

**GNSO Transcript
Special Trademark Issues : URS
24 November 2009 at 17:30 UTC**

Note: The following is the output of transcribing from an audio recording of the Special Trademark Issues meeting on URS held on 24 November 2009 at 17:30 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:

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Participants on the Call:

Registrar Stakeholder Group

Jon Nevett- Registrar (acting as Chair)

Jeff Eckhaus – Registrar

Jean Christophe Vignes- Registrar

Commercial Stakeholder Group

Mark Partridge - IPC

Paul McGrady - IPC

Zahid Jamil- CBUC

Mike Rodenbaugh - CBUC

Phil Corwin – CBUC

Non Commercial Stakeholder Group

principle participants

Wendy Seltzer -NCSG

Kathy Kleiman - NCSG

Konstantinos Komaitis – NCSG

Robin Gross - NCSG

Alan Greenberg - At Large

Olivier Crépin-Leblond - At Large alternate

Maimouna Diop – GAC Observer

ICANN Staff:

Liz Gasster

Kurt Pritz

Margie Milam

Amy Stathos
Marika Konings
Gisella Gruber-White

Apologies:

David Maher – Chair
Jeff Neuman

Operator: This call will now be recorded.

Gisella Gruber-White: Would you like to begin phone call?

Margie Milam: Okay, so let's get started. This is Margie Milam. We're here to talk about the URS. And John Nevitt will be chairing the call. He can't get on the Adobe Connect right now. So, we'll - I'll manage for him. And then, Gisella, do you want to take roll?

Gisella Gruber-White: Absolutely. Good morning, good afternoon, good evening to everyone on today's STI URS, Tuesday, 24 November. We have Zahid Jamil, Wendy Seltzer, Mark Partridge, Jeff Eckhaus, Olivier Crepin Leblond, Paul McGrady, John Nevitt, Kathy Kleiman, Mike Rodenbaugh, Konstantinos Komaitis, Alan Greenberg. From staff we have Margie Milam, Amy Stathos, Liz Gasster, Marika Konings. And apologies, we have David Maher and Jeff Neuman. If called, please remind everyone to state their names for transcript purposes. Thank you. Back to you, Margie.

Margie Milam: Thank you. I sent around earlier -- and John, I think you should probably have it in your email -- the URS Strawman Proposal updated to reflect the notes from the last call. I sent it out about an hour ago. So, John, I don't know if you...

John Nevitt: Yeah, I have it. Does everyone have that?

Man: Does no one not have this?

Man: I do.

Man: Yes.

John Nevitt: Great, great.

Margie Milam: So we have that up right now in the Adobe Connect room. And I thought probably the best thing to do would be to go - start where we didn't finish. We didn't finish the last two points. And then go back and revisit the conclusions and the notes that I've circulated. I think that's probably the best way...

John Nevitt: Yeah.

Margie Milam: ...to approach this.

John Nevitt: That sounds great.

Margie Milam: Okay.

John Nevitt: One housekeeping - actually two housekeeping items. I read the transcript of the last call and Paul McGrady is Paul Diaz in the transcript, so we should update that. And then also just a reminder that everyone say their name at least in the beginning because there's a couple of spots in the transcript where it just says, "Man" said something. So, I wasn't sure who the man was, so.

Margie Milam: I'm sure if Mark wants to become...

Man: It's all my evil plan for there to be no historical or evidentiary record of me being involved in this.

Man: Can we all can say that?

Kathy Kleiman: No fingerprints.

Margie Milam: Okay.

John Nevitt: Okay, so abuse of process is the one we left off on?

Margie Milam: Yeah, that's correct.

John Nevitt: Okay. So, the proposal is two abusive complaints or one finding of perjury barred, or perjury it would be the entity or the person would be barred for one year from the URS. And then three or more complaints against a panelist that are overturned by appeal, they lose their accreditation to serve as a panelist or examiner I think we're calling it now.

And then, you know, we left it to staff to implement guidelines of what constitutes abuse. And that's a little different than the staff proposal, the default proposal is if there's an abusive complaint on three occasions, you're barred for one year. So based on some of the comments we took that down by one.

Alan Greenberg: It's Alan. Can I get in?

John Nevitt: Yep, go ahead.

Alan Greenberg: Yeah, I'm happy to leave the details for staff implementation. It would be good to have some level of - either provide them with guidance, or they come back with a quick Strawman. Because the issue of who decides and how do we measure abuse is critical to the success of this. It would be, you know, from the point of view of people who are worried that the IP holders, the trademark holders, may - some of them may be inclined to be more something, obstreperous than one imagines they would be.

So it would be good to have some input into how that's going to be managed.

Not just assume the gods of the sky will open up and the gods will give us a definition of abuse that we're all happy with.

((Crosstalk))

John Nevitt: I'm sorry, go ahead.

Margie Milam: I'm sorry, I was just going to say Kathy has her hand raised.

John Nevitt: Yeah, great. Thanks.

Kathy Kleiman: Thanks, Kathy Kleiman. I think that overall it's a good summary with perjury. At least as originally proposed, and I'm kind of getting some of the drafts confused. Excuse me, I think with perjury it was much more than a year. I think as originally proposed, it was you're out of the URS process if you've abused it with by lying to the tribunal, you don't get to come to this tribunal again.

Of course, perjury in say U.S. courts, perjury would be treated, you know, with even higher sanctions. So I wanted to propose that as a much more significant penalty for perjury.

John Nevitt: Does anybody want to say...

Margie Milam: We have Mark - yeah, Mark Partridge.

Mark Partridge: Well I'll take off on what Kathy said. I think perjury might be a workable standard. I'm not sure it's the same around the world. And we need to be clear that we're not just saying a factual mistake or something that's - something along those lines. But it's a deliberate intent to deceive the process.

As far as standards for what abuse would be, I'd suggest that one of the

places where we could look would be in the UDRP cases where there's been a finding of abuse. There are reported decisions. I've written at least one, maybe two where that's happened. And so we've got that to work from.

John Nevitt: I understand Jeff Eckhaus has his hand up.

Jeff Eckhaus: Yeah, thanks. So I just had a question. Can we, John, maybe I as to (unintelligible) - can we just take a step back and say where I guess the separation or why - where we're not on consensus as to what the gap is between I guess the - not between what we have on the Strawman here. I guess maybe on the Strawman or what the separation is because I'm just a little confused. I know people are throwing out what some of their thoughts are, but what are the separations and what we're trying to bridge here? Is that possible?

John Nevitt: Sure, there are - I guess there are three...

Jeff Eckhaus: Or not you or if somebody else could. I don't know. I'm volunteering you as chair but...

John Nevitt: Yeah, that's fine, Jeff. There are three issues here. There's the number of abusive complaints that, you know, one has to engage in in order to be - have some kind of sanctions. The second one is - and then there's a subpart to that is do you look at that based on abusive complaints versus one of outright lying, and is there a different sanction for the two. And then, you know, is there kind of abusive discretion on behalf of a panelist or an examiner that we're looking at as well.

So, you know, there's the IRT recommendation which, you know, set one standard. There's - Kathy has just mentioned that she had a proposal that has another level of a number of complaints. And then the staff had one and then we tried to amalgamate that and come up with something that we thought was a workable compromise. So that's what's being discussed now

too.

Yeah, if I would look at it - you know, look at the abusive complaints on behalf of a complainant. And should we have two standards, one for some kind of, you know, outright lying with the intent to deceive the panel or the examiner versus just being abusive in that, you know, there's no leg to stand on and they filed the complaint anyway. And they had the registrant and the respondent incur the time and resources of responding.

Jeff Eckhaus: Okay, well thanks. So, I guess my question is -- thanks, that was very good. So, it - this is Jeff by the way still talking. So, my thought is I guess then is -- I'm not a lawyer here but maybe the people - I'm assuming almost everyone else here is -- to say, you know, some of the thoughts and ideas are if they're lying or if it's abusive is can that be proven or who is the person to decide that to make that happen? I'm just wondering are we setting our goals saying, "Okay, if this person is lying or if it's abusive, but is it possible - how difficult is that for it to be, you know, proven?" Or how does that happen for that decision to be made so that we're making these judgments saying, "Two abusive or three abusive?" Or is it almost impossible to get somebody named abusive I guess is my next question.

John Nevitt:: Mark, do you want to take that from your UDRP experience?

