

GNSO
Special Trademark Issues : URS
1 December 2009 at 17:00 UTC

Note: The following is the output of transcribing from an audio recording of the Special Trademark Issues meeting on URS held on 1 December 2009 at 17:00 UTC . Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at:

<http://audio.icann.org/gnso/gnso-sti-20091201.mp3>

On page:

<http://gnso.icann.org/calendar/index.html#dec>

(transcripts and recordings are found on the calendar page)

Participants on the Call:

gTLD Registries Stakeholder Group
David Maher - chair

Registrar Stakeholder Group
Jon Nevett
Jeff Eckhaus

Commercial Stakeholder Group

Paul McGrady -IPC
Mark Partridge - IPC
Zahid Jamil- CBUC
Tony Harris -ISPCP

Philip Corwin - CBUC - Observer

Non Commercial Stakeholder Group
principle participants
Konstantinos Komaitis - NCSG
Robin Gross- NCSG
Kathy Kleiman - NCSG

Alan Greenberg - At Large
Olivier Crépin-Leblond - At Large alternate

ICANN Staff in attendance:

Kurt Pritz
Liz Gasster
Margie Milam
Marika Konings
Amy Stathos
Glen de Saint Gery

Apologies:
Jeff Neuman
Maye Diop
Wendy Seltzer -NCSG

Coordinator: The call is now recorded. Please go ahead.

Glen DeSaintgery: Can I do a roll call, David?

David Maher: Yes, please.

Glen DeSaintgery: On the call we have Zahid Jamil, Paul McGrady, David Maher, Mark Partridge, Jeff Eckhaus, Alan Greenberg, Konstantinos Komaitis, Olivier Crepin-Leblond, Jon Nevett, Kathy Kleiman, Robin Gross. And for staff we have Amy Stathos, Margie Milam, Liz Gasster and Glen DeSaintgery, myself. Have I left off anybody? Thank you, David, over to you.

David Maher: Okay. Thank you. I think we can start right off. This is the December 1 meeting on the URS. The first box that we have in front of us is whether or not the URS is mandatory for all new GTLDs.

Then other, the ICANN proposal is for best practice. The note says there's a tentative consensus based on resolution of other issues. Have those other issues been resolved? Any comments? Kathy.

Kathy Kleiman: I would love to put beside them at the end and not the beginning of the (unintelligible). Is that possible? Can we come back to it...

David Maher: I...

Kathy Kleiman: ...because the answer would be yes, but...

David Maher: I have no objection. Unless anyone objects to that, let's move this down to the bottom then.

Kathy Kleiman: Thank you.

David Maher: Okay, moving along then, the elements of the complaint same as the UDRP, the slightly different proposal from ICANN. Any comments on this? Kathy.

Kathy Kleiman: Yes. I think this consensus of the proposal from ICANN is not - I don't - is not accepted. The proposal from ICANN was not the UDRP. So it had ors instead of ands. So at least the UDRP is the starting point.

But we were asked and we have circulated elements of the complaint that our narrower and more defined and designed six areas that require substantive review in UDRP.

Back in Seoul the issue had been raised of the - the idea had been raised of reaching out to (unintelligible) and finding about its domain and dispute policy.

And no one - I thought staff might follow up on that. No one ever did. But I did. And they've done exactly the same thing, not quite the same words, but they've gone back to kind of the UDRP element and clarified them, made them more concrete for both the complainant and the respondent.

And I think it's exactly what we need to go forward with a really fast review of the URS is to clarify the element, not a lot, but a bit and go forward with that.

And so I wanted to see what people thought of the elements that we had raised or that NCSG had raised, but also of how (nominant) has done its work and whether there's room here for something that's more clear-cut for a clear-cut process.

David Maher: Okay, Alan.

Alan Greenberg: Yes. I'm a real novice in this area. So I'll prefix with that. Looking at the elements, I suspect Kathy is right, that they need some adjustment. They're just saying use them exactly as is from the UDRP is probably not appropriate.

Given that, I'm not sure that the proposal that NCSG made is the one that's likely to be accepted by this group. But I suspect that's something done offline between a number of parties and this group could come up with something that is a modification, but is reasonably balanced.

Tony Harris: Hello, Tony Harris joining.

David Maher: Sorry. Who was that?

Man: Tony Harris joined us.

Tony Harris: Tony Harris just joining.

David Maher: Oh. Mark or Paul, do you have any comments on this?

Mark Partridge: I'll comment. You know, I - we have talked a good bit about this issue. And there's three places where during the process where differences between the URS and the UDRP come into play.

And the first point is on the elements and the difference that the IRT suggested was that this be based on a registered right, not on something more liberal as is available under the UDRP, but that the other UDRP element should be the threshold to come into the door.

And we think it's very important that we keep that threshold the same because of the body of precedent that we have that exists as well as the other safeguards in the processes as the thing moves along. If we try to anticipate what will happen in the future, we create problems for the system, we create loopholes, et cetera.

The next step would be at the answer stage. And this is what I've suggested before and it's picked up here, that examples of safe harbors at this stage would be appropriate. And I, you know, I would support that.

Beyond that we have the procedural protections that are in place which is the level of review and that provides the added fairness and protects good faith registrants from an adverse decision.

And that - I think we've come to an understanding that that would essentially be a - no genuine issue of material fact on the elements of the claim. But I haven't seen anything that goes to modifying the UDRP elements in a way that I could support.

David Maher: Is there any possibility that offline between now and Friday you could work out something based on the (nominant) model working with a non-commercial group? Or is this just a plain lack of consensus?

Mark Partridge: Well, I guess as I've suggested before, safe harbors at the answering phase and the evidentiary protection, those are things that are open to have a discussion about how that would be...

David Maher: Well, as I - sorry to interrupt - but as I understand it there is a real difference of opinion here. I'm getting the impression from listening to Kathy that the UDRP elements, she believes, should be modified slightly. And I might - leaving aside the other issues, are you willing to talk about that or shall we just mark it up to no consensus?

Mark Partridge: I'm willing to talk offline with Kathy about that.

David Maher: Okay.

Kathy Kleiman: Great, great. Thank you.

Mark Partridge: But again, to the group as a whole, I think it's a mistake to go into changing the UDRP elements for the reasons I've said. And what I would be talking to Kathy about would be creating specific examples of safe harbors at the answering stage and making it clear to people that what the evidentiary standard and burden of proof is.

David Maher: Well, okay. But it's I hope - trust both parties will keep an open mind. And but I think we - well, there are other people who have raised their hand. Zahid.

Zahid Jamil: Thank you. I just wanted to echo and agree with Mark. I think that the elements are something that several people have looked on with the IRT, whether it was here.

There (unintelligible) add into the (unintelligible) would also like to see that the (unintelligible) of the (unintelligible) similar aspect and the elements remain the same because that really addresses the actual (clear mark) issue for us.

I think thought that, and I think that this (unintelligible) back to discussions I've had also with Kathy is that there are safe harbors, exceptions, carve-outs. Those are things that definitely we should look into. But it will address the (unintelligible) issues. And I'm wondering if any work on that has been done so far.

David Maher: Okay, Konstantinos.

Konstantinos Komaitis: Yes. What I would like to say and I would like to basically say to the group is that the NCSG proposal does not aim to change the UDRP elements. Rather we seek to tailor to serve the URS needs. And this is actually following the discussions that we've been having for these past couple of months.

The NCSG proposal really looked into the (nominant) one. And the great thing about the (nominant) one was that the amendment was incorporated where after some years of experience and mistakes that - well, we addressed the mistakes that they have been doing.

