
ICANN Transcription

New gTLD Subsequent Procedures Working Group

Tuesday, 01 October 2019 at 0300 UTC

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TERRI AGNEW: Good morning, good, afternoon, and good evening, and welcome to the New gTLD Subsequent Procedures Working Group call taking place on the 1st of October 2019.

In the interest of time today, there will be no roll call. Attendance will be taken via the Zoom room. If you're only on the audio bridge, could you please identify yourselves now? Anne, are you still in just audio-only for the moment?

ANNE AIKMAN-SCALESE: Yes, I'm in the car and I will be for a while and audio-only is for now. Anne Aikman-Scalese. Thank you.

TERRI AGNEW: Perfect. You're welcome, Anne. Hearing no further names, I would like to remind all to please state your name before speaking for

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recording purpose, and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this, I'll turn it back over to our co-Chair, Jeff Neuman. Please begin.

JEFF NEUMAN:

Thank you very much. Welcome, everyone. As Jim has just posted, it's back to back 03:00 UTC calls. How'd that happen? I think it's because the Monday and Thursday rotations are different. Every Monday rotates and every Thursday rotates, but they don't necessarily – it's not one after the other. So, yeah, we're just lucky this week.

Anyway, the agenda is up on the screen and we're going to finish objections and we're going to start accountability mechanisms. I don't think we'll get all the way through accountability mechanisms because there's a lot to talk about there. But just in case, you can see the next subject on there is community-based applications, and the links to all the documents are on that agenda as well. Before I get started, let me ask if there are any updates to any Statements of Interest and/or Any Other Business?

Let me just look at the chat here. I will say [inaudible] welcome back to Elaine Pruis who has updated her Statement of Interest as Elaine has put into the chat as well, so you can see that up on the wiki of all the members.

Great. Any other updates or any other questions on the agenda? Okay. Then let's jump right into objections where we left off at String Confusion Objections. And the main item on this one that

we need to cover is a comment here from – I guess it was a proposal that was submitted initially by the National Association of Boards of Pharmacy. Had a significant discussion in the – I want to say it was Work Track 3 and then was put out for public comment, namely that if an applied for string is an exact translation of an existing string, that is in a highly regulated sector and the applied for string would not employ the same safeguards as the existing string then a String Confusion Objection could be filed. In other words, I think in the example that was used – so they have .pharmacy. If you applied for a .drugstore or something in the United States, that would be a kind of a synonym, and if it was in a highly regulated sector and therefore if it didn't imply or employ the same amount of safeguards as the existing .pharmacy then they would want to us to have an objection based on that. And then this of course also would apply to exact translations. So if it was in a different language and they applied for and didn't have the same kinds of regulations. So, that was the proposal.

Thanks, Steve for posting the document at the link. And so, the comments that we got back, there were some level of agreement to that proposal. National Association Boards of Pharmacy, At-Large Advisory Committee, the United States Postal Service, and the INTA all agreed with this type of a proposal and there are some rationale that's explained just below that, their agreement. The IPC had agreed with it but had some concern if the exact translation is clearly defined, objection grounds are limited and additional details filled in. So, I guess it's that qualified support. But the Brand Registry Group, Registrars and the Registries did not agree with the proposal saying that it would extend the purpose of String Confusion Objection unnecessarily and that

there are potentially other mechanisms that could be relied upon. And the Registrars said that this is a business decision by the applicant. String should be evaluated on its own merits. And the Registries stated that these categories were solely derived from GAC Advice and not self designation by the applicant, and different rules should not apply.

I put a note into this section just before the call because the CCT Review Team recommendations, specifically recommendation 12 did have a recommendation in there that incentives should be created or eliminate current disincentives that encourage gTLD registries to meet user expectations regarding one, the relationship of content of a gTLD to its name, restrictions as to who could register domain names with certain gTLDs based upon applied messages of trust conveyed by the nature of its gTLDs particularly insensitive or regulated industries. And three, the safety and security of users, personal insensitive information. And they specifically including health and financial information.

So then there's more to that recommendation but essentially those in support of the proposal cite – sorry, if you can just scroll up a little bit. They cite that these are highly regulated sectors and that it can create confusion. So, you can imagine let say .pharmacy in English has a bunch of restrictions and so there's user expectations if they purchase pharmaceuticals off of .pharmacy that can be assured that they meet some level of restrictions, but if you then allow a .pharmacy in let's say farmacia in Spanish but it doesn't have the same restrictions, are we going to have potential user confusion which could be a safety issue if that happens to be

applied for as an open TLD and there's no such checking or there's not a same level of checking as .pharmacy currently has.

I want to throw that out for some discussion to see what the people in this group feel. Is there any way that we can work on this recommendation in a way that is one that we think we could adopt as far as an objection? Remember, it's not a right of – it's not giving anyone a right to the TLD. We're not saying that .pharmacy can't be competition and that there can't be someone else that runs in another translation or saying here that there should be some level of comparability, I guess, in the restrictions for users.

Thoughts, comments on that? Rubens says, "I don't think this belongs as a String Confusion Objection. It looks like a good idea in the wrong place. That's fine as well. I think it's only in this place because I guess that's the only category or the closest category but sure, if there was – we want to call it something different, I think we could certainly call that something different. I don't think the label is what's critical here, but Rubens seems to think that that's a good idea. Does anyone else think this is a good idea, something we should work on, something that's got merit? And again, also it would be something or could be something that meets the CCT Review Team as far as an incentive for those that apply with restrictions or with some sort of qualifications.

Steve said that the incentives aspect seem to lend itself to consideration in the context of application types. I think that's right, Steve, but as going to through it, it seems like an incentive. This could be also another type of incentive not in terms of monetary incentive like I think the CCT Review Team was initially thinking of

in their examples, but again if it is a sort of an incentive, to make sure that if anyone else does apply that they have to use similar standards in that highly regulated string. That's not an exact match but it was something that just kind of came to mind.

Paul McGrady says, "Can we think about how this could go wrong? What if the translation is such that it isn't really a sensitive string like the other regulated string?" Okay. I suppose again, if we like the idea and it is an exact translation with the exact meaning, I think that could be part of it as well. Paul's got guard and guarda – and I'm not sure what language that is, guarda. If it's Spanish or ... I have no idea. I don't know.

