ICANN

Moderator: Nathalie Peregrine
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Rob Hoggarth: Welcome back, everyone. This is Day 2 of our NCPH Intercessional meeting. This is going to be Plenary Session Number 4. Our topic is policy discussion topics. And we had two outstanding chairs, Marc and Poncelet. Gentlemen, I will turn it over to you with one time note, we're starting this session about 15 minutes late. Thanks, everybody, for joining. So if you guys need 10, 15 minutes at the noontime period, we'll go over a little bit, then take a break and then we'll get into the discussions with the budget that Ed and Jimson are going to run.

Just one note, a couple of people asked, the purple juice in the bottles is – it says Detox Juice, that's not any other purging or cleansing juice, it's totally detox to help you prepare for the day. Marc and Poncelet, I'll turn it over to you. Thank you.

((Crosstalk))

Poncelet Ileleji: Good morning. Poncelet speaking for the records. Thank you, Rob, for introducing this session, which I'll be cochairing with Marc. We're going to be starting with policy discuss on the RPMs. And is going to be a dialogue-

like discussion and I will hand over to Marc to give a brief of how we want to go by and then we follow with questions. The last session will have some time for fully to discuss some issues raised by Heather on the INGOs. Thank you.

Marc Trachtenberg: Thank you, Poncelet. So based on discussions in the RPM Working Group as well as many other community interactions and discussions, there seems to be a pretty wide variance in the level of understanding of intellectual property law and structure in different parts of the community.

The result of this is, instead of having productive discussions, people are essentially shouting past each other and you can hear this on the calls and in the chat on the RPM Working Group as well as in other community discussions and interactions.

People are relying on things like Wikipedia to inform their comments or, you know, even if they look at the US PTO or INTA websites, they're just looking at one narrow issue without any context of how it relates to the law generally, which results, I think, generally in a distorted and inaccurate perspective.

And some examples of this include the fact that things that are generally not recognized and are not present in discussions are things like that the fact that trademark law is not universal and it's different, in fact, in every country; that trademark rights are territorial, they only extend to the borders of the country or region issuing the rights.

The discussions tend to focus on US law or be through the lens of US law, when in fact US law is actually not representative of trademark generally in most parts of the world. For example, the US is a first to use jurisdiction, meaning that trademark rights are based on use, not registration, whereas most

of the rest of the world is actually first to file meaning that trademark rights are based on your registration, not necessarily your use.

In the US you have to be very specific as to what goods and services you're claiming your trademark registration whereas in most other countries, you can claim general categories of goods and services. And this lack of understanding leads to misunderstandings also of how the RPMs function.

For example, there's a common misunderstanding that a trademark owner can submit its trademark to the TMCH and gets coverage on a worldwide or universal basis. And this is actually not true. In fact, a trademark owner has to submit a registration to the TMCH and pay for it for each individual registration in each country that they want any coverage for.

And this is because the claims notice only provides notice of registrations that are included in the Trademark Clearinghouse. And these notices tell the potential registrants which country the registration in the Clearinghouse is from and what goods and services that registration protects.

So if a trademark only submits a registration for one country to the Trademark Clearinghouse, it only provides notice to a registrant of rights in that particular country for those goods and services. And so to get broad coverage for a trademark owner that has many trademarks in many countries it becomes very, very expensive.

And so, you know, at the end of the day the RPMs are a compromise. They're a balance between providing some measure of protection for owners of trademarks and intellectual property from rampant abuse and they're balanced against the ability of others to freely register domain names.

Like any compromise, it's not perfect, and neither side is completely happy or satisfied with the result and gets everything that it wants. But I think the goal of the RPM Working Group, and other discussions of RPMs, really is to find the right balance for these mechanisms. But this goal was frustrated and it's difficult to achieve when people are not speaking the same language and don't have common understandings.

How can you have a productive conversation about whether the RPMs are an appropriate balance for protecting IP rights if you don't understand how intellectual property law works. It's basically impossible.

Accordingly, we think there to be great value in providing some basic information and education in this area to the community. And to be clear, we're not talking about trying to convince the community that the IPC or the CSG position is correct, but rather just providing basic information and education on intellectual property and the law and how it actually works.

And we think this would enable a more productive conversation, you know, both in the RPM Working Group and really across the community for discussions of this type. And, you know, with that we'd like to open it up to discussion basically from the participants.

Okay, I could take that to mean everyone agrees.

Ed Morris: Hi, Marc. Thanks. And I was a little bit surprised because that really was an even handed perspective. I appreciate that. Because in the working group we're not getting that, at least in my view we're not getting that. The problems run even deeper – first of all, in terms of education, I agree, I've been educated in Europe, IP, (unintelligible), European trademark law, UK trademark law, there are vast differences.

When you try to bring that up on our RPM group, I have people that have no background in IP law telling me no, it's the same everywhere. They don't understand the territoriality principle. And this is on both sides. We have folks on the more minimalist IP perspective that are – don't know what they're talking about. You guys on more the maximalist perspective, you have folks that are so wedded to the philosophy. It is a property – no, no, no, property right, up until the 50s we just called it an intellectual monopoly. It's a little bit different. It's not the same thing. It has similarities.

But until you start recognizing what IP rights are, what they engender, until there is education, but the education can't be done by the INTA; they can't be done by WIPO. Probably could do it by a group of us from both perspectives to – such as the claims notice was put together, as I understand it by Kathy and Paul. We do need education. I completely agree with you, which is why in the last call I'm shocked, education for the folks that get the – no, we don't want – so I'm hearing a few things here.

Review, it's the review of RPMs, yet we get from our – from the IP folks, we can't review this, this or this. We have messages – I'm sure, Marc, this doesn't – some of the folks on our side, I sit there on the call like why? Why? I'm sure you get the same feeling at times for your own folks. I'm reading messages, this does not serve trademark interests and that's what the TMCH is for, for example. No it's not. We don't exist to serve the trademark community.

And I think we need to start toning down some of the rhetoric. And that's – this is why I pushed this in the planning sessions; I pushed this meeting because I talk to folks outside our little call and there are some adults in the room who are very passionate advocates of their position but they understand

they need to compromise. They understand the validity of other points of view in this area. But that's not coming through in the calls and I'm not sure why because I haven't seen this problem and other groups I've been involved within ICANN. Thanks.

Poncelet Ileleji: Thank you. I think your comments are well noted but (unintelligible) that's the whole reason for this policy discuss is for us to try to find common ground like with anything. If you see what happened with the (WICITS) in Dubai the way a lot of differences and people (unintelligible) that they had to massage the text at the end of the day. So I think I would like to use that phrase, we should try to massage our text and try to agree on the education in which Marc talked about, is very important especially when we know that IP it varies from territory to territory, and those are the things I think would be good to also hear the views of people within the IPC to see how best we can come on common ground.

Ed Morris: I think we need to commend the tri-chairs of the community because if you remember when we started off the RPM group, the first three weeks were education about RPMs themselves. We had a ton of good slides there. So when we have - it irritates me when we have people coming on the calls that don't really understand - forget IP law, that's a separate issue that needs to have education, but they don't even understand what the Trademark Clearinghouse really does. It's on the slides.

Phil, Kathy and J. Scott, they provided that information at the start and there's no excuse for people to come in not knowing that. So even if we provide IP education is a part of me that thinks no one is even going to listen. I hope I'm wrong.

Marc Trachtenberg: That's possible. There many people that do not want to be educated so those people are - oh sorry Marc Trachtenberg for the record. So, you know, there are people that refuse to be educated and, you know, you can never reach those people. But, you know, there are many that are not a lost cause and I think could benefit greatly from some access to information.

And so, I mean, there are many questions. You know, one, who is the sponsor of this? You know, is ICANN the sponsor? You know, does the ICANN perimeter, is that enough or does it have to be some sort of group like you suggested, Ed, where there's people on, you know, you said sides. I don't like really sides but, you know, if you want to use that term sides where you have people from various parts of the community, put that together, you know, I think that also, you know, could work as well.

And I also take your point that there also needs to be education on the RPMs themselves and how they function and I think that could be a component of this. And, you know, the key I think is that whatever work product this is that it's, to some extent, brief. You know, we're not going to have a 300-page treatise on the law in every country. And I think the purpose really is just to set some basic ground rules and guidelines, you know, probably to some extent any bullet point form you know, with other information accessible beyond that.

