
ICANN Transcription

The Review of all Rights Protection Mechanisms (RPMs) Sub Team for Sunrise Data Review

Thursday, 02 May 2019 at 1800 UTC

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ANDREA GLANDON: Good morning, good afternoon, and good evening. Welcome to the RPM Sub-Team for Sunrise Data Review call, held on Thursday, the 2nd of May, 2019, at 18:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you are only the audio bridge, could you please let yourself be known now? I do note that we have Claudio DiGangi on the audio bridge. Do we have anybody else?

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

Thank you. Hearing no further names, I would like to remind all participants to please state your name before speaking for recording purposes and to please keep your phones on mute when not speaking to avoid any background noise. In addition, a reminder to turn off your video camera if needed. It's down at the bottom on the left-hand side. In addition, we do have Julie and Ariel both sharing their screens. So if you would like to flip from Ariel to Julie or vice versa, please go to the top of your screen under View Options and choose the person's name whose screen you would like to see.

With this, I will turn it over to Julie Hedlund. Please begin.

JULIE HEDLUND:

Great. Thank you very much, Andrea. This is Julie Hedlund from staff. I'll just quickly run through the agenda. We'll have the updates to the statements of interest, then an overview of the updated timeline and workplan, then on to the development of preliminary recommendations, the continued discussion of Sunrise Charter Question 6 in conjunction with Proposals 2 and 4, discuss agreed Sunrise Charter Question 8 and, if time permits, discuss agreed Charter Question 9 in conjunction with Proposal 13 and, finally, #4: Any Other Business.

May I ask if anyone has any other business?

CLAUDIO DIGANGI:

Julie, it's Claudio. I do, unless we cover it during the other topics.

JULIE HEDLUND: I'm sorry. What was the item?

CLAUDIO DIGANGI: I left a couple things open from the last call, so we could cover it under Any Other Business or at some point during the other discussion topics.

JULIE HEDLUND: Okay. Well, then please do speak up when you think it's an appropriate moment. Thank you.

CLAUDIO DIGANGI: All right. Perfect. Thank you.

JULIE HEDLUND: Now and I'd like to go to Ariel, who will give an overview of the updated timeline and workplan.

ARIEL LIANG: Thanks very much, Julie. This is Ariel from staff. I just posted the timeline document in the chat. You're free to scroll it yourself. To give you a quick overview, the timelines are designed to provide the sub-team a clear understanding of the intended scope of work, week by week, meaning which charter question to be reviewed to develop answers and related recommendations and also which individual proposals should be reviewed in conjunction with that charter question.

On the screen, you should see there are three tables. One table is for the review of individual proposals. The second is for the agreed charter questions. The third is the overall sub-team plan for the weekly basis. When we developed this plan with the sub-team Co-Chairs, the anticipated pace is for two meetings. The sub-team should finish reviewing one agreed charter question, meaning the draft answers should be developed, and also the related individual proposals also should be reviewed.

You can see that this pace is being reflected in the intended scope of work in the third table of this spreadsheet. But we're also keeping track of the actual work completed on a weekly basis, and that's reflected in the third column after the third table.

Currently, the sub-team is actually slightly ahead of schedule, but then we do note that some of the discussions of charter questions and individual proposals are pushed to the discussion [thread]. So they're not considered completed yet. But once they're completed and we have got the draft answers and the preliminary recommendations, then we will reflect that date [in] the actual completion date, which is the third column of Table A and B. So you can see that we have already put some dates there.

So, for the remaining work in the coming weeks, there's still quite a few numbers of charter questions the sub-team hasn't reviewed and also the individual proposals, but the [goal] is to get them finished before ICANN65, if possible. But, based on our anticipated pace, we should complete that within ICANN65. But this could happen sooner.

So I will stop here and see if, Julie, you have any additional comments.

JULIE HEDLUND: Thank you very much, Ariel. Just to emphasize the last point again the Ariel made that, if the sub-team can find some efficiencies in working in particular with the discussion threads – so carrying over some of the conversations onto the threads – and also if the sub-team does get ahead of schedule, this will be noted, as Ariel said, in the actual work completed. So we do know that it is the goal of the Co-Chairs to complete before ICANN66. Of course, we'll do everything we can to support that goal. Thank you.

Anybody have any questions or comments that they'd like to make?

MARY WONG: Julie, this is—

ARIEL LIANG: Julie ...

JULIE HEDLUND: I see Mary. Please go ahead.

MARY WONG: Thank you. Just to follow up on that as well and to let the sub-team know that, based on discussions with the sub-team Co-

Chairs – of both sub-teams, actually, I should say – we know that this can be quite a lot of information to keep track of. So a couple of things. One is hopefully seeing this timeline in front of you will situate you as to where we are, where we're going, and what we've done. As Ariel said, staff will keep track of the progress each week. The summary tables that you look at are updated for that purpose.

But, towards the end of this process, sometime in late May or in June perhaps – we haven't discussed this exactly with the Co-Chairs as to when that would be the appropriate time – whatever draft recommendations this sub-team, as well as the other one, comes up with will be extracted from the summary tables and placed into a single document because that will then be the recommendations that each sub-team forwards to the full working group for their discussion.

So hopefully that's helpful as well. Thanks, everyone.

JULIE HEDLUND: Thank you very much, Mary. Let me go ahead now and turn things over to David McAuley. David, please?

DAVID MCAULEY: Thanks, Julie. Hello, everyone. I was the Chair on last week's call, so Greg is going to be the Chair in this call. But I'm going to begin with a very brief summary of what came out of last week's call.

We began with a discussion of Claudio's Proposal #9, which related to Charter Question 1 on possibly expanding the identical

match requirement for sunrise registrations. Claudio's proposal, which was well-presented and discussed, was based on elements of the ICANN-approved launch plan for Uniregistry, and it basically encompassed the span-the-dot notion. Claudio gave the wal.mart example. John McElwaine gave the firstnational.bank example to illustrate the span-the-dot notion. It was a good discussion.

We moved to Charter Question 5A on whether a 30-day minimum sunrise serves the intended purpose. Claudio again spoke and talked about additional notice. In a couple of instances, Claudio mentioned that it would be good to run some of these past the ICP again. That's certainly fine, but I think I'll just make a personal note here. All of those kinds of effort should be put in a very quick front-burner kind of thing in the interest of getting to closure very quickly.

