

ICANN

**Moderator: Brenda Brewer
July 22, 2016
9:00 am CT**

Coordinator: The recordings have started.

Yuko Green: Thank you. So this is Client Committee meeting Number 24 on 22 July at 1430 UTC. I will hand it off to Jonathan now.

Jonathan Robinson: Hi. It's Jonathan Robinson. I'll be chairing this Client Committee call. Welcome to Josh, (Gayle), and Sharon from Sidley as well as myself, Greg Shatan and Maarten Simon from the Client Committee. We're expecting Lise Fuhr to join us shortly. And we've got Yuko and Nathalie here from ICANN staff.

For the record, we had the opportunity to spend a little time beforehand talking informally about the structure of the call and what we needed to cover, Sharon and Josh. And really, I mean, the bulk of our focus right now wants to just be - to make sure we're organized on the IPR side of things. But we also thought it was appropriate to give you a heads up as to what we were expecting to achieve (unintelligible) ahead of our meeting on the 28th of July, the next CWG meeting. So really the purpose now is to make sure we're in shape on the IANA IPR work.

And really what we think we've got to achieve here is there were a set of - a table, which highlights a series of issues associated with the chart of principle terms, or the principle terms on the IANA IPR. And I think Sidley had raised a series of questions. We had discussions with the other operational communities and they indicated some surprise that there was any potential concern with the IETF Trust. And we repeated back that there was an agreement, in principle, to go with the IETF Trust subject to there being no overarching legal concerns.

So my understanding is that we have a meeting on Tuesday with representatives of the - the trustees from the IETF Trust effectively representatives of the IETF Trust - to provide us with clarifications in order that we can satisfactorily answer the questions or issues or ultimately not, as the case may be, but hopefully we can. So that's Objective Number 1.

And then the second is to - in that call on Tuesday and potentially going forward is highlight any substantive issues, any or all of the substantive issues, in the IPR documents to date. And we've been provided with series of documents. So I suggest, Josh, we probably go through them in that order.

And I'm not quite sure practically, how we deal with this. I mean, one thought we had in our preparation call was that maybe an appropriate output is for us to tabulate with Sidley really to come to the meeting on Tuesday with the key questions for the IETF Trust to be resolved or discussed and also the key substantive issues in the IPR document to date.

How does that sound as a process and a mechanic and any thoughts or comments in and around that?

Josh Hofheimer: Jonathan, I mean, that seems like a fine approach. I - given that we've - we can certainly prepare like a summary list of the sort of key issues or material issues that we have identified, some of which not the sort of still outstanding ones that are reflected in our markup that you've seen and that I've recirculated and that Greg has commented on and yesterday we sent a revised integrated draft of the IPR license.

And, Greg, I don't know what your timing is for comments on the sort of - or feedback on our comments to the community agreement. But we can send those and send with them, you know, like - almost like a cover note but an outline or a schedule of the key items. There are really only a few items that we see as material. The rest of sort of cleanup or questions for people to discuss and things for the parties to consider.

But there are, you know, a couple of principle notions that need to be sort of fully considered and vetted. You know, one is the authority of the IETF Trust to mandate changes and services or perhaps pull back the license. And the authority of the IETF Trust, just unilaterally to enforce or defend the IP and capture the value from that. And still the question that nobody has really answered of how things are going to be paid for.

And those are three, there may a couple more as I think about it and go through the documents once again. But the key issues - the fourth one being, you know, what happens if the IETF Trust breaches. Everybody says that they fully trust the, you know, they completely - they have full confidence in the Trust. And that may be true, but, you know, things can change over time, people have had varying degrees of confidence in ICANN.

And so, you know, what I think we need to have in place is a process to protect the interests of the community and sort of smooth functioning, which

has always been the goal. And if the Trust itself should become problematic even if we don't expect it to be but if the Trust should become a threat at sort of smooth operations then there should be mechanisms to make a change.

I think that's - those are the four sort of key issues. And again, I may see more but we can certainly highlight those as a lead-in. Because I don't know that we're going to necessarily - and that the people that are on the call, you know, the trustees and others, are going to want to dig into all the details of some of the comments that we've put in the documents from a legal perspective. But I think there are a few principled terms that we should discuss and the parties should think about how they feel.

Will we also have - will we also have ICANN Legal or ICANN representatives on the call next week, do you know?

