**ICANN**
**Transcription**
**Review of all Rights Protection Mechanisms (RPMs) PDP Working Group**
**Wednesday, 03 January 2018 at 18:00 UTC**
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Attendance of the call is posted on agenda wiki page: https://community.icann.org/x/sgxyB

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page http://gnso.icann.org/en/group-activities/calendar


Terri Agnew:          Good morning, good afternoon and good evening and welcome to the Review of all Rights Protection Mechanisms, RPMs, in all gTLDs PDP Working Group call held on the 3rd of January, 2018.

In the interest of time, there will be no roll call as we have quite a few participants. Attendance will be taken via the Adobe Connect room. If you're only on the audio bridge could you please let yourselves be known now? And again, Brian Beckham, we have you noted on audio only at this time.

Hearing no further names, I would like to remind all to please state your name before speaking for transcription purpose 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 cochair, J. Scott Evans. Please begin.

J. Scott Evans:      Thank you so much, Terri. This is J. Scott Evans for the record. So welcome, everyone, good morning, good afternoon and good evening depending on where you are located throughout the globe. I want to welcome you all to this first call of the Review of Rights Protection Mechanisms call in 2018.

We have not had a call since the 20th of December. We took two weeks for holidays and so now we are back. And given that I cannot be sure who was

on the last call and who was not, I thought I would give everyone a brief summary of where we ended on the last call, an opportunity for anyone then to make any comments if there are any comments once I finish the summary and then we'll turn to today's business. If that's appropriate and I hear no objections to that I'm going to begin.

Great. What you see in the - for those of you that are on Adobe Connect room you will see that there is a document presented before you and this is a document that we considered in our call of December 20. Now this document was prepared by staff as a reaction to, an extension of, the proposal that was developed on the November 30, 2017 call. And in that particular call it was suggested that we, for the URS, might consider taking a slightly different approach in our methodology in order to assist us in moving forward hopefully in a more timely manner.

The basic concept of this approach would be that we would look at the charter questions that are in the charter and we would identify subjects that those charter questions were seeking information about. Then we would take those generalized subject matters and we would develop a list of template-ized objective questions and we would apply the same or similar questions to each set of general topics in order to obtain objective information about the particular topics identified from the charter questions.

And so what you see here in this document is a draft for consideration by the group. And in the Part 1 is a list of the suggested questions that were put forward, these are not final in any way, these are not the questions that we will ask, this is a starting point for consideration to sort of conceptualize the idea by the group and that's at the top of Part 1. If you'll scroll down then you'll see that there is a list of topics in Part 1.

So that's what we did is we considered this last time. And I went back this morning and listened to the call from December 20 because at the end of that call the last 15 minutes there were two questions put to the group. The first

question was whether anyone - and I'll just read it because I wrote it down verbatim, it's a little confusing but the first question that Phil asked the group was, "Do working group members agree or disagree with the proposed approach of using a standard set of high level questions to be applied to each topic on the list that are reflected in the chart in Part 2 of the document?"

Okay so in other words that was the question of does everyone agree that this general methodology is the approach we would like to take? And that those people who chose to participate everyone agreed with the methodology.

I do believe that later in the call Rebecca Tushnet objected to the methodology; she was on audio only and had not voted one way or the other. But when she got some clarification from additional questions I think it's clear on the record that she has disagreed, but the majority - everyone who did so through the voting mechanism in Adobe Connect agreed that they would like to participate this way.

So then the second question that Phil asked the group was - this is verbatim, "Do working group members agree that in applying this approach the working group should have some flexibility going forward in modifying or adding to the standard set of high level questions presently contained on Page 1 of the document before us?" And that's the five questions you see bold at the top. And the majority of folks who responded agreed with that.

Now from listening to the call last week, this morning, it seems that there is a bit of confusion as to what we agreed to. And my personal opinion, and unless I see someone raise an objection, is that the questions you see before you are just merely a suggestion, they are no way - it's not that you have to use these questions or a form of these questions that we can agree on, these are just a suggestion of the types of questions that we might ask in each topic. There could be that we don't want to ask these questions, we want to ask different questions. It could be that we like these questions. It could be

that these questions are appropriate or a set of questions appropriate for a certain number of topics, but then there are different questions that should be applied to different topics because of the information we're trying to seek.

So that is sort of where we ended up at the end of the call. So our purpose today is to consider the list of topics in Part 1 and are those appropriate topics? Are they all the topics? Does there need to be additional topics? Are there topics that are not appropriate? That's - it's all open for discussion. This is simply a draft document for consideration by the group. It requires the group to agree that this is appropriate for us to move forward. I think that's where we should start first.

Then the second question - topic that we can discuss or area that we can explore is what should the high level questions be? Should they be the questions that are listed in bullet points 1 through 5 at the top of the document? Are those appropriate? Should there be different questions? Should there be different questions for different topics? All of that is open to discussion.

So I know we've gone over it before, but given that I can't guarantee that everyone on this call was on the December 20 call, nor that how many, if anyone, listened to the December 20 call on the MP3, I've asked Mary Wong if she would give us a brief synopsis on how this paper was developed and how the information in Part 2, the chart in Part 2, relates to the high level topics that are listed out in Part 1 so that we can sort of understand the development of this paper for our consideration.

Then once we have that, we can take some questions if there are any questions of Mary or there are any concerns, and then we can dive into our work. So at this point, I would like to know if anyone has a question, concern, additional comment about the summary that I've provided to you with regards to our December 20 call? I see that George Kirikos has raised his hand and I will call on George.

George Kirikos:     George Kirikos for the transcript. Yes, I agree with that summary, I just wanted to note that we'll probably iterate between the two things, the questions, the columns if we're doing a table or a matrix and the various issues. One concern I had was during the last call it was noted that the list of topics was incomplete, it only went up to a certain date. I just wanted to confirm that that's still the case because I notice the topic I raised on the mailing list about availability of the courts isn't on the list of topics, so if it's still the updated document that should be noted. I think somebody else maybe also had an additional topic that wasn't reflected, I think it was maybe Claudio. Thanks.

J. Scott Evans:     Okay. George, just for clarification on my point, I noticed that in Part 1, appeal process, is one of the areas that has been identified as a high level topic. And as I understand your concerns, although there is no instance of it with regards to the URS, you have posted several things and I believe you even posted a link this morning to an article in Circle ID by David Maher regarding the yoyo.mail case, which is a UDRP case but your point is availability of the courts. And it seem to me that that is covered high level in appeals process because that's part of the appeals process.