We moved on to Question 6, which is on SDRPs. We mentioned the two proposals that George Kirikos had made. They encompassed a number of questions but probably most closely aligned with Charter Question #6.

And Kathy mentioned a concern about our homework. So it's another point where I will reiterate that our homework is as stated but we will also move forward sequentially with the questions. So, please do a little more than the annotated homework and be ready to move on if we have the opportunity to. Kathy made a very good point. We have to analyze the data. On SDRPs, she made the point that there is a lot of data that would support both trademark owners as well as third-party challengers. So there's something we have to dig into here. Again, that's one of the things that the threads are there for.

Both George, in his written proposals, and Jason stated the concern that gaming of the system is a real issue here with these SDRPs and to look at that.

I'll make a point that Greg made last week, and that is, unfortunately, no one has been using the threads. That actually is a statement, in a sense. Maybe all of the discussion around these ideas have been made. But, in any event, we need to move forward. ICANN65 is not going to be a very good place to do the drafting of the document that Mary was just talking about. Our goal – and it's a personal goal of mine – is to beat that and to have this done and dusted. I have a feeling that Greg and I will very soon be coming to the discussion room threads and saying, "This is the sense of the room as far as we see it," in an effort to try and come to closure. But, remember, the threads are there, and they're a very good place in which to make a comment, make a proposal, try and move this thing along.

Thanks very much. That's the end of my summary from last week's call, so I'll turn things over to Greg.

KATHY KLEIMAN: David, may I ask you a question? This is Kathy.

DAVID MCAULEY: Go ahead, Kathy.

KATHY KLEIMAN: Thank you. I think I heard you say that Claudio presented Proposal #1, but I think Proposal #1 is from George Kirikos. So I'm not sure Claudio has any proposal in writing. That's one of the questions that came up last week: is he proposing a Sunrise B, which is what Uniregistry turns out to have done for only those registrants who had a Sunrise A? So lots of questions were raised, but I think George has Proposal #1. Thanks.

CLAUDIO DIGANGI: David, could I respond to Kathy's question?

DAVID MCAULEY: I'm sorry. I was speaking into the mute, but, Claudio, let me make one quick point.

CLAUDIO DIGANGI: Yeah.

DAVID MCAULEY: I messed up on the mute button. I spoke too quickly, Kathy. Claudio's Proposal is #9 and it relates to Charter Question #1. That's what I meant to say. So it is Claudio's proposal, and I think that part of the summary was accurate.

I'm not really chairing, but let me go ahead. Claudio, take a real brief moment to speak and then I should turn things over to Greg.

CLAUDIO DIGANGI: Sure. Thank you. That's what I was going to say. I was just going to also add that it was submitted in writing through the SurveyMonkey form. So that should be available for the team. Thank you.

DAVID MCAULEY: Thank you, Claudio. Greg, over to you.

GREG SHATAN: Thank you, David, and thank you all for the conversation so far. Now we get to the meat of things, which I believe takes us to Question 6 and the related proposals, #2 and 4. Maybe we should have lettered the proposals to avoid the confusion we just had, but we'll remember that for next time.

Question 6 itself is very short. Three parts, though. A) What are sunrise dispute resolution policies, and are any changes needed? B) Are SDRPs serving the purposes for which they were created? C) If not, should they be better publicized, better used, or changed?

Before we get to the proposals, for this one we don't yet have any draft answers to these questions. I think we need to begin by discussing how we might answer these questions. So I will open the queue.

Maybe we'll start with Question 6A. I'm not sure if we need to answer the first part: what are sunrise dispute resolution policies? Hopefully there's something we can use to answer that. I don't think we need to draft an answer to that. And the question, are

any changes needed? Maybe we answer that by looking at the proposals. If we decide that any of the proposals pass muster, then I guess we can say that the changes are needed. If none of them do, we either say changes aren't need or we say that maybe changes are needed but we don't have any proposals for them, which seems a little bit like we're dodging a bullet. So perhaps we don't answer A right now, and maybe we think about whether they're serving the purpose for which they were created and whether they should be better publicized.

We can talk about those now if people have something to say. Otherwise, we can turn to the proposals. But let's see what people have to say about answering these questions.

I'm not saying any hands, but [inaudible].

CLAUDIO DIGANGI: Greg, it's Claudio. I could say something.

GREG SHATAN: Please go ahead, Claudio.

CLAUDIO DIGANGI: I may admit that maybe I misheard you, but I thought that George did submit something in writing. Maybe you were just referring to that, but I thought he did put something in based on the Uniregistry SDRP.

GREG SHATAN: Yeah, I said George did. There are two proposals on this [that] relate, # 2 and 4, and we'll be discussing those. I just wanted to see, before we got those, whether we had direct answers to the questions.

CLAUDIO DIGANGI: I see. Okay.

GREG SHATAN: I hope these things are coming up in the right order for me. I have Kristine followed by Maxim.

KRISTINE DORRAIN: Hi. I think, relating to Question 6, Mary said in the chat – I agree with her – that, when we put together the sunrise dispute resolution policy, there's information about that. So we can probably plop that in there. We know what the SDRP is.

But I'm not sure that it's serving the purpose for which it was intended. I've talked about this a little bit before, and I might be wrong. [Az TI] and the IRTs included this. This idea of a sunrise dispute policy was included in the earlier drafts of the Applicant Guidebook. It was meant to remedy a situation when someone got a sunrise registration when they shouldn't have.

However, the TMCH wasn't fully fleshed out at that time, so, once the TMCH got going and they built up their systems and it became this sort of automated – like you submit the mark and they do a check and they check for use and then you ... well, maybe they

don't check for use for sunrise. Sorry. But they check the mark and all sorts of – validate the mark. Then they have a policy that basically says, if something was not supposed to be in there, you can bring a dispute to us and you can challenge it through our system.

So the SDRP, as organized by the registry operators, is sort of vestigial. I'm not really sure that it has any specific use at this point. Everyone has to have one, so we do, but they all address stuff that's already covered. So some people say, "Well, what if we allocated the domain name wrong specifically in an end-date sunrise?" So some of the SDRPs specifically go to how we're going to solve allocation issues. But I think a lot of registries just ticked a box on that.