Jonathan Robinson: Okay, Josh, so two points then, and then I'll transfer to Greg. One, I thought the way you described that was helpful and to that extent correct. I think really the purpose of the call should be to give advance warning that those are the key subjects that need to be discussed and the potential resolutions understood.

I think the detailed legal - I don't think minutiae is quite the word - but the detailed legal points can be hatched out on list and the sharing of documents so that's okay.

I don't recall, and maybe as I hand the microphone over to Greg, he will confirm or maybe (unintelligible) from ICANN who's on this call can confirm. I think we said that we were (unintelligible) participate and so that extent it may well be that there is ICANN Legal on the call. But I just don't have a definitive answer right now.

Greg, over to you.

Greg Shatan: Thanks, Jonathan. A couple things. I agree that all of the points that Josh raised are important and key. I think, though, that there is kind of a set of questions that come, to some extent, before those issues and which was actually the original impetus for this call, which was to ask certain questions and get certain understanding about the IETF Trust itself and its operations.

And, you know, not least one of those - I think one of the ones that Josh mentioned that clearly falls into that first bucket, actually, which is how would the IETF Trust pay for any of this or in fact, you know, should ICANN be paying for this, you know, either a set amount of basically a budget of some sort rather than IETF.

But I think there's, you know, some questions about kind of the way the Trust works and what the Trust is that were not fully resolved in terms of, you know, the trust being essentially fit for purpose. As much as some would like us to bury that question and move on, I don't think I, for one, am not, you know, yet completely comfortable with that.

And I think there are some of the questions that are raised in the - both in the Sidley comments on the proposed principles and also in the documents - in the definitive documents kind of go to questions, you know, about the Trust. So that was kind of more what I was thinking of as the first order of business in terms of questions.

And then the second order of business, you know, would be key issues in the document, you know, regarding, you know, basically the way that the Trust operates in this relationship and the relationship between it and the

communities in the interest of the communities. But I think the first order is kind of squaring away questions about the Trust itself.

Jonathan Robinson: Greg, thank you. That's consistent with my view. And, Josh, just to highlight that in our preparatory work thinking about this we looked at prospective outcome or actions. And if you look at the point on the right hand side of your screen where it says "Highlight key questions for IETF Trust to be discussed," and then "highlight substantive issues to be resolved in the IPR document to date," and then finally, "process of dealing with those." So that's great, Josh, thank you. I note your point in the chat.

And then this point on ICANN Legal, I mean, I - to the extent that they can - that ICANN Legal can help and contribute and be clued into whatever is going on up front and it doesn't compromise the discussion at all, I don't have any objection. Greg, do you recall what we've discussed about this so far on the IANA IPR list? And when or when not it may be appropriate to have ICANN Legal involved? What are your thoughts there? Should and could we invite them to this meeting?

Greg Shatan: That's an interesting question. I mean, I think we need to certainly have them involved soon, if not at this call considering that they're a party to two of the three agreements or agreement types. And the question is whether we want to kind of get ourselves squared away as the operational communities before bringing ICANN into the mix.

However, you know, both in the interest of time, transparency and whatever, it might not be a bad idea to have ICANN on this call. There's nothing that would be confidential that would be discussed or that would somehow empower ICANN to do things in ways that are less - that are detrimental to the operational community because of this. So - in terms of overall

information sharing, I would be in favor of having them on the call if they could make it and - but not postponing the call if they can't.

Jonathan Robinson: So that's helpful, Greg. And I'll come to you just one moment, Josh. In fact, and you can help us when I do come to you because you were the one who suggested it. Greg, what I thought, though, was I thought there'd been some discussion on our list, I mean, I heard you and I'm pretty sympathetic to your view. In fact, I have more or less - my temptation is to say we should invite ICANN Legal as observers.

But also sensitive that this isn't our call, per se, and that there might have been some reservations expressed from others about having ICANN Legal involved at this stage. Do you recall whether or not there were?

((Crosstalk))

Josh Hofheimer: ...was our call, that we were the ones who reached out and suggested a call.

Greg Shatan: True, this is, in essence, our call so to speak. Not that I, you know, wanted...

((Crosstalk))

Jonathan Robinson: Here's how I suggest we handle it then. I mean, I suggest we invite ICANN Legal as observers on this call. I mean, I think that that makes sense and then we inform the other communities that we've done that in the interests of transparency and coherency of all of the work. Agreed, thank you, Yuko.

Now, Josh, you hand your hand up in any event. Let me hand the mic to you.

