

**ICANN Singapore Meeting
Update on UDRP
TRANSCRIPTION
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Stephane Van Gelder: ...and we will restart with a session on the UDRP issue report that is currently being worked on. We have Margie Milam from ICANN staff who will give us a run down of the work that's been going on on that issue report and within that group. So Margie are you ready to start? Okay. Over to you. Thanks.

Margie Milam: Hello everyone. I'm going to provide you with an overview of the preliminary issue report on the UDRP. And just to provide you guys with some background we decided to take a different approach on the issue report.

We decided to essentially adopt the approach that's in the new PDP process, which calls for a preliminary issue report that's open for public comment followed by a final issue report to be issued after the public comment period closes and we thought that that would be a good way to get information on how the community felt about the UDRP.

And just as background, in February the GNSO council asked for an issue report on the current state of the UDRP and specifically asked that the issue report cover certain things such as has the UDRP addressed the problem cyber squatting, identifying insufficiencies or in the qualities with the process.

Also wanted an evaluation of the definition of cyber squatting inherent in the existing UDRP language to see whether it needs to be updated or reviewed,

and then finally ask for suggestion on how a possible PDP could be managed. And so when this project was assigned to me it was quite an overwhelming task to really gather the information to produce the issue report and fortunately the GNSO council was very helpful in putting together a drafting team that assisted me in kind of figuring out how to analyze this, this issue and out of that effort came several pieces of information that fed into the preliminary issue report, the first being the webinar that was held on May 10th to solicit viewpoints from experts on the current state of the UDRP.

For those of you that weren't able to participate in that webinar it was a fairly long webinar, two and a half hours and we heard from experts representing all perspectives on the UDRP, we had providers, we had panelists, we had attorneys that represent complainants and respondents. We also had a trademark council and academics, so it was really designed to solicit different viewpoints and a lot of the information that's in the preliminary issue report came from the webinar on May 10th.

We also did something where we sent a specific questionnaire to each of the UDRP providers to try to solicit facts that would be referenced in the issue report and as you look in the preliminary issue report there's the responses from the various providers are attached in the annexes.

So we published the preliminary issue report for public comment, the public comment period is open until July 15th and we have a session scheduled on Wednesday, any of you interested in this topic I encourage you to attend and really share your viewpoints on the recommendations in the preliminary issue report.

The game plan is to take the public comments and prepare a final issue report that would include the information received from the UDRP session and from the public comment forum and then at that point the GNSO council can decide whether or not to initiate a PDP on the UDRP.

So briefly the issue report really explores the current state of the UDRP and from the staff perspective we certainly believe that the UDRP is a success and is a policy that is effective and is evidenced by the fact that there's been over 30,000 complaints filed over the, in the last decade, there are several service providers that have spent a lot of resources and attention to providing quality services to those that are seeking to take advantage of the UDRP.

It is viewed as a viable alternative to the costly litigation that was around before the UDRP came into effect. If you think about what it was like before the UDRP was in effect if you were involving a litigation with parties in different jurisdictions it was extremely costly and the UDRP has certainly helped to alleviate that cost and the UDRP has served as a model for various ccTLDs so it's something that is looked upon as effective and a useful model that has been carried forward into other registries.

And the thing that we find very helpful is that the providers have spent a tremendous amount of resource and education and really making the UDRP effective in the sense that decisions are published, a lot of attention is paid to a training both panelists and attorneys that are interested in protecting the rights of trademark holders and it really, you know, is a useful tool for the community.

I also spent a bit of time in the issue report talking about what the community felt about the UDRP and the opinions that are reflected in the issue report primarily came from the webinar that was, took place on May 10th and as I mentioned before it is viewed as cost effective compared to traditional litigation.

The theme that I heard across the board from various perspectives is that the UDRP is flexible and fair to respondents in the sense that over the last decade as issues have come up the panelists have adapted to address those issues, so things like you know, paper click, reverse domain and hijacking, there's a lot of issues that have evolved over the years because the UDRP is

so flexible and the panelists and the providers have really tried to make it fair to respondents and to address some of the changing circumstances in the marketplace.

One of the examples cited by the, one of the providers is that you know even though sometimes respondents don't necessarily even file a response the panelists go out of their way to try to make sure that the respondents are protected, I mean you will find cases where decisions are not in favor of the trademark holder if there hasn't been a sufficient document, you know and evidence in the complaint itself.

The other thing that we heard over and over again in the webinar is that the UDRP is predictable and fairly transparent in the sense that because there is so much information available on the decisions that are published, and there's a lot of treatises out there and it provides a very solid benchmark for those that are trying to protect their rights and rely on the policy itself.

There was a theme from brand holders that the UDRP is unfair to brand holders who end up spending, you know, millions of dollars fighting cyber squatting but to folks that address this issue on the webinar didn't necessarily find that it was the fault of the UDRP but it was more a fundamental problem in the domain name industry that could be addressed through other ways.

But it wasn't, you know they weren't advocating getting rid of the UDRP, they were just saying that you know, that it's still, cyber squatting is still a problem, it hasn't taken away the problem of cyber squatting.

The theme that you'll see if you review the issue report is that although you know everyone recognizes that the UDRP is not perfect, and it's clear that there are things that could be changed, the theme was that more harm than good can result from a PDP.

And a lot of perspectives from the webinar were from the different stakeholders that were involved was that you know it's probably best to leave it alone and that if a PDP was undertaken at this time it could actually undermine the effectiveness of the policy itself.