But is there something in particular beyond that you feel that hasn't been addressed?

George Kirikos: George Kirikos again. Thanks. The - I think the appeal process, as you note, on Page 4 - at the bottom of Page 4 and the top of Page 5, that's talking about the built in appeal process within the URS. The topic I raised is entirely separate; it has to do with access to the courts to go beyond the internal appeal mechanism, talking about external appeal. So it's kind of - it would be Section F but it would probably be Point Number 2 rather than within the Point Number 1 on - in the document as currently stated. Thanks.

J. Scott Evans:     Mary, I see that your hand is up. Mary Wong.

Mary Wong:     Yes it is. Thanks, J. Scott. This is Mary from staff. And so if I may follow up by answering George's question and then lead into what you asked me to summarize because I think they're somewhat related, and also of course invite anyone with additional questions along the way to please raise your hands in Adobe or speak on the audio if that's where you are.

So George's comments and suggestions that were raised on the list and on the last call on the 20th of December, as well as Claudio's, and you're quite right, George, it was Claudio who made additional suggestions, those have all been noted by staff. And I think what we confirmed on the last call as well was that this particular document would not be changed or updated until the group has first of all agreed on the methodology and then secondly, started going through the draft suggested list.

And at that point, presumably starting from this week after this call, we as staff would then update the document. It was felt that it would be more confusing if this document, between the 20th of December and today, got updated with some suggestions that had not yet been fully considered by the group. So I hope that clarifies George's question and our answer to that.

And so coming back to this document, as you'll see the date basically says 13 of December, and this was prepared following two prior calls. As J. Scott noted earlier, this methodology that has now been generally agreed, was first discussed at the end of November and the suggested list of high level questions were suggested on the call following that. So what we did in this document that you first saw on the 13th of December and that you discussed the week following on our last call, represents a culmination and a summary of what had happened up until then.

And so to go to J. Scott's request, Parts 1 and 2 should really be read together. Part 1 containing the draft list of suggested topics was developed by staff as a short list in consultation with Heather Forrest, who was one of the

folks who suggested the methodology in the first place. And the idea is to present the topics as short descriptive lists to make it clearer. Secondly, all of these topics were developed based on all the lists of URS related charter questions. And that is where Part 2 comes in.

Part 2, as you see, is the table which you've seen before, where the actual suggested topics from Part 1 are listed on the first column matched to the actual original charter questions. And so that was intended to capture the fullness of what the community prior to the initiation of our PDP had come back to ICANN with feedback over several years. And so in your discussion as to whether the topics are accurate, as to whether they could be modified or added to, hopefully this background will be helpful.

And finally, I'll just note that two things, one, is that in both Part 1 and Part 2, we did put bullet points at the end. And I believe this was one of Rebecca's concerns that she raised on the last call that there are additional general charter questions that are likely to be relevant to URS review. But as the general or overarching questions they are likely also to be relevant to review of other RPMs so we included them as bullet points in Parts 1 and 2 so as not to lose sight of them.

But it will be up to the working group to determine when it would be appropriate to deal with these general questions in the context of say the URS versus other RPMs. So then I'll end with a note on Part 3 which is something that the working group has yet to discuss. And Part 3, as you see, is an unedited - well not extraction - an unedited copy and paste of the cochairs' statement on the URS review. So as we noted, this has yet to be fully discussed by the group, and within that statement, there are some questions that were suggested there as well so those could be considered as part of the discussion of topics.

J. Scott, I hope this is a helpful summary to follow up on what you summarized from the last call. And as George has noted in Adobe, yes, that's

correct, George, what you have in this 13 December document is what was discussed up to in terms of substantive topics and questions up to the meeting in Abu Dhabi. Thanks, J. Scott.

J. Scott Evans: Thank you, Mary, very much. Are there any questions, concerns, comments with regards to anything that Mary had to bring forward? Okay, so Mary has explained that the chart in Part 2 is - they looked at the original charter questions and from that they extrapolated this suggested general topic, which is in the first column. So and that is what is then summarized in Part 1 is you just have those general topics listed in Part 1. So the Column A, yes, the first column, Suggested Topic column is also repeated above in Part 1, this draft list of suggested URS review topics.

So I think the best thing for us to do, and unless I hear objection or somebody has a better idea for a work flow, is for us to look at the suggested topics in Part 2 and then look at the question that was asked either in a new question or an original charter question to make sure that we have extrapolated the necessary information.

Now as regards to how these were ordered, I think they were sort of put in order by work flow of a URS proceeding for the most part on Kathy's suggestion on one of our calls that we should take them in that order. So that's the reason we start with complaint, then we go to response, then we go to fees, then we go to standard of proof that's in the action, then we go to defenses, appeal, so that's just sort of the work flow. And then I think at the end there are some additional topics that are not necessarily related to how the URS flows from start to finish, so there are other questions around abuse of process, education, languages, those other issues.

So looking at this, I think the thing we should do is we should go through and look at the question and then look at where we come out on our high level topic and make sure that the necessary high level topics have been

extrapolated from the question, in other words, the general subject matter that we're seeking information about has been identified.

Is there anyone - and you can show by raising - by putting I believe there's a "no" mark, a "disagree" mark, if there's anyone that disagrees with proceeding in that fashion today showing by disagreeing in the Adobe Connect room. If not, that's how we're going to proceed today. If there's anyone who has a comment or someone who thinks that there's a better methodology for proceeding today please speak up now.

Okay, hearing no objections and seeing no "disagrees" in - and I'm scrolling down just to make sure I'm not missing anyone, it doesn't appear that I am, that's how we'll proceed. So the first topic is the complaint and there are two suggested topics for consideration to be explored with a set of questions. And one is the standing to file and two is the grounds for filing. And these were extrapolated from a suggested question from ICANN 60, that would be the October meeting in Abu Dhabi, and the question is listed in the third column of the chart, "Should the first element be modified to include names that are abusively registered but that may be not confusingly similar or identical?"

So that asks a very specific question and so staff up-leveled that up and said well they're basically asking, you know, about the standing to file and the grounds for filing. Is there anyone that thinks that there's more in depth, that there's something else that they're trying to get at? George.

