

**ICANN  
Transcription  
Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working  
Group call  
Wednesday, 10 August 2016 at 17:00 UTC.**

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at: <http://audio.icann.org/gnso/gnso-rpm-review-10aug16-en.mp3>

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Terri Agnew: Good morning, good afternoon, and good evening. Welcome the Review of All Rights Protection Mechanisms, RPMs, and All gTLDs PDP Working Group Call taking place on the 10th of August 2016.

In the interest of time, there will be no roll call, as we have quite a few participants. Attendance will be taken by the audio bridge - or the audio connection only. The attendance will be taken by the Adobe Connect Room only. If you are only on the audio bridge, could you please let yourselves be known now?

Hearing no names, I would like to remind everyone to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this, I'll turn it back over to our moderator today, Kathy Kleiman. Please begin.

Kathy Kleiman: Thanks so much, Terri. Hello everybody and thank you for joining us on - with a hot summer day for some of us. And we have special apologies from co-chairs Phil Corwin and J. Scott Evans, who cannot be with us today but send their regards. And of course we have our wonderful staff here, Mary Wong and (David Tate), as well as Terri Agnew.

So again, special thanks for joining us. Now's the time where we do, you know, the normal updates of statements interests. I wanted to make a special note here that I noticed that there are some people in the group who are kind of shifting jobs and getting some new titles and going to new employers. So let me urge you to please update your statement of interest, as that as a requirement of membership. And if you have any problem at all with the wiki, and sometimes people do, you know, please let me know or Mary Wong or (David Tate), and we'll help you with that. But please update the statement of interest and tell us your new locations.

We have a lot of material to cover today and it's hard to do it in the dead of summer, but nonetheless it is our job to do so. So as a big overview, we're going to be looking at in the second item of our agenda questions that we have - follow-up questions that we have a number of different areas, the PDDRP providers, the community and others.

We'll be returning to number three of our agenda to the issues and concerns report that we've been working on, the summary of issues and concerns that we want to look at, which has been wonderfully updated by staff with boxes that kind of show us where the moving targets are on some of the issues we're working on.

And then we've got an interesting report from -- initial report -- from the Trademark Clearinghouse Sub Team, the vanguard that kind of went out to look at some of the initial issues with the trademark clearinghouse, including a question about their scope. So that will come back to us. So I may wind up

cutting off our discussion on issues and concerns midway, which we've done before, to move on to the Trademark Clearinghouse Sub Team. And I ask staff to let me know about 15 minutes before the end of the call so that we can move on to that issue, we can move from three to four.

Let me just pause actually to see if there - if anyone wants to update a statement of interest or share with us something that's happening with them. Okay, seeing no hands, let's go straight to the questions. This is now a questions page that includes three sets of questions, and two of them I think are pretty defined, and I think the third has yet to be really fleshed out. But let's go over it quickly.

The first is the draft follow-up questions to the three trademark PDDRP providers. And here we have -- ah, you're not seeing the full redline. One, two, and three haven't changed. Four has changed a bit. So one is asking the providers whether they think that the rules of the PDDRP in their current form permit or do not permit the filing of a joint complaint by multiple different trademark owners against the same registry operator for the same alleged infringing behavior in respect to different trademarks. So what do they think?

There's been - we've had some back and forth on that. What do the providers think? And then asking about their supplemental rules and whether the consolidation would present any procedural limitations should the working group choose to recommend that the council and ICANN go in that direction, other questions about the supplemental rules.

And then number four has changed a little bit, so let me read it and just see if everyone's okay with it, which is, "What is your view on the proposal to add the express possibility of a joint complaint to the Trademark PDDRP and/or your supplemental rules? The working group notes that one goal of such an option could be to clarify pre-filing and post-filing consolidation of complaints and minimize any administrative burdens of consolidation on providers while also maximizing efficiency and cost effectiveness for complainants. If this

option is added, what in your view would be the limitations, if any? If you do not think this would be a useful addition, what are the reasons?"

Again, this was expanded and clarified from our discussion last week. Does anybody object or want to comment on number four or numbers one, two, three, and four? Mary, go ahead.

Mary Wong: Thanks, Kathy. So I just made a comment in the chat because we also noticed that this is the clean version. If it will make it easier, we can swap out to the redline version so that you and members can see the changes. Would you like to give us a few second to do that?

Kathy Kleiman: Sure, absolutely. I think that would be very helpful, and in fact that's what I'm looking at in the hard copy.

Mary Wong: Hold on. I'm just trying to locate it. Apologies for that, and it's coming up right now, Kathy. Thank you very much.

Kathy Kleiman: Thanks so much, Mary. Great. This shows the edits that staff has added in red line from our discussion last week. So let me pause again to see if anybody wants to comment or critique any of the questions that we're sending to the PDDRP providers. And if not, does anyone object to this being our recommendation to the full working group that these questions go out by the end of the week? We'll of course leave it - we'll of course post the minutes of this meeting on the list so if anybody who can't make the meeting wants to comment or critique, they'll have a voice as well.

Okay. Then let's put in our notes please that the working group approved the submission of the questions as edited to the PDDRP providers. Great. Then moving down to -- and you should have control of the document -- moving down to the second set of questions. And these were initially discussed as draft survey questions for IPC and BC members, and of course they should be included but there was discussion last week and very broad agreement

that these questions should go out to the full ICANN community, all SOs and ACs, stakeholder groups, and constituencies to see if anybody wants to comment. And if people want to, great, if they don't, that's great.