Are those exact translations, Paul? So, the example I was thinking of pharmacy, farmacia. I'm sure there are other people on this that could think of exact translations of pharmacy. Similar thing for bank. So, if there's exact translations of bank that intend to use it in exchange for banks. Perhaps that could be another example.

Paul is saying, "I'm not sure I can come up with examples on the fly but I think we should." I think I came up with a couple for pharmacy, and I know that that was part of NABP's concerns.

Maxim is saying, "It might be complicated, for example, regulations in the same area in different countries are different which prevails." I think, Maxim, I think that's a good question. Again, it would be the jurisdiction in which the applicant is located. I would think if we're talking about national law, so I would think that would be not true. So, for example, there are .pharmacy in the U.S. has a very different restrictions than let's say in Italian or Spanish version of pharmacy. But I think being licensed to do

business in those areas, I think is something that I know pharmacy has in their restrictions and so any kind of exact translation would have similar restrictions in their own jurisdiction. So, I think it is something that can be jurisdiction by jurisdiction.

Justine says, “Maxim, would those considerations be raised in the rationale for any string objection to be filed?” Maxim, right. Requirements for a license might be different. That’s correct, Maxim, but again, I think if you raise it up to the 50,000 foot level, it’s the fact that a license is required, not necessarily that the same requirements to obtain a license are required in every jurisdiction.

Rubens is saying one example of lost in translation. Both bank and bench translates to banco in Portuguese. What if the applicant thought of .bench instead of .bank? I suppose that would come out in the application itself or in the objection. I would think that that’s something that would come out at that point in time. I guess that would be a defense, right? If an objection is filed and they say, “No, this is not intended to be used with banks and therefore it’s for benches, I guess.”

Spa and Spa. Sorry, Maxim is that? Alright. So, that’s geographic. Let’s stay away from the geographic examples since that’s the exact same string.

Again, as Justine says, the grounds will be included in the objection itself. So, we’re not saying anyone’s got a first move or first right of refusal. We’re not saying that [inaudible] gets in every language or [inaudible] that’s it’s based on objection. Greg, your line is open. Oh, maybe not.

Anyone else like to add in anything here? Okay. Oh, let's see. Maxim says it creates a situation for two cities where one is ... Okay. Where one is restricted to citizens. Sure. But I guess that would be a defense and that would be known in the application itself.

Justine says every objector has to formulate their grounds, so dispute resolution providers would evaluate whatever is raised. I think that's right.

Okay. So, it does merit some further discussion. I don't think it's something we should dismiss out of hand. It seems like there were some levels of support. There were some divergence and it would be great if this is the kind of proposal that we could work on getting some sort of high-level agreement on as something also in line with CCT Review Team recommendations as providing that sort of incentive, and that it gives you sort of jurisdiction for some objection later on down.

Alright, since there's no other comments let's move on then to the Thai Network Information Center does bring up homonyms here. We did talk about with reservations and we previously have had discussions on Internationalized Domain Names and the string evaluation. And I don't think we need to go over those now but we should put a link in this section to that discussion. So, if we could just put a note over there, homonyms was something that came up during that evaluation discussion.

Okay, alright. Now that brings us to the Legal Rights Objection. I've highlighted a couple of things here just to give cues to myself really for this discussion. The question that was post in the initial

report was, should the standard for Legal Rights Objection remain the same as it was in the 2012 round? If you click on the “Show more” of that comment that’s to the right, that was the existing standard whether the applicants potentially used to the applied for gTLD, would be likely to infringe the objectors existing trademark or IGO name or acronym.

And then it says, the panel will determine whether the potential use of the applied for TLD, 1) takes unfair advantage of the distinctive character or the reputation of the objectors registered or unregistered trademark or service mark or IGO name or acronym, 2) unjustifiably – this or not and – or unjustifiably impairs the distinctive character or the reputation of the objectors mark or IGO name or acronym, or 3) otherwise creates an impermissible likelihood of confusion between the applied for gTLD and the objector’s mark or IGO name or acronym.

The BRG, US Postal Service, and the Registry Stakeholder Group support maintaining this existing 2012 standard and criteria.

INTA, Universal Trademark Associations suggest amending the standard of proof to whether the potentially use of the applied for gTLD by the applicant takes. And then I’ve highlighted this because I think this is the part that they added. Or will once used take unfair advantage of the distinctive character or the reputation of the objector’s mark or creates or will once used create actual confusion with the objector’s mark or high likelihood of such confusions. INTA I think recognize what a number of trademark owners had recognized once the objection were to be filed, that an application by itself may not infringe the legal rights of a third party because it’s just an application. It’s not like it’s been used yet, but

once it is used, once the TLD is used then that is what could create the confusion or the infringement etc.

So, I think that's what was intended by the initial version of a Legal Rights Objection. It wasn't actually stated that way, so that is something I think that – plus Paul says, “The old standard was nonsense since it was an infringement standard, and infringement requires use but you're actually looking at these strings before there's any use of that TLD.” And so, I think this sort of puts in line with, I believe, what was really intended. But I want to make sure before we accept that that just to make sure we have discussion on this item.

ANNE AIKMAN-SCALESE: Yeah, can I get in the queue? It's Anne.

JEFF NEUMAN: Yup. Sure, Anne. And then also just before you do, one second. There are additional factors that we'll get into in the INTA comment, but let's just talk about this part first. Anne, please.

ANNE AIKMAN-SCALESE: Yeah. I just want to mention that actual rules adopted by the dispute resolution providers, and I think there's good reason for this. They don't assert an infringement standard. They assert a likelihood of confusion standard, and so I'm not sure why we're sort of commonly referring to the standard as being they're relevant because you can't see actual use. I mean, when the application comes in, you got question 18, you've got the purpose

described in the application, right? And likelihood of confusion is the worldwide standard for trademark issues, and so although I would personally support adding additional and I think [inaudible] would support having additional grounds for suspending a Legal Rights Objection, making it anymore strict or any less compliant with worldwide trademark law with standards likelihood of confusion, narrowing that standard is a very bad idea from the standpoint of trademarks holders.

I can check again with that in the IPC. There's a lively discussion going on at one point, but we can add additional reasons for opposing on Legal Rights Objections. I think Paul is an advocate of a bad faith standard but we should not delete the likelihood of confusion standard. That's a worldwide standard. Thanks.

