

**Trademarks and New gTLDs
Minimizing the Need for Defensive Registrations
at the Second Level of New Generic Top Level Domains
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Participants

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Welcome and Opening Remarks

THEO HNARAKIS: Okay. Well, thanks for joining us. Hopefully, it will be a lot calmer in this room than we're about to see happening outside this hotel in the next few hours.

I'm Theo Hnarakis, the chief executive of Melbourne IT. There're a lot of familiar faces in the room, which is good to see. Melbourne IT isn't unfamiliar with these sort of changes. We're one of the first five test bed registrars back when the whole industry was deregulated, and we got involved fairly early with Neustar on launching .biz as well when the first change occurred.

But I think we're all amazed at the amount of change that we're about to see in the next 12 months or so with potentially over a thousand TLDs going live sometime through 2013 and 2014. It's creating a lot of uncertainty, a lot of questions.

Melbourne IT is involved heavily in the digital brand services business. We have several thousand large organizations who are all asking us questions. We've surveyed them. Certainly there's no general consensus about some of their concerns, but they range from why is this happening, to when will it happen, through to how do we protect ourselves and how do we protect our customers.

We were motivated to put forward a view over the last couple of months about HARM, and that is as a starting point to try and improve on what we have today. What we have today is by no means an optimum solution. In fact, it's extremely suboptimal. However, at the same time we don't expect there's a silver bullet in resolving this situation. There is no one clear solution that will pacify and satisfy all the groups involved.

But what we can do is make some progress, and what we can do is try and improve on what we have today. It is critical that—as delighted as we'd all be to reach consensus at the end of this meeting and have a position to put to ICANN, and the ICANN management consider a new solution, I think if we can get some general principles agreed and if we can get some outcomes where at least the majority of the room feels that we're going in the right direction, then I think we would have achieved an outstanding success on the day.

So with that, I'm delighted to say that we've got just a marvelous panel to lead the discussion on various groups that are involved. And, of course, I encourage everyone to both challenge, question, and also tweak their hearts out as the event unfolds. So with that, I'm going to hand on to Bruce.

I'd like to thank you all for attending. And let's hope we can move the discussion forward from the starting point we put forward about HARM and how we can get a better balance to the industry going forward.

Thank you.

History of this Issue at ICANN

BRUCE TONKIN: Thank you, Theo.

Just before we start, just to let everyone in the room know, fairly similar to ICANN convention, we are broadcasting this event on the Internet via webinar for those that couldn't attend in person. We also will be creating an audio and video recording of the event using the FTR technology that's used in many of the courtrooms in the U.S., and it just happens to be a subsidiary of Melbourne IT. Then we will create a transcript from that recording that will also be made available. So we just want to let everyone know. We encourage feedback and comments during the presentation, but just be aware that, essentially, they're public, what you say.

I thought it might be worth giving a very quick overview of how we've got here, and a little bit about how legal rights protection has been handled within ICANN.

Going back before the year 2000 when there were trademark disputes, they were typically resolved primarily through the courts, which was an expensive and time consuming process.

One of the successful pieces of work that ICANN did in the very early days, and even started before ICANN was created, was the development of the Uniform Dispute Resolution Policy. That's more than ten years old. It's extensively used. The outcome typically is the domain name is transferred to the

complainant if the complainant is successful. But there are no penalties for the original registrant, which may be different to some of the court processes that may have caused award damages or some other penalty to the party that is infringing.

WHOIS has also been an active topic, and obviously there's a lot of focus now on improving the accuracy of that tool, but certainly the tool itself is used as an important mechanism for people to try and resolve disputes even before it gets to a UDRP. So many people find the value there in being able to contact the registrant, maybe get some of their content removed, or tweak their content or otherwise respond without having to go through the expense of a formal process.

The new gTLD process was started back in around about 2005 as a formal policy development process. In that process a number of working groups were kicked off to look at specific topics. There was a legal rights working group. I believe it was chaired by, I think, Kristina Rosette, who's in the room. And that discussed various methods of protection, but no—there was no real agreement on a minimum standard, and so it was kind of left to new gTLD applicants to propose their own protections.

But many people felt uncomfortable with that and felt that there's to be such a wide range of applicants for new gTLDs, some of those will be very experienced and will implement appropriate protections, and others might lack that experience and the protections may not be sufficient. So the government advisory committee had advised ICANN that it needed to do more work on trademark protections. As a result, the ICANN board provided travel support to a group, which was the IRT group, to actually come up with a specific proposal for protection of trademarks in new gTLDs.

I'm reliably informed, in fact, this was the very room where some of that work was, in fact, done. I can say that's a pure coincidence as we didn't know that before this room was scheduled. As a result of that, a proposal was put forward. And the benefit of having a solid proposal is people can really actively comment on it, rather than lots of disparate ideas that are being tossed around.

The board sent that proposal to the GNSO and other groups at ICANN, and some feedback was provided. As a result, that led to the current provisions in the guidebook. So, essentially, the guidebook today has what I would refer to as a minimum set of protections. It consists of a database that's used by most of these protection mechanisms, and that's the Trademark Clearinghouse.

Then the mechanisms themselves, there is a standard Sunrise process, and that essentially gives a trademark holder the first right to register before a domain space is opened up to the general public.

There's a trademark claims process. Here, the registrant would receive notice that the name that they wish to register has a trademark associated with it and they need to respond and acknowledge

that they've received that notice. The trademark holder themselves receives a notice to say that a registrant is actually registering a name that uses the trademark of the trademark holder. But that doesn't really block all. Really, the only effect is that the trademark holder knows about it and would then need to monitor its use to decide whether or not any infringements had occurred.

Then there's also the concept of trying to find something, I guess, faster and cheaper than UDRP, and that was the Uniform Rapid Suspension, or URS process, and this only results in suspension and not transfer. Essentially, this was a one-size-fits-all approach. It's trying to say, "There's no specific eligibility other than holding a trademark for any of these protection mechanisms." The trade-off is, do you start offering higher levels of protection for some classes of trademark or do you just increase the overall minimum protections to a higher level?

So the aim today—certainly we're about a year, maybe a little longer, before we see new gTLDs go live. Now is the chance to review the mechanisms that have been put forward in recognition of the names that have been applied for. So we now know that there are roughly 1,900 applications for new names. There are some duplicates. So there's probably less than 1,500 unique names in that group, but it's a reasonable number of names.

We also know many of the business models. Some are very closed in that they're registering a name for internal use by the applicant, and so you would not— typically those would not be subject to many registrations at the second level. Then other names that are operated on, more or less the .com registry model, which is, you know, most people can apply for a name in that particular namespace, and so you would expect there would be large volumes of registrations.

So we can look at both the names that have been applied for and how those names are going to be used, and we can reflect on the trademark protection and other legal rights mechanisms that are in place.

Many people are starting to talk in the community, and we know that there's been various groups, and they've been visiting different governments and working also internally. But we thought that we really wanted to get some of these ideas out into the open, and that's why this event is being broadcast and also transcribed, so that we can all hear what those ideas are and share that knowledge.

Then the aim here really is to say, "What are some of the commonalities that are emerging in these different ideas?" "What's the appetite then to take those common areas of agreement forward?" At the very minimum, some of these ideas can help inform registry operators that are today implementing their rights protection mechanisms or planning their rights protection mechanisms, so

this will be input to all the applicants. And they may choose to take some of these mechanisms on voluntarily.

Maybe some of these mechanisms become part of formal advice to the board, which could come from a constituency, or a stakeholder group, or house or council. Those in the ICANN world will understand what those terms mean. And finally, they could actually be taken through a policy development process, which then means the outcomes of that process become mandatory for all existing and new gTLDs. This takes longer, but it does have the strongest impact.

The board, more or less, has a requirement, unless there's a really strong reason against, to take the recommendations from a policy development process and they have contractual weight in that the registry and registrar contracts require the registries and registrars to comply with the policies that are developed.

So those are sort of three options, all going from, I guess, things that you could do immediately, to things that may take a year or a bit longer to develop.

So at that point, I'd like to introduce our panel. As Theo pointed out, we're pleased to have a diverse group. We have a number of panelists that are actually involved in multiple gTLD applications. We also have representatives from industry associations that have had a lot of input from their members with respect to protection mechanisms. We also have representatives from law firms that have been pretty active in this environment as well.

So to my left, just alphabetically, we have Andrew Abrams, who is the trademark counsel for Google, and Google has applied for quite a few names.

We have James Bikoff, who's a partner at Silverberg, Goldman & Bikoff. James is involved in taking action against, I guess, infringements online for both the non-profit and for-profit sector. I guess publicly, he's been fairly well known for his involvement with the infringements associated with the International Olympics Committee, so I guess he's been particularly busy this year.

We also have Steve DelBianco from NetChoice. NetChoice is an industry association, has many members that are involved in the ICANN community, as well as others. Steve is, I guess, an office holder in the business constituency of ICANN.

We have Dan Jaffe from the National Association of Advertisers. Again, another industry association. Has become particularly active in providing input to ICANN, I guess especially over the last six months or so, and, again, is representing the concerns that many of his members have conveyed.

We have Jon Nevett, who's a co-founder of a new company called Donuts. Donuts has been

active, also, with many new gTLD applications. They're in the process, I guess, of developing their mechanisms for legal rights protection.

Russ Pangborn is from Microsoft. He's here virtually, which is appropriate being from an IT company perhaps. I believe he's using some of his company's technology, Skype, to communicate with us. Russ was a member of the IRT team, and also—Microsoft is also an applicant. Russ also looks after the issues associated with infringements against the various trademarks that Microsoft has. I guess Russ brings multiple perspectives depending on which hat he's wearing today I'm not sure.

Craig Schwartz is with fTLD—financial TLDs, I guess, Registry Services. He's been involved in some applications in the financial services sector. That sector has also been very active in the last couple of years at ICANN trying to develop proposals for minimal protections, particularly as they relate to the financial services industry. That's an industry that has a particular problem with association—with respect to fraud on financial services related names.

And finally, we have Brian Winterfeldt, who is a partner with Steptoe & Johnston. Brian is a member of the GSNO Council on behalf of the intellectual property constituency, and has also been involved in providing advice with respect to new gTLD applications, and is also involved in dealing with online infringements.

So that's our panel. I would ask each of the panelists to make some opening remarks. Then we'll really just open it up for the forum here to comment. The aim is for each of the panelists to speak for sort of eight minutes or so, and focus on what you think are some of the key improvements that could be made to the current system with the objective that we're trying to find some common ground rather than necessarily—as Theo mentioned earlier, there's no ideal solution. What we're really trying to find is a solution that most people can be comfortable with.

So thank you. I'll hand it across to Andrew.

ANDREW ABRAMS: Hello.

Short Panel Presentations

ANDREW ABRAMS: Thank you, Bruce. Hi, I'm Andy Abrams, trademark counsel for Google. I'm very happy to be here for now. Hopefully it stays that way. Thank you to Bruce and to Melbourne IT for hosting this event, and for having me as a panelist. I appreciate it.

So as you mentioned, Google is participating in a fairly big way in the gTLD program. We have

98 pending applications. I think we're relatively unusual in that we have a very multi-faceted plan for these 98 applications. We don't have like a single cohesive strategy. So I want to take a few minutes to kind of explain that, and explain what—how that affects our RPMs and our proposed RPMs.

So out of the 98, we have 31 that are effectively closed, meaning that Google is going to be the registrant of the second level domains. But of those 31, 16 are closed in the traditional sense and 15 are going to be operated by third parties, but they're going to point to a specific Google offering, such as Gmail, Blogger, YouTube.

There's going to be 23 that are open, but with registration restrictions, meaning that there will be some restriction on who can actually apply for a second level domain on those TLDs. For instance, they must be registered corporations, or doctors, or have authorized copyrighted content.

The remaining 44 are going to be pure open. So as Bruce described, those are going to be, essentially, the traditional .com model where the registry allows for most people to register second level domains, so long as they follow the abuse guidelines.

Like I said, that affects the proposed RPMs in this matter. With the closed registries, essentially, in addition to the ICANN requirements, those are going to be fairly consistent in terms of take-down policies, complaint procedures, with existing Google products. So for .YouTube, you know, it's going to point to a YouTube page. So existing YouTube policies will control, as well as Gmail, Blogger, and so forth.

For the registration restriction TLDs, in addition to the ICANN requirements, we propose that remedial action be taken if the registrant violate the core policy, which is, you know, that they have to be a registered corporation or doctor, or so forth.

Finally, the reason why we're all here today is sort of a general open model. And so in addition to the ICANN requirements, what we've proposed in our applications is to have an extended Sunrise of 60 days, ongoing claim service for an indefinite amount of time, and authentication of registrant email information.

In addition to that, I think everybody in the community has been very interested in having some sort of additional rights protection mechanism, whether that's mandated by ICANN or put forth on a—as a best practices or a voluntary basis. We're very seriously considering, whatever happens, adopting at least on a voluntary basis some sort of reserve list.

I appreciate that Melbourne IT put forth at least a concrete proposal. You know, we've taken a look at it. We're very interested in the HARM proposal. I think where we really agree with the HARM

proposal is the fact that this reserve list should be narrower than the clearinghouse. It should be a globally protected marks list, so the HARM list has a criteria that you have the registrations in three of the five geographic regions. We do think it should be an at-risk marks list, so the five UDRP victories or other legal proceedings, I think, is a good criteria. A little bit more controversial is the fact that they can't be a common generic term, and I think we're generally in support of that criteria as well.

Where I think we prefer the list to be a little bit broader is currently the HARM requirement is that the registration must exist for five years. I think all registrations would probably be included in there.

The point system seems a little bit complex and might exclude a lot of valid registrations.

Finally, the corporate domain requirement, you know, I think I would be fine with getting rid of all those requirements and having a little bit broader of a HARMs list variation.

In addition to that, we've been really pushing— we're in support of enhanced URS protections. So I know right now the URS is very much open and up in the air. So to the extent that the community can push for a cheaper, faster version of the URS and have a lower standard of proof to be consistent with UDRP, have a loser pays model and even a discretionary transfer remedy, I think those are all good things that the community can push for.

So at this point I'm really interested to see what everybody else on the panel has to say, what the people in the community have to say. You know, it's a work in progress. So I'm happy to be here and I'll turn it over next to Jim.

BRUCE TONKIN: Thank you. Go ahead, Jim.

JAMES BIKOFF: Thanks, Bruce. I'm Jim Bikoff. I represent the International Olympic Committee. I'm also a member of the IPC. I have several other clients who are interested in the current conversations on gTLDs.

I guess one of the reasons I'm here is because I represent a company that—an organization that really is at risk. In fact, it's way beyond at risk. It is a subject of massive cybersquatting on a regular basis. We monitor domain names in the existing TLDs on a weekly basis, and we find hundreds to as much as almost a thousand a week that are being registered with Olympic or Olympiad.

Many of these are names that are registered for phishing, gambling, pornographic activities. Many are parked, and they basically are ones that we see all year round, but especially in periods like 2012 where we've had a major Summer Olympics in London.

It used to be that counterfeiting occurred mainly in shops around the country and in various

countries, but now almost everything has gone online. They called the London Olympics the first digital Olympics, because most of the infractions were online. We were busy for three weeks taking down websites, streaming, trademark violations, ambush, et cetera. Through cooperation of people like Google, Go Daddy, and other registrars, we were able to do that mostly on a voluntary basis without litigation.