So just highlighting here, we're asking - this is where we're asking some of the more specific questions, and four is where we did a lot of the work. So number three, did you or your clients or persons or entities your represents or your members ever consider filing -- and I know I'm editing a little bit -- ever consider filing a complaint under the PDDRP but not proceed, and what were the reasons?

So here number four tries to get into more detail. And so in four, if someone says they did, it would be helpful and we talked about describing as much specific behavior as possible. The party responding can choose to name or not name the specific registry or registries, but, you know, how has - and let's, you know, please look at A, B, and C that will follow.

Has any registry conduct - or has any conduct by new gTLD registry operators - is there any conduct that you believe constitutes -- sorry about the cold -- a substantial pattern or practice of specific bad faith intent to profit from the sale of domain names at the second level? If your answer to the above is yes, what do you think the - why do you think the PDDRP has not been used even as this behavior is apparent in new gTLD registries? If it's yes, do you believe the PDDRP in its current form addresses the problem? If it's no, do you think the PDDRP should be amended to address the problem? Why or why not?

So this reflects our discussion last week of really wanting people to dive into specifics and the general agreement on that. Does anyone object or want to add or edit the survey questions any further? Okay. Great. Seeing no hands - - it's a quiet day -- seeing no hands, we'll move on to C, where I hope people will participate because we're greatly lacking in questions to ask ICANN Compliance.

So here let me preface for people who don't remember and if other people remember differently or want to add their recollections, please raise your hand, but when we talked to the providers initially, they - there was some sense by more than one provider that some of the issues that might have come to them may have instead gone to ICANN Compliance. And there was some discussion in our working group meetings over time that ICANN Compliance has changed considerably since the days when some of us in the working group drafted the PDDRP and edited it to where ICANN Compliance is today.

So there might be a real possibility that ICANN Compliance is acting on things that we never would have considered, you know, five or six year ago. So the question is what questions should we be asking ICANN Compliance, which has now been expanded to also include external legal counsel and other appropriate parties, that would shed light on what ICANN Compliance might be seeing and whether they indeed might be handling - might be kind of heading things off at the pass, as we might say, and helping hear complaints and perhaps solve them early so that they're not right into the level of a PDDRP.

I would love to know people's thoughts on what questions we might ask, whether we should even go to ICANN Compliance. And we'll talk about the special situation of use cases in second, but first I wanted to see if anyone wants to pose some general or specific questions for ICANN Compliance, given that there are none currently. There are no bullet points on that currently on our sheet.

Go ahead, Mary.

Mary Wong: Thanks, Kathy. Hi again everybody, this is Mary from staff. Kathy, this is more of a placeholder, as was noted in some emails with the sub team, and I see that she has raised her hand. So I don't know if (Susan Payne) is going to

make the same point. I was just going to put in a placeholder because the Trademark Clearinghouse Sub Team I believe does have a potential question for ICANN Compliance. So I will yield to (Susan). Thank you.

Kathy Kleiman: (Susan), please go ahead. Thank you.

(Susan Payne): Yes sorry. I took me a bit of time to get off mute. Yes, we did have a potential question for Compliance, but I'd actually put my hand up for a different question. So maybe - I mean the first question I thought we perhaps could ask Compliance was just whether they have had any situations referred to them, any complaints referred to them which they feel would have been within scope for a PDDRP but which, you know, which they dealt with themselves or where the complainant for whatever reason didn't choose to go down that route. Do people think that would be worthwhile?

I'll do my second point and then I'll sort of throw it back at you and see what people think about that suggestion. But the second point was that in the course of our conversation with analysis group, who have produced the draft independent review on the trademark clearinghouse, they encountered I think it is two registrars where they feel that they were making unusually high requests to the clearinghouse, which may be an indication of some kind of attempting to use the clearinghouse data for a purpose for which it wasn't intended, i.e. they're not requests for registration from registrants but for some other interrogation of the clearinghouse data that of course could be either entirely innocent.

And so we did have a question about whether analysis group were going to refer that - those two registrars to Compliance or not. And I don't think they felt that necessarily they were sort of - that it was appropriate for them to do so, but it did seem to me that we had a sort of general question of, you know, where a situation comes up where a review identifies a potential issue which needs further - at least further investigation, you know, should that be investigated by them or will they only investigate something if they receive an

actual complaint about an actual circumstance, which of course in this case, none of us know who those registrars are. So, you know, no one else can submit a complaint to Compliance about this because we don't know who the registrars are.

Kathy Kleiman: So, (Susan), let me double check. This is Kathy. So there are two questions you're submitting - you recommend that we submit. One is are there any complaints that ICANN Compliance has received and dealt with that might have - that kind of reference -- you said it better -- but reference the PDDRP. And I hope Mary will capture this in the notes. That's the first one. And then, let me see if I can help phrase the second one, and please tell me, you know, I hope you'll stay off mute and join me in the discussion and I hope others will raise their hand.

That if ICANN Compliance becomes aware of possible fill in the blank, possible negative activity or problematic activity involving the use of shall we say areas related to the PDDRP, are they empowered to act directly, absent the complaint on that knowledge. Is that a fair characterization? Would you like to give it another shot? Would anyone else like to give it another shot? And then I'll call Mary. But I'm going to wait for (Susan) on this.

