how to make this meeting more useful and more cost-effective for everybody. Thanks.

Greg Shatan: Greg Shatan and Tony Holmes will follow me, two quick comments.

One I think if we were to look at the Intersessionals being the culmination of a process rather than someplace where things are going to start or somehow gel or somehow not we'd be better off if we had a planning process for this but

we didn't have any actually substantive work that we were kind of bringing up to a point.

If you're on the - we've been having face to faces in the CWG and CCWG and, you know, those have typically come when we've reached a point in our work where face to face deliberation's really going to get us over the hump on things that we've been trading back and forth for a time.

So maybe for the next Intersessional it can be seen as a - as the end of a line of a process. So I'll stop there and give it to Tony.

Tony Holmes: Thanks Greg.

I share Chris's view that plan in check feeling was tight, somewhat difficult to do. But I'm totally surprised if anyone turned up here claiming that they didn't know what we're going to talk about because certainly the schedule was published and for the ISPs whenever we had a call we went through what was going to be discussed here.

I'm not saying we had a position on everything we came into. And maybe that's something we need to look at. But everyone was aware of the discussion.

So if anyone came here not aware of what we're going to talk about then you should be asking the people on your constituency or group who (unintelligible) this meeting because the opportunity was to go back there and have those discussions beforehand. I don't see that a failing of the Intersessional at all.

In terms of its worth I attended all of these and I think each one gets better.

In terms of having goals so I'm not so sure about that either because setting targets that we're all going to agree on five points on anything is a pretty high bar.

I think one of the benefits of the sessions is that we're a pretty mixed house with a lot of different views. And one of the benefits of these sessions is understanding the others perspective on each issue.

Reaching a set of goals or agreement something's is a good ambition. I'm not sure it's always achievable and I don't think we should walk into meetings always expecting to come out with that goal.

But walking away with a much better understanding of what the issues are and trying to chart a way forward to resolve some of those things is a really excellent outcome. So I have a slightly different perspective on that.

Tapani Tarvainen: Thank you Tony. I'm looking at - do I see that Sam Lanfranco is next in the queue? Then...

Sam Lanfranco: Yes just a very brief comment as I reflect on the last couple days.

I had an idea of what the issues were and what the agenda was to be. And probably like most of you I've made a long list of to do things that I have to do as I go away here that I've been reminded about and that came up.

There are some bigger issues that we just sort of kick around and vent a little bit and that's good and then we kind get a sense of where we are.

But there may be a middle list which is almost like which is almost like we used to do in boards and other organizations I was in. The agenda ended up producing a little to do list of four or five things where two or three people were going to pull it together, write it up and have it ready by the 1st of March or 1st of June or 1st of July.

We might want to carry away a little sort of to do list of stuff that we pull together and toss back to us in a more organized form that kind of distills those discussions that were more about how we work together and the issues that confront us as opposed to the issues that confront ICANN.

Tapani Tarvainen: Thank you Sam. This is the hottest topic of yet because I see at least four people wanting to speak. Let's go Jimson you're next.

Greg Shatan: And Kiran (unintelligible).

Jimson Olufuye: Thank you very much. Jimson Olufuye for the record.

First and foremost I just want to liken this Intersessional with the meeting we had in Geneva during one of the CSTD and we had heated arguments and had some friends from South Africa and from other countries that are pushing back against business positions and ICANN with our stakeholder.

And during one of the lunch periods I engaged with a country representative. And by the time we resumed at the main meeting there was a clear new understanding of the position of BC of business and where we're coming from. And that happy great deal you want to soften the tune of the environment, the means of government and what of you so to like in that to this Intersessional has been highly valuable if it goes.

And because in the course of this meeting interaction with some of the leaders and other constituencies and to get to appreciate, you know, some of the position we have and the need to further engage is gelling with these and the CSTDs and others environment so very positive.

Then two, I think the staff has done a good job but they can still do better by reflecting on some of those who have to travel from very far like (hotel) that gets the price for, you know, jet lag and what of you. So 22 hours, 24 hours flights you need to arrive and at least where human being takes a little rest so there has to be concentration of that, a redeye and things like that.

And again, to know the (unintelligible) we have each challenge, we're growing and so we need to consider our health as well.

Then another point I would like to identify is the need for outcome.

At the end of this meeting there should be substantial of outcomes. And I believe we - it might be a good thing to have our own secretariat - no, we have a secretariat but we should have expectation maybe (unintelligible) status meeting, another days months we should have the summary of these outcomes. And that should be well publicized.