Mark Partridge: Well I will say it's not impossible to have a finding that the complaint was abusive. There's a difference between being abusive and losing of course. And, you know, there's far more situations where people have lost but it hasn't been an abuse. That normally in the UDRP the panelist is the one who makes the decision based on the record that gets submitted.

John Nevitt: Any hands up?

Margie Milam: Amy has her hand up and then Wendy and then Paul and then Kathy; we've got a long queue here.

John Nevitt: Okay, great.

Amy Stathos: Hi, this is Amy. Just a quick question on the proposal with respect to c complaints from a complainant. Are we talking about an individual entity or related entities? Or what was the group contemplating on that?

John Nevitt: As far as the complainant?

Amy Stathos: Two - it says two complaints, two abusive complaints.

John Nevitt: Uh-hum.

Amy Stathos: Would that be a complaint from a single entity or related entities? Say one, the parent of a sub. Or was there contemplation of that?

John Nevitt: We certainly didn't discuss that finer detail on - for this proposal. But I would think you would use the same. In the IRT report we talked about when an entity could file a complaint together or separately. So you might want to think about the same level of standard for that. Meaning if Time Warner had a complaint and it was for HBO versus - you know, Time Warner Cable versus Turner Network or something like that, are those related or not? And, I think there was a standard in the IRT report for that.

Amy Stathos: Okay, I'll think about that.

John Nevitt: Do you remember, Mark, what the specifics were?

Mark Partridge: We didn't address the exact question from Amy's point of view, but I think it would be difficult to say - to go into the related companies you don't know if the companies are related. And often related companies really don't have any common - you know, a common voice. They operate as independent operator so the abuse would be by a particular party filing the case.

Margie Milam: Yes, that's...

Konstantinos Komaitis: Yes, this is Konstantinos. Just on this very topic - and sorry to be jumping in, but I agree with Mark. It would be very unfair I think. Even considering the how many distribution agreements are out there, as well as to bar one company in a secondary or franchise is completely simply because one trademark corner has abused the system. So I would agree with Mark on that.

John Nevitt: Okay, let me go back to - anyone else on that specific point? Otherwise I'll go back to the main queue. All right, I got Wendy and then Paul and Kathy.

Wendy Seltzer : All right., Wendy. I just wanted to agree with Mark's suggestion that allowing the panelist to determine abuse. It seems like a good solution. So two separate categories of either abuse or to perjure themselves; good reasons to bar them from reusing the process.

John Nevitt: Okay. Paul?

Paul McGrady: Hi. Sorry about pushing the lock button when I need to be pushing the unmute button. I apologize. Yeah, I think that we should, in terms of perjury, that's - it's an interesting concept. And I just wanted to have some clarification on the folks who suggest - from the folks who suggested it. I mean we - perjury's generally - it's criminal. And so are we talking about, you know, in the event somebody is convicted of a crime? Or are we or do we - are we saying perjury that means lesser than that?

John Nevitt: Kathy, do you want to respond? You're the one who proposed it. I could tell you what I was thinking when I put it in this proposed Strawman.

Kathy Kleiman I'll tell you what, why don't you start and I'll follow up. Apologies for the cold here.

John Nevitt: Okay. No, you know, it certainly wasn't a - you know, I don't think these would be under rules of perjury certainly from a U.S. legal standpoint. So it would be, you know, I think Mark referred to a report as some kind of intentional line to the examiner. And obviously there would be a level of proof associated with that intentional act.

Mark Partridge: A way you might phrase it would be "deliberate material falsehood."

John Nevitt: Sounds good to me.

Kathy Kleiman I'll agree with that. That makes a lot of sense. It's Kathy. So deliberate intent to deceive, lying to the examiner, deliberate material falsehood. Paul, does that do it?

Paul McGrady: I think it's more clear that what we're taking about in that situation is that the panelist involved or I suppose an appeal body is empowered to reflect. Otherwise, we end up in a situation where somebody who had an abusive complaint filed against them would have to essentially get local law enforcement involved in order to reach a perjury conviction.

Or in the alternative we could see a good faith actor who was filing good faith complaints. But each time he did that an abusive respondent, perhaps in a shall we say less - well, I'll just go ahead and say it, in a more corrupt jurisdiction. You know, a good faith complainer may find himself constantly trying to send off perjury charges in a more corrupt jurisdiction.

And so I just, from my point of view bringing the criminal authorities into all this even by accident, you know, would be a bad outcome. So that's a long winded way of saying, "Yes, I think what Mark suggested would be great."

John Nevitt: Great, that's good. Thanks, Paul. Kathy?

Kathy Kleiman I wanted to comment also on the abusive complaint. Would it - some of the things that I was thinking of in terms of this were there have been findings of reverse domain name hijacking. Increasingly there's kind of a concept of trademark lawyer abuse of when the process has been abused. Would it be useful or would anyone want to come up with some examples of these kinds of things? Probably going through your DRP cases.

John Nevitt: Anyone think that would be useful, or I mean?

Mike Rodenbaugh : It's Mike Rodenbaugh. I don't think that's particularly useful because all of those examples are going to be based on the specific facts of those cases. You know, just it's not very helpful to just create a list. I don't see why we need them anyway. And the standard I think is clear enough under the UDRP to send dozens of decisions finding reverse domain name hijacking.

John Nevitt: Okay, any other comments on that? Margie any other hands up? I'm still trying to get in.

Margie Milam: No.

John Nevitt: Okay. So the next topic is the review of the URS and UDRP. So we'll take a queue on that topic.

Margie Milam: Constantine has raised his hand and Alan as well.

John Nevitt: I was just about to call on him.

Konstantinos Komaitis: Yes, this is Konstantinos. I think - and NCSG feels very strongly about it, but we need to proceed to a review of the UDRP for the single reason that we're about to create a system to URS for those with rapid cases. But we defend heavily on the UDRP. And the UDRP has an operation for the past 20 years and it hasn't undergone a substantial amendment.

So considering the fact that we're about to launch something whereby we're using (unintelligible) of a specification of the UDRP and we're using the experience of the UDRP and much of our wording derives from the UDRP, I think that it would be beneficial to also request for a deep review and amendment if necessary for that matter of the UDRP.

John Nevitt: Okay. Alan?

Alan Greenberg: A couple of things. Although I agree the UDRP needs a review, if we are intending to incorporate whatever the URS is in the final (unintelligible) for product of the UDRP review -- in other words, to collapse them both into the same thing -- we may well want some experience with the URS before we start that review. So that's point number one. I strongly support a set of reviews built into the URS to ensure that it is meeting the intent when we're setting it up. I think to do that we are going to need to define some metrics at a recognized success, number one.

Number two, there's a problem of something that we've never addressed in ICANN. And that is how do we modify a policy without going back and starting a PDP process from scratch? Other than, you know, the emergency provisions within the Bylaws for the Board to take action. And it's something that we're going to be discussing as we rewrite the PDP rules over the next end months. But I think it's something we have to factor in.

If indeed we do a review after 6 months or a year and find out that the URS is not working well and needs tweaking -- even if everyone agrees -- what would the process be to actually do that. And I think we need to think about it just a little bit. Otherwise putting up a request for a review without knowing how do we handle if we find - you know, how do we handle the outcome of that review is going into it a little bit blind.

John Nevitt: Any comments on that?

Jeff Eckhaus: Yes, it's Jeff. I guess I think I was up next. And I'm still finding myself saying this almost every week is my comment is completely in agreement with Alan which is, you know, what are the remedies if - you know, I guess what are the judgments? Is it going to be just thumbs up or thumbs down that you're doing a good job, you're doing a bad job?

And if a decision on a bad job is there, is what are the remedies? What are the decisions? You know, just to say, "We're going to have a review." That's great, but is the person doing the review going to have - is it going to have to teeth to be able to do anything because if there's no teeth to it, then I'll say - then let's just say, "All right. You know, then we'll just push this one by because it doesn't even matter actually if there's a review or not, if there's no remedies available to whoever is doing the review."

Alan Greenberg: Just a follow-on, John?

John Nevitt: Yep, go ahead.

Alan Greenberg: Yeah, I don't think we have the time to flesh this out right now. But I think it has to be identified as a critical issue in putting forward the whole URS process; that there be some ability to adjust it as we go along if indeed that's found to be necessary. You know, just we need to acknowledge that it's a problem that we've never addressed at ICANN and we have to somehow put - build it into this one even if we don't come up with a solution today.

John Nevitt: I've got Mark, Kathy and Paul.