JEFF NEUMAN:

Thanks, Anne. And maybe, Paul, if want to get in the queue. We're not deleting the likelihood of confusion standard. I think what we're saying is just recognizing that the string once it's used will create a likelihood of confusion. I think an application in it of itself could not cause a likelihood of confusion. It's the TLD itself once it's delegated and used that creates the likelihood of confusion.

Maybe Paul or someone else can get in the queue, but I don't think we're changing that or getting rid of the standard. We haven't yet talked about the bad faith one yet. Paul, do you want to get in the queue? Paul, please. Yes. Thanks.

PAUL MCGRADY:

Thanks. This is Paul McGrady. So, I'm just looking at that language at the Applicant Guidebook which governs, whether or not the providers in the last round added some things or whatever. You know, great. When we look at the outcomes from the Legal Rights Objections, they were bizarre and a lot of trademark attorneys including myself refuse to use it because the standard was bizarre. So, at 3.2.1, Legal Rights Objection, the applied for gTLD string infringes – current text – the existing legal rights of the Objector. And then we go to 3.2.2.2 for additional discussion and then it says, “The objector is claiming rights are infringed.” Again, it’s an active thing “...are infringed by the applied for gTLD and so on, so on, and so on.” Again, maybe the service providers looked to the Applicant Guidebook and said, “Gee whiz, this is nonsense, we’re going to do our best to try to rewrite the Guidebook.” Hooray for them or boo on them depending on your world view, right? But what’s not before us are the providers supplemental rules or however it was they dealt with it, right?

So, what’s in front of us is 3.2.2.2 and then the other section I read before, both of which refer to infringement. In infringement you have to have use and applications are applications not use. Then, yeah, the traditional trademark law applies most likely a standard called likelihood of confusion in infringement cases not in dilution cases and not in cybersquatting cases. There’s a different standard for those cases but for infringement cases, yes that’s what’s applied and I have no problem capturing that concept. But the idea that an application alone is infringing, I can certainly see the potential for infringement. I can certainly see bad faith applications that are designed to take unfair advantage of

trademark rights, but applications themselves hard to prove that they're infringing because the registry has not been launched yet.

So, I do think we need to take a look at this. I understand what Anne is trying to say. I'm not for taking out anything even if it's not really helpful. I'm all for modifying something to make it helpful but I do think we need to look at other things including the bad faith intent to the applicant when they applied and their history – those kinds of things. And so, that's kind of where the chatter within the IPC and INTA has been, so hope that's helpful. Thanks.

JEFF NEUMAN:

Yeah. Thanks, Paul and what you just said is the way that I really interpreted at least this first part with the INTA. And so, I think it just clarifies the way that the panels did look at – I haven't read all the Legal Rights Objection cases or I did at one point but not recently. But I do believe that that was the intent behind it, and I do agree with you and that an application itself does not infringe or it's very difficult to even imagine how an application for a TLD alone could infringe. It certainly could once used, I think which is what INTA says. It certainly then would have the or could have the potential for confusion.

So, I do think that that part make sense. Before we go on, Anne, does that make sense to you? Before we go on to bad faith standard and – okay, Greg has got his hand raised. Greg, please.

GREG SHATAN:

Yes. Briefly. I agree with the concerns about the words infringe in this space but likelihood of confusion I think can be judged at the

application stage. Indeed in the U.S. the trademark office judges intent to use applications on a likelihood of confusion test on among other things. So, I think I would not say the likelihood of confusion analysis necessarily requires use although it can bring much more to the table in the analysis, if there are facts surrounding use but as such likelihood of confusion applies in perfectly well as applications. Thanks.

JEFF NEUMAN:

Yeah. Thanks. And Paul notes that likelihood of confusion is included in the INTA comments. Was it included in the initial standard? No, I don't think it was. So, the way that it was or is – I'm sorry. The way that it is in the 2012 Guidebook, it doesn't have the words "likelihood of confusion" in the standard itself. It says "likely to infringe," which is very different than likelihood of confusion. So, I think although that's in the INTA comments, that's not what's currently in the Guidebook.

As Paul is saying, it wasn't. The initial standard as written ...
Alright.

Steve says that's there further detail in 3.5.2. Likely to infringe as Greg says is problematic. Steve, pull up 3.5.2. Alright, can you make that a little bit bigger, sorry. Is there a way to do that? That is a factor of the infringement but that is not the standard itself, Steve. So I think there is a difference. If you scroll up – these are things that the panel could consider, but what we're talking about here is likelihood of confusion. It's not just a factor, it is the standard. There is a difference there.

Help me out, Greg or Paul. Am I correct in making that statement, or does it seem like 3.5.2 does solve the issue? We'll wait to see if anyone can jump in here. Paul, please.

PAUL MCGRADY:

I think it might be helpful. I mean I think it requires a leap from the prior two sections which talk about active infringement. This gives factors for that panel to consider, but again strict reading of the other two sections, it's action there and not impermissible likelihood of confusion that we find here in 3.5.2. So 3.5.2 may be helpful in overcoming the defects of the other two sections, or it may just be inconsistent. And if I'm a panelist, I might scratch my head and say, "Well, which of these am I supposed to be concerned about?" It seems like I would want that complainant to get past the first two gatekeeping sections first before I start looking at these factors.

I know I'm kind of saying bad things in a transcript that I may not be happy with later. And I would argue that 3.5.2 does what everybody hopes it does, but the problem is that gives – because the other two sections are so badly written, this doesn't really give people comfort that they can go in and file these things and have good outcomes and, in fact, if we look at the outcomes from those who did roll the dice and file these, the outcomes weren't great. Again, I appreciate Steve raising it, but I think we really ought to go back and fix the other two sections so that it's clear how 3.5.2 affects those.

JEFF NEUMAN: Thanks, Paul. Greg, your hand is up. Do you want to get on the queue?

GREG SHATAN: Yes, please.

JEFF NEUMAN: Okay. Go ahead.

GREG SHATAN: Thanks. I think 3.5.2 perfectly highlights what the problem is. 3.5.2 is an attempt to make the best of the bad situation I think because at the time this was being written, one couldn't unmake a GNSO recommendation. So this is like when the omelet falls on the floor and you decide you're going to pick it up and serve scrambled eggs and you try to make it presentable. But the problem is GNSO Recommendation 3, which is quoted here, "Strings must not infringe the existing legal rights of others, blah, blah, etc."