But the problem is extensive, and that's only in the existing 21 TLDs. We have protection for the words. Unlike most trademark owners, the words are protected by statute in the United States and many other countries. So the use of the word without permission is a violation of law, except in certain, very narrow cases involving grandfathered uses and geographic uses, which are very, very low in terms of frequency.

So for us, we have tried to have a dialogue within ICANN, as well as with the government advisory folks and we've made some progress. We have the names reserved at the top level. Now we're working for second level protection within ICANN. There's a GNSO drafting team specifically on this issue, which is right now having weekly meetings to try to decide what it's going to recommend to the council as far as protection goes.

The Board, the GAC, our firm as counsel, have all done studies on the protection. I think the best thing I can tell you is that when the board released its unredacted minutes from a couple of years ago, they said that—they concluded that very few, if any, organizations, apart from the IOC and the Red Cross, could satisfy the criteria of national legislation and treaties. Then they said outside counsel have not yet discovered any others that do satisfy the criteria.

The advice from the GAC was limited to the IOC and the Red Cross, and I know that there's going to be a PDP on the IGO issue. It may or may not include the IOC and the Red Cross, but we don't feel it's necessary.

So we've done everything to get protection, everything we can with all existing organizations. But in spite of that, what's happened is bringing actions against 1,800 cybersquatters in the District Court in Virginia, UDRPs, take-downs. We're struggling now with 21 TLDs. We can only imagine what's going to happen when we have a thousand new ones out there. So we need remedies that can be used to stop some of this, not only for the IOC, but also for other companies that have well-known brands.

So we're very encouraged by the HARM proposal. When we received it, looked at it, and analyzed it, we thought that there is a need to give special protection for these at-risk marks, and to make sure that they have some status where they can deal with the coming onslaught of new second

level infringements.

As far as the existing rights protection mechanisms, I think there are many things that should be the subject of improvement, some of which Andy mentioned. But we think on the Trademark Clearinghouse, that the claim service should last well beyond the 60 days that are provided for now. We think that the claim service should include strings that contain the word, not just the exact word, because many of the infringements that we see on the second level are strings that include the word but are not the identical word.

We also think that the URS, we need to see what the expense is going to be because they haven't yet come out with a figure. We're in favor of a loser pay system and a shortened default judgment time. We also favor a blocking mechanism such as was used with .xxx, because we think that that would be proactive rather than reactive. We need somehow to be able to deal with the expected amount of infringements that are coming.

Finally, I think we need to make sure WHOIS verification is accurate, complete, and that it's available not—to law enforcement certainly, but also to IP owners. And with that, I'll turn it over to Steve.

BRUCE TONKIN: Thank you, Jim. Go ahead, Steve.

STEVE DELBIANCO: Bruce, thanks for hosting today, but also thanks for inviting the business constituency to weigh in on this, because our perspective is somewhat unique. We're different than the intellectual property constituency, because our notion is protecting the businesses who are registrants, but also protecting their own users and consumers and customers, all the way down the line, to make sure they have a trustworthy DNS.

I think there's two things we can all agree on. One is that it's critical to the success of ICANN's multi-stakeholder, private-sector-led model that this gTLD expansion go well. That is to say not go badly. There's both the external problem and that a lot of governments will be highly critical of ICANN, highly critical of letting the private sector drive this bus if it goes extremely badly for their citizens or the companies that would complain to those governments, if it turns out that there's a lot of problems.

The other is the internal view. Three years ago next week ICANN signed the affirmation of commitments. It committed ICANN, one year after new gTLDs go in the root, to do an extensive review of the program to see whether the expansion promoted consumer trust, consumer choice, and competition. So choice and competition mean registrants and users being able to find meaningful new choices for domain names. You don't actually satisfy choice in competition if people are buying domain

names for purely defensive purposes. So that's one of the key linkages between ICANN's evaluation and the gTLD program.

The second fact I think everybody understands is that for anybody with a lot of trademarks the mathematics are pure madness. It's mad. If a company, say, has a couple thousand, 4,000 different trademarks for different publications or journals that it runs, and they have to register in 600 open TLDs, register or block at \$20 a year, that's \$50 million dollars a year. The mathematics are madness. We've got to come up with a better way, and I agree with that.

I think everyone up here knows these facts. We're not in full agreement on everything, but we are allies on trying to fix this. As Winston Churchill said, "There is at least one thing worse than fighting with your allies and that is fighting without your allies." So we do need to stick together on this.

So I organized my remarks in a handout that was on every chair, a one-page handout, to focus on the convergence around objectives, mechanisms, and eligibility for rights protection mechanisms. So as I walk through this, I'll highlight the business constituency, or BC solutions, which have been in the record for quite some time. But convergence toward consensus is really my aim. Because if we are far apart on solutions, I think it's far less likely the Board will even consider adding new rights protection mechanisms in this round. That has got to be our objective if we want to avoid a disaster.

So in my document I've put together three high level objectives, and it's under those objectives that you want to consider mechanisms, the eligibility, and who's the proponents.

The first mechanism is to minimize registrations of exact trademark matches by others. I actually think this is the least interesting of the objectives, because it's the one where we probably have the best solutions in place, and yet provides very little relief from abuse of registrations and the costs I was talking about.

For instance under 1, No. C, the business constituency has recommended a standardized, centralized Sunrise process, let it run for at least 60 days, as Andy indicated. The idea there is that having a brand owner having to simultaneously manage several hundred Sunrise processes, especially when they're only 30 days long, was going to be unworkable. They all have to look the same and act the same. Better yet, if ICANN provides a lot of tools to help registrars and registries do it. In other words, push some of that up to ICANN.

Look at the next one on D, the business constituency has been saying for so long that trademark claims notices ought to run indefinitely. I heard Andy and Jim say the same thing. There's a distinction there, though. Take a look at this, Bruce's proposal from Melbourne IT, says only high, at-risk marks

would be eligible for this indefinite continuation of trademark claims.

Bruce, that may be far more trouble than it's worth.

If a registrar has TM claims notices working, it might be easier to just leave it on than to determine ahead of time whether this is a mark that's eligible for it or to turn it off after a certain number of days.

I can't wait to hear Jon discuss some of the Donuts ideas, like trademark claim notices, the trademark claims plus, and I love just saying "donuts" during a technical presentation.

Finally, the permanent block on registration of exact trademark. You know, that's interesting, too. Donuts is going to try to cover it across all their own TLDs, and I think that's a great idea. But again, there's a distinction of who would be eligible, and it really leads me to my concern that exact matches are exactly—well, they're not worth so much.

What we really need is to move to number two and minimize abusive registrations of domains that are closely related. Typographical variance, a trademark term that might even be spelled wrong, or a trademark term that's spelled right, but is followed by a word. Wellsfargosupport.whatever.

So the mechanisms here, I have four of them listed—the first one in there is one about which the business constituency is really passionate. We say that if a domain is recovered in a URS proceeding or UDRP, even though we're looking back five years like Bruce did, that ought to go into the Trademark Clearinghouse, both for the purposes of Sunrise registration, blocking, which also comes out of there, but also for claims notices.

In other words, if you've done the hard work, Jim, of recovering a name that had been used to infringe and defraud customers, that name ought to be in there whether it's an exact match or not, however it's spelled. This is one way to eliminate sort of the arbitrary nature of what words go in, because only an arbitrator in URS and UDRP would have determined that it was an infringing use. I would love to gather more consensus for that one.

There's also distinctions about whether trademark notices would be issued for those that include the trademark, or just the trademark, or the trademark with any other words. Just last night the business constituency decided to support the Brand Summit's proposal that the trademark plus any of the goods or services listed in their application would be eligible for trademark notices. It didn't say that they would go into the clearinghouse. It would just say that the notice service would say that if PayPal's in the clearinghouse, then the word "PayPal Payments" could be combined in any way. So `Paypalpayments.tld` would automatically generate a notice. So that will be of some help. Some help.

But we can go further than that. I think that Paypal-support is a great example. I doubt that the word “support” is in PayPal’s trademark registration application, but Paypal-support.whatever is likely to be a phishing scam or a website that would come up and try to get somebody’s PayPal account for the purpose of ripping them off.

The third set of objectives is tools. Tools to what? To contact, suspend and recover an abusive registration once it’s already occurred. Because the previous objectives were stopping them from even being registered, right? But after they’re out there, the BC has been a big proponent that all registrars who distribute names in the new gTLDs should adhere to the amended Registrar Accreditation Agreement, or RAA.

A lot of work going into that. We got an update from Margie Milam on staff this morning about the negotiations with the registrars. Can’t wait to see what comes out at the end of that tunnel. But when it comes out the end of that tunnel and makes its way into the PDP tunnel, it’s essential that all registrars adhere to it, as opposed to waiting until their RAA comes up for renewal.

I think that it’s not just good policy, it’s exactly what the governments and law enforcement officers are expecting when they stimulated the negotiation of the RAA. So we’ve got to find a way to require that, and I would love to get, again, some support on this. Staff told us this morning that it’s not in the plan right now.

We do think that they ought to validate information for registrants, and the BC’s a big proponent of centralizing and standardizing the validation whenever possible. Try to find a way for ICANN to provide tools to do that. Let the registrars handle it since they have the customer relationship. It doesn’t make much sense to push that to a registry level, but we’ll wait and see how that comes out.

I think that Melbourne IT’s proposal said only do this for high at-risk marks. Again, I don’t understand how that distinction will be meaningful to a consumer who gets ripped off, because they were victimized by a scam and it so happened that the trademark behind the scam is a trademark that somehow didn’t qualify for the HARM. That’s not going to be much solace to them nor business for its customers.

I like your idea, Bruce, about suspending if the registrant doesn’t pay a response fee within 48 hours. A nonresponse on a URS? Let’s go back to 2A, and the minute that happens, that suspended name ought to go into the clearinghouse, so that notices get issued if anyone tries to register it again.

The BC also believes that URS ought to be managed by a single vendor under ICANN supervision. We’re glad to see that the Brand Summit, Brian’s group, supports that as well. I think the URS loser pays

is something the BC doesn't have a firm position on, but it makes good sense to me.

Bruce, I'll close by saying that category four is Other, because you always need an All Other category. Other ways that ICANN can minimize is one of the BC's primary points over the last twelve months is under 4A, is that ICANN needs the ability to enforce a registry's compliance with all the registry's commitments. These are commitments that show up in what they promise to do under question 18, question 28, commitments they may have made to a government or a regulator to satisfy consumer protection concerns.

When commitments are made in a bilateral way like that, the registry operator's got to bake those into their registry contracts so that ICANN can enforce it. If we end up having registries who actually don't follow what they promised, to get a government to remove a GAC early warning, that government will expect ICANN to enforce it. It will be an unacceptable answer for ICANN to say, "Well, sorry. That wasn't in the contract and we can't enforce it." That will never work. That leads us to the failure scenario that we need to avoid.

Finally, under 4B, we have got to do a superb job of communicating not just the opportunities but the risks of rights protection mechanisms to registrants, and users, and would-be registrants, and one day will-be users all around the globe, because the awareness level of this program is still very low. It's very difficult to communicate. Many times we'll say that we've already done a communications program, but the key to communicate is to do it over and over again.

My goal on that, and the BC's goal on that, is to minimize surprises. Because surprises to registrants trickle straight up to their government and law enforcement agencies. Surprises to consumers that are victimized by fraud and scams will trickle straight up to their governments. And when the governments claim, "How is it we didn't handle this?" we've got to have an answer. The answer starts with converging on rights protection mechanisms improvements that we can all support and implement in this round.

So I look forward to the rest of the remarks and the questions.

BRUCE TONKIN: Thank you, Steve. Dan.

DAN JAFFE: Good afternoon. I very much appreciate the opportunity to be here to talk to you about this issue. I represent the Association of National Advertisers. That's 450 of the largest brand-holders in the world who do about \$250 billion dollars worth of advertising in this country. We've also created a group called CREO, which is 181 groups, associations and companies.

Hopefully you can hear me without the microphone, but apparently I need to move it in closer.

Can you hear me now? Okay. Great.

I want to thank Melbourne IT for convening this session. I think it's a very useful effort. I want to congratulate them on spotlighting the issue of defensive registrations. I think that you are hearing and you will probably hear from more on this panel the growing consensus that there is a true defensive registration problem. I also agree with what others have said who spoke before me, that just taking care of the defensive registration issue is not going to be enough, because the numbers really are— even for the companies that I represent— going to be backbreaking. So if they're going to be backbreaking for those members who have tremendous amount of economic capacity, what do you think this will mean for the medium size and the smaller groups that will have to be dealing at the secondary domain?

And I think that Steve made a very good point that as consumers are concerned, who cheats them, it doesn't really matter whether they are a high risk domain or whether they're some domain that's just beginning to grow, as long as they're being cheated they're going to have distrust for the whole system that we're trying to build up.

And we've made the Internet an enormously effective area for business growth, but that can be severely undermined if we have consumers finding themselves being phished and cybersquatted even at a higher level than has been the case in the past.

One of the things that Melbourne IT stressed was to strengthen various parts of the programs that ICANN has proposed. But I think it is important to emphasize that some of these mechanisms that were claimed to be essential before the rollout just don't exist. We can talk about strengthening the URS, but there is no URS at the present time. And so it is fine to talk about that, but before you start rolling out a thousand new top-level domains, or whatever the final number will be, you have to have these protective programs in place or you're going to be certain that you're going to run into trouble.

And by the way, while we're talking about secondary domains, at a meeting I went to this morning people started to talk about when you're protecting the secondary domains remember that crooks are very creative, that they will be going to the third level, the fourth level domains as well. So we have to have these protective mechanisms, not just take care of defensive registrations.

I believe, I believe our group believes that the proposal, while an interesting one from Melbourne, is just too complex and inadequately protective. Many of our own members, who are some of the largest brand-holders in the world, would probably not meet the criteria. It certainly would not protect those companies that are not large enough to be out there making all of these various kinds of UDRP and URS efforts. So it's going to really keep way too many people out of the game.

Also, Melbourne IT uses the Red Cross as an example of a group that should be protected under these proposals, but then says it will not protect common words. At least to me, “red” and “cross” are common words, so I don’t know— but somewhere we need to deal with that seeming to be inconsistency. And I strongly and we strongly question a fundamental premise of the Melbourne IT proposal that states that the framework established by ICANN provides a sufficient protection for the vast majority of organizations that are trademark holders.

There just is no evidence to that effect. The existing system clearly doesn’t provide that. The protections that are supposed to be coming on aren’t there, so why are we so certain that this system will be truly protective? I think we can’t talk in abstractions or hopes when we’re dealing with the security of the Internet system. And I think that it is wrong to believe that there’s only a very small subset of the universe that deserves these kinds of protections, and so I think that while there may be some criteria that may be developed, they have to be much more encompassing than the ones that were put forward so far.

So, we look forward to working with Melbourne IT. We look forward to working with all those on this panel. I do believe that there is a growing consensus of concern in this area, and so that I think we can find common ground in many areas. And where we do not have common ground, we should at least look closely at those issues. We continue to believe that if you can block on a TLD by TLD basis, we do not understand the logic as to why you would not be able to do that more globally.

So we’ll hear from Donuts, which seems to believe that you can do it globally within their system. We do not understand why that shouldn’t be able to be extended across TLDs. And if it can’t be done, then we want people not just to say that it can’t be done, but really show us what stands in the way of making that practical.

Thank you very much.