George Kirikos:    George Kirikos again for the transcript. I'm not sure if it's best to put it in Section A here, or whether it should be somewhere in Section D, but some limitations period, like a statute of limitations could go into Part A or it could go into Part D as a defense that the complaint was brought too late. There's obviously the debate over latches and statute of limitations for the UDRP as well, but I think if the URS is going to possibly be applicable to domains that have been registered for you know, 20 plus years in dotCom then that's going to be an important issue for the URS review as well. Thanks.

J. Scott Evans: Okay. So George, that is not a - something that was asked here but you're just saying as an additional point that needs to be considered, we need to consider a possible statute of limitations or timing consideration and you're not sure it should be in this particular area but it should be included somewhere? Okay, I see that he's agreed that that's what he's - he is - is there anyone that agrees or disagrees or has any other thoughts with regards to that particular? Okay, hearing none. I see that that's been picked up in the notes by staff so we have that. And I see Michael Graham has said in the chat that he believes it should be considered in D rather than A. And D has to do with defenses. Okay. All right.

All right so the next area is we come to the response. And you see here that there are the duration of the reply period is one of the high levels topics that was extrapolated and it was extrapolated from an original charter question which you see in the second column, "Should the ability for defaulting respondents in URS cases to file a reply for an extended period, e.g. up to one year after the default notice of even after a default determination is issued, in which case the complaint could be reviewed anew, be changed?"

And so basically they just up-leveled that up and said let's look at the duration of the reply period in general and we'll ask the template-ized questions against it. I see that Michael - Michael, I'm sorry, I can't see your full last name, looks like it's Karanicolas, but I'm - oh here it is, it's Karanicolas, I think. I'm going to call on you now, I see your hand is up.

Michael Karanicolas: Thanks very much. It was a great attempt, Michael Karanicolas for the record. So I'm not sure if this would go under Number 1 or Number 2, but I - or sorry, Number A or Part D, but I think it would be good to get some consideration of the notice that's provided for registry and their level of awareness of the kind of process that they're facing when one of these complaints is initiated. And also related to - kind of related to this but also related defenses later on, I think it would be good to consider the

understanding that registrants have of these defenses and the options that are available to them.

J. Scott Evans:     Okay. Thank you for that comment. You'll notice that there is a section on education and training, would that be where we would want to consider that?

Michael Karanicolas:   Just give me one second to take a look at that section.

J. Scott Evans:     Okay. Rebecca seems to think that she agrees, I think I'm reading that correctly but she believes that that's where it should go in education and training. Rebecca, thank you for raising your hand, you can explain and I won't put words in your mouth. Go ahead, Rebecca.

Rebecca Tushnet:  I did not - I hit the wrong button, as usual.

J. Scott Evans:     Oh okay. All right for the record let me clarify then, Rebecca was raising her hand.

Rebecca Tushnet:  Yes. Thank you. So I actually think that this should be in the response or perhaps the prelude to the response so, you know, maybe a Question 1, right, are people receiving the notice so they know they need to respond, you know, can they understand the notice that they've received? And this goes to the - first of all to the questions, you know, is it being used? Why and let me add my voice to saying we should add why or why not because that will tell us a lot.

And it's also not a matter of education in general, it's a matter of what happens when this thing arrives at your door and the question of whether educational resources are adequate once you go looking for them is actually different from whether the thing that you got in the mail is understandable to you. Thank you.

J. Scott Evans:     Are there any other comments or concerns? This is J. Scott Evans for the record, speaking from my perspective I think that's a very difficult question to answer in this working group. I'm not sure how we're going to answer that question. Did - do respondents understand the documents they receive? I'm not sure we can answer that question. I just - I'm a little confused at how we would answer that question. Kathy Kleiman has her hand up then I see Susan Payne and then see Rebecca Tushnet again, and I'll take them in that order. Kathy.

Kathy Kleiman:     Hi, J. Scott, hi, everybody. Happy New Year. Speaking in my personal capacity, it sounds like there is a proposal on the table to add something called "Notice" between the complaint and the response. I recommend that we start putting the letters into Part 1 that we have in Part 2 so Complaint A, then the new B would be the notice.

So, you know, critical question, you can't respond unless you get the notice, so are people getting the notice? And J. Scott, to your question of kind of the esoteric, do they understand it? There is a requirement I believe that says that the notice should be in the language of the registration agreement. So you know, are people receiving the notice of the URS process? And if so, you know, perhaps how? Which method of reaching them is most successful? And then two, are they receiving the notice in the language of the registration agreement? That's the easiest way for us to know that they're getting it in some form that they can understand.

And then as Rebecca points out, education is in a different category. So again, you know, notice is critical; if you don't get notice you can't respond and the rest of it falls. Thank you very much.

J. Scott Evans:     Susan Payne.

Susan Payne:       Yes, thanks. Hi, it's Susan. I sort of feel like I'm going to almost to answering the question here, but I think that we need to recognize that this is a quasi-

legal process. You know, and people do, you know, people receive legal - the various types all the time and, you know, have to deal with them. I mean, I think we can't completely spoon feed people. If you get something that's, you know, summoning because you've been driving too fast, you know, there's a kind of assumption that you understand what's going on or that you educate yourself and find out.

So, you know, I don't think we need to be starting from an assumption that all you know, all of these registrants are somehow incapable of knowing what's going on. If we come across some evidence that suggests that perhaps, you know, a number of domains per put on suspension and that only at that point there were challenges to the process, but I'm not - I don't think we'll find that kind of evidence. But, I mean, if that evidence exists, that suggests that people didn't get notices or didn't understand the notices then great. But I think we don't need to get - I just don't think we need to get bogged down in the minutiae of whether every single person who receives a notice entirely understands what it means and has no capacity to find out.

J. Scott Evans:     Thank you, Susan. Rebecca.

Rebecca Tushnet: Hi, Rebecca Tushnet. So that question is hard to answer, does not distinguish it from many of the questions we are being asked to gather data on. I will point out for the group that we have agreed to undertake what everyone agrees is the difficult if not impossible task of figuring out how - what sort of matching changes might possibly work without being incredibly over-inclusive. I guarantee you that's a harder question than comprehension questions.

Second, I think it's a mischaracterization to say that notice is about whether everyone understands every detail. First of all, that's not what I asked. Second, we have very good mechanisms of determining general comprehensibility, in fact we're considering them right now in the data

gathering request where we can actually include in our survey replications of the notice and ask comprehension questions, a pretty standard thing.