Mark Partridge: Yeah, I was just going to express the view that I think that the issue of having a review of the UDRP is a complicated one I think as to what the nature of that review is and how it goes forward. And it seems to me to be outside the scope of what our project is here. I think focusing on the URS is the right thing for this group.

John Nevitt: Okay, Kathy and Paul? Kathy then Paul.

Kathy Kleiman Just making a note here. We had proposed - NTSG had proposed a sunset, which it may be worth revisiting for a second here. A sunset for the URS, not to stay the URS, not to suddenly have it suspended, but to really kind of force the review of the URS in the UDRP. I think just trying to go back to what the reasoning was of that, it was the concept of integration of the URS and the UDRP.

What we're doing here is a little stilted. I mean we're taking - we're creating a new process where some people, like John Berryhill and Paul Keating, have commented that rather than a whole new URS, some tweaks to the UDRP might be a faster more efficient way to get to many of the same results. Still we're creating two parallel processes that really probably should be part of the same whole.

So, if we have the concept of the sunset, it forces that review have we gotten URS right and should the URS be better integrated with the UDRP. So I still - I'd like to put back kind of a two-year or three-year sunset into the concept, into the framework.

John Nevitt: Any comments on the sunset? Paul?

Paul McGrady: Yeah, the sunset issue is essentially the same issue of what we've been talking about in terms of do we have the vision right now to write out the criteria for success (unintelligible). Do we have the vision right now to write out, you know, what kind of tweaks we might see coming down the path. In essence, we have to ask ourselves -- and I think the answer is no. I'll tell you up front that, you know, are we really the group that's designed doing that (unintelligible) the review process in the future? Do we see it all now? Do we see it all the issues now?

Or is the review process the exact opposite, which is we don't get all the

issues now. We need a robust review process; that reaching conclusions, for example, in advance like the URS needs to be sunsetted or here are our personal views of the indications of success URS I think really short circuits a true, open, honest and helpful review process.

I think instead that we should put these things down as dicta, right. We can say, you know, this is only for whoever takes up the review. Here are the things that we think - you know, here are - we didn't reach consensus on these, but here is a list of what the (FCI) thought - various members of the (FCI) thought would be indications of success. Here are the potential outcomes of the various members of the (FCI) suggesting, you know, one is sunsetting. But to reach those conclusions in advance of the review I think really does (unintelligible) us to the notion of us (unintelligible).

John Nevitt: Let's go to Alan.

Alan Greenberg: Yeah, ICANN seems to love setting targets for itself which are impossible to meet. And one of the things of the - you know, how organizations must be reviewed every three years where the GNSO - one, the GNSO if we followed that rule and it was still around, we would have to be doing another review before the new council got seated. I think it's clear that ultimately the UDRP has to be reevaluated.

You know, the world changes around and we need to make sure it still meets our needs and it's adjusted based on what we've found out over the last ten years. The URS probably will become part of that probably if we do it in a proper way. But I think that's a different issue and I think that's beyond our scope right now to mandate or to set what the timeline is for it.

On the other hand, saying we're building a URS which we're -- to be honest -- doing on the fly, trying to reach consensus, we may be making some stupid decisions. And we acknowledge that and want to make sure that we build in a correction process I think is part of our mandate.

So sunseting I don't agree with because I think it sets arbitrary timelines which we're not in the position to enforce or even set realistically. But making sure the URS is robust enough to live as long as it needs to live I think is important.

John Nevitt: So how would you word a position on this issue? You don't like the sunset. You think there should be a UDRP review and a URS review.

Alan Greenberg: I think the UDRP or the URS needs to be reviewed every six months and we need to set some metrics or some metrics need to come out of the implementation of it to recognize whether it is basically working or not.

John Nevitt: What kinds of metrics are you talking about, like numbers of cases?

Alan Greenberg: Number of cases decided for and against. You know, for instance we keep on talking about, you know, words like, you know, these are obvious cases of abuse; they're a slam dunk. If we find out two-thirds of them are rejected, we have a problem.

John Nevitt: (Unintelligible).

Alan Greenberg: And I'm not saying that's going to happen, but that's an example of from my point of view an obvious metric.

John Nevitt: Why is that a problem?

Alan Greenberg: Because we designed it on the assumption that they were so obvious that most of them are going to be decided in favor of the complainant. And I think that's one of the premises of the whole process.

John Nevitt: Well if there's aggressiveness on behalf of the plaintiff on behalf of the complainant and they don't win, then - and why is that a - I guess I'm not

following why that's an issue.

Alan Greenberg: Okay. Maybe that isn't one of the ones we can agree on. I would have thought it was one. I just think that's part of the discussion. We need to recognize what is it which is going to indicate to any of us that it's not working the way we envisioned it.

John Nevitt: Right. I've got Wendy and then Mark.

Wendy Seltzer: Hello. I'm going to agree that ICANN is not good at dealing with its deadlines effectively. And that timeline is one of the things that a sunset does is it's enforcing assumption that says, "This is going to end unless it's either reviewed and found to be still effective that it should continue or changed into something that works better." So, I do think a sunset is a useful tool to build in there.

And as Kathy was saying earlier. I think because we're designing this as a fix for things that we found broken about the UDRP, I think it makes sense and is in scope to tie it together; the reviews to suggest about what we really think should happen is a review of the generalized trademark protection mechanisms and the conclusion about how they all are working together.

John Nevitt: Then Mark Partridge.

Mark Partridge: I was just going to support what Alan said. I think his approach is - makes good sense on the metrics. One of the things to keep in mind in whether people win or lose is that in a substantial number of cases not all the information can be known to the complainant and they may make good faith conclusions about the merits of their cases to start but nevertheless lose. So. it's very tricky to set a metric on how many cases should be decided on one way or another within a dispute resolution system.

John Nevitt: Okay. Paul, did you change your mind or are you still?

Paul McGrady: Mark said it.

John Nevitt: Okay, so did - let me ask a question. Other than - it sounds like the NCSG is pushing for the sunset; it was certainly in their proposal. Any other members of the team other than the NCSG support the concept of a sunset of the URS or is it more of a mandatory review process? Okay.

Mike Rodenbaugh: This is Mike Rodenbaugh...

John Nevitt: Mike?

Mike Rodenbaugh: ...speaking. Sorry, I'm not really using the Adobe Connect hands up thingy because I'm on the lap top and that was cause me to have to switch back and forth a lot. I think, you know, speaking personally, I could be in favor of a sunset provision if we give this thing some more teeth. I mean, right now where we're at with the lack of consensus on the transfer issue in particular makes it seem to me like this thing - it's just not going to be used by anybody since we were working on a worthless solution.

But if people are willing to negotiate and give it some teeth, I'd be willing to have a sunset provision I think. As long as there's, you know, specific goals that are identified in advance to what we are all intending for this to do so we don't have to have that fight three or four years from now.

John Nevitt: Okay. Just to respond to that, you know, the IRT recommended this process with a takedown without a transfer. So if the panel of trademark lawyers that served on that recommended that, I'm not sure if they felt that that was worthless, but. I take your point.

Mike Rodenbaugh: Okay. Compromise, right?

John Nevitt: I've got hands up from Wendy and Alan. Was that from before or is that

new?

Alan Greenberg: Alan is a new...

Wendy Seltzer: Nothing from me, Wendy.

John Nevitt: Okay, go ahead Wendy and then Alan and then Mark.

Wendy Seltzer: I said nothing for me. I'm sorry.

John Nevitt: Oh I'm sorry. I didn't hear you. Okay, then Alan and Mark?

Alan Greenberg: Yeah, I was just going to support what Mark said; that it is difficult understanding what the metric should be. And I was suggesting metrics not to say there's a problem, but to say we need to look at it in more detail.

John Nevitt: And Mark?

Mark Partridge: I'm sorry. I meant to take my hand down.

John Nevitt: Okay. I see a microphone next to a couple - Marika,. is there something? All right, Kathy.

Marika Konings: Nope, that's Mike.

John Nevitt: Okay.

Kathy Kleiman: John, I don't know why the microphone is coming up, but it seems to be popping up when some administrator...

John Nevitt: Some administrator turns it on for you.

Kathy Kleiman: Oh, okay. I wanted to support Alan's idea of the review of the metrics of - if

we require that the metrics be created at certain times every six months as he proposes, then we know they will be run and I think that will be very important analysis as we go forward.

John Nevitt: Okay. All right, any last points on this because we're, you know, 40 minutes in. We can start at the top now. Okay. Kathy that's from before.