And then there were also those that felt that if there was to be anything done at all that there might be some benefit in focusing on process and treatments as opposed to trying to change the policy itself.

So given all this the preliminary issue report has a section that includes the staff recommendation and the staff felt that you know, after hearing this community view through the webinar that the UDRP should not be tampered with, we recommend against initiating a PDP. We felt that the community viewpoint was fairly strong and in the webinar and that it's probably best not to do a PDP at this time.

However if the council does believe that a UDRP, that a PDP or something should happen with the UDRP we suggest an alternative approach rather than taking on an entire PDP on the UDRP. We're suggesting that a team of experts be convened that could focus specifically on process recommendations because most of the issues that were discussed in the webinar were really more process issues as opposed to policy issues and we felt that having a dedicated team of experts that are, that have experience with the UDRP and its implementation can really be more effective in producing recommendations on how to improve the process itself.

And then once that process is completed and those process recommendations are either active dawn or evaluated you know, you could always do a PDP at a later time if there's still a need to take a more in depth view of the policy itself.

So the next few slides I have are going to briefly talk about the issues that were raised on the webinar with regards to the UDRP. There were some

issues that were raised on the webinar that are truly policy issues, one of them being the, a bad faith requirement. In other words the requirement that in order to prove bad faith you have to have bad faith registration and use and you have to prove both of those.

And so one of the suggestions was if you're going to look at the policy you want to change the word and to or to make it easier to find a successful UDRP case, and so that's one of the suggestions.

The other one was that it was pointed out that the policy doesn't have a lot of safe harbors, particularly with respect to free speech and fair use and that that is something that might be incorporated into the policy itself, and probably the third thing that listed out of the policy issue is that the policy itself does not have an appeals mechanism. If you are unhappy with the decision you can certainly appeal your process through the court system but the policy itself does not include an appeals process and so those were kind of the issues that were identified as policy issues.

The next few slides, and I'm not going to go through all of these, but they'll give you an idea of the kinds of issues that were raised and also it'll give you an overview of how complex this issue is and if there is a PDP that is started on the UDRP you can see through these next few slides that it, there's a lot of issues to be addressed and it would probably be a very complex process if we were to engage in really delving into the UDRP and looking at these issues.

The issues that I've identified on these slides are primarily process issues that were raised, as I said, on the webinar itself and I don't think, and we can always, when we take questions later on we can go through these issues but I'm not going to summarize them, there's very many of them and I'm just going to flip through these slides right now.

You know there's quite a bit of information in the issue report, this information is a summary of things that are included in the Annex A to the preliminary issue report.

And then finally I have just information where you can learn more about this issue, a link to the policy itself, we actually have the webinar archived and you can watch it through the Adobe Connect or review the transcript, and then if this is something that you have concerns about or would like to expand on some of the issues that can be discussed in the preliminary issue report please participate in the public comment forum which is open until July 15th.

And that's my presentation.

Stephane Van Gelder: Thanks very much Margie. And let's open it up straight away Wendy and then (unintelligible).

Wendy Seltzer: Thanks Margie and I've got a couple of questions and concerns with the process and substance, so first I think the webinar was great and very informative and a creative way to look for evidence, but I question whether we can call a consensus out of that.

We have perhaps relative consensus among those who've participated in the webinar but I don't think we can call that a community consensus and it certainly doesn't equate to a GNSO consensus and it's of consensus among those who were participating.

And I then wonder, you know, what can we conclude from that, we can conclude that those participating in the webinar generally didn't support review of the UDRP and I don't know that, it doesn't tell me that the ICANN community doesn't support a review of the UDRP. And I would ask to the ICANN community the question that's been asked of me many times in reference to the Whois studies, you know, what's wrong with gathering evidence?

What's wrong with doing a review of a process that's been operational for ten years now, a review doesn't mean undermine it and revise it, it doesn't mean destroy it and rebuild something different, it means investigate it, document how it's working and for whom it's working or not working, as prelude to discussion of whether it needs to be revised, but I don't think we have the evidence that tells us we don't even need to review what the UDRP has done in the past ten years.

Stephane Van Gelder: Thanks Wendy. So I have next in the queue Chuck, Jeff and Milton.

Chuck Gomes: Thanks Stephane and thanks for letting me speak as an observer. I'm speaking in my personal capacity.

Stephane Van Gelder: I do that a lot.

Chuck Gomes: I'm safer than you though; I'm not chair anymore. So, and in particular in a capacity having been involved in the DNSO and GNSO in its entire history and in the ICANN in its entire history and only say that to emphasize the fact that I'm not aware of us ever identifying a policy that would not be reviewed.

And I'm curious as to why this one would be singled out, I was interested in two of the statements on your slides, Margie, and it was a nice presentation, thanks for that. One of them said more harm than good could come from a PDP. I'd sure like to understand where that, how that conclusion was reached.

And in the second one, and in picking up on Wendy's comment about consensus, a PDP could undermine the effectiveness of the UDRP. How? We do, we have done PDPs reviewing policies for quite some time now and I don't think any of the policies have been undermined, let me just cite one as an example.

The IRTP, and this also happens to be an example of a very complex policy, in fact we broke it down into five, really six because when it already happened, different parts because of the complexity. So we're just wrapping up on Part B, there's still three more parts to go, one of them didn't recommend it and the first one, A, didn't recommend any changes.