Josh Hofheimer: Well, so I guess I was going to ask a question for sort of process and goals. If we - if we - we want the first part of the call to be highlighting the key questions for the IETF Trust, you know, sort of going through and doing a little bit more diligence, I call it, on the Trust itself.

Greg Shatan: Yes.

Josh Hofheimer: I'm just thinking out loud whether or not we want to send the detailed set of comments in advance because we talk about here are three things to discuss the process of, you know, highlighting the substantive issues to be resolved, discuss the process of dealing with the documents. My only - the only concern - and I guess I can go either way, I'm just raising it as a thought, is if we send the markup in advance then we're going to be - we might get pulled into the details of the markup as opposed to being able to cover, at least the first two issues on your perspective outcomes or actions.

Greg Shatan: Yes, I think that's a good point. And I think we already saw that in a response from Jorge Contreras on the list that he seemed to be thinking that's where the call was going. And I think the agreements would then become the bright shiny object in front of everybody. So we may want to hold off and send...

((Crosstalk))

Jonathan Robinson: Exactly. So I agree with that thinking. It seems like it might be more attractive to prepare that table or summary that we indicated in the first instance, Josh. And so in fact, Yuko, if you could - where you've got down the bottom there, IANA IPR Sidley to prepare summary, I think that's really an action on Sidley, a request to prepare summary of the key items. So, Josh, I think the thinking there is that instead of submitting all the marked up documents we pull out, A, the substantial issues in the principle terms. And,

B, the substantial issues in the marked up documents. And I could see a document that just has a series of headings or a series of headings with key issues in the principle terms to discuss key issues or material issues in the - in Document 1, material issues in Document 2, and material issues in Document 3.

And hopefully, our list isn't that long. It's, you know, 6-10 items or something. And we can deal with those in that context. That feels like a more practical way of doing it rather than discussing a marked up document on the list. How does that sound to you, Josh and others?

Josh Hofheimer: Yes. That sounds perfect to me with one minor modification. I don't think we should, at this point we've moved beyond the principle terms that was kind of their, you know, version of a term sheet. And we're actually dealing with a definitive document. And so I think the comment should be - they're high level and they're going to cross - they're going to cut across multiple sections and even across the two agreements. So I think that - but I think we should just focus it on the actual IPR license and the naming agreement - I mean, the community agreement, sorry.

Jonathan Robinson: I'm very happy with that. That feels like it takes us a step forward. Subject to just checking with Greg that nothing gets lost in the wash that way around. But it feels very practical to me. Any concerns with that approach, Greg?

Greg Shatan: Just I think that we need to focus on the - what Josh called the due diligence of the IETF Trust. And I think it may be that all of those questions have moved forward from the principle terms.

Josh Hofheimer: Yes.

Greg Shatan: And they continue to be reflected in the definitive documents. But I think we need to kind of assemble a questions - kind of does that as such and not, you know, by reference to let's say a section of the license agreement and look at it as a diligence kind of KYC exercise, not really - this is not really know your customer but - or maybe just a KY exercise, you know, fill in the blanks with the third letter.

And because I'm concerned that one of the things that we discussed kind of with - in the collaboration group was, you know, lingering concerns about the IETF Trust, (claw) the Trust, as a fit for purpose entity. And so I - and the idea was that to some extent that we can move forward on the documents while not losing sight of that question and allowing things to move forward in parallel.

And I want to make it clear structurally that we haven't kind of moved past those concerns although, again, there are some who wish we would. But not because they've been resolved, only because they don't like the question. So I assume we need to keep that question as a question or as a set of issues, the issue being the party.

((Crosstalk))

Jonathan Robinson: I agree with that. I think it's structurally sensible, Greg. So, Josh, in terms of preparing the questions it may be that - the subject headings are due diligence on the Trust, other substantial issues or something along those lines which makes it clear that - because I think our good faith approach to this is to continue to prepare the documents and deal with the substantive and minor issues within all of the relevant agreements. But at the same time, and in parallel, do the appropriate level of due diligence on the Trust.

And the ultimate objective of all of this is to be able to go back to the CWG and say, we've done the due diligence, we've got the advice from Sidley, and here is a position with - that we can reach whereby the Trust is a satisfactory vehicle from the point of view of the names community and, moreover, we have the relevant agreements in place to effectuate the transition of the IPR to the Trust.

Greg Shatan: This is Greg...