Kathy Kleiman: Sorry my hand is down now.

John Nevitt: Okay. So why don't we just start at the top of the proposal. It sounds like just the recap on the URS UDRP. Everyone seems to be in favor of some kind of review. The question is what kind of metrics and what kind of review process would we use and there does not appear to be a consensus for a sunset.

Okay, mandatory; there was consensus. Elements of the complaint; consensus but needs examples.

Kathy Kleiman: Wait, wait, wait. John, can we go back to mandatory?

John Nevitt: Sure.

Kathy Kleiman: There's consensus again with NCSG provided that there's a fair process and balance and appeal and this also has to do with the forum shopping issue.

John Nevitt: Right.

Kathy Kleiman: Thanks.

John Nevitt: Sure. So caveat a consensus. Elements of the complaint. So the proposal was same elements found in the UDRP. And then I guess, Kathy and Konstantinos, do you want to talk about the document you sent around?

Kathy Kleiman: Absolutely. Konstantinos, do you want to start?

Margie Milam: Do you want me to pull it up? I have it; it's not redlined though. For some reason when I converted it, it didn't show the redlining. But if it's useful to have it, I'll go ahead and put it up.

Kathy Kleiman: Sure.

John Nevitt: Okay, Konstantinos dropped. So, Kathy if you could take the lead.

Kathy Kleiman: Okay. What we have here - and apologies for sending it out so late. And you know, if everyone wants to discuss it at a next meeting, that would certainly make sense. What we went through with an evaluation as we requested of what was that we thought would be the elements of a clear-cut abusive registration. And we started with the UDRP of course; it's the right place to start.

And then just went through where the- two kinds of things. One where the UDRP we think because is ambiguous to begin with; and the other, just really narrowing it down to specific circumstances that are easily provable, quickly provable, kind of the slam dunk kind of situations that have been part of the examples that we've been talking about in my involvement since Sydney. So under applicable disputes we have -- Konstantinos, are you back online?

Konstantinos Komaitis: Yes, (unintelligible). I am back.

Kathy Kleiman: Okay, please participate and add as we go through.

Konstantinos Komaitis: Yes.

Kathy Kleiman: Do you want to walk through this Konstantinos?

Konstantinos Komaitis: No, you have already started; let me see where are and I will take it on. Thank you.

Kathy Kleiman: Okay. For applicable disputes, we took it to your domain name is identical. The process of proving a domain name is confusingly similar is a difficult process, a time consuming process in some cases. And also looking through the forms of the IRT, it looked like the form of the complaint in number ten that the IRT was envisioning a trademark that was identical to the domain name. And of course, identical is now identical writ large where you have the spaces and the underlines and the characters, like the ampersand, that have been either typed out or replaced with an undersign or something like that. And we can certainly put that in more expressly.

Then just - let's see, in the administrative proceeding the complainant must prove with evidence. I think that just makes sense, but it's kind of a signal to the complainant. You know, produce some evidence that each of these three elements are present; don't just assert this.

And then we're writing in evidence of clear cut abusive registration because that's the purpose of the URS. We've changed panelists to URS examiner, consistent with one of the changes we talked about in the last meeting to make it clear what proceeding we're in. And again, kind of repeating as I goes through B, repeating the clear cut abuse.

In (i), we're talking here about a significant number of domain names. One of the things we heard a lot about in Sydney and in Seoul were serial cybersquatting. So this is really codifying the serial cybersquatting concept. and the practice of registering these names primarily for the purpose of selling them back at a high price which is something, you know, no one likes.

In (ii) we've got the case where you're trying to prevent the owner of a trademark from reflecting the mark in a corresponding domain name. And we've added, "Provided your use is not to criticize or to comment on the trademark owner." And this came to mind to me yesterday when I was watching our national news here, there's just been a recall of two million

cribs. We've had 15 children badly hurt; some killed just recently. And it's a joint recall of Canada and the United States Consumer Protection Commissions.

And you can bet if my child were the one hurt, I would register every variation of that trademark on this Web site and put up as many warnings as possible to parents so that those cribs would get off the market. So that's kind of the concept that we're trying to do here. And of course the idea would be to try to get in the way of that commercial commerce. In this case it's already been recalled. But had the cribs not been recalled I would have wanted to spread the news of that.

John Nevitt: How would that work if you were a competitor of that crib company?

Kathy Kleiman: Oh my goodness, I'm going to refer back to...

((Crosstalk))

Kathy Kleiman That's a good one. In (iii), trying to again signal to the complainant that you know, here's what - here's the evidence we need. This is supposed to be a fast, rapid review. So if you're trying to show that someone has registered a domain name primarily for the purpose of destructing your business, again, you don't want the non-commercial people; that's under freedom of expression. So, it's probably a commercial competitor, a (Kaplan) and (Kraplin) for those who go way back in this field. And then, you know, provide the proof of the destruction and, to the extent you can, any actual consumer confusion. To the extent you can put it out there, it's the extent that the URS examiner can do a really rapid review of this.

And (iv), again, adding - you've attracted for commercial gain Internet users to your online location by intentionally creating the confusion. This is the passing off section and we just tried to strengthen it. This is intentional confusion. This is the wipe-out situations that we were hearing about, the

pharmaceuticals. If you're out there marketing a pharmaceutical or even worse a dangerous knock off of a pharmaceutical, let's get those Web sites down as quickly as possible.

Under C, the demonstration of rights and legitimate interests. We've again modified panelists to URS examiner. We've added a new one here. This first one, "You have a credible and good faith belief that you're use of the domain name is legitimate and legal." Again, going back to kind of the IRT forms, this seems to be what the IRT was envisioning in its form answer; that, you know, you believe you have a correct use of this.

We wanted to add here and make it explicit that people are going to be coming to use words, maybe even that they haven't been known by, the rest of the world's now coming online, we're breaking the artificial scarcity. In .com -- and I know this because I came in at the beginning of, you know, the .com disputes 12-13 years ago. In .com there was a sense that there were already people there; this was a space that was already occupied.

But now we're opening up new space. This is the new - in these new top-level domains, this will be the space for the new brands, the new companies, the new groups, the new ideas. When people come online they may not have a reason for why they chose the name other than that they really like it and it's an ordinary word and it seems fairly descriptive of what they're doing.

So we thought let's invite people to make their case as clearly as possible of why they think they should be here, why they think they're allowed to be here. And then everything else is just a slight modification of what's already in the UDRP.

Konstantinos Komaitis: Yes, can I just jump in a little bit to just say a couple of things that's well? The whole idea of this document was to reflect the UDRP element, but at the same time adhere to what the IRT and the staff recommendation have been saying about raising the burden of proof. And

Kathy was very correct in the beginning when she said that at least we need to bear in mind that it has to be a little bit different compared to the UDRP. First of all because this is a rapid suspension system.

So the confusingly similar element will inevitably delay a little bit the process. So if we're expecting, for example, URS examiners to deliver their judgment very quickly, we cannot at the same time impose on them warning restriction or restrictions that will stall this process. We have the UDRP for that.

And at the same time, this takes into consideration the trademark concerns which are very valid with those people who have registered multiple domain names, who have tried to capitalize on someone else's pain. And with mainly the situations where the UDRP has proven in an effective system, but at the same time address those very legitimate concerns of the registrants who believe that they have a legitimate right or they have spent a lot of money and time on creating Web sites and they act in good faith.

So it is an issue of creating this new process, but being also very balanced. So on the one hand we are raising the limit and we acknowledge that trademark corners under the URS will have to carry a different version of proof compared to the UDRP. But at the same time we also acknowledge the problem that exists out there.

Mike Rodenbaugh: This is Mike Rodenbaugh. Can I get in the queue?

Kathy Kleiman Can I make the comment before we go into the queue?

Mike Rodenbaugh: Have we lost our chair?

John Nevitt: Yes, yes, definitely. Will go to Kathy and then go to Mark and then Mike.

Kathy Kleiman: I just wanted to apologize. I had switched over to a different screen. I was working off of the version Konstantinos sent out that's completely redlined.

And I just flipped back and realized that some of what I said might not have been clear. I should have been outlining much better what was deleted and what was added. I apologize and urge everyone to go to the version Konstantinos sent out just before the meeting.

John Nevitt: Okay, thanks for doing that, Konstantinos. I've got Mark Partridge and then Mike Rodenbaugh.