Now is the time, here is the place, I believe, to address GNSO Recommendation 3 because now is the time we're in a group that can again make policy recommendations and a policy recommendation should take care of GNSO Recommendation 3, so that we don't essentially have a grafting of a reasonable attempt to the standard but onto a root of a recommendation, which not to blame anybody, thousands of things are going on at the time of course, but that just didn't make sense. As it even says, it's trying to give meaning to the recommendation but the

recommendation by itself really is not meaningful. I think that's similar to what Paul had said.

So our job is not merely to fix 3.5.2. Our job is to fix GNSO Recommendation 3 so that we're no longer coping with this infringement nonsense as being the colonel around which everything else tries to fix the problem. Let's fix the problem.

JEFF NEUMAN:

Thanks, Greg. I think you're right. I think it's incumbent upon us. If the original GNSO policy is not written the way it probably should have for clarity sake, then it is incumbent upon us to make the change. From my perspective, I think this is more of a clarification of what was intended, but I definitely want to leave this open for others to [inaudible]. Frankly, I don't see this as being a substantive change in the sense of changing what was originally intended to have better language.

Justine says a small drafting team might be called to rewrite/correct the section. I'm not sure we need a full drafting team. I think putting in what the INTA comment was I think might be enough and just evaluated by the group. We'll put that as an action item. But again, what I'm really interested in hearing about is whether there are those that think that that really substantively changes the intent of what the GNSO had in mind. I don't think it does but that's only my reading and obviously there are people who have much more knowledge than I do on this subject area.

Okay. Now, the second part is an addition. The INTA and I think the IPC also believes that there should be some expansion. First

the INTA states that additional factors that would guide applicants and Legal Rights Objection Panels on concepts of bad faith. The want bad faith to be also included in the infringe the legal rights of others or this Legal Rights Objection, and so they want history like looking at the history of the applicant and the individual behind the applicant, and whether underlying trademark rights acquired by the applicant were filed solely with respect to supporting the business of the application.

This would be an addition. It's a relaxation a little bit of the standard to a bad faith standard as opposed to likelihood of confusion or an infringement standard. Are there thoughts, comments on that? I think this is what, I believe, that the Registries Stakeholder Group and the BRG had opposed. I'm not sure, maybe Anne could answer whether this was something United States Postal Service opposed, but I think the U.S. Postal Service was more in line with let's just keep the same standard that we had in 2012. But I believe the BRG and the Registries Stakeholder Group did not want to expand the scope of the Legal Rights Objection.

Comments on that? Greg said, "I wouldn't call bad faith a relaxation of the standard."

Okay. What would you call it then? Maybe relaxation is not the right word. I've just looked at the next sentence for the IPC, and they said that the standard should be relaxed but that could be because they're also saying that registered marks which also constitute generic names should be able to prevent awards to third party applicants if those third party applicants intend to use the TLD in similar goods and services as the objector.

Paul is saying bad faith can be an additional element. Okay, fair enough. I think that might be what Greg was going to say because his hand is now down.

Any other comments or questions on this? Is this something that we should explore? INTA and IPC have recommended it, but do we have others that have thoughts on this? Quiet crowd tonight. Maybe everyone is watching The Tonight Show with Jimmy Fallon.

Okay, there was also a strawman redline that was submitted. I think the strawman, if I'm remembering correctly, had some elements of this – I don't want to say relaxed standard – but had some elements of this additional elements and that was something the Registries Stakeholder Group also did not agree with.

ANNE AIKMAN-SCALESE: Hi, Jeff. It's Anne. Can you hear me now?

JEFF NEUMAN: I can hear you now. Yup.

ANNE AIKMAN-SCALESE: Okay. For quite some time I was trying to get off mute, then staff had me muted and there was no way via telephone to get them to unmute me. I kept pressing the *6 and you could never hear me. So I had to dial back in.

The strawman and redline is something that I think is still certainly being discussed or debated within the IPC itself. Again, I'd have to agree with Greg Shatan that a bad faith standard is certainly not a loosening of the existing standard and likelihood of confusion. As far as some of the public comments there from IPC, USPS, and others possibly, certainly there are situations where bad faith can be shown. Those are fact situations that could look a little different from the traditional likelihood of confusion analysis on application that Greg is talking about, that if we could get consensus on, it would be an additional standard, not a substitute standard from what I understand. Thank you.

JEFF NEUMAN:

Thanks, Anne. I put a question to the chat and I'll just repeat it. Perhaps saying relaxation standard was not the right way to say it, but in theory I guess my question is you can have bad faith without having a likelihood of confusion. So someone may have registered something in bad faith which may have nothing to do with the trading off of your goodwill or a likelihood of confusion, and so I definitely agree that it can be a factor in likelihood of confusion analysis or it could be an element, but it is not in and of itself bad faith. If all you needed is bad faith then I think that would be something additional than just a likelihood of confusion analysis.

ANNE AIKMAN-SCALESE: Yeah. Traditionally, domain name analysis where I [inaudible] the form or whatever, somebody registered the domain name itself and offers to sell it to you, that's evidence of bad faith. In other

words, buy low, sell high. I suppose the same thing is possible in terms of gTLDs and particularly as application pricing comes down and procedures become more standardized, if you're a big player and you're at the casino and you're playing in the high rollers room, potentially you're going to have a bad faith TLD registration that's analyzed in the same manner as a domain name registration.

JEFF NEUMAN:

Yeah. Again, I'm not saying we shouldn't add it as a different type or a second type of Legal Rights Objection. I just think it is different. That's why we added the UDRP and then U.S. also added the anti-cybersquatting or Consumer Protection Act. I might have the name wrong, but it's to give an additional cause of action above and beyond trademarks likelihood of confusion because in and of itself at the time, bad faith did not necessarily amount to trademark infringement. Anyway, neither here nor there, I'm just saying it could be a factor in likelihood of confusion analysis, but the question is whether it gets its own grounds for a Legal Rights Objection, which is an added Rights Protection Mechanism, I guess. Greg, please.

GREG SHATAN:

Thanks. I think the bad faith probably goes at least as much to – if we look at 3.5.2 where the INTA suggestion, the taking unfair advantage of the distinctive character or reputation of the objector's mark, even into potential as INTA or as IPC indicates even with a "generic" term if the use that's being made is one that goes to its use in the distinctive trademark fashion. So it's not that

it has to go into the likelihood of confusion bucket, but clearly there has to be some connection at the string level in order for there, I would think, to be a bad faith. So I think that is implied that I don't think it funnels only into a likelihood of infringement analysis. I think it stands independently on basically the intent in the application is to have trade-off or pass-off in some fashion or profit from someone else's legal rights. Thanks.