And lastly just to say that this Intersessional help to advance the course of ICANN because right now I represent AFLICTA. And is it is AFLICTA that is a member of BC that has an MOU with the member of MPOC and everything the multi-stakeholder approach across continents so describes positives so it needs to be sustained. Thank you.

Tapani Tarvainen: Thank you. I may have missed the order of people so apologies if I'm being in the wrong order but I have next Marilyn.

Marilyn Cade: Thank you Marilyn Cade. My comments are I think just going to build on what's already been said.

And I have been involved in attending all three. I also was heavily involved in working with others to plan the agenda for the first one which was an experiment. And I really want to reinforce that because I think we learned a lot.

But one of the things we insisted in the first one and we were able to achieve in the second one was significant face to face time with senior staff and multiple board members. And this is not a criticism. It's a comment.

I think and I really want to reinforce the importance of having the Intersessional that focuses on management and leadership issues, not the policy differences that the governance and the sort of management responsibilities that the constituencies have as they work together, not just on policy but in contributing to the governance of ICANN. And I think this meeting really helps to do that.

The second thing is I want to thank David for traveling back. And I want to thank Fadi for traveling back. I know that there were other conflicts and commitments. I want to thank Xavier for participating with us and thank Markus for coming and even earlier in order to be with us.

But I think next time I really think that we must work in a way to have the face to face time with the senior staff and with multiple board members.

And I say that to suggest that that be taken into account in planning keeping in mind the challenges that exist at this time.

We are missed - we missed the opportunity to there are new board members appointed by the nominating committee that may have really benefited from being able to attend for a day and observe the working of this path of the GNSO who normally only get to hear from you in soundbytes in a very, very busy set of scheduled meetings. So in the future a couple of must haves that maybe could go back on the list.

Tapani Tarvainen: Thank you Marilyn. Next Ed?

Ed Morris: Thanks Tapani and I would agree with Marilyn. Having some interaction with board members to sort of bridge the community board divide would be a good thing.

I'm not as positive about this meeting as many who have spoken so far. I think part of the beauty of the intercessions is we get to meet each other in a bit more relaxed fashion. So I would be opposed to making a formal statement part of the agenda.

But I think part of what's going on here is those of us in the CCWG I mean I've seen Greg more than I've seen any of my relatives for the past year. We - - and it's that - and given my family that's not a bad thing Greg. But we have developed our own relationships.

I email with Steve DelBianco. He's in my inbox more than anyone except for Kavouss from Iran who I actually have a special folder for now.

But so we've been - one of the good things about the CCWG and the CWG is we've been able to develop the personal relationships that we haven't had before.

But as an NCSG member having already stated that I find the non-contracted party house to be a bit of an artificial construct what I would love to do is have one of these next year what the registrars in the NCSG, other registries in the NCSG because I really don't know where they're coming from.

I have a bit of an understanding of where our guys are coming from after three of these but I - it would be very valuable to get to know the parties in the CPH.

And have somebody based in Europe might I suggest that if we really are aiming for one world one Internet we could of one of these not in North America.

Many of us do have to travel and although I understand for economic reasons why we're here I'd love to visit David Olive. We have these hub city strategy and we're not using it for these meetings. I think these meetings would be a wonderful way to use the hub cities as a base.

Thanks.

Tapani Tarvainen: Thank you Ed. I think Kiran will be next.

Kiran Malancharuvil: Thanks. I think I probably need to clarify my earlier statement.

I don't necessarily think that we didn't know what topics we were going to discuss coming in but rather we didn't have a clear direction of where we were going on those topics. So the topics were introduced and we ended up just kind of being all over with that stuff.

And so when I say we need more clarity we need more direction. Even if it's not a formal statement coming out of the meeting or, you know, a specific outcome, goals just kind of help give the discussion direction that was very, very much missing to a lot of us in this meeting.

I also I agree with Marilyn that the staff meetings are very important part of the NCPH Intersessional.

And I think this time we have a bit of a disadvantage with that because we didn't schedule appropriately because everybody was kind of flying in from Singapore it seems like which was problematic.

And also the timing isn't great in general because, you know, we had an hour with the CEO but he's not going to be our CEO in a month.

But, you know, it's difficult to care a lot about what Fadi has to say about Fadi when Fadi isn't going to be our CEO in a month.

So as I'm listening to more and more people especially Chris it seems like that the most useful part of the NCPH Intersessional is sort of getting to know one another and each other's positions.