So, when we talk about "Is it serving its intended purpose?" I don't know that it is because I think it's in some ways obsolete. But I think it could be more useful to deal with maybe other concerns that people have about the way registries might allocate or register sunrise names.

So I'm just going to throw that out as a launch for a discussion, and if I'm wrong, I'm wrong. Thanks.

GREG SHATAN:

Thank you, Kristine. That's certainly food for thought. Maxim, please go ahead.

MAXIM ALZOBA: Actually, I think we have a bit of an issue because SDRPs are per-TLD policies. So I'm not sure it's in our scope to decide what to do with the particular policies of particular TLDs.

So the question might have the answer: yes, there are multiple TLD policies, at least one per each – I mean SDRP. Are they serving their purpose? We might have a thousand answers as it's per-TLD. Thanks.

CLAUDIO DIGANGI: Greg, it's Claudio. Can I jump in here at some point?

GREG SHATAN: Yeah, Claudio. Please go ahead.

CLAUDIO DIGANGI: In picking up what Kristine mentioned, I think part of the challenge is that, if there is a sunrise registration that was obtained perhaps through fraud on the trademark office and then used to register a domain name, the question is who will bring the complaint? In other words, we've talked [inaudible], and I think [Jason] [inaudible] about in Example 1 just occurred. But in order for the process to be triggered, somebody actually has to bring a complaint. Presumably it would be a registrant that wanted that particular domain name and then went to go register it and saw that it was not available and it was already registered.

But otherwise, if it was just [inaudible] and no one was interested in that particular domain name, or at least interested enough to use the procedure, then the mechanism is not going to be used.

So I just that's another wrinkle in terms of when we're looking at whether it's serving its intended purpose, that it rarely involves someone having to take that extra step in going through the process. Thank you.

GREG SHATAN: Thanks, Claudio. I think I have David McAuley next.

David, if you're talking, we can't hear you.

DAVID MCAULEY: I'm struggling with my mute button. It's almost broken. But Kathy was before me in the queue, so I was asking if Kathy would like to go ahead and then I'll speak. I'm sorry for the delay.

GREG SHATAN: No problem. Kathy, why don't you go ahead.

KATHY KLEIMAN: Terrific. Can you hear me, Greg.

GREG SHATAN: You I hear great. Thanks.

KATHY KLEIMAN:

Okay, great. Zoom does have better audio. [I'll give them that.]

Okay. I'm just going to read from one SDRP that exists for .shop and that go back to our data. So, just as a reminder, SDRPs serve to two purposes. One is an improper sunrise registration. The other is an improper denial of a sunrise registration. Both interesting and important.

For the improper sunrise registration, the original intent of this provision as I remember it was that, if the registries did limit sunrise registrations to certain categories of goods and services, which they are allowed to do. So .pizza would only accept sunrise registrations from the Trademark Clearinghouse for pizza, restaurants etc., eating, dining. Then this would be the opportunity for Joe's to, of if there was a Macy's pizza, to say, "Hey, that's really where I should be."

Let me read some of the information which confirms what Kristine was saying. This is from our Column 2 in the summary table of final agreed sunrise questions, data, and discussions. "SDRPs do not seem to serve the purposes for which they were created. Based on Deloitte's responses, some sub-team member believes it's a problem when a third party would not receive the claims." So you have a timing problem with the claims notice. By the time you get the claims notice and you want to do an SDPR, the sunrise period is over and the SDRP is over.

But we do seem to have groups that are using SDRPs. AFNIC had two SDRP disputes. So a question to Maxim: whether this group – whatever [word] you want, Greg ... whether his registries use SDRP, whether SDRP is valuable, and whether we should go

in and edit these. Again, the note that the SDPR was based on the openness of the Trademark Clearinghouse. Thanks.

Oh, and that was in my personal capacity.

GREG SHATAN: Thank you, Kathy. And in the sub-teams we assume you're speaking in your personal capacity. So now we're back to David McAuley.

DAVID MCAULEY: Thank you, Greg. I would like to make a comment. I'm going to preface it by saying I'm speaking in my personal capacity here, not as Co-Chair. I want to suggest an answer to Question 6C, actual text. I'm going ahead and put it in a thread later today or probably tomorrow. I've got a lot of – never mind. I'll do it tomorrow. But let's just review.

Question 6A says, "What are sunrise dispute resolution policies, and are any changes needed?" I'll refer to that "changes" in just a bit. B) "Are SDRPs serving the purpose for which they were created?" C) – this is the question I want to address – "If not, should they be better publicized, better used, or changed?"

I suggest my answer is that we say we're not going to answer the bit about change in 6C because it's asked in 6A up above. As to "better used," I don't think that's any of our concern. That's really for registries and claimants to the SDRP process. I don't know how we could answer whether they should be better used.

Then the first question – “Should they better publicized?” – is contingent on whether we find they serve the purpose. I think we should answer this by saying, “Whether they serve the purpose or not, there’s really nothing harmful by having monthly or a quarterly reminder that the SDRPs exist. You should go and read this document to see what they provide.” I’ll put in in the thread, but I’m personally trying to get to something concrete.

That’s my comment. I will now go back on mute if it works. Thanks.

GREG SHATAN:

Thank you, David. There’s a fair amount going on in the chat. I think, Kathy and David, those are old hands. So I think I have Maxim again.

MAXIM ALZOBA:

I just want to clarify my answer. The thing is, if we are talking about the historical experience in this round, how SDRP worked, if it worked at all, we have to understand that [we have to fully analyze] this question as it’s different per each TLD. Some registries might have the same SDRPs but it’s still per TLD they own. And they’re independent. I mean each TLD is independent from each other. Registries which are not affiliated with others do not have the responsibility to follow what others do or not to follow.

So, to fully answer this question, we will have to analyze each and every TLD and all the anecdotal data. I’m not sure we have enough time for that. I don’t think it’s in our scope because, if policies were violated and compliance was the mechanism to use

in this – because, if it's not used and there were [no] signs that that particular registry violated GNSO policies or clauses of contracts, I'm not sure we know what we're talking about. We will spend too much time on this because to say, "Yes, it was a requirement for every registry to have an SDRP," it's in a requirement, and real SDRP policies aren't, I'd say, implementations from the registries' side. If we're talking about implementation, the analyzing of the requirement doesn't give us much, I'd say. Thanks.

CLAUDIO DIGANGI: Greg, can I get in the queue? It's Claudio.