But we know that most people are not going to read beyond some bullet points and so, you know, while a little information can sometimes be dangerous I think that's a risk we have to take because no information is even more dangerous.

Poncelet Ileleji: David.

David Cake: Okay so, I mean, I understand the intent and I think it's really helpful. And the – and I can certainly see how, you know, if it works for IP law then it would also be handy to have similar resources to say privacy law and other – and maybe even some technical questions that come up again and again and have to be explained again every time.

And – but I am a bit, you know, I'm a bit wary about how limited this is sort of going to have to be. The – it doesn't take very long to dip down into, you know, stuff that would normally be regarded as esoterica. Just in a session earlier, you know, Kathy mentioned fair use as a principle and I had to sort of go well actually in Australia we have fair dealing which is quite different when you get up close.

And things like that. But that's not normally an aspect of, you know, I'm just wondering how tractable this is going to be especially when you get into things that are little bit controversial, you know, do they exist global, you know, global marks and things like that. To what extent…

Marc Trachtenberg: I mean, I think that's a very fair point and that is certainly a challenge for…

((Crosstalk))

Marc Trachtenberg: …deliverable. But, I mean, just the point that you raised goes back to what I said earlier about, you know, people talk about fair use, fair use, okay well fair use, you know, they talk about it under US law and they look up something in the US – could be a Website or they look up something about US law and just to basically have them understand that that only applies to one country; that right there is a huge leap forward to enable further

discussion of, you know, you don't need to know how it works in every single country…

David Cake: Yes.

Marc Trachtenberg: …but just to know the fact that it's different in every country that's a huge step forward. That enables a very different discussion than a discussion based on the assumption that, you know, one country's law is universally applicable and the discussion of the RPMs has to be through that lens of only that law.

David Cake: Yes, and sometimes very difficult – some subtleties on that as well, I mean, the difference between, you know, First Amendment free speech and the, you know, universal human right of freedom of expression. They're kind of the same but…

Marc Trachtenberg: Again, the purpose would not be to go into a deep dive on every country but just a gain, the basic awareness that there are differences like that...

David Cake: Yes.

Marc Trachtenberg: …I think enables a very different more productive dialogue than, you know, a dialogue based on a warped narrow vision of trademark law universally based on something that somebody read on Wikipedia or on the US PTO Website, that's not going to enable a productive discussion. And it's not applicable to most of the world and so again, you know, just expanding people's minds a little bit I think will have a significant effect.

David Cake: I agree but I think the – let's not underestimate the challenges of deciding exactly what we need to talk about and who – we will be something where we will need people from – various bits of the community. And I don't mean that

just in, you know, minimalist or maximalist but certainly in terms of the whole range of global jurisdictions and different approaches. Yes.

((Crosstalk))

David Cake: Doesn't sound like it's easy but perhaps it'd be useful if we do it.

Poncelet Ileleji: Greg then Marilia.

Greg Shatan: Thanks. Greg Shatan for the record. I think this is off to a good start here. And I think that what – I would hope we would have, maybe we can have come out of this is maybe a small group from all sides of the house and elsewhere as well to those – but those who know their way around the block on this like Ed, like Kathy, like even me, maybe.

So and try to come up with a primer that, as David says, doesn't go down into the weeds too quickly but stays at kind of the primer level but establishes kind of basic facts and tackles certain things that we've heard come up incorrectly over and over again. I've heard trademark fair use and copyright fair use conflated and they're completely different even though they use the same two words.

So there's a whole bunch of kind of – they're almost at the FAQ level but we can do it at the primer level and come up with something that is a neutral baseline. As Daniel Patrick Moynihan said, "You're entitled to your own opinions, but you're not entitled to your own facts." Now that seems to be under siege in the United States at least. But I think it's still fair here.

So you can have a minimalist opinion or a maximalist opinion but you have to be working from the same body of facts. And then you can have a good

discussion as opposed to a discussion that's based on some misreading or some misapplication or the little knowledge of the dangerous things sort of thing. So, you know, my view is that there are always balances to be found, but if you don't know where you're starting from how can you possibly end up in the right place?

So I'm willing to volunteer to be part of the primer committee and would hope that it is something that can be, you know, a team that looks like the world in some way, that looks like it's going to be neutral. We can, in fact, be neutral. We can come up with stuff. It'll take time. We have I think Stephanie said we should be spending, you know, $400,000 on it so that sounds good, said that in the chat. Maybe that wasn't quite what she said. But I think we can do it for half that.

And so, you know, I hope that we can do that. I think – because that really advances the ball. When you know what you're talking about you can have a disagreement, a principle disagreement, and then you can come to a consensus. But we're never going to get there if we're all starting from different fantasies. And to speak against an interest for a second, frankly, you know, if you know a lot you can also decide what you're going to say about it and what you're not going to say.

But if everybody knows enough then it's a little harder of baffle people about complexity because at least you've established a baseline. And somebody can say, but the primer that we went through, those 47 slides, said this. But oh yes, you kind of, you know, it takes a little bit of mysticism away from those who are IP knowledgeable as well. But that's a small price to pay for everybody knowing enough to have a good discussion. Thanks.

Poncelet Ileleji: Thank you, Greg. We have Marilia and then Bill and then Avri.

Marilia Maciel: Thank you. Marilia speaking for the record. First of all, one of the things that impressed me very much when I started to participate in ICANN is the number of discussions that we hold here that have some legal background that require legal background. And I think that is a deterrent for people to participate when they do not have the specific knowledge.

And I think there is some areas in which we will come back over and again when we are developing policy in the organization, intellectual property is one of them, privacy is another. And if we have an initial material that can present the basic facts I think that that would be helpful to get everyone up to speed and to have a more fruitful discussion.

I think that this is probably one of the most difficult places to start because even though I pretty much agree with Greg that, you know, we should respect the facts, but the way that intellectual property has been built is that limitations and exceptions they are sort of the scars in the law that show all the different battles that different sides took to get there.

So even when you present the law itself you are also presenting different views. So even if we try to stick to the facts I think that the balance that Ed mentioned is very important when the course is being developed, it's not because that it's difficult that we shouldn't try to do it. I think we should try to do it. It's an interesting project.

But my only suggestion would be that anything that is developed is placed in ICANN Learn, which is an open platform and a very good platform for us to place this kind of capacity building that will serve to other people in the community. Some years from now we will have other newcomers that will

need this background knowledge again. And if we place the information there then it will be easily accessible for others that come after us. Thanks.

Phil Corwin: Thank you. Phil Corwin for the record. And I'd like to open by reminding everyone that just as there is matter and antimatter, there are facts and alternative facts. But, although I'm a cochair of the working group, I'm speaking now in a personal capacity.

I think Marc's point is useful to a point. It's good for everyone in the working group to know that there is a wide variation on national trademark laws; there's not one standard rule around the world, there are different approaches. And to understand that the ICANN RPMs law there informed by trademark law are not identical to trademark law.

For example, the verification standards for the Trademark Clearinghouse may be less rigorous than what's required in some trademark regimes and more rigorous than in others. And then you go over to the UDRP and that has nothing to do with the verification standards for that Clearinghouse because if you've got a mark in any nation you've got standing to bring a UDRP case on the allegation that a domain name is identical or substantially similar to your mark and it's being - was registered and is being used in bad faith.

So it's useful but the main focus of the working group is the fact that the ICANN RPMs are trying to establish a universal rule within the ICANN regime that necessarily is going to be different in some ways from any particular nations approach to trademark law. And it's going to be a compromise and it's going to be - we're going to probably be adjusting some things around the margins but it's never going to be identical to any particular national trademark law, which of course changes with time and statutes change.

And we're just -- it's alternative to legal rights. Anyone who has a trademark who feels that the -- in any particular instance that the ICANN RPMs are insufficient always the option of going to their national court and bringing a case based on their national law. So it's useful. I think the point to keep reminding people in the working group that trademark law differs around the world and we're not trying to construct an ICANN policy that's identical to the laws of any particular nation is useful but that's about the end of the usefulness. Thank you.

Marc Trachtenberg: Phil, I think you're making my point. I mean, that's the whole point. If your view is that there is one universal trademark law then, you know, it's hard to have a productive discussion about the RPMs if you think okay well should the RPMs match that universal trademark law or should they not match that, should be different. When you understand that the law is different everywhere it enables a different and more productive dialogue understanding that it's a compromise and that it's not exactly going to be the same and it can't be the same as anyone law because there are so many different laws.