(Susan Payne): I think that's a fair characterization in the context of the PDDRP. In the context of what we, you know, what was being discussed by the Trademark Clearinghouse Sub Team, I suppose I don't know whether the second one that's potentially - the potential situation would be a potential situation which falls within the PDDRP or not. But I suppose it could be if it was interrogating the clearinghouse data in order to determine what trademarks are in there and therefore to designate them as premium or something like that. I mean it's - yes I guess so.

Kathy Kleiman: Let me ask you, do you think it might be - my guess is we'll be returning to ICANN Compliance again and to the trademark clearinghouse section. Do you want to - would you like to include this question now or wait and have it



as part of the compliance questions under the trademark clearinghouse, or both?

(Susan Payne): I think they could be a sort of general question, which is when reviews are being undertaken which may bring to light circumstances which require further investigation, you know, is Compliance empowered to look at that, and do they do so or not? Or is there, you know, or not - yes. And perhaps that's the extent of the question because, you know, there may be other circumstances. The CCTRT for example is also conducting investigations which might or might not identify circumstances which might or might not warrant further investigation.

Kathy Kleiman: Perfect. That makes sense. And then to come back again for additional information under the trademark clearinghouse. Thanks for the phrasing. I'm going to mispronounce this. Sonigitu could you join us? Thank you.

Sonigitu: Sonigitu for the record. Good evening.

Kathy Kleiman: Good evening.

Sonigitu: Just supporting the previous speaker to understand if this registry we are closely related to some other registry or are they subscribers in terms of if there is a spreadsheet to show the registry's information.

Kathy Kleiman: Sorry, could you phrase...

Sonigitu: Hello?

Kathy Kleiman: Hi. Could you ask that again? I missed a few word.

Sonigitu: Hi. Yes I'm asking do we have a spreadsheet showing the detailed information about each of these registries and their subsidiaries so that we

are able to use the data there to have a lot of inputs in our question, in the draft questions.

Kathy Kleiman: I think we're collecting that information now. I think we - no PDDRP has been brought yet -- and other people feel free to answer this too -- but no PDDRP has been brought yet, so there is no specific information, there's no case that we can look at, there's no arbitration decision that we can follow. And so what we're asking for is if people know of specific instances of misbehavior and how they've been handled. So we're trying to create that report or spreadsheet. But right now we don't have it. That's kind of our job. Is that a useful response?

Great. Thank you. Mary, go ahead.

Mary Wong: Thanks, Kathy. I had raised my hand in response to (Susan)'s suggestion. So let me preface these comments by saying that these are not views that I can say, you know, I'm speaking on behalf of Compliance or GDD or any of the other ICANN departments that may have more insight into these areas than the policy staff.

That said, (Susan), on your first suggestion, my recollection is that we had gone back to Compliance with a somewhat similar question about the type of complaints that they may have seen that could potentially fall under the PDDRP. And what they had mentioned in response was that they are not able or prepared to answer a question like that because that would be either speculative or opinion. I don't specifically know if they had in mind any compliant they received that specifically referenced the PDDRP but that then did not proceed to the PDDRP.

If it a factually based question like that, they may be able to give us an answer. So in other words, for your first suggestion if you could narrow it down or make it a little bit more specific as to maybe some factual allegations in a complaint, that may be easier for them.

On your second suggestion, I think in terms of the specific incident that we had discussed with the analysis group in the sub team, my understanding is that for that specific incident, because the information is in the hands of the independent examiners, the analysis group, then that would depend on I guess the terms on which they got the information and exactly what that information is, which we at ICANN we don't know. So on that, I can say that my colleagues are following up with the analysis group to see if this is anything that can or needs to be brought to Compliance's attention. So that was just a comment, and I have no comment on the broader suggestion, which I've tried to capture in the notes. Thank you.

Kathy Kleiman: Okay. So a call to make our follow up with Compliance point number one, which Mary has left blank in the notes on the left side, a little narrower. Anybody want to respond to that challenge? In that case, Mary, I'd like to recommend we go forward with the question that's raised by (Susan). I think we'd have to go back to the transcripts to get it, but are there any complaints they feel could have gone to the PDDRP and how they dealt with it.

I think it would have - it would be obviously new gTLD complaints or concerns regarding registry conduct. So if you could go back and grab (Susan)'s question the way she phrased it, let's put it out there as a draft for the rest of the working group with a request to see if people want to narrow it or add some more specifics. And we'll submit it formally to Compliance and they can respond formally.

Any objections? Great. Hearing none, we close these follow-up questions in three different places and move on to the next item, which is the continuation of our discussion on issues, concerns, and suggestions with the Trademark PDDRP. And here I'm going to kind of move us through quickly because we've actually done a lot of work in the last few weeks.

So what I'm going to do is try to move us through quickly. On Friday night, at least Friday night Eastern Time, Mary sent out some action items and some thoughts and she tried to help us focus on where the action really is on - where the questions really are, the open questions really are on this issues and concerns document. And she highlighted the issue of remedies, the introduction of a limitation period for filing a complaint, and we'll find a few other areas at the end of this document.