So the element that we are suggesting is - I meant to provide a higher burden of proof for the complainant as the URS we're saying and at

the same time try to avoid some of the mistakes that have been taking and the (unintelligible) that have been taking place within the UDRP, simply because we don't want to see them taking place within the URS system.

Needless to say that I believe that we need to create more checks and balances within the URS system so as to preserve both the trademark (corners) and the individual and non-commercial registrants.

David Maher: Okay, Alan.

Alan Greenberg: Yes. I'm not in the position to argue the merits of this. I'll just reiterate what you said, David, that at this point there seems to be a very wide divide between the NCSG proposal and what Mark and the business people have said and that in the absence of trying to find common ground, the staff will implement something.

At this point everyone doesn't like what they (want). So I think there is some urgency on trying to find some common ground where we may get something that none of us like and all of us think is worse.

David Maher: Okay, Kathy.

Kathy Kleiman: I hear what Alan's saying. But actually, and I hope everybody's sitting down, I'm not sure how wide the divide is because there have been discussion online and offline. And I think Mark's emphasis on the answer may be the right one and Zahid's expansion that is as exceptions and carve-outs.

A lot of this will be about the answer and clarifying what the respondent can present that would be considered valid. (Nominant) has done a lot of work on this. And so I think it's very - a very right barrier (for work). So I look forward to working with Mark and coming back to the group.

David Maher: Okay. Mark, is your hand still up?

Mark Partridge: Yes. I don't think so. I think it would be more productive for us to have the offline discussion I guess.

David Maher: Okay.

Mark Partridge: I'll (take)...

David Maher: Let's move on then. The format of the complaint where I believe Paul and others have been able to work out a format and we have a consensus. Is there any comment on that?

Kathy Kleiman: Is there a format?

David Maher: Oh, am I...

Kathy Kleiman: I'm sorry. This is Kathy.

David Maher: ...did I miss something?

Mark Partridge: No. We agreed on the description. The format was on the claims notice I think.

David Maher: Oh, I'm sorry. Okay. Well any - the format of the complaint, the note says we have consensus on that. Is there - can we move along then?

Kathy Kleiman: Yes

David Maher: Fine, okay. This brings us to standard of evaluation, the so-called Rule 56 issue. There's been correspondence on this in the past day. Mark.

Mark Partridge: I - this is set up in the boxes as if there are two different standards. And I think our consensus is on - is that both of those standards apply. And there are two different issues. There's the burden of proof and then there's the standard of evaluation.

The burden of proof advocated by the IRT, and this is what I thought we had consensus on, is that the complainant has the burden of showing the elements of the claim by clear and convincing evidence and that the standard for evaluation is that there is no genuine issue of material fact requiring further consideration.

And I think that the combination of those two things are what - are the - is the level of protection that we've all been comfortable with. But others can tell me whether I'm right or wrong on that.

David Maher: Okay. Any comments on that? Alan.

Alan Greenberg: Yes. I think the problem is that for people who have not been participating in these discussions forever, those words are - do not have enough clarity to give them a level of comfort on either side.

And I think we need to flush out, we certainly can't use a reference to a U.S. law which is used in a different circumstance. And I think we need to flush it out a little bit more so people around the world will understand what we're talking about.

David Maher: Okay. Robin.

Robin Gross: Thanks, thanks. Yes. I just wanted to say that I think we're in agreement with Mark on Rule 56 and the appropriate standards of clear and convincing evidence and no genuine issue of material fact.

It, you know, and if we have - and if we can clarify some of the elements and some of the safe harbors that would be helpful too. So I think we're in agreement.

We just it sounds like need to word-smith it a little bit and come up with the right language that isn't so U.S.-focused or, you know, you don't have to be a U.S. lawyer to understand that. But I think we're in agreement with Mark on what this should be. We have consensus.

Alan Greenberg: Yes. I mean one of the objections that someone raised at large is that this that rule about summary judgments and we don't have summary judgments somewhere else. Therefore it does not apply. We need to get rid of those kind of arguments and simply explain what it is we're talking about instead of making a reference to something that's not applicable.

David Maher: Okay. I think in the notes I'm looking at right now, best to remove the Rule 56 reference. We're talking about two things, no genuine issue of material fact and prior to that the complaint should have clear and

convincing evidence. The standard is no genuine issue of material fact. Is that a quick summary? Is that right? Margie, you had your hand up.

Margie Milam: Yes. I just want to comment that there was some email exchange between Alan and (Wendy) on Rule 56 kind of putting it into, you know, words as opposed to just referring to the rule. And I have that in Adobe Connect. Would you like me to put that up? Would that be useful for you guys to look at?

David Maher: Yes. It would be.

Margie Milam: Okay. Let me pull it up right now.

Alan Greenberg: I think (Wendy) and I ended up saying the same thing except she said it in lawyer talk.

David Maher: Okay. Let's...

((Crosstalk))

Margie Milam: Yes, maybe someone wants to walk through it, either Alan or (Wendy). I guess (Wendy)'s not on the call right now. Alan.

Alan Greenberg: I heard (Wendy).

Margie Milam: Oh, is she on? Okay.

Alan Greenberg: (Wendy), are you here?

Woman: I don't think she told us she (unintelligible).

((Crosstalk))

Alan Greenberg: I thought I heard her voice earlier in the call.

Glen DeSaintgery: She said that she couldn't make the call.

Alan Greenberg: Okay. Then I heard somebody else. Yes, I was trying to give what I understood to be the meaning of the reference to Rule 56. And I...

David Maher: Okay well...

Alan Greenberg: Go ahead.

David Maher: Let's focus on (Wendy)'s. I think - does anyone have a problem with the wording that says, "Thanks for this (framing). I've added in a few details." Can we reach consensus on this proposal from (Wendy)?

Alan Greenberg: Yes. She took my premises...

David Maher: Right.

Alan Greenberg: ...and left them alone and then rewrote the - what the examiner must do.

David Maher: Yes. I see...

Robin Gross: I think...

David Maher: ...two hands up, Robin and Mark. Robin, you want to go ahead?

Robin Gross: Yes. I was just going to say I think that we do have consensus on (Wendy)'s wording here. But I will lower my hand and see if others...

David Maher: Okay, Mark.

Mark Partridge: Yes. I'm in line with what Robin's saying. I just posted on the comment notes before I saw this a wording that would put the two concepts together. The complaint is established by clear and convincing evidence and there is no genuine issue of material fact requiring further consideration.

To me that's a simple clear statement of what has to happen for a decision to be rendered in the case.

David Maher: Any - so that's let's see is a standard. And then do we add (Wendy)'s wording to that or does that come in elsewhere?

Robin Gross: Yes, I think we want to add (Wendy)'s wording because she gives a few details that sort of flush out what that actually means to an examiner (in the process).

David Maher: Okay. I - that seems reasonable to me.

Alan Greenberg: I - yes, it's Alan. I also have a concern that this be made clear not only to the examiner who presumably is legally trained and the complainant was probably legally trained, but for the - to the registrant, to make it clear what it is that they have to answer.

David Maher: Well...

Alan Greenberg: And to be quite candid I'm not sure a statement saying there is no genuine issue of material fact is particularly meaningful to anyone who doesn't have that training.

David Maher: Well...

Alan Greenberg: Maybe that's not a reasonable expectation.

David Maher: Yes, I think there's a limit to what the (human mind) can do in this area. It's better to have clear language that we understand and that - Paul, go ahead.

Paul McGrady: Yes. I - the problem of course with digging into this level of detail and not adopting a real standard which is what Mark was proposing is that then we really end up sort of at the 11th hour now making judgments about how we will expect, you know, really what we will expect an examiner to behave and shifting some major burdens around the system.

So for example the Number 2, if a response was not received no defense can be imagined to indicate the use of the domain name in question is not infringing or fair use of the trademark.