Mark Partridge: Thanks, Jonathan. The first point I guess I want to make sure we're all on the same page about is where we were before in our discussions was that we would work from the UDRP elements and keep those and give some examples. That was where we ended the last conversation about this. This proposal changes the UDRP elements in significant and material ways. It's also a departure from the principals that were in the IRT, the idea of taking out confusingly similar - it was not the IRT's position that or the staff's position.

And if I can give just a quick example of why - there's probably other issues here. But if you only focus on identical marks, you miss most of what the problem is. I've got a court order here from a district court in Florida with 40 infringing names where the cybersquatters paid \$100,000. And the marks are things like quickmastercard.com, rebatemastercard.com., www.mastercardbusinessad.com. All of these are used for paper click sites or sites where they get affiliate fees from competitors. There's no dispute that these are the kinds of things that should be stopped quickly through the URS. Some might be phishing sites as well.

So that's a problem when you take - when you change the UDRP elements. You take away the identical. Also none of these are situations where this person is trying to sell the name to Mastercard. He's just being engaged in a business where he registers variations of Mastercard over and over and over again, not primarily for sale but for click-through revenue. That's an example of what this process is designed to go to.

And I appreciate the goals of Kathy and Konstantinos on trying to come up with some examples. As I suggested before, I think the way to do it is to create safe harbors for good faith registrants. For example as Konstantinos put it, that person who spends a lot of money and time creating a new site. That's something that they could submit their evidence and show on the answer.

But I suggest that it's a problem to change the elements of the basic complaint and the way to look at this is to - as we discussed last time is to create some safe harbors as defenses for the good faith registrants without minimizing and reducing utility of this process.

John Nevitt: I have got Mike and then Zahid.

Mike Rodenbaugh: I agree completely with pretty much everything Mark just said. To me this is just kind of a non-starter to change the elements of the cause of action because of the confusion the (unintelligible) creates in the community, not only in the IP community but in the registrant community. I just don't see any reason why the standards should be different. I've always agreed that the burden of proof should be higher and that's where we should be focusing, but not on changing the elements themselves.

John Nevitt: Okay, we've got Zahid and then Paul McGrady.

Zahid Jamil: Hi. Yes, I mean I appreciate the work that Kathy and Konstantinos have put into this, but changing the elements from, you know, identical and confusingly similar to identical and a whole bunch of other things. For instance, I mean I see that if you look at evidence of credit card abuse, it says the use of a domain in bad faith and of credit card abuse, so you've raised that standard. We've talked about if you look at it says, "Significant number of the domains as opposed to one single domain," so if you have to be only a complaint with regard multiple domain and abuse that (unintelligible) need to bring up, that

would be an issue that would be different.

And basically - and I also see the last one which is that the UDRP standard of without intent to commercial gain (unintelligible) consumers has been taken out. My understanding from reading the IRT report and also the staff report is that all of the stuff is still there. From taking this back to our members for instance and saying, "Well, we watered it down beyond the staff report." Well I think Mark is absolutely right, it would be a non-starter and very difficult for us to be able to explain why we're taking risks (unintelligible) many others.

I just want to say that this is a tough sell for us and it may be difficult and just to agree with what everything Mark has just, you know, said.

John Nevitt: Okay. Thanks, Zahid. So Paul, do you want to echo the same thing? Anything new to add to those three comments?

Paul McGrady: Yeah, I think so. And without going through all the problems that this document creates, I mean I'll give you one example and then I'll move on. But then, you know, for example, in the B(i) would be significantly in excess of out-of-pocket expenses. You know, the question there is what margin? Are we opening up a loophole where somebody runs it straight to 100,000 domain names and only wants to sell them for \$10 more than what they bought them for? That's still a really profitable business model if he can offload a bunch of his inventory and, you know, would essentially escape liability under the URS. And so there are - I mean I just went through this and found, you know, 10 or 12 others that are - I hope are, you know, sort of unintentional loopholes that this thing opens up.

You know, I think that frankly this is so far away from what we talked about on the last call that I almost feel like it's - I mean that I don't want to say that we shouldn't talk about it because, you know, we should always be able to talk about things. But it is just so far away that I'm concerned that this really is going to bog us down. This would take literally weeks I think to talk through

on these sorts of calls.

And so is it possible for the team that did this to sort of go back and do what Mark suggested and what we talked about on the last call which is instead of messing with the elements, instead write in examples under each for clarity purposes? So I guess I'd ask is that team willing to do that and take that approach? Or are we sort of really stuck with having to talk about this because I'm just concerned that this - you know, there's just no way in the world we would get through this in a conference call format within the time frame that we have.

John Nevitt: (Tim)? Alan?

(Tim): You know, despite what I think Jeff said earlier, not all of us are lawyers and not all of us are trademark lawyers. And it would have made this a lot easier if we saw a true redline to understand what the changes were. I mean I'm a little bit at a loss to even contribute at this discussion because I really can't evaluate what the changes were that were made.

John Nevitt: You know, Konstantinos sent out a true redline but it was right before this phone call, so you didn't...

(Tim): Oh okay, sorry. I didn't download.

John Nevitt: No, it was very last...

(Tim): I've been on one conference call after another today. So looking at that it may make it a little bit better. It sounds like this is a pit that we're going to go into that we're not going to get out of given the time frame that we have right now. And I wonder to what extent can we take this offline and try to have something presented next week which is closer to a consensus?

John Nevitt: Konstantinos?

Konstantinos Komaitis: Yes, I don't have a problem facing the supply. The only things that I would like to do (unintelligible) everybody's attention because we had what the examples that (Claude) gave, which is actually a valid example. But the flip side of that as well is that under the duty of these panels we have heard repeatedly that all the trademarks that have the attached with (unintelligible) suffix and they're used for criticism sites are confusingly similar.

And I wouldn't like for example to have - to create a system whereby I would bar or we would bar those domain names that in the eyes of some panelists or examiners might be confusingly similar. So this was an attempt to capture also all these cases whereby in under the UDRP, confusing similar has been interpreted as almost meaning anything.

John Nevitt: Okay, so from a - wherein the registrar had, I think we would agree with some of the comments we've heard so far that this isn't the right time to do this. I would think that these elements should be reviewed along with the UDRP and the URS during a mandatory review process and that this process - you know, that was a specific decision that we made on the IRT not to get into the elements because we think it would be a Pandora's box, which it appears that it is. And that we're not going to get consensus on changing the elements at this point.

With that said, it might be worthwhile for folks, you know, precursor to a mandatory review to start discussing some of these issues because they're very meaty and very important. And it's not like we won't agree with some of these changes when the time comes; we just don't think the time is right at this point. I've got Kathy and then Jeff.

Kathy Kleiman: Okay, thank you. What you say makes sense. But I just wanted to add that we were asked to do this and accordingly we invested a lot of time to do it. And last week we didn't have it because there were flu among our group and

illnesses and other things. But I would hope that we don't dismiss this right now.

We were asked to bring in what to us is clear cut abuse and we'd like to know what it - and we took - we went through some key questions. And this wasn't just me and Konstantinos, this was a full NCSG effort with Wendy and (Robin). And really going through our sense of what clear cut abuses, going through our discussions in Sydney and Seoul about the slam dunk cases that had been talked about to us and trying to document them.

So I'm sorry. The version that we're looking at online doesn't have the redline. You've got it from Kostantinos. If people could go through it and we could talk about it at the next meeting, it might be more fruitful because I know you're looking at it kind of cold right now and that's not fair either.

John Nevitt: Okay. Jeff?

Jeff Eckhaus: Two points: One, I just want to echo from a registrar point of view to agree with your statements, John. And I just had a question about I guess some of the terms that are used when people are saying, "Hey let's take this offline," or I mean I'm not sure - I mean does that mean let's discuss it off on the list and let's keep this in part of it?" Or let's shelf this and not include it as part of the discussions

I mean I appreciate, Kathy, the work that you and Konstantinos and everyone did on this in the week. But I'm not sure if - you know, if looking at it just - now that we have this in front of us maybe it does open up such a Pandora's box that it's - maybe we all agree to not include it now. I'm just unclear of the terms when people are saying, "Let's, you know, take it offline and put it on the shelf." Well what sort of - can we sort of have an agreement about what are the next steps here? I mean is it going to be discussed just on the list or, you know, if someone can help me out with that.

John Nevitt: Alan?

Alan Greenberg: Before we end, we need to discuss what our deadlines are. But just as a little bit of an insight to it from the GNSO meeting yesterday, we have one more meeting on this before we have to deliver a report. So I think we have to factor in that time.