So what I'm going to do is kind of move us quickly through the document so we get to the end, which is where the newer and more open issues are. And so this is a summary of our working group discussions and particularly a compilation of our member issues and concerns and suggestions raised on the list about possible changes to the PDDRP.

And the first one is of course mediation. I'll let you read the text, but I'm - oh, Mary, to your question, I'm always in favor of redlines, but I don't know how other people feel. So what we're going to see is that staff has created a number of boxes for us to focus on, and we'll go to the boxes and that's really kind of where the state of play is. And if you disagree that it's an accurate representation of the state of play or you have additional questions or issues, please let us know and we'll expand or edit the box.

So right now we want to go to Page 2, which is where the mediation is. And Page 1 kind of summarizes the discussion that we've been having and some of the key issues on mediation and some of the open questions and how we're addressing them. So the follow-up discussion and tentative agreement on adding a mediation option -- I hope everybody's with me in this box on Page 2 -- that mediation should be optional, not mandatory but should - so then there's a question, should refusal to mediate be something the panel can take into consideration for example in awarding costs.

And then considering adding a policy statement to encourage but not compel mediation as part of the PDDRP. There is - there was agreement that

mediation - general agreement, not consensus yet, but general agreement, that mediation should be done online for reasons including cost concerns, efficiency and time considerations, and that the procedural requirement should be lean and lightweight, for example, skeletal based on the skeletal complaint only. But I note that there was - there were some differences on that and some people felt it would not be fair to go forward without a full complaint.

Should mediation always be confidential and without prejudice? And that relates to the question above. Should mediation option be available before a complaint is filed or after? Should parties be obliged to use only mediation services from existing PDDRP providers? So the next steps, there are two bullet points and I'm going to jump to the second one first.

Right now the question is there's a doodle poll indicating whether or not there's support for adding online volunteer mediation. And I would urge you to go follow the link on or before Friday and let us know your thoughts on this and some of the other issues raised on the doodle poll.

Then, moving back to the first bullet point, do you want to seek - there was some idea that we might seek input from (Nominet) or other experienced mediation providers. Is that something people want to do? It would of course delay the work that we're doing, but it might be important input. George, you're writing a lot of text. I would urge you to come on the line and talk with us. Can you do that? And I would urge others to come on to the call. George, thanks. Go ahead.

George Kirikos: Sorry I was on mute. George Kirikos for the transcript. Yes I just had a question about what was meant by online mediation because typically from what I've seen is that written submissions, like brief written submissions, are made to the person conducting the mediation and then they get together for, you know, either in face or face-to-face or telephone meetings because

they're conducted in real time. My concern is if you limit it to online mediation that is not in real time then the process can drag on forever.

Kathy Kleiman: Good question. (Christine), it looks like you've got some answers. Is there any way you can join us on the call? Go ahead. Thank you.

(Christine): Oh hi thanks. Yes this is (Christine) from Amazon, formally of the National Arbitration Forum, and I just wanted to just offer sort of a background experience which is oftentimes when parties agree to do online mediation, it's not a typical like sort of UDRP online process where it's back and forth exchange of documents. Usually it's done where everyone submits their mediation statement to the mediator, you know, ten days before the hearing and then there is actually a hearing.

There's software that conducts mediations that allows for private caucusing in side rooms as need be. Some mediations allow for private caucusing. And - but other times simply Skype is used. If there's no need for a private side, you know, side conversation with the parties, the mediator will simply use something like Skype or WebEx or Adobe Connect, and then they'll just set a time limit and the mediation will happen. And if parties can come to a mutually agreeable solution then, you know, it's good, and if not, then, you know, the mediation was unsuccessful. So I think online mediation, especially in 2016, you know, is almost as good as in person.

Kathy Kleiman: So, (Christine), before you get off the phone please, let me clarify that online mediation then is not solely online but it's a combination of written statements and an oral hearing basically, so it's that combination. Is that right?

(Christine): Yes absolutely. And when we talk about an actual online mediation as far as the types of, you know, the sort of patentable inventions and the types of things that providers around the world have been working on, you know, there is a lot of technology that is truly online. So everyone logs in, everybody, you know, sort of has these video conferences and they have

sidebars and they have places much like our Adobe Connect room where you can have, you know, sort of a chat and you can see who's there and you can see who's talking and you can take turns.

So there is actually a lot of sort of technology that can be involved in online mediation. It might be a little bit more cool and techy than it was ten or 20 years ago.

Kathy Kleiman: Thank you very much. To (David) and Mary, per George's question and (Christine)'s response, to the second bullet point in this box, let's expand it for next week, that mediation should be done online -- and include the parenthesis -- but online includes the traditional format of written statements as well as hearings that are conducted, hearings or discussions that are conducted online. So that will clarify that based on (George)'s excellent question so that everyone else knows as they're reading it that it's probably both. Petter, go ahead.

Petter Rindforth: Oh thanks, Petter here. You summarized it in a very good way, so I don't think I have anything to add. I'm just saying that I have been participating as an attorney a couple of times for what we call online mediation, and I would say that there were differences that you're not meeting in the traditional physically face to face, but everything else can be done and you - I would say from a time point of view, it actually goes more easier because you don't have to travel to the physical meeting points themselves.

But of course you miss the - a good opportunity when you can actually read more from people when you see them acting physically. But I think from the perspective we want to suggest or try this system out, it would work for this type of disputes. Thanks.