So that puts the burden on the examiner to spend some time in essence sitting around, you know, imagining possible fair use defenses when the respondent didn't bother to show up.

In essence what we're doing is we're saying if the respondent doesn't bother to show up, doesn't bother to represent himself or be

represented we are going to shift the burden onto the examiner to act as the respondent's attorney.

And so a lot of these things, you know, look innocent. But when we really dive into them we realize that they are shifting the burden from the respondent or shift, yes, onto the examiner or other ways doing serious damage to the elements...

David Maher: Okay.

Paul McGrady: ...of the URS. So we...

David Maher: (Thank you).

Paul McGrady: ...should adopt a more straight-forward approach that Mark suggested.

David Maher: Thank you. Zahid.

Zahid Jamil: Thank you. I'm looking at - is my voice clear by the way?

David Maher: Yes.

Woman: Yes.

Zahid Jamil: Okay. I'm looking at the issue, the example it's in what I think (Wendy) has added. (It's an) example evidence for (matching) trademark (registrar) jurisdiction of performance of standard review.

I understand the inclusion of this language in the (unintelligible) claims and (trademark) clearing house. But here I think what we're doing is

changing the way the UDRP was and I don't think it's a requirement for UDRP either. So that's one point there.

And secondly, when we're saying that - sorry (unintelligible) - the evidence renders in use abusively to infringe the trademark. To what extent would that evidence need to be provided?

And one last point, if the examiner concluded the complainant has not met its burden or that real factual questions remain around any of the elements, I think the language that real factual questions remain around any of the elements become very wide. I think we need to tighten that language up.

David Maher: Do you have a proposal as to how to do it?

Zahid Jamil: Good point. I haven't yet because I've just seen it. What I will do is come back with some language definitely.

David Maher: Okay. Kathy.

Kathy Kleiman: I don't have (unintelligible) Zahid will come back with language that clarifies and improves this. And I think that's great in the idea that we keep Mark's language as the standard and maybe use this as an explanatory note so that both are there, the legal language and the kind of layman's terms.

But I think there's - I would hope that we could do both sets of language so that someone sitting down to read this without a legal background could understand it easily.

David Maher: Okay. Mark.

Mark Partridge: I think Kathy's making a good point in that the legal standard is something that does have established meaning at least to people who practice law or who will look it up. So, you know, we can tell what that is. And then adding some explanatory language for lay people could be useful.

David Maher: Okay. I think, Margie, we can go back to the other chart. And that brings us to the note of notice where I believe there is consensus, email, fax and hard copy. Anyone - any comment on that? And that brings us to notice of contents. Any comments on that? (Unintelligible) if not move along.

Woman: Kathy.

David Maher: Kathy, go ahead.

Kathy Kleiman: You know, weren't there some, maybe I'm mixing up my (unintelligible). To Alan and Olivier, were there some language issues here...

Alan Greenberg: That's mentioned...

Kathy Kleiman: ...that you had been advocating for?

Alan Greenberg: That is mentioned there.

Kathy Kleiman: Okay. I thought there were some more details on that.

Alan Greenberg: We don't know how to implement it, but the words are there.

Kathy Kleiman: Okay.

David Maher: Okay. Then moving along to the effect of filing a complaint on passing initial examination, initial freeze, the transfers, no (unintelligible) changes, but the (main name) still resolves and other features would function.

We appear to have consensus on that. Any comments? Moving along then, time to answer, I apologize. I'm not aware of what consensus we reached on this. It's 14 days with a limited extension of seven with no answer fee. Is that the consensus?

Alan Greenberg: No. The consensus is the left box, 20 days no answer fee I believe.

Kathy Kleiman: Yes.

David Maher: Okay.

Alan Greenberg: That was on the assumption that the next items ensure fast decision.

David Maher: Okay. Mark.

Mark Partridge: Yes. Alan just basically said what I was going to say. Our position was 20 days was okay if the decision is issued within three days after the close of the time for submissions. And we think that's possible with online...

David Maher: Okay.

Mark Partridge: ...admissions and processing.

David Maher: Okay. So that brings us to the commencement or evaluation or again consensus, may be late upon expiration of 20 days or submission of answer. Expedited basis goal is three business days, detail left for staff to determine. I see no hands raised on that.

That brings us to a number of examiners, one examiner with legal background on an expedited basis. Any comments on that? That brings us to assignment of examiners, rotation within a provider to avoid (forum) shopping, but not random among providers. Examiners trained and certified, provider has the right to drop non-performing examiners. Kathy.

Kathy Kleiman: Here my - I was wondering if staff had examined what's in parentheses which was kind of a critical element from NCSG perspective of what Mark and I developed, that staff to examine implantation option to have a pool of examiners share multiple providers.

The idea as I believe we've discussed on the call is that you have people who have gone through training. They are all certified. They have all been properly trained in the URS. They're all eligible as examiners and that you - as a provider you can't kind of pick or choose kind of in a results-oriented way.

David Maher: Jeff Eckhaus.

Jeff Eckhaus: Yes, thanks. I - just as a quick question, I'm sorry if maybe I'm just missing something here, but on the trained and certified who - I'm just

curious, who is the certification coming from and the training done on the URS?

Considering, you know, it's never been done before. I'm just curious. Is there - is it the actual forum that's going to certify them? Is it somebody independent? Maybe I'm just missing this. Could someone just explain that please?

Kathy Kleiman: David, Mark has a lot of ideas on this.

David Maher: Mark.

Mark Partridge: Well, Kathy and I talked about possibilities. We didn't really micromanage it down to exactly who would do it. But it could be that a separate CLE body is created. It could be that it's done by the providers. Or it could be done - that it's created by ICANN. And how it would be funded likely could be that people who want to be panelists would sign up for training.

David Maher: Okay.

Kathy Kleiman: And CLE, for anyone who doesn't know, is continuing legal education.

((Crosstalk))

David Maher: Alan.

Alan Greenberg: Yes. I'm a little bit leery of words saying that a forum cannot refuse to use examiners because there are issues in nonperformance and things like that. I think we need to capture the intent.

And the intent is that a particular forum should not be able to only select examiners who find for the claimants. And therefore that forum becomes known as a good place to do it because you're going to get a quick judgment in your favor when you file URS.

So somehow we have to work against that, at the same time giving the forums the ability of rejecting people who just don't deliver their answers for instance.

David Maher: Mark, was your hand up?

Mark Partridge: Oh, I was going to take it down. But, yes, I think we - that was part of our discussion last time. I think the idea was that they - the examiners could pick where they would work and the providers could drop people who do not perform.

But that doesn't mean reach certain results. It means they don't turn in their decision, they don't, you know, they're non-responsive or they're overruled by appeal all the time.

David Maher: Okay. Kathy.

Kathy Kleiman: And in fact Alan's exactly right. And that language was added to the (unintelligible) and provider have rights to drop nonperforming examiners to capture that.

But back to my question which I didn't phrase very clearly, to anyone on the call who's ICANN staff, has there been any kind of evaluation or

even discussion or leaning on this issue? You know, would you say you're leaning more against it or for it? Any thoughts?

David Maher: Margie.

Amy Stathos: This is Amy, David.

David Maher: Amy, yes, go ahead.

Amy Stathos: Kathy, when you say on this issue, we've been talking about a couple of different issues. So I just wanted to confirm what you were talking about.

Kathy Kleiman: The parentheses in the box where the issue is assignment of examiners, there's a parentheses. It says rotation of examiners within a provider to avoid forum shopping, but not random among providers.

Amy Stathos: Right.

Kathy Kleiman: And in parentheses, staff to examine implementation options and have a pool of examiners shared by multiple providers. And this is what Mark and I had come back with from the offline discussion.