GREG SHATAN: I've got Kristine and then Claudio. Kristine, go ahead.

KRISTINE DORRAIN: Hi. Thanks. The Applicant Guidebook was really clear about what, at a minimum, a registry's SDRP has to contain. As Susan put in the chat, the RPMs' requirements also says at a minimum what an SDRP must contain. So I think we're not taking here about the additions. A registry operator can absolutely add more to the list. I was responsible for developing the National Arbitration Forums – or forum now. They're sort of SPRP templates that registry operators could adopt if they wanted to. There's some sections that were required, and then there was the "Tick a box if you want these sections to apply or if they apply to you," and that goes to what Kathy said. One of those additional terms could be that you had some additional registry-specific sunrise restrictions that

weren't me. Or, if you had a different date restriction on which sunrise SMD files, you would take those sorts of things.

So they can be customized, absolutely, and I don't believe that that is up for this group's discussion. I 100% agree with Maxim on that. I think the only piece for discussion is this required bit that registry operators have to implement. For instance, I'm going to read you one of the elements. "The complaint must" – this is one of the required elements that all SDRPs must contain – "prove one or more of the following elements" – if this is the disputed complaint. "At the time the challenged domain name was registered the registrant did not hold a trademark registration of national effect." That goes to whether or not the mark should have even been in the Trademark Clearinghouse to start with. That is something that gets adjudicated using the TMCH dispute policy that I posed a link to in the chat.

So my point is that that is a requirement. When the next round opens, if we keep the Applicant Guidebook the same, registry operators will be required to have that part of their SDRP. And it doesn't make sense because the TMCH is handling those sorts of disputes. So it's not about the parts of the SDRP that are open and flexible for any registry operator to adopt. It's about the mandatory parts that I think is within our scope. We should take a look and see if it does or does not make sense. That's, I guess, the point I'm trying to make. I think we have a distinction here. Thanks.

GREG SHATAN:

Thank you, Kristine. Claudio?

CLAUDIO DIGANGI: Thanks. I think I agree with a lot of what Kristine was just saying there. One issue I could see is if there was a mark that was not a national effect and it shouldn't have been in the clearinghouse but it was used to register a domain during sunrise. That registration – I guess there'd need to be a process because, even if you went to the TMCH and said, "This trademark record should not be in the clearinghouse. [It] was already registered," I would think it would just remain registered. I'm not sure if there's a process for the TMCH to notify the registry of that. So it's possible that that's why that's in the SDRP.

The other points I was going to make was that this issue certainly impacts some important topics. I believe the purpose of it was to really ensure the integrity of the sunrise procedure, which is really for bona fide trademark owners. If there is gaming going on, I think that's why that procedure was put in place. So I think it is an important issue.

From a trademark owner's perspective, I think what the issues are goes to potentially the confidentiality of which trademarks are in the clearinghouse. I'll give an example. I just noticed that, in one of the recent TLDs that finished its sunrise period I think just yesterday, .inc, if you go to the registry's website, they are publishing the list of domains that were registered during sunrise. There's over 100 or so registrations listed there. It clearly shows which trademarks were registered during that period.

So it seems like registries are able to do that, unless that was some sort of non-compliance with their registering of that list. So I

think the issue then related to whether that's something that we think should happen across all the TLDs and what impact it's going to have on the Trademark Clearinghouse confidentiality. Thank you.

GREG SHATAN:

Thank you, Claudio. If I can sum up a little bit here, I think we're making some distinctions. First what we're looking at is the mandatory portion of the SDRP or the baseline of the SDRP and not at any customized or VIP or extra bells and whistles that may have been added by individual registries. So to answer Maxim's question in the chat, there is one baseline SDRP, and many of the SDRPs out there also have variations. So there's at least that number of variations. I think we're looking really at just the baseline.

I also see the distinction between using the SDRP to challenge the application and using the Trademark Clearinghouse [SDRP], or whatever it's called, to go after the underlying record in the Trademark Clearinghouse and that one could do one and not the other but would only have effect in the one area. The SDRP would only affect the particular application that was being challenged, and the TMCH matter would only affect the underlying record. So you really would have to do both if you wanted to both eradicate the record and nullify the sunrise registration. It raises the question whether something more streamlined could be done there. But that may not be a question we want to touch.

Going back to "Is it serving the purpose for which they're created?" it seems that there's maybe some publicity problems

that goes also to the third question and also some questions about whether there is adequate information to allow people to commence an SDRP if they don't know what the underlying trademark was. It depends on the ground.

I suppose one could do research outside the TMCH to see whether there is a trademark registration anywhere that matches the sunrise. So that's a possibility, but clearly, if more information was coming out of the TMCH, it would be easier to mount a challenge.

So I'm not sure where that leaves in terms of separation of work between TMCH issues and sunrise issues, but that seems to be where we're at. Not that we have nothing to look at here but that we have a limited scope in terms of what sunrise we're looking at. Then we have issues regarding information flow.

I guess one of the things we don't know – I'll ask if they know or if there's a way to know – is how many SDRPs were commenced in total across all of the new gTLDs and are they listed anywhere on one place? It's a little hard to discuss whether it serves the purpose without knowing what happened in the cases that did exist. Of course, some of the points we've made go to the cases that didn't exist because there wasn't enough information to start.

I see the chat coming up here. Susan answers my question, "No because they operate at the registry level." Maxim says, "+1, Greg. It might be the best question about this subject." Kristine Dorrain informed me her hand is up. I'm trying to keep all these different windows open at the same time. Unfortunately, they don't

[inaudible]. They all open at the same time. So I will call on Kristine. Go ahead.

KRISTINE DORRAIN

Hi. Thanks. I do want to clarify that the only concern I have – I think I take your point that the Trademark Clearinghouse is not really within the scope of this specific group, and that's fine. But my suggestion is, if you look at what is required in the Applicant Guidebook for registry operators to implement – the four elements; I put them in the chat – if you strip out all of the three that the registry operator can control, you're left with maybe one, which is #2: The domain name is not identical to the mark in which the registrant based its sunrise registration. So the registry operator could presumably be on the hook for allocating a domain name and sunrise that wasn't an exact match.

Other than that, the SDRP requirements themselves don't make sense. We cannot go and look at – I agree with Maxim – SDRP decisions because they're not aggregated in one place. They're specific to registry operators. I don't think there's a requirement that registry operators even publish the decisions if they take them.