This one that we're working on right now that you have a motion on the table for this coming week is going to recommend some policy changes, they're not huge and none of that has undermined the policy, and in fact on your slide you identified three policy issues in particular that arose that looked like they would be good to explore further and maybe consider some possible changes.

And lots of others on the other slide and yet recommending no PDP, I don't understand, are we afraid of looking at something to see if we can make it better? What's the fear? I haven't seen any ground swell of opposition to the UDRP in the community. I think most of us recognize that it has been a success but even in your own investigation in the issues report you identified areas for improvement, why are we going to put that aside?

I don't understand, is this going to be the only policy in ICANN history that we won't review or were we just putting it off and if so why? None of that makes a lot of sense to me so I don't know if you can help me understand that.

Stephane Van Gelder: Thanks very much Chuck. I'll give Margie an opportunity to come back before going to Jeff. Thanks.

Margie Milam: I think the reason you heard those viewpoints from, especially from various perspectives on the webinar was concern or maybe perhaps arose out of the IRT and the STI kind of work that took place, you know a year ago, and it seemed as though if you open up the policy it may end up watering it down so much that it's no longer effective.

At least that was the overwhelming theme that was heard from different, and it wasn't just the IP lawyers, it was you know it was IP lawyers, it was panelists, it was even respondent's council that felt that sometimes in reviewing a policy you might actually make it worse.

And there was a sentiment raised by some folks, which we also identify in the issue report, although I didn't comment on it in this presentation, that given that there's this, you know, these new rights to protection mechanisms that are in the new gTLD program that it might make sense to wait and see how effective they are and to see what kind of, you know, problems arise out of say the URS, you know, as it takes a different approach than the UDRP does.

And it might make more sense if this is to happen, this review is to happen is to wait until those processes are in place and have been around for a while to really get the data as to whether those principals should apply to the UDRP.

And on the consensus issue, because I think you raised it and also Wendy raised it, one of the reasons why we put it out there in the preliminary issue report is to get the community feedback, I mean that's what this is, right now we're trying to see, we're testing those theories and to the extent that there's a disagreement in the way that we review the community sentiment that certainly can be reflected in the final issue report.

But that, what struck us in the webinar and we'll see during the public comment period and during the workshop was that the sentiment was carried across various stakeholders, it wasn't just one viewpoint, like the IP view one for example, it was surprising to me that so many different stakeholders felt this way and so I encourage you all to if you disagree with those suggestions or summaries or commentaries to file public comment and to participate in the Web, the session on Wednesday.

Stephane Van Gelder: Chuck is that okay?

Chuck Gomes: Yes. It didn't convince me any differently, the rationale that you gave could have been done for any review we've ever done if we're going to act on fear, I don't think we've reviewed a policy and watered it down but I think we have a lot of history and I'm talking about actual examples of what we've done, not somebody's fear of what might happen.

Don't think we've watered any of them down or made them less effective, I think we've made improvements. And so all of a sudden now with this issue we think we're going to handle it differently, I don't think there's any basis in historical fact for expecting that, but thanks Margie, I appreciate that.

Stephane Van Gelder: Margie is there any reason for you to think that this is different to any other policy that we've reviewed before? I mean why do you feel that you're getting a different result this time?

Margie Milam: Well I guess I'm not hearing people demanding this be reviewed, I mean that did not come across at all in the webinar and just because the policy is in place for ten years doesn't mean it has to be reviewed with all the resource constraints and all the issues that the GNSO council can face.

The question is, you know yes it can be done, it's within scope, we're not objecting to the fact that it's not within scope for the council but is it really, is there really a need to do it at this time and I just haven't picked up on anyone really advocating for the change to occur, and yet heard the opposite in the webinar.

Stephane Van Gelder: Thanks Margie. I have Jeff next and then Milton, (Jonathan) and Wendy.

Jeff Neuman: So I have a few points, I guess I have an issue with the staff recommendation, so I guess you're hearing it. If you had come out and said that there's no, you don't recommend that PDP on the substantive issues of

the UDRP I would have understood that because that's what everyone made clear on that (unintelligible) but everyone, once you said okay, well what about the procedural side, every single person on that webinar had a list of issues that they needed resolved.

In fact you have six pages worth of issues in Annex Two of a ton of issues. So that's one. Number two is I consistently heard from ICANN staff over the last ten years when talking about whether PDP should be commenced or not or whether something's in scope or not you consistently say that staff cannot presuppose the outcome of any PDP and therefore we can't make a recommendation based on what we think may be the outcome.

But unfortunately that's exactly what staff did here, for the first time in history ICANN staff has presupposed that a PDP could result in changes to the UDRP and therefore is recommending against initiating it.

The third thing is, well I've already said there's six pages of issues that everyone except for WIPO had said that they want to addressed, and I'll bring up something that came up on (unintelligible) discussion, because there are, and I just quickly jotted down Whois issues with UDRP and Whois updates issues with transfer, uniform transfer procedures, proxy registrations, contact data, registrar notices to registries, registrar cooperation with UDRP decisions.

So relating this to our thick Whois discussion earlier this morning where I was told by ICANN staff if we don't address it through a PDP then how are we going to address it, same thing applies here.

If we don't address this to a UDRP how are we going to address it, I think saying well we'll convene some experts and hopefully rely on, you know, the good nature of registrars to actually implement it, I think.