Kathy Kleiman: Makes sense, Petter. Thank you so much. And we'll only make people travel to ICANN meetings. We're trying to avoid other types of travel, which makes sense to me. Is there anything - have I missed anything in the chat room? Is

there anything people want to add to this box again? The call to go to our doodle poll, which hadn't been - which had only had a fraction of people responding from the working group last I checked, so go to the doodle poll and tell us what you think about this.

Okay, moving on. And again, the open issues are really towards the end so - but the discussion's great. Moving on. Number two, are the requirements for filing a PDDRP complaint too narrow? You can read the discussion. There aren't very many changes to it from last week, but let's go the box that follows on the next page.

And so this is our follow-up discussion, tentative agreement on consolidation joint complaints. And this is really, you know, an open question and we're exploring it. So a complaint currently does not seem to be made public until after it's filed, but this may be necessary information in making a decision to join the action. We need to consider what practical burdens there are for trademark owners and respondents, as well as registries and possibly even registrars.

Interesting and probably useful point made, avoid using the term class action, as that's generally understood to be a situation where a single complainant represents other similarly situated and is different from the consolidation or joinder of actions. Note that - and then it talks a little bit more about consolidation.

Next bullet point, will a second PDDRP complaint be precluded if a registry wins a previous class action complaint. That's interesting. What sources should the working group consult for additional input or additional information on the advisability of adding this option? And the suggestions so far include ICANN Compliance and other similar types of investigations. So far we don't have any questions about this to ICANN Compliance but we might want to add it to our list.



And should complaints about targeting multiple TLDs simultaneously be permitted in a single dispute or where different TLDs have common ownership? So what we've decided as our next step is to send out questions to the PDDRP providers requesting further feedback by the end of August. And I have a question for you, which is should some of these questions also be going out to the community? Is this something we might want to add as part of our community outreach and questions, which, you know, we're well on our way to finishing up?

Does anybody have any thoughts and, if so, would you have any phrasing of a question we could send to the community? Okay. Does anybody have anything they want to add or take away from this box at this time? Great. Then we will consider issue, at least for the people on this group, fairly well defined and laid out. And thanks to staff for laying it out so clearly for everyone.

Moving on to Roman number three, is the PDDRP too difficult to access? Is it not being use because the burdens are too high or the remedies too uncertain? It sounds like somebody's just come on the line. Is there someone who wants to comment? Okay thanks for muting. So is the PDDRP too difficult to access? And, Mary, I'm going to ask you to read, if you would, Mary or (David), to read the box because it looks like it's been - oh now it's been filled in. It was truncated on the version I was looking at.

So one of the questions is substantial infringement. Again, letting you read the text. That hasn't changed much on this. But the box that says in our follow-up discussion and tentative agreement on substantial infringement, we are sending a survey out to the SOs, ACs, constituencies, and stakeholder groups relating to awareness of the procedure of the PDDRP and the existence of any new gTLD registry conduct that could fall under the PDDRP, and we've asked of responses by mid-September.

So are there any - is there any place else we should be looking for information about substantial infringement? And is everybody happy with the way we're moving forward on this issue of looking at is a PDDRP too difficult to access? Good. Then we move on to some of the really open questions, which right below the box, suggestions related to whether the working group should change the standard and burden of proof in the PDDRP.

And so some think -- and here I'm going to go into some detail because these are still really open issues -- some think that lowering the standard of proof should be required, some think that the standard of liability should be changed to a willful blindness standard or a new or should have known standard, along with the additional of a safe harbor provision, which would insulate registrars that took certain actions in response to complaints from liability.

And the discussion on the working group list so far is that since the remedies that can be recommended on the PDDRP are quite extreme, it's important that the complainant's burden of proof remain high so this is the counterpoint, and accordingly, the clear and convincing evidence standard currently used in the PDDRP is proper. So we can debate the issue or figure out how to get more information for discussing the issue of lowering the burden of proof.

And here we again have this is an issue whether we should be - continue discussing this as part of the doodle poll. Mary, do you have the doodle poll in front of you? Do you want to read exactly what the question is that people are being asked on this? And while you're looking it up, I will call on Jeff Neuman. Thanks.

Jeff Neuman: Thanks, Kathy. I'm kind of scratching my head here because I do want to hear what the question is on the doodle poll, but I feel like we are redoing a conversation that was had in a huge amount of detail prior to putting this policy in place and you're asking a question about whether the doodle - or whether we should lower a burden without anyone coming forward and

saying that that high burden is a problem or what problem we're trying to solve.

So asking in the abstract intellectual property owners or businesses whether a burden should be lowered, the answer is always going to be yes. Asking registries, the answer's always going to be no. To me it makes absolutely no sense to completely redo an issue, in a lot of the cases actually, to redo things that we spent so much time in 2008, 2009, 2010 and there's no evidence of any change of circumstances for us to be engaging in these discussions.

So that's what we should focus on really, producing evidence that people would have wanted to use in a PDDRP type action for which they couldn't bring because the burden is too high. Once we establish that as a fact, then we can revisit the burden, but to me, it just doesn't seem like - I don't know why anything should be changed from when we put this into place. Thanks.