So I think that some people use the forum. The forum offers a templated policy and customized. So I believe some of theirs might be published, if there were any. But I thought that the answer was that the form hadn't had any of those disputes.

So I think my point is just taking a look at the SDRP when we want to think about remedies that brand owners have or that

people/registrants have against unlawful sunrise registrations. Is the SDRP an effective remedy? I think probably not as written and required. That doesn't mean that registry operators aren't making it effective and aren't doing something with it that is more effective. But, as written and as required, I don't think it's effective, and I don't think it requires a lot of additional research to take a look at the plain wording of what the Applicant Guidebook requires. Maybe this is something we punt to SubPro, but it just seemed to me that, at some point, we should discuss, if we're talking about ways to fix the sunrise process, is SDRP one of those ways? That was my point. Thanks.

GREG SHATAN:

Thank you, Kristine. That's very helpful. Maxim says, "I'm against adding a requirement to use the forum to the SDRP." I'm not sure that was what was being suggested. I don't think we want to have single providers or anything.

I don't if we should recommend or considering a recommendation that SDRP results should be published and aggregated. Something to think about out of all of that.

Kathy, let's go over to you, please.

KATHY KLEIMAN:

Thanks, Greg. Your summaries have been great. But, Kristine, I think there's something more – I'm reading from the Applicant Guidebook and I seem to have different numbering than you do, Kristine. So I'm reading from early Applicant Guidebook. It's Section 6.2.4. Sunrise service is Section 6.2. I agree completely

with Kristine that a lot of it is very basic and high level and that a lot of it probably doesn't involve us.

But there is something that concerns me. From the perspective of representing – and, believe it or, I do represent trademark owners; I do represent businesses from time to time (not this year at Princeton). Okay. So 6.2.4. What troubles me here is my rights exercise – my rights under the Applicant Guidebook – the right to standing, and do I have what I need in order to bring a challenge?

So let me read. I'm sorry it's long. "The proposed SDRP must allow challenges based on at least the following four grounds. One: at the time the challenged domain name was registered the registry didn't hold a mark of national effect." We've talked about that one. "That the domain name (2) is not identical to the mark (3) The trademark registration was not national effect. (4) The trademark registration on which the domain name registry based its sunrise did not issue on or before the effective date of the registry agreement."

So trademarks had to be a certain age before they went in the Trademark Clearinghouse or before they were eligible for sunrise. We didn't want things that were created a month before. That was built into the Applicant Guidebook.

But how do I exercise my rights under the SDRP to bring a challenge if I can't go into the Trademark Clearinghouse and say, "Hey, can you help me confirm? I do believe that this is not the right X, Y, and Z. But you've got it registered in the Trademark Clearinghouse."? So how do we create enough access to the Trademark Clearinghouse to at least allow this right of challenge.

That would seem to be an operational fix that would then make the SDRP usable by those people who want to use it for challenging. Thanks.

GREG SHATAN:

Thanks, Kathy. I think that's a very valid, useful set of questions. We certainly don't want people just going on fishing expeditions because they have a suspicion or they can't get information. So it is somewhat of a puzzlement. I'm even puzzling about what the differences between Ground 1 and Ground 3. Maybe somebody who had another cup of coffee that I didn't have can mention that. But it does seem like, certainly, there's an issue the way the SDRP and the TMCH intermesh. I wasn't suggesting when I was talking about [an alliance] between different groups that we should have high walls here because it's all part of the same working group in the end and we should be able to answer questions that span different sub-topics. Those conversations, to my mind, can start anywhere. It can start in the sub-team here. And everything has to go up to the working group, anyway. So I was not trying to quash a discussion of the Trademark Clearinghouse, although, to some extent, obviously we may not be able to answer that question in this group. But it's at least something we can float back up to the full WG.

Let's see if we have any hands. I see Maxim followed by Susan.

MAXIM ALZOBA:

Also, I'd like to remind us all that typical data retention periods of three years are over for lots of registries. I mean for registry

agreements which had sunrises three years ago and something on the top. And that [circle] data might not be available.

The second thing is registries cannot look into the TMCH and are not responsible, for example, inaccessibility of services of the TMCH or mistakes made by [inaudible] or something like that. Thanks.

GREG SHATAN:

Thanks, Maxim. That's an interesting point about the data. I guess it creates to some extent a question of whether there's a statute of limitations on these matters. Obviously, UDRPs are filed a long time, certainly, after the trademark and the domain were registered. But, if data retention is an issue, that could raise an issue after time. I'm not sure that I would think there would be any registry liability if any of this doesn't work, but we can put a pin in that thought.

Susan?

SUSAN PAYNE:

Hi. Kathy, you were talking about challenging the Trademark Clearinghouse records. I may well have misunderstood you, but there is a challenge process at the TMCH. This is what Kristine has been saying. If you're wanting to challenge whether the mark which has been used for a sunrise registration was really one that should [inaudible] been available for use, that challenge process is offered by and operated by the TMCH and has been used, as far as I know.

So I think that we have that there already – what you’re looking for – but I may well have misunderstood what you were saying. If so, I apologize.

GREG SHATAN:

Susan, before you go ahead, I think what Kathy was saying is that, in order to institute a sunrise DRP, there is information that is uniquely within the Trademark Clearinghouse that you would need in order to essentially identify whether you have a valid complaint to make and that, without knowing what the trademark registration of national effect was in the clearinghouse, there’d be no way to start the case.

So it’s not a question of challenging the – this goes back that other bifurcation I was discussing. There’s two DRPs that speak to the same of a bad TMCH record. One challenges a sunrise registration that was based on a bad record, and the other one challenges the bad record itself. And we’re focusing more, I think, on the SDRP and the fact that the SDRP requires some knowledge of a bad record. If you have no knowledge of the record in the first place, you can’t know whether you have a bad record to base an SDRP on.

So sorry to interrupt you and to preempt Kathy’s response, to whom it was directed. Go ahead, please, Susan.

SUSAN PAYNE:

Okay. No, that’s good. Thank you very much.

CLAUDIO DIGANGI: Greg, can I get into the queue? It's Claudio.

GREG SHATAN: Yes, you may get in the queue. I believe the next person in the queue is Kathy, unless I said everything she would have said. I see her hand is down, so maybe I did justice to—

KATHY KLEIMAN: You did. Thank you, Greg.