And I went by the way we got a registrar/registry meeting and talked to a bunch of registrars and all of them said look, it's not the good ones that we're worried about, all right the good ones will adopt voluntary procedures, but it's the ones that don't participate but the only way to have them do something is through a PDP, through a consensus policy, and there were just a few issues I rattled off, six or seven issues that could only be handled and changed through a PDP and a consensus policy.

So, and for the same issues that Chuck mentioned, this a first in history where we're saying that a policy should not be, a policy that's 12 years old that is a consensus policy should not be reviewed, and frankly I'm not aware of any way to change a consensus policy other than through a PDP unless you're hoping on the voluntary adoption by everyone in the ecosystem of these.

So I totally understand the fears from a substantive standpoint, as a registry, as Neustar I don't want to see the substance of UDRP changed, that said we do need to address these six pages worth of issues that were brought up by everyone on the call and I don't want the fear of a change in the substance to drive all of our decision-making here.

Stephane Van Gelder: Thanks Jeff. Margie do you want to come back on any of that?

Margie Milam: (Unintelligible) but just because, you know the, I guess why don't we talk about on the process issues I think we look at them in a way that we put them in different buckets and I think many of them are implementation issues not policy issues.

And so we're not saying change the policy, we're saying if you're going to change the process you don't necessarily need a PDP to do that, and certain things can happen to make improvements to the process that affect everyone across the board and make it more effective through just changing the implementation of it.

And it doesn't necessarily have to be a PDP and that's our suggestion is that at least give us the chance to get, to break out those issues and to figure out which ones can be dealt with through experts in clarifying that the process that might get implemented say through the providers and don't involve the contracted parties, and see whether there's actually an improvement that you know, improvements that really bring the policy, you know implementation forward in a way that makes it more effective.

Jeff Neuman: So as someone who was...

Stephane Van Gelder: (Jon), I was just acknowledging that I saw you (unintelligible) you wanted to, to you just want to be able to...?

(Jonathan): No I don't need to speak.

Stephane Van Gelder: Okay. No. Did you want to speak to this or did you want to be in the queue?

(Jonathan): I want to be in the queue.

Stephane Van Gelder: Okay. So in the queue now I have Wendy then next.

Wendy Seltzer: No. I just wanted to respond to the earlier, you hadn't heard people calling for review, and I think or that again depends on whom you're listening to and where in the process this discussion came out of the RAP working group where there was a call as a consensus among the group there I believe that UDRP should be reviewed in the context of looking into registration abuse practices and policies and the overall issues there.

So in that group there was a consensus calling for review because those same people didn't necessarily show up to webinars but I don't think we can ignore their voices, and I'm not sure what we get by asking people to come

back repeatedly re-announcing their interest in having the policy reviewed.
And I'll stop there.

Stephane Van Gelder: Thanks Wendy. Milton.

Milton Mueller: I just want to start out by saying that I'm one of the few people that's actually done very systematic studies of the UDRP, we did a review, an article in 2000 statistically assessing the effect of provider selection by the complainant and discovering that that had an influence on the outcome. And then two years after that we got a grant from the ACM to do a systematic study, we literally read 4,000 cases, law students classified them and did the results.

So one of the things I want to point out is that it became very clear from our study that there is an inconsistency in the particular in the area of the Freedom of Expression Safe Harbor that the judges are all over the place on free speech cases.

So there's a very clear case to be reviewing and possibly modifying the substance of the policy on the question of the Free Expression Safe Harbor because there are people who believe that if you incorporate a trademark into a domain name that it is de facto a trademark violation.

And there are legal cases that have decided in the United States, Canada and elsewhere that that is in fact a free expression right, so the UDRP is actually inconsistent with established rights, it's certainly, and the decisions reflect that confusion, there is, it's literally a flip of the coin which way those cases will go at least during the period that we studied.

I have to find that Chuck stole a lot of my thunder, I was really puzzled by what exactly you would say is the, how you would undermine the effectiveness of the UDRP if you review it. Nothing will change, the UDRP will continue unless there is a consensus on a policy change at which point you would presumably have an agreement of at least two-thirds of the council

across both houses so that nothing would change unless you had a very strong reason for change.

Now in the Whois thing this inertia was a problem because many of us believed that the policy was wrong and we were sticking with the same thing because we couldn't agree on a change.

But in the UDRP case I agree that if we can't make it something that we can all agree on to be better, it won't change and it wouldn't be a disaster if it stays where it is now but I don't know of anybody who thinks that it shouldn't be reviewed at all, and I can't see how you could harm it or harm its effectiveness now by simply reviewing it to see if there's any consensus for change.

So let me just state the elephant in the room as some of us are putting it. What's really happening here is that a lot of us are afraid. We don't know what way the review will go, and there's people like that in my own constituency group who are afraid of reviewing it because they're afraid it might go the wrong way rather than what they consider the right way.

I acknowledge those fears. I would be a little bit tense about this myself, but again we can I think satisfy ourselves that unless the policy process is broken and we end up with changes that are not really consensus changes, that we can do a review and make it better to satisfy everybody on the Council if we agreed that that's the way it's going to be done, that nobody's going to try to ram through something that doesn't really have consensus.

And since the NCSG is typically the group that gets the short end of the stick when it comes to people declaring things to be consensus when we don't agree, I think if we support a review there's no reason for anybody else to be afraid of a review. Thank you.