So I think you're making the point for just again very basic level of education of just the most basic principles of structure of how it works?

Phil Corwin: And I will say that as a cochair based upon this discussion I'll be more sensitive to the issue going forward and more ready to leap in and remind people that whatever they know about the law of their particular nation doesn't mean that the ICANN RPMs has to match that law or the laws of any other nation. If the compromised system to provide an alternative to exercising statutory rights.

Poncelet Ileleji: Thank you very much, Phil. Avri.

Avri Doria: Thank you. Avri speaking. With some trepidation I want to speak of a slight skepticism about the new worship of facts because facts certainly there is an expression of facts are what is the case. But when facts start to be described and there starts to be a primer of facts we start to develop an orthodoxy of the facts.

And in any incomplete expression of facts, and of course any expression of facts is going to be incomplete, there is a great allowance for a shaping of the expression, for shaping of which facts are more important than other facts.

And so I just I certainly support the notion of educating and such and dealing with facts as opposed to fantasy but I do want to remind people, and perhaps it's because I spent far too much time in philosophy and history of science that the earth was factually flat for centuries. And anybody that went against that fact was indeed in trouble. And so if you take the perspective that we are some future's ancient history I would just sort of caution the acceptance of facts as truth. Thanks.

Poncelet Ileleji: Okay, Lori now.

Lori Schulman: Thank you, Avri, for pointing that out because I think it does give us some food for thought particularly in trying to align variations in law. But I want to support what David said which appears a little bit off the RPM topic that I think is cogent and that is this issue between our two houses. We seem to have a heavier leaning of IP professionals, although I know you have IP professionals within your ranks of course. And you seem to be heavy on the data protection, freedom of expression side of the house in terms of understanding what the different international regimes look like beyond what we might know.

Just again to make a point too my own organization, International Trademark Association, we just recently this year started a data protection committee and project to actually look at, you know, where privacy laws, data protection laws align and collide with intellectual property law. So we are looking at this in a broader spectrum and I think it's important for the room to know that.

I wanted to then make a suggestion, perhaps given that there's so many different perspectives and there are - while we could agree maybe there's a core to Avri's point, the core might actually be a little broader or narrower than what we even think the core is. Perhaps this is a good place to use ICANN wiki.

That yes, it's not, I mean, it's quoting Wikipedia; we understand the limits to that. But we do have an ICANN wiki that is underutilized in my opinion for some of these issues. And that might be there forum to start these projects where we use different teams from our constituencies to start building on the information that's there.

Poncelet Ileleji: Greg.

Greg Shatan: Thanks. Just briefly, and I think Avri has given food for thought, I thought a little about it. I think that's why it's important that whatever small group we have represented a variety of ways of interpreting the facts so that we do end up with a no spin type of version of fact and an understanding that, you know, rules have exceptions, generalizations can be gross and things like that and try to avoid an orthodoxy that seems to tilt towards one way or the other.

So I would hope in a sense for it to be kind of an honest start to discussions that move on from there. And if it does end up, you know, saying something

like, you know, trademarks are the best thing since sliced bread and they go on forever and ever amen, you know, somebody will say come on, that's bullshit. So let's please get back to the facts that we can go from.

So I think that anything that -- facts that become factoids rather than facts are a problem. And so, you know, it'll be an effort I think by those who go from facts to advocacy, you know, almost seamlessly to avoid that. And for those who go there in the other direction from the same facts kind of keep each other honest. And if we don't do that then we haven't created a primer, we've just created kind of a head fake, and that's really just going to be a huge waste of time.

So even if it somehow ends up, you know, if it ends up supporting some maximalist view of trademarks or some minimalist view then either way it's failed. So whatever the small group decides to do it has to kind of -- no matter what way you look at it it has to be kind of neutral - a neutral starting point, it has to be tofu, and then we can move from there and see what we can do with it. But I figure it's good to keep in mind that it's very easy to start going from facts to spin and if we do that, you know, it loses all credibility.

And it has to be something that's credible no matter what you ultimately believe about how it should be applied or which different facts you want to apply on top of kind of the circle of agreed facts. Thanks.

Klaus Stoll: Klaus for the record. Just a very short observation from the outside. Wouldn't it be better if you as a group or we as a group would concentrate on what we are trying to achieve, and what I'm hearing here is a concentration on trying to defend a position. And I think it would be much easier if we basically rephrase the question saying what are we trying to achieve here and then work the way backwards.

Poncelet Ileleji: Thank you very much, Klaus. And going back to your statement, Poncelet speaking, I was saying let us look at ways in which we can move ahead with this because we have had various views. And going back to what Marc said in his introductory comments, we shall have common ground despite the divergent views. So I think I would like to move the topic to where can we have common grounds and how can we best, in our discuss today, in relation to the RPMs, move forward with this.

Lori.

Lori Schulman: Maybe some of the issues that we could agree on – and Phil, I think mentioned a few of the reasons why RPMs were developed, why UDRP was developed 17, 18 years ago, is that there seemed to be at least at the time, community agreement that it would be better to have streamlined process, efficient process, low cost process because there are some in practicalities on both sides of the fence whether you're the -- and intellectual property owner or a registrant of the domain name as opposed to a registrant of a trademark.

To constantly be dragged into court, to be subject to court procedures in all jurisdictions applicable where costly, particularly in common law countries, costly discovery processes. That there were certain sort of slam dunks, certain things that everybody in the room could agree on weren't good. And that if we came to that solution, and Kathy remembers way back when, we could have, and he'll probably too, that the common core was for those that are egregious, for those that are the slam dunk, for those that we could have a relatively low cost solution, that would be a good thing of community no matter which side of the argument you're on.

And I know that in support of the IP owner side, and this is a statistic that's used, quite frankly, in support of changing the UDRP perhaps to be less favorable to trademark owners, is that there's such a high percentage of success when a trademark owner files - particularly in the early days of the UDRP, people didn't really know where they were going with this and there were cases filed. And one back then that probably wouldn't be one today because we have evolved an understanding about freedom of expression. And we have evolved a body of law inside the UDRP that says it's okay to criticize and that's not an infringement, you know.

And it took a while to get there but I do believe we're there, and I believe the statistics in terms of those types of cases will bear that out. So I think if we keep back to that idea of the common core that it's streamlined, it's low cost, whatever it is, it's the URS, the TMCH, whatever those solutions were they do in my mind, and compass that streamlined, low cost egregious, the worst cases. The cases that are nuanced, the cases that have real, in my mind, questions of law that are the slam dunk case is. They're going to go to court anyway or they're going to settle or they're going to somehow find a resolution outside of a UDRP or any sort of RPM process.

Marc Trachtenberg: This is Marc Trachtenberg for the record. If I could briefly remind everyone to please introduce themselves when they speak. I am equally guilty of this as everyone else. But there is some level of frustration for those following along online. So if we could all remember to introduce ourselves it would be greatly appreciated.

Poncelet Ileleji: Poncelet for the record. Renata, I see your flag up.

Renata Aquino Ribeiro: Thanks, Poncelet. Renata Aquino Ribeiro from CUC. I would just like to get back on Lori's comment on ICANN wiki resource for topics. There

is a technique for commenting and discussing and contextualizing policy done which is sort of a sprint or a mini marathon to write about certain concepts that are around a determinate topic.

So spending sort of a brainstorm on the main concepts associated to a topic that it's contentious, that it's too broad to understand, helps incredibly to move on to actions that are more concrete. And of course you can do something superficial like a panorama or you can just do a deep dive into a certain aspect.

For instance, the UDRP, I think it takes so long for people to even associate the acronym that having an acronym map and a sort of a context of actions that were important in UDRP's history would be quite interesting to move forward.

Marc Trachtenberg: Phil.

Phil Corwin: Thank you. Phil Corwin for the record. A lot of what we are discussing is probably focused on UDRP and our working group is not even going to begin discussions of the UDRP until next year. We are still in the middle of reviewing the new TLD RPMs.

My personal view is that when we get to UDRP and looking at potential adjustments, which should always be balanced, that's what we're striving for is providing mark holders with a faster and less costly alternative to litigation that preserves adequate procedural (unintelligible) due process for domain registrants because registrants must have rights. And we've learned since the UDRP was created that domains have become valuable and tangible assets onto themselves.