Third, let me just say in general, it is not necessary that people understand as soon as they get the thing exactly what it means and what their next steps might be, although it's helpful if they can get information about where to go from there. But it is really important that they know that it's not, for example, a phishing technique. So I as a domain name registrant get phishing things and commercial pitches all the time. And it took a fair amount of skill and learning over time to understand which I should actually invest a little more investigation into.

So it is worth knowing whether people are going to get these and put them in their spam folder because this is actually an area in which we know that there is a lot of - there is a lot of junk that you get once you are a domain name registrant. So I don't think it's in any way either difficult to ask about, especially given what we're already planning to do, or unanswerable. Thank you.

J. Scott Evans:  Thank you, Rebecca. This is J. Scott Evans for the record. It's my understanding that the survey that we're doing is limited in subject matter. And it does not include any subject matter regarding the URS. It only includes the Trademark Clearinghouse, sunrise and trademark claims notices; it doesn't include the URS so saying that we could include it will only I think delay us further and cause us more problems.

I think if what we are looking for is - this is speaking in my personal capacity - is we might look at appeals and in those areas we might ask were there any appeals brought because they felt like they - I mean, they have a year to appeal and it seems to me if you lost your domain and it was because you didn't know you would have appealed and you have a year to do so. But we might identify that as something we want to consider in the appeal process to see if we can extrapolate if that's been a problem.

And if it has, then we can - then we can look at it. I'm just suggesting that there might be a way to consider it but I'm not so sure it's at this junction, maybe we want to put it under appeal as a topic to look at. I see you have your hand up again, Rebecca.

Rebecca Tushnet: Rebecca Tushnet, thank you. So I think it's an excellent suggestion. And we should absolutely look at what is going on in appeals. I don't think that the questions are fit for the survey and it's not really - we can at least cost out the extra question because we're actually targeting a group of you know, registrants already; it's not actually asking for a new population. So I don't think we should dispense with that out of hand.

The issue is though there are other questions around notice so I don't think we should just put this in Appeals and be done with it. I think the question about, you know, is the language requirement being followed, that mechanisms are being used, right. Are there a lot of undeliverables, you know, what's going on is something that we just need more information on especially given the high level of defaults, which - and there are many explanations for that but we don't know which one is true until we investigate. Thank you.

J. Scott Evans: Thank you. So then it seems to me that what we would do is we have the complaint as A, and if I understood Kathy correct, then perhaps B should be notice. Look at Mary's comment in the chat that the URS rules say that a notice to registrant must be in English and must be translated into the predominant language used in the registrant's country or territories determined by the countries listed in the Whois record when the complaint is filed. And a provider must employ reasonable available means calculated to achieve actual notice.

So what we may want to do then, and I put this to the group, and Martin, I'll get to you, is put in complaint then B be notice and we can ask some

questions with regards to notice and then - then the response and remember, we're going to ask template-ized questions, there might be one that would be specific to this but we haven't gotten to that; what we're going to do is try to come up with questions that ask very objective high level questions about each of these topic matters. So just keep that in mind but I have - I personally have no problem with adding notice as one of the high level topics that we consider since there are specific requirements around the notice in the actual policy.

I'm going to go to Martin and let's - I see Mary's got her hand up, but I'm going to go to Martin then Mary.

Martin Silva Valent:    Thanks. This is Martin. I hope you can hear me. I just want to stress out the point that a (signature) between usually the registrant and the trademark owners is huge and Susan was asking for evidence like let's not get too bothersome in the process if we don't have evidence worked. And usually, at least from my side the research I have done regarding the UDRP in Latin America is that most of the complaints don't get responses mainly because the registrants just don't know what the notifications are about or what the process is about, they don't know anything. So I think that anything you can do to make registrants in general more aware it would be a huge improvement in the legitimacy of the process because right now it's fairly easy to abuse it if the other part - the normal registrants doesn't have some sort of business background or trademark background.

So I don't think it's a burdensome process to try to educate them and be very, very careful that we are making a system that is fair, that is not only useful for trademarks to be enforced but also that people get a chance. In truth I work mostly with small businesses, small businesses are even with a trademark in their own portfolio sometimes they still lose the domain because they don't know the process. The signatory is very varied between the big law firms, big corporations that know about trademarks and domain names and everyone else except for cyber squatters.

J. Scott Evans:     Thank you. Mary Wong and then I'll get to you, Susan.

Mary Wong:         Thanks, J. Scott. This is Mary from staff. Just a quick note, that just as there
                   is another section for education and training to which some of these topics
                   could be added, there is also a section I believe it's I, further down on
                   language so some of the points that folks are making here about language
                   and translations could go there as well. I do recognize that Rebecca and
                   others made points also about the notice that are separate from those so as
                   you said, J. Scott, staff will create a new section to go between the complaint
                   and the response for notice, but for some for some of the language and
                   education-related topics those may be more appropriate under the
                   subsequent sections. Thanks.

J. Scott Evans:     Thank you. Susan Payne.

Susan Payne:       Hi. Thanks very much. I just put my hand up to respond quickly to something
                   that Martin was saying, and I wanted to make an overarching point of course
                   which was that Martin's concerns appeared to be about lack of
                   understanding, if I heard him correctly or about the UDRP. And to everyone
                   that we're not talking about the UDRP at the moment, we're talking about the
                   URS. It may be there's a similar lack of understanding, but I think it's
                   important to bear this in mind because of course things like the remedy are
                   different for the URS and the UDRP, albeit that we will be talking about
                   remedy at some point but for the present purposes there have been no URS
                   case where the registrant has lost their domain name because they didn't
                   know what was going on.

                   You know, the worst that happens, and it may be bad, but the worst that
                   happens is it gets suspended. And as J. Scott, you've also pointed out,
                   there's this at least a year period where it's possible to challenge that
                   suspension. So I think we need to remember that when we're getting very
                   upset about the possibility that someone's domain name might get taken off

them because they didn't know what was going on. I think that would be very helpful.

And I wanted to also make an additional point which is I think perhaps we could all commit, before the next call, to reading the URS rules and familiarizing ourselves very carefully with them because it seems to me that not everyone is terribly familiar and therefore there seems to be quite a lot of misinformation and misunderstanding from some of the people who are commenting on this call. And I think we'd all find it extremely helpful if we educated ourselves before we started trying to fix things that don't need fixing.