And as I look around the table I feel like I very much know a lot of you even on the other side of the table and I very much know where you stand on most of the key issues up for discussion in the ICANN community right now.

And so maybe the answer to making the NCPH a more useful thing for the non-contracted party house in general is to actually get rid of us old timers. And, you know, I'm not like old in life but I've been around in ICANN for a

long time-ish according to, you know, I mean compared to some of the other folks.

And maybe the question is to make sure that the people that are extended this lots who attend the Intersessional are not the same old people so that's new people coming in and getting to know the new people and getting to know the new positions and the new issues that are bubbling up instead of just continuing to hash around the same issues.

I think part of the reason why was so frustrated with the discussion of the topics around the table now is because I've heard you guys say these things a million times since I've been around at ICANN for the last 12 meetings.

So let's get maybe it's about new blood, new faces and outreach as opposed to just kind of us coming in and hashing around the same things over and over again.

And that maybe that sort of speaks to Ed's point as well although I'm not necessarily sure that the NCPH Intersessional needs to be scrapped for something where we're crossing the aisle with the contracted party house.

I think that's a really good idea of some additional sort of outreach where, you know, each individual constituency or stakeholder group in on our side of the house can reach out to the other side of the house and as they see needed. I don't think we scrapped this in favor of that. Thanks.

Tapani Tarvainen: Thank you, Stephanie next.

Stephanie Perrin: Thanks very much, Stephanie Perrin for the record. And I think we can see from the number of interventions here that there's quite a spread in the goals of what people anticipate from these sessions.

And personally I thought the goal was to improve the relationship between the two sides of the house here and find some common ground and explore the areas where we have difficulties.

And I think if people do come with an open mind. Trying to get to know people and understand their point of view that can be very useful. So I guess I'd like to echo some of the things that Jimson was saying a while ago that it's a great opportunity to meet people.

Secondly this has been constructive for a lot of our new people who are watching on the Adobe chat. They have been sending us messages hey, I'm learning about this. Because if they're not on a particular working group I'm quite sure that both Steve Metalitz and Kiran are painfully aware of how I feel about these issues and maybe not interested in reaching out and trying to reach common ground.

But for those new people that we've been able to attract who are constituencies from outreach they don't understand it. If they're not on a working group it's hard to follow.

So this is a useful discussion even on this third rail where we didn't have much discussion on some of the issues.

So maybe since that's one view and there are plenty of other views like I don't want to meet board members. I'm sorry Markus. I think that the goal here is to meet each other.

But if we have to divide the time according to people's priorities then maybe we need more work in the prep to figure that out. Thanks.

Kiran Malancharuvil: I'm sorry can I - I just need to jump in for second Stephanie. I don't think it's a fair characterization of Steve Metalitz at all and probably not me either that we're not working to willing to work with you in the issues that we sat on the other side of the table for and that we're not willing to reach on compromise with you.

Stephanie Perrin: I don't - I didn't mean that Kiran, Stephanie Perrin for the record.

What I'm saying is you don't need to come all the way to LA and be held hostage as you said earlier to hear me expound on the Whois conflicts with the law. That's what I - the point I'm trying to make.

Kiran Malancharuvil: Thanks for the clarification.

Tapani Tarvainen: Okay thank you Stephanie. Matthew next, then going to Tony.

Matthew Shears: Yes, Matthew Shears. A lot's been said so let me just add a couple of other things. I actually find these incredibly valuable.

The working groups come and go the - we get to ICANN meetings and we're rushing from one event to another, one meeting to another. We don't see much of each other unless we have an issue that we're working in common.

So this is the (unintelligible) the second one that we've had of these. I think it's valuable.

I think that what I would like to say is that we do have something coming out of this one that we didn't have coming out of the last one which is a recognition and a desire to kind of take a little bit more control over the future of the house.

And so and I would actually like to suggest that an ongoing assessment from Intersessional to Intersessional and some work on ensuring that we do have control over the future of the house is something that we could probably make a permanent feature of these meetings going forward.

And hopefully the work that's being led or can we call it Christian's ad hoc will probably and hopefully lead us in that direction.

The other thing I'd like to say is I really like and love working with my colleagues in NCUS and NCSG but maybe not as many breakouts this time. Maybe some sessions where we actually do come together on a couple of issues of importance to the house as a whole. We have this unique opportunity. Let's make a little bit better use of it. Thanks.

Tapani Tarvainen: Thank you and next Tony.