And of course their platforms for speech and commerce and lots of other important things. So there has to be a balanced and fair process. Beyond that, I think another challenge for working group is to preserve the U in UDRP, which is uniformity. When the UDRP started out it started out with WIPO being the dispute provider. Now we're up to five separate dispute providers.

And I anticipate that probably over the next decade we will have several more accredited by ICANN. I wouldn't be surprised to see one request for accreditation from someone, some organization in India. I wouldn't be surprised to see Latin America have its own provider.

So we're going to have a proliferation of providers and we have a system where ICANN has no binding agreements with any of the providers to assure uniformity, where there's no binding precedent in the UDRP, and that creates potential both for forum shopping and for great uncertainty for both mark holders and domain registrants because it's important to have consistency and predictability.

And how do you ensure consistency and predictability in the administration of this policy when you have a proliferation of providers and nothing to assure that a fact -- that the facts of a particular dispute will be decided in a similar manner by different accredited providers? So I think that's the challenge we face. We're a long way from addressing all of the many issues that are going to come up.

But I think that's the framework we need to approach them in is to make sure we retain an effective procedure for rights holders that gives adequate protection to registrants and for everyone's sake assures greater predictability and consistency and results in a world of proliferating UDRP providers. Thank you.

Marc Trachtenberg: We have Avri and then Martin. Not Avri, just Martin.

Martin Silva: Yes, regarding diversity of accredited providers, we did research in the University regarding exactly that, the problem of Latin American not having a local provider that could speak Spanish between two people that were arguing in Spanish. And it was very clear that having a US centric and European centered solution for providing the dispute resolution purely made an asymmetric difference on the results.

And it specifically left out non-commercials, being sued usually, but as well the small businesses. Small businesses were also very affected by having a more local way of getting to this because the letters usually (unintelligible) answered in English and there was a very foreign body and that usually is a great (unintelligible) effect regarding how these people use or participate in the resolution process. So just to mention the research.

Marc Trachtenberg: I mean, one point I would make is that the language of the UDRP proceeding is the language of the registration agreements and so to the extent the registration agreement was in Spanish the proceedings would be in Spanish. So I would be curious to see your study to better understand the results that you're describing.

Martin Silva: Most of the registration were in English because the domain names usually are so English even in Latin America is the standard for almost, except for the ccTLDs, that gTLDs are all of them. I own domain names I bought in Argentina, I'm Argentinean, and they're all in English today, the agreements.

Marc Trachtenberg: Kathy.

Kathy Kleiman: Kathy Kleiman, and thanks to Marc and Poncelet and everyone for a great discussion. So here I'm very definitely following Phil's example and taking off my hat as cochair of the Rights Protection Mechanism Working Group. And speaking first of a long time ago when we had newly formed ICANN And newly formed Noncommercial Users Constituency, and the World Intellectual Property Organization, the experts, came forward with a draft that they presented actually for adoption of the UDRP. And it had no rights for registrants; there was no (4C).

And we thought like mad for any rights for registrants. So please forgive us if we don't always feel that the experts come forward with balanced and fair policies. And the World Intellectual Property Organization knows well my views on this and (Francis Gury) and I talked about it.

So to what Greg was saying, that if we do education, and Marc also and Poncelet, it has to be very fair and very balanced as well as very diverse and across the board. That would be great; it would be good to have education.

From a cochair point of view, putting back on my cochair hat, we are plowing through material. Help me with the time frames here, we are in the middle of analyzing a number of charter questions on the Trademark Clearinghouse. As was pointed out earlier, we worked very hard, Phil, J. Scott and I and with Mary Wong and then David Tait who is no longer with us on staff, to put together frameworks and background and really bring people up to speed on what is the Trademark Clearinghouse, what are we going to be working with with sunrise and the other rights protection mechanisms they use it.

Tell me the timeframes. How long would an education process take? Do we stop? Does that go on top of everything? How does everything intersect? Thanks.

Marc Trachtenberg: Marc Trachtenberg for the record. And just for clarity I'd like to make very clear that I was not criticizing the chairs or the working group itself at all, just pointing out that there's a lot of background noise going on that I think is interfering with what could be even more productive.

I agree that the working group is plowing through a lot of topics, you know, I just don't see any reason not to make it even more productive and to avoid some of this, you know, background noise which you see on the calls and especially in the chat room.

As far as, you know, answering another question of - I don't know exactly what form it would take. I mean, what I propose the least is not a course, not even a university course that takes the semester, I'm talking about some really basic information, you know, one page, two pages, maybe even bullet points, I don't know. And I'm not proposing that any working group stop; everything should move forward as it always does it just to some extent if we could get some more information out there, more information is always helpful in a format that is readable, understandable and accessible.

I mean, if we want to put it in, you know, ICANN learning Center, that's great too but I don't know where that is and I think most people don't access that. The key is to make it accessible. You know, have it accessible during working group calls, have it accessible, you know, somewhere prominent, you know, on the ICANN website to the extent that exists.

So and again, you know, this is my, you know, a proposal and throwing out there. I don't know all the really what form it would take but, you know, that's my proposal. I think it would be quite helpful from what I've observed in the

many years that I've participated and particularly, you know, on this one working group.

Kathy Kleiman: In an ideal world we'd stop and wait. I mean, this could be really valuable. But that's not what you're saying. We keep everything going in parallel is…

Marc Trachtenberg: Unfortunately we do not live in that ideal world.

Kathy Kleiman: Darn.

Marc Trachtenberg: Erika.

Poncelet Ileleji: Yes…

Erika Mann: Marc, I think that's an absolute right idea to pursue because it's one of the biggest problem ICANN faces, it's such a sophisticated in legal terms environment and policy terms as well. And many of the issues relate to different national legal environments. Some have mobile implication or international law implications, some not.

So I think a paper which is - which really explains the basic in legal terms, and I really mean legal terms, and then maybe which continues and looks to the specific of the ICANN environment, because there are certain specific which you will not find even in the IP environment or you will find less in other sectors. So I think this would be super helpful.

And then I would say you could have a section even which would talk about unanswered questions or no solution found which would again be helpful for in particular for newcomers because they would get -- they could grasp, you know, the depth of the debate and the discussion. Legal cases, you know, if

you keep it open a document you could have legal cases. There are some freaks, which like I for example, I love to read legal cases because you learn sometimes more from them. So why not doing this? Why not having this? And by the way not just in the IP environment but in all related areas.

Marc Trachtenberg: Marc Trachtenberg for the record. I mean, I think what I propose I would personally stay away from legal cases. I think that's getting too much into the minutia. The audience of this I think is not lawyers, you know, lawyers generally tend to understand this area of law…

((Crosstalk))

Erika Mann: Marc, I don't agree with you. I'm not saying you should copy or you should go into the legal debate about a legal case, and I just have the links there. There will be always somebody in the environment too would love to read it and either because it relates to a sector or because it relates to a national law or it clashes with something somebody has an interest in. Let people decide what they want to read. Just keep it open?

Poncelet Ileleji: Thank you, Erika. I just want to add – Poncelet speaking for the records. With all the documentation's and papers it will also be - I think it would be good to have something to wrap this in between like having a webinar because sometimes you have - with a webinar you have some unanswered questions. And you can have it once in a while as part of the whole education process. I think sometimes people we just want to raise questions to understand facts better because with documentation sometimes is there and sometimes there's an oversight. You don't just -- you forget that is there.

But if okay we are having a webinar on this topic today, those of you who are interested common newcomers or anything, in regards to our working group

to give an overview, and insight of things to get you moving, I think it would be important.

David Cake: So the – me? David Cake. The one thing that just occurred to me that is - when Lori mentioned that, you know, we can do the same for privacy law. And it really occurred to me that, I mean, privacy law is that very difficult because it is very rapidly changing. And, you know, particularly, you know, at the moment the relationship between US and EU privacy law is, you know, has a major cost - major case that upsets everything every few months it seems.

So when we do think about producing any such resource that's sort of an introduction, we really are going to have to put in some mechanism for regular review as well; we can't just kind of take it out there and hope it will remain useful. I don't think we're going to, I mean, we may not see drastic changes in trademark and copyright law that we may see a few.