What I meant offline was someone from NCSG and someone from the IPC or whatever to get together in trying to come to some common ground. That's what I meant by offline in this particular case.

Paul McGrady: Okay thanks. No one in particular - that was just a question just to someone who could clarify that. Thank you.

John Nevitt: Okay. So let's move on unless, Paul, you have a last? Nope, good. Thanks, Paul. Let's just continue to go through the list. And if folks want to take that issue offline in the way that Alan recommended that would be great. So we're going to continue to go through the Strawman proposal. We're on format of the complaint. It looks like there's consensus on that. Standard for evaluation, consensus.

Stop me if anyone disagrees with this. I'm just reading through the staff notes. Mode of notice, consensus. Notice contents, looks like there's consensus on that.

Alan Greenberg: No. Alan.

John Nevitt: Alan, go ahead.

Alan Greenberg: Yeah. I certainly did not agree to the terms without change to - without requiring change to Whois. I mean I'm not saying whether we need a new element in Whois or we need a formatting of an existing text element. But ultimately we are not going to be able to fix the language issue without some

change, either to Whois or to a registrar's database that backs it up.

John Nevitt: I wholly disagree with that. I mean we could have notices in different language. You don't have to...

Alan Greenberg: The question is do we have to know what language to use for a given registrant.

John Nevitt: Well you can have standard languages. You could have the notices just like you do when you go to a Web site when you have the different flags or something like that. But to your point is you're looking for a deletion of without requiring changes to Whois as a matter of policy principally?

Alan Greenberg: I'm saying we could certainly say we would want to minimize that, but I wouldn't want to tie staff's hands on requiring that if ultimately that is the only way that we can meet the long term goals. Remember, we're doing this whole thing in front of the world. We're claiming to be a multinational organization, an organization with presences in many places and in many lands and we're going to be using IDMs. We are going to have to address the language issue even if we don't know how to do it in November 2009.

John Nevitt: Okay. Any other comments on - so would you agree that there's consensus if you deleted that clause without requiring changes to Whois?

Alan Greenberg: I would certainly - I would be happy with that, yes.

John Nevitt: Okay, next one upon passing effective filing a complaint for the initial freeze; that has a consensus. All right, time to answer. Any more discussion on that? Any offline discussions happen during the week? So we have 20 days, 14 days or 14 days with a seven-day extension.

Alan Greenberg: It's Alan. I have a quick analysis of it.

John Nevitt: Sure.

Alan Greenberg: The original IRT said 14 days and then I don't remember if the report said or people said that there was an expectation that a judgment would be rendered within 14 days which meant the Web site might be taken down as quick as 28 - within 28 days.

What's being proposed here is 20 days and a much quicker judgment. You know, certainly less than we're targeting three working days and hopefully less than a working week. So we're meeting the end - we're meeting the same end deadline as in the IRT report just by juggling where the boundary is between...

John Nevitt: Right, so you're giving the respondent more time...

Alan Greenberg: ...between the answer.

John Nevitt: Okay.

Alan Greenberg: So from my point of view this sounds like it meets the original target without, you know, softening when the Web site might come down.

John Nevitt: Okay, anyone care to respond, or is everyone comfortable with the 20 days now, understanding that we're putting a burden on the examination to go a lot faster than at least we and the IRT anticipated? Okay. That's Mark Partridge. So close, Mark.

Alan Greenberg: (Ernie), I have too many buttons to push here.

Mark Partridge: There I got it. Am I on?

John Nevitt: Yeah, you're on.

Mark Partridge: Oh, okay. Now I can hear. Okay. Yeah, I just - I'm really worried though about this being a creep for longer and longer times and want to emphasize that we're dealing with stuff that should really come down very, very fast. So, you know, if the 20 days is tied to an examination within three days, that doesn't seem too problematical. But if we live with - get 20 days and then there's creep on longer and longer things, then I think this procedure is a problem.

Alan Greenberg: Okay, I would support that. That was Alan.

John Nevitt: And that could be one of the metrics in the review.

Mark Partridge: Good point.

John Nevitt: Okay, commencement of the evaluations. Again, the goal would be approximately...

Alan Greenberg: Just a...

John Nevitt: Sorry, go ahead.

Alan Greenberg: It's Alan. I have a question. I'm assuming that if indeed the registrant responds in four days, the examiner doesn't have to wait the full 20. Is that correct?

John Nevitt: That would be my understanding. Right, Mark?

Mark Partridge: I'd suggest the system that this is done online. And as soon as everything is on file or the deadline has run that the examiner gets a notice that the case is ripe for review.

Alan Greenberg: Yeah, no, I'm just verifying that yes in the case of a default we have to wait the full number of days but if there is indeed an answer, the process does go

ahead. I was just verifying that that's indeed the way it's envisioned.

Mark Partridge: Yep.

Alan Greenberg: Okay.

John Nevitt: Okay, commencement of evaluation. Again, three business days. I think there was some email traffic between (Curt) and folks or at least a discussion on the call. The staff implementation said that three days might prove difficult. I think Mark made a statement that the staff backed down on that, or is that? Where are we on that? I don't know if (Curt's) on the call or. Margie? Margie?

Margie Milam: Oh, actually my question related to the prior thing. Where did we end up on the time to answer? I just want to make sure we...

John Nevitt: Twenty days.

Margie Milam: ...accurately describe it in the notes.

John Nevitt: Twenty days.

Margie Milam: Thanks. I believe (Curt's) on the call.

John Nevitt: You just threw him under the bus, didn't you?

Margie Milam: It's part of the answer to the question.

John Nevitt: And I mean we listed as a goal it's not a requirement, so I guess it would be an implementation issue which it has to deal with.

Amy Stathos: John, this is Amy.

John Nevitt: Uh-huh. Go ahead, Amy. Thanks.

Amy Stathos: Yeah, I think that's the key. I mean, Mark obviously knows a little bit better having been a panelist for UDRP in terms of timing et cetera. But, I think it's something that we would certainly want to talk to when we get to, you know, putting in implementation with the providers just to confirm that that is a doable...

John Nevitt: Okay.

Amy Stathos: ...deadline.

John Nevitt: So the way it's worded it looks like there's a consensus that - you know, that's the goal and the hope is that, you know, the providers will be able to do that. And based on Mark's comments it's not unrealistic to think that they would be able to do that.

(Curt): Yeah, that's right. This is (Curt). Yeah, we'd make it a very specific request in the solicitation for service providers and, you know, if they weren't able to do that 100% of the time, it would have to be specifically balanced against other needs; for example, quality or, you know, consistency or something like that.

John Nevitt: Okay. Number of examiners.

Mark Partridge: Just before you go, John...

John Nevitt: Okay, Mark, I'm sorry. Go ahead.

Mark Partridge: ...I was just going to add a real quick comment that the UDRP as it's currently run is not our best model. I'd say look at what the American Arbitration Association does with handling online cases or actually what ICANN does with the nominating committee review of statements of interest. Those

models are online and you can look at them as soon as things are posted.

John Nevitt: Okay. Okay, a number of examiners, there's a consensus. Assignment of examiners, so where are we on that? Wasn't there a subgroup working on that issue? Kathy?

Kathy Kleiman: There was. Mark and I circulated some language about randomization of examiners across - within providers. And also that this idea of certification; that everyone be trained as a URS examiner. And I think in light of our detailed discussions here that's a very, very good idea that URS examiners be trained.

And then the whole goal of preventing the forum shopping; that we don't want URS providers to kind of pick URS examiners who are going to come up with solutions on one side. And if we randomize it, particularly across providers, administratively there's nothing new here because UDRP providers do the three judge panels and they work with panelists outside of their immediate community, outside of their own panelists all the time. So there's administrative precedent for this.

And it achieves the fairness goal that NCSG is so concerned about. And with this kind of randomization across - of panelists a certification that everyone who qualifies gets to become a panelist in (unintelligible) included within the randomization process. Now with that, we can go kind of for the mandatory of the URS because this is kind of a critical element of the fairness and due process.

John Nevitt: Okay, Alan and then Mark.

Alan Greenberg: Two points: One, I thought we agreed we wouldn't use the word "random" but rather "rotation" or something like that. The second point is the comment, "The notes ends in the letter B," and I don't know what the rest of the sentence is. I may have a comment once I know what it says.

John Nevitt: Okay. Any clarification on that?

Alan Greenberg: Or is it only my version that says that?