JEFF NEUMAN: Thanks, Greg. Okay. Paul, please, your hand is up.

PAUL MCGRADY: Thanks. Can you hear me? This is Paul McGrady.

JEFF NEUMAN: Yup.

PAUL MCGRADY: Okay, great. Thanks. I never know how many mutes I pushed.

Let me give you an example of this. The reason why the bad faith standard is an important thing to add into whatever we do to fix infringement standard. Say you have an applicant that applies for – and somebody's already taken. Bear with me. I'm trying to come up with something on the fly. They apply for .McDonalds, .Wendys, .Checkers, and .Culvers. Their application says, "We will never sell cheeseburgers." That's in all the applications and they're going to use .McDonalds to sell second level domain names to people's last name or McDonald's, and they're going to

sell .Wendys to people whose first name is Wendy, and they're going to sell .Checkers to people who like to play checkers, and they're going to sell .Culvers to people who live in Culver City. We can add up all those facts and say, "Hey, wait a minute, they seem to be squatting on a bunch of famous cheeseburger marks. That's not right." But they've excluded from their applications the possibility of selling hamburgers, so you can see panel saying, "There's not infringement if there's not going to be use," but there's still something stinky going on there, right? I think that's why we need to work in a bad faith option into whatever we do to fix the infringement/ likelihood of confusion concept.

So I would like to be proactive and suggest that maybe since Anne and Greg and I seem to be the nerds that are most interested in this, then the three of us go offline with these two concepts and mess around with some of the language and come back to the group with something. Is it too early to suggest that? Thanks.

JEFF NEUMAN:

No. It's the perfect time to suggest that, Paul. Yes. I think the way you guys are heading, it sounds to me like it would be another element in 3.5.2 as opposed to its own standalone cause of action – for the lack of a better term – which is what Steve has already put into the comments on the draft.

I, Paul, Greg, and Anne would love if you could tweak that and also the incorporating the INTA comment for the ones used. This is not the full redline that we're talking about. That was already the strawman redline but perhaps just adding the factor and somehow

incorporating what we were discussing earlier on from the INTA comment.

ANNE AIKMAN-SCALESE: Great. Yeah. I'm certainly getting on board with that. Thanks.

JEFF NEUMAN: Great. There's an interesting discussion of burgers going on on the chat. For those of you that are in the United States. Actually, five guys are all over the world now if you like those burgers.

Alright, let's jump then from burgers and objections to accountability mechanisms.

ANNE AIKMAN-SCALESE: Hey, Jeff, that's a great way to get in and out of this discussion.

JEFF NEUMAN: Thanks. The title of the section is Accountability Mechanisms, which is sort of a misnomer because what we're actually talking about or spend a lot of time talking about are appeals or re-reviews of decisions, and specifically not talking about any changes to the Bylaw accountability mechanisms which is what most people think about when they hear the term accountability mechanism. That will become more apparent as we go through this, but there you go.

The background documentation is there. The policy goals, we're just reiterating the 2007 policy.

Recommendation 12: “Dispute resolution and challenge processes must be established prior to the start of the process.”

Implementation Guideline R: “Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated.”

Then we have another policy goal that is added more from our discussions, but something I don’t think anyone will have an issue or should have an issue with, which is, “In addition, dispute resolution and challenge processes should be transparent, fair, and cost effective.”

Alright, I’m assuming no one is going to have an issue with those policy goals, so let’s move on to the high-level agreement. The first high-level agreement is it’s a conditional if. Now, after we go over the comments, I think most of the comments did support this but the high-level agreement is: If a new substantive appeal mechanism is established, the process must be transparent and ensure that panelists, evaluators, and independent objectors are free from conflicts of interest.

What I then put in a note, highlighted it, is really again from my notes. But the registries in their comment, I thought had a very helpful reference to other comments they filed. But ultimately, the way that they put this is that a limited substantive appeals mechanism process for certain types of disputes that arise from a failure to adhere to criteria in the Applicant Guidebook, for example but not limited to, where: An evaluator misapplies the

Guidebook or omits Guidebook criteria; or A panel relies on incorrect information or standard to decide an objection.

If we look at the comments – which I’m not going to do at this moment, we will – it does seem like this is the type of appeals mechanism that which pretty much had high-level agreement from the entire community. I don’t think we’ve got a comment in, although we may have gotten one that says that there should not be any sort of this type of appeals mechanism. So I do think there’s high-level agreement to change that if to we should have a limited substantive appeals process for these types of disputes.

Also, I believe this high-level agreement on the next bullet point, which is that the new substantive appeals mechanism must not be a substitute for, nor act as a replacement of, the accountability mechanisms in the ICANN Bylaws – namely, one would look into whether ICANN violated the Bylaws by making or not making a certain decision.

So, in other words, the latter type or that thing where you would look at to whether ICANN violated the Bylaws by making or not making a certain decision – that stays with the accountability mechanisms in the ICANN Bylaws. These are not a substitute or replacement for what’s in the Bylaws. That seemed to have high-level agreement as well.

Paul is saying, “Support new appeal mechanisms that do not erode what we already have.”

Then the other aspects that we think have high-level agreement. Post-delegation dispute resolution procedures. The parties to a

proceeding should be given the opportunity to agree upon a single panelist or a three-person panel bearing the costs accordingly.

We also think that clearer, more detailed, and better-defined guidance on scope and adjudication process of proceedings and the role of all parties must be available to participants and panelists prior to the initiation of any post-delegation dispute resolution procedures.

This is not referring to the capital post-delegation dispute resolution procedure (PDDRP), but really any after delegation dispute resolution procedure. It's a little confusing there, I know, but we try make it a little less confusing by lower casing them.

Rubens notes that we should note that the IRP is different from the 2012 IRP; the new IRP might fit the desired new substantive appeal mechanism description, saving us from baking yet another mechanism.