Stephane Van Gelder: Thanks Milton. (Jonathan)'s next.

(Jonathan): I'll be very brief on the first point and equally so on the second. I think I was slightly surprised by like others that - sort of lack of a review for the Staff. I mean, I could see and Margie brought up only towards the end that perhaps with all the new gTLDs about come down the track, there's reason to postpone.

And that might be - in fact in many ways for me that's a more perhaps credible reason to hold fire on the review and that - so that's my two cents' worth on that.

As far as - the one thing that slightly surprised me slightly was I don't know if anyone's got a feel or perhaps if you've got a feel for how much a typical UDRP costs.

But I was slightly surprised that it was seen as cost effective. I can see it cost effective relative to litigation, but it's still relatively costly and I was surprised that there was no push for a slightly more cost effective solution.

Margie Milam: Yes, the comment is compared to litigation. I mean, obviously if you're involved in litigation that's, you know, tremendously more costly and we didn't hear, I mean, that wasn't one of the issues raised during at least the webinar that it should be made, you know, cheaper.

(Jonathan): A feel for what a typical UDRP costs.

Margie Milam: No I don't think I had that information. I don't - I'm sure others in the room may have information on that but I don't have that at my fingertips.

Stephane Van Gelder: Thanks. (Jon).

(Jonathan): As someone who was part of Margie's team in putting together the webinar and then reviewing the resulting report, one of the missing pieces from this

conversation is the organizational value of creative tension I think that the webinar revealed.

The level of participation in the webinar was substantial, and if you just look at the number of people, the corners from which they came who participated, I think you would agree.

If you don't then please let me know or speak up to everybody. But it is - it - this idea that the process - the UDRP works well enough right now and I take (Jonathan)'s point that right now it is also an important concept to consider when thinking about a PDP on the UDRP.

We are at a moment in time where the resources of the organization, the attention demands on the Council, the advent of the new gTLD program and the - what I viewed as the positive value of that creative tension in the process right now all add up to not now moving on a PDP.

Now Wendy, I guess I could be convinced otherwise. I, you know, have been known to throw a Molotov cocktail in the middle of the room myself from time to time.

I just don't really want to get personally burned by taking up too many of the cycles of the Council for a process that would not yield a better result than we have right now perhaps at some point down the road.

Stephane Van Gelder: I think Chuck wants to respond to the point that you just made (Jon).

Chuck Gomes: Yes, I'll be real brief. I can totally accept that argument that we don't have resources. That makes sense to me because I know how busy everybody is, okay.

The other arguments just didn't click with me, so that to me - so we may have to - we could postpone it, you know, if we decided to do it and that would make sense, because we do have to prioritize our activities so that we can realistically do the work.

(Jonathan): It's all currently with a plus 1 on that.

Stephane Van Gelder: Thanks. Jeff.

Jeff Neuman: Yes, I'm just trying to process that whole request for postponing. I guess, you know, in the end it's, you know, Staff makes its recommendation and it's up to the Council.

We decide whether now's the right time and I think this is one of those occasions where the threshold to initiate a PDP will be interesting, because it's a fairly low threshold to initiate it.

So just so the people listening here - I, you know, it's not the majority of the Council that needs to agree. It's not - it's a very low threshold to initiate a PDP.

So obviously, you know, Staff has their own opinion but this wouldn't - if we do initiate a PDP this wouldn't be the first time that Staff's opinion has been overridden.

So again ultimately it's up to us and I'm kind of curious as to the timing. I mean, I understand the argument that's being made and certainly we need to consider that.

I will note though that now that, you know, there's - there hopefully will be new TLDs. You know, one of the whole reasons why we had the IRT in the first place and why we did all those, you know, is because brand owners and trademark owners were not happy with the current state of the UDRP.

And that alone with respect to new TLDs was not deemed to be enough, and we went through a bunch of processes and, you know, there's still processes that are being debated even now by, you know, governments and others to add additional protections because the UDRP is not enough.

And I agree it's not enough and so there are a bunch of changes that we could talk about. That's really what started this whole thing. In my opinion what started the whole - years ago. Anyway that's all. Thanks.

Stephane Van Gelder: Thanks Jeff. So I have (Jon), Christina and (Jaime). Just before I move to you (Jon) I should also add that for the people in the room anyone is welcome to come up and ask a question or make a comment.

Just make yourselves known and come up to a microphone at the desk - at the table, sorry. (Jon).

(Jonathan): Just to make sure that I was not misheard because I know that when Jeff speaks many people listen. I was not recommending it be postponed. My view, the view of the business constituency, is that there is no need for a PDP right now and if there becomes a need for a PDP it will likely be down the road.

So the view is that it's not necessary, owing to the fact that at some point it might become necessary especially as we learn more. But that would be my view.

Stephane Van Gelder: Thanks (Jon). Christina.

Christina Rodriguez: Yes, I guess one of the things that I'm getting a little confused on Jeff is are you talking about kind of a - is your concern that there's a recommendation that there should be no PDP notwithstanding the process issues that have been identified in the report?

Or is your position that there should be a PDP and it should cover not only the process issues, but other issues of substance to be left defined to a later time, because in order to actually initiate a PDP we've got to figure out what the scope of that is going to be?

And I think we will need to figure out, you know, how broadly we're going to do this. I think it's probably no big surprise to anyone in this room that, you know, the IPC does not think a review or a PDP on the UDRP is necessary at this time.