John Nevitt: Where is it at? I don't see where you're looking.

Alan Greenberg: All right. Maybe it's the way I printed it. Oh, I see what the problem is. Okay. Okay, sorry. And then it does say, "Full randomness may not make sense." Okay.

John Nevitt: Okay. Let's see, I've got Mark.

Mark Partridge: Yeah, I was going to suggest that based on what we heard last time that we're coming around to the view that the proposal that Kathy and I floated with, some acknowledgment of what Alan had said about first of all not random but perhaps blind rotation, taking into account needs for language and jurisdiction and the ability of providers to dismiss -- for lack of a better word -- bad panelists. Not meaning that they're bad on the merits but that they, you know, don't do their job. They don't meet the deadlines. They don't respond, et cetera. They're not doing their job. That it seems like we had consensus on that overall concept.

John Nevitt: Yep.

Kathy Kleiman: Absolutely.

John Nevitt: Okay. And it sounds like you just - you said what Paul wanted to say because he just pulled himself off. So any other comments on this one? All right. So what's the next step exactly? Mark and Kathy, you've more work to do or?

Mark Partridge: I don't think we have any more work to do if the staff can write up what we've

- you know, that final point.

John Nevitt: Okay. It's great.

Kathy Kleiman: Great.

John Nevitt: Success.

John Nevitt: Okay, evaluation on the merits. There was consensus. Let's skip the next one because that will have an effect on the discussion just - and then we'll come back to it. Affect the filing after the defaults. The note is consensus, but needs clarification in implementations. Anything more on that? Margie, are you comfortable with - does anything in the text need to change?

Margie Milam: Actually, I don't recall why that was in the notes. Maybe someone on the call here recalls why there needs to be clarification. Yeah, I just don't recall.

John Nevitt: Okay, anyone? Okay, let's just mark that consensus then.

Jeff Eckhaus: Wait. Oh, John, that was mine. It's Jeff. Yeah, I don't remember that there were any issues on there, so I think that one was marked as consensus.

John Nevitt: Okay, great. Appeal decisions.

Alan Greenberg:: Sorry, John, I had to go away for a second. The only question I had on affects of filing is it doesn't say there that the Web site goes down or is brought back up if someone files an answer after default, which I think was the intent.

John Nevitt: Yes, could you clarify that, Margie, in the next round?

Margie Milam: Yeah, I can clarify that. Thank you

John Nevitt: But it comes back up. Okay? All right, next issue, appeal. So there's a clarification, it's not in all cases either party has a right to de novo review in the UDRP. The complainant has a right to go to the UDRP or court for de novo review. The respondent has a right to go to court, not the UDRP. So there's the URS appeal for either party. There's UDRP or court for a complainant and court for respondent. And that...

Kathy Kleiman: In those courts where the respondent might have access.

John Nevitt: Right. Court of constant jurisdiction.

Kathy Kleiman: But this is - oh, protocol.

John Nevitt: Go ahead, Kathy.

Kathy Kleiman: But just many people we - in the United States we have access for an appeal because of the Anti Cybersquatting Act. It's just important to keep in mind the vast majority of registrants don't have access to their courts, or so we've been told because there is no cause of action; there is no legislation creating a cause of action for them.

Mike Rodenbaugh: Really? Mike Rodenbaugh. I mean wouldn't that be just some sort of conversion theory? Fraud theory?

John Nevitt: Mark.

Mike Rodenbaugh: I'd like some more detail on that, Kathy. I don't understand...

Konstantinos Komaitis: Mark, he knows. And I can assure you that only as a separate cause of action for registrant. Under all the other - in national jurisdictions, registrants don't have a valid cause of action unless of course they have registered their domain name as a trademark. Unless that happens they do not have a cause of action and they have to be - the fact that we are giving

the trademark corner two possibilities, the UDRP and the court. And we only give the court, which is expensive and slow, to the respondent. I would think that it's problematic and it's unfair.

Mike Rodenbaugh: I actually agree with you on that Konstantinos. It's Mike Rodenbaugh again just for the record. Have we - I don't know if the talked about this or not, I guess I don't particularly care. But has anybody talked about the idea of, you know, having an appeal actually go to another panelist in the URS, that whole scenario. Was there any work done on that aspect yet?

John Nevitt: Now we are - just to clarify, we are talking here that anyone, either side has the right to appeal in the URS in addition to whatever other rights they may have in the UDRP or in a court of competent jurisdiction.

Man: It will appeal the URS how and to whom?.

John Nevitt: That's the next item.

Man: Got it.

John Nevitt: Okay?

Man: Yes.

John Nevitt: All right, I've got Wendy - again, we've got eight minutes. So I've got Wendy, Paul, Mark and Alan. Is Wendy still there? Okay, Paul?

Paul McGrady: Yes.

Wendy Seltzer: Hello?

John Nevitt: Oh, Wendy's back. Okay, go ahead, Wendy. Sorry, Paul.

Paul McGrady: That's fine.

Wendy Seltzer:: Sorry about that. I thought we were creating an appeal panel within the URS as in the statement below.

John Nevitt: We are.

Wendy Seltzer: And so then this discussion above doesn't - it seems contradictory. I wouldn't think we would give the complainant appeal within the URS and appeals within the UDRP. But rather send everybody either through the URS and if they were dissatisfied with that, directly out to court.

John Nevitt: I don't think we're in a position to mandate that they can't go to UDRP.

Wendy Seltzer: Sure we can. We can say in creating this new procedure that you get one bite of ICANN arbitration apple and if you've chosen URS instead of UDRP, then your only option is appeal within URS. I think we can say that in....

Man: No, but we've already said it's a different threshold, so.

John Nevitt: Yep.

Paul McGrady: (Unintelligible) would be. You would make the URS what? You would just make the URS (unintelligible) use it.

Margie Milam: Because they want rapid takedown and because they have an appeal within that process so they have two tries to make - to get the panelists...

((Crosstalk))

John Nevitt: But the appeal would be at the higher...

((Crosstalk))

John Nevitt: Sorry.

Margie Milam:and if they fail at that (unintelligible).

John Nevitt: All right, Paul.

Paul McGrady: I think what we're trying to say here is that there's not an appeal to the UDRP. There's simply is - there is no claim preclusion. In other words if you bring or defend under the URS, that there's no claim preclusion. Meaning, you know, we're not blocking your access to the UDRP process. We're not blocking your access to whatever remedies there are for you under national legislation and with your courts.

You know, there is a process under the ATPA for folks who have access to the U.S. Courts or they're the residents or whether they simply have (unintelligible) reversed to domain name hijacking. Whether or not, you know, such provisions exist for others in other jurisdictions may or may not be, you know, a bad outcome. But again, we're just the STI; we're not in the position to legislate for other people.

And so I think this really is - if we go down this path and essentially carve out the access to the UDRP process, we're essentially -- as someone mentioned -- providing - you know, agreeing to a URS that nobody is going to - in a URS that nobody's going to use is essentially, you know, no URS.

So again, like the dramatic proposed changes to the proposed elements of the URS, I really think that we need to stay focused on what we've been talking about and all the calls leading up to today's call and not to go so wildly off track and just sort of deal with what we have, you know, before us, which is, you know...

John Nevitt: Okay...

Man: Yeah, no, go ahead.

((Crosstalk))

Paul McGrady: ...(unintelligible) appeal.

John Nevitt: Okay, so let's look at the evaluation of an appeal because that might help - if that's okay with folks, that might help move this along because we - I think we only have a couple of minutes. So, you know, reading the transcript it looks like folks were not comfortable with the naming a three-member panel based on fair use academic trademark law expertise, but really wanted each side to pick one and then maybe have a third one, a neutral for lack of a better term.

If anyone is uncomfortable with a typical AAA or American Arbitration Association or JAMS or one of the bigger arbitration panels, that each side picks one and then there's a third one. Or the default of, you know, one ombudsman person that I can't put in there. A three-member panel is going to be a lot more expensive than the other issue to the appealing party.

Amy Stathos: John, this is Amy. Just to clarify?

John Nevitt: Uh-hum.

Amy Stathos: The ombudsman part was something that the IRT had recommended and our indication was that that was something that would be requiring additional review and consideration. So not necessarily something that we were recommending out of (unintelligible).

John Nevitt: Well, okay, but that's in the default. If we don't reach a consensus, that's...

Amy Stathos: Well, the proposal actually indicated that it would be something that would require further consideration.