Amy Stathos: Yes. Well, we have not had a discussion with any particular provider in that there are no URS providers at the moment. However, I think as Mark knows, I mean there's - it's certainly I think a possibility in that many of the let's say for example UDRP panelists do provide services to more than one of the providers.

So I don't think it's - there's any prohibition on people providing services to various providers.

I haven't looked nor have we talked to anybody about the mechanism of having just one pool. I think it would be difficult to dictate to providers who they utilize in terms of who they work with. But it's certainly something that we can talk with potential providers about. We just haven't had a chance to do any of that.

Kathy Kleiman: Can I modify? Not necessarily one pool and, Mark, correct me if I'm misspeaking, but that a provider who submits their credentials to - not a provider, a panelist or an examiner, a person. So Mark submits his credentials to a URS provider. If he is properly certified and has done - has no record of kind of bad acts, that provider accepts him.

Amy Stathos: See I don't think that we can dictate to a provider who they must utilize as, you know, a panelist.

Mark Partridge: Kathy is on point with what we discussed. That was our recommendation that people who were certified would be entitled to be on any of the panels they chose unless they were rejected for performance failures or language or other substantive issues.

Kathy Kleiman: And there's precedence...

Mark Partridge: Right.

Kathy Kleiman: ...that because when we have three-person panels, the provider becomes the administrator for a person who has no affiliation with them whatsoever in many cases the third panelist who comes on.

Amy Stathos: Sure. I mean and I don't see that there's an issue with that. I'm just saying to tell organizations that they must utilize somebody, I'm just - I would need to look at the ramifications of that. And we haven't done that yet.

Kathy Kleiman: Would that be possible to do since from an NCSG perspective this is a critical element of...

Amy Stathos: I'm sure it's possible. I don't know if it's possible to do between now and Friday. But it's, you know, something we can try to...

Mark Partridge: Clearly the ability to make sure that claimants don't - can't do forum shopping is the target regardless of the implementation.

Amy Stathos: Yes. I don't think there's an issue with having that principle as an, you know, applied to the process of panel selection.

Mark Partridge: Maybe the way to do it is to say that's the principle and this is what the STI recommends.

David Maher: Well, okay. I think we've exhausted this subject. Evaluation on the merits, the note says we have consensus on this. Unless withdrawn by the complainant, the examiner will evaluate the claim on the merits in every case even if there's a default or - and especially if there's an answer. No comments?

Okay. The remedy, if successful -- and here I think we have some issues -- the proposal that the domain name be suspended for the

balance of the registration period and WHOIS requirements, option to pay for an extended suspension. Comments on this?

There are a number of questions in the notes. Or do we have consensus on the default provision with no option to extend for one year? Alan.

Alan Greenberg: Yes. I'm just noting as I read this that although I'm not sure it makes any sense by removing the one additional year we get the effect of a transfer without doing the transfer.

In other words, if the claimant wants to keep on renewing for - until the year 2075, it still stays in the name of the other person, is locked and is unavailable, but hasn't technically been transferred. I don't know if that has any merits. It's just a side note because it came into my mind.

David Maher: Zahid.

Zahid Jamil: Thank you. I think I'm on the (second) where we're looking at remedy (successful) on the merits. Is that right?

David Maher: Yes. Yes.

Zahid Jamil: Thank you. Thank you very much. Here, I cannot (unintelligible). And there's a problem that will be apparent if you're (dealing) with URS and a trademark holder is complainant. And after one year the domain name goes back into the pool and goes - a revolving door issue.

What will be the effect (unintelligible) can keep coming back again and again. And the URS will be filed again and again on that domain name

if the option isn't given to transfer. Otherwise the trademark holder has been forced I think to pay for the URS and then do an additional UDRP in addition to the URS.

And I think that's a financial burden because a number of domain names they'll be dealing with under the URS is going to be substantial. So what I would like to say is that (unintelligible) (position) (unintelligible) the people do they feel that there is a remedy for that? Is there some sort of a response to that or solution to it?

David Maher: Jeff Eckhaus.

Jeff Eckhaus: Yes. I want to respond to that. I don't think that - well, let's look at currently at let's - what's happening now with UDRP decisions. I'll need to find this, but I believe that there was a (study that did) what happened to names that were won in UDRP and that it was some very large percentage of the names were dropped by the person who won the UDRP filing.

So we can look at it now and say what are the people doing right now when they win the UDRP. The names are not taken out of circulation. They have a chance to renew it. And it seems the majority of them are dropping the names.

So to say that this is something new that we have to address in the, you know, with the URS I think isn't true. I think - we see that what's going on right - they have the same options - they'll have the same options now with the URS that they have now with the UDRP.

David Maher: Any other - Zahid.

Zahid Jamil: Thank you. The thing is that really UDRP is just one (district) resolution that you have to go through. But with the URS you have to go through the URS, get to the end of that and then over, you know, probably wait until the appeals process is over.

And then file a UDRP again and there's another (district) resolution process, so quite a bit different from just the UDRP because now you have two things you have to go through.

Jeff Eckhaus: Right but the point of your email I'm reading, it says after it gets put back into the pool and gets snapped up forcing again TM owners to file the UDRPs. But I think most of the - I'll have to dig this up but it was saying that many - even after winning the UDRP let the names drop and go back into the pool.

So it's the same situation they're in. This isn't a new remedy that we need to think up because trademark holders are facing the situation right now. It's their decision whether to renew it or let it drop, it's not a new situation with the URS.

I understand there's one other step but what happens with it dropping back into the pool is what goes on right now.

Zahid Jamil: Can I - this is Zahid again in response to that, that kind of information would be very useful for me to take back to the (BC). If you can get me that - those kinds of statistics or information, I can at least go back and convince them and say look, you know, this is a problem that is already existing. So it becomes difficult for us to saying something new should happen.

If you can get that information, then that might help.

Jeff Eckhaus: I will definitely - I will look that up right after the call and try and send that out to the whole group, okay?

Man: Thank you.

Jeff Eckhaus: Okay.

David Maher: All right, Jon.

Jon Nevett: Yes, thanks Zahid. I'm not going to repeat what I put in the email. I mean, this was a clear in the IRT perspective to have a choice for the trademark holder. And I think we're assuming that all names that might be subject to a successful URS challenge must go to the complainant otherwise, you know, the (nefarious) conduct will continue.

Whereas there are plenty of names that, you know, might be subject of a successful URS that if back in the pool, a legitimate user can pick up. And, you know, we can discount that. And to Zahid's point that it doesn't have to be a two step process.

If a trademark holder wants to get the name and wants a transfer, then they should just choose the UDRP at start. They don't have to go through the URS, just go down the UDRP road. You know, and if they think it's' worth whatever the filings be of the URS to do it in two steps, that's their choice as well.

I mean, they're protecting their trademark and they might choose to say all right I really want to take down. And then, you know, some time to figure out whether I want to get the name back or not. And again, it's the trademark holder's choice and we're giving them options on how they could protect their trademarks.

David Maher: Mark.

Mark Partridge: Yes, Jon is expressing what the IRT's proposal was and I think that's, you know, a good balance and probably the minimum benefit that's important here.

But I guess I'm wondering why there - an added remedy or transfer shouldn't also be available after there's been a chance for appeal without going through the UDRP.

I think the main reasons we've had against it after the appeal process has run its course, has been technical reasons. But it does better address the ultimate goal of reducing the cost of dispute resolution to have that occur in one process, that's a goal that I think we agreed was important.

And if it comes after adequate protection for good faith registrants, that would be a more efficient process.

David Maher: Konstantinos.