((Crosstalk))

Greg Shatan: If I could just chime back in realizing that, you know, in looking at some of the comments that one of the CWG participants put on the chart, there's the issue with the Trust of who is the Trust answerable to? You know, they use the term "fiduciary responsibility" in the community agreement. Fiduciary responsibility is owed to somebody, but they don't - they used the passive voice and don't indicate to whom.

And the short answer to that question is probably that the IETF Trust owes its duty to the beneficiary of the trust, which is the IETF, and neither of the other communities. And there's an inherent tension in that. And that kind of rings through probably all the other questions. But that's, you know, that - I'm not sure that's exactly reflected in the chart as such. But that is, I think, you know, part of the question of getting our arms around the Trust.

And it's wonderful thing to be able to trust the Trust but the Trust, when push comes to shove, you know, has to take care of the IETF and not the other two operational communities. That plus, you know, what I've seen is, you know, personality intransigence, nothing, you know, remarkable but you can't kind of put that and, you know, complete trust together, you know, not expecting

anybody to be an angel but at least let's admit when people are human and have interests. Thanks.

Jonathan Robinson: Thanks, Greg. I suppose the corollary to that kind of question is making sure that ideally we have a proposed answer as well. I mean, we obviously (unintelligible) seeking an answer but what level - what sort of answer would be satisfactory or what form of modification would be satisfactory? Bearing in mind, as you well know, that we've been told that...

Greg Shatan: I think the - yes, if I could just...

Greg Shatan: ...interrupt in the interest of time because I only have about 7 minutes. The answer to that is that we decided to deal with that functionally through agreements, rather than by modifying the structure of the Trust. And that is supposed to be carried out in the community agreement, which at this time falls rather short of that desire to make the operational communities as much in charge and, you know, giving them as much oversight as possible over what is really a stewardship position and not a typical ownership position that the IETF Trust has vis-à-vis the IPR.

So while I think we do need to confirm kind of from the horse's mouth some of the issues around the trust and also, you know, kind of who holds the IPR when the Trust holds the IPR, at least the trademarks, there are issues there with actually the, you know, it may be a legal fiction to some extent but the trustees hold the IPR in the view of the US Patent and Trademark Office and not the Trust itself.

But without getting into, you know, issues only a trademark lawyer could love, I think there is kind of the issue that we want to understand, you know, more about the Trust than also, you know, make it clear that the community

agreement is intended to solve any problems with the Trust being fit for purpose, therefore it needs to do so.

((Crosstalk))

Jonathan Robinson: ...Greg, I think that's a very constructive way of (unintelligible) that. Josh, I'll come to you in just one moment. But I do think I'd like to capture that because I think if we can successfully articulate that point it explains why we have the questions and how we see the answers begin developed through the community agreement, or that the community agreement is the vehicle for those answers to be developed.

And in so doing, potentially gets us the answers we need and perhaps puts at rest, puts the minds of the other communities more at rest, that this isn't sort of tactical mechanism to try and create a third party trust, which is what seems to make them so anxious at this point, that the Trust may be in some way be deemed through this process to be unfit for purpose. And if we can remedy any of its apparent lack of fitness for purpose through the community agreement, that feels like an attractive way forward.

Josh, go ahead.

Josh Hofheimer: Yes, I was just going to highlight the sort of my agreement with Greg that I think the key, as you said, or you were asking, Jonathan, to - how do we solve this or our proposed solution. The key is to make it clear that it's to constrain the purpose of the Trust so that it's not engaged - it really is that steward or caretaker for the interest of the three communities. And is not going to be exerting independent subjective control.

Greg Shatan: Right. And I think a corollary to that can be the relationship of the multistakeholder communities to the ICANN Board. You know, typically boards don't, you know, get policy recommendations from communities that they then are, you know, must adopt unless rejected by a super majority. But the idea is to - and maybe it hasn't been carried out as well as it could have been, but the idea was to try to put the multistakeholder community in the driver's seat, you know, less so than the Board.

Again, may not have accomplished that as well as one would want, but one would hope for a similar thing. And to drone on for just one moment, you know, I've worked on some IP asset acquisitions where we had outside advisors who were essentially running the portfolio and really making the decisions as such, but it had to be clear, at least on paper, that they were advisors and that the named owner was making the decision.