John Nevitt: Got it. Okay. Thanks for that clarification ,Amy.

Kathy Kleiman: John?

John Nevitt: Yeah, go ahead.

Kathy Kleiman: I raised the point last time -- and I'm not sure where it got put -- that, given the rapid review process, it seemed like a standing appellate board might be appropriate here because this doesn't - this whole time frame in the review doesn't have the same time frame as the UDRP. So that having standing experts so that the appeals can go just as quickly seems to be (unintelligible).

John Nevitt: So that would be akin to what we have in ICANN world right now for the new registry service, the funnel process where they have a standing panel of experts that would look at a new registry service to see if there's any security and stability issues with that.

Kathy Kleiman: Uh-hum.

John Nevitt: So that might be an analogy we could use. Any thoughts on that? I've got Mark?

Mark Partridge: Well my thought is, again,. I'm - I think as much as we can follow existing practices that are working we're in good shape. The idea of having a three-member panel to review something is similar to what seems to work pretty well within arbitration and in the UDRP process where the sides pick. And on the appeal at least I don't think we have as much of a time concern; we don't need to have as much of a rush on that happening.

But I'm not dismissing what Kathy says. I'm just wondering if we really need to come to a conclusion on that point or if we can come to a consensus on the idea that it's a three-member panel, review would be available and that

would consist of an existing appeal panel or a panel selected by the parties.
Just to try to move this forward.

((Crosstalk))

John Nevitt: Alan?

Alan Greenberg: Yeah, I would just ask a simple question. I am not sure if we discussed or if we need to discuss who pays for the appeal if the appellant wins.

John Nevitt: So is there a cost shifting if the appeal is successful, should the loser pay?

Alan Greenberg: Yeah, yeah.

John Nevitt: Okay. Question? Okay, so obviously we're out of time now. We have our call tomorrow. I was not on the clearinghouse call last week either.

Do you think we'll have extra time? Because we still have the one issue that we did skip on what happens per - in a successful URS complaint. So we have that issue out there that I know is important to Mike in to BC, so I don't want to shortchange that. And from Alan's update, it sounds like we don't have much time all together in this process from the GNSO perspective.

Alan Greenberg: Yeah, I would like to take - either I or Zahid should take a minute and just say what was decided yesterday.

John Nevitt: Yeah, go ahead. Thanks.

Alan Greenberg: Okay. The GNSO next meets on the 17th. We have acknowledgment from staff that the Board will accept a three-day delay. So our target is to get something to the GNSO to allow a decision to be made at the meeting on December 17. Our target is that we should have a target to the GNSO preferably by 7 of December, which is a Monday or, at worst, two or maybe

three days later. But to at the very least give the counselors a week to consult with their constituency stakeholder group to instruct them how to vote if that's appropriate. So we need a report essentially two weeks from yesterday...

John Nevitt: Okay.

Alan Greenberg: ...if I have the timing proper. And so we're going to have to sometime next week start putting together some drafting teams. Or maybe by the end of this week to start putting together some drafting teams to draft what we have - do have consensus of and approve it at our last meeting, which is likely to be the next week in each of the two cases. Or maybe we want a third meeting next week to discuss the actual text documents to pass them onto the GNSO. In any case, our target is we're supposed to be delivering something roughly two weeks from today.

Wendy Seltzer: Why is - what's the status on taking notes or not what we have (unintelligible).

Alan Greenberg: (Unintelligible), I'm not saying it isn't. I'm just saying that at some point we have to pass it onto the GNSO and that point is roughly two weeks from today. So we...

John Nevitt: Yeah, I agree with Wendy. We need a full blown report, but we could give them, you know, even a bullet point or...

Alan Greenberg: I wasn't trying to say otherwise, just that we need something that we can say we're signing off on.

John Nevitt: Right. Okay, so the point is we'll have one maybe two at best meetings before we just have to pull the trigger. But it doesn't sound like we're all that far apart, but we did have this one issue on the URS side. So the question again is - well are folks okay adding some time or cutting out some time of the trademark stuff - the clearinghouse stuff tomorrow to add this one issue or

will we have a full agenda on the clearinghouse stuff?

Man: God knows.

John Nevitt: Yeah, okay.

Man: One more thing is it was clarified that should we not be able to come to consensus completely or on any given issues, the alternative is not the staff proposals as written on the documents several months ago, but the Board will factor in whatever we do come to a consensus on plus the - of course the public comments that are coming in (unintelligible).

John Nevitt: Sure. Okay, Zahid?

Zahid Jamil: Thank you and thanks, John. One of the issues we've been discussing with BC is that we're happy to get the process moving and there's a lot of places we see the word consensus come up as we go through the URS. I mean we had concerns about important dates or the 20 dates. But if supposing we don't discuss and don't have consensus on the issue of the transfer, I think we will have to go back and say, "Well there's a lot of things we don't have consensus on." So I don't want - just for the record, just because we're going through this process shouldn't be taken as unconditional consensus as far as the BC is concerned if you don't have transfer. Just to make that point for the record.

John Nevitt: You don't have transfer, or?

Zahid Jamil: Transfer, transfer domain name and the remedy.

John Nevitt: As opposed to the one year that we had talked about? I know that there was some discussion about that yesterday with some - last week.

Zahid Jamil: That's right because...

John Nevitt: So you're say transfer is a gating item for you - for the BC?

Zahid Jamil: ...it's about transfer. Well, I mean we would need to discuss it. We need to come to some consensus on that because it basically triggers many of the other issues we've been discussing. Like we've been letting go on a lot of issues -- I'm sure other people have as well -- but I mean it really is a gating issue for us.

John Nevitt: Yeah, I would, you know, ask that you guys go back and talk about that and talk to maybe the IPC folks who was not...

Zahid Jamil: Okay.

Mike Rodenbaugh: But, John - it's Mike Rodenbaugh. We have talked to the IPC folks and we have discussed this internally. And our very strong position is that this is an entire waste of time if there's not a transfer remedy at the end.

John Nevitt: Okay. All right. I appreciate that (unintelligible).

Alan Greenberg: Okay, it's Alan. I have some (unintelligible) that or I'll put them on the mailing list.

John Nevitt: Yeah, okay. We can take that and maybe would could get some discussion on that issue. Okay. And then I guess we're reconvening tomorrow - I'm not sure of the exact time for everyone -what the ETC time is. Does anyone know that?

Man: Hold on.

Margie Milam: Ten-thirty Eastern.

John Nevitt: Ten-thirty Eastern. So whatever Eastern in the U.S. I'm not sure what that

equates to everyone else.

Margie Milam: (Unintelligible) PC.

John Nevitt: Okay.

Kathy Kleiman: Will there be a new Strawman coming out?

Margie Milam: John, can I have a moment?

John Nevitt: Yeah.

Margie Milam: So in terms of next week should we just go ahead and send a doodle out for three days? Is that what we're suggesting? I just want to make sure we get that on everyone's calendar given the holiday.

John Nevitt: Yeah, I would think, you know, Monday and Tuesday if we could do that if we would need to.

Margie Milam: Okay. And do you want to tentatively schedule a third that we might cancel if we don't need it or just the two days?

John Nevitt: Yeah, if folks are willing, we could do Monday, Tuesday, Thursday, Friday or something. I know that's a big commitment. Or maybe we have a shorter one.

Margie Milam: Okay, well and we can always cancel. So, you know, if we get through this quicker, we can cancel some of those calls.

John Nevitt: Yeah. And then tomorrow are we expecting a new Strawman on the clearinghouse?

Margie Milam: Yeah, I'm sorry. I'll try to send it out earlier than I did today.

John Nevitt: Okay, well...

Man: Margie? Margie? Can you send out the spreadsheets not protected?

Margie Milam: I don't know how that happened, but I'll try.

Man: Okay. Yeah, because it's nice to be able to make a note on it or highlight a box that we want to talk about.

Margie Milam: Sure.

John Nevitt: Margie, thanks for all your, you know, time in pulling this together. I know it is not easy so.

Kathy Kleiman: Thank you.

Man: Thank you.

Margie Milam: All right.

John Nevitt: Okay. Well, thanks everyone and we'll talk tomorrow.

Man: Okay.

Alan Greenberg: Goodbye.

Jahid Jamil: Okay, good bye.

Kathy Kleiman: Bye-bye.

Margie Milam: Thanks, John, for moderator.

John Nevitt: Bye. Thanks.

Gisella Gruber-White: Thank you, (Ed).

END