BRUCE TONKIN: Thank you, Dan. Jon.

JON NEVETT: Thanks, Dan. Thanks, Bruce and Theo, for organizing this important discussion. I think this is great to have the community together at various points. Not at the craziness of an ICANN meeting, but outside that so we can think about these important issues.

Again, my name is Jon Nevett. I’m from Donuts, Inc.. And for those of you who don’t know us, we are comprised of various veterans of the industry from various parts of the ecosystem, and we’ve applied for a handful of TLDs, plus some.

(Laughter.)

Our approach, essentially, we want to operate open, inclusive TLDs. All of our applications are for open, generic TLDs. We're not trying to limit abuse by limiting access. We want to limit abuse by limiting abuse.

We don't think any entity or group should have the exclusive right to generic terms at the top or second levels. We obviously are operating or going to operate open TLDs. No by-invitation-only, exclusive clubs of TLDs. We just want to provide a lot of breadth and specificity to the domain name space so to give consumer choice and competition, which is the point of the program as Steve mentioned.

Obviously we spent a lot of time on rights protections measures, both personally and now as a company. Three-and-a-half years ago I sat here in this very room at the kickoff of the IRT meeting, and this is after the new TLD process at the GNSO. And Russ, who's speaking next, was with me there, and that was three-and-a-half years ago. So we've been talking about these issues for a lot of time, and talking about the URS three-and-a-half years ago, and the clearinghouse three-and-a-half years ago.

And then after the IRT report came out, we spent a number of months on the STI report. And I spent a lot of time on that, perfecting or weakening to some—in some people's eyes, but working with the community to get consensus on a lot of the rights protection measures that are out there. And the STI report got—I believe it was unanimous support of the GNSO at the time, and then we went through the GAC process. That was almost two years ago now. That was January of 2011 where we spent a lot of time talking about these very issues again. And now we're here. And obviously over the last two years we've talked about it a lot as well. So we care about these issues. We care about protecting rights in our TLDs, as far as Donuts goes. And I think the community has shown that there're a lot of protections baked into the new TLD process. A lot of protections that are not currently in existence in any TLD you would buy today. There's mandatory Sunrise. There's a mandatory claims process. In the first round that was an alternative. You could have one or the other. You could choose—a registry operator could choose one or the other. Now they're both mandated. There's the URS that's mandatory. There's obviously the UDRP that has been in existence. There's required procedures for take-down and remediation. There're requirements for Thick WHOIS. There're requirements for use of the clearinghouse. There's a requirement for the post delegation dispute resolution policy. There are detailed security policies. There's required implementation of DNSSEC. And there are requirements for 24/7, 365 abuse point of contacts.

That wasn't enough for us. It sounds like a lot, and it is a lot, but that wasn't enough for Donuts.

We decided to add more protections on our TLDs. So we're going to do periodic audits of WHOIS data for accuracy. We're going to have a domain protected marks list, or a DPML. Now, it comes out of one of the requirements—or one of the recommendations, rather, of the IRT called a GPML, but we're having a DPML, which I like calling the "Donuts Protected Marks List."

And, essentially, we will give every trademark holder the opportunity to—if they don't want to participate in the Sunrise and register their names and use it actively, they could register their names and block the trademark plus, so it's not just limited to the exact match in all of our TLDs. So however many of the 307 we get, those names will be blocked.

We'll have a claims plus product for trademark protection that Steve mentioned. Very aggressive terms of use that prohibit illegal and abusive activities. And we can't forget malicious misconduct when we're talking about trademark protection and infringement. There's a lot of things out there that could happen and we want to make sure that we're protected against that.

We're going to limit certain limitations on proxy and privacy services, and we will obviously have proper resourcing for all of these. And that's for every one of our TLDs. For certain TLDs that we deemed more sensitive, we added even more protections, because that wasn't enough. And we're going to do more extensive validation of WHOIS data. We're going to have very aggressive requirements in our Registrar Registry Accreditation Agreement. That's the RRA, not to be confused with the RA, Registry Agreement, or the RAA, Registrar Accreditation Agreement.

So the RRA, between us and our registrars, will have very strict compliance requirements, take-down requirements, and anti-pharming, phishing, spamming, botnets, and infringement and other forms of abuse. Also 24/7, 365 abuse contacts.

So, you know, we think we've struck a careful balance between trademark protections and then providing services that consumers want. We've certainly relied on what's in the guidebook. And from our perspective, the guidebook, at this point, should be deemed closed for new TLDs. And that might not be a popular statement in this room.

But essentially we paid, as an applicant community, over \$350 million dollars to ICANN, so we're not contracted parties. They've accepted our money and they are processing those applications according to the guidelines in the guidebook. So policy development time is over with regard to the new TLD round.

With that said, there are mechanisms for changing these, and changing—and as Bruce mentioned, changing them for all TLDs. So instead of hobbling just the new TLDs, if we think there's a

problem in the community or a problem with something that needs protection, let's make sure all the TLDs are protected, not just the new ones. We don't want to create an economic and competitive disadvantage for new TLDs versus existing ones where that's, quite frankly, where all the traffic is now anyway.

So we want to make sure that the process moves forward, we implement new TLDs. We see how, for example, the URS is working, and then we adopt it for all TLDs. And we make whatever changes and tweaks that have to happen. So we do it in a test bed, essentially, with the new TLDs where they're very—there'll be far fewer names, far less traffic, and then we could look at TLDs and see how they work, and the protections and see how they work, and then adopt that for all TLDs and not just the new ones.

As far as delays go, I think the more we talk, the longer it's been, and the more I can't keep—the application fees and new TLD applicants are kind of hanging out there, especially the ones that aren't as well capitalized. Under the guidebook, the first TLD would have been in the root in January. Now, under the current timeline, perhaps it could be as early as September. Someone mentioned 2014 on the panel. I think it was Jim or Steve. That's a long time for applicants that don't even know if they're going to get the TLDs, if they're in a contention set, to be operating, to be building protections out when they don't even know if they'll have a TLD.

So there's a diversion from protection development. There's a holding pattern. People obviously need to be paid salaries and whatnot. And there's a lot of resources that are going into just maintaining themselves as opposed to putting it into—putting the resources into operating the TLDs and building those out, and building some of these changes that people are talking about. So the key is next steps, get the TLDs moving as quickly as possible. In fact, I saw in the guidebook the other day—I just read it for fun, I think, that the next round of TLDs— in the guidebook it says that the next round of TLDs will—the goal for ICANN is to have them one year after the opening of the window of this round. So we're looking at January 2013—just, what, four months from now that we're going to have the second round start, so we'll see if that happens.

(Laughter.)

Fadi has his work cut out for him and we welcome him, and hopefully that the trains will get back on time. In fact, him starting two weeks early, I think that's the first time that I can think of anything in ICANN history that happened early.

(Laughter.)

So we think that's a good omen and hopefully something that will be a good sign for ICANN moving forward and getting these TLDs done, and that we working as a community to add whatever additional protections through the PDP process and moving on from there so we can have a safe and vibrant Internet.

Thank you.

BRUCE TONKIN: Thank you, Jon. Craig.

CRAIG SCHWARTZ: Thanks, Bruce. And thanks for inviting fTLD Registry Services to join you today.

Unlike most of the applicants for TLDs, we're one of 84 that submitted community-based applications. It is well known at this point that we submitted for .bank and .insurance. And we'll obviously be running TLDs much differently than a vast majority of the other applicants, specifically as it relates to it being highly restrictive and having validated registrations prior to activation in the DNS, restrictive name-selection policies as to what types of names can be registered, and a host of additional security-type mechanisms that we've been very vocal about in the community even long before I joined the Financial Services Roundtable last July in 2011.

So as I'm sitting here listening to all the prior presentations, I'm trying to balance the fact that I really wear two hats. One is as a Director of fTLD Registry Services, which is an applicant and is proposing to run these community-based, top-level domains. So for us many of the rights protection mechanisms that are built into the system are adequate, because we feel that the registration restrictions that we will employ far exceed the value that will come out of those rights protection mechanisms.

In .bank, if you're not intended and legitimate to have a particular registration, you won't. And that is very much consistent with what we heard—or what we've heard from the GAC over the years as they've talked about insensitive strings, as they've talked about strings that are geared towards particular sectors or geared towards regulated industries. They said in February 2011 that those types of strings should be identified as community-based applications, and we listened to that and we listened to our members that have said the same thing.

The other hat that I wear is an association hat, because I am an employee currently of the Financial Services Roundtable, which represents about 100 of the largest banks, insurance companies and integrated financial services companies in the United States, many whom are members of the organization that Dan Jaffe represents.

So while I balance what we need to do in fTLD Registry Services in terms of advancing our applications and consultations with our communities and ensuring that the voice of registrants around the world are participating in the process, I also have an obligation as an association representative to be informing our members about how they can participate in the ICANN process most effectively.

So, we are looking at what others are doing in the space. I very much appreciate what Donuts is doing and what they've laid out, what Steve DelBianco and NetChoice has laid out, because it gives a small company and a fairly small association like us some meat to bite into and to start to consider how we might adopt those for our particular registries.

We are continuing to engage with our members, and that is of the Financial Services Roundtable, and the American Bankers Association, who is our partner in fTLD Registry Services' efforts. As I said at the onset, many of the rights protection mechanisms that are built into the system now by ICANN are adequate for what we intend to do with .bank and .insurance, but we are open to exploring other possibilities and look forward to participating in the community dialogue about this and coming up with solutions that are not just good for us, but that are good for the entire DNS space.

So, again, thank you, Bruce.

BRUCE TONKIN: Thank you, Craig. Brian.

BRIAN WINTERFELDT: Great, thank you. Thank you, Theo, Bruce and Melbourne IT for putting this together today. I think this has been already an interesting discussion and we haven't even gotten to the audience yet.

I come to this community, I guess, by way of being a trademark attorney, Internet attorney and helping clients originally in online brand enforcement. And then became more engaged through the International Trademark Association's Internet Committee and working on ICANN issues and becoming engaged in the IPC through that perspective.

I wanted to talk today about a couple of different things. You heard Steve mention in his discussion about the Brand Summit, and I wanted to tell people what that is since I think a lot of people probably don't even know what we're talking about. And so I'll give people a little background on that and what we're doing and how they could become involved in providing feedback if they'd like to with that.

In addition, I have some preliminary IPC feedback on the HARM proposal that we're discussing today. It's still in flux and we're going to work on putting together sort of an official IPC position, but I had some thoughts that we vetted through IPC leadership just to give some initial impressions.

So first I wanted to start by talking about the Brand Summit. That is a group of U.S. concerned brand owners that got together in New York actually on June 11th. Covington actually graciously hosted us with Kristina in New York. And we had a lot of folks that were brought together. I'll just give you a flavor for a few of the companies.

We had representatives from Coach, CitiGroup, Avon, the Coca-Cola Company, Johnson & Johnson, Microsoft, Verizon, Time Warner. A lot of great brands showed up. And, in addition, we had representatives from AIPLA, INTA. We had sign-on from IPO. We had participation from CADNA and from ANA.

And, ultimately, we were able to put together a letter that went to both NTIA and to the USPCO that was able to be signed off on by CADNA, INTA, IPO and the AIPLA, and essentially we're focusing on trying to look for second-level improvements. I guess a lot of these we would consider implementation.

We really focused our comments for this point on the URS and the Trademark Clearinghouse. As we all know, they are in a state of being formed, and so we want to make sure that they're formed in a way that are really going to help brand owners make sure their marks are protected in this greatly expanding space. So I do—and would be happy to share a copy of that letter that went out.

There was a meeting, and a lot of folks actually here in the room today were actually at the meeting with the USG where we presented some of those results. And we're in the process actually of giving some feedback and some refinements on our recommendations that were contained in the letter. And we definitely would love to include other peoples' feedback in that as well, both who were at the live event a couple of weeks ago as well as folks who are here who would like to. So feel free to come up and talk to me, or shoot me an email, and we're happy to share where we're at, the letter that's been drafted and the draft that we have right now with additional feedback.

Basically, the USG has requested that we provide them—in addition to sort of the list of improvements that we've requested with the Trademark Clearinghouse, and what we'd like to see once it's sort of defined, and the URS, kind of a ranking based on sort of what we think is most important, as well as what we think is ultimately implementable.

And I'm sure that folks in this room might be able to help us frankly with identifying what the priorities are. There are other people in the room who would really help us with the implementation piece, since, frankly, coming from the brand owners' space, we're not always as in tune to all the technical details and what it takes to really implement a lot of these things, so we would love to have peoples' feedback.

So that's kind of where we're at with the Brand Summit. And, again, we're in the process of doing follow-up for that.

The next piece I wanted to give was just a little bit of preliminary feedback on the HARM proposal. You know, we are—obviously we were really excited when we saw the proposal from Melbourne IT and we appreciate this event today. We do think that it's a very good proposal, and we're obviously very open for additional mechanisms to sort of help brand owners in this space, whether they end up being through the policy development process or recommendations to the board, or whether they are able to be voluntarily adopted by the applicants. We're happy wherever we can get increased protections. I think some of the concerns we have were shared already, or suggestions for improvement were already put forward by some of the other panelists today.

I think Andy already talked about—we're concerned a little bit about some of the high bars that are sort of set. We're a little bit concerned about sort of the hundred-point barrier maybe being a little bit too high, a little too exclusive. We're concerned about younger brands, such as Twitter, for example, that might be a very obvious target for infringement being excluded, because it's new.

We're also concerned about it maybe being a little under-inclusive in the regional requirements, because there might be a very strong mark that is maybe perhaps only based in Australia and wouldn't meet the barrier for registrations in three of the five regions that were identified in the current proposal.

We're also concerned about the dictionary word requirement that would bar, essentially, any brand that is a dictionary word in the six official UN languages. We're concerned that that might be, again, too high of a hurdle and that might make it a little too exclusive and exclude some really important brands. For example, Coach in the United States would be a good example of that.

In addition, we are a little bit concerned about the emphasis, again, on sort of the point system and having to meet such a high requirement to show repeated patterns of abuse. We think that maybe those might just be too high. And, again, they might need to be simplified a little bit, or maybe the barriers brought a little bit lower so it does not exclude brands that do need these important increased protections that are being proposed.

So that's just a little bit of initial feedback. Again, we're working on sort of an official IPC position, and we'll be looking forward to sharing that with Melbourne IT and the folks who are participating here today. And, again, I appreciate the opportunity to be here.

BRUCE TONKIN: Thanks, Brian. You mention in your letter—or your Brand Summit letter, you

talked about URS and Trademark Clearinghouse. For those that haven't seen the letter, can you give a bit of a flavor of some of the improvements? It sounded like you had a long list, but maybe some of the ones you think are the most important ones.

BRIAN WINTERFELDT: Sure, I'm happy to do that. I was kind of avoiding grandstanding too long. I know there's a lot of people here and a lot of people in the audience who'd like to participate. I'm happy to give kind of a flavor.

So, for example, with the Trademark Clearinghouse, we're looking for broader than mere identical matches. Again, these are some of the things that Steve discussed. And, again, on his sheet, if you look at it, wherever he references "Brand Summit," those are things that came from this letter and from the discussion that we're having. We're looking for the trademark claim service to certainly last longer than 60 days. I think Steve already made the point—once that's set up, it's probably more trouble to turn it off than to just leave it on. And we think that could be very helpful for brand owners to prevent abuse and to gather evidence about infringement.