J. Scott Evans:     Thank you, Susan. I think I see Rebecca and then Martin. Rebecca.

Rebecca Tushnet: Rebecca Tushnet. Thank you. So quickly, I think that having one's domain name suspended is colloquially understandable as losing although the permanency is different. If I had my driver's license suspended I wouldn't be able to use my driver's license and that seems quite relevant to the normal things for which a domain name is used. So I don't think you should assume things about what people know about the URS based on the word they use from the registrant's perspective.

But more broadly, in terms of putting this stuff down in someplace called Education and so on, and Language, I understood that this was supposed to be a framework that we could suggest revisions to rather than a presumptively correctly deal. And the reason that I want notice to be moved up is because I think a lot of these questions are actually more centered around notice and, you know, if that means that we do language early on, that's fine with me. But, you know, I think where language is most important is the question of notice and contested proceedings, so let's move it up. Thank you.

J. Scott Evans:     Okay, first of all I - this is J. Scott - I don't - to clarify for the record, I didn't hear anyone suggest at least I haven't heard anyone suggest that it shouldn't be moved up. I did hear other people say that it might be considered in other areas and then it was suggested it be moved up and given its own area. But it was also pointed out it might also relate in other areas. So I don't think anyone's ever suggested that it shouldn't be moved up so I just want to clarify that for the record.

So I'm going to take Martin and Susan then I'm going to call the question so we can get consensus and move on about whether we should create a B in certain notice as a high level topic - suggested topic between complaint and response so that we can move on. But first I'll take comment from Martin, and, Martin, keep it really short and then we'll go to Susan.

Martin Silva Valent:     Very short that in my comment I mentioned my reference on UDRP and that's because I didn't on URS but I think that - my comment was all the general symmetry found along the whole process, URS, UDRP, Trademark Clearinghouse, the symmetry is always there.

J. Scott Evans:     Thank you. Susan.

Susan Payne:     Thanks. Yes, also very quick. Just to respond to Rebecca I didn't suggest that having a domain suspended from the perspective of a registrant wasn't a problem, in some cases obviously it may be, particularly if they weren't aware of the process, didn't understand. What I was pointing out was that the domain name hasn't been transferred away from and therefore it's very rectifiable or potentially very rectifiable in a way that perhaps the remedy on the UDRP isn't so rectifiable.

So if we're looking at things like you know, if we're trying to assess the level of understanding of the registrant in these circumstances, we can at the moment look at things like how many people subsequently appealed and said I didn't understand or I didn't get the notice because those are very real

remedy for them there to do that if they've had not had this level of understanding or have not received a notice in the way that you and others appear to be suggesting. It's a very real means for us to assess whether it's seriously a problem or not.

J. Scott Evans: Thank you, Susan. All right, now I'm going to call the question to the group, the question is simple. If you disagree, if you feel we should not add notice between the complaint and response as a high level topic to be considered, would you please show by giving a disagree mark in the Adobe Connect room? Okay, I see no disagree - I see one disagree, George, has disagreed but that's the only one. So I see us putting notice and, staff when we do the revision to this chart and to the topics listed above in Part 1, I'd like us to add, I think it's appropriate for us to add notice as a high level topic to be considered by the group.

All right, now so under response there were two issues. One was the duration of the reply period and the second was the response fee. So those are the two areas under response that have been identified as high level topics. For the response fee there was a question that asked specifically about a certain response fee and we've of course raised this up and just asked that we would ask general questions about response fees in general and get our information with regards to it not applying to any specific response fee. Is there anyone that thinks response fee shouldn't be one of the topics considered? Okay.

Moving on, the next area - I'm sorry, Kathy Kleiman has raised her hand.

Kathy Kleiman: If we've moving onto - if we're moving past response, this is Kathy Kleiman, in my personal capacity then I think we've had it in many areas and it doesn't just belong in education, affirmative defenses and the question is do people know the - as John Berryhill noted in our discussion with John and Doug, there are a number of affirmative defenses that were added to the URS based on the Nominet defenses.

And the question is, you know, are they being used? Do people know them? The idea was that this is a very fast response period and that we wanted to - the STI group wanted to make it very easy for registrants who did have a good response to make it available. In fact there was even a talk about a template for a response, although I don't think anybody went that far. So adding - so to response, I would add Number 3, affirmative responses and then measure them against the high level questions. Thanks.

J. Scott Evans: Thanks, Kathy. As pointed out by - in the chat, there is an entire section, Section D on defenses. So anything with regards to defenses I think would be appropriately considered under that particular section. We have…

((Crosstalk))

Kathy Kleiman: Let's move it into response because separating it seems a little artificial.

J. Scott Evans: Well I think that's form over function. If we're giving it an entire section to consider then we'll put questions to defenses, I think that, you know, I'll leave it to the group but personally I don't see anything would - I think it's fine where it is. I think it should be because it is affirmative defenses, should probably be because, you know, the questions we're going to be asking, are these being used? How often are they being used, those type of high level questions would apply to all the defenses.

I'm going to go to George and then, Kathy, if you want to respond to that I'll go to you next but I'm going to go to George because his hand has been up for a moment.

George Kirikos: George Kirikos again for the transcript. Just want to make a small point regarding the language at the bottom of Page 3, it calls it a reply period, it's actually just the response, it's a response to the complaint but there's a - there's no right for the - for example for the complainant to reply to the response or for the respondent to have a reply. So I think they might want to

change the language of reply period to response period instead of calling it a reply because there is actually a meaning of a reply period, it's for the complainant to respond to the response from the respondent. Thanks.

J. Scott Evans:    Thank you, George. Kathy.

Kathy Kleiman:    Yes, I do - I understand defenses are in another area. I think we should pause and see what else needs to be added to this response area. And as was pointed out earlier in the call, why we're not receiving the types of responses, the number of responses we actually expected in the URS, the default is very high. So if we do want to look at affirmative defense someplace else, that's fine. I think we're missing a lot of questions that have been raised about default and responses and the current way we phrase this, I guess it's C now, C, the response. Thanks.