Konstantinos Komaitis: Yes, to answer to Mark's statement, the idea is that we're not evaluating how bad or good the domains names are. We're evaluating them on (issues of) activity of the registrant.

And simply because a registrant under the URS was unsuccessful and was proven that the use of the domain name was abusive. The second registrant does not mean - it doesn't mean that the second registrant will engage in exactly the same activity as the first one.

So it is very unfair to consider that just because under a URS filing the domain name was considered abusive, that all subsequent users of the same domain name will be abusive. And my understanding for the URS and that was very clear in the IRT and in the ICANN staff was that the UDRP - the difference between the UDRP and the URS is when it comes to the remedies.

So if we allow an automatic transfer, then we don't distinguish the two systems. We're just saying - we're merely displacing the UDRP by providing needless to say as I said on the emails that I circulated, an extra (judicial) remedy that the panel is not even considering.

The panel is only considering whether the domain name will be placed on hold. So we'll ask - we're about to provide the remedy that we haven't even elaborated on it.

David Maher: And Zahid.

Zahid Jamil: Thank you. I was just sort of - was mulling over the point made by both Jon and I think if the statistics show - just something to think about, I'm not saying this is a position.

But if the statistics show that the trademark owners are not actually transferring domain names, then that shows that in practice, the risks

of the domain names being transferred and not being available to other
- creating a registrants is limited and low.

So by putting this safeguard in case somebody needs it wouldn't be a
problem. So I'm going to try to reverse the argument, you know, it's just
something to think about.

And second is, if supposing there's a URS and it goes back into the
pool, could we create a situation where the same trademark owner
comes back again, complainant comes back again and says this URS
is being again or is subject to habitual, you know, abuse, et cetera.
Could they do this without a fee or have some benefit the second time
they do it or a third time they do it?

David Maher: Kathy.

Kathy Kleiman: Zahid, you - let me see if I understand the question. Is the concern that
the same registrant is going to keep registering the domain name
because if that's so, I don't see what the incentive is for that?

A registrant registers a typo and they register it for five years. The
trademark owner picks it up within the first few months, has the rapid
review of the URS and it's suspended for the balance of perhaps, you
know, say four and a half years. And why - what's the incentive for the
registrant to come back and do it again?

Zahid Jamil: Can I respond to that?

David Maher: Sure.

Zahid Jamil: Thank you.

David Maher: Go ahead.

Zahid Jamil: It's not so much - thank you. Yes, number one, the same registrant that could be one example or most probably you won't get the same registrant. It'd probably be somebody else posing to be the same registrant. It could be a guy who changes his company name or use a different proxy, we don't know.

But the same type of registration, the same sort of abuse on that domain and coming back again and again, what do you do about that? So I'm having to continually (file) a URS if the issue is I'll file it once but it comes up again and it's the same sort of abuse that it's been subjected to. If I have some sort of benefit and the second time I do it, it's something maybe we can live with.

Kathy Kleiman: David, can I respond?

David Maher: Sure, go ahead.

Kathy Kleiman: Okay. Well the second time you go to UDRP and end it. Right? Why would you go to URS a second time?

Zahid Jamil: Okay, so - I'm sorry, I guess I'm responding. The issue there is that there's going to be so many new GTLDs, so many domain names that trademark owners are going to have to manage that this becomes a question of volume and cost.

And that's why UDRP doesn't provide sufficient remedy and that's precisely why the trademark owner is looking to URS, it's a cheaper method to be able to (unintelligible) abusive, you know, demonstration.

David Maher: Alan.

Alan Greenberg: We seem to be in a mode of, you know, that we're writing rules and we must follow the rules. If indeed what's going to happen is after URS someone is going to go to UDRP and we believe they're going to win and that has to be the mechanism for doing the transfer, it seems rather foolish to not put the transfer capability in the URS and, you know, and stop the extra process.

I really don't see the harm if someone's going to go to UDRP anyway. It's going to pay more money and then get it transferred. What is the rationale for not just allowing it? This is not a big issue with at large but it seems we're talking semantics and saying we must follow a set of rules when we could bypass it and make life easy for everyone.

David Maher: Konstantinos.

Konstantinos Komaitis: Yes, I think that we're discussing under the assumption that all trademark owners want to get transfer of domain names which I don't think is the case. I mean under the UDRP you have the option of either to transfer or the cancellation.

And there have been instances where by the trademark owners is asking the cancellation - just the cancellation of the domain name which means that it goes back into the pool and anyone can grab it.

So if that - if, you know, this is relevant in the UDRP, I don't see why it shouldn't be relevant in the case of the URS. I mean, the same more or less happens in the UDRP and the trademark owner has the option to choose either between transfer or cancellation.

David Maher: Kathy.

Kathy Kleiman: I defer to the registrars for many of the details but, you know, (Jeff) and Jon. But I think here the difference, Alan, of what we're talking about or what I thought Zahid and I were going back and forth on is we don't want - the URS is not supposed to be the UDRP.

It's a rapid review, it's a way of taking down a use that might be abusive and suspending the domain name. But another use of that domain name might be perfectly appropriate and again the - as we know, the registrant has not chosen to register this particular domain name.

But it's the pattern of abuse that Zahid is bringing up. And that pattern of abuse, we don't know about on the first use.

There may be a million reasonable uses or there may be - Jeff Eckhaus posted kind of the Rolex example, the inadvertent use or maybe in some countries you're allowed to give an accurate description of the goods and services that you're providing even without the trademark owner, like in the United States, there's a big Volkswagen case.

And somebody who fixes Volkswagens is allowed to say he fixes Volkswagens even without Volkswagen's permission. Another country there may be - that may be considered abusive.

So here may have inadvertent abuse. We may be able to have easy and quick remedies for the domain name registrant. Another registrant may have completely non abusive use of a normal word.

But it's when you get to those cases where there's a pattern of abuse then you have a quick, cheap remedy and that's the UDRP. It's much cheaper and much quicker than court. And that's why we created it ten years ago.

David Maher: Mark.

Mark Partridge: I wanted to make the factual point that the instance of people electing a cancellation as a remedy in a UDRP action is extremely low, probably less than a 1% of the cases. And the reason for that is because the name falls back and can be used again in an abusive way.

So, you know, the concern is real here. But there is in fact the UDRP is process to use that - for people who do want transfer.

I still come back to the point that after this has had a chance to go through appeal and everything, it seems like allowing for transfer's a possible remedy doesn't cause any harm to anyone and would be an improvement in creating an efficient and effective system.

David Maher: Zahid.

Zahid Jamil: So I'm thinking about this, about what Kathy has said. If there's abuse of transfers or (unintelligible) transfers are not a problem, that these - what we've heard from the (unintelligible) that are not a problem in practice.

So why don't we just put this in and review this after a year. If it's not been used or it's being abused, then it can be taken out and I think that is the exact purpose of the review that we're talking about the end of this (unintelligible).

Another solution may be and I'd like to - this is something offline people are sort of discussing on the chat is, well could there be a provision for repeat offenders such as lower fees or expired notice times or the remedy to transfer if it happened a second time.

David Maher: Alan.

Alan Greenberg: Yes, I just wanted to note that what (Jeff) said was not that people don't use the transfer capability in the UDRP. I think what he said is they use the transfer but then let it drop afterwards so they don't maintain the registration.

Jeff Eckhaus: Yes, that's correct, that's what I was saying. I'm trying to find the study - actually the study was by CSC and I'm trying - I had part of it and it was saying that - I'm trying to find out of the thing but it was over 7000 domains were let expire that were one in a UDRP filing.

Yes, that's - I'm trying to get some of the - I have it here, I'm just on a blog somewhere that they were citing it. I'm just trying to find the

original piece but it was from a study from January 2000 to May 2009 that 7000 names that were one in UDRP filings were allowed to - they say to lapse or to let expire.