I looked at that, Rubens, and it doesn't. The IRP is still based on a violation of the Bylaws. It would not be based on an evaluator that misevaluates an application or wouldn't necessarily apply if an evaluator or panel ruled on its own conflicts of interest, then you wanted to appeal that. It wouldn't necessarily ... I mean ICANN had to really extend its accountability mechanisms to handle a lot of the types of issues with the new gTLD program, and the reality is even under the new Bylaws it still requires some Bylaw violation as opposed to something in the Guidebook where the evaluator just didn't get it right.

As Greg says, it's not fundamentally an appeals process. So I think that's important.

Some outstanding items that we need to discuss. If we scroll down ... Again, the – sorry, not speaking correctly here. ALAC, BRG, INTA, IPC, Council of Europe, the CCT-RT, and the Non-Commercial Stakeholder Group all support developing mechanisms to have this substantive appeals mechanism.

If you look in the bold language in that sub bullet point on the CCT Review Team, they talk about introducing a host dispute resolution panel review mechanism. The NCSG's concern was more about the CCWG accountability work. So I think by high-level agreement, if we are clear that this is not a substitute for or replacement for the Bylaws accountability mechanisms, and they have different scopes. I think we covered the NCSG concern.

Paul's comment: "If the ALAC and INTA agree, it must be okay."

The Registries Stakeholder Group and Valideus also agree. I moved this up – that highlighted language – up above just so you could see where I got that language from. I think there's some good information in that Registries Stakeholder Group comment which describes the people's mechanism.

ANNE AIKMAN-SCALESE: Jeff, could I get a quick comment when you get a chance here?

JEFF NEUMAN: Sure. Now is a great time before I get to the ICANN Org concerns. Please.

ANNE AIKMAN-SCALESE: It's really in support. The discussions that we've had about conflict of interest and objection proceeding, and the fact that we don't seem to have an interim step there where the conflict of interest is alleged and determine one way or the other and then all the expense of proceeding goes through. It just seems that there ought to be a way to appeal a determination on conflict of interest at that point. I know that we did not obtain public comment on that but I just wonder if anyone else feels that it would be appropriate to be able to have an appeal mechanism on a conflict of interest determination before the entire objection proceeds. Thanks.

JEFF NEUMAN: Thanks, Anne. We're going to get into – I'll actually put a comment a little bit later on specifically on appeals of conflicts of interest, because I think they do have some unique issues. You'll see a comment later on which I thought was a good one that appeals in general should wait until something is "final" before doing an appeal, but there may be some type of exception for what you had just mentioned about a conflict of interest where that's before the actual decision is even taken. We'll get to talk about that a little bit –

ANNE AIKMAN-SCALESE: Good. Thanks.

JEFF NEUMAN:

Great. Okay. ICANN Org did have some concerns. So I put in comments if I were asked to address the ICANN Org concerns, how would I address that?

ICANN Org would like to understand how this proposed “New Appeals Mechanism” differs from the Reconsideration Request. In that first comment to the right, I put the standard for a Reconsideration Request, and as you could see, a Reconsideration Request still has to contradict ICANN’s mission, commitments, core values, ICANN policies, etc., still very much tied to the Bylaws, and not tied to a specific like the Applicant Guidebook itself. Now, one might be able to argue that in established ICANN policy or policies includes the Guidebook but again I think bringing this up in front of the Board, the Board Reconsideration Committee, it’s probably not the best appeals mechanism. It’s certainly not experts in that area. Whether they’re independent or not is also another question.

So I think for a whole bunch of reasons, I think this appeals mechanism can and should differ substantially from a Reconsideration Request simply because of the substance and the nature of these types of issues.

If the goal is to enable a re-examination, should we call it a re-review? On this one, I guess one of the things we need to decide is whether it’s – I want to put in the comment – are we talking about de novo reviews? In other words, reviewing it from the beginning as if there was never a decision, or should we have some sort of standard for these appeals that there’s some

deference given to the original decision and you have to basically find they clearly got it wrong or there was some clear error in order to overturn let's say an evaluation or a panel decision. That's something we'll talk about a little bit later on. But from what I understood from previous discussions, we're not really just talking about a re-review. We're actually in some cases, if not all cases, talking about some sort of appeals where there may be some sort of deference given to the previous decision.

Okay. The next part that ICANN states that we need to define procedure, when can an appeal be filed, to who it would be filed. We'll get to all these questions as we go down this section. Does anyone have any comments on ICANN Org's concerns, or agree with my assessment, disagree?

ANNE AIKMAN-SCALESE: Jeff, can I ask a question about this?

JEFF NEUMAN: Sure.

ANNE AIKMAN-SCALESE: Is it true that Request for Reconsideration, even then with the revised procedure is in fact reconsideration of a Board decision. I thought appeal would be from a panel decision. I'm trying to help to understand, to clarify when an appeal applies and when a Request for Reconsideration applies. I think Greg probably has a real good understanding on that.

JEFF NEUMAN: Not to put you on the spot, Greg, but if we go to the Bylaws – and you know what, I had it up and I just closed it a little bit ago thinking, “We’re not going to need to look at the Bylaws.” Anne, let me take that on as an action item. I believe it still has to be a Board or staff action. I don’t believe it applies to a third party evaluation until it’s formally adopted by staff or the Board. And even then, the Board could still just argue that it was reasonable to rely on the panel decision and deny the Reconsideration Request, which is what it did in, fortunately, every case where reconsideration was brought based on a panel decision. It just said that we were reasonable in relying on the third party and never treated it like an appeal.

ANNE AIKMAN-SCALESE: Right. I think though that it makes it pretty clear that the two won’t be confused, right? Because aren’t we talking about appeal from a panel decision versus appeal from a Board or staff decision? I’m sorry that I’m unable to see the chat, but I’ve got a lot of driving going on here.

JEFF NEUMAN: Be careful, Anne. Don’t get into an accident.

It’s panel decision but it’s also evaluations. Yes, I guess we contemplate that evaluations are going to be done by a third party. In theory, however, it could be done by ICANN staff. At some point in the future, if it brings it in-house any of these options.

Okay. I think at this point, yes. It's probably not going to be actions by ICANN staff, but in theory, in the future it could be. So I'm not sure that would be the guiding line or the dividing line.

ANNE AIKMAN-SCALESE: It seems like it could be super confusing if we don't have a really clear dividing line between where does appeal apply and where does Request for Reconsideration apply.