But please rest assured that if one is initiated we have our list of issues, and there's going to be a lot of us at the table, probably more so than any Working Group in the past.

And I think it's important to just kind of keep in mind that a lot of the representations that have been made by these organizations to trademark owners in the context of new gTLDs have been, "Oh don't worry. Don't worry. You have the UDRP. You have the UDRP."

So once you create a scenario in which the utility and efficiency and value of that mechanism which has been pointed out to all of us as why we shouldn't worry, why we shouldn't have been pushing so hard for RPM, once you start to call that into question I think you really run the issue - run into the problem where you are incentivizing a group of stakeholders who at this point might be willing to just sit on the sidelines and bit their tongues to do more than that.

And with regard to some of the more specific points, you know, I have to disagree with you Jeff. The whole point of the IRT was not because we objected to the UDRP.

The whole point of the IRT was because there was a concern about the onslaught and the recognition that the UDRP as a post-abuse measure has its limitations.

And with regard to the cost (Jonathan) I can't certainly speak for everyone, but I can tell you that we can't do one for our clients including the filing fee for a one, you know, one to five name, one panelist proceeding for under about \$4000.

So obviously once you start getting multiple names, multiple panelists, obviously the prices are going up. And I think part of the reason there's a reluctance not only in terms of the timing of doing a PDP, but one of the big mechanisms that came out of the IRT was the URS, to be something faster, to be something cheaper and obviously there's a tradeoff in terms of the remedy.

You know, I think we should wait and see if that actually has the desired effect. It may well be and it may well be the case that it's so successful that for a lot of trademark owners who might have otherwise gone the route of the UDRP, that there's no longer a need to.

And to that extent some of the concerns that might have been raised is process issues are really no longer as relevant.

Stephane Van Gelder: Thank you Christina. Jeff, you wanted to respond then I have (Jaime) and Fred.

Jeff Neuman: Yes, so just to be clear and this is just my personal view because the Registries haven't as a stakeholder group settled on this. We've discussed it once or twice but we'll discuss it more at this meeting and since there's not a final issues report out.

But my personal view is that it should be limited to the procedural issues, not the substantive issues of the, you know, bad faced and those issues. And that stems primarily from the fact that there were a lot of procedural issues that can only be addressed in my view through a PDP, because again the good Registrars aren't the ones that are causing the problem.

You know, the ones that participate aren't the ones causing the problem. And if you want to fix the problem you have to do it through a PDP through a consensus policy.

And again those include things like Whois updates, uniform transfer procedures, proxy registration, contact data parties, Registrar - Registry's notice to Registrars, Registrar cooperation - those are some of the procedural ones that I pointed out that need to be through a PDP.

And I want to make sure for the record that you weren't threatening to say that if we have a PDP we're going to get more people involved. I'm actually - I think that's good.

I think it's a great thing that people should get involved, so I'm - it sounded a little bit like a threat. I think it's actually a good thing so I just want to clear that up for the record, because I do think more people participating is actually good.

And I do agree with you that there are definitely other issues that intellectual property owners have that will come out through this process. And again I see that as a good thing as a way to improve the UDRP, so I again think that's a good thing.

Stephane Van Gelder: Thanks Jeff. (Jaime)'s next.

(Jaime): My question was answered by Christina.

Stephane Van Gelder: Thank you (Jaime). Fred, please just for the record state your name and affiliation.

Frederick Feldman: Hi, this is Fred Feldman from MarkMonitor and we have a lot of clients who use this process, and I was listening to Wendy's comments earlier and I actually find I like her comment and I actually agree with it.

You know, it's an amazing policy and there's an amazing amount of data as well. And, you know, when you look at the breadth and scope of the issues that were identified by Margie, because there are - there is a lot of data we have a great opportunity to look at that data objectively and actually determine and prioritize which of them are problems.

So I don't know if a PDP is the right thing at this time, but maybe the right thing is to actually look at some of this data, which is well captured and well documented and find the ones that are actually really impacting both, you know, the people who use the PDRP and also the people who are, you know, the subject of it.

So that way, you know, we'll be able to address the issues and make sure that we focus the short resources that we have during this very busy time on only the ones that are actually most important.

In fact, you know, some of the providers have even produced analyses of their decisions and actually there's some great stuff out there as well and I think there's something published in March or April by WIPO that could be helpful analyzing hundreds and hundreds of cases.

So that's the only thing that I think is maybe at this point before we look at a PDRP, maybe it's a good idea to figure out what are the most important issues that affect the most amount of people.

Stephane Van Gelder: Thank you very much. I have Rosemary and J. Scott.

Rosemary Sinclair: Mine are two very general issue is I think - because I'm not into the detail of this. The first is just a question and I think it's to Jeff because of your knowledge of our policy development process.

Have we built anything in there in terms of governance of our own work such that we would do reviews of our major policies from time to time? I just can't remember whether there is.

And the second one -- it's also to Jeff -- is it seems to me that there's a distinction in what we're talking about between a policy review and an implementation of policy review.

And we kind of got ourselves a big quarter over that with the JAS Working Group, where we weren't really talking about the policy so much as the - exploring implementation kinds of issues.

So again in our policy processes is there any approach that is - or do our processes take account of policy as well as implementation work? Am I making myself clear? Okay.