Kathy Kleiman: Jeff, don't leave the line please. So what - would you think that the current outreach, the questions that we answered, you know, the questions we were looking at in the prior document, is that sufficient outreach or should we be adding something else to find out if the circumstances have changed and if there's any evidence of that?

Jeff Neuman: Well it's almost like we should be going out there to every - and getting INTA and other trademark associations' help to get it out there as to what are the problems you're seeing with the registries, what - and what evidence can you tell us. And I know we've asked like the SOs and ACs, but again, I don't think that's going to be good enough, because, you know, those are just people that participate in ICANN, although I know (Lori)'s here from INTA and maybe she can use some of her clout to get it out there.

But, you know, that's what we should be collecting, evidence of what the bad behaviors are of registries, collecting that information and then making an

assessment as to whether those bad behaviors should be addressed by this type of situation. So it would be great to get to, you know, INTA, and (Lori) said they've already asked. We should get it out to (Marx), which is in Europe. There's - we should get publications if we could like, you know, managing intellectual property and others to publish something and asking for information.

So, yes and (Lori) does point out on the list that they're on record with some bad practices, so we should take that, we should look at those bad practices and say, "Okay is this something that should be covered by a PDDRP?" And only then should we talk about lowering burdens. But asking a question - I mean I'll tell you right now, every registry's going to say no, the burden should not be lowered, every trademark owner's going to say yes it should be lowered, noncommercials will probably say no it shouldn't be lowered. You know? So I think it's pretty predictable.

Kathy Kleiman: Jeff, do you think we should mark this one - so you think we might have gone too far with the box that says follow-up tentative agreement along the burden of proof and really mark this whole section as under great debate that while some people may have suggested lowering the standard of proof, others are contesting that, saying that it's, you know, maybe put it into the bullet point saying that this was explored extensively, based on what you're saying, extensively -- and my recollection -- extensively before the drafting of the PDDRP, and absent evidence of some problem, maybe we're leaning towards keeping the current standard of burden of proof rather than (unintelligible) on lowering it?

Jeff Neuman: I would always say that the - that you always stick to the status quo until or unless there's evidence presented that should cause you to change the status quo -- always. And that should be a default for everything. And so in this case since there's never been a case, we don't have any evidence put forward except (Lori) said there was some evidence of bad practices sent by INTA to ICANN last year so we should look at that, but absent any reason,

real reason, we should not say that there's any kind of agreement to do anything different.

And I would highly contest the fact that, you know, and again I'm going back to not necessarily my current employer or whatever, I'm not expressing those viewpoints, I'm expressing just being heavily involved in this debate and kind of, you know, writing articles on it, which are available on CircleID and other places about why the standard should not be lowered, which (unintelligible) intellectual property owners wanted it to be lower.

Kathy Kleiman: And you're going to circulate some of those, the links to some of those?

Jeff Neuman: I did during the first meeting and I know it was in the chat at one of the first meetings. And I know ICANN staff collected a lot of that information because it was - the question was asked as part of the guidebook process. I don't know maybe (Kurt) has better memory of this than I do, but I know that there was certain information. And then ICANN actually did a legal analysis and the legal analysis was what I had said, which was that there's no - that ICANN should not create additional law, go above and beyond what the law says. And the law at current time and back then did not have a willful blindness standard that would support this type of cause of action.

Kathy Kleiman: Jeff, could you work with Mary and (David) to create a section in this part of the report that lists these documents? You're referring to ICANN legal analysis, you're referring to CircleID research and editorial that you wrote. Let's - I think it may not have percolated into people's consciousness, including mine, when it came up early on, but it sounds like it's really timely for us to have this material in front of us now. So maybe you could work with them and make sure that kind of the low-hanging fruit, the things that come to mind quickly and in your mind are here in the materials so people can reference them quickly (unintelligible).

Jeff Neuman: Yes, and my point is...

Kathy Kleiman: I'm going to call on Susan in just a second. Go ahead.

Jeff Neuman: Okay, yes I will do that. And again just to clarify, my point's not that things shouldn't necessarily be changed, it's just that we should only make changes not based on a gut feeling but based on evidence that's presented that would cause us to go back immediately and say, "You know what, there was behavior out there which probably should have been addressed in this type of proceeding. So the way to address that is" whatever it is. But just do it kind of, you know, thanks. That's it.

Kathy Kleiman: Thanks, Jeff. Much appreciated. Susan, go ahead.

Susan Kawaguchi: Thanks, Kathy. This is Susan Kawaguchi for the record. So I'm not going to weigh in on the point of whether, you know, the level - what we have to show, you know, is high or low, but just to the point that, you know, we should base this decision on actual circumstance and sort of a need, I think it's been pretty clear from the CSG in general, the IPC, and the BC that there's been very bad behavior in some of the registries.

And - but, you know, especially our former CEO made it very clear at a meeting when the CSG met with the board and the - Fadi just sat there and argued against every point we made with not a lot of trademark law understanding, in my opinion. And so it - he sort of set the tone that, yes, these are not ICANN's concern, pricing, and targeted pricing is not, you know, something they can control, and any of the bad behavior we need to, you know, do our due diligence and bring it forward. But instead of saying, "Hm, maybe we have a problem here and we should look at this," it was building a wall against that. So.