I mean, to go back to my example I'm hoping Australia will adopt fair use instead of fair dealing for example. So we are going to have to put that in mind that any resource I think -it will have to be actively reviewed every now and then to remain valid. I don't know how we're going to do that. But just wanted to bring that up.

Poncelet Ileleji: Lori.

Lori Schulman: And I agree their David – oh Lori for the record. I apologize, you call me and then I think I'm referenced. Lori Schulman for the record. Thank you. I agree with David, I think it would be – it's an upkeep, it's a maintenance task. It's not than once so we would have to have some responsibility for how we would update wherever we decide to put these resources.

And I still maintain my suggestion about ICANN wiki might be the most practical even for the updating because people can to win and keep it honest all the time as far as that goes.

But I would also suggest perhaps using resources of associations to lighten the load. For instance, there's the International Association of Privacy Professionals that have a lot of data on privacy laws globally. And I think they'd be an excellent resource. Even my own association, some of the things that have been quoted on the RPM discussion list have been sort of snippets of information that's offered to the public on the INTA site.

But I could certainly offer that INTA could provide the FAQ sheet that we provide to the public in their entirety would be something that we could lend to the community for the community to look at because we do look at trademark law globally and are keenly aware that it is not a one-size-fits-all endeavor. So I'd be happy whatever we do decide, we have a 235 person Internet committee that has legal resources and communications team. The lease on the IP side we need things drafted, I think this is a project that our committee could take on.

Poncelet Ileleji: Any remote participant questions?

((Crosstalk))

Poncelet Ileleji: Sorry, Greg.

Greg Shatan: This is Greg Shatan for the record. This may be getting down into the weeds but responding to something Kathy said a little bit earlier about how should we integrate education with the RPM Working Group?

One specific issue that I think comes up, you know, Marc, we did have some very good educational stuff at least about the RPMs and related structures like a TMCH at the beginning, but I get the feeling that might be sensible to perhaps go back for a refresher or perhaps those who have joined after the first two or three meetings may not, as one is supposed to do, go back and read from the beginning and get up to the point where everyone else is but they've jumped in midstream.

Or like many people, they've decided that if they can throw something out on the mailing list and make other people work to refute it that it's at least worth a try to do that. But whether it's a matter -- whatever the reason sometimes it helps. And it's presumptuous of me, as somebody who is working hard to be a rapporteur on a subgroup, I've learned how hard it is to give recommendations to the others who are doing the same thing.

But I don't know if there's a way to kind of at least keep some, even for the cochairs to say at some point that people have gotten so far away from the fact that they're not arguing interpretation, they're just, you know, it's not real stuff anymore. So I know you want to leave broad discussion and you want, you know, to have that discussion between participants and not have this, you know, not be the, you know, have a didactic or top-down approach as a chair that somehow still -- sometimes you have to say that, you know, just the kind of blow the whistle and say stop splashing in the pool.

So it's a delicate balance that sometimes maybe there does need to be a little bit of constructive - and maybe one way to do that and rather than actually saying it is to go back to the slides and say let's go to this thing toward let's try to develop some common learning on this kernel where there's so much heat and so little light being developed. And, you know, rather than worrying about

the universal primer IP law and all jurisdictions for all time that what is this thing we're discussing this thing and those who know the facts realize that there's a lot of stuff out there that's hooey that's coming onto the list.

And let's go back and re-task based at the exploration of what the actual facts are as opposed to snippets of things from law firm websites that are designed more to get clients than they are to shed, you know, actual information on peoples - on the actual law. So that's my idea for kind of how perhaps to deal with all this integration.

Poncelet Ileleji: Thank you, Greg. I will just - is that Kathy up?

((Crosstalk))

Poncelet Ileleji: Yes, yes, I just want to make a comment. I think I would like to hear from (unintelligible) cochairs and Kathy and Phil based on all the discusses have gone so far. Personally your views how you see moving ahead with your working groups especially with the comments that are coming out, since you are still in the first phase.

Kathy Kleiman: So Kathy Kleiman. And Greg, what you said is useful. It is hard to know how to balance what's going on in the working group when you have people who are very very experienced. Not just experienced in trademark law but also experienced in the Trademark Clearinghouse. There are a handful of people who live and breathe this stuff every day and the vast majority of the working group on both sides - on all sides doesn't.

And so we have -- it's hard to know how to balance those people who live and breathe it every day and frankly love it, with those of us who were there really

to, you know, think about it, understand it, review it. And so your comments are useful and I took some notes.

There may be a real opportunity, I like what you're saying about reviewing because we actually been told maybe we reviewed too much. But we tried to review it two points. We reviewed at the very beginning, we kind of laid out the whole framework of what we were going to be approaching which was the new gTLD rights protection mechanisms including the Trademark Clearinghouse, the sunrise period and the trademark claims notice, and then – in the URS, and then going on to the UDRP.

And then when we got to the Trademark Clearinghouse we get a set of slides and a day or two of review of all of that. But if it's time to do it again that's a very useful comment. And that may be where we create the education opportunity is just to go off-line and even enter into another segment. We can either use our working group time or another time to do both the education on trademark law and its balances, for lack of a better word, better term and also the Trademark Clearinghouse uses.

And to the extent we can tie in the education with some of the questions we're asking, including design marks, what is a design mark, what's a figurative mark? Were about to start getting into this and it has international implications. To the extent we can tie it into the specific questions that we're looking at in the Trademark Clearinghouse charter, and then as we develop other questions as we go along, the more the better. The more we can inform the debate the better.

Phil Corwin: Just adding to what Kathy said. I think one, as I stated before based on Marc's remarks…

Poncelet Ileleji: Phil, please, introduction.

Phil Corwin: Oh, Phil Corwin for the record. I will personally be more sensitive if members of the working group reference particular national laws in the course of our discussions to remind them that we are in a process that informed by trademark law but is quite different from trademark law.

Second, I think Kathy and I should probably enter other cochair, J. Scott Evans, if not with us here today, we should probably have a call with him and with support staff about this discussion and talk more about how we can make sure the basic education needs for the working group members are satisfied.

And I do believe that our process has been very careful both from our initial introductory the weeks we spent trying to educate working group members, and there's not much we can do about people jump in and out at various points. But as we introduced each separate topic, the Trademark Clearinghouse, and next we get to trademark claims and sunrise registrations, the first thing we do when each of them is spend an entire session reviewing what the current policy is and kind of how we got there and what the aim is.

So we're trying to build the education into each stage of our process in terms of educating people about the existing RPMs and what issues we are going to be addressing as to whether they should be modified in any respect. Thank you. Thank you.

Marc Trachtenberg: David.

Poncelet Ileleji: David.

Marc Trachtenberg: Phil, do you have a comment?

Phil Corwin: May ask the folks running this meeting, where are we in -- are there other issues you have on schedule to bring up? There's something I do want to address before we end this discussion at 12:15, but I don't want to disrupt anything you've got planned.

Marc Trachtenberg: This is the main topic for discussion that we had for this session. There was a request to spend some of the time in the session to go over the NGO…

Man: IGO…

Marc Trachtenberg: The IGO NGO discussion. I don't know if that's what you want to talk about or was it - whether it's…

((Crosstalk))

Phil Corwin: Actually is something else but I'll be glad to make some brief remarks on IGO NGO because I'm also cochair of the working group.

Marc Trachtenberg: Why don't you make your comments that's relevant to the session first and then we can carve out some time at the end?

Phil Corwin: Okay, okay. At the risk of inciting riots, there's an elephant in this room and this elephant was born last week. And I think it's raised a topic that our working group on RPMs is going to have to address, a topic that frankly would never have occurred to me before last Thursday.

And as many people know, I know many people know because I've had many discussions at this meeting. Last week the Domain Name Association announced A Healthy Domains Initiative with a multipart approach. And I

have no interest in getting into what those proposals are other than to note that the fourth component is a copyright third-party education procedure models on the UDRP, it's called the Copyright ADRP proposed to be adjudicated by the National Arbitration Forum.

And again, putting that aside it's raised an issue which I would never have thought of until last Thursday. And the issue is should the work of our working group be preemptive of any other proposals for nonjudicial adjudication of trademark disputes?