Jeff Neuman: So on the first question yes, one of the recommendations coming out of the PDP Working Group in the final report is that there are regular reviews done on policies that come out of a PDP.

Now the UDRP actually didn't come out of a PDP - well it came out of something. I don't know what we called it back then. There are a bunch of Working Groups.

There was the - a policy process and then there were some implementation teams and ultimately we got to this back in 1998 I want to say - maybe '99. But the PDP Working Group does recommend strongly that reviews are done of policies that are passed through a PDP.

And then when you talk about - I think it's always an interesting discussion when you discuss what is policy versus implementation, and I even know with new gTLDs we've had this debate over and over again, what is a policy versus whether it's an implementation?

And I don't think there's ever been agreement by anybody as to what it constitutes, so it's different on the person you ask. That said the PDP Working Group final report does talk about the Working Group that's involved in the creation of policy having some sort of - I would call it a review function or some sort of - providing some sort of assistance into the implementation so that, you know, if there are any questions on implementation that may impact the policies, that there's some sort of communication back to the Working Group so that they can help determine what was initially meant.

So I think that is being built into the - well assuming everything's adopted certainly that's something that we've thought of as the policy development process Working Group, yes.

Stephane Van Gelder: Thank you. J. Scott.

J. Scott Evans: For the record I'm J. Scott Evans. I'm President of the Intellectual Property Constituency. First, I want to back Christina up to say that the reason we had the IRT was not because trademark owners felt the UDRP was insufficient.

We felt like it was a solution handed on the back end when we have 21 TLDs that it's done and at the time ICANN was saying they were going to have 500 new gTLDs, so that's 521.

And so we just didn't have - we felt like there weren't sufficient solutions to handle the volume. If it's scaled with what we deal with now in com, net and org and the other ccTLDs, you know, we didn't feel like it would scale and we

needed other solutions to complement it in order to handle the scalability of the problems, so that's that.

Secondly, you know, I was involved since the first meetings with the UDRP in Georgetown some 12, 13 years ago and I would say that of the six annexed issues that are listed there, none of those are really policy.

They were never talked about in the policy. They're all Rosemary the implementation of that policy by the various Contracted Parties that are in - either there's misunderstandings because they're unclear, either they're just bad players and they feign to have some sort of misunderstanding because it plays to their financial interest their implementation details.

My concern is that, you know, Jeff, you say again and again, "Well the bad actors - well we're concerned about the bad actor." Well what I'm concerned about is the fact that in fiscal year 2012 budget the contractual compliance is getting very little juice in the budget.

And if you're going to have a whole group of people having to deal with many more Registrys they've got to do contractual compliance for, and now you say you're going to put all these implementation things on there.

Unless we get some juice in the budget with regards to helping those folks do their jobs and having the people to do their jobs, we can tell people what they need to do but the bad players are still going to be getting away with it to the detriment of the good players and to the detriment of trademark owners and consumers and others.

So, you know, I do believe. I was surprised that there were more people - there were more - I was like Margie. I was a little surprised on the webinar that there were so many people lined up and said that the good thing about the UDRP is it offers both - everyone a sense of reliability, that they know

now there's a process in place and they sort of have a built up experience with it.

But I do believe there were - I think it was an aside spoke that there were some Registrar clarification they felt that needed to be given them. There were some implementation details and I think everyone agreed that those need to be looked at.

I don't - I think what people are most concerned with as a brand owner, 60th on the interbrand list, my biggest concern would be that you all have promised me that I don't need to worry because I have the UDRP and these other solutions about 500 new gTLDs, and then I'm worried about well now we're going to substantively change all that, because that's a huge problem to me.

If two years down the road when you're looking at the URS, you want to see if it's working together with the UDRP and you've gotten the solutions you thought.

They are complementing each other. That might be different. The implementation details, the implementation problems I think need to be dealt with.

One, I don't know if the PDP is correct. We need to - the general - I just don't know if that's correct; and two, if it is correct - well if it's the only way then it has to be complementary.

You can tell people what to do all day long but unless you pull the plug on them or punish them when they're bad actors, it's all empty words.

Stephane Van Gelder: Thanks. So I have Jeff next and the gentleman at the end over there and (Jaime) also and - okay yes. Can I just - both of you want to respond so I'll take that in the order - okay we'll take that in the order but just

to make sure so that you're aware that I'm going to have to cut this off because the timing obviously for the next session has to be precise, so please be brief Jeff, (Jaime).

Jeff Neuman: Yes. No, I just want to agree with J. Scott that, you know, I believe and someone can correct me if I'm wrong, but if there are changes to the way a Registrar has to implement things in the UDRP or clarifications, the only way that that's going to be done is through a PDP unless they - sorry, unless they voluntarily agree to do it which again, I mean, if that's what you want to rely on I guess we could do that.

So I agree with you. I also agree that it will become a compliance issue so - and from a new start standpoint I don't want to see the substance for the UDRP change.

I'm very comfortable with it, in fact it keeps me as a Registry out of those types of debates or the liability, I mean, if we go back to that so I think it's working from a substantive standpoint.

I just think there are a lot of procedural issues. I think one of the things - problems I'm taking out of this is that people have a problem with the word PDP and maybe it's a wording issue, because other people are like, "Well we can have people look at the data or we could have people do - a special group of experts do a study on it."

So it's - I think that's causing anxiety so maybe that's the issue. My fear is that if something good comes out of that result we're not going to be able to do anything with it unless we have a PDP, unless people voluntarily agree.