Tony Holmes: Thank you Tony Holmes.

We've heard a number of views and some that I certainly concur with Matthew's input. I very much concur with Stephanie's explanation of what she intended to get out of this very much goes along the lines that I had.

Because we are all faced down at ICANN meetings and we may be in the same house. We have very little time to dialogue with the other side of our house.

And for me it's important to know what the issues are that are driving that part of the house, where we have differences. I need to understand better why we have those differences. This is an opportunity to do that.

I share the points that Marilyn made about interaction with senior staff. I think that's really important. We don't get the privilege of doing that. There isn't the time to do it at ICANN meeting so that's another important element of this.

If we are going to change the nature of this we need to have a much more fundamental discussion because personally whilst I support the introduction of new people and bring them along if we're going to turn this meeting into an introduction for newbies on both sides it changes the whole perspective of this.

And having some of the more delicate discussions without people around who have some history or knowledge of the way things are and where we got to how we are probably isn't going to be helpful.

So that's a totally different concept to an Intersessional meeting as I understand it now. But I see great benefit from having these meetings.

I think in a way it's a pity that this issue was raised before we have the next session because the next session is returning to topics to resolve issues or discuss where we go.

So maybe that will actually help people understand if we did get anything out of this meeting or if we didn't.

And perhaps I mean this discussion now before we've even got to wrapping up the issues that we've discussed previously wasn't the ideal way to do this. But there's been an exchange of views and I'm sure it's been noted for future discussion.

Tapani Tarvainen: Thank you Tony. I don't see any other hands raised. Okay Joan?

Joan Kerr: Okay it's Joan Kerr for the record. And I'd like to say this is my second to Intersessional and as an old person in age but a newcomer in experience I really actually appreciated this Intersessional.

I came expecting to talk about common grounds and some of the issues that we don't get time to talk about when we go to the conferences. And I think that was really very helpful to me.

And I'm speaking just for myself. I learned a lot about some of the backgrounds of ICANN. Yes, I mean you can read that stuff. But when you talk to people like Marilyn Cade for example she gave me a really great lesson albeit the only 15 minutes but it's a personal story and those personal experiences that you don't read about. So thank you for that. And I found it very helpful because for one thing is I love storytelling.

Secondly, any time you have a session that's called third rail I think it's a good thing because it just opens up a situation where you can actually talk about those issues at your leisure. And I think that was a really great thing that you can actually do that.

When I came I expected to as a whole to talk about common grounds and how the - we all can work together and collaborate and also to - I'm from NPOC and so we had a specific plan about what we wanted to get done face to face.

And we got them done. And we were so efficient that we actually had to strike something off of our plate which is Panama. We had a strategy for it and we got it done and it was taken off. We were like okay we're too efficient.

So I just want to say that for newcomer I think these are really great. They're informal. They're informational and they're interactive. So that's what I'd like to say. Thank you.

Tapani Tarvainen: Okay thank you Joan, any others? And okay I see David Olive wants to comment on this.

David Olive: The opportunity at ICANN meetings I get to see you for about one second as I'm running from one conference room to the next. It's not my preference but we haven't 185 plus sessions to take care of.

So I really appreciate this discussion time both one to one and in these sessions in a more quiet and thoughtful way.

So my - I'm happy to do whatever you want but that's just my opinion on helpful it is to me. Thank you.

Tapani Tarvainen: Thank you David. I have Carlos.

Carlos Gutierrez: Yes thank you. Having missed Washington DC last year and hearing this was better I feel much better. So I'm very happy to be here but the definition of the homeless council member is very temporary.

I'd like to say something which I think is really out of the box and go back to the commentary by Heather about having face to face time to do PDP work.

And right now looks like we have two long meetings A and C I think. And we have a short meeting B and a very short meeting which is the Intersessional.

I mean it would be great if the two short meetings instead of four and two would be two three day meetings only on PDP work or mainly on PDP work. I guess the working groups when they meet face to face they work better at least that's my experience from ATRT 2 and that's my expectation of CCT.

But I would envision like two full meetings during the day with your clients with your friends with your everything with gala and so on and two short meetings of real GNSO work. It's necessary.

I mean the GNSO so has a tremendous agenda in front of it to deal with all changes necessary of the rollout of the gTLD. Thank you very much.

Tapani Tarvainen: Thank you, Carlos. Markus did you want to speak?

Markus Kummer: Thank you, Carlos yes. (Unintelligible) say a few words. I found this very useful. It's also my second Intersessional I attended. And like others I agree that I find this one better than last year's not that I found last year's bad. I think there is a progression.