Because the proposal is that registries should be free, and I don't know if this would require an RSEP request, that's a separate issue, to adopt the so-called Copyright ADRP and bring copyright complaints outside of the courts that would be adjudicated by NAF and could result if - and there is no real detail out yet about what exactly the standards are going to be other than to say it's aimed at pervasive infringement or websites that are facilitating mass copyright infringement.

But put that aside, he raises the issue of whether at the end of our RPM and all the compromises it inherently involves, whether one side of the discussion, which is the trademark site because the other side can never propose a separate system that would be weaker than whenever we come out with because complainants are the ones who bring cases and would never opt for a weaker system, whether the final results of our work on the new TLD RPMs, including whether they should be consensus policy, and the UDRP which is going to be a whole difficult discussion on its own, at the end of our process, at the end of whatever we recommend and their adoption by Council and the Board, should that occur, whether that can be the jumping off point for trademark interests to propose a stronger system than what we've arrived at.

And urge registries to adopt that stronger approach as an alternative to the final recommendations on URS, UDRP etcetera. So I think we're going to have to grapple with this because it goes to -- it's going to go to whether we are engaged in a good faith exercised by all parties or whether those representing the trademark side, and I have no - I'm a member of the Internet Committee and I have complete respect for trademark law and protecting trademark rights, whether this is going to be, whatever we come up with are going to be the rules going forward for the next decade or two, or just the ICANN rules and whether private parties can propose separate and more favorable rules for trademark interests and urge registries to adopt them.

So I think it's unfortunate that this has come up, but I think now that -- and again I never would have thought that there could be a separately developed proposal as an alternative to the UDRP for example until last week. But I think now that that proposal is out there the issue is impossible to ignore.

And I don't expect that this group can settle that question today. But I think the issue is out there now and are working group is going to have to address that at some point. So I just wanted to put on the table about whether the results of our working group should be preemptive and that registries should be prevented from adopting any other nonjudicial adjudication process or whether they're free to do so. It's something we're going to have to grapple with.

Marc Trachtenberg: Marc Trachtenberg for the record. I mean, I think really this issue probably already existed in the form of the DPML or other blocks, which I think would probably fall maybe into the same category or would that…

((Crosstalk))

Phil Corwin: No, I would disagree. And the trade group I am counsel to, the Internet Commerce Association put out a statement last week that was very carefully drafted that I'm speaking only - personally and ICA recognizes that registries are private entities and are free to adopt terms of service that bar the use of their products and services for unlawful purposes and can make their own decisions on that.

I am focusing on a very narrow of whether an alternative nonjudicial adjudication system can be adopted. DPML is different, that is a blocking list; it's not a case where a registrant can be brought before a panel that's going to decide whether it's domain can be extinguished or transferred.

Marc Trachtenberg: Marc Trachtenberg…

Phil Corwin: The blocking is about stopping registrations before they occur. This is about extinguishing or transferring domains after they exist. So I would differentiate them in that regard.

Marc Trachtenberg: I mean, I think it's a slippery slope to the extent that you're saying the registries are private entities that can create their own terms. I think it's a slippery slope and I don't know that I really see that much difference. But that aside, not to get into the weeds on this, I think really the question you're asking is, you know, with the ultimate RPMs decided by the working group be a floor or a ceiling? Is it, you know, the minimum protection and you can add more or is that the maximum protection you can have?

Phil Corwin: That's another way of putting it. The way I put it was should they preempt alternative proposals for other DRPs addressing the same subject? Because otherwise they become a floor and there's no telling what might be proposed in addition to whatever we arrive at.

Marc Trachtenberg: If there are no other comments - Greg okay.

Greg Shatan: Thanks. It's Greg Shatan for the record. I think there already has been some discussion, maybe six or seven weeks ago in the working group of this topic. And no need to rehash that there. But I would say it may be a little strong to call this an elephant in the room, probably a smaller mammal would be a better choice but maybe a gerbil.

And so I think that, you know, it's a worthy discussion. I don't know that I would see preventative rights and curative rights as being that different to kind of use the lingo and that the IGO INGO groups have used. But if we can agree that certainly preventative rights are only a floor and not a ceiling that's maybe a good start to the discussion.

I don't see them as being that different. I don't think that, you know, the work here should be preemptive or ceiling-creating or however you want to look at it. And if a registry has a business model that involves heightened protections, that's their business model and people can choose not to register in that domain. In a sense, you know, to some extent it's a consumer safeguard or a PIC Spec, you should be able to, you know, go above and beyond.

So that's my personal opinion on where that should go, and whether - I think there is even a question in the sense of jurisdiction, not use that word more often than I have to, but whether it's, you know, within the scope - it's certainly within the scope of the RPM group to know what the total landscape of RPMs looks like, whether they are ICANN generated or privately generated, whether it has the right to even at the scope to preempt other things is I think an open question.

Before you get to the question whether it should do it, the question is whether it could do it. If we assume, for argument, that it could, I don't think it should. But I don't think that assumption should just be glossed over either. Thanks.

Marc Trachtenberg: Phil, before you respond, I would just point out that there's about 15 minutes left in this session and so to the extent that you want to cover the INGO and NGO topic, you have, you know, 15 minutes to deal with whatever your response is to Greg and that topic.

Phil Corwin: I don't have a response to Greg. I think Ed wants to speak to this. But I just want to identify this is an issue I think our working group is going to have to address so that people are aware of it.

Marc Trachtenberg: Okay. We'll do Ed first and then Tony.

Ed Morris: Thanks, Marc. It's a rhinoceros, Greg. It's a very large mammal because take this to its obvious conclusion that we ask our volunteers to dedicate hundreds of hours of their lives in a PDP. We come out with a work product, and it's not just this group it can be anywhere, and then the folks in the other house, there are folks in the Contracted Party, say hey, we have best practices that we are all going to follow.

And yes, you have your nice PDP. That's our floor. But we're going to have - on the trademark site for example, we're going to give a lot more protection. We appreciate the hundreds of hours you've put in developing these proposals but, you know, they're nice, they're sort of guidelines. Where are you going to find the volunteers to staff the PDP? I'm not going to be here.

If through all of our work and the compromises we make with the trademark industry, with the registrars, we already are having trouble finding folks from

the noncommercial viewpoint with expertise in this field to donate time. We have trouble, thank you Martin for being here, we have trouble finding folks from outside North America and Europe. Where are we going to find the people to staff our groups when the policy output is immediately nullified?

The bargains that we make are nullified by industry groups after we finish our work product. I'll tell you right now this is a direct threat to the existence, to the legitimacy, to the ability of ICANN to function long-term. Thanks.

Marc Trachtenberg: Marc Trachtenberg for the record. We'll get to Tony. I mean, I would just disagree with you and I think that it's not going to affect participation. And really you're establishing minimums. Some people, some registrars or registries may choose to take a different approach and go beyond that…

((Crosstalk))

Ed Morris: But we are negotiating now. We are compromising now to reach that minimum. And then if they say well we compromised on the minimum, which is not going to compromise anymore. The end result is we will not compromise and consensus will not be reached. If our compromises can be shoved out the door out the door the minute it's done and new standards maximalist level are established.

Marc Trachtenberg: But that's how ICANN works; ICANN sets the minimums for registries and registrars. It sets a minimum set of obligations and requirements…

((Crosstalk))

Marc Trachtenberg: …registries and registrars can go above that and beyond and have…

((Crosstalk))

Ed Morris: Can you name me one registry or registrar who's gone beyond – well actually I can't. You have the Donuts MPA agreement is quite interesting.

Marc Trachtenberg: But that's how the ICANN system functions. You create the minimum set of obligations or requirements for the registries and registrars, the contracted parties, and they're free to have different business models and take a different approach…

((Crosstalk))

Ed Morris: Okay, then my position on the UDRP review is we should eliminate the UDRP and force people to go to court. And I'm not going to compromise because any compromise I make could be superseded by the private agreements past the PDP.

Marc Trachtenberg: I think that's one position, but let's get to Tony. Tony has been waiting patiently.

Tony Holmes: Thanks. I'm aware we're a bit short of time anyway but I just wanted to reiterate that the…

Marc Trachtenberg: Introduce yourself please.

Tony Holmes: …IGO INGOs session…

Marc Trachtenberg: Introduce yourself.

Tony Holmes: Sorry, Tony Holmes for the record. Just that that fits into the agenda item that we're having straight after lunch. So just remind you of that. Thanks.