J. Scott Evans:     Thanks, Kathy. All right, we're moving on unless anyone else has any comments? Is there a great move as Kathy has said to - because again these are just the high level topics, we're going to be asking questions against each topic; we haven't got what those questions will be. All right, so we're moving to standard of proof. And, George, you'll notice that your comment with regarding to wording with - now C1 has been noted by staff in the notes.

And so standard of proof is one of the areas that we - and it's clear there was a question about is the URS clear and convincing standard of proof appropriate? So we just put a standard of proof questions, we will ask some very general questions against that. Is there anyone that believes there's an additional sub point that needs to be asked or - not asked, should be considered under standard of proof or is just standard of proof by itself? I know that this is something that has been at least on blogs and in articles and others hotly debated by everyone. Phil Corwin.

Phil Corwin:    Yes, hi J. Phil for the record. Happy New Year. Just a quick note, it's really probably more appropriate in - for consideration in - I'm scrolling down to

Section - bear with me - Section L on the URS providers, but I just wanted to note that on some of these questions there's a policy issue kind of theory, you know, is that the proper standard of proof, clear and convincing. And then when we get to the providers there's the practice question of whether the standard is actually being applied rigorously. So I just wanted to note that.

I'm not asking for it to be - anything to be added here, just noting that compliance with a lot of these standards will be covered in Section L when we look at the actual performance of the URS providers. So thank you very much for letting me make that note.

J. Scott Evans: Thank you very much, Phil. Okay, now moving to defenses, identified is scope of defenses and that would - we would ask some standard questions against the defenses to see. Michael, I see your hand is up.

Michael Karanicolas: Sure this builds - this is sort of related to the way that the question is already framed, but I would like to see it consider a little more the level of understanding among registrants of the defenses that are available to them. I see this as distinct from the - which is just about awareness that the process is happening and also just in different language which I think also doesn't fully get at the accessibility of the system and how registrants navigate it.

I mean, this is sort of touched on a bit when you talk about why extended defenses - or sort of are they being used and if so how and but I would like to sort of also have that framed more directly in terms of the systems' accessibility and the level of awareness among people who - of the defenses that are available to them.

J. Scott Evans: All right, are there others that agree to disagree with that? You know, I don't see defenses - I would see that maybe we need to ask - I see Kathy agrees. So I guess I'll put out to the group then, how many people feel that I need to see an "agree" in the button so this is a call for consensus, that under Defenses we need to have beyond scope of defenses how many people feel

we should also include an inquiry into the understanding of defenses in - under Defenses? I need to see a green checkmark in the Adobe Connect room please.

This is the last call for folks to provide their input. And from what I can see here there is no consensus to add that at this point, so we will move on. All right, then we go to Remedies as a high level topic. And that's been divided into a couple of sub topics. You see here the question that was asked in the original charter questions, "Should the URS allow for additional remedies such as a perpetual block or other remedies?" So that was raised to just scope of remedies.

And then there was another question, "Is the current length of suspension to balance the - to the balance of the registration period sufficient?" So that was raised up to just duration of suspension for a high level topic. So we would consider in general the duration of suspension, we would ask them general questions against that and to extrapolate some subjective answers. Did I hear someone speaking? Is there somebody that would like to speak that doesn't have their - ability to raise their hand?

Okay, I see no hands raised. I've scrolled up and down a couple of times so all right, are there any comments with regards to Remedies? Yes, George.

George Kirikos:    George Kirikos again. Just want to go back to the little kind of poll that we did where Kathy raised what I thought was a legitimate topic for discussion and it was kind of blocked through I guess the tyranny of the majority. But to me it seems more appropriate that if there is a base level of support that meets the certain, you know, minimum threshold, that should be sufficient for a topic to be added rather than to simply remove a topic from consideration because a certain, you know, larger group might not want that uncomfortable topic to be even on the table at this point. So I think it might be, you know, premature to have removed that topic just on the basis of a small vote. Thanks.

J. Scott Evans:     Well, I'm chairing the call so I'll put it to the group. Who - we have to make decisions somehow and I am open to any manner of someone - describing to me a way to make decisions. I don't think it is appropriate to say that every time someone or two or three people out of some 180 people have a comment, concern or saying that it either derails or gets put in the process or we have to have some manner of making a decision.

And I asked the question to the group and I got it's how we've made decisions on everything we've decided to date; I didn't use any new methodology, I didn't do anything different. But I am open to anyone explaining to me if they have a better way for making decisions that will move us forward. I'm happy - I am totally neutral as to this, so I'm happy for someone to give me a better way to do this. I see that we have Rebecca, then George, then Paul. Rebecca, you may be on mute. Okay, I'm not hearing Rebecca so I'm going to go to George.

George Kirikos:     George again, if Rebecca wants to jump in when she has voice again that would be great. My point was that the way the question was framed it was whether there's a consensus to add the topic and so one other alternative was is there consensus to eliminate that topic, to exclude that topic simply by framing the question in a different manner obviously achieves a different result. So that might have been an unintended consequence, like there doesn't seem to be a consensus to either accept it or reject it depending on how one frames the question.

The other alternative I proposed initially was if there's a minimum level, you know, minimum level of support for a topic then it should be included so if, you know, 5 or 10 people support the inclusion or, you know, whatever the arbitrary number is then it should be allowed unless there's, you know, some massive super majority against inclusion of that topic. But that shouldn't be just based on voting, people should justify exactly why it should be excluded, you know, people shouldn't just vote blindly, you know, because they don't

like the topic; they should actually give a reasoned and articulated analysis as to why that topic is unsuitable. Thanks.

Rebecca Tushnet: I'm sorry, I realized I was on mute and I think - this is Rebecca Tushnet - I think I'm saying something similar to what George did. But I just do want to say, you know, I respect that you're chairing, J. Scott, but I do think that you have to take a consistent methodology not treat agreement as consent for Kathy's question and agreement as rejection for the next questions. Thank you or silence as rejection versus silence as agreement, I think it just needs to be consistent, that's all. Thank you.

J. Scott Evans: And to be clear for the record, I made no comment with regards to the people who made no response whatsoever, so silence was not counted as one way or the other. I only looked at the disagree and the agree and this - and luckily this is captured so if you want to go back and listen to the Adobe Connect recording, all the votes will be captured.

((Crosstalk))

Rebecca Tushnet: …J. Scott, you said, "Does anyone disagree?" You saw one disagree and declared there was consensus for Kathy's question. For the next question you said, "Who agrees?" You saw a few agrees and said okay, there's no consensus. And either one of those is fine I just don't think it's fair to switch between them without some reason. Thank you.