And I don't remember which meeting it was, I remember very much the (unintelligible) they were all confused at this point, all conferences look the same at ICANN meetings to me at this point. So I mean it would be

worthwhile because, you know, I'm sure that was transcribed, but pull that discussion up and see where, you know, the BC specifically and probably the IPC too has been very vocal about, you know, there's one thing, you know, ICANN can't control the pricing of registries, and we're not asking that, but why can they leverage the TMCH and figure out, you know, and they can do this in a Google search too, but figure out who values their trademarks the most and is trying to protect them and then, you know, up the sunrise fee by multiples of ten to 15.

I mean I've been very vocal with - about (.top) doing that. And so, you know, there's been a lot of evidence out there but I think there's a tone with ICANN and ICANN Compliance where it's like, "Oh we're not going to do anything. That's just competition."

Kathy Kleiman: Okay. Thank you, Susan.

Susan Kawaguchi: You know, we could go back and look at all those transcripts and pull out many points that we should look at.

Kathy Kleiman: In our limited amount of time, but yes okay. So there's - Jeff, I'm going to have to move on to the next issue actually. I'm going to have to draw a line. Let me summarize, Jeff, and if you still want to add. But, Susan, you're saying there is evidence, there is discussion. So you're going to add - you're going to bring those documents in so that we can reference it here.

You're going to send them to staff so they can list it so that people can look at the evidence and the discussions made in the transcripts of some of the meetings you're talking about. (Lori), could you go ahead and please send to Mary and (David) the document, the INTA document and other documents perhaps that you're talking about so we put it all here. And I'm going to ask staff to take off the words tentative agreement on lowering burden of proof. I'm not sure there is tentative agreement.

But what I'd like to see is that A, B, the current bullet point that says discussion thus far become C, and D being some of Jeff Neuman's responses so that we see that there's really now, judging from the chat room, there's kind of - there's really strong discussions and arguments on both sides. And I think this should reflect that concept that there is not tentative agreement right now but a real difference of views.

Jeff, for administrative purposes, we have to go on to another issue but I'll give you a few last words. Sure go ahead.

Jeff Neuman: Can I just like...? Yes, ten seconds. I think what we'll find, I agree with Susan, we should be collecting the bad behavior, documenting that. I think what we're going to find is it's not a lowering the standard of proof but it may be either increasing the causes of action or creating additional causes of action or addressing it some other way. I don't think it's actually a burden of proof because in the situation Susan's talking about, there's ample evidence out there. So I think that's what we should focus on. Thanks.

Kathy Kleiman: So I'm not sure that's covered in any other area. I defer to Mary. Increasing causes of action sounds like another suggestion now from the group, and we're going to have to leave this document but I'm going to fast forward you to the other two boxes here, which we'll be talking about in our next meeting, which is our follow-up discussion on clarifying and adding remedies kind of related to Jeff's idea of clarifying and adding causes of action. And then the last one is the discussion that we started last time on introducing a time limitation for filing complaints. And there was some discussion of statute of limitations from other locations.

And that leaves us five minutes to talk about an interesting problem that has been - talk about something new, which is the scope of the Trademark Clearinghouse Subgroup, and I bring this to your attention because there's been a difference of opinion in the subgroup.



And I don't know if Mary's going to be able to put up a document we have that has the transcripts from two meetings, but basically on 6-1 we created the Trademark Clearinghouse Subgroup, which is quite a small subgroup, to look at publicly - to help us look for publicly -- there we go, I'm actually looking at the transcript -- but to help us for existing information on the trademark clearinghouse and, you know, was there publicly available information that could help us better understand what data exists versus what data we want to gather.

It appears that some people now think that the trade - that the subgroup should really deep dive into the questions themselves and formulate for the working group the questions to ask the trademark clearinghouse and maybe even go out and interview the trademark clearinghouse as a subgroup. And so we wanted to come back to the working group for direction on this.

And you'll see it here. It's in our kind of initial report of the Trademark Clearinghouse Sub Team. And, (Christine), go ahead. I know you're an active member of the subgroup. So I would appreciate your views on this. Jeff, are you in the queue for this or is that an old hand? Let me call on (Christine) and then we'll figure out Jeff. (Christine), go ahead please.

(Christine): Hi thanks. This is (Christine) from Amazon Registry Services. And yes I am on this small active Trademark Clearinghouse Sub Team and I will throw my hand up and say, "I'm sort of the disagreeing voice." I was under the impression that this committee was designed, or sub team, was purposely designed to not only sort of gather, you know, sort of freely available information but to brainstorm some topics and actually go out seek as much information as we could, you know, and to the extent that we needed to sort of talk to the clearinghouse or talk to providers, but we would start gathering that sort of information.

Now our sub team has sort of talked a little bit about -- I think we've talked about it in this group -- this sort of survey fatigue or, you know, everybody's

getting sick of answering questions and answering surveys about, you know, what their experiences are. So I want to be mindful of that fact that if the working group sort of plans to go back and re-interview the trademark clearinghouse and re-interview the providers or to the extent that everyone wants to be on those calls, and we fully expect everyone would, you know, what was the mandate of this group?

Were we just sort of gathering public information and aggregating that sort of thing? Were we actually sort of doing a little bit of a deeper dive, seeking some answers, anticipating working group questions so that when it came time to open up the trademark clearinghouse conversation we could come forth to the working group saying, "Hey we've gathered these resources, we've found this data, you know, we've asked these questions, we've gotten these answers, you know, here's what we can start with" and sort of lay the groundwork for really, you know, for the full Trademark Clearinghouse Working Group discussion.