Alan Greenberg: Knowing 7000 out of how many would be useful.

Jeff Eckhaus: That's what I'm going to say. That's just a flash number and I found that it was CSC, Corporation Services Company, that did the survey. So I'm going to try to contact them but if anybody else has a good contact there, I think they did a huge study on this.

Zahid Jamil: And this is Zahid. I think that addresses the problem. I think that addresses the problem because if the statistics show that they're being dropped after transfer of one year, I think that addresses the problem that (unintelligible) was saying but they don't go back to them if legitimate users want to use it.

So statistics show that it's not a real problem, it doesn't lead to (unintelligible) effect or blocking of domain names when used by others and if that is the case, (unintelligible) request that you put it in and review it subsequently.

David Maher: Paul.

Jeff Eckhaus: Sorry.

Paul McGrady: I volunteered to get the study from CSC and to contact (WIFO) and (NAFT) to get the latest headcount on the number of UDRP decisions since the inception and put together a little chart so that we can decide whether or not this is a real problem or not.

David Maher: Good, thank you. Kathy.

Kathy Kleiman: In light of that, I'll take down my hand.

David Maher: Okay. I think - I don't hear a consensus on this and I think we've had probably enough discussion unless anyone objects, I think we ought to move along. The effect of filing answer after default. We appear to have consensus there unless there's any comment. And then - go ahead.

Man: I have no problem. I think we need some clarity if the answer comes in, you know, during the examination or things like that, details to be worked out.

David Maher: (That's a) detail.

Man: Yes.

David Maher: Okay, then that brings us to the appeal of the decision, where we have consensus but we need clarity on who pays for the appeal. The suggestion that losing appellant should pay the fees, any comment on that?

Kathy Kleiman: Yes.

David Maher: Kathy, go ahead.

Kathy Kleiman: In the UDRP, just by way of example, there's no appeal but there is a three person panel and the costs are split and so I would recommend that as a model for here.

David Maher: Any other thoughts on that? Robin.

Robin Gross: Yes, I just noticed that on the page under the ICANN default proposal that is says (unintelligible) appeal go to an ombudsman. So and I just wanted to reiterate our NCSG's concern that an appeal go to an ombudsman.

We feel like that would be a totally inappropriate response. And it's a different sort of mechanism that doesn't really belong in this kind of adjudication of rights, process. So I just wanted to, you know, once again state that we don't think it should to go an ombudsman.

Man: I thought that was a staff proposal which we rejected.

Amy Stathos: May I - David, this is Amy. May I speak to that?

David Maher: Sure.

Amy Stathos: Yes, I believe I clarified on a call a couple calls ago that in fact an ombudsman was not the staff proposal. It was something that was identified as an option in the IRT report.

And we indicated that that was what was - has been proposed in the sense that it required further consideration. So it's not necessarily a staff proposal as a solid factor of what our proposal would be.

Robin Gross: Okay because the way it's worded here, it looks like it's the staff proposal as the default proposal, so that's why I wanted to raise a flag that that would be a big problem for us.

Man: But it's not in the (unintelligible) unless I'm misreading it.

David Maher: Can we all - can we just agree that we'll strike the ombudsman?

Woman: Yes.

Robin Gross: Yes.

David Maher: Jon...

Jon Nevett: (Unintelligible) ombudsman in the (unintelligible) proposal.

David Maher: Okay, I think we have a consensus that ombudsman should be struck from the wording in both boxes. Kathy, getting back to the appeal, do we have a consensus on who pays? Kathy?

Kathy Kleiman: I actually wanted to pose - actually I think Jon may have been ahead of me.

David Maher: Go ahead, Jon.

Jon Nevett: No, it's fine. You can go ahead if you have a proposal.

Kathy Kleiman: I actually had a question, I had floated it by a few people but I don't think I sent it to the whole list which is does - given that the cost of the URS appeal and the UDRP may be about the same hypothetically.

Do we need an appeal for both sides or just an appeal for the registrant? And if the appeal is just for the registrant because the complainant can go to - the trademark owner can go to the UDRP. So question, do we need an appeal for both sides?

And if the appeal is only for one side, for the registrant, then probably the registrant - I haven't run this by NCSG - probably the registrant would pay.

David Maher: Let me - Zahid.

Zahid Jamil: Just a thought. A failed URS should not prejudice any subsequent UDRP - I'm just following up on what Kathy said - and if that is the case, maybe (we) want to clarify that in the URS process that if you do fail a URS the complainant is not sort of considered to be (unintelligible) not having a case, for instance. And maybe we'd want to put that on the agenda.

Kathy Kleiman: Provided the same language for the registrant, that make sense?

Man: Sure.

Kathy Kleiman: But what do you think of not having - about the appeal being for a registrant because the complainant has a UDRP?

David Maher: Any...

((Crosstalk))

David Maher: ...response to that?

Man: We'll have to think about it.

David Maher: Alan.

Alan Greenberg: I - it may well be true that most of trademark holders will go (to the) UDRP process at that point, but I don't really see the need to remove it. It doesn't cost us anything and leaves the option open. If no one exercises it, we've learned something when we go to rewrite this whole thing in three years.

David Maher: Okay. I don't see any further comment and on the next box we've agreed that the ombudsman is no longer under consideration. The evaluation of the appeal by a standing three-person panel or panelists appointed by the appellant. Anyone want to talk about - Alan.

Alan Greenberg: Yes. No, this is on the previous one. I don't think we've ever written down what happens to the domain name during appeal. I'm assuming that it gets put back up during the appeal but I don't think we've ever documented that.

Jon Nevett: Could I respond to that?

David Maher: Sure.

Jon Nevett: Sure. This is Jon. I could tell you from the (unintelligible) proposal the - that would be true, Alan, in case of a default. But if there's a decision against the registrant then no, it would stay down pending appeal. At least that was the intent of the drafter.

David Maher: Hey, Margie, you had your hand up.

Margie Milam: Yes, sorry. I just wanted to go back to the prior point. Did - what was the consensus on the fees? I don't - I didn't - I'm not sure what we would put there so I just wanted to ask you, David, clarify.

David Maher: Okay. Kathy, do you want to...

Kathy Kleiman: I had made a proposal of splitting it.

Man: Regardless of who wins?

Kathy Kleiman: Regardless of who wins. I see - know what, I think I need to go back and talk to NCSG about this.

David Maher: Okay, so at this point we don't have a consensus. Mark, did you want to comment on that?

Mark Partridge: No. Different point. (Unintelligible).

David Maher: Amy?

Amy Stathos: Yes, mine was the next point that we were talking about.

David Maher: That's fine.

Kathy Kleiman: We'll - this is Kathy. We'll have a response to that next call. Sorry about that.

David Maher: Okay. Well, that brings us to the evaluation of the appeal. Mark.

Mark Partridge: Yes. The note there I don't think captures what the consensus was in that it says panelists appointed by the appellant. It's - the idea was panelists appointed by the parties, that is the appellant picks one, the respondent picks one and either they or the provider pick a third one.

David Maher: Kathy.

Kathy Kleiman: Agree with Mark completely. And I don't think the or - it's interesting. I thought we discussed on the last call that these actually both be options and so maybe - that may be what the or means or it may be a choice of one or the other.

And I thought to have these - to have a standing three-person panel is an option for appeal. I think will make the process go faster. So maybe clarification, unless anybody objects, of that order. Say both options are available and then the details of what Mark had said I agree with completely.

David Maher: Alan.

Alan Greenberg: Yes. Is it clear that we're talking about the same URS provider who's managing the appeal as managed the original URS? If so, we should specify that.