GREG SHATAN: Good. Thank you. That coffee is kicking in then, but I still can't figure the difference between Grounds 1 and 3.

Claudio, please go ahead.

CLAUDIO DIGANGI: I'm trying to compare this to how this might work in the real world in the trademark context, where there was a product that was trademarked and that was confusingly similar to an existing mark. What the trademark owner would do in that context ... The way I'm coming at this is that – you're right; Kathy, you're correct – if the Trademark Clearinghouse was fully open, that would help. But I think that's going to be a pretty big bridge to cross because of the confidentiality issue.

So I'm wondering if another way of approaching is – I'm pointing to what the .inc registry did. They published a list of domains that were registered during sunrise. So, if you're a potential registrant

and you're interested in a specific domain in that TLD, you could see which domains were registered during the sunrise period. I'm not sure if you would really need to go into the clearinghouse to examine which mark was registered but what you could – and this is what happens in the trademark context – is then search to see across the different trademark registries. ... And WIPO has a database and most of the trademark offices have open databased that can be searched. So, if a registrant saw that the particular mark was registered during the sunrise period and perhaps they thought, "Well, that word can't legitimately be a trademark," they then could go and search the trademark databases to see if there are registrations for that mark. That would help inform their decision. If they came across registration that looked frivolous, they could then decide, based on all the information, that they want to challenge that registration.

So that could be an approach without having to open up the TMCH for this purpose. Thank you.

GREG SHATAN:

Thanks, Claudio. So I guess the essence of what you're saying is that we could consider recommending that all sunrises publish a list of the sunrise registrations at the end of the period. That's providing at least somewhat of a hook to at least think about whether you had a challenge. Then you'd need to look at underlying trademark registrations as opposed to the TMCH. But at least you'd know what fish were in the barrel before you started trying to shoot them.

CLAUDIO DIGANGI: Exactly.

GREG SHATAN: Kathy, your hand is up.

KATHY KLEIMAN: Yeah. Question for Claudio because I'm looking at .inc and I'm not seeing the list. I know it's there. I'm just not finding it.

Claudio, what information – I don't want to launch based on a discussion based on [inaccurate] information. What did [Dadding] publish? And is it just the trademark itself, or is information about the trademark owner, the jurisdiction, the date of registration, anything [else]?

CLAUDIO DIGANGI: I am trying to pull up the link. I think it's get.inc/companies. They've published the domain name, and they have a little logo there to identify the trademark owner. So, again, it doesn't go into which registration, but that would have to be ascertained independently.

KATHY KLEIMAN: So you could tell who the trademark owner is so at least you know the name of the company?

CLAUDIO DIGANGI: Yes.

KATHY KLEIMAN:

Interesting. I wish I could see it. A logo may [inaudible]. It seems to me that – maybe we should table this; to look at the list that Claudio is talking about – if you look at the zone file, all you're going to see is the domain name registry. So you don't know which trademark owner it is because, potentially, a myriad of trademark owners have registered that word in a myriad of different trademark offices around the word for different categories of goods and services.

So, even if you could find a registration, how do you know it's that one? Then, how do you know the dates? If you're trying to show priority, the trademark – the registry said they didn't want trademarks created yesterday. They want trademarks that are at least two years old. My trademark – I'm the challenger – is 14 years old. Your trademark is two days old. Get out. That's why you'd go to the Trademark Clearinghouse.

So the question is how we create one-shot deals, I think, to go to the Trademark Clearinghouse with some kind of good faith showing, presumably short, that says, "I should be entitled to get some basic information about this Trademark Clearinghouse registration so I can exercise my right to challenge under the SDRP." As likely as another trademark owner, or certainly as another business owner of sorts, you'd have something you'd be able to show very easily. Thanks.

So creating that right of access to the fastest way to get the cleanest data.

CLAUDIO DIGANGI: Greg, could I reply?

GREG SHATAN: Yeah. Go ahead, Claudio. Then I've got a question, I think. Go ahead.

CLAUDIO DIGANGI: Okay. Yeah, Kathy, you're right. It would not provide the specific registration. But I recall – the reason I'm mentioning this is just because I recall this is really – I don't know if it was heavily debated but it was significantly debated during the last process where these were developed. The concern was around the confidentiality of what marks trademark owners put in the clearinghouse and really the whole confidentiality around that.

But you're right. What would have to happen is you wouldn't know the specific, but if there was a word there – again, this is probably just for registrants who are interested in that particular string – they would see the trademark. They would know that must have been registered as the trademark during the sunrise period. Then they would have to search the databases and see if there really are legitimate frameworks in there. We would see the registration date for when those marks are registered.

So it's not a full 100% solution, but I'm just trying to thread the needle because I know there's just going to be difficulties with opening up the TMCH. Thank you.

GREG SHATAN: Thanks, Claudio. I'm looking at the Get Inc. company's page, which displays the logo of the company registrations. I wonder if they have a license to use the logo. The name would be not an issue, but they're using the logo. So, interesting to know. And they show the trademark underneath. So they've got beyonce.inc and intuit.inc and other recognized names. Oddly enough, Hanes brands is listed as having registered [nerder.inc]. I don't understand that. But I have to [look at] the registry.

So I guess there's no GDPR issue here because there's no personal data at this point, but you do at least have the company data. But then again, there's [another] question about whether the organization information is somehow too sensitive to list. But I guess that's being raised more in the question of [WHOIS]. Maybe [it will not infect] pages like this until later on. Or maybe [Ireland] will have joined.

In any case, I guess they have to think about how this information works, whether this is, in essence, a minimum data set of something that would allow people to go forward and make an actionable SDRP claim.

I think I've got Maxim followed by Kathy. Maxim, please go ahead.

MAXIM ALZOBA: I have a simple question. As I understand, as per AGB, the sunrise is for those entities which are effectively clients of TMCH. They paid for entries to be added to the database, and that's it. [Are] we going to extend it further? I'm not sure. We have reasons

to do so. If some entities decided not to participate in TMCH as users, why do we need to protect them? Because sunrise is only for the trademark owners have entries in the clearinghouse. Thanks.

GREG SHATAN:

Thanks, Maxim. I don't think we're thinking of extending the right to participate in sunrise. I think that's pretty much accepted at the moment. But having a TMCH record is the price of entry, so to speak, into the ability to use sunrise, and not just the TMCH entry but one where use has been validated.

Is your issue with the fact that the plaintiffs, so to speak, would not be in the Trademark Clearinghouse? Because I think the defendants, if you will, if they're getting into the sunrise, should have an SMD file to get there. So they must be in the TMCH. So I'm not sure exactly what you're driving at in terms of the expansion of the pool of people involved or entities involved.

I'll let Maxim chew on that, I guess, and go to Kathy.

Kathy, please go ahead.

KATHY KLEIMAN:

Sorry, Greg. I love these new screens. So several things. Maybe Claudio and I could take this offline. First, in terms of the confidentiality, as he noted, trademarks are public filings in the vast majority of the countries that we know. So, when this issue was being debated in the STI, that was discussed – it was discussed extensively – and we choose not to make the TMCH

confidential. There's nothing in the rules adopted by the GNSO Council or the Board that made the TMCH confidential because these were public records that were going in for the most part, which is why the SDRP didn't talk about how you would challenge what the challenger needed to get because it was supposed to be public. You could query it from the TMCH database.

So, now that you can't, we're still back to the same question. How does the challenger exercise their rights? So let me pause it and then I will put into writing that someone who presumably has their own rights or has a valid reason for showing that the registrant in the sunrise doesn't have – for example, the trademark is only two days old. That, once you have a basic showing, you can take it to the Trademark Clearinghouse and get back just that information.

The reason we know that just that basic information about one trademark registered in the Trademark Clearinghouse is not absolutely [inviolably] confidential is because that's what printed out in the trademark claims notice. So on a need-to-know basis, you can access it anyway. That's what the notice is all about. We're spending a lot of time in the other sub-team doing that.

So how you can access one-shot so you can exercise your rights, get one registration Trademark Clearinghouse, might be something that would then allow both – all the rules now could make sense, both the SDRP and the TMCH. Thanks.

GREG SHATAN:

Thanks, Kathy. So it sounds like you may be heading toward a recommendation for a single-shot access to a record in the

Trademark Clearinghouse for the purpose of seeing whether or not an SDRP would be well-grounded.

I think there's some distinction to be made. I'm saying this from a neutral, hat-wearing perspective. There's something to be said for distinguishing between perhaps non-publicness and confidentiality. I think the idea is not so much that each record is confidential but that the totality of the records in the TMCH is not public. That's a discussion we've had at a different time about why that should or why that shouldn't be, but I think that getting at an individual record – I think, if you were to say that you had standing to pursue an SDRP – we haven't really discussed standing. But assuming you have standing to pursue a particular SDRP, that might be enough to allow you to look at a record in the SDRP to see whether it's kosher or whether it's one that would be the grounds to challenge the sunrise registration. So I'm musing here but also trying to bring together our threads into actionable recommendations.

CLAUDIO DIGANGI: Greg, could I respond to Kathy? It's Claudio.

GREG SHATAN: Claudio, please go ahead.

CLAUDIO DIGANGI: I was going to say basically what you mentioned there about the totality. And, Kathy, I hear you about the value of doing this, but I think what the issue is is that, for prospective SDRP complainants,

it's only going to know that a particular domain name was registered during the sunrise period, assuming you go in this direction of making that public. There's no requirement that the trademark owner has to put up a website or do anything further.

So I think it would be helpful, when you mentioned the – I think you mentioned a prima facie case or something like that. I just don't know what that would entail, other than, "Here was the mark that was registered during the sunrise period." When you go to the TMCH, I just don't see what other information the registrant can provide. It's basically a hunch that this is not a valid trademark.

So, by opening it up, even on a single basis, that could be easily gamed because you could just bring multiple claims and, after a sufficient amount of time, you would have all the records in the clearinghouse. So, if there was a way to address that, I think it'd be a good idea to flesh it out some more. Thank you.

GREG SHATAN:

Thank you, Claudio. I guess that goes back to the question of standing. I don't think any one party would likely have standing to pursue every sunrise registration ever issued. But then again, as I said, we haven't discussed standing. I'm not exactly sure what the standing is. But I think Claudio has an answer coming from Kathy. So I'll turn to Kathy.

KATHY KLEIMAN:

Oh, hand down. Yeah, I think there's a way to address it. I think we should think about this and work it out. I'd rather take it offline and see if I could give share something on the thread. Thanks.

GREG SHATAN: Thank you. I see there's a longstanding staff hand up from Mary Wong, so I will go to Mary and complain about Zoom's multiple windows some other time. Thank you.

MARY WONG: Thank you, Greg. This is actually probably an opportune time to turn to us because of the discussion that was going on. What I wanted to do was to clarify the response that I gave earlier when I said that we're not aware of a single published source of all the SDRPs. I think it's important to add that the SDRPs are available. It's just not all listed on one page per registry operator. How you find them is you go to the new gTLD startup page that ICANN maintains, which has all the sunrise and other periods – claims periods, LRPs, and so forth – and then, from that page, for each registry operator, if you click on them, you can go to another page for that RO that lists the documents provided by that registry operator.

For some of these registry operators, the SDRP is linked and provided as a specific document. Then you'll see it, obviously, on that second page. For some, it's provided as part of a single document that includes all other information about their sunrise periods and other startup issues. Then you have to go into that document to find the SDRP.

So, in other words, the SDRPs are there. They're just not super obvious. They're definitely not listed in one place, in one page.

“This is the operator and this is the SDRP”: it’s not as simple as that. Thank you.

GREG SHATAN:

Thank you, Mary. Very helpful. Sorry you’ve had to wait to say that. I guess what’s also not available is one place where all SDRP decisions are listed. I guess, if the forum had handled any, they may be listed on their site. But apparently, although they’re a provider, they haven’t handled any. So that’s the other question. I don’t think there’s an answer that’s even as nifty as the one you just gave for how to find the actual policies. So that raises an issue.

My personal gut feeling listening to this is that the SDRP definitely has growing pains as a DRP. So I think that there are certainly some issues we’ve uncovered here that could make it better, more often used, not even getting to the issue of publicity. But there’s a number of flow issues here that require some analysis.

It’s 3:15 and we haven’t yet gotten to proposals, so I would propose to turn to those proposals at least briefly before we call the end of this call. Otherwise, our goal of finishing ahead of time/under budget will be threatened. So maybe we could put up the first of George’s two. I believe it would be #2, if I’m not mistaken. Proposal #2.

Here it is up in front of you all. This is somewhat germane to this discussion at the moment. The basic proposal is that all details of any trademark relied upon to secure a sunrise registration should be made public in order to permit utilization of the SDRP details

[to] include all information provided to the TMCH. So that is the suggestion here. It seems like our discussion has somewhat dovetailed with this. We've discussed some way for somebody to see the underlying record or the underlying trademark, maybe not publicly but at least some access under some purposes if you were a potential claimant.

But let's see what people have to say about this proposal in and of itself. Kathy, please go ahead.

KATHY KLEIMAN: Just that I agree. It's interesting – this proposal; we were talking about it before we came onto the call – and maybe we should just, unless there's an objection, morph it into that access for legitimate challengers, some good faith challengers, who seek to challenge based on legitimate grounds.

GREG SHATAN: We could call it a unified access model. Or has that been taken already?

KATHY KLEIMAN: I think that's been taken, but that's funny.

GREG SHATAN: Yeah, may be better not to call it that. But in any case, I digress. Any other hands? But I agree. Looking at proposals as jumping points, we have touched on the ultimate issues that George is trying to solve for, considere[d] some other solution that perhaps

balance the equities that different sides see here a little bit better without creating an SDRP where the only lock is one that nobody has the key for or last make a bet on what the underlying record is.

Anybody else? I see Kathy's hand is still up, but I assume that's an old hand. Any other comments on George's proposal? I'll take it that no comments mean that George's proposal is here but we moved away from it into the discussion we already had, which [he] knows covers the same overall issue which a slightly different potential solution, which we haven't quite solidified yet.

Why don't we go to Question 4, since I'm not seeing any other hands? I mean Proposal 4. Sorry. I know we should have gotten letters know. Gah.

Note to—

CLAUDIO DIGANGI: Greg, it's Claudio. Could you read that one out? Because I'm not on the Zoom.

GREG SHATAN: No problem. I'm getting it up in front of me here. So this is a recommendation that's a little more lengthy: if the sunrise could include, as part of the minimum standard for SDRPs, the Uniregistry substantive ineligibility clause, which basically – I'll try to summarize on the fly – allows a challenge based on token use or non-use, where the underlying trademark registration is not the subject of actual and substantial use in commerce or has been

unused for long enough to constitute abandonment in that jurisdiction where it's registered.

The second prong of substantive ineligibility in the Uniregistry world they call a pretextual sunrise registration. The domain name is otherwise a non-exclusive and generally applicable term having a primary meaning and a relation to good or services other than those for which the trade- or service mark was obtained. I guess Apple would be an example of that. And the domain name is not used or under demonstrable preparation for use or held to prevent infringing use by the registrant in connection with the good and/or services on which the subject trademark registration is based.

The following circumstances, without limitation, constitute evidence of such. The registrant's use, licensing, or offer of licensing of use of the domain name for the primary purposes of exploiting such non-trademark primary meaning. Circumstances indicating a pattern by the registrant or in concert with others of sunrise registrations based on formal claims of trade- or service mark rights in [inaudible] which are otherwise non-exclusive, generally applicable terms. As an aggregating factor, whether the term in question is particular generically applicable in connection with the TLD in which the sunrise registration was made. So apple.fruit, I guess, would be the aggregating factor. Not to pick on Apple, of course.

But that is the proposal here. Maybe that's a little bit to chew on at 3.82. We might have to pick up there next week under the stewardship of David McAuley. But at least we have that one out in front of us as an idea about whether that could be considered for the minimum set of grounds for the SDRP.

We have a couple of minutes before we get into our wrap-up, so anybody have any comments on this one, now that I read it out?

CLAUDIO DIGANGI: Yeah. Greg, it's Claudio.

GREG SHATAN: Claudio, please go ahead. Then I got a hand up from Julie.

CLAUDIO DIGANGI: Okay. Sure. And I'll keep it brief. I was just going to say that I will [inaudible] around the IPC and then, by next week, I'll hopefully be able to provide more input on it. Thank you.

GREG SHATAN: Okay. Thank you for your bandying. Julie and then I've got Maxim.

JULIE HEDLUND: Hi. Just a staff suggestion that perhaps, since there has been quite a bit of discussion today on this question, we could consider moving the discussion of the proposals with the discussion of the answers to the questions under Charter Question 6. And the [for the] possible preliminary recommendations, perhaps staff could open a thread for that discussion. That would enable the sub-team to move to Question 8 for the next meeting. Just a suggestion. Thank you.

GREG SHATAN: Thanks, Julie. I think that's a good idea. We really need to use both the threads and these 90-minutes in order to get our job done. I think both the discussion we've had on the first major issue and this one, which is at least teed up, I think are perfect examples of thread-ready topics.

Maxim?

MAXIM ALZOBA: If I'm not mistaken, if we're talking about .inc with "c" at the end, [inaudible] just a set of policies. It's a single document. So I'm not sure how you want to cut it. And I'm not sure other registries have to follow the same idea of a single document for every policy.

GREG SHATAN: Thanks, Maxim. I guess that goes to the question of how these things are all – I don't think anybody suggested that. I think Mary was talking about what she was finding, how we could find SDRP – the policies themselves. Now that you mention it, it could be a good idea to have a more standard way of dealing with it. I think we have enough on our plate without that. And, yeah. I know, Maxim, you definitely did not suggest it. Understood.

That brings us to 3:26, so we're in the [No] Other Business portion of the meeting. I'm going to turn it back to staff to take us home, as Kurt Pritz used to say when he was chairing the EPDP.

JULI HEDLUND:

Thanks so much, Greg. Thank you all for joining, and thank you very much, Greg, for chairing. We will meet at the usual time on the usual day next week on Wednesday. We realize that there's the GDD meeting, but there is really no leeway, as you noted from the timeline and workplan today, to not hold a meeting. So, for those who may not be able to attend, we will of course be capturing the discussions. Also, we will open up discussion threads. So there will be continued opportunity for people to provide input. Also, it's likely that at least one of the questions will probably carry over into the meeting the following week.

So, again, thank you all for joining. We'll go ahead and adjourn this call and look forward to talking to at least some of you next week.

[END OF TRANSCRIPTION]