And the discussion whether or not there should be an output reminds me a little bit the discussion we had many times in the IGF context where those who would like more tangible output and others who see a value in the meeting itself and value of coming together, getting to know each other, exchanging views and sharing best practices and experiences.

And I feel this is very much what's happening here.

And for me this is extremely valuable as a board member who's elected by this group to know a little bit better the people and to know what they think.

And it's an incredibly disparate group people from disparate corners, different corners of life coming together with different views. So it's important to understand where they come from. So for me this is extremely valuable.

And I think you as a group actually you have a tangible output. You agreed yesterday to form a working group to start a bottom-up process on how best to restructure post IANA transition ICANN and how it will look at the new version of the GNSO so this is I think a very important step forward.

And as a last word of what I said yesterday to the Commercial Stakeholder Group as a board member I'm not meant to represent any particular group. I'm meant to act in my best conscience and knowledge.

But at the same time I think it's important to remain connected to the group that elected the board member just to have a feeling what the opinions, what the visions are of this group.

And please don't hesitate to contact me. I have an open-door policy. And if you have any issue of concern I'm happy to listen to you.

It doesn't mean that I will automatically agree with you but it's important for me to know what your views and concerns are and where you come from.

And thank you again for inviting me. It was a pleasure being here.

Tapani Tarvainen: Thank you Markus. Did I see Marilyn did you raise your hand?

Marilyn Cade: I'm sorry it's Marilyn. I wanted to ask a follow-up question that is - it's in a very different direction.

But when I was on the council Tony was also on the council. I think a few other people were. There was a particular PDP where we had a fast track deadline. And we did do face to face PDP work.

The only reason I mention it is I'm not suggesting - it's not at all like an Intersessional. But it was, you know, two to three days of full-time work on a PDP. And it was a particularly contentious issue but one that I think because of the face to face opportunity that we were able to meet that very accelerated deadline.

So if the - and again we're meeting here as sort of a set of I would say, you know, managers I'm talking about as opposed to PDPs.

But if within the council you as those of you who are counselors if you decided you need to have that flexibility given that the budget, their budget implications for it I would just highlight the idea that you ought to be thinking about planning ahead to make sure that budget would be available to support that kind of additional face to face and now I'm going to use the word Intersessional related to that kind of meeting.

Tapani Tarvainen: Thank you Marilyn. I think Denise next.

Denise Michel: Yes thank you. I just wanted to echo my support for Carlos' statement of using the Plan B meetings to get PDP working groups together to make face to face progress on that. I think it's an excellent idea and I'd like us to look at the Panama or wherever that's going to be scheduled agenda to see if we can work in some intensive PDP Working Group time in the schedule.

Tapani Tarvainen: Thank you Denise. And I see Jimson.

Jimson Olufuye: Yes Jimson Olufuye. I just want to reiterate the importance of measuring outcome because in management if you cannot measure it you cannot really manage it.

So recall even when in BC new people were asking so what was the outcome of the last Intersessional? And yes good. We had a little summary and that gives some background.

So I think going forward is still important. Some of the tangible outcome we had. And so we'll have it in summary form and then, you know, send it out.

And maybe another comparison, in IGF it was said, "Oh we don't want any output, we don't want any resolution, yes, no resolution, no negotiation or at least there are these some measurable outputs that some people can hold on and to work on."

And they turned out at the IGF Working Group on, the CFC Working Group on IGF improvement this made that recommendation and it's been a very good tool today that supports the continuation of IGF.

So at the end of this important meeting it's very important also that we have some tangible outcome document.

Greg Shatan: Thank you Jimson.

I don't see any other hands or cards up in the room or the Adobe chat. So I think this is probably a good time to wrap this session up. Thank you Tapani

for co-chairing with me and being the guy who actually wrote down the order in which people put their names in.

Thank you all for contributing. I think we managed to survive the third rail. Maybe we, you know, survived by avoidance but nonetheless we survived. And I think we had a number of fruitful points that came out of this.

So I'll turn it back to Rob to logistigate us to the next session.

Robert Hoggarth: Please join me in thanking our co-chairs Greg and Tapani for leading this last session and for ending five minutes early which allows you to have a brief break prior to the last formal session any other business.

That session will be co-chaired by Tony Holmes and Ed Morris. And as they gather together up front please feel free to grab a cookie or coffee or something out in the lobby and come right back. Thank you.

END