We are looking for Sunrise periods, including an option for brand owners to block in perpetuity second-level names that match their trademarks. That's sort of our clearinghouse list. Then with the URS, we're looking to automatically tie the URS with an easy to use interface, so that brand owners only need to validate their marks once, thus making it easier for URS complaints to be drafted and completed. We're looking for default judgments. And then for fees, we're looking for the loser of a contested URS proceeding to bear the URS filing and adjudication fees.

That's not exclusively everything, but that kind of gives you a flavor. Again, I'm happy to share that letter with everyone here who's interested.

BRUCE TONKIN: Thank you, Brian. We're running a little ahead of time and I thank all the panelists for being fairly succinct in their remarks. But what I suggest we do, before we open up to the group—

(Laughter.)

RUSSELL PANGBORN: I am still here.

BRUCE TONKIN: Thank you, Russ. Russ, please go ahead. We can hear you.

RUSSELL PANGBORN: Okay, great. Thank you.

First, I want to thank Theo and Bruce and Melbourne IT for hosting this event and inviting me to join. I do think it's an important discussion. I wish I could be there in person, but, luckily, thanks to the magic of the Internet and to Skype technology, I can join from my offices here in Redmond.

To address Bruce's introductory remarks about me, I did participate in the IRT, and my employer here, Microsoft, applied for 11 TLDs, predominantly branded TLDs. But I will be wearing my brand owner hat today, because we're discussing trademark protection mechanisms in the system.

I want to start with that by citing to a survey that was conducted quite a while back by MarkMonitor that was really focused on defensive registrations. I think Steve alluded to it during his comments. According to that survey, 90 percent of the MarkMonitor client portfolios consisted of defensive registrations, and fully more than 50 percent of those in the survey indicated that they thought that these new gTLDs were going to create new opportunities for brand harm. I think all those conclusions are pretty hard to deny.

Using numbers where we anticipated the applications to be somewhere in the range of 250—at least that was the testimony that was proposed by Curt in his Congressional hearings, that they expected the expansion to be around 250 or so new gTLDs. Little did we know that we would have one panelist here with more than that himself, and the total amount exceeding 1900.

Now, even when you reduce the numbers to account for duplicate applications and those open versus closed, we're still significantly way above the 250 concerning applicants involved in the expansion. So basing the cost aspect where if you have a Sunrise fee roughly of \$150 just for protecting one mark in the system and only a third of those open restricted registries, you're going to have a cost that will be roughly \$50,000. If you filed it in only ten percent of those registries, you're looking at only around \$15,000.

But when you start doing the math and if Microsoft were only to cover its top ten brands in Sunrise, you're looking at \$150,000. We have a lot more than ten brands, and we anticipate that there's going to be a need for protecting in Sunrise for likely more than ten percent of those registries.

And as was pointed out by several of the panelists, if you're a small or medium-sized business, these costs get very excessive very fast. So this really underscores the urgency for these conversations and for ultimately improving the trademark protection mechanisms in the system.

Some of the key points I want to raise—and in the interest of focusing on implementable RPMs, as Bruce instructed us, here are some of my thoughts. Right now the applicant guidebook calls for the Trademark Clearinghouse and with a limited trademark claim service. As has been pointed out by several other people, the trademark claim service is set to only last 60 days, and this somewhat defies logic to me.

Effectively, this should be available for the duration of the registry's existence. One of the

concerns I have is even in the gaming of the system around that 60-day limitation. Rumor has it that there are registrars already looking at not even offering second-level domains in the new gTLDs until that 60-day limit has passed so they don't have to incur any costs related to complying with these claim services. And this is just one way that you're going to have potential industry players making a mockery of the trademark protections. So putting some more teeth into those protections is essential. Practically speaking, the claims service should be broader than exact match.

It was just mentioned by Brian that this is one of the asks coming out of the Brand Summit. Well, I've been pointing to this as well. While there are many variations that people have put out there, my proposal has been that as long as the domain contains the trademark, you'll get the majority of what a brand owner is concerned about. That's been our experience. Yeah, there may still be some typos and other variants, but in general if you're going to be getting the domain containing the mark, you'll be able to get a large number of those concerning domains.

Also the clearinghouse should be linked to the URS so that information can be pushed and pulled for URS matters. I mean, one of the real benefits of having this repository of information like the clearinghouse, it was about making sure that we had mechanisms that were going to be effective and efficient to ensure that there is going to be the protections available to the trademark holders. So allowing the clearinghouse to interact in the URS as well is important.

Turning to the URS, now let's remember that the Uniform Rapid Suspension System was proposed as an inexpensive, fast means for taking down obvious cases of infringement or cybersquatting. And this was intended to be a supplement to the UDRP, not a replacement. That's why there isn't a transfer of domains that happens. So it only has a chance to succeed if it's going to be rapid and inexpensive.

As it presently stands and as we heard from service providers in Prague, the process is not exactly rapid. And the costs that are incurred from the way that the service is currently drafted, it cannot be done for the target price of 3- to \$500, which is what I believe was the target that was being proposed for service providers. So this begs for the system to be simplified or subsidized. I think Jon in Prague during his comments made the suggestion of subsidization. And I get that ICANN may have a little bit of reluctance to that, but it is something that was built into the guidebook, so they do have an obligation to get this right.

But the process in my view needs to be fast. It needs to be where you can have a brand owner take down these egregious, offending domains within a week. Some people are calling for 48 hours. Some people are calling for longer times. But if it's going to start extending into three, four, five weeks and the offending sites are still up, it's going to be no better than the UDRP process. And, again, if you can just pay

the fee for the UDRP process, you do get to transfer the domain. So unless you're going to be getting this fast, quick relief for an inexpensive price, all of this work around the URS is all for naught. To me, this is the number one issue in getting it right.

Other quick thoughts. I think it's already been mentioned that there's an option in .xxx during the Sunrise period to just block rather than actually own the domain. And I think it's akin to what Jon was describing that Donuts is proposing. I welcome that addition to the system. If you don't need—you know, Microsoft has tens of thousands of domains. Many, many of them are defensive in nature. Adding domains simply for the sake of holding on to them to prevent cybersquatters from having them is not something that's high on my list of needs. I would much rather just block all of these extra domains for an inexpensive price and then be done with it.

Now, block lists like the GPML that was proposed by the IRT in the course of the discussion were summarily dropped by ICANN. And I think that the reason you continue to see many variants of these lists is that there wasn't an adequate explanation as to what happened to it. There was an obligation for ICANN to actually do its homework and do a study and try and figure out where and how the lines should be drawn in the Globally Protected Marks List back when the IRT proposed it. We never saw any of that. We effectively just had it dropped out of the discussion at the next meeting. And so it's coming up in various forms.

And we heard it from the ANA where they're trying to propose an entire block list for any brand owner. And then you're hearing it in various forms with the DPML or a HARM list, et cetera. For me, rather than having criteria for a list that would allow for a famous mark or a globally-protected mark, it's really difficult because you're going to have those brand owners that are just off the edge of the list be very frustrated that they didn't make the list. So it's hard to get that kind of uniform approach from the brand community that we are so badly seeking.

What I had proposed in the course of my comments—and it's somewhat like what Melbourne IT has done and I like the direction they have gone a little bit, but they do draw lines where I think it's a little bit difficult, again, getting to coverage in certain jurisdictions and the like.

But what it's really about, it's about protecting those brands that have been targeted for cybersquatting. And so what I have done was in one set of Microsoft comments put in a comment about requiring a burden shifting of second-level domains incorporating frequently cybersquatted marks. So rather than determining whether or not the mark is famous and registered all over the place, as long as you have that mark and you've entered it into the clearinghouse and you can show that it's been targeted in the past for cybersquatting be it, you know, five administrative or legal proceedings or whether you've had to

recover umpteen number of domains, the bottom line is that if it has been targeted, you can then identify it as such in the clearinghouse. And then it would just merely push the burden over to the applicant to say why they have some legitimate basis for pursuing the domain they are. If they provide that, if they meet that burden, then they, in fact, can proceed on to get that domain.

So keeping my comments short, I just wanted to again reiterate that I agree with many of the other comments that have been made throughout the course of this panel, but, in short, getting the clearinghouse and the URS right is urgent for us to have a successful launch of the new gTLDs.

Thank you.

BRUCE TONKIN: Thank you, Russ. Much appreciated. And thank you for participating from distant Seattle. I think we might be getting more rain here than Seattle actually, so you're probably in good weather.

RUSSELL PANGBORN: It's sunny today.

BRUCE TONKIN: Yeah, I knew it would be. So we are running a little ahead of schedule. And what I suggest is we break for ten minutes, allow a chance for people to stretch their legs, visit the restrooms if you need to. There's also water and coffee and cookies, which I will avail myself of in a moment. So if we could just break for ten minutes and then we'll come back and enter a more general discussion.

(Break)

Open Q&A Debate

(Transcript begins where the recording starts.)

BRUCE TONKIN: —the feedback. I just tried to capture—I haven't captured this perfectly, but it just gives a general gist. So we heard from Andy at Google with respect to some of the domain names that are going to be operated more as open registries, but there's support for some form of extended Sunrise for 60 days, trademark claims being an ongoing process, email authentication at the time of registration, some form of reserve list, but not as tight as the sort of HARM proposal, for example, not requiring filing dates for trademark registrations to be sort of five years earlier and try to simplify that model.

Jim Bikoff noted that he supports protection for high-risk marks, particular improvements. He wants trademark claims to last beyond 60 days. Claims should support exact match, but as well as words that include the trademark.

And we also heard that from a number of panelists as well. Some form of user pays for URS and ensuring that the WHOIS is accurate.

Steve DelBianco on behalf of the Business Constituency also looking at perhaps standardizing the Sunrise process, so you don't have to do each Sunrise process separately, support of the idea of the permanent block for trademarks rather than having to pay renewals, which was also reiterated by Jon and a number of others. Minimizing abusive registration of words that include trademarks. We're hearing that quite a bit that people don't want to just be restricted to the exact match of the trademark, but the concept that if it's PayPal, it would be "PayPalpayments" or "PayPal-payment" or "Pay-Pal" or the variations of the match.

And Steve was sort of saying one mechanism of doing that is to say if the particular variation has been subject to UDRP, that variation could be something that could be included in the clearinghouse.

Dan Jaffe from the Association of National Advertisers is very much saying that don't just need to look at the top level or second level, but there's issues at the third and the fourth level. Concern like— similar to Google that the criteria for high-risk marks is too high a bar and that that needs to be lowered particularly. Otherwise, it really only protects very large organizations and not many smaller businesses that may be affected by defensive registrations. Similar comments on common words being too much of a restriction. Didn't feel that there was enough evidence to really say that the existing mechanisms are sufficient, so definitely, yeah, there's support to try and improve the protections.

Dan noted, like Donuts had suggested, that within their top-level names, the several hundred that they have, that if you reserve a name as a trademark holder, that would apply to all of those names. And Dan was suggesting that that shouldn't just be restricted to a particular registry operator, but it should be more broader. So, again, this is a concept of some form of reserve list.

Jon noted from Donuts that, again, they're focused on WHOIS accuracy and requiring audits, periodic audits to ensure that it's accurate. They use a new acronym, DPML, Domain Protected Marks Lists. And, again, it protects across multiple TLDs. For some of the TLDs they operate, they'll have more extensive elevation of WHOIS data and they'll have a tighter registry/registrar agreement.

I believe that any changes that should be made now should be subject to a policy process that then applies to all gTLDs, not just changing aspects of the guidebook.

Brian mentioned that—some improvements to URS, so that I guess faster processes around default judgments where the registrant doesn't respond to the complaint. The clearinghouse, again, reiterated that

it should be broader than exact matches. Trademark claims should be longer than 60 days. Sunrise should support this blocking concept. Also concerned about the concept of setting a barrier and having that barrier being set too high.

Russ from Microsoft noted that the—again, the trademark claims should be ongoing, that the URS needs to be looked at to make sure that it really is cheap and fast. Also supported the idea of a block and was a bit limiting on the use of the HARM list again, in that it may set too high a bar or too hard to get an agreement on where the dividing line is. Pretty similar concept to Steve DelBianco, that if there is a mark that's frequently cybersquatted, you know, potentially a mark that includes the trademark itself plus a related word, that's the sort of thing that should make it eligible for protection.

So some of the common elements, there seems to be generally a number of panelists were talking about the trademark claims process running permanently, quite a bit of support for some mechanisms to include beyond exact matches in the Trademark Clearinghouse. Fairly strong support for the idea of not just having a Sunrise registration that you have to renew every year, but some form of Sunrise blocking effect that you just pay once-off and you're not having to renew it every year. And a number of panelists are saying that should apply to multiple top-level names.

So at this point I'd like to open it up for feedback. Really, anyone from the audience can speak if you're in favor of any of the particular mechanisms being proposed or also speak if you're not in favor and you have a strong view against some of the proposals that we've heard so far.

And we have standing mics, so we have—I'll let Bill kick off the proceedings from—and if you could announce your name just because we are transcribing and it helps for people that are not in the room and are adhering to the recording. So if you could just state your name and perhaps a little bit about your interest, if it's not obvious, and then, please, make your comment.

BILL SMITH: Sure. I'm Bill Smith with PayPal. We have an interest clearly, I think, in brand protection. That's not my angle on this generally, though. I am from the security side where we have lots of problems that come at us, phishing attacks, et cetera, that are using the brand. So we care very much about the brand, both from a trademark protection but also from a security side.

I wasn't in the room when Steve did his arithmetic lesson, but I'll do a quick one here. I heard he did it. Basically do the math, right? A thousand new TLDs, a thousand defensive registrations per brand, \$10 each, \$10 million. No one can afford to do that, especially when you look at an organization like PayPal where we have 10,000 names, most of them defensively registered. That's \$100 million a year. We're not going to spend that money. We can't spend that money. And the current mechanisms in my opinion will

not work, though some of the suggestions here and some of the things that are in the current guidebook will help mitigate some of the problems.

The real issues are on the abuse side. The people who are—who make this expensive are people who are—who will abuse any system we come up with, so we have to remember that.

Brands are willing to spend money to protect their brands. We are also willing to do things that protect security, our security, enhance security. In PayPal's case, we spend at least six figures on brand protection. Okay? We will spend even more money if we got something that was really useful, I believe. We also spend money on security, well beyond six figures on an annual basis. We will pay more if we get something that is useful.

There's some commonality here. We need to find something that will work in both cases. I suggest we work together for—on both marks and security. We both need rapid suspension. In security's case, phishing, et cetera, rapid means minutes, okay? Forty-eight hours? Too much. Forty-eight days? Way too much. Forty-eight minutes? Hm, we're getting close, okay? And the reason is a phishing—one reason, phishing sites, when they go up, their half life is 24 hours. We don't get it quickly, there's no point even trying to go after it.

We need better mechanisms on the security side for cyber issues, et cetera, and they impact consumers. If we combine these two things, mark and security things, we could put together a system where—that enables the white hat actors to take action, to initiate an action for a rapid suspension in realtime where all that the prevailing party might pay is a small administrative fee. And it needs to be small.

We have floated ideas in security circles and other places about posting bonds. We would post a large bond in the six-figure range, okay? Perhaps we could do the same thing with marks, similar situation or combine it in some way. And for that bond, we are able to then do rapid takedowns. Registrants need to be protected. If you pay \$7 for your domain name, your domain name might be taken down quickly. If you spend \$70 for it, well, maybe some additional steps have to be taken before your domain can be taken down. And you have a graduated scale.

I believe if we looked at things like this as opposed to just, oh, let's have this list, let's do that, we actually could come up with a system that will meet both the brand holders' needs from a trademark protection and also help us with cyber issues. But it need—we have to think about it differently. If we think about these things independently, we may not come to a good solution. And the current systems that we have in my opinion will not—okay, will not work. That's demonstrable. The math just doesn't work.

So, I think there are ways that we could go about this and we'd be happy to have discussions with

other brand holders, security folks, whatever, to try and find a mechanism that, in fact, is usable, but it will mean potentially a change to the guidebook, okay? And, well, this—I understand that you believe you are a contracted party, okay? I understand that. You paid a lot of money. You took a gamble. This—we have to have a mechanism that protects brand holders and the security side of things. And I have heard nothing today that is going to address my security issues.

I've got a thousand new—potentially a thousand new registries to deal with. You know how we do suspensions now? Personal contact. I know somebody at this registry, I know somebody at this registrar, I know somebody at this ISP. We get a phishing attack, I make phone calls. Not me personally, but we make phone calls. We send emails. How do you think that works when you multiply it by a thousand? We have to hire a thousand more people? A hundred more people? That can't work. It's not sustainable. We have to have a different model.

Thanks.

BRUCE TONKIN: Do any of the panelists—thanks, Bill. Do any of the panelists want to respond, perhaps particularly Jon and maybe Andy, on the particular topic of security versus sort of the trademark side, because you probably do have mechanisms for takedown if it's a phishing or something similar.

JON NEVETT: Absolutely, Bill. And I agree with you. I think that we should have mechanisms and we do. We laid it out in our application that for—at least for ours that—and for every TLD, it's a requirement in the guidebook that you have a remediation take down processes. So I agree with you. We have to analyze malicious conduct differently than the rights protection mechanisms that are in the guidebook, because those, to your point about the timeliness, are very important. And that's why we have 365, 24/7 requirements in here so that we can deal with malicious conduct quickly and effectively.

BRUCE TONKIN: Andy, do you want to comment on that?

ANDREW ABRAMS: I'll just second that. I think we also treat security issues separately from trademark RPMs. In question 28, we outlined the fact that we have notice and takedown for all abusive actions like phishing, pharming, that sort of thing.

BRUCE TONKIN: Okay. Phil?

PHILIP CORWIN: Thank you, Bruce.

Philip Corwin, I'm counsel to the Internet Commerce Association, which is a member of the Business Constituency, though I'm here today speaking only for the ICA. Our trade group is made up of professional domain portfolio owners and managers. We're also involved in many other aspects of the domain name system, operating registrar, secondary marketplaces, and some but not all of our members

are involved in the new TLD programs, both applicants, consultants, et cetera.

I want to start by observing and I want —I'm not criticizing Bruce, but there's a very important voice, which I know is within ICANN, which is not represented on this panel, so the apparent consensus may be a tad illusory, which is registrants. And I want to say I brought this concern to Bruce early on when I saw the panelist list, and he told me he had invited someone from the Noncommercial Users Constituency, who couldn't be here today, but I think that is an omission, which should be noted. And that's very important.

There's a number of ways this program can fail. One would be if TLDs launch and become a hotbed for cybersquatting and bad acts and is a bad experience and it tarnishes ICANN's reputation.

Another way it could fail is that if we never get agreement, this discussion of required RPMs goes on for years and TLDs don't launch and applicant groups see all their money frittered away. But the third way is that what if you build it and they don't come, because registrants with any knowledge of their rights at new TLDs compared to incumbents realize that this platform they're intending to buy as the platform for their business, the platform for their speech, that they don't have adequate due process rights if a charge of infringement is brought against them or if they're just spooked.

If you have a trademark clearinghouse warning system, well, if it's exact match, it's pretty clear they probably shouldn't be trying to register a domain. If it's an exact match plus keywords, we're looking at that, that's a little broader. If it's any typographical variation that the trademark owner wants to register, then people come up with cool new names for companies—like Google was a cool new non-dictionary word —are going to probably get a warning from someone and they'll try another one and another one and they'll just say, you know what, it's not worth hiring a trademark lawyer to figure out if I'm going to be in trouble, I'll just register as an incumbent and avoid this.

And I think it's important we have a process, which narrows—gets some consensus from the brand owners before Toronto on what they really want discussed, so the community can react in an orderly way. Because I don't know if people have looked at the calendar, but from Toronto to the next ICANN meeting in Beijing is half a year away, six months later. So Toronto coming up in a few weeks is the community's chance to discuss all of these ideas and tell the board and their constituencies what they think of them.

I have to say I have some question about the rationale for a lot of the ideas being thrown around. Russ Pangborn said before originally these RPMs were conceived with the notion there's going to be 250 applications. Maybe early on, but I think by the time they were finally adopted after a two-year somewhat contentious process and then unanimously adopted by the GNSO Council and the board, the general expectation was for at least 500 to a thousand applications. And a lot of these things, URS, the

clearinghouse, you may not like exactly how they are, but they do scale. They do provide a warning at any TLD. They can be used at any TLD.

The one area where I know what my members think before I survey them—and I'm trying to do that to get consensus reaction on all of these proposals for Toronto—is that the URS was sold to the community as a narrow supplement to the UDRP. And, frankly, what we hear now looks like bait-and-switch where if you reduce the burden of proof to be exactly the same as the UDRP and if the remedy is exactly the same, domain transfer, it's not a narrow supplement. It's a \$300 substitute for the UDRP with the registrant having a lot fewer rights. And that is not going to help these TLDs expand.

And I would say the gentleman from Google, I admire the great job your company did in opposing SOPA, and I'd urge you to look at these URS proposals again to make sure they don't turn into a trademark-based version of SOPA.

So wrapping up, I hope we get some order to this debate looking to Toronto, but I think—well, I don't want to say before I talk to my members that we're opposed to everything. I think Jon Nevett has a good idea that the guidebook is a good—there ought to be a damn good reason to go beyond the guidebook and the results of that two-year process.

We had an ICANN—seems to me most of the major applicant groups are proposing to go beyond the minimum requirements, so why not—just the way we let the states—United States be laboratories for change, let the various groups be laboratories for experimentation with going beyond the minimum RPMs and see how that works out and then have a more informed debate before the second round.

So thank you very much for considering my remarks.

BRUCE TONKIN: Thank you, Phil. Yeah, next. And just a reminder to state your name.

MALE: No responses or...

BRUCE TONKIN: Oh, sorry, if there are any—sorry.

STEVE DELBIANCO: Steve Delbianco.

Phil, as a BC member, I know you know the BC's members are all registrants, as well as most of the panelists up here. I think you were really concerned about would-be, want-to-be registrants in the future, and you expressed a concern they might be spooked by a trademark claims notice.

Well, the intent of a claims notice is to get smart, not spooked. To get smart about the potential infringement. And I hope you'll volunteer your time to help write the notices in a way that gets the registrant smart about their potential infringement, but assures them that if where they're going doesn't infringe, they can go ahead and register.

Remember, the claims notices do not stop a registration. They simply put you on notice that there may be a problem. And if it gives some people pause, if it spooks a few people, that is exactly what it's supposed to do.

BRUCE TONKIN: Any other comments from panelists? No? Yes, go ahead.

JAMES BLADEL: Hi. It's James Bladel from Go Daddy. And I wanted to thank Bruce and the others for putting this on, for inviting us and for having us.

We are applying for three strings, one of which is our brand. But setting that aside, I'm here mainly to discuss the concerns from a registrar perspective, especially, particularly, a high-volume registrar. I forget the number, it's maybe even a year or so old, but I think we register a domain name per second. So I know it's a tough sell in this room, but not all of them are trademark infringers. And, in fact, a vast majority of them want to—

(Laughter.)

JAMES BLADEL: —to get—they have something to say and they want to say it on the Internet.

So just to respond and react to a few of the things that I've heard today, I'm a little concerned that this and the Trademark Clearinghouse Summit that was held in Brussels recently are not really talking at the operational concerns of registrars. It's ICANN and trademark holders and new gTLD applicants, and in some cases incumbent registries, all talking about what we're going to do for them. And I think that's kind of—by extension goes to Phil's point as well about registrants being left out of some of these conversations.

To react a little bit about the desire for similar strings as opposed to exact matches, my response to that is what's your tolerance for false positives? There are a number of distinctive marks that are two-, three-, four-letters long.

Craig, I'm sure you're familiar with ING and all of the English words that would get a hit for you on that one. So, I mean, just let's think about this here a little bit, what do we want to accomplish with that goal, how sensitive do we want this to be. And, you know, we've got to design code for this, so this is going to be a fuzzy logic problem.

To another mark, to that point about speed and volume, anything that comes up out of this group or out of ICANN or any other group has to be—has to scale. It has to be high performance. It has to be high availability. Otherwise registrars, registrants, and probably new gTLDs are going to be concerned. They're going to stay away from it. They're going to ride it out through the Sunrise period if possible. And if it's extended beyond that, they're going to stay away from that TLD entirely. I know that doesn't scare some of you on the panel, but it probably scares a few.

So I just want to put that out there to be thinking about this when you're talking about multiple lists, HARM, and Trademark Clearinghouse, and now this DPML and all of the possibilities that those will all overlap. The possibilities that the breakdown or lack of performance in one might impact the overall registration process, and it really might just put more of an operational burden on the registrars, because anything we come up with has to be as well—perform as well or better than the system that's in place now.

BRUCE TONKIN: Thanks James.

Any comments from the panel? Go ahead, Jon.

JON NEVETT: One quick one. James, thank you for raising that point and that perspective. Obviously that's an incredibly important part of the ecosystem and getting that accomplished is huge.

On the claims notice, for example—and I know a couple of people have been talking about that and Phil raised that and Steve. That's a perfect example of the type of RPM that should not be limited to new TLDs. So if the community wants to get together and come up with a way that makes sense for everyone to do that, how could that not be included in the existing TLDs? How could the new TLDs be saddled with having their customers get a claims notice when the existing one where all of the cybersquatting occurs today, they don't get them? So that clearly doesn't make sense to me, but something that we should discuss as a community. And if there's a consensus around doing something like that, that should apply to all TLDs, not just new ones.

BRUCE TONKIN: Thanks, Jon. John?

JOHN BERRYHILL: Yeah, hi. My name is John Berryhill. I'm a troublemaker and I speak on behalf of troublemakers. We're all smart people and we all have great ideas and we're all in love with our own ideas, so I don't really have any specific proposals or criticisms of proposals. But I would like to just have you chew on some general principles in approaching or testing your own proposals against reality.

Jim stole some of my thunder. And one principle that I always try to live by and that I think you should run your proposals through is: What would Oprah Winfrey think? It's—honestly, your life will improve if you ask yourself that.

But Oprah Winfrey has a trademark for the letter “O.” She is one of two famous trademark owners that have trademarks in the letter “O.” The other one is Oakley, the sunglasses. And I understand there's some, you know, that retailer —

(Laughter.)

But going on, you know—okay, three conflicting trademark—and Yahoo! has the letter “Y,” actually 15 of the 26 Latin alphabet letters. So when you're talking about things that, oh, well, it contains a

trademark, anything with an “O” in it, you know, it's kind of strange. So always think what would Oprah Winfrey think of this proposal.

The next thing, the word “permanent” seems to be coming up a lot in the discussion. I bought my first cellular telephone—I originally contracted with a company called Cingular that no longer exists, all right? They didn't like the brand anymore and they changed back to AT&T. Now that brand, I think, had a life of what, four years? Tops. Tops. We're talking about gTLD registries that are going to presumably run for decades that are going to be bound to whatever the state of trademarks were in 2012.

This idea of permanence in trade, you know, in blocks, in TLDs, when trademarks themselves—every business that has ever been created is going to go out of business, all right? There is no business that lasts forever. There's no trademark that lasts forever. And, I mean, speaking of AT&T, again, this, you know, battle, scatter—you know, it's fun to sit and compose a list of how many words you can write with AT&T as a substring. You eventually go to the —go to the alphabet. And then if you're talking about one party blocking, for example, Apple with Mac, M-A-C, all right, they block it in every TLD. So Mack Trucks, if they want to get a domain name, can't get it. Neither can my son Mack. It just—as James said, the false positives in some of these just, you know, get completely out of hand.

The last point—the last point to bear in mind is to think about really where cybersquatting comes from. If I have, you know, a lot of people shooting each other and I'd like to make them stop and I've got a—I approach the situation and there's 100 million bullets and a million guns and a hundred thousand gun owners, going after the bullets is really not a good idea.

Mr. Bikoff gave us a wonderful brief description of I'm sure what could be an entire day of stories about going after counterfeiters of Olympic marks. And everyone who's going to engage in cyber crime or counterfeiting or cybersquatting next year is walking the Earth today. They're here now. And I find it hard to believe that those people who are going to engage in counterfeiting involving Olympic trademarks, that of that population there's some several thousand of them sitting around saying, “Damn, I couldn't get a good domain name,” and that's the only thing that stopped them from doing it.

I think that there is a finite population of people who are going to do nasty things on the Internet and that merely expanding the name space—it's not like gas that expands to fill the vessel. It's like taking the water in an Olympic-size swimming pool and putting it into a tanker. It's still the same amount of water, but it does not increase the number of people who do these things.

Thank you.

BRUCE TONKIN: Thank you, John. Any comments? Jim?

JAMES BIKOFF: I think you're right, there is a finite number of people who do these things. But right now with the existing 21 TLDs, we're at maximum force. We think that with a thousand new ones added, the same people who are doing 21 will now maybe do 1,021. Some—

JOHN BERRYHILL: If you stop that one guy—

JAMES BIKOFF: Well, it's not one guy, though. It's—

JOHN BERRYHILL: I'm just saying, the mischief comes from individual people.

JAMES BIKOFF: Right. But the resources and time needed to go after these folks right now is at a certain limit. And that's with my clients. I'm sure with small nonprofits and others who have the same problems, they can't even attack the one or two guys. So I think just envisioning what's going to happen and how much more cybersquatting there's going to be, we have to have some way to contain it.

BRUCE TONKIN: Steve and then Brian.

STEVE DELBIANCO: Thanks. John is always articulate and often clever, as he was once again, at describing corner cases, interesting exceptions, but they don't blow up the rule. They're not dispositive of the need to fix this. Instead, they point to concerns—principles you called them—that should guide the actual drafting of the way in which blocks expire when the company goes away or that the trademark owner would pull them back if they no longer were in the business or the notion of single letters triggering claims notices.

I mean, the wisdom of your cleverness is that it ought to inform how we design this. And we ought to design that in a way that may or may not require changing the guidebook. The URS internal functions may or may not be in the guidebook at all. And we ought to get that done. And if we have to change the guidebook, it's mostly to require that firms use it, because, unfortunately, a significant portion of the applicants are not volunteering to do what Donuts says they'll do. And Donuts doesn't have enough donuts in their pockets to win at auction in every single—well, maybe they do. That's a lot of donuts to win every auction. And if they don't, we're going to be dealing with a lot of folks who—unless the guidebook requires it, they won't do it.

BRUCE TONKIN: Now Brian?

BRIAN WINTERFELDT: Right. I just wanted to make the point that—just kind of following on Steve, that I think that there are—it's definitely very helpful to get that kind of feedback and to think about where there might be issues with implementation and that's part of why we're having the dialogue today. But certainly there are a lot of challenges as also pointed out by Jim with brand owners currently trying to deal with the existing space.

And the fact that there are going to be all these new spaces opened up, they're going to be exponentially larger, you do want to try and give tools and mechanisms for them. But to think about the kind of implementation issues like you brought up are really valuable, and particularly if we can look at the proposals being given and talk about constructive ways to adapt or change them to take those into account, I think, would be very helpful and part of why we're here today as well.

BRUCE TONKIN: Thanks, Brian. Jeff.

JEFF ECKHAUS: Thanks. Hi. Jeff Eckhaus from Demand Media.

So I guess the issue of non-exact matches has struck a nerve and it's something I want to bring up as well, but in a little bit of a different context.

So my company is—also has applied for a handful of TLDs, and we are also the backend provider for Donuts and they are a handful of TLDs. And we're advocates of the DPML as well and we're looking to actually offer that across our TLDs as well. So we think it's a good idea for brand holders and for others to go through. And I think that the non-exact matches that the brand holders have been asking for, I think that they're okay in the context of the DPML.

When the brand chooses what their term is and their term-plus, you know, and what their word is that they want to block—for example, if Sprint decides they want Sprint-phone.pizza and they want to block that in the .pizza TLD, that's okay. That's their choice. They can make that decision. They know what are the harmful terms attached to their terms that people cybersquat on. And I know people, you know, they could look at historical UDRPs or other issues, but they will know what are the pieces. And I use the .pizza as a joke, but they would do it in TLDs and block them in ones where they had concerns.

But having—trying to have a registry provider or the Trademark Clearinghouse do a semantic search or do that decision on the term-plus on these non-exact matches is an almost impossible task. Nobody has been able to successfully do this yet. And no one—and to do this, as James had mentioned earlier, in a high-volume, automated fashion is going to be impossible.

This is not a simple task. This is something that people wrestle with all the time on these semantic searches. And this is—we're only thinking right now in English, but what happens when you start adding in other languages? Who's going to be able to do those searches in those other languages?

And I know John brought up his sort of corner—you know, somebody said a corner case, but thankfully thanks to the pervasiveness of Words with Friends, I started looking up some words and trying to say, hey, does this come up? Is this something often? And I looked up the term “bing,” and you start thinking, okay, what are we going to block and what are the terms that are associated with it and how do

you decide at that point when you have—of course you might say, hey, the brand owner might say, okay, “bing shopping,” that's an easy one. But what about “bombing” and “absorbing” and “plumbing”? Those are terms that—these are common terms that start coming up, “blabbing,” “binges,” and, of course, “bingo.”

These are terms that—I think that for somebody to decide—a registry or a clearinghouse to decide on the fly at that time of registration is to say, hey, well, let's figure it out in the implementation, I can tell you as somebody who's been deeply involved in sort of domain spinning and looking at domain names, that this is an impossible task. And if you want to let the brands decide this and if they want to do this in a blocking sense, I think that would work. But to have it try and be in a high-volume, automated fashion that the registry or the clearinghouse will have to do is an impossible task that is not going to work.

And we will not have just these—will not be corner cases, this will be the standard of false positives.

BRUCE TONKIN: Okay. Any comments? Brian and then Steve.

BRIAN WINTERFELDT: I think what you make is an excellent point. I think that is certainly something that we have considered and that we're aware of. And I think, for example, we're looking for ways to limit beyond exact match in a way that is implementable and is something that can be automated.

So, for example, one of the proposals that we've thought about is limiting the additional terms to something that's in the trademark registration, so there's a finite number of terms that are associated and it would avoid the pitfalls of something like “bingo,” for example, that would—could have a negative impact or be difficult to implement.

BRUCE TONKIN: Okay. Any other comments? Steve?

STEVE DELBIANCO: And we supported Brian's proposal on that, because the trademark owner determines which terms go in. I think an algorithm at runtime would be a disaster. They ought to be terms. The trick is if there are only terms that are in their trademark application, they're going to miss a lot of words. I mentioned “PayPalsupport.” I mean, that's a terrible target for fraud. And if the word “support” is not in PayPal's trademark application, they wouldn't get it. So we don't think we've quite gotten there far enough. And what about “Pay-Pal” or “Pa1” instead of “L”? None of that would qualify unless we find a way to pick up things that have been squatted before and generated fraud.

BRUCE TONKIN: And so, Steve, using your example, so you're saying you would include something like “PayPalsupport,” “support,” let's say, is not in their trademark, but on the basis of what that particular combination of terms has been abused, is that what you're saying is the criteria? STEVE DELBIANCO: Yes.

The objective is to allow PayPal to generate claims notices on PayPal plus things that would cause potential squatting or fraud. And PayPal knows that list. The proposal on the table from Brian said here's one way to limit the list. No, this is not an algorithm. It's a list that would be logged one time when they register. And so there's no algorithm needed. But they said that the goods and services that were described in their application, so PayPal has words in their application. Mary Jo, one of our members identified them, words like "payment" is in the list, so the word "payment" naturally would be one of the ones you'd flag. But there's a bunch of other words in their application that don't make any sense for PayPal to flag.

And while we're flagging, there are things for which warnings are generated. These aren't blocks; they're just warnings. So I do think we have to—we have more work to do. It can't be just the words in your application. It should include words that you've had to recover before from a squatter through a URS or UDRP.

BRUCE TONKIN: Thank you, Steve. Any other panelist comments?

JEFF ECKHAUS: Bruce, can I have a follow-up on that?

BRUCE TONKIN: Yeah, sure.

JEFF ERKHAUS: Okay, thanks. So the one issue with the part on the claims—and I've been heavily involved in implementation of the Trademark Clearinghouse. I was lucky enough to fly to Brussels for a day and a half a few weeks ago to work on this. And I think for people here that— I'm sure you know that when the registrant gets presented with the claim, they have to accept every single claim that goes through. So if it's a term and it's plus and if it's a term that is very generic, you know that a lot of people have trademark claims on, you can have a registrant having to accept—I don't know, 3-, 400—like, for example, if PayPal said they have 10,000 terms, if they attach 10,000 terms that would mean that—PayPal, I mean, is a bad example.

What I'm saying, if there's a generic term, if you had "apple" and you wanted to get "apple-picking," but Apple had "apple" plus 10,000 terms that you would have claims on, then the registrant would have to go through and accept 10,000 claims through that process before they can go and get their "apple-picking." So these are things we need to think through to say, okay, yeah, let's just have the registrant accept the claims.

And I'll tell you, I'm going to put my registrar hat on as somebody who operates the second largest registrar, I know what happens when these—in a large volume registrar. These things— you're not going to have people registering domain names. You're going to actually—you know, I know we have the term, people it's—going to freeze them out, that is what's going to happen when people are going to have to go

through 10,000 claims notices and accept them. We're going to have a failure in this new TLD program, because nobody's going to go through this process. They're just going to abandon it and that'll be it.

STEVE DELBIANCO: So you obviously wouldn't do it that way? You'd consolidate whatever the clearinghouse gives back, all of the potential trademark claims, and put them in one notice for which one accept would be acceptable, right?

JEFF ECKHAUS: That or if there are up to—the person would have to go to—for further information go to the clearinghouse. But the registration could go through if they accept the claim, but except that there is a claim on it, but then it's up to them and it's their responsibility to review all of those claims afterwards, because having that in the registration path is—

MALE: Slows it down.

JEFF ECKHAUS: —an issue. And we have been, part of it, sort of put a plug in, but for those of you that are following the clearinghouses, we have put an updated proposal to the ICANN proposal that modifies some of this and makes it a lot easier for the claims process and also at the same time does protect the trademark data, which I know has been an issue for IP holders.

So I would encourage many of you to start looking at some of the alternate—it's called the ARI/Neustar proposal, so I would take a look at that and see, because there are ways that we're trying to simplify the process and make it easier for registrants while protecting IP terms and make sure that rights protection mechanisms are in place.

BRUCE TONKIN: Thanks, Jeff. And just a reminder for those that are listening in via the webinar, we're also open to take questions from that forum. I believe there's a chat mechanism. And also following the ICANN procedures, we're happy to take questions from that forum.

Colin, if I can just ask, is there any questions in that forum so far?

COLIN LLOYD: Give me another minute to look.

BRUCE TONKIN: Okay. Meanwhile, I'll let you look, but if there is, if you would just raise your hand to let me know if there's any questions from the online forum.

Yes, please, go ahead.

STEVE EMMERT: Thank you. My name is Steve Emmert and I'm with Reed Elsevier. And I just thought I'd put a couple of— sort of facts behind a couple of these things.

The notion of permanence with regard to the use of a mark and sort of tracking where the mark is in the marketplace, for those of you who don't know, Reed Publishing has been around for 250 years. Elsevier is a little older than that; it goes back to the Gutenberg press. And so not

everything is permanent, but at 400-plus years, we'd like to continue to protect those marks.

We also have some other issues. We have perhaps—and it's a little bit of a range, but between 3,000 and 4,000 marks that are currently in use. I'm not talking about protective marks. I'm talking about marks that are actively used on specific products in the marketplace. And it creates an enormous problem in terms of the cost of the registration just on actual marks, not to mention anything you would do in a protective sense.

And that's certainly of concern, because you can make the argument in the context of the PayPal scenario, their principal mark being PayPal, they have some other marks, and then they have 10,000 that they're trying to defend. We've got 4,000 or so that we need to protect on an initial basis. And then you can talk about defensive registration.

So this costing issue is a big deal. It's not a simple matter. And so I just kind of wanted to emphasize that, because this is going to affect a lot of companies. I know Proctor & Gamble is not here, but—and they can speak for themselves, but they've got a lot of consumer products that they are going to have marks in that they're going to need to protect. It's a large portfolio. And so this isn't just a theoretical problem; it's a very tangible problem.

BRUCE TONKIN: Thank you. Any comments on that? Okay. Jeff, please.

JEFF NEUMAN: Thanks. My name is Jeff Neuman. I'm with Neustar.

I guess Jeff Eckhaus sort of took a little bit of my thunder. I was going to make a plug for the proposals that are out there on the implementation of the Trademark Clearinghouse. I think a lot of those things you—even though there's significant portions of those that are heavily technically based, a lot of those really do relate to intellectual property owners and brands and making sure—sorry, there's a tornado warning, so I'm just trying to make sure my family is okay.

(Laughter.)

BRUCE TONKIN: Are you the tornado or—

(Laughter.)

JEFF NEUMAN: Yeah, so okay, they're all right. Okay. Sorry, where was I?

Yeah, so everyone, you should be following that list, because the way that ICANN initially designed the implementation mechanism, along with their chosen vendors, was one that really didn't encourage a permanent or a more everlasting trademark claims period.

I think the way they designed it was really for a throwaway, 60-day period, which was based on a—what I'll call a decentralized approach, meaning that they basically give all of the marks in the

clearinghouse, they give the list to all of the registries, the registries then do a check, and then—or the registrars or some combination of the two, and then they send out the notice and then you get it back. But that's not a way that a trademark claims period can be done on a more permanent fashion or even—forget permanent, even for a year, or anything past 60 days.

So I strongly encourage everyone to read that, because—and the alternate proposal that AusRegistry, ARI, and Neustar put together, along with VeriSign and Demand Media and a number of other companies. That proposal right now is on the tech list that ICANN created, but hopefully within the next two weeks it should be put out to the broader community. We wanted to make sure the technical implementations were feasible before putting it out for everybody to comment on.

The other question I have, though—

BRUCE TONKIN: Just a quick one on that, Jeff, just so I understand what you're saying. So you're saying there's a proposal from some of the backend registry operators to perhaps make the trademark claims more robust. Is what you're saying, is that may support having trademark claims permanently? Is that what you're saying, that you're making it more robust, therefore, it's more scalable in the longer term?

JEFF NEUMAN: Without getting into any of the policy issues around that, yes, from a technical perspective the proposal that we set forth would support longer periods of trademark claims. So—but I'm staying out of the whole policy argument, —

BRUCE TONKIN: Yeah. No, I just wanted to understand technically—

JEFF NEUMAN: —whether that should be the case, but, yes, technically it could be with the clearinghouse being more of a centralized provider of these services as opposed to kicking out copies of the database to the registries and registrars.

STEVE DELBIANCO: So it's even more private, more secure, and more efficient if we centralize it. There's a lot of reasons.

JEFF NEUMAN: Sure. A little bit more expensive for ICANN to implement, but, yes, it would certainly be more efficient and more secure at least from our perspective. And also would—for the claims anyway, I know there was a lot of issues from brand owners—or issues raised by brand owners that they didn't want all of the registries and registrars to actually have entire copies of the database. And even though ICANN provided for some mechanism of encryption, it would take literally most of us a period of a day to break that encryption and figure out everything in there. So, yes, it's much more secure.

So, everyone, please read that and make comments on it when it comes out and urge ICANN to—if

the current vendors they have selected can't do it, then there are other vendors in the halls waiting that actually make proposals that could actually operate the centralized model.

So I see actually a question here. I don't know if I could take questions.

(Laughter.)

KRISTINA ROSETTE: No, no. Just for scheduling purposes, Jeff, are you saying that it's likely that that proposal is actually going to be put out by ICANN for comment?

JEFF NEUMAN: I wouldn't say it's going to be put out by ICANN for public comment. It is our request or we will put it out. Our goal is to, you know, within a couple of weeks is to put it out. Certainly by October 1st we'd like to put it out. We'd like ICANN to put it out for us, because they have a much larger distribution channel, but we will certainly put it out if—

BRUCE TONKIN: But I guess, Kristina, one—just to understand the process, so ICANN established a mailing list called the Trademark Clearinghouse mailing list. And most of the discussions of that mailing list are from the registry operators. They then—because they were having some issues on the implementation, they called for a meeting.

And so there was a meeting held in Brussels, which involved the clearinghouse operator, meetings with Deloitte and IBM, and also had ICANN staff there. I think a bit like this forum, I think—and I believe that was available online in the sense that it was a webinar. Is that right? So it was an open meeting?

JEFF NEUMAN: Yes.

BRUCE TONKIN: But leaving that aside, I think, Kristina, probably what's important is just like we've had webinars hosted by ICANN on topics like the batching process and other things, I think it's timely to actually have one on the Trademark Clearinghouse, because it's been more or less six months of discussions and it's evolved quite a bit. And I think now it would be appropriate to go wider and get input not just from the operators, but also the users.

JEFF NEUMAN: Sure. And there's other—just to add to that, there's other issues that are important to brand owners that we were—had to make assumptions on during these meetings and writing these documentations that may or may not prove to be correct.

One of the assumptions we made is that in the mechanism we proposed, the registries proposed in doing things through something called PKI, Public Key—basically encryption., as opposed to giving trademark owners Sunrise codes. Because under the ICANN method, each trademark owner—or each brand owner would be given a unique Sunrise code for each top-level domain they wanted to register in for each of their marks. So someone with a thousand marks that wants to register in 1,000 top-level domains,

well, that's a thousand times a thousand number of codes that you'd have to manage, which I don't know, you know, it's pretty hard to manage a couple. Trying to manage that would be a disaster, whereas the registries have proposed an alternate mechanism, which would only have to—basically you would have one file per mark, which is in any—that would go for any TLD. So there's issues like that that we have improved the ICANN model.

But one of the other things that I wanted to bring up unrelated to that was just on the notion of going beyond exact match. And I think we need to—as a backend registry operator, we need to separate the discussion of claims versus blocking. And I noted that the Business Constituency has endorsed kind of both.

On the claims process, as long as we can get an efficient model and as long as—I think it was Jeff Eckhaus had said, as long as it's on a list, then the registries can implement it. So if it's a list that trademark owners pick that is vetted by some source, that's fine. That's something that registries can implement.

I will point out there's some difficulties with that, because even generic words like “support” may be in a number of different applications, which is okay for claims. So United Airlines can have “united support,” so could United Van Lines and so on. You get a claim—just more parties to a claim, which is fine. We can implement that.

Blocking it becomes a little bit more difficult, because if United Airlines wants to block “united support” for everybody in every TLD, that's not really fair for all of the other “uniteds” out there. Even ANA, that mark out there, there's a registrant for ana.com, it's someone called ANA's Clouds, which is a cloud-based service. I didn't read that much about it. ANA.net is the advertisers. ANA.org is American Nurses Association. So for any one of those ANAs to actually purchase a block across all TLDs may not be fair to the other ones out there. And that's not really an Edge case. That's actually most trademarks in the world have multiple owners. So I just encourage you to do that.

For claims, it's not necessarily that big of a deal. For blocking or for Sunrise or for others, it becomes much larger of an issue.

BRUCE TONKIN: Thanks. Comments from the panel on that particular point about if you extend beyond exact match, whether that should apply just to claims or whether it would apply—you know, you can get a block or a reservation with an exact match plus some other term.

Yes, Jon.

JON NEVETT: Sure. So it really depends on sequencing. So if you give every claim holder the ability to register their mark in—during the Sunrise process and then you do the blocking after, which is the

sequencing that we envision, then you give the ANA nurses the ability to register their name and perhaps a medical-type TLD and you give the advertisers the ability to register during Sunrise, whatever, and then the blocking would occur after. So, again, there is some protection for that.

JEFF NEUMAN: Well, that's okay, but not when you add the generic words after it, right? Not everyone's going to think of all of the generic terms, they're going to want every TLD during Sunrise periods, right, or even during blocking. So, I mean, it's your registry, you're free to adopt whatever policies you want and implement it. I'm just saying it may not work for everybody.

BRUCE TONKIN: Steve?

STEVE DELBIANCO: Yeah, Jeff makes some great points. And the discussion in the BC about whether to go to this plus included a lot of the points you made and there are definite concerns. The BC loves to keep focusing on things that have been recovered. But you're right, if you allow that word "support" to go with PayPal, that's an explicit blocking of that.

I would ask everybody here whose experience comes out on blocking, because ICM has been doing some blocks on xxx, and when you talk to Stuart about it and how it works, it seems rather crude. I mean, Delta could block "delta" forever and the other Delta wouldn't have an opportunity of lighting up "delta.xxx" even though it's unrelated to Delta Airlines. It might be Delta Faucets. But what—are there any wisdom of lessons learned because Jeff—sorry, it was Jon talked about the experimental nature. ICM's been running a blocking service for quite a while.

What have we learned about how it works well and how it doesn't work well?

JEFF NEUMAN: I remember that. That's within one TLD. It's very different when you're talking about a mandatory protection across all TLDs. And my big point is don't ask us registries—or please don't ask us registries to solve real world—to solve problems that aren't solved in the real world, right? There's lots of trademark cases that are brought all the time on the use of a trademark word with another word added to it in different contexts. Judges haven't worked this all out. There's no unified set that's—there's no unified law globally. So give us a list. We can implement technically a list and we can block those or we can do claims on those. But anything beyond a list, computers or automation doesn't think, it just does.

So, thanks.

BRUCE TONKIN: Thanks, Jeff.

Carlo, do we have any comments on the online forum at all?

CARLO: None.

BRUCE TONKIN: None, thank you. I think, Bill, you're next.

BILL SMITH: Bill Smith, PayPal. Again, I'm going to ask that we pay attention to our arithmetic, or as the British would say, maths.

I'll use PayPal again as an example, 10,000 names, \$10 each, \$100,000 a year. If there are ten like us with just 10,000 names, and I mean just 10,000, that's a million dollars, just ten companies. A hundred companies? Do the math. Get a thousand companies, each paying \$100,000 each, that's \$100 million a year in money, in my opinion, just flat out wasted.

For \$100 million a year, we should be able to implement a system and run it, okay, that deals with these issues. And I really urge that we get together and think out of the box and find ways to deal with that. We all are spending money on this magnitude, tens if not hundreds of millions of dollars a year dealing with this issue. And we'll have to continue to do it. Brand holders are willing to pay the money. Let's find a way to do it.

The 100,000, roughly, that we may pay right now gets us nothing, I would argue. I know other people in PayPal would disagree with me, but I see very little return on that investment, okay? And the vast majority of those are just domains that we have recovered through various processes and we just park them. And it would be great if I could take that money and say, well, yeah, these are parked., don't ever issue them again or don't issue them for ten years. But I don't have to pay for that. And instead, I'll pay for something that's useful, that actually does something and catches the other bad actors.

Thanks.

BRUCE TONKIN: Thanks, Bill. John?

JOHN BERRYHILL: Yeah, Steve, just in answer to your question. I wrote the trademark protection policies for ICM. And in that context where you were dealing with a TLD with a peculiar likelihood of malicious behavior, I would say that the policies have worked well. I would particularly like to take a look at the rapid takedown, which has been used a number of times and works well. The cost is not where it should be, but that is an entirely artificial cost. And I really can't get into that, the reasons why, but I believe it can be done for \$300. But using xxx as a model, you do have to consider that, you know, I mean, for crying out loud, you know me. And I wrote, you know, what I consider to be pretty draconian policies that have worked well.

But that's different from, you know, a situation where a Jon Neve's going to give us every word in the dictionary as a TLD and one trademark owner, one Yellow Page—there's an outfit that has “YP” as a trademark, so PayPal won't be able to get any domain names and they don't have to worry about it since it's a substring, but there are some good things in xxx, but I wouldn't suggest it's a model for gTLDs.

BRUCE TONKIN: Thanks, John. Yes, go ahead.

AMY MUSHAHWAR: Hi. I'm Amy Mushahwar from Reed Smith. Just a very quick point—the ANA, the United/United issue, the Delta/Delta issue, we understand that there's going to be unavoidable conflicts where there will be two lawful trademark holders at odds with one another. This is something that we can work through as organizations, as brands, as registries and registrars. This is certainly an area where, for example, just one simple solution—if we happen to be so lucky to get a do-not-sell list or a do-not-register list where we could preemptively block a name, we would let the enrollees' home country law, the enrollees' trademark law be the guide.

So, for example, if United Airlines had a trademark—you know, does indeed have a trademark for United, and United Van Lines wanted to register, those two companies are not in the same line of business. Let local trademark law be your guide. And we most certainly wouldn't have Jeff Newman or Neustar or VeriSign be any—be in any type of position where they are making a legal determination regarding an issue.

You can most certainly have a conflict. Have that conflict. Have either a presumption in favor of local trademark law and then have either a negotiation period, and then if that negotiation period did not conclude successfully or concluded badly, you could have an independent, third-party review process. We need to look at the fact that ICANN received millions of dollars in this application process. It should spend thus millions of dollars to make sure the companies are protected.

Thank you.

BRUCE TONKIN: Thanks, Amy. Any comments from any panelists? Okay, Phil.

PHILIP CORWIN: Yes. Phil Corwin again with two quick supplementary comments.

One, I wanted to respond—Jon Nevett had suggested there be some issues, which should be addressed, both for new and incumbent TLDs. And I want to point out the ICA at the beginning of this whole debate had the position that we shouldn't be developing separate RPMs for new TLDs, that we should look at the UDRP, have some UDRP reform discussions, and make the UDRP better across the entire space. That wasn't the decision.

And now the GNSO Council under some considerable pressure from the brand community has deferred initiating UDRP reform until 18 months after new TLDs launch, whenever that actually occurs, so if there's a desire to revisit that position, we'd be happy to be part of that discussion to at least consider procedural reform.

The other is that one thing I hope everyone in the room could agree on is that we need some good answers from ICANN in Toronto about what's going on with URS implementation, because Trademark

Clearinghouse implementation, whatever the flaws, is miles and miles down the road, was done through an open, transparent, inclusive process where different parties participated with staff support.

We had a roomful of people in Prague, many of whom are in this room today, who were ready and willing to start that process for URS. It's almost a quarter of a year later and so far as we can tell nothing more has happened. And ICANN, so far as we can tell, we hear that, well, you can't meet the goal for—for the target price, but that comes—that's the response from two incumbent UDRP providers who provided no economic evidence. We've asked for it in document disclosure. It doesn't exist.

There are other credible arbitration groups in the world, which could provide expert trademark attorneys to do a URS. And we need to get this process started for the existing URS. The debate about whether it should be altered can proceed, but TLDs will never launch if we don't start getting URS implementation moving. So I hope we'll have some good answers from ICANN in Toronto on that.

Thank you.

BRUCE TONKIN: Thanks, Phil. Any comment? Brian.

BRIAN WINTERFELDT: I just want to say that I agree—definitely agree with Phil, and I think that that's something that we really do want to push the community to start moving forward on and push ICANN to get those processes in place.

DAN JAFFE: I would like to add also that I think this is a critical question that a lot of the discussion is, oh, this is theoretical, we will have this or we will have that or we could do this or we could do that. You've got to get into a process where you're going to get some conclusions that are reached before you have a thousand new top-level domains being rolled out. And we do not at this time have any reason to believe that that's happening. And if you can't make it work financially, you've got to explain why you can't make it financially, because then the community can start thinking about if there are ways around it.

Here we only get yes/no answers, so it's really time for us to try and set some very fixed time frames for everybody to come to some resolutions on these issues or at least clarification as to why people are coming out on these issues so that we can move within realtime to create real protections. And that, unfortunately, is not happening. And unless we can find some forcing mechanisms in Toronto, it's not going to happen. And then you're going to have these things roll out without adequate protections. And then there's going to be a big backlash. And that's—you know, people say they're concerned about the ITU. That's where the ITU danger will really come and bite us.

BRUCE TONKIN: Thanks, Dan. Kristina.

KRISTINA ROSETTE: Just—Kristina Rosette for the record, just a few, not necessarily related,

observations.

Steve, I think you'd asked about experience with .xxx. I will say that generally clients were happy with it. It didn't take too long for them to figure out that they were basically paying the same for a block as they would've paid for ten years' worth of Sunrise. And that what they're really saving there in terms of resources are the administrative costs associated with having to docket, you know, this is how long this registration is, this is who the registrar is, this is when it needs to get renewed, et cetera.

I did one RES proceeding for a client where the .xxx was the client's mark plus a generic word commonly associated with the brand, so I think that goes exactly to the kind of mark-plus.

I was generally happy with the RES. I can tell you that as a lawyer, it was really hard to write something persuasive in only 300 words. So that may—

(Laughter.)

KRISTINA ROSETTE: —that may ultimately—that may really cut down on how many URS applications—

BRUCE TONKIN: Can you just elaborate just a little bit for the audience? RES and what—

KRISTINA ROSETTE: The Rapid Evaluation Service, which is basically the rapid takedown for .xxx. I am still baffled, however, as to why it costs, you know, upwards of—I think it was \$1,400. So to the extent that that is a price point that is being used as a model for the URS, then I think there need to be some very hard conversations with that provider.

And kind of using that as a segue to the URS, it's my view and it's my interpretation of what's in the guidebook and in the registry agreement that the availability of the URS as a viable, implementable, ready-to-go RPM is a gating function to the launch of any new gTLD.

So independent of what we trademark owners are concerned about, I'm, frankly, a little surprised that the applicants themselves haven't been pushing a little harder on this, because as the contract is written, they can't launch if it can't be used.

And I agree with everything that Phil said about moving forward on that. And I would really encourage us to try and focus on where are the points of agreement. And maybe we need to be doing Venn diagrams or whiteboards or the like, but I think we really need to do that if we're going to see any progress.

JOHN BERRYHILL: I just want to add to what Kristina said that there is one multi-TLD applicant that in their application says that if there is no URS ready, then they would then—the registry will implement it independently the way that ICM did it and at the cost of \$300. So there's differences between the

applications.

BRUCE TONKIN: Comments from Kristina?

KRISTINA ROSETTE: No.

BRUCE TONKIN: No? Okay. Yes.

PAUL MCGRADY: Paul McGrady from Winston & Strawn. And I just want to set the bookend on the other side. John set the bookend at "O" on this side. For giggles, I went to dictionary.com and checked for "Xerox." It's in the dictionary, right? And so we have some standards here that are still very much in flux. And I thought I would at least set the bookend on the other side in terms of inclusiveness. I was hoping I could get Steve to withdraw his invitation to reopen the drafting of the claims notice. Back in the STI days, Kathy Kleiman and I blew up a weekend negotiating that, so please withdraw that invitation just for humanitarian purposes.

(Laughter.)

PAUL MCGRADY: And I wanted to say also to Melbourne IT, thank you very much for hosting this event. This has been fantastic. And all of the feedback and the chance for us all to be together in this size room was just greatly appreciated, so thank you.

BRUCE TONKIN: Thank you. Any other comments anyone wishes to make? Yes, please. JIM

PRENDERGAST: Hey, Bruce, Jim Prendergast with Galway Strategy Group.

Just an educational question for my benefit and maybe for others. On the block that's in .xxx or the one-time reservation fees, are there the ability for the parties that register those names to transfer the rights to register to other parties or sell them down the road if they need to get out of that?

BRUCE TONKIN: Do you want to have a go at answering that, John, since you wrote—

JIM PRENDERGAST: That's the implementation, but there's also the proposals, like in the HARMs proposal, for that as well, so there's a real world and a—

JOHN BERRYHILL: Again, xxx was a nice, limited kind of case, and there were some games we wanted to prevent. So I think people know sort of where my sympathies lie in these kinds of discussions and I, in every instance, drew the line at one that I couldn't myself stand, but we were worried about—

JIM PRENDERGAST: —so you can't transfer it in .xxx?

JOHN BERRYHILL: No, because, I mean, if it's blocked, it's blocked. It's not resolving, you have something that's doing nothing and there were multiple claimants. You know, this guy wants it permanently blocked, that guy wants it permanently blocked. It's permanently blocked. It doesn't really belong to anyone. One piece that was left on the cutting room floor in the—there was a charter dispute

policy as well, one chunk of that that we felt we might visit a bit down the road after we had more experience are things like people that have a legitimate interest in a blocked name. For example, my son Mac, well, he doesn't want to run a porn site, but—

(Laughter.)

JOHN BERRYHILL: —he does actually have an online business that he started when he was 16, but not like that, but something where,—

(Laughter.)

JOHN BERRYHILL: —you know, someone has some established business associated with a name that has nothing to do with the trademark and then some sort of procedure for tying that off. But those kinds of pick-up issues, you know, how do we turn things back on, how do we transfer names that aren't doing anything in the first place, we wanted to accumulate a couple of years of operating experience before we really worried about how often does this come up in this very limited TLD.

As far as gTLDs, I don't know.

JIM PRENDERGAST: Different story. And I guess the other question—Bruce, coming back to the HARMs proposal, have you run the existing criteria that are in your proposal against trademark lists and have you come up with a list that would qualify under the HARMs criteria?

BRUCE TONKIN: No.

JIM PRENDERGAST: Okay.

BRUCE TONKIN: We just sort of set that really as a discussion point, yeah, the concept that there would be some mechanism for deciding what is a high-risk mark. And we tried to balance between marks that had lots of trademark registrations, but as well as marks that were frequently abused and just tried to come up with a bit of a scoring system. Because some people have hardly any trademarks but get a lot of abuse, others have lots of trademarks, maybe they haven't had to enforce them too much. So it was just a strawman proposal for comment rather than a detailed analysis of what's in, what's out.

Bill.

BILL SMITH: Bill Smith, PayPal. So I have not focused on the new gTLD program. I'm busy doing ITU stuff, WIKI, WTPF, you name the acronym. But I am struck and I'll beat the horse again here. So we have a new gTLD. Nobody's going to be able to launch unless we can get the rapid suspension—someone to do rapid suspensions at a low cost. So far we have no one.

What happens if no one steps forward to do rapid suspensions? And I'm assuming because it's either too complex for the cost that has been requested, there's too much information, too much

something, yet, I've heard, well, the applicant guidebook is closed. So if the guidebook is closed and we can't do an absolute required piece of what's in the guidebook, this system's dead.

So that's a question to the panel, but I offer a suggestion. And that means that we have to find a different solution. The current one isn't working, okay? Otherwise, someone would have stepped up. And I sat in the back of the room and did a little quick math and said Jesus, for 300, 500 bucks a pop, it seems like a pretty good business. It's got to be a thousand, 10,000, 100,000 of these a year. I might go into business. But there's got to be a reason people aren't doing it.

(Laughter.)

BRUCE TONKIN: Steve and then Jon.

MARILYN CADE: I want to make a comment on this topic.

BRUCE TONKIN: Yeah, I'll let the panelists respond and then you, Marilyn. Steve and then Jon.

STEVE DELBIANCO: All right. I just want to say that if, in fact, the cost recovery of 300, which was promised, isn't sufficient to pay for an adequate URS, then you have to look to ICANN to subsidize and make up that difference. Just like ICANN needs to spend the money to make the clearinghouse work the way it needs to work, including the side databases of words that might be necessary.

So it is ICANN's responsibility with the great deal of money that's been brought in to run centralized and wherever possible standardized things, just like Jeff Newman described with respect to the proposal he had for the clearinghouse. We ought not be shipping data to registrars and registries. It ought to be centralized. And, if necessary, ICANN needs to subsidize it.

BRUCE TONKIN: Thanks. Jon?

JON NEVETT: Yeah, I was going to say something very similar. We don't need a guidebook change. Essentially we negotiated certain protections for registrants in the process. And the whole point of the URS—the original point when the IRT discussed this was you want a rapid takedown system that's cheap and easy for slam dunk cases, because 70% of the URS—the UDRP cases go unresponded to. So for those 70%, we want to do it quick, cheap, and easy.

During the process there were some additional protections built in based on comments from certain segments of the community that wanted protections. Those protections cost something. If based on an RFP I can't find a provider that could provide the service at the price point that we were all looking for, 300 to \$500, then the answer is simple. Don't change the protections because those are—those were highly negotiated, but if the ICANN community wants certain protections in there that can't be achieved at a certain price point, then they should pay for those protections. It's pretty simple and it doesn't require a

guidebook change.

BRUCE TONKIN: Thanks, Jon. Marilyn?

MARILYN CADE: My name is Marilyn Cade. I chair the Business Constituency. My comments are a follow-on to what Steve said, but let me introduce a concept that you should all become very familiar with if you're not today. And that's called the concept—it's an economic term called "negative externalities."

What ICANN is doing right now is creating negative externalities from creating a cost factor that is moving to and being imposed on the trademark holders and on registrants. And I fully appreciate that those who want to run a business are concerned about the cost to them as well, but I think the URS is actually—I prefer we use the term "underwrite" as opposed to "subsidy." And I would also say that we should keep in mind that the underwriting period doesn't have to be all that long since we are required to evaluate the success of the initial mechanisms and then to determine whether to continue them or not.

So I'm sort of of the view that we should push for underwriting this mechanism so it provides quality service, it provides rapid service, it doesn't create additional negative externalities for applicants, as well as non-applicants, and at least check the box on that mechanism and be able to move forward in that space.

BRUCE TONKIN: Thanks, Marilyn. Any comments? No? Jeff.

JEFF NEUMAN: Thanks. This is Jeff Neuman again.

I wanted to kind of latch on to something Jon said, Jon Nevett. He said an important part, but it was kind of glossed over. ICANN never did an RFP for the URS providers. ICANN just went over to WIPO and maybe the National Arbitration Forum, I'm not sure, because none of that information is out there, right?

So they just all of a sudden came back, no showing of evidence that it costs more than 3- to \$500. And we all just accept that at face value? Why not do an RFP? I'll give you an analogy. Everyone thought when the guidebook first came out and there was this whole requirement for a letter of credit that the amount that everyone would have—would need for that letter of credit would be \$1 million or hundreds of thousands of dollars per year to cover all of those costs. What happened? ICANN did an RFP, or an RFI, I guess, for emergency backend registry operator providers.

And what came back was now wait a minute. The cost is much, much lower than that. The only way they found that out is because they actually did an RFI. But ICANN didn't do that here. They went to the National Arbitration Forum, they went to WIPO, had these backroom conversations where there's no evidence, whatsoever, of any of this stuff, no communications that are public, and all of a sudden declared

it's between 3- and \$500. Put out the RFI. I'm sure you're going to get some costs that are a lot less.

And one of the items on cost that I do want to address as well—and this came up I think in the BC proposal and others—there seems to be this anger towards the issue that in defaults there has to be some judgment on the merits, right? They say that that adds to the cost. I think I'm sort of partly to blame for that.

During the IRT discussions and during the STI discussions afterwards, I never asked for a judgment on the merits. It kind of got twisted a little bit. What I asked for was a sanity check. Someone to just take information that's alleged in the complaint, just look it up. Just make sure that that certificate that they provided or that evidence that they provided actually exists. Like go to the website, type it in. If you get that result back, great. That was it. It was a sanity check that was later turned into a judgment on the merits.

I do think that things can be improved with the current process in the URS to make the costs lower, but I specifically would not want to see a default just accepted because the party didn't respond. Some sort of sanity check needs to be done to make sure that there's no abuse of the system, but it doesn't have to be a judgment on the merits.

DAN JAFFE: Could I just add one thing to that? Earlier I said if we don't take certain steps to force the process, we're not going to be ready in time. We're having a discussion where something that could really put a major monkey wrench in the process. We've come, I think, to a consensus within this room at least that somehow we have to get information from ICANN as to why the numbers are not adding up, which is either an RFP or an RFI, or however, but some way we need to—I think we need the community to demand of ICANN in a fairly unified way that we now need that kind of information, because this is such a critical piece of the puzzle.

At least we should start deciding what are the critical pieces of the puzzle and then forcing out the information that's necessary so that we can decide whether this is doable at all. Maybe we'll find out that, in fact, it can't be doable if someone will give an explanation. But let's know. We can't just sit around here or we're all going to be talking about this forever. So we really should try to get a community push to ICANN on this issue at least.

BRUCE TONKIN: Jon?

JON NEVETT: I just want to say one thing that I've never said before is I agree with Dan Jaffe, Marilyn Cade, and Jeff Newman.

(Laughter.)

BRUCE TONKIN: John.

JOHN BERRYHILL: I wanted to pick up something Kristina left laying on the floor and tie it together with some of what Jeff was saying. Kristina said that it's hard to be persuasive in 300 words. The type of situations the URS is looking at, you don't need to be persuasive. You probably don't need 300 words. If, you know, it's PayPal support and it's going to some phishing page and it doesn't belong to PayPal and here's their trademark and everybody's heard of PayPal, what do you need to say? And that's the kind of situation that the URS, at least in my mind, is targeted for these—you know, you look at the cases filed at WIPO and you can see pending cases. Oh, boy, barclaysbankcard.com, I wonder how that's going to come out. And we're all capable of doing this. I work for domain registrants that have portfolios from anywhere from 100 to a couple hundred thousand domain names. And every morning I come in and there's a stack of C&D letters. And I go through like 10, 15 of these. That's what I do between 6 and 9 in the morning is I take all of the C&D letters that came in from all of the various people that love me and say you don't have to transfer that name. Eh, we'll argue with that one. You're going to have to transfer that name. These are determinations that a skilled trademark attorney can make in under 15 minutes. And the point of the URS is that if they're spending more than 15 minutes and not reaching a decision, then it goes to the domain registry. And I cannot understand how even at, you know, the rates that some of you here in DC charge how—

(Laughter.)

JOHN BERRYHILL: —15—you know, a maximum of 15 minutes time devoted. And I think that's the way it should be played. If you can't make up your mind in 15 minutes, forget it. If it's not obvious in the first 10, 15 seconds, you know—because UDRP cases tend to be pretty obvious one way or the other within the first 15 minutes. So if you want to do that math, how much of an administrative layer do you need on top of what amounts to \$100 of time. And that's why I cannot fathom why it would cost more than \$300 to get somebody to look at something for a couple of minutes to make a decision.

BRUCE TONKIN: Thanks, John. Well, I think we're—Ron Andruff, sorry, go ahead.

RON ANDRUFF: Thank you, Bruce.

I've been listening all afternoon and I am actually taken—I appreciate John's comment about so much agreement across the board here. I think everyone in this room is starting to coalesce around some very important and critical ideas that we should've been coalescing around last year and the year before and the year before. The question that comes up in my mind is we've talked about the global marks. We've talked about protecting all of these things. They got thrown out in the IRT round. And then we have a book

now that says what it says. I'm not sure how we now start to squeeze this back into the book.

And I guess that's the question that's coming up to my mind, some great ideas, and I think that there's a lot of logic behind them. And clearly we can't go forward. A lot of us are starting to slide over to Dan Jaffe's side of the equation because he's right. And we can't go out as ICANN as the community, put something out that's just going to be dead on arrival and then hurt the organization and watch it all slide away to the ITU because we've screwed this up so badly.

How do we now start getting these pieces back in? And maybe that was Melbourne IT's intent here to kind of gather us all together to find a way forward. But I'd kind of like to know what your thinking is on that.

Thank you.

BRUCE TONKIN: Thanks, Ron. Oh, we've got one more. No?

(Laughter.

Closing remarks

BRUCE TONKIN: So, yeah, I think that's a good question is certainly the what-next. And in a moment I'll just summarize, I guess, what I'm hearing and where I think there might be possibilities to build some support around a few key ideas.

But as I mentioned earlier, at the very least, there are registry operators that are listening to this event and some are here. And I think that many of those will want to do the right thing and will implement practices that have broad support. So I think the best practice is something that I think will happen.

The next level above that, which also is what I'd like to see, is that once we summarize some of the results from this forum, that we really see some of the constituencies and stakeholder groups get behind those. So at the moment at ICANN we have very much a silo approach. We might see the Business Constituency has their position and the Intellectual Property Constituency has a position that's slightly different, some commonality elements and then some elements that are different. And by the time you add all of the different constituencies up, you've got ALAC and GAC. By the time it gets to the board, you've got 50 different views. You might be able to pick some general ideas out of that, but it's pretty hard to focus.

And that's why the board kicked off the IRT work initially with the same problem. We're getting too many different ideas. We wanted to get a group to get together and at least reach a bit of consensus on

some core ideas. So I think that's—you know, we'll try and facilitate that. We'll provide a summary position and ideas that we think are valid. But really, we need the constituencies and the stakeholder groups to get behind that and get together like we are here rather than working in silos. And so look, here's some things that we can agree on. That's then something you can really work on within the ICANN fora. You can then take it through the GNSO, you can provide those ideas to the board, because they are coming consolidated with support from a number of stakeholder groups, not just one single group.

So sort of moving on to—hold on one second. Just picking up, I'll just sort of reflect back on what we heard and I'll just pick a few elements out of this. But I got the sense that broadly there was some support for extending the trademark claims to being an ongoing process. Yeah, that we heard that from several providers. The main concern I think the Donuts have is that if we're going to do that, that that should also apply for existing TLDs. It shouldn't just be limited to new gTLDs. And certainly the policy development process, if we took that through the PDP, I think there's enough meat on the bones there that we should be able to do that, then that process does become available to new and existing.

There's various elements of authentication that have come up in several proposals. The revised registry/registrar agreement may have some minimum protections in there as well, but certainly I think at the very least some form of email authentication seems reasonable. And the real debate amongst registrars is does that happen before a name is registered into the DNS or after. And that seems to be more the point of debate rather than whether or not some form of authentication should be doable.

Other things that we've heard across a number of these proposals is the idea of extending beyond exact match. And there seems, again, to be general acceptance in the community that some form of extension sounds reasonable, but the methods of which that are done, certainly it shouldn't be algorithmic. So in other words, you can't just take—and I heard Jeff mention the term “domain spin,” that you can't just take a trademark, let's say it was Melbourne IT, and then say, okay, we're going to then run that against every generic word, so Melbourne IT in front of every word in the dictionary is not viable either.

And I think there's general support that if we're going to have—going beyond these exact matches, we have some rules for how that's done. And then those names are formally put into the Trademark Clearinghouse, and so the registry and registrars can actually read off that list. And the obvious example is the sort of PayPal payments-type scenario. There seems to be fairly general support for that as an idea, as long as it's gone through some due process and the—you know—and it is on a defined list that others can use in their processes.

We heard quite a bit about improving the efficiencies of URS. And I know Russ and Microsoft

pointed out to that as well. And we started descending into us trying to do implementation I think in this room, which is always hard. But I think certainly the principle is, is I think if ICANN doesn't get an appropriate response from the provider they've chosen, then obviously going out to some sort of RFP/RFI would be the next step if that breaks down. And certainly if there's going to be a change to the process to try and reduce costs, you know, that's something that they need to think very carefully about, because a lot of work went into defining those rules.

I'm just seeing if there's any other ones that I missed there. Yeah, I think in terms of the idea of creating some special requirements for higher at-risk marks, that sounds like it's going to continue to be problematic. A number of people have said that there's still a concern that their preferred mark doesn't get included. So that seems like an idea that doesn't have enough support to really work further forward on. Or if it does, we'll probably spend a year trying to debate the terms of that and that's, perhaps, not the most effective use of our time.

So I think if we look at the trademark claims process, extending that, looking at some of the implementation issues that Jeff and the registries and others have picked up on, extending the exact match concept in trademarks to being at least exact match, and some form of related term with the trademark and perhaps augmented by what Steve was saying, that where we've got case history—where if we take something like PayPal, we've got case history of how PayPal has been combined with other words, and therefore that should inform what goes in the clearinghouse.

So that's kind of my rough summary. We will write up a summary of this meeting, and that will just be our summary, but the transcript itself will be available. And we'd really encourage that people sort of build on that summary and build on this event to try and get together either between now and Toronto—certainly in Toronto to try and collectively break down some of these silos and agree on some common points, and actually use the ICANN process appropriately, which is really supposed to be the coming together of the different views and the forming of consensus.

So at that point I'll thank you all for your time and attending today. We are providing drinks. I don't know whether they're here. Maybe we could give them a hurry-up. They're due in at 5:00, but we might be able to speed that up a little bit. But we have some drinks and a few little nibbles available. We would certainly encourage you to mingle and discuss some of the ideas here. And, once again, thank you all for attending.

(Applause.)