Stephane Van Gelder: Thanks. (Jaime).

(Jaime): I have a question to J. Scott. It seems to me that everybody's easy with the UDRP. It's functioning for the - both the trademark owner, the IP lawyers and Registrars and Registrars.

They are pretty confident that - with the policy, but where a new PDP would harm this? I think I don't see where and from your and Christina's assertion, I understood that the - you want to wait for the IPC to show any results and then commence a PDP or you don't see any need for a PDP - for a new PDP never.

J. Scott Evans: My point was that I didn't - I wasn't - I don't think the substantive parts of the UDRP need to be checked at all. But if they are going to be checked it seems to me the most rational time given the constraints on the GNSO and its resources, would be when you've already committed to do a review of the URS, which is about 12 to 18 months after it is initiated.

I think that's built into the guidebook. It says that they're going to do - that was one of the concessions that came out of the STI was that they are going to do a review of it after.

So given that you're going to be doing a review of one policy, it seems to me you might do them both at the same time because it's a good resource. I don't think it needs to be done but if you're going to it seems to me that makes sense.

With Jeff's point I think that there was consensus on the call that the procedural or the implementation details, the problems and the clarifications that need to occur for Registries and Registrars with regard to how it's implemented needs to occur now, and I would agree that I did hear that.

My point was I'm not sure a PDP is going to help if you can't enforce the contract once you've complied - get it on to somebody. But I think the good

people will continue to do the right thing and the bad players will continue to do the bad thing.

Stephane Van Gelder: Thanks J. Scott. Can I ask (Bill) to bring our discussion on this to a close?

(Bill): Sure, I'd be happy to provide the last few words. As someone who repeatedly called for looking at UDRP reform during the whole IRT, STI et cetera process, I find myself in a curious position of perhaps sharing concerns from both sides about substantive review which I view as being - reviewing the words of the actual decision making criteria for the panelists as opposed to all the other issues.

And the folks I represent certainly have concerns about predictability and consistency, but I think one thing that has not been addressed is that we know it is mentioned that we can probably expect a proliferation of more UDRP providers over the next few years.

We had a - we've had expressions of interest of being accredited by ICANN by a group from Amman, Jordan, by one from India and I think as we see more IDNs, more TLDs, you're going to see more providers.

And I think the one message I'd like to - the key message is that there really is a need for an organization whose only enforcement power is through agreements, through contracts.

It's rather amazing to me that ICANN can accredit organizations and WIPOs at the top but then we're going to see a lot more to take people's domains away or if there's going to be URS, and I don't think there's going to be a contract for URS providers though that was originally called for, to suspend domains and yet they give this power but there's no definition of what that power is, what the limitations are, what the enforcement responsibility is.

There's really a need for some kind of standard agreement, not just for the existing providers but for the proliferation of providers we're going to see over the next few years.

On the URS I'm still waiting to see what the final form of the URS is. It's still in debate between the Board and the GAC, and I think there's a real question whether it's going to be to supplement to the UDRP or substitute for the UDRP.

And on the question of cost we understand the concern of rights owners that \$4000 is a lot. I hope they understand the concern of Registrants that losing the use of your domain and the \$300, 500 word complaint is a cause for concern on the Registrant side.

And finally if we're going to have this bifurcated world of new rights protections for the new TLDs and UDRP, whether it's reformed or not for the incumbent TLDs, I would like to see IP interests stop trying to foist the URS on the incumbent domains as we've seen twice in the last two months with sort of a call to put the URS on .net as part of the .net renewal.

And we just saw a comment from the IP interests that if an incumbent Registry wanted to affiliate with a Registrar they had to adopt the entirety of the new TLD contract, which would include the renewed rights protection mechanisms.

So let's - if we're going to have this bifurcated world let's see how the URS works, if it works and then think about applying it to the incumbents. And I wish the IP interests would stop trying to look for every opportunity to stick it on the incumbent TLDs before we even know what it is, much less whether it works. Thank you for allowing me to speak.

Stephane Van Gelder: Thanks. Zahid, you had one final comment you wanted to make.

Zahid Jamil: Yes, I'm just thinking from Brenden and (Jon)'s point of view, I mean, it's important that some of the points made today was the UDRP is consistent so everybody knows what it's - what the results are going to be.

We're looking at a situation where we're going to be scaling up all the gTLDs. This is the foundation and through that process we've gone through the IRT and the STI, and people have found to some extent - not everyone may be happy but we found some sort of a balance.

Now we're at the last stages and we sort of pulled the plug on the foundation of this. There's going to be a whole bunch of gaming that'll take place within the UDRP between different interests.

I think that would be a very, you know, caution has to be applied to that. And that's precisely why I think when we're building it upon our foundation, once we pull the UDRP and say, "Well let's look at this whole thing again," then you should also hold back the URS and a whole bunch of other things that have built on this sort of a stack of cards or a house of cards. And I really would like to caution against sort of, you know, pulling that foundation at this point in time. Thanks.

Stephane Van Gelder: Thanks very much. So we're now going to break until 4:30 at which point - 5:30 at which point we will meet with the Board and Glen, can you just - so I've been told to ask everyone that's not a counselor to not sit at the table for that meeting please.

And what other instructions did you give me Glen? And so the counselors have to be on this side and the Board on this side. I'm just doing what...

END