CR - Defensive Registration for new gTLDs
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ICANN - San Jose, Costa Rica.

KURT PRITZ: Thanks, everyone, for joining us for this session on defensive applications for new gTLDs. As the date for launching the new gTLD program became closer, ICANN all of us, received several letters for many quarters seeking to receive assurances that many of the rest of the trademark community, to Internet users had been addressed in the program.

This is especially true for entities that haven't been working on this program for years, wanted to be educated as to the protections that existed, understand to the extent those protections would be adequate, understand the risks associated with the program as well as the opportunities.

One of the issues that was raised in many of the letters was the perceived need for entities to register at the top level to provide a new gTLD application defensively in order to keep others who might misuse that TLD from getting the name.

In response to those letters, ICANN organized a series of activities to reinvestigate that issue to see what ideas there were for mitigating, to check opinions on whether the existing protections were adequate.

Part of that was launching a public comment forum. The commenting part of that comment forum is closed, and we are in the reply period now.

We organized this session as a way to promote understanding and solicit feedback.

And, third, ICANN undertook another part of its communications campaign to provide materials to those that were interested in this topic so they were at least fully informed and could discuss it.

So today we're all gathered -- or these guys are all gathered to discuss aspects of that issue. So I'm going to briefly describe the agenda and then, luckily for you, step away.

First the panelists are going to introduce themselves and provide a brief overview of the issue. And in the brief overview, they might state what they think a defensive application is, what we think the likelihood of defensive applications are, whether the existing protections are adequate or not.

And then the second step of this this afternoon would be a brief examination of the ideas that have been published in the public comment forum. So we will put them up in very short form, because slides have few words. And we'll ask each of the panel members if they want to discuss any one of those, the merits or non-merits of any, or any new ideas.

Many of you have read the comments in the public forum or participated in the public comment forum but. To facilitate your understanding, Kevin Murphy, our moderator, will provide a brief overview of those comments first. To the extent we have time left over, we'll take questions.

So I guess -- so this is kind of hokey, but time and again during these ICANN sessions, I get to say we have a terrific panel today. And we do have a terrific panel. You know many of these people. They are renowned in their expertise, and they are gracious in giving their time to discuss these issues.

I'm going to introduce Kevin Murphy, who is the editor of Domain Incite, who is going to act as the moderator today. I will turn over the microphone to him in just a second.

But, first, we're going to start to leap ahead and ask Stacey King to make a few comments to sort of set the whole presentation in motion.

Stacey is an intellectual property attorney, been involved in ICANN a long time. We have worked together on a lot of issues. And I'm grateful for her participation.

So, Stacey, if you would start.

STACEY KING: Thank you. I wanted to just talk quickly to set the stage, as Kurt was saying, about what brands -- just so you have an understanding of what brands are going through.

Just so you know, I'm I.P. counsel. I work in-house in a luxury goods company. I'm an officer in the IPC. I'm on the board of directors for INTA. I was on the IRT.

I mention all of this not because I'm representing any of these companies or my company when I'm speaking here. This is mostly going to be from my perspective as having dealt with brand owners for a long

time and how they react to these issues. And for a lot of them, it is very new.

I have been speaking on the new gTLD process since probably 2007 in a variety of forums. And since this past July, I've been doing this presentation to brand owners that I call the stages of brand grief.

It is an explanation where if you are approaching a business and they really -- most of them don't -- have no idea about the new gTLDs, these are the stages that they really go through in dealing with it.

So the first one is denial. And this is just like the stages of grief with death, right?

[Laughter]

And these are some of the things I know I've heard and my colleagues have heard when we go into the CEO or head of marketing's offices: "This is the dumbest thing I have ever heard of." "Nobody is going to use these." And then the "Get out of my office now, you are wasting my time."

Then they go into stage 2, which is the anger stage. "ICANN and the registries and registrars are just trying to con us into spending more money on this." "This is a total scam." "I'm not going to give into these" -- and you can fill in the blank. "Let's sue them." And, of course, "Get out of my office now."

Then they move into stage 3, the bargaining stage. "Maybe if we go to the ICANN board and tell them our concerns, they'll listen." "Maