
MONTREAL – GNSO - Review of all Rights Protection Mechanisms in gTLDs (Session 1 of 3)
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UNIDENTIFIED FEMALE: Welcome, everyone. This is the RPM PDP Working Group Session 1. If you are a working group member, please do come up to the table to facilitate our discussion. We'll go ahead and get this session started. Can I get a thumbs up that the recording has started? Awesome. The recording has started. Thank you very much. Let me go ahead and turn things over to our co-chairs. Let me ask, Kathy or Phil, which one of you would like to take over?

PHIL CORWIN: Good afternoon. Welcome to Montreal. Thank you, all, for being here. I'm Philip Corwin. I'm one of the co-chairs of this working group. Kathy Kleiman, another co-chair, is next to me. And just arrived is Brian Beckham, our third co-chair. So, all the co-chairs are here. We're all happy to be here in Montreal.

I'm very happy to be entering the final stage of what's been a very long journey at this meeting and in this session and the next session today we begin to review the recommendations and questions that we have already adopted that will be in the initial report and put out for community comment as we embark on the final stage of this phase one of the RPM Review Working Group. I'll turn it over to Kathy and Brian to go through what's on the slide and we'll be switching off during the meeting and hoping to hear from you.

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.

But what we're really doing at these two sessions is reminding ourselves of the work we've done, the final output from that work, and I think the most useful input from working group members will be to hear your ideas about what type of context we need to make sure staff provides the initial report so that the community is fully informed of how we got to these recommendations and questions to give the most meaningful feedback to help us in drafting our final report and reaching consensus on hopefully most of these items. Kathy?

KATHY KLEIMAN:

Thank you, Phil. We're finally here. We're entering the final lap, three-and-a-half years later. So, thank you and congratulations. It's good to be this far in. So, no further data gathering or analysis. We are now phrasing what we're putting out for the initial report.

So, just wanted to quickly review the five things that we're doing not just in this session but in the next session which follows immediately after this one with a short break.

We're reviewing the agenda, which we're doing now. We're going to start with a rapid review of the sunrise and trademark claims preliminary recommendations. We've talked about this now several times. This was closed largely in Marrakech and on our teleconferences we reviewed the wording. So, we'll review this quickly. But it is proceeding directly into the initial report.

We'll be spending some time on number three which is reviewing the URS sub-team preliminary recommendations. We've done a lot of

talking about URS individual proposals. This is different. This goes back to the three sub-teams chaired by Phil, by Brian Beckham, and by Jason Shcaeffe where we were going through URS data, the practitioner sub-team, the document sub-team, and the provider sub-teams. So, we're going to be looking at recommendations and issues raised from about a year ago and coming back to that and seeing what goes out to the initial report.

Number four, very important that we talk about the timeline and next steps and how quickly we're going to proceed to the initial report in its publication. Then ... Four and five. We're changing the [inaudible].

So, then, we'll be quickly reviewing the TMCH charter questions that we closed discussions on recently. These are the structural questions. So, let's go on to the next slide.

I understand staff is going to be bringing up documents. So, this is just a placeholder as we rapidly go to review the sunrise and trademark claims preliminary recommendations.

I'm going to ask staff to lead us through because you can probably see it ... Can you also put the link into chat so that people can pull these documents up for themselves?

ARIEL LIANG:

Hello, everyone. This is Ariel from staff. As you can see, we have put the link to the document in the chat and you can also see it on the screen. So, this document is finalized on 24th of July. That's following the deliberation on the sunrise sub-team proposals and all these

recommendations were endorsed by the full working group. So, [inaudible] session in the interest of time, we can just quickly go through the column two and three. That's the preliminary recommendation from the sunrise sub-team and also the proposed question for community input.

So, if you're following the screen, you can see on page three we have one question for community input. That's what remedies would you propose for any unintended effects of sunrise period that you have identified in your public comment? So, that's the first question.

Then, the second and third is on page four. That's have you identified abuses of sunrise period? To the extent that you have identified abuses of the sunrise period, if any, please describe them and specify any documentation to substantiate the identified abuses. So, that's three questions.

Then, now on page five, we have the first preliminary recommendation from the sunrise sub-team. That is in the absence of wide support for a change to the status quo, the sunrise sub-team recommends that the current availability of sunrise registrations only for identical matches should be maintained and the matching process should not be expended. So, that's the first recommendation.

Then, the second one is on page seven. That is the sunrise sub-team recommends that the registry agreement for future new gTLDs includes a provision stating that a registry operator shall not operate its TLD in such a way as to have the effect of circumventing the mandatory RPMs imposed by ICANN were restricting brand owners' reasonable use of the

sunrise rights protection mechanism. So, that's the second recommendation.

PHIL CORWIN:

Ariel, let me just suggest that – we can stop here. But that after every two to three recommendations, we stop briefly to see if anyone in the room or online has any comments, not about ... We're not reopening any of these for debate. These are adopted. They're final. But if anyone wants to say anything about anything important they think should be in the initial report in terms of context around the recommendation to inform the community. So, anyone have any comments on these first two? And we don't need to but if anyone ... Or maybe we can just ... I think a bit more efficient, just go along and if anyone online has a comment or anyone in the room has a comment, raise your hand and we'll call on you and hear you. That will be the quickest way to get through.

KATHY KLEIMAN:

I like the idea of pausing after every one just to give everybody that chance to raise their hand in the chatroom or here.

PHIL CORWIN:

Brief pause.

KATHY KLEIMAN:

Brief pause.

ARIEL LIANG:

Thanks, Phil and Kathy. So, I'll continue and I will stop for five seconds after reading each, just to see hands. So, the third recommendation is in absence of wide support for a change to the status quo, the sunrise sub-team does not recommend a creation of a challenge mechanism.

Then, the next one is on page 10, I think. That's the fourth recommendation. In the absence of wide support for a change to the status quo, the sunrise sub-team does not recommend the publication of the reserved names list by registry operators.

Then, the next one is the sunrise sub-team recommends, in general, that the current requirement for the sunrise period be maintained, including for 30-day minimum period for a start-day sunrise and a 60-day minimum period for an end-day sunrise.

Following that is another preliminary recommendation. In the absence of wide support for a change to the status quo, the sunrise sub-team recommends that a mandatory sunrise period should be maintained.

After that is a slightly longer recommendation here. The sunrise sub-team recommends that the next version of the Applicant Guidebook for future new gTLDs be amended as follows. There are several sub-bullet points here.

Number one, the new version of the AGB should include the TMCH dispute resolution procedure for challenging the validity of trademark records entered into the TMCH. This procedure is currently published at a URL on the screen you can see there. ICANN Org should ensure that its

contact for the provision of TMCH services makes the operation of the TMCH dispute resolution procedure a requirement for the TMCH provider.

The second point is section 6.2.4 of the current Trademark Clearinghouse model of module 5 of the Applicant Guidebook must be amended to remove grounds one and three.

The third point is the Trademark Clearinghouse model of module 5 of the Applicant Guidebook must be amended to include a new section 6.2.6. The registry operator will, upon receipt from the TMCH of the funding that a sunrise registration was based upon an invalid TMCH record, pursuant to a TMCH dispute resolution procedure immediately delete the domain name registration. Registry operators, in their applicable SDRPs, will describe the nature and purpose of the TMCH challenge process and provide a link to the TMCH for reference.

Then, there's a note also following these recommendations is registry operators should continue to have the option to offer a broader SDRP to include optional additional sunrise criteria as desired. I'm not seeing hands.

Then, the next one is relatively long to read. I'm not sure whether we should read everything but that's a proposed question for community input and that's related to the limited registration periods. So, I will just read a little bit.

The RPMs Working Group has received limited feedback that the rules for ALP and QLP do not integrate smoothly with the concept of sunrise.

For instance, some geo-TLDs struggle to ensure that words needed for operation of their TLD (i.e. required by the governments that approve them) were all able to be allocated or reserved for later registration before sunrise. These words may have been recorded in the TMCH but needed to be reserved to the governments. One example is police, which is both a word for local law enforcement and a brand. Notably, many registry operators did not use the ALP or QLP options and only a few used RPs. In order to develop potential recommendations related to this agreed charter question – there is a typo there – the sunrise sub-team recommends that the following guidance be sought from registry operators.

The sunrise sub-team asked registry operators to be specific about which programs they are referring in their response to all questions and what the shortcomings of each of these mechanisms are. There are several questions on page 19 and 20.

KATHY KLEIMAN:

So, I have input. ALP, QLP, and LRP, we've been really good about defining our acronyms in other questions and I think we should define it here. I assume the context of this question will reference some of the materials that define these limited rights periods, registration periods, but I think we should have that in the context – those links – so people can find out more details. But definitely in the question define the acronym. Thanks. Any other comments? And we'll thank Maxim and Kristine for preparing these lengthy questions to see if we can get more input on these important registration periods.

ARIEL LIANG:

Thanks, Kathy. Perhaps just skip these questions as it's on the document already. Then we have next preliminary recommendation. In the absence of wide support for a change to the status quo, the sunrise sub-team does not recommend that the scope of sunrise registrations be limited to the categories of goods and services for which the trademark is actually registered and put in the clearinghouse.

The next is also a proposed question for community input. The sunrise sub-team suggested that public comment be sought from trademark holders who use non-English script languages on the following questions. Did you encounter any problems when you attempted to participate in sunrise using non-English script languages? If so, please describe problems you have encountered. Do you have suggestions on how to enable trademark holders who use non-English scripts, languages, to effectively participate in sunrise?

Then next is also a pretty long question that's from page 22 to 24 on this document. I'll read the context of this question at the beginning. The RPMs Working Group has received information that the 2012 Applicant Guidebook ... Actually, this is exactly kind of the same context as the other question we just read, so perhaps we don't need to repeat it here. It's also Maxim and Kristine's contribution. That's on page 22-24 on this document. And that's it for sunrise.

PHIL CORWIN: Okay, thank you, those who participated in those sunrise sub-teams and subsequent discussion [inaudible] how much work went into reaching those recommendations and questions. I'm not seeing any hands up or any hands in the virtual room or in the physical room, so I think we can move on.

JULIE HEDLUND: I'll go ahead and read the recommendations and the questions for the trademark claims sub-team recommendations as endorsed by the RPM PDP Working Group.

The first one is relating to charter question one and it is that the Trademark Claims sub-teams recommends that the language of the trademark claims notice be revised in accordance with the implementation guidance outlined in the sub-team's recommendations for question three below. This recommendation aims to help enhance the intended effect of the trademark claims notice by improving the understanding of recipients, while decreasing any unintended effects of deterring good faith domain name applications.

Next recommendation. This is relating to charter question 2A. the Trademark Claims sub-team recommendations, in general, that the current requirement for a mandatory claims period be maintained, including the minimum initial 90-day period when a TLD opens for general registration.

With respect to charter question 2D, there is a proposed question for community input. Some Trademark Claims sub-team members recommend that public comment be sought on the following questions. Let me see here how lengthy these are, whether or not we want to read them. They're not terribly lengthy. I'll go ahead and read them.

First question. Is there a use case for exempting a gTLD that is approved in subsequent expansion rounds from the requirement of a mandatory claims period due to the particular nature of that gTLD? Such type of gTLD might include (i) highly regulated TLDs that have stringent requirements for registering entities on the order of dot-bank and/or (ii) "dot-brand" TLDs whose proposed registration model demonstrates that the use of a claims service is unnecessary.

And question two. If the working group recommends exemption language, what are the appropriate guardrails ICANN should use when granting the exception, e.g. single registrant, highly regulated or manually hand-registered domains or something else?

Moving along to charter question 3A. The preliminary recommendation is that the Trademark Claims sub-team recommends that the trademark claims notice be revised to reflect more specific information about the trademarks for which it is being issued and to more effectively communicate the meaning and implications of the claims notice, e.g. outlining possible legal consequences or describing what actions potential registrants may be able to take following receipt of a notice. To assist the Implementation Review Team (the IRT) that will be

formed to implement recommendations from this PDP and redrafting the claims notice, the Trademark Claims sub-team has developed the following implementation guidance.

First bullet. The claims notice must be clearly comprehensible to a layperson unfamiliar with trademark law.

Second bullet. The current version of the claims notice should be revised to maintain brevity, improve user friendliness, and provide additional relevant information or links to multi-lingual, external resources that can aide prospective registrants in understanding the claims notice and its implications.

And bullet three. The sub-team advises that ICANN Org considers input from external resources. Some sub-team members suggested external resources, including the American University Intellectual Property Clinic, INTA Internet Committee, Electronic Frontier Foundation, and the [Clinica Defensa Nombres de Dominio Use En].

Also, associated with question 3A is proposed questions for community input. Some trademark claims sub-team members recommend public comment be sought on the following questions.

First bullet. Have you identified any inadequacies or shortcomings of the claims notice? If so, what are they?

Second bullet. Do you have any suggestions on how to improve the claims notice in order to address the inadequacies or shortcomings?

I'm just pausing for a moment to see if there are any hands up and I don't see any in the room either.

The next recommendation is for question 3A(iii). There are a lot of little l's there. The Trademark Claims sub-team recommends that delivery of the trademark claims notice be both in English as well as the language of the registration agreement. In this regard, the Trademark Claims sub-team recommends changing the relevant language in the current Trademark Clearinghouse requirements on this topic to "registrars *must* provide the claims notice in English and in the language of the registration agreement" and "must" is emphasized.

The Trademark Claims sub-team also recommends that, where feasible, the claims notice include links on the ICANN Org website to translation of the claims notice in all six UN languages.

The next recommendation is for question 3B. The Trademark Claims sub-team recommends that the current requirement for only sending the claims notice before a registration is completed be maintained. The Trademark Claims sub-team also recognizes that there may be operational issues with presenting the claims to registrants who pre-registered domain names due to the current 48-hour expiration of the claims notice. The Trademark Claims sub-team therefore recommends that the Implementation Review Team consider ways in which ICANN Org can work with registrars to address this implementation issue.

PHIL CORWIN: Just interjecting. As you can see, we're keeping the trademark claims RPM. We're keeping it the same length. But there's broad support for improving the language and improving the technical information contained in the notice to make it more informative and more useful for everyone.

JULIE HEDLUND: The next recommendation is for question 4B. In the absence of wide support for a change to the status quo, the Trademark Claims sub-team recommends that the current exact matching criteria for the claims notice be maintained.

The next recommendation is for question five. Trademark Claims sub-team recommends that the current requirement for a mandatory claims period should continue to be uniform for all types of gTLDs in subsequent rounds, including for the minimum initial 90-day period when a TLD opens for general registration. (Note: some sub-team members asked for public comment on potential exemptions which would then not be subject to a claims period of any length. See question 2D.)

KATHY KLEIMAN: Actually, when it says the trademark claims sub-team recommendations, it was my understanding that these have now been adopted by the working group as recommendations because they've been reviewed and discussed.

JULIE HEDLUND: Thank you for your question. Kathy. Yes. these tables are as they were presented to the full working group, so they are all in the language of the sub-team recommending but they were discussed and endorsed by the full working group. And that will be reflected in the initial report as well. Thank you so much.

KATHY KLEIMAN: Perfect. My understanding as well.

JULIE HEDLUND: And we've come to the end of the table. We've come to the end of the preliminary recommendations and questions for public comment.

KATHY KLEIMAN: Okay. So, presenting now to the public a huge amount of work that was done by some tremendous sub-team members, a lot of data, analyzed and discussed a lot of hard work, as Phil said, of the sub-team. So, thank you for the review – the rapid review – of those recommendations. They are available in the links to this meeting if anybody wants to take more time to review them.

Now we're going to move to something we really haven't talk about friend the last year and this is sub-team proposals for URS policy recommendations and operational fixes for initial report.

You have to go back about a year to our URS work, and as I mentioned in the introduction, to the work of the three sub-teams. One closely examining issues regarding the providers of URS services, those that

exist today and likely those additional providers that will exist in the future. I believe there are three providers now operating in an array of languages.

We also had a practitioner sub-team that was looking at issues of attorneys and practitioners who are operating in the URS space and questions, concerns, matter, that they'd be interested in and concerned about. Then, Brian Beckham led the document sub-team which was looking at an array. Actually, maybe you can summarize. You were looking at an array of documents and issues regarding some of the rules and writings. Am I right about that or would you like to summarize what your sub-team did?

BRIAN BECKHAM:

If I remember correctly, the task of the document sub-team was to sort of identify potential data sources that would help fill out the work of the other sub-teams. Does that sound right?

KATHY KLEIMAN:

Ariel and Julie will lead us through this table which had circulated in the last but really hasn't been discussed since sometime in 2018. I just wanted to point out that the headings of the columns are something we need to look at carefully. So, the first heading is original URS sub-team proposal. So, this is what's coming out of the sub-team and the sub-team worked hard on its wording and they're bringing back issues. And some sub-teams brought back the same issue. They saw it from different perspectives. The recommendation as discussed by the

working group, and there was someone discussion in the working group about this, a discussion that needs to be completed today or in the next few weeks, depending on how this goes. So, different parts of the recommendation could come from different sub-teams.

Second column. Revised your sub-team proposal and proposed question for public comment. This is really where our focus is going to be today is what goes into the second column, because as I understand it, that's what's going to be going out in our initial report. That's what's going out for public comment.

And some of this – in fact, a lot of this – is new. We haven't seen it before until this document circulated recently.

Because of what was sitting in column three, could you page down just a little bit so that we can see the yellow of column three in the next question? I know you're going to be walking [inaudible] as well. Could you just page down just a little bit?

So, you see here an example. Actually, page up just a little bit because I can't control the document. Action item from working group deliberation on the proposals in September 2018. Here you'll see an example where the provider sub-team left kind of a flag to do some reworking of a question. What we're going to see is the action items have now been somewhat reworked. And again, Julie and Ariel will fill us in more. They've been somewhat reworked in consultation with the sub-team chairs to go into column two.

So, one of the things we're going to be looking at is column one, column three, and then are we happy with column two. And then of course references in column four. But unless Phil or Brian want to comment, let me turn this over to Julie and Ariel. This is really an interesting and extensive document and this is kind of what's going to keep us busy for the next session or two.

ARIEL LIANG:

Thanks very much, Kathy, for the introduction. This is Ariel. Kathy actually provided a very good summary of what the columns are for. So, the focus today is to look at the suggested revised language in column two. That incorporates the action item you see in column three. And then staff also look at all the transcripts and chat record back in September 2018 when these proposals were discussed to make sure when we try to revise the language it's accurately captured the points mentioned by the members of the working group.

So, perhaps we can take a look at the first one. It's actually optional fix recommendation related to the complaint section of URS procedure. There is actually a question to be sought for public comment. The wording of the question is what mechanism do you suggest that allows the URS provider to efficiently check with other URS and UDRP providers in order to ensure that a disputed domain name is not already subject to an open and active URS or UDRP proceeding. So, that's a question for public input.

ZACK: Question, Ariel. Is the question for proposed public input in addition to the operational fix recommendation, so the URS provider should check other websites but for public comment is the question? Are there any other ways? Is that the way it works?

ARIEL LIANG: Thanks for the question, Zack. This is, actually, when we check the transcript, I think what the suggestion is to make it into a question for public comment rather than a direct recommendation of that sort. So, that's why we suggested the language here. Just as a question for public input.

KATHY KLEIMAN: So, in thought, couldn't column two be column one and then put that out and see if the community agrees with that. So, asking the mechanism of the provider sub-team actually provided ... The recommendation was to look at the websites of the other providers to see if something else is in play on the same domain name.

So, shouldn't that be brought over, then with the question, does the community agree or perhaps do you see other mechanisms? But the inclusion of this carefully worded provider sub-team recommendation which suggests an answer in and of itself.

ARIEL LIANG: Thanks, Cathy, for that comment. I think staff's understanding is first to recommend that this disputed domain name should not be subject to

another already open active URS where you do RP proceedings. So, to provide a context to this question and then follow that is the question: what kind of mechanism do you suggest? That's for public comment. Is that what you're suggesting?

KATHY KLEIMAN:

I didn't under ... Let's see what the provider sub-team chair What do you think, Phil? Is Coms 1 and 2 the same thing? They seem to [inaudible].

PHIL CORWIN:

Well, it's been a while since this sub-team operated. I can't recall every minute detail but if others who are on it ... I think, for initial report purposes, the general – I don't know if policy is – but the general rule we're trying to follow is that a domain shouldn't be subject to two disputes, whether the UDRP, URS, or a mix simultaneously, for all sorts of reasons. And the sub-team recommended that the provider who's been approached to bring, for the URS proceeding, checked to make sure that ... Let me just finish, Greg, and others can chime in – can check the other providers. It's a limited number globally who provide URS and UDRP service just to see and make sure that it would be unlikely but it's possible that the domain at the time is subject to another legal challenge.

So, I think we could have ... This is the policy rule. This is what the sub-team recommended and asking the community I think – of course, the reason to put it out for comment is to get the community's reaction to

say not just do you agree with that sub-team recommendation but is that the best way to do it? I think that's the best way to approach drafting the initial report. I know Greg had his hand up and I don't know if others have comments. But I think we can easily, in the initial report language, mold all this together so people understood what we're trying to enforce, what the sub-team came up with, and then get community response, not just is the basic recommendation good but is there a better or additional way to do that checking? Greg, you had a comment.

GREG SHATAN:

Thanks. Sorry, it's obviously been a long time since we looked at this and I'm not recalling. Is there currently a rule that a domain name cannot be subject to more than one active proceeding or is that being suggested as a new rule? Because I can see ... I'll ask that question and stop there for the moment.

BRIAN BECKHAM:

Thanks, Greg. So, I had one procedural question, whether these were previously considered by the full working group or whether there was still an opportunity to comment on the sub-team recommendations.

And to Greg's point, I seem to recall discussions during the earlier policy development on the URS that, because the timing of the URS is quicker than under the UDRP. It was specifically contemplated that a party could file a URS case and a UDRP, if you will, simultaneously to obtain faster relief, in the case of URS, to get a more immediate action on an

[offending] domain name. But that the UDRP case could then run its course because of the different remedies in the two mechanisms.

We've actually had one or two cases filed under the UDRP that were previously subject to a URS for this expressed purpose.

GREG SHATAN:

So then it sounds like there is no prohibition against this.

BRIAN BECKHAM:

So, it sounds to me like it should be framed as whether a domain name is subject. And in the case of two URS filings, imagine a brand owner had multiple outside counsel working on automatic instructions and sort of accidentally, if you will, two URS proceedings were filed. That wouldn't make sense, arguably. So, that could be one fork in the road where there would be a bar. Again, I don't know how the sub-team contemplated this.

But then, for the other scenario of a URS and UDRP, that seems to me something that, at least my recollection was, that that was expressly contemplated. So, I would wonder how the sub-team came up with the recommendation that varied from the earlier legislative history on this.

GREG SHATAN:

If I could just continue, now that I have a little more information.

DONNA AUSTIN: One moment, please. Could we all say our name before speaking for transcription purposes?

GREG SHATAN: This is Greg Shatan, for the record. There's another scenario which I think is potentially – I don't know. I wouldn't say it's more common but just as likely, which is that two different complainants filed for UDRPs against the same defendant or either close in time to each other [inaudible] or there could be a URS from owner A and UDRP from owner B. I don't think any of that is prohibited, so I think the basis of this so-called operational fix is false. I think this whole thing ...

The idea of a mistake, that the same applicant or same complainant could have two filings simultaneously, I think that should be flagged. But that I think is less likely. Unless you kind of have to have a mistake at the inside Council level in that case.

But really, the issue is – there should be no bar against filing against an active URS, UDRP proceeding. So, there's no need for this operational fix because it's not fixing anything.

KATHY KLEIMAN: Thanks, Greg. I think what we're finding is that people are going back to the recesses of memory and – go ahead, please.

RENEE FOSSEN: Renee Fossen, for the record. URS provider. This really isn't a big issue because we do check and I think we mentioned that when we were

going through this initially, that the providers mainly check if they're able to determine that.

The other issue is that URS cases are locked on the registry level and the UDRP cases are locked on the registrar level. So, we're going to know when we request verification, which we do on all URS and all UDRP cases if it's already locked and subject to another proceeding.

KATHY KLEIMAN: Thank you so much for the information and clarification. Greg, back to you.

GREG SHATAN: What then is the consequence if you find out that there is an overlap? So far we're only talking about information.

RENEE FOSSEN: If it's exactly the same with the same parties, then one of them will be dismissed. It would be the second one. They wouldn't even be dismissed because they wouldn't have even commenced yet.

GREG SHATAN: Between a URS and a UDRP or two URSs?

RENEE FOSSEN: Two URSs.

GREG SHATAN: That makes sense. None of the other scenarios make sense. I don't recall discussing this at all, by the way.

PHIL CORWIN: Excuse the co-chairs one moment as we consult among ourselves.

KATHY KLEIMAN: Five-minute break.

UNIDENTIFIED FEMALE: For those here and remotely, we're taking a short couple minute break to confer with the sub-team co-chairs.

SUSAN PAYNE: Hi. I found the bit in the rules if you want me to tell it.

UNIDENTIFIED MALE: The current rules.

SUSAN PAYNE: The current rules. Is that helpful?

UNIDENTIFIED FEMALE: I'll come around.

UNIDENTIFIED FEMALE: One minute to reconvening. One minute to reconvening.

JULIE HEDLUND: Thank you, everyone, for your patience. We're going to start back up again. Thank you.

KATHY KLEIMAN: Okay. We're coming back. Thank you for the time. What we were talking about is both procedurally and substantively. On a procedural level, I just wanted to share with everyone what we kind of recollected from the timeline which is that the three sub-teams worked very extensively on these recommendations. They were reviewed in this case when we checked column four. This particular recommendation was reviewed with the full working group on September 5, 2018 and objections weren't raised or anything that was raised was included at the time. The new language, again, is in column two.

But Phil noted to me that this is an operational fix. It was intended to fix something. And Susan Payne remembers what it was that we were trying to fix. So, Susan, if you could share with us. And what this is going to become is the context to the question in the initial report, because if we can't remember this, the public as a whole doesn't know it. So, what we're doing is kind of laying things out. But before I call on Susan, Brian wants to say something.

BRIAN BECKHAM: Sorry. Just to complement what Kathy said, what we were discussing was that, because we had gone through this once quickly, the idea wasn't to completely reopen, if you will, the discussion, but rather I

think this is a good example of a need to refresh our memories and finetune. We don't want to wordsmith with everyone here but the staff will take notes and of course this is being recorded, so for this one we'll identify the applicable rule and the intent and agree on the finetuning and then that will be reflected in a further iteration of this document. Thanks.

KATHY KLEIMAN:

Right. So, staff will come back to us with some reworking. Sorry, Susan, over to you.

SUSAN PAYNE:

So, just to flag again that the work that the sub-team was doing was not to change the existing rules, certainly in this particular context. It was that we saw that in the URS rules there was a provision in 3, subparagraph G which says the URS complaint may not be filed against a domain name that is part of an open and active URS or UDRP case.

So, within the sub-team, we then went, "Well, how do they know that?" So, that was the discussion and hence the discussion about what kind of operational fix? We just really wanted to I think capture that we felt that there should be some communication, which indeed I believe there is communication between the URS providers to make sure that they're aware of whether there is an open and active URS or UDRP on a particular name.

KATHY KLEIMAN:

Thank you, Susan. Not changing the rules but really implementing them. Thanks. Okay. Any other comments on a) the complaint and this particular recommendation? So, we'll be looking at a new variation that has columns one, columns two, and some of the background and references to the existing rules mentioned by Susan. We can go on to the next one. Staff, would you like to walk us through?

So, here's one where we've got columns one, two, and three. So, a lot to watch.

ARIEL LIANG:

So, the second recommendation is discussed on September 5 as you can see in column four. Maybe I will read the original language first of what it looks like. It's another operational fix related to the complaint section. So, providers should modify their operational rules in terms of the automatically populating the complaint form using WHOIS RDS data consistent with applicable ICANN consensus policies. So, that's the original language.

Then, during the meeting, we captured some of the action items. So, the action item is to ask the provider sub-team to rework the language. One working group member suggested revising the language to providers should modify their operational rules in terms of automatically populating the complaint form using WHOIS RDS data consistent with current and upcoming ICANN privacy policies.

So, in order to capture that action item, we suggested this new language in column two is that the provider sub-team recommends

that the URS providers comply with current and future ICANN consensus policies with regard to WHOIS RDS and adjust their practice of using WHOIS RDS data to automatically populate the complaint form. So, it's kind of slight tweaking of the language but the idea is kind of the same.

BRIAN BECKHAM:

I want to ask a question as a working group member. I'm at WIPO. We're a UDRP provider, not a URS provider. But I was just curious. It says that provider would populate the complaint form and I just wanted to check that that was right that the provider is populating complaint. Thank you.

RENEE FOSSEN:

We are the provider that is subject to this question and what we do is, as I explained, I think we were in Puerto Rico, that we have an online complaint generation program. So, the complainant goes through and enters all the information and when they enter that domain name into our system, it automatically pulls a WHOIS and populates the complaint with that information. We don't do it. The system itself does a WHOIS lookup, populates the complaint so there's no mistakes, so that we don't have to stop and check it to make sure that it's right because it automatically populates.

Now, this was obviously before GDPR. But really, in practice, nothing has changed because the complainant doesn't have access to that information anyway. So, we still ask the registry for verification and get

the correct registration information from them. That's not populated in the complaint but it is provided to the examiner and to the complainant so that they have that information. They can withdraw if they want to file it again or they can proceed with the information that they have. But all the information is included in the case file. It's just not in the complaint, because as we all know, you can't amend a URS complaint per the rules right now.

KATHY KLEIMAN:

Maybe you know the answers – thank you for the background. Would there be other providers that do not automatically populate their complaint forms and should we tweak this? Not right now but tweak it to provide for that?

RENEE FOSSEN:

I understand that the [Italian] provider does not have the automatic lookup and they're probably doing it manually. They don't have a lot of URS complaints so they don't have the volume that we have to do.

KATHY KLEIMAN:

Thanks, Renee. Julia or Ariel, is someone taking notes on this? If you would, thank you. So, I think we have to make the provisions for the providers that populate automatically and the providers that don't, so that we're not requiring something we didn't intend to which is kind of the special process that Renee and her company have adopted.

JULIE HEDLUND: A question is does any of this language that appears here in the table have to change, given that some providers are doing this automatically and some are unable to do so?

PAUL MCGRADY: Similar question to staff. Are we missing an “if” statement? If a provider does the automatic population, then the provider should blah-blah-blah and so forth. Sorry.

KATHY KLEIMAN: Thank you, Paul. Greg, go ahead.

GREG SHATAN: I’m a little bit unclear about what the recommendation is because I don’t know what “adjust their practice” means and I assume that whatever is available from public WHOIS could still be used to populate the field. Again, adjust their practice means nothing to me, at least. Adjust it to what? And based on ... I know we’re saying because of future policies, but again, do we want to say broadly should adjust their policies if their practice is in violation of consensus policy? I don’t even know if we need to say that because then they’d be violating policy but we could say that if policy changes and no longer allows this, then providers should adjust their practices with regard to policy. But we can make a more general statement that URS providers should always follow consensus policy and not necessarily get down into the weeds like this.

PHIL CORWIN: Thinking about the best way to handle these comments on language we're seeing for the first time, I'm just going to suggest personally people can disagree that we not try to agree on final language for any of this in this room today. I know staff is taking careful notes. We're just starting the process of drafting the initial report, so staff can, based on the conversation on this and any other similar discussions today come back with revised language when reviewing the actual initial report draft. Does that work for you, Greg?

GREG SHATAN: I wasn't questioning the final language. I was trying to understand what concept we're trying to convey. That's where I'm getting at is I don't understand the concept of adjust. I don't care how we say it. We can talk about that later. But right now I want to know, in any way they can be expressed plainly, what we are actually telling URS providers to do.

PHIL CORWIN: As I understand it, some but not all URS providers had a practice of automatically populating the complaint for the complainant based on WHOIS data, then GDPR came along and threw a wrench in that and now there are some responsive ICANN consensus policies on the use of that registrant data. So, I think in the end we're saying if you utilize registrant data in some automatic process, make sure you're doing so in a manner that's consistent with relevant ICANN consensus policies. That's my understanding.

GREG SHATAN: I'd like to turn to [inaudible]. But that doesn't sound factually correct to me. I don't think we have a new consensus policy and I don't think that the registrars ... I think they react to whatever is in the public WHOIS. So, I think this is a problem. This is a solution for a non-existing problem.

PHIL CORWIN: Just to respond, it was my understanding perhaps [inaudible] that EPDP Phase 1 had addressed at least part of this in terms of operational practices, but I can – what's that? Yeah, the temporary specification. But I'm not an expert on EPDP output. Thank you.

RENEE FOSSEN: The EPDP group did also come up with this recommendation but they weren't in this room and heard as much as this group did about what the actual practice is. There really is no difference in what we're doing before with a privacy shield. You pull that in, it wouldn't give you any information anyway.

The examiner has all of the information. The complainant then has all the information. It's not part of the complaint but you can't amend the complaint anyway, so they can withdraw or they can move forward. And we're not populating their complaint. They don't have to sign it if the information they feel they don't want to include that's coming from the WHOIS. Thank you.

KATHY KLEIMAN: I'm going to ask Susan Payne a question. Going back to the rules, I think you may still have them called up. The URS rules may have required that these forms be populated with the registrant name and other information that's no longer available. So, this may be an operational fix to ensure that the rules no longer require information that's no longer public.

SUSAN PAYNE: I don't think it's in the URS rules. I think if it's any rules at all that it might be in the individual providers rules but it's more likely just the operational process. Renee can answer it better than I can because she works for [inaudible].

KATHY KLEIMAN: Thanks, everybody, for all the input. Much appreciated. Any other comments on this issue? Brian, go ahead.

BRIAN BECKHAM: I think I'm kind of in the same camp as Greg. I'm not sure what it is we're trying to address here. Is this a GDPR compliance issue or a technical issue? Maybe that would help us understand a little, at least me. Thanks.

GRIFFIN BARNETT:

Maybe I can take a stab at responding to that. My guess – and again, not recalling all of the back and forth that took place when this was drafted. But my guess is that it was intended to prevent a scenario where a provider was disclosing non-public data that otherwise should be kept private due to the new policies relating to WHOIS data. And perhaps the fear was that, by somehow automatically populating these fields as part of the complaint development process that some of that underlying non-public data would somehow be inserted in there. But from what I understand from Renee, they just pull from any public WHOIS record that anybody else would be looking at.

So, to the extent that the WHOIS data itself is compliant with WHOIS data policies that are now in effect, then there would be no issue with that, and that the only non-public data gets disclosed only following that process only as Renee said, to the examiner and to the complainant following that process.

BRIAN BECKHAM:

I wonder if this recommendation maybe hasn't been overtaken by subsequent events and maybe we can sort of retrace our notes. I think there were some recommendations to this working group from other working groups and see where we go with this.

JULIE HEDLUND:

So, staff will take a look at what has transpired, because certainly the EPDP has accomplished a lot since the year – more than a year has passed since this recommendation was made by the sub-team and it is

entirely likely that it's been overcome by events and that could be driving some of the questions we're encountering today as to why we need this particular recommendation. So, we'll take a look at that and make a recommendation accordingly. Thank you.

KATHY KLEIMAN: Shall we move on to the next?

ARIEL LIANG: So, the next one is also operational fix and that was discussed on September 5th as well. The original language is GDD providers and registries should jointly develop rules for the timely response by registries to request for non-public information from providers. And we got two action items after the deliberation is that the provider sub-team to clarify the notion of developing rules, e.g. whether the general public can provide input during the rule development process.

Then the second action item is to reference UDRP rules, paragraphs 4a and 4b for guidance. Clarify whether the intent is to obligate registries to timely respond to URS providers for requests for non-public information regarding the disputed domain.

So, staff had tried to capture these action items and close them by proposing this revised language in column two is that the provider sub-team recommends that registries timely respond to URS providers request for non-public information of the disputed domain names that are subject to URS proceedings.

The provider sub-team also recommends the Implementation Review Team consider ways in which ICANN Org work with providers and registries to address this implementation issue. So, it's basically just to specify it's some kind of implementation guidance, how it's going to work out. But then the main [inaudible] recommendation is the first sentence here.

KATHY KLEIMAN: In light of events of the last year, does anything change or provide insight or raise questions on this? Terrific. Greg, go ahead.

GREG SHATAN: Just trying to understand the nature of the recommendation. Is the idea that we're recommending that registries respond but they can follow our recommendation [inaudible], that this is a recommendation directly to the registries or are we recommending that there be a rule that they require to timely respond? I don't understand which one it is quite there and I don't know if we can require them to timely respond or not. But clearly if they're not timely responding, then there's a problem. The URS is going to be messed up. So, I'm not sure where this is going exactly.

PHIL CORWIN: One, we can require the output of this working group in terms of consensus recommendation subsequently adopted by Council and the Board become ICANN policy. So, we can require things. But I'm going to just briefly call upon Renee. When a URS is filed now against a particular

domain but the complainant has no idea who the actual registrant is because of either privacy-proxy or GDPR, what is your experience in getting timely response from registries to fill in those blanks?

RENEE FOSSEN:

It's actually pretty good. Occasionally, there are a few registries that don't have the information anymore. They're saying that the registrars are the ones that now have that information or maybe they used to but now they don't. So then they have to go to the registrar or they ask us to go to the registrar to get that registration. So, there is a little bit of ... There can be some difficulty there because then that's an extra day or two or three for us to be able to jump through those hoops to get that information.

The procedure is that we are to get that information from the registry, not the registrar, because the URS is all on the registry level.

PHIL CORWIN:

So, what I hear you saying is that, in most cases, it's not an issue. In a few cases, it's an issue not because they're saying, "We refuse to give that information." But they're saying, "We no longer ... We've purged it from our system," or something. It's going to take us a couple of days to get it. This is more of an operational thing that I think could be effectively addressed by a recommendation from this working group. It doesn't sound like a big policy debate. It's strictly an operational improvement. Thank you.

KATHY KLEIMAN: Thanks. Hopefully, we've provided some more context, Julie, Ariel for the question when it goes out for public comment. Thank you. Okay. Absent additional comments, let's go on to the next. Thank you.

ARIEL LIANG: So, the next one is actually a policy recommendation and that was discussed the 12th of September. What staff did is try to convert the language in column one or two a language that sounds like a recommendation. So, basically merging the bullet points. I will just read the revised language here.

The provider sub-team recommends that the URS rules 3b be amended in light of GDPR and the permissible filing of a [inaudible] complaint. Specifically, the provider sub-team recommends that the URS procedure paragraph 3.3 be amended to allow the complainant to update the complaint within two to three days after the URS provider disclosing the registrant data related to the disputed domain name.

The provider sub-team also recommends that expert intermediaries should conduct outreach and education efforts to increased awareness on the concept of [inaudible] complaint which is allowed under the temporary specification for gTLD registration data.

JULIE HEDLUND: Anybody have any questions about that language? Brian?

BRIAN BECKHAM:

Curious what the expert intermediaries is supposed to cover, who they are and what their task would be. We covered this idea of education and outreach with respect to the TMCH and I had expressed some reservations in that context and it's equally unclear to me who would be doing what here. So, a little bit of context may be helpful.

PHIL CORWIN:

A couple of comments. One, there's another one of these responses to the situation created by GDPR and I think we probably need staff to check on whether this has been overtaken by events by the output of EPDP Phase 1 or anything else and check with the actual operations of NAF and other URS providers and how they're handling this.

I don't recall more than a year later after the sub-team's operation who we may have conceived as being the expert intermediaries who are going to explain or make more understandable this concept of filing a John Doe complaint without the actual identity of the registrant in jurisdictions where that's not a commonly used legal practice.

So, I think this one we have to highlight as one needing to be checked to make sure that it's still necessary or hasn't been overtaken by events since. And two, to check the record and see if there's any references and maybe fill in with more specificity which names or types of expert intermediaries we have in mind for inclusion in the initial report. Ariel, you have your hand raised and I think Susan Payne wants to. And Brian, do you have further comments, too?

BRIAN BECKHAM:

I was just doing to say I think the temporary spec speaks to this, the Doe complaint, but I don't want to sound like I'm against educating people but I think there's a difference between providing information somewhere – it could be on an ICANN webpage, on a provider webpage. But I think we have to assume that people are going to be filing legal complaints are doing a reasonable amount of educating themselves. Providing the information, making it available, maybe is one thing but the concept of expert outreach feels to me to maybe be a bridge too far. Thanks.

PHIL CORWIN:

Just to agree with you, Brian. The original recommendation spoke of increasing awareness and outreach implies a somewhat more active level of activity – that's not a good phrase – than merely making [clear] information available to potential complainants. So, perhaps the concept of outreach needs to be dialed back just a bit. But I know we had other people who wanted to comment here. Ariel as well.

ARIEL LIANG:

So, the language of the expert intermediaries was actually in the original proposal from the provider sub-team but perhaps staff could suggest to maybe rework it as implementation guidance but not to mention who will conduct such outreach for education effort, but maybe we need to say the awareness needs to be increased on the concept of Doe complainant but then it's up to the IRT to decide what will be the mechanism. Maybe we can just leave it generally in that language. Will that be a compromise?

KATHY KLEIMAN: I think we're still discussing. Thank you for sharing what you're thinking. I think we're still in conversation. Susan, go ahead, please. Susan, then Greg.

SUSAN PAYNE: Thank you. So, I just wanted to kind of circle back to why we made this recommendation. And it may well be that it's been superseded, because as we've all been saying, it's like a year already since we're having these discussions. But when the sub-team was looking at this, it was just a few months after May and we were all very conscious that things like rule 3b in the URS rules has a very specific section that talks about the complaint must include the name and contact details of the registered name holder taken from the WHOIS.

So, we knew there was temp spec and we know it still is in existence. But we also knew that the rules said you're supposed to put something in there and that there wasn't going to be anything you could put in there.

So, I don't think we necessarily ... I think we're going through the rules. We're identifying things. We spotted that there was this conflict between the new environment of WHOIS and what the rules said and we just wanted to make sure it didn't fall between the cracks.

So, if this gets picked up by the EPDP implementation team and they fix it, super. But we just didn't want it to get missed because we had

spotted that it was a consequential amendment that needed making. I have no idea about the expert thing.

PHIL CORWIN: Susan, thank you for that history. That was kind of my feeling about these recommendations came out early on in the GDPR impact and EPDP process. We're not going to make a decision today but based on that and based on what's happened since, is it your personal view that we still need this type of recommendation or have events passed it by?

SUSAN PAYNE: Well, I don't think the rules have been changed, so maybe there's someone in the EPDP implementation team who is working on changing the rules but they haven't been changed yet.

PHIL CORWIN: Okay. So, I hear you saying we still need to address it in the initial report. Thank you.

KATHY KLEIMAN: Greg, go ahead, and then I'm going ask Renee.

GREG SHATAN: I think the first two bullet points are ... The main point sounds perfectly sensible. If the rules say you must have the name of the complainant and GDPR results in the name of the complainant being redacted due

to GDPR, you have a problem. That's I think part of the problem that was intended to be fixed.

Then, as Renee noted before, you currently can't amend the complaint at all and this is a recommendation that allows the amendment of the complaint once the respondent data is shared. So, this all makes sense.

Again, I don't think the outreach and education efforts about Doe complaints ... It seems to me that if the instructions on the website are clear that says put down whatever you can get from the WHOIS and then you can amend it when the identity is revealed in the course of the process. You don't need to educate people about Doe complaints. I think calling them a Doe complaint, maybe you need to stop calling it that because that is a very American-centric term. But you file the complaint against the registrant as noted to the extent available in public WHOIS. Thank you.

KATHY KLEIMAN:

Thanks, Greg. I was wondering, Renee, how is it working now? My recollection is the same as others. We were looking at this right on the heels of GDPR and the temporary spec. So, Renee, how is it working out now? Do people from around the world have any trouble filing a URS complaint with you absent knowing exactly who the registrant is because information has been redacted.

RENEE FOSSEN:

No, we have not really had any complaints at all about how it's going, even with the [inaudible] population of the information that we're

pulling from WHOIS, we haven't gotten any complaints. And I think that, in itself, like Greg was saying – I totally agree – is enough education where if they just put that in there. They don't even need to know that it's not going to be accepted because it will be rejected at the time if it is something that we can't take. It's not been a problem really at all. I'm surprised it hasn't but it hasn't.

KATHY KLEIMAN: And then you update the complaint. I think you mentioned this earlier. You update the complaint a few days later when you get the information from the registries.

RENEE FOSSEN: We do not update the complaints at all because you can't amend the complaint. They have the information but there's no amending of that complaint.

KATHY KLEIMAN: Interesting. Thank you.

PHIL CORWIN: Julie, I see your hand up.

JULIE HEDLUND: First, I'm going to note a time check. This session ends in just four minutes. Then there will be a break and then the next session will start and we can continue this discussion. But we might suggest in instances such as

this where there does seem to still be some support for having a recommendation that we do still have the text that will be included in the initial report as well as with the context and the context may be helpful in that case as well.

So, where there does seem to be interest in the working group looking at this language again and especially with some context, perhaps we can suggest that we move on to the next item when we restart the conversation at the start of the next session. Then we'll take a note here that the working group will have the opportunity to review the language again with context in the initial report.

PHIL CORWIN:

Sure. That's a good reminder that this is just our initial dip into the waters of reviewing the initial report recommendations and questions and we're going to have much more complete language later on in this process to review and approve.

Just a point of clarification. Right now we're doing proposal for URS policy. Is this the last item on our agenda today or do we have something else?

JULIE HEDLUND:

We have two other items on our agenda. They're both brief. The first is just a reminder of the timeline, where we stand, next steps, and the structure of the initial report. The other item is just to remind everybody how the charter questions relating to TMCH have been closed out and that also will be no more than five-minute discussion.

PHIL CORWIN: Okay. And how much more do we have on these URS recommendations? With have a lot.

JULIE HEDLUND: We have a lot.

PHIL CORWIN: I would suggest – what do we have, like, two minutes until break now? Oh, 15 minutes. Oh, no the break starts about now. All right. I’m going to suggest maybe we take the break now, come back, go a little further on these URS things, go for a while and then hit those other two items which don’t sound like they’ll take ... How long do you think the TMCH review will take?

JULIE HEDLUND: It shouldn’t be more than five minutes since it’s just a reminder of what’s already been discussed.

PHIL CORWIN: Okay. So, let’s take a break now, come back, we’ll start at 5:00 promptly. Go through this for about an hour, hour and 15 minutes, and then hit those other two items at the end and we’ll have had a good day. Okay?

JULIE HEDLUND: Thanks, everyone. This session is adjourned. We'll be reconvening in 15 minutes for session number two.

[END OF TRANSCRIPTION]