Poncelet Ileleji: Lori.

Lori Schulman: Lori Schulman for the record. I think to Ed's proclamation, I mean, I think we discussed it in the RPM group. I don't know how to respond to that from I'm not going to compromise to compromise. But I'd like to just point out some industry trends and responses that may be detaining this outside of ICANN, not even inside of ICANN because we are not exclusively ICANN.

I mean, there are contracts with ICANN that control clearly and yes, I would certainly be in the camp to say what they are floors, they're not ceilings. But that also being said, I do believe that a lot of this effort for voluntary practices has actually come at the behest of ICANN itself because it doesn't want to deal with some of these issues and feels it's better dealt with outside of policy discussions. And I think it's important to recognize that I mean especially given the big Allan Grogan voluntary practices show of a year ago.

That also being said that there is a lot of pressure outside of ICANN from governments, that governments will actually step in to regulate registrars and registries, those that they can in their home turf. And so unless the industry steps up and self-regulates in a way that makes some sort of sense, the entire industry opens itself up not just to what's going on in ICANN, but going on in each individual jurisdiction which I think would be…

((Crosstalk))

Lori Schulman: Yes, exactly, I think it would be horrible for the industry. So I think it would be very smart to be skeptical of these practices and that we look at these

practices and use them to inform the discussion as sort of where our baselines may end up looking at what the private sector looks at as a different kind of compromise.

And use it that way rather than just sort of, you know, saying here's our line in the sand and here's their line in the sand and we're never crossing the border. I think that would be a real mistake because the whole I would imagine true that it would take a lot of the burden off of the policymaking process if there were private agreements that were reached with industry input.

Now there are some questions about how much input was done to these particular set and how they were launched and the wait was launched. And I don't want to talk about that here. But I do want to say like this is a global concept. I don't necessarily see these as a bad thing, that they could in fact be helpful. But I haven't even read the guidelines yet quite frankly so I can't speak to this particular…

((Crosstalk))

Ed Morris: But, Lori, just understand that if we are going down this path the support of many noncommercial groups for ICANN may evaporate. We may be the ones calling for government intervention…

Marc Trachtenberg: Ed, introduce yourself.

Ed Morris: I'm sorry, Ed Morris.

Marc Trachtenberg: Then we have Kathy and then Klaus.

Lori Schulman: Then I think that would go back to do we agree or disagree that government intervention is a good thing?

Marc Trachtenberg: Lori, if you could introduce yourself?

Lori Schulman: Oh sorry, Lori Schulman for the record, sorry. You know, then we go back to this issue how much government in any government intervention a good thing? And that's a holistic question. And that may be where we actually might find common ground more than we realize. Thank you.

Marc Trachtenberg: Kathy.

Kathy Kleiman: Kathy Kleiman. If we're looking for common ground I think we need to go on to IGO INGO real fast, just my personal opinion. But to Marc, it's already affecting deeply our participation. If after years of good faith negotiations and compromises everything we do or major things we do is undercut, yes, no, we're not going to get the participation and the multistakeholder model will fail.

And there are some really big -what's the word in Iceland – rifts, there are rifts. And it's going to be a problem. So I agree with Phil, this is going to be an issue we deal with. We have to address, but there is a real – there are real rifts going on, guys.

Marc Trachtenberg: Klaus.

Klaus Stoll: Very quickly until about 15 minutes or 10 minutes ago I didn't know why I was here or why we are here. Now I know. And to be absolutely - not being alarmist or whatever, there seems to be conflict which has to be resolved

otherwise we're blocking each other and have built another Chinese wall or whatever.

We are here. This is forum to discuss this and to solve that. And we should find a way to at least trying to address that roadblock in one form or another whilst we are here face to face before we spend months and months and months of discussion online and blocking a lot of other bandwidth. And now let's go to the IGO.

Phil Corwin: Moving onto - Phil Corwin moving on to a less contentious issue and reporting in my official capacity as one of the two cochairs of the working group to review curative rights processes for IGOs and INGOs, IGOs being International Intergovernmental Organizations; INGOs being International Nongovernmental Organizations.

Are working group labored for more than two years to produce a report that was put out for public comment on January 20. The comment period is open another 15 days until March 1 so the comments will be closed before Copenhagen. The staff report will be delivered on March 30 which is after Copenhagen.

We were tasked with looking at improving the ability of these organizations to protect their names and acronyms in the domain name system against basically infringement against parties registering similar - identical or confusingly similar names or acronyms and pretending they were these organizations for nefarious purposes.

Early on, about six months into our work, and I should mention my cochair throughout this process has been Petter Rindforth of the IPC and former GNSO councilor for the IPC. We - about six months and we determined that

INGOs needed no special protection, that being private organizations, they have the same rights as any other private enterprise to bring URS or UDRP complaints based upon trademark rights. And there was no need to go further; there were no sovereign immunity or similar issues to address.

Throughout this process we urged IGOs and GAC representatives to participate in our working group as members. They never did so. We did have some participation from IGO counsel. At some of our face-to-face meetings though they made clear that they were participating strictly in a personal capacity and not as official representatives for their organizations. It is unfortunate.

Our working group has recommended a series of recommendations that we think will substantially improve the ability of IGOs to protect their names and acronyms in the domain name system. In addition to their existing rights to bring complaints based upon trademark registrations, we have recommended that any IGO, which has asserted its rights to protection in national trademark law regimes by sending a letter to WIPO saying we want protection under Article 6ter of the Paris Convention on Industrial Goods, will have standing based upon that assertion of Article 6ter rights.

Those rights are respected in all nations that are signatories to the Paris Convention as well as all nations that are members of the World Trade Organization. And the number of IGOs that have already asserted their Article 6ter rights is substantially larger than the list of IGOs forwarded to ICANN by the GAC in 2013 for the purposes of permanent protections in the new TLDs.

We would also permit IGOs to file either directly or if they wish to avoid any clear concession on sovereign immunity claims, to file through an agent, licensee or assignee so basically through a third party can file on their behalf.

That would usually be their legal counsel but it could be some other organization.

In the rare case of an appeal, we don't think there'd be many appeals under this system, because if in someone's imitating an IGO and loses at the UDRP or URS level it'd be unlikely they'd appeal. But we've decided that if there's an appeal and if the IGO wishes to assert its claim of sovereign immunity, the court would decide whether or not that claim was valid.

That decision is based upon a 25-page legal memo, which contained in the final report, written by Professor Edward Swaine of the George Washington University Law School, who is a recognized expert in international law and a former legal counsel to the US State Department, we actually suspended our work for year in order to secure funding from ICANN for an outside expert and to find a qualified expert.

And his basic advice to us at the end of his research on the question of is there a consensus rule on sovereign immunity for IGOs, he said no, it really depends on the court addressing the issue and the facts of the particular dispute. And based upon that whether we question the effectiveness of if we were to recommend that a registrant would have no recognized rights to appeal a UDRP decision to a court of jurisdiction, whether the court would even respect that ICANN policy and deny that register and its statutory rights.

We have asked for feedback on all five of our recommendations. And one of our recommendations is incomplete where we could not reach consensus on what would happen if the court - if there is an appeal and the court grants sovereign immunity one faction of our working group thought that the prior UDRP decision should be vitiated and the situation to return to the status quo ante.

A different group within the working group thought that in that rare instance there should be an appeal to an arbitration board. So we're looking for specific feedback on that.

This whole issue, aside from the very esoteric narrow issue of curative rights processes for IGOs, feeds into the larger discussion of the role of the GNSO Council and the role of the GAC in post transition ICANN in two ways. One, simultaneously while our working group was undertaking its task, the Board on the subject of permanent protections for IGOs in new TLDs in which there's conflicting Council recommendations and GAC advice, the Board, rather than deciding what to do about that disagreement, held closed door talks solely with the GAC and IGO representatives and not with Council representatives.

At the end of those talks, they did not recommend anything in particular, but they did forward the so-called IGO Small Group recommendations on this. And they were the same as what we had heard from the IGOs for two years, was that they wanted a separate UDRP and URS like CRP process just for IGOs in which there would be no right to appeal to a national court. We did not go that way for the reasons I've already discussed.

Finally, before we meet in Copenhagen there are supposed to be talks kicking off moderated discussions facilitated by former Board member, Bruce Tonkin, between Council members and GAC and IGO representatives to discuss dispute on the permanent protections as well as the CRP issue.