J. Scott Evans: Paul.

Paul McGrady: Thanks. Paul McGrady for the record. It seems to me on the question of agree, disagree, and all that that's more a form rather than substance. And I think that most people on this call are able to handle, you know, a yes vote or a note vote depending on whether something is being included or excluded from the list. So I don't - I think that that's sort of a weird cul-de-sac and I don't think we have to spend any time really addressing that.

I think the more important issue is the one that George has raised which is how many people does it take to get a topic on this chart which of course follows on to how many people does it take to, you know, get one off. And then if we stick with the practice of having a very low margin of people, you know, one or two or three or four, you know, how, you know, is that what is going to govern the rest of how we do our work.

We've never operated that way where three or four people can make a decision for an entire working group in any working group of ICANN that I've ever been involved in. I don't think we should start doing that now. I do think that consensus means consensus which means, you know, there has to be at least a rough number of people who are on board with a particular way to go, not just two or three out of, you know, 40 or 45.

So if we could just stick with the way we've been doing it that would be great not only because as the way that we've always done it in working groups, but also we've got a lot of work to do and if anybody can stop a process and adding a new topic anywhere along the lines with just three or four people interested in that topic we are never going to get done. Thanks.

J. Scott Evans: I think I see Greg Shatan and then - oh, I'm not sure who was first so Mary, do you have a point that relates to this overall before I go to Greg and Kathy?

Mary Wong: I do, J. Scott.

J. Scott Evans: Okay.

Mary Wong: And the staff thought that we could perhaps provide some background that we hope can be helpful especially as this is a large group and we do have folks who are not generally, you know, active participants or long-time participants in the ICANN process. So the framework for reference for all the working groups is the Working Group Guidelines. And under those guidelines

there are certain roles and expectations on the chairs as well as on participants. And essentially they go towards inclusiveness, ensuring that everyone has a chance to contribute, not reopening questions where there's consensus and methods for designating or finding consensus.

To build on what Paul said, the normal operational method for GNSO working groups is to not count votes. So while polls are sometimes used, it's not a matter of counting heads. In terms of practice, what this normally means is that when you have a draft document like this, it will be updated following the call based on what may be seen or deemed to be agreement on the call. It will then be circulated to the mailing list and people will have the time and opportunity to object to correct and to further discuss or raise additional questions.

So one thing that the staff do on many occasions and that we're going to suggest for this particular document is that in addition to updating this table based on the agreements that are deemed to be reached today, we create what we can call a parking lot, where additional suggestions, other comments that were brought up either on this call or on the mailing list can be included.

And those become documents for the group to refer to so that as you go through the process of review, and I know a few people have said that it is an iterative process, that some of these may become relevant later on. And hopefully that will be helpful in terms of providing you with a full documentary record of what was actually suggested, what went forward, what stayed parked at least for a certain period of time.

And then to go back to the question of discovering consensus versus agreements versus disagreements or consensus to exclude, one thing that the GNSO community has been very I think careful about like I said, is not to count heads or count votes, that's partly why we try and allow for some time both between calls and on the mailing list for people to review transcripts if they miss meetings, to review documents at their leisure.

And discretion is given to the chairs, there is no one method prescribed to the chairs to say you must have 75% in order to declare consensus for example. So there are some guidelines, there is discretion and flexibility on the chairs and we do try and allow for time for an iterative process as well as for comprehensive documentation. I hope that's helpful, J. Scott.

J. Scott Evans: Thank you. I think we have Greg Shatan and then we have Kathy Kleiman.

Greg Shatan: Greg Shatan for the record. I think this is a rather unfortunate discussion overall. I think that I found J. Scott's handling of the two questions to be consistent with each other. And that the general overarching concept in this and every other working group I've been in is that an action is not taken unless there is a consensus to take that action. So adding a question, approving a question is an action. That things don't move forward unless the group has a consensus they move forward. I have not seen the idea that something - everything moves forward unless there's a consensus to stop it.

And so that has never been a process that I've seen put forward as the proper process and that would be quite inconsistent with everything that we do. I think it's just, you know, something doesn't gain traction as Thomas Rickert likes to say, then it gets tossed to the side and traction means, you know, broad support and if there isn't that broad support that traction it gets tossed aside and we move on, otherwise we'd never move on. Thank you.

J. Scott Evans: Kathy.

Kathy Kleiman: Hi, all. Kathy Kleiman. First, J. Scott, thank you for the opportunity to have this discussion. I actually think it's a very important discussion. You guys know I'm a veteran of the UDRP, the URS, STI and even the Whois Review Team, groups - the first Whois Review Team, groups that had very, very different opinions and people coming in with very, very different concerns for different communities that were directly involved in what's happening.

We have never been in a position that I know of, of frankly until this working group, where the needs and discussions of the leadership of one stakeholder group, Martin is on Council for the NCSG, Michael is very involved in the leadership of NCUC and NCSG, where we're ignoring one stakeholder group and where consensus is being used to say no, the concerns of one stakeholder group are not important. And that's frankly how, you know, I believe I speak for others, that's frankly how it's being interpreted whether it's intended that way or not.

And I've never seen that happen before. So here we are talking about defenses, it is, you know, staff could easily have told us that it was lower down in our charter questions that where a number of communities, there were a number of charter questions that asked about really whether both - whether respondents understand what they're responding to, that could easily have been added to the response to defenses here, you know, what is the scope of defenses and is there knowledge in use of defenses?

As a review group looking at a brand new process it is absolutely critical to our mission, guys, to ask whether people understand what we have created before them with such a huge default, it is incumbent on us whether you want to or not, this group will be held to have asked that question and if we want to ignore it, you know, because it's inconvenient, that's fine, but it's not fair. Thank you.

J. Scott Evans:   All right, so I want to - this is J. Scott; I want to go on the record. I simply was trying to make a decision or get the group to make a decision so that we can move on. There was a suggestion about adding something and so I went to the group to see if there was consensus to add that. First of all, I don't know who is involved in which group except for about 10 people because a lot of these names I don't recognize. So if somebody says they agree or they disagree, 9 times out of 10 I'm not even looking at your name, I'm just looking whether there's a green check or a red X because that's what I've asked to

do and I'm trying to see what I see the most of, I'm not counting, and if there is still a little microphone or microphone with a mute button it, I don't even consider it when I've looked at these things.