JEFF NEUMAN: Yeah, I think that's right. I think in the Guidebook, I think we're trying to push substantive decisions like whether a panel got something right or wrong, evaluation is right or wrong. Those should really be made by not through the Bylaw mechanisms unless there's extreme Bylaw-type issue, which I don't even know what that would be. Greg, you have your hand raised.

GREG SHATAN: Thanks, Jeff. I think you're really on the right track here. I think appeals that it needs to be something that is fundamentally different. As Paul puts it, it makes sense to be able to appeal or to have an objection process for a bias or a conflict of interest issue rather than letting an entire process unfold and then challenging it based on something that could've saved a lot of time at the beginning and then the more typical appeal which is an appeal from a decision to another panel or higher authority designated to hear such appeals. But I think it is pretty bright-line difference from a Request for Reconsideration and as you call them, the Bylaws, and ultimately kind of Board/staff decisions. We have a pretty

clear subset of objection processes here that we created basically a first level jurisprudential system without creating any second level system, and I think the maturation of any traditional process is to add an appeal process to it. In New York, the trial court is called the Supreme Court because after that one, that was only court. They built other courts on top of it to appeal it from. That's why the Supreme Court is on the bottom, not the top in New York.

In any case, appeals I think is a natural outcome of the maturation of a process and a realization that some decisions should not be allowed to stand or should at least be challenged within a system to do so. Thanks.

JEFF NEUMAN:

Thanks, Greg. I agree with your comment. I think we kind of shoehorn the reconsideration and accountability mechanism processes because there were no appeals. Had we started over with an appeals process, I would say that 95%, if not more, of the things that went to reconsideration would never have even gone to a reconsideration but rather would've been settled finally at the appeals level as opposed to going up to a Request for Reconsideration, but that's all we had at the time.

Now we get into some more of the details here. This asked the question of, what is the scope? What are the types of actions or inactions that should be subject to the new limited appeals? In going through this, I think Jamie did a really good job of listing a bunch of different types of appeals, saying that something is substantive or procedural, while it does provide some guidance. I think there's lots of gray areas. I'm sure Greg and many others

that went to law school, Anne and Paul, myself, could have many stories and many cases of trying to find a dividing line. The reality is there's not a clear dividing line between substance and procedure but I think that we can certainly list all the types or many of the types of appeals that this would take care of – and I think Jamie does a good job or a good start of these types of things.

The ALAC talks about – again we need to make sure that we're not running afoul of the stuff that would normally be Bylaw-related. So the ALAC states all decisions made by ICANN, evaluators, dispute panels, should be subject to such an appeals process. Relevant actions which should be appealable include decisions undertaken by any purported decision-maker who did not have standing to do so, or by any properly authorized decision-maker which was supported or accompanied by either weak or no justification or reason whatsoever.

INTA says this should apply to decisions of the ICANN Board or staff, and to decisions of evaluator ... Is there a typo there? This should apply to decisions of the Board or staff. Does it mean you should not apply? And to decisions of evaluators ... Oh maybe it should. Okay. I'm sorry. I'm reading the INTA comment. This should apply to decisions of the ICANN Board or staff, and to decisions of evaluators and dispute panelists appointed to act on ICANN's behalf.

I'm not sure it would apply to actions taken by the Board because in theory, you would appeal something before it gets to the Board level. It could be a decision by staff if there are certain in-house, if staff brings certain things in-house. But again, we've got to be

pretty clear or make it very clear that we're not talking about accountability mechanisms, nor do we want to replace those at all.

The Registries Stakeholder Group supports the option of a narrow appeals process for all applicants where parties identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard. Then they have the pros and cons. They set out pros and cons of appeals options.

Valideus states that decisions should be made by independent dispute panels as opposed to ICANN itself. So hold that thought for a moment because we're going to need to get to that one separately.

IPC states there should be appeals with regards to decisions of ICANN, evaluators, and dispute panels by parties directly impacted by the decision.

Then the Council of Europe has also a bunch of types of situations where an appeals mechanism would be appropriate. Then in a comment ... if we scroll up a little bit. Okay, yeah. There I just put a question to think about. What about review of conflicts? Because technically, I don't know if that's considered a substantive decision but that certainly is something that should be reviewable on an appeal.

So I think the question then that we need to get to is who those appeals should go in front of. But before we get to that, we go to the next one. If we scroll down – I want to read Donna's comment, "I'm a bit concerned about a large number of decisions being subject to appeals, [apps] in some form of objective test."

Donna, I think we will need to develop the scope further of appeals in terms of how we define those. I'm not sure there's going to be a 100% objective test, but I think we can define certain causes of action, and then of course, Greg, we'll have to have a standard of appeal which we'll get to further down. I think it's partially also addressed by standing and how to prevent frivolous appeals. Donna, what kinds of things are you concerned about that would be appealable that others are not already using an accountability mechanism in the 2012 round? Donna, please.

I think you're still on mute, Donna.

DONNA AUSTIN:

Yes, I am. Sorry, Jeff. Donna Austin from Neustar. I guess I was just concerned when I saw Jamie's list because if you have such an expansive list of opportunities for people to appeal a decision which is subjective because you're a party to the decision. So I guess what I'm concerned about is – you mentioned that we were going to go through frivolous – sorry, my brain is not working – the possibility that there may be frivolous appeals. So obviously, that's something we have to deal with. But I'm also concerned that – and maybe this falls into the frivolous category – is that people will just tie applications have been processed. We have seen that in 2012, and I think this has the ability to have more of that showing up. So I guess that's what my concern is. There's TLDs that are still tied up more from a contention set respective from the 2012 round, but I'm just really concerned that this is just going to drag things out. So it's important that there is some kind of objective test. I think when maybe when you get to the frivolous stuff, then maybe that's where we can address some of my concerns. Thanks, Jeff.

JEFF NEUMAN:

Thanks, Donna. I think the frivolous – this section that we’re going to talk about in a minute. But I also think – and I can’t remember where this comes up – but all that basically says is that anything you can or that’s eligible to be appealed must be appealed within that initial timeframe so you can’t just keep appealing. Like you file one appeal based on one factor and then if you lose that, you file an appeal on the next factor, etc. I think there are rules that we can put in place to actually give it much more process than what currently exists, which is Reconsideration Request which has a defined period, but ICANN it’s a long period. Then the Board Governance Committee, and then the Board has to adopt it, and then you can have an IRP, etc. I think our goal is to make it actually not be tied up as much by having a defined process and you must follow that defined process, or else it won’t be considered.