There's two separate issues raised by those facilitated discussions. The first is whether they will create a precedent for what the board will do in the future when there is a dispute between Council recommendations and GAC advice

on those recommendations about whether the Board will make a decision on what to do about the conflict or will tell the Council and the GAC to go off and work something out, which is a very different approach than what people might think would occur looking at the bylaws.

The other is on - and there's been no clarity yet as to what these discussions will do other than informing GAC and IGO members about the reason for recommendations. I have made clear in my communications to ICANN staff that my participation in these discussions is premised on the fact that - aimed in regard to CRP they are only to inform the two sides of each other's views and are not to resolve the issue because we have an ongoing PDP, and the bylaws require this PDP reach a conclusion, that we take all comments into account, that we issue a final report.

Based upon those comments that Council will then do whatever it wishes with our final report and recommendations. And then the Board will receive it in the GAC can render whatever advice they wish in response to that. I've made it clear that I will not be party to any process that would derail the ongoing PDP and attempts to negotiate the CRP issue outside of the bylaws.

So that's the substance of our report and the associated things going on in the issues they raise. And I opened the discussion. Thank you.

Poncelet Ileleji: Very much, Phil. Poncelet speaking for the record. I just want to mention some comments Heather Forrest raised and to (unintelligible) put as questions. So I will mention them before I take your questions.

One, she said, “Based on what Phil has said, what shall be the next steps for (unintelligible) the facilitated dialogue be? It is important that this is specifically linked to the earlier or a new PDP?”

She also asked, "What are your expectations of this facilitated dialogue?" And the third she asked is, "Is there anything specific that the facilitated dialogue should not do or discuss?" I will now take questions and I will start with Phil's hand. Yes.

Ed Morris: Oh, my questions were covered there.

Poncelet Ileleji: Stephanie. Was it David?

Phil Corwin: Phil. Let me say briefly, I haven't gotten clear answers about what the aim is of this facilitated dialogue. I have seen some traffic from GAC members which indicates that they have much higher expectations for the output then a lot of people on the Council do. So I think it's very important to establish the ground rules for what the purpose of this dialogue is before we get into it, otherwise we're walking into a minefield.

Poncelet Ileleji: Thank you, Phil. I think that was one of the reasons - that's why Heather said we should raise it here to get comments and ways to move forward.

Christian Dawson: So I guess I will take a moment – this is Christian Dawson for the record - articulate a part of that question that I think is really relevant. And that is, Phil…

((Crosstalk))

Christian Dawson: Yes, I did. Christian Dawson for the record. And that is, Phil, I think that your PDP appears to be deftly operating and moving forward, and I see that there aren't a tremendous number of comments, in fact I don't think there are any comments yet. I want to know what the best way to make our voice be heard.

Is it useful to put comments in here that express our concern over GAC advice potentially being overruled by a consultation – sorry - by GNSO processes being overruled by GAC advice to the Board preemptively?

Or should we be doing letters to the Board? What do you think is the most effective way to make our voice heard on this?

Phil Corwin: Phil again for the record. You know, this is a question of first impression for me. I would recommend a two track approach, and including voicing any concerns about this at the public forum in Copenhagen where the full Board will be assembled.

But really the official scope of comments on our initial report should go to the substance of the report and particularly the open question where we're looking for input. If people want to add to that the view that the PDP should be allowed to run its course and not that the CRP issue should not be decided in some separate process that's not based upon the bylaws, I think it's appropriate.

But only our working group will be reading those letters. I think if you want to get a message to the Board and senior staff you need to take an alternative route as well.

Christian Dawson: Thank you.

Poncelet Ileleji: David.

David Cake: Yes, so I was, I mean, I was involved in this working group early on but it quickly became clear that it was into the realms of legal esoterica that I was relatively fully equipped to even understand. But it was very clear to me that I

think the leadership that Phil and Petter have provided on this one was spot on, but they approached it very carefully and very thoroughly. And, you know, for such a obscure issue, I don't think we could have expected a better process to have come out of ICANN, you know, not just that it was a well led working group backed it was, you know, appropriately resourced when they needed it and so on. It was a tricky thing and I think they really did well.

One of the great joys about no longer being on Council is I can be a little less diplomatic than I probably would have when I was on Council. I'd like to hope the one thing -- one of the things that unites all of us here is we really want the GNSO continue remaining the primary policy development. And, you know, we think policy development should be in the SOs and we should stick to our model, which is I think, you know, I think this one really demonstrates can do a good job.

And we really have -- the Board have accidentally put themselves in the position where effectively the small group has been used, if not intended, as an alternate policy development sort of venue with only one major stakeholder group present. And we really have to sort of - and I think that's raised expectations within the GAC that are, you know, in conflict with the bylaws and quite problematic.

All we can really do is follow GNSO processes where we are allowed and take this as, you know, important considered input that we need to look at but just that, just input into the group. And where it conflicts with the work that is being done - and I note the difference between - I don't think the GAC in many cases, grasps the difference between policy advice and policy. You know, that the amount of work and detailed and, you know, what we produce is a policy document is of a different nature. It involves a lot more detail. It's, you know, many times the length usually and quite thorough.

And where we have done very, you know, some pretty serious legal research to try and base the, you know, very carefully define exactly what our legal basis of things, the assertion from one - admittedly very important involved group of stakeholders, you know, we can't simply say oh what we do is research, that you guys we should, you know, you'd like to have your alternate facts so we will take them. No, I think we've really got to stick to her guns on this one.

And what we need is a process, is to do it within the GNSO bylaws and process as much as possible. And, you know, thank the small group for their useful and relevant input and consider it seriously but within the GNSO processes. Thank you.

Poncelet Ileleji: Thank you very much, David. I'll take the last two questions please because you're running (unintelligible). Greg and Markus.

Greg Shatan: Thanks. Greg Shatan for the record. I think we perhaps introduced or maybe even moved into the two o'clock session discussion that Tony - and I'm sorry I can remember who from NCSG is cochairing – Kathy. How could I forget? Are chairing, and so I'm not sure if we'd ended the session quite within the bounds of the session. But no matter we are all anarchists at heart.

So I do think we should kind of put opinion what we've discussed here. I think maybe a difference between this discussion is we started from the particular and moved out to the general, and maybe a two o'clock we want to look at the general and move back to the particular. Just a thought.

And I've also noted that I think we are, as I say, we are going overtime so maybe it is time to reset. Thanks.

Poncelet Ileleji: Okay, Markus.

Markus Kummer: Markus Kummer speaking. I'm speaking as a Board member who is part of the small group accompanying this facilitation process. I would like to recall that the suggestion came up and the Board that the GNSO in Hyderabad and it was actually put forward by I think it was Donna Austin who suggested to have a dialogue.

I agree there might be a different expectation, a mismatch of expectations what can't be the outcome of this dialogue. But as we see it from the Board, it should at least lead to a better understanding and then we see what happens. But I fully recognize that there is maybe a mismatch in expectations.

And the board thinks that we ought to separate, I mean, the small group thinks we are two separate the issue of Red Cross protection and the other IGOs. And Phil did not mention the Red Cross, and the Red Cross is actually - and hearing speaking as a former Swiss diplomat - this is sort of the feather in the hat of the Swiss diplomat is we take pride in being the guardians of the Geneva Convention.

The Red Cross Red Crescent and all its associated names are protected by international law on the Geneva Convention. Each country, each government has the obligation to protect these names. And we think that should be an easy solution, maybe revisit the PDP. But we can look into that and specifically part of that facilitated discussion.

There is a wiki page up, and it's not a surprise that (unintelligible) the GAC made a very thorough representation on the protection of the Red Cross name under the Geneva Conventions.

Poncelet Ileleji: Thank you very much, Markus. Poncelet speaking for the record. I think this discussion - this policy discuss that start with the RPMs has gone on well so without much ado on behalf of myself and Marc, if Marc wants to make any maybe he will just close the session and we move over to Rob. So thank you very much all of you for your contributions.

Rob Hoggarth: Thank you very much, guys. We're now looking at a 10 minute break to let you all step outside, grab lunch which is in the foyer, stretch your legs a bit and come back in. And Jimson and Ed will be the lunch conversation about budget activities. Thank you all very much for your patience.

END