So that's all I was trying to do was to call the question so that we can move on. Okay? So that's what I want to say. Secondly, how people interpret that that's what I was trying to do I cannot control. And I apologize if by using a methodology that we have used for almost 19 months in every decision that we have made in this group somehow now is being twisted into some sort of methodology to shut down a group, I apologize because that certainly wasn't my intent.

But I can tell you as chair that if this where we're ending up, I'm becoming so frustrated with the fact that I can't even chair a meeting to get to decisions, using the same methodology that's been used for 19 months without people interpreting or inscribing there's an interpretation of some sort of nefarious, you know, back story behind the fact, then I don't know how we're ever going to get our work done. I simply do not know how we're going to get the work done because there has to be some sort of methodology for us to make decisions. There has to be.

And I'm at a loss for what to do to the point that I'm going to take next week to consider whether continuing as chair is even worth my valuable time because I cannot continue to argue about everything and everything be a slight when all we're trying to do is do good work. And complimenting me before insulting my integrity doesn't take away the sting. So, you know, I simply was trying to get an answer. I used the same methodology that we used last week and the two questions that I read at the beginning of this call, nothing different.

So I'm happy to, you know, go forward however people feel is necessary, but, you know, we've got to have a way to decide whether what we have here is workable, whether we're going to add things, and I don't think, my personal

perspective, that it is sustainable that every time one person or a couple of people or three people have a comment that they feel needs to be included and everyone else doesn't agree with that, that we can continue because that just gives - it's just not tenable, it's just not workable. And I've been on many, many working groups as well.

So I look to the group to tell me what they want to do on this. I see we've got three people in the queue, and we've got seven minutes. I was hoping we could get further today so that we can get to the real substance of the work because we still have to figure out what questions we're going to apply and if, you know, so I'm going to call on Greg, Steve, and Paul; first Greg.

Greg Shatan: Thanks. Greg Shatan for the record. I'll say once again this is an unfortunate discussion and I share your pain listening to it. I think it's, you know, ascribing all sorts of thoughts and nasty thoughts whether it's to, you know, people voting a different way than you, either that they have no reasoned judgment or that they are voting against something that is uncomfortable or voting against something that is inconvenient or that there's a conspiracy theory or that people are being slighted because of the group they belong to rather than because of the number of people who supported one outcome versus another.

You know, I think all of that is absurdly unhelpful to moving forward. And I think it, you know, creates an atmosphere where, you know, there's just this kind of - I apologize - the only word that's coming to my mind right now, and I apologize twice for using it, is butt hurt about this. It's just I think you know, making decisions that are always - when you have to decide between one thing and another there are people who support the other, the one that doesn't win. And we just have to get used to that and move on. I hear the orchestra playing so it's my time to stop talking. Thanks.

J. Scott Evans: Okay. Steve Levy.

Steve Levy:        Hi, Steve Levy for the record. Can everyone hear?

J. Scott Evans:    Yes. We still have the luau music though. Okay, Steve.

Steve Levy:        I thought it was organ music. I just wanted to echo what just mentioned and
                   what J. Scott mentioned, and I - my main comment is that I think there are
                   folks on this group who, you know, are trying to just delay and stir up as much
                   trouble as possible. And I hear the frustration in your voice, J. Scott. You
                   know, you've been chairing this for a long time. I've known you for a long
                   time. I think you're doing an excellent job. And my main comment, the point of
                   my comment is please don't take the bait. You know, when you say things
                   like, you know, you're debating whether you want to stay on as a cochair of
                   this group, I think that's giving in to the voices on this group that are trying to
                   create discord and trying to derail the process. So my main comment to you
                   is please don't take the bait; we need you.

J. Scott Evans:    Okay. I'm going to end - we're getting close to the end so the last call will be
                   from Cynthia and we're going to move to Paul McGrady. And if it's - if all
                   you're going to - I would say to the final speakers, if all you're going to do is
                   address something that I said, I don't think that that's really necessarily the
                   most productive. If what you have is an additional point or something you'd
                   like to make with regards to the process, please continue. Paul.

Paul McGrady:      Thanks. Paul McGrady for the record. I just would like to ask Kathy the
                   question that I put in the chat for her but didn't seen a response, was whether
                   or not her comments were made in a personal capacity or as a cochair of this
                   working group. Thanks.

J. Scott Evans:    Okay. I didn't see the thing but I will leave that to Kathy to answer to the list.
                   Cynthia.

Cynthia King:      Hi. I just - I just want to say that the more than we discuss the discussion
                   instead of discussing the topics, the more we are losing. We do not have

unlimited time, we do not have unlimited resources. We need to move forward with the project and discussing the discussion is a losing position, we really have to move forward. That's it.

J. Scott Evans:   Okay. So where we've ended up is we got through standard of proof for the summary for those that will be listening to this call. I believe we are on defenses and remedies. We're - I'm a little unclear so I'll have to listen to the record but that's where we'll pick up for the next call is to continue working through to ensure that we've looked at the charter questions and that we have extrapolated from those charter questions the necessary high level topics. Then once that has taken place, we will then move on to considering whether what questions we would apply - template-ized questions we would apply to the various topics, whether the suggested questions work, whether they need to be different questions, whether there need to be two sets of questions.

And our next call, I believe, is next Wednesday but I will turn it over to staff to introduce that to the group.

Brian Beckham:   J. Scott, this is Brian Beckham, could I ask a question?

J. Scott Evans:   Brian, you can ask it to the list because we need to move on to the - from the call so…

Brian Beckham:   Okay, well it's really quick. I just made a comment which is it's important I agree with what you've said as a way forward, but it's important that the other cochairs agree. Thanks.

J. Scott Evans:   I'm sorry, the other cochairs agree to what, sir? I'm sorry, I don't…

Brian Beckham:   To the same way forward.

J. Scott Evans:     Oh, okay. Okay. If we could find out when the next call is. Oh I see it's been put in the chat, it is Wednesday January 10 at 1800 UTC for 90 minutes. All right? Thank you, all.

Man:                      Thanks, J. Scott.

Terri Agnew:        Thank you, everyone. Once again, the meeting has been adjourned. Please remember to disconnect all remaining lines and have a wonderful rest of your day. (Marty), if you could please stop all recordings?


                                                    END