David Maher: Okay.

Kathy Kleiman: Okay.

David Maher: Okay, moving along then. I think we've come to abuse of process and we appear to have a consensus here. Is it - with which is the consensus?

Alan Greenberg: David, it's Alan. Did we decide on whether the domain is up or down? I don't really care which it is. I just believe we need to document it during the appeal.

David Maher: No. Jon, can you give language to Margie on that? Or, Mark, did you have something to say?

Mark Partridge: Well, I was just going to support. I think what Jon said is the right approach. If there's a default, it goes back up until the case is decided on its merits. But once it's decided on its merits, it stays down until there's a reversal on appeal.

Alan Greenberg: Okay.

David Maher: Okay. Back to abuse of process then. Which one is the consensus?

Woman: It's the one on the left. The left column is the (unintelligible). The right column is staff proposal.

David Maher: Okay. So the two abusive complaints are one finding of perjury, barred for a year and so on. So that's the consensus. Okay.

Kathy Kleiman: Yes. This is Kathy.

David Maher: Kathy, go ahead.

Kathy Kleiman: I see what you're saying, David. There - it's written out two different ways on the left side. In one case it's one finding of perjury. And then we come - I'm reading it two different ways as well. What happen - why do we go to two complaints of perjury if one complaint bars you? Am I misreading that?

David Maher: Oh, I see, yes.

Margie Milam: But I think I can clarify that. I believe the first one is barred for one year and the second one is barred forever I guess or - I think it was a time period.

Kathy Kleiman: Great. If you want to clarify that, that sounds good.

David Maher: Okay. Mark.

Mark Partridge: I want to express a concern about the barring for perjury after simply one. I guess it says two and that seems reasonable but I think oftentimes the problem will not actually arise from the complainant but it might arise from the attorneys who are working on behalf of the complainant.

And so it, you know, just having it happen - permanently barred after one instance is a bit too draconian under those circumstances.

The - I'm - have a bigger concern though about Point 3 on there where you're going to say if a panelist is overturned three or more times they lose their accreditation. I don't think it's necessarily apparent that a wrong - that being overturned means that it was an abusive decision.

I think it should be that there should be a finding that there - that the panelist abused its discretion or abused its office rather than simply was wrong.

David Maher: You know, Justice Sotomayor wouldn't have made it if the test was being overturned.

Mark Partridge: Yes. So I would suggest that phrase. That there's three or more instances where the panelist has been found to have abused his or her office in rendering a decision.

David Maher: Kathy.

Kathy Kleiman: I agree. I agree completely.

David Maher: (Good). Okay if there's nothing else on that, can we move on to the review question?

Margie Milam: David, I just want to confirm. So there is consensus though on the two complaints for perjury (per) same entity would bar you from the system?

David Maher: Yes - I (think) Mark...

Kathy Kleiman: David, I think there may be disagreement on my side on that. That's not what I was agreeing to.

Mark Partridge: Kathy, you wanted more or you wanted less?

Kathy Kleiman: No. I was agreeing to your language about the appellate - the abuse of discretion.

Mark Partridge: Right.

((Crosstalk))

Mark Partridge: ...on the second clause that's on my screen in red.

Kathy Kleiman: I am seeing disagreement among in NCSG. Konstantinos, did you want to say something about this, the...

Konstantinos Komaitis: I don't think that we can - I mean I understand where Mark is coming from. But at the same time I don't think that we can punish, you know, the attorneys. It is the trademark owners that, you know, if they engage into abusive conduct then they are the ones that have to be punished...

Mark Partridge: I did...

((Crosstalk))

Konstantinos Komaitis: ...correctly. I'm sorry.

Mark Partridge: I didn't mean that you would bar the attorneys. I meant that to be permanently barred based on perjury it would be more than one instance. You'd be barred for one year as it says here based on one instance. But you'd get a second chance if it was only one. The second time you'd be out.

And the reason behind that is that it might not be the complainant's fault. I know it's the complainant's attorney's fault. But it - that, you know, the complainant could go to different attorneys and then get a second chance at...

((Crosstalk))

Alan Greenberg: And this time warn their attorneys not to lie.

Mark Partridge: And then - and get - and tell their attorneys to be good citizens, you know. It's...

Konstantinos Komaitis: And after the second time, let's assume there's a second time, are they barred for good?

Mark Partridge: I think that's what this idea was here, that they would be.

David Maher: Okay. Paul.

Kathy Kleiman: I think that's what it says.

Paul McGrady: Just a question on clarification, we say two complaints of perjury per entity. Do we mean two findings of perjury as opposed to just complaints made by (unintelligible)?

David Maher: Yes. That should be findings.

Paul McGrady: Thanks.

David Maher: Alan.

Alan Greenberg: Yes. I thought we were going onto the next item. But there's also - going back to the one on what happens on appeal. The notes that Margie had doesn't really answer the question. The answer was if there was a default then the name goes down and it stays down until there's a finding. And, you know...

Mark Partridge: No. It goes back up when there's an (answer) is filed.

Alan Greenberg: ...it goes back. But the question was during appeal, that we documented, entering...

((Crosstalk))

Mark Partridge: Once there's a decision on the merits and it goes down, it stays down until that decision is reversed on appeal.

Alan Greenberg: Mark, you're assuming that the decision in only one direction. If the decision was for the registrant, then presumably during an appeal it stays up. In other words...

Mark Partridge: Oh, yes.

Alan Greenberg: ...initiating an appeal doesn't change the status of the domain.

Mark Partridge: Right. We agree.

Alan Greenberg: Okay. Okay. Now my hand is still raised whenever we get to the last point.

David Maher: Okay. Kathy.

Kathy Kleiman: I think what Mark wants is what's written and in which case I think we all agree. The two - the one finding of perjury you go down for - you're barred from the URS for a year, two findings of perjury and you're barred from the forum for the duration. Is that right? And if so, I think we agree.

David Maher: All right. I think that is the understanding.

Mark Partridge: Yes.

David Maher: Margie, did you want to say something?

Margie Milam: Oh, yes. I just - I wanted to clarify that I'm going to, if you don't mind, not use the word perjury because that means something different than deliberate material falsehood in the next (unintelligible). I think that's what we all understand, right?

Kathy Kleiman: Yes.

David Maher: I believe so.

Margie Milam: Okay, great.

David Maher: Okay. Then I think we get to our last point which is the review. Alan, you wanted to stick to that?

Alan Greenberg: Yes, we keep on talking about a review. And we, you know, some of us have different opinions on when it should be done. I still think we need

to focus at some point on some concept or what happens if we do a review and find something needs to be changed.

If the review says everything is working perfectly, that's dandy. If the review says there are substantive problems that have to be addressed, somehow we have to start talking about what is the mechanism by which we can address that. There is not an (ICANN today).

David Maher: Konstantinos.

Konstantinos Komaitis: Yes. I am in favor of the review and I also wanted to ask, I see is the (unintelligible) version that I have in front of me that the review of the UDRP at the same time, (well it's related). Did we decide on that?

And my point being that we are talking about the UDRP and we are borrowing elements from the UDRP and we are borrowing the precedent of the UDRP and we are using the UDRP as an experience accepting that the UDRP's all good. But it's not all good.

And I think that this is the appropriate timing for - to have the URS in place and at the same time initiate or recommend to the GNSO to the staff to open up the debate for the UDRP. And I would like to bring that back on the table. Thank you.

David Maher: You know, I think we're certainly entitled to recommend a review. We can't - I don't see that we can make it a condition of a URS proceeding. Mark, did you...

Mark Partridge: Well I think that's where we were last time, David, was we - at least several comments were that calling upon ICANN to do a review of the UDRP was really outside the scope of our mandates for this project.