So just some, you know, asking for some feedback and maybe, you know, in a minute everybody can't weigh in but I want to sort of spark that conversation and make sure that we are going in the correct direction.  
Thanks.

Kathy Kleiman: Thanks, (Christine). And I put myself in the queue as a participant in the sub team. I'm taking off my chair hat now and while people are thinking about this interesting issue, because I'm just going to read the transcript, kind of the slightly abbreviated version of it because of what I thought we were delivering to the group, which is -- this is the transcript from June 1, which was me when I was sharing.

So I wanted to see if anyone would like to volunteer for the sub team to go out and again look for existing materials that give us information and understanding of the trademark clearinghouse. And I thought we were going to report back on this publicly available information and then find out what the

full working group wanted to do next, and maybe create another subgroup to kind of figure out what questions we wanted to ask the trademark clearinghouse based on the publicly available information.

So it's 2 o'clock. (Kurt), go ahead. And I apologize. If people want to sign off, please do. It would be useful if everyone could stay on for another minute or two and then we can flesh this out further on the group. But I know (Kurt) and (Susan) want to speak, and they're both members of the subgroup. So I will put back on my chair hat and take myself out of the queue. Thanks. Go ahead, (Kurt).

(Kurt): Thanks, Kathy. So in the last two weeks the subgroup interviewed the analysis group that did the TMCH report, and that - so I don't know if that was part of the original plan or not. And well what came out there was that the analysis group, as you can read in this report, couldn't answer some of the questions about the effectiveness of claims and discouraging abuse or the - or why sunrise was not widely used by trademarks because they couldn't get at the needed data.

And so that gave some on the list pause to think and talk about, you know, how do we get the data. So I think where the subgroup is, is it's sort of a bifurcated effort now, where they want a report in the very near term, you know, in the next couple of weeks about what data is publicly available and provide a listing of that and examples of that and maybe some sort of compilation of that. And then the second part of the effort might be to describe what additional data would be beneficial for this working group to be able to access and how to go about getting it.

Kathy Kleiman: (Kurt), quick question. What kinds of publically available information is there? What kind of low-hanging fruit is there on this that we could quickly report back to the working group on?

(Kurt): That question's just a set-up. I don't know. If you scroll down through this report, I think there's certainly the reports that the TMCH provides to ICANN and whether - well the information that the trademark clearinghouse both, I don't know if it's Deloitte and IBM or just one of those provides to ICANN whether that can be made available to us and any other information they provide. (Unintelligible) if there's any other information either in the reports that Deloitte and IBM have given in public fora or in reports or in, you know, written up in articles that describe trademark data. So those are three kinds.

I think, you know, the monthly - the regular reports are probably the most fruitful, and then we'd just want to look at the other reports to see if there's anything that they provide outside in addition to the monthly reports.

Kathy Kleiman: Terrific. Thanks, (Kurt). (Susan), I think the last word is yours.

(Susan Payne): I guess I'm not sure I want the last word. Like the others, as a member of the working group, I think we just came to get input from the wider working group for the subgroup on, you know, to what extent we should be seeking information that's more than sort of readily available by doing a quick Google search for example and what, you know, some information is - can be made available to us but maybe, you know, requires us to ask questions of people, which doesn't mean it's not publicly available necessarily but, you know, can, you know, are we empowered and are we being expected to go and ask people questions.

Certainly some of us think that, you know, having had our conversation with analysis group, it was clear that there was some questions that perhaps they could have asked and hadn't and they identified themselves some information that they didn't have. And so, you know, there are gaps. And so we are keen to get guidance. So I'm a bit reluctant to be the last voice on this really.

Kathy Kleiman: Fair enough, fair enough. So you've heard from members of the subgroup. Some believe we have kind of a narrower mandate to report back to you with publicly available information, the monthly reports that the trademark clearinghouse makes to ICANN, the community presentations that Deloitte and IBM have made, you know, on behalf of the operation of the trademark clearinghouse, and some other public documents. Others would prefer a deeper dive and really going into kind of putting together all the questions that - and maybe doing the data gathering on behalf of the working group.

If that's the case, I think we should definitely encourage more people to join the subgroup. Does anybody who's listening to all this information kind of given to you in the last ten minutes have a voice? Does anybody want to say anything in the chat room? Do you prefer a narrow mandate or a broader mandate for this particular subgroup? It looks like Jeff is going broader.

We will put this out to the list for further discussion and further guidance. And if you want to join the subgroup, please do. Mary, can I ask you when the next meeting is and let's wrap up. And I want to thank everybody for the extra five minutes and also for joining us in the dog days of summer for those of you in the northern hemispheres. Mary, what is the time of the meeting for next please?

Mary Wong: Hi, Kathy. This is Mary. So as Terri has just put it into AC, it is still Wednesday, because that's the day for our calls, but we are rotating times. So next Wednesday it will be at 16:00 UTC.

Kathy Kleiman: Fantastic. Thank you very much. Thanks to everyone. Any last words? Otherwise, great thanks to staff for the documents that helped guide and develop our discussion. And thanks to all of you and thanks for everyone who participated today. Take care. Bye-bye.

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