Let’s go through this and then once we get to the end, we’ll have to think about other areas where it could get tied up and make sure we’ve addressed it all. In the standing argument, this is an interesting one too because obviously it may depend on the type of appeal that you bring or what you’re appealing, but you can easily see an applicant having standing to an appeal. You could see a losing party to an objection having a standing to appeal. But then I had a question which I put in the – can you extend the comment there, example of parties? Thanks.

The applicant, the loser of an objection. But what about an independent objector? Should an independent objector have

standing to appeal if he/she loses the independent objection? That's a question because again, that's paid for by ICANN.

Someone in a contention set – let's say you're not directly involved in that application, but you're in the contention set if they prevail in their objection or in their evaluation. Should you have somehow standing to appeal? Or is that considered frivolous? What if it's ICANN is the evaluator? Do they have – well, I guess not an evaluator. I don't know how that would be. But would they have objection. Then of course you have constituencies, stakeholder groups, public at large. These are all things we need to think about. I think we would definitely say A and B, at least the first part of B would have standing. So that's an applicant or someone that loses an objection. But what do people think about an independent objector? Should they have standing? Jamie, please.

JAMIE BAXTER:

Thanks, Jeff. I just wanted to quickly touch back on Donna's point. I think we certainly support eliminating frivolous appeals as well, and hopefully the notes that will follow are very clear on that point from our perspective. But the list that I provided is really to highlight that in the 2012 round, the evaluators were never held to any of their work. And unfortunately, it was the ICANN Board who was forced to defend their work. I think it's important that we not let that happen in the next round, the people doing to evaluation should be responsible for their work, and therefore what I've outlined are ways that they could be challenged or should be challenged if there are problems that are identified, and it should not be the work of the Board to defend the evaluators the way that it happened in 2012 round. That's just again, as you pointed out,

from experience, that's just a short list of some of the things that come to mind. Thanks.

JEFF NEUMAN:

Thanks, Jamie. I agree that putting ICANN in the position to defend – unless ICANN itself is the one that made the decision that's being appealed – is not something that we should put ICANN in that position or they should put themselves in that position. That's interesting because Paul put down an answer to all of these. Paul believes that an applicant should have standing. The one who loses an objection should have standing. Independent objector, Paul does not believe nor any other of that list. Although I'd definitely be interested. I know we're running out of time here, but certainly I would be interested on how others feel about independent objector if it loses. I guess the exception to the SO/AC may be what about if it's the ALAC that files an objection? I guess we could say if the ALAC is the losing party then they could appeal, but otherwise I don't think – I shouldn't say, "I don't think." What do others think about stakeholder groups, constituencies, or others filing an appeal? Greg, please.

GREG SHATAN:

Thanks, Jeff. Unfortunately, my hand was not up to answer that exact question, but just briefly, I think that appeals from evaluation decisions and appeals from objection processes and other adversarial processes are [assumed] to be fundamentally different or at least significantly different and try to mush them all up in exactly the same appeals process. It might not be a great idea. I think it's at least a theme in variations but I think Jamie's list went

largely to issues of the evaluation process, whereas a lot of the other things we're talking about were more of the objection processes. I think it will do us well not to put them together. Thanks.

JEFF NEUMAN:

Thanks, Greg. I think that's important too, to keep the objection separate from the evaluation.

To answer Donna's question – Donna says, "How is C different from A?" The way I thought of C, Donna, was let's say there's an evaluation and a string similarity evaluation up front, and the evaluation finds that this application is not in the contention set with others because there's no string similarity found. The thing I had in mind for C is could someone, other party that would otherwise be in contention set say, "We disagree. They should be in our contention set." That's kind of what I had in mind. Or [the other way] around. Let's say the find that it is in a contention set with five other applications and one of the other applicants that's in that contention set says, "I don't think that that application should be in our contention set." That would be an example of how C would be different than A. Does that make sense? I know it's late but I hope that makes some sense.

ANNE AIKMAN-SCALESE: Hello, Jeff. I'm just going to interject quickly because I know the discussion is not really over but it's beyond time. I don't see any way you can have a staff or Board decision be subject to an appeal when accountability process says those are subject to

Request for Reconsideration and independent review process. I don't see I can have both an appeal process apply and have gone through everything that the community went through in accountability. I feel like an appeal has to be in relation to a third party determination, then you can go up. And when that determination is accepted by ICANN staff or ICANN Board then you can apply Request for Reconsideration or independent review, according to those rules. But I don't think you'd have both things apply at once. Thanks.

JEFF NEUMAN:

Yeah. Anne, it's not just about the party that takes the action or inaction, it's about what the action or inaction is. So in an appeals mechanism, you're saying that the action or inaction is inconsistent with the Applicant Guidebook or the standard set in the particular program. Whereas the accountability mechanism is the action or inaction is inconsistent with the governing documents of ICANN with the Bylaws, with the core values, with the mission. So I definitely see a line now can get grayer and grayer. But there is a line there between when you're saying that if ICANN staff was doing the evaluation, let's say they were doing the string similarity evaluation, and ICANN staff just got it wrong, they didn't apply the factors right, that shouldn't be an allegation that the staff violated the Bylaws or the fundamental ICANN policies. They violated [inaudible].

ANNE AIKMAN-SCALESE: I'm sorry, Jeff. But then you know all good lawyers plead all the causes when they're ... you're going get double action instead of

just one action because you're going to get all those things alleged in count one, two, three, four, and five. It's really not workable.

JEFF NEUMAN:

We can make it workable. That's our job to make it workable. Let's put our heads together and try to make this workable because not everything should have to use an accountability mechanism under the Bylaws. This is really for a narrow set of circumstances.

Okay, anyway, we are over time. I know that so we're going to continue on accountability mechanisms on the next call. We're going to hopefully continue some of the discussion via e-mail. If someone could post the time for the next call which is on Thursday, the 4th, 20:00 UTC, for 90 minutes. Thanks, everyone. It's great discussion. Sorry, we went a couple of minutes over but I think we got a lot accomplished today. We'll talk to everyone in a couple of days. Thank you, everyone. We can stop the recording.

TERRI AGNEW:

Thank you. Once again the meeting has been adjourned. Please remember to disconnect all remaining lines, and have a wonderful rest of your day.

[END OF TRANSCRIPTION]