David Maher: No, I agree. Well, we do have a consensus that there should be a review. It remains to be seen what the outcome of the review. And there again I think we're not in a position to dictate the future action based on a review.

If there's a review that's highly critical of the URS, at that point it's up to the - either the GNSO or the counsel or the board to do something. I don't think that they are likely to just say oh, well, we had a review, life goes on, in any event. Alan.

Alan Greenberg: Yes. I was just going to say the same. There's a well-documented procedure that a small part, small percentage of the GNSO counsel can initiate a review or initiate a PDP on the UDRP. So I don't think we need to do that here. It's not...

David Maher: Yes.

Alan Greenberg: ...hard - it's not hard to do although I hesitate to think of what would be involved in doing it.

David Maher: Yes. Okay. I think we have to go back now to the issue of the mandatory use of URS. We agreed to put that off until the end. Do we - well, what is the consensus now if there is a consensus? Kathy.

Kathy Kleiman: We have always said, NCSG has always said that if this becomes a fair process and a neutral process then we would lean in favor of mandatory which isn't where we had started from.

So I would say, and I hate to say it, but there's still a key question on the floor for us, or two. One is the URS element and which Mark and I are going to take offline.

And the other is the question of the assignment of the examiners and the staff review of whether service providers, future URS service providers, can cherry-pick their certified U.S. examiners for outcome.

And so well, if everyone doesn't mind we'd like to wait until we hear on both of those. So I would, you know, I would assume the next call. But we're definitely moving towards the, a very fair process I think.

David Maher: Okay. Zahid.

Zahid Jamil: I was just wondering whether we can - if that is part of our note saying that these are the two - the elements in the assignment of the examiners are the only two concerns that the NCSG has. And thus otherwise they would be able to agree to (mandatory). Can we say that?

Kathy Kleiman: Konstantinos, Robin, is that okay?

Konstantinos Komaitis: Sorry, Zahid, can you please repeat that?

Zahid Jamil: What I heard was that - this is Zahid, sorry - what I heard...

Konstantinos Komaitis: Oh sorry.

Zahid Jamil: Yes, sorry. What I heard was that the two issues that were keeping the NCSG from making it mandatory were one, elements which (we) needed to work on and the fact that the assignment of examiners (unintelligible) of the examiners. Could we say that in our notes that these are the only two issues that are a (barred) the consensus on mandatory?

Konstantinos Komaitis: (Yes), I think so. I mean from the (unintelligible) would appear that these are the two ones.

Kathy Kleiman: Great, thanks.

David Maher: I think that's reasonable.

Zahid Jamil: Great. Thank you.

David Maher: Okay. We have a few minutes left. Does - is there anything else that needs to be covered?

Margie Milam: David, this is Margie. I just have a question for Kathy. You said one of the issues that (unintelligible) dating is the cherry-picking of examiners. And are you - just so I understand the issue when we talk about it on the staff level, we already have in there that there's, we do rotation of examiners.

So it's not the rotation that's the issue for you, it's - I thought the only issue that was open was whether a provider had to use all accredited providers or panelists and I don't - I just wanted to make sure we

understand the issue on the staff level so that we can get back to you in a timely manner.

Kathy Kleiman: Thanks, I appreciate your asking. Mark and I had come forward with several recommendations. One was the training and certification of the examiners, the other was the rotation of examiners within a provider so you can't just, you know, take the top person off 15 times in a row and (nominant) does that as well.

And then, you're right, the third part of it was this idea that you can't reject certified examiners unless there's some reason for it, unless they're nonperforming.

So it was all three elements and it looks like the third element is under review and so I did want to find out - does that answer it? It is - it is that idea of taking all the certified providers.

Margie Milam: Yes. Sure, sure and I guess the question is from the - from your perspective, why is that make it more or less fair? In other words, if a certified provider is demanding some significant amount of money, is that, you know, is that a reason that - I mean we're trying to understand the logic behind why that makes the process more or less fair.

Kathy Kleiman: I'm going to refer to Konstantinos who has done a lot of work on - his book has just gone back in on the UDRP on providers. Konstantinos, would that be fair on providers and panelists?

Konstantinos Komaitis: To be what? Accredited at certain times? Yes.

Kathy Kleiman: Well, why - that there's been a problem with UDRP providers and a bit of selection of panelists for outcome.

Konstantinos Komaitis: Yes, the statistics show that providers have a tendency to use - because it is a trademark on which is the forum, providers have a tendency to assign cases to panelists that are (compliant) and friendly and this is the kind of forum shopping that we are talking about.

(Wiper), for example, is accused of forum shopping not because it's (Wiper), but because of the panelists that they assign to adjudicate the cases. So any attempt to eliminate it and ensure that this is not taking place is very important if we want to ensure this due process.

Kathy Kleiman: And not just assignment of panelists, but the hiring of the panelists, right? It goes back to the hiring, right?

((Crosstalk))

Konstantinos Komaitis: Yes, the hiring of the panelists, yes.

David Maher: Okay, Mark?

Mark Partridge: I was just going to make the point on the way it works now is that of course each provider has its roster of panelists. There's substantial overlap, but the critical overlap comes about when a three-member panel is appointed because parties can pick a panelist who's on any provider's roster for that purpose.

What that indicates is that the providers, at least under current practices, can and do have anyone who is acting and experienced as a provider - I'm sorry as a panelist can end up serving for any provider.

And what Kathy and I came around to suggesting was that if somebody is accredited, they're entitled to be on any of the panels - any of the roster of providers that they choose and then appointments would be made on rotation subject to jurisdictional needs and language needs.

And then finally Alan suggested the idea that providers should not be required to keep bad actor panelists.

And Margie I think your thought well, what if a panelist wants to charge to much? I think that would be grounds for the provider not including that panelist on their roster. That is, they say this is how much we pay. If you want to be on our roster, you're entitled to be on it.

But to address Konstantinos' concern, you wouldn't have the providers picking or having the appearance of picking examiners that have a certain point of view that dictates certain results.

David Maher: Alan?

Alan Greenberg: I want to go back on something that we skipped earlier that I had a point to raise, but let's finish this discussion first.

David Maher: Well I - we've run out of time.

Alan Greenberg: Okay, let me just - I thought we had two hours actually, but let me just raise the issue, we'll continue on the list. The issue was raised, what happens if there are registrants that deliberately file late replies to get more days on their paperclip pages?

And the suggestion was made if that - if registrants continue to file late replies on a repeat basis that there be a fee. So in other words they...

David Maher: Well, let's take that offline.

Alan Greenberg: Okay. Sorry, I hadn't realized that we were out of time. I'll take it offline. We can discuss the next meeting.

David Maher: Okay. If there's nothing else urgent, we've run the - 90 minutes was the schedule for this meeting.

Alan Greenberg: Okay.

David Maher: And...

Konstantinos Komaitis: David, can I ask - what time is the Friday meeting again? Is it four UTC?

David Maher: The Friday meeting, I have 1600 UTC.

Konstantinos Komaitis: UTC. Okay. And the Thursday meeting is at 1900 UTC?

David Maher: That's correct.

Konstantinos Komaitis: Okay.

David Maher: Okay, thanks very much everybody.

Man: No, 2000, I think.

David Maher: Yes, so this means - that was initially the - but there was a correction sent out, it's 1900 UTC on Thursday.

Man: Oh, okay.

David Maher: If you check the messages from (unintelligible).

Man: I'll do that, thank you.

David Maher: Okay, thanks everybody.

Woman: Thank you, David.

Man: Thank you, David.

Konstantinos Komaitis: Thank you all. Goodbye.

Man: Goodbye.

Man: Thank you, David.

David Maher: Thank you.

END