So there was documentation which essentially made it clear that this was merely advice, but at the same time you - there was a very high hurdle to rejecting any of that kind of advice. So frankly I'd prefer to come out of the gate talking about approvals rather than recommendations or was highly weighted advice but of course that's, you know, that's going to come in our turn of the documents because it certainly wasn't in theirs.

Jonathan Robinson: Okay, but it sounds like then the three of us, to the extent that we've dominated this particular conversation, but feels like we've done a - in the right way rather than - it feels like we have a common view of how to both approach Tuesday's call and what we want to get out of it. And so that's helpfully.

I'm actually not 100% clear who is going to lead the call. Absent another volunteer I'll offer myself and then Greg and Josh, you'll be in a position to provide the sort of - the substantial contributions.

And ideally, Josh, I guess we get that document out to the other groups on - well as soon as possible really ahead of the Tuesday call, that's really I would say is highlighting the key points. And if you want to run it by the, you know, this client committee beforehand, no problem. But I suspect we've got a pretty good idea of what's got to go in it.

I'm tended to turn us to briefly to Item 2 on the agenda, which is the legal work that's really more for Sharon's concern, I think, no actually this is Josh as well I think. But in preparation for the Tuesday - Thursday 28 meeting.

Josh, I think what we're thinking there is that that Thursday 28th meeting is going to have two key components to it. One is a report back of the Tuesday meeting and where we are with the IANA IPR so all of this - taking this to the CWG and to the extent that there are any decisions to be taken on any of this to put those to the group.

And second, to take the opportunity to present Sidley's first review of the naming function agreement and the intercompany agreement. How do you feel about being in a position to do both of those, you and/or Sharon, being in a position to do both of those in time for the Thursday 28th call?

Josh Hofheimer: We'll be fine for the naming function agreement. When you say the intercompany agreement, what are you referring to? Are you talking about the services agreement header?

Jonathan Robinson: Exactly, sorry intercompany services agreement.

Josh Hofheimer: Yes, that's - I mean, all that is, is headers at this point so, yes, that'll be fine too.

Jonathan Robinson: And I think what I would like to see you comment on is your satisfaction or not, at this stage, and I'm happy - if you want to sit on the fence and say we are not yet able to establish that because we've only got headers in the latter agreement, that's fine. But your satisfaction or not with the - or don't know yet - with the separate agreements and where you are on that position. And then second, any substantial points naming agreement and/or the headers.

Thanks, Greg. So we'll talk to you soon.

All right, well from my point of view that solves the objectives of this call because what I've gleaned is that we don't need another call between us on Monday, 25th of July. Let me see if either you, Josh, or any of your Sidley colleagues, need to make any other points. And if we're in, you know, we're all clear and in good shape at this stage.

Josh Hofheimer: So just one comment just so - process and if the question comes up. I think that if we get - if we come to agreement on the community - if we're ready to send the community agreement markup back as well, I think we are ready with the IPR license agreement, I would suggest we let them know on the call that we're going to be sending, you know, specific comments - I mean, we have to digest some of the call but we're going to send specific comments back in the next day or so. And, you know, markups of those documents. But we won't do it before the call.

So I want to confirm that understanding with everybody. And the second thing, we will circulate - it may not be able to get out today but over the

weekend we'll circulate the sort of due diligence questions and the - and the summary of material issues or material questions that we see in the document for discussion with the IETF Trust to use on Tuesday. We'll circulate that with the idea that we'll get that out in writing to them in advance of the call but we'll circulate it internally first over the weekend so just people have an idea to be looking for that in their inboxes.

Jonathan Robinson: Thanks, Josh. I'm good with both those points. Yuko, you can just capture that for the record that - I see, yes, yes, Steve already captured under Action 1. Yes, Josh, I think that's exactly right. On your Point 1, I mean, as we discussed earlier, I think it will just potentially create unnecessary distraction and given that we're going to call the potentially premature to have the document circulated - the markup circulated ahead of the call, let's go for the call and indicate that the markups will follow shortly afterwards taking account of anything relevant that's taken place in the call. That sounds perfect to me.

Josh Hofheimer: Okay.

Jonathan Robinson: Okay, Holly, Sharon, anyone else need to say anything else at this stage or Maarten? If not, I think we can say we've done the job. Okay, sounds good. Thank you very much, in particular Josh, but thanks, everyone. That seems like we've had a productive and focused call. So we'll be communicating online and meeting with you again on the Tuesday call. Thanks, everyone and thanks, ICANN staff for your help as well. We can stop the recording at this stage and call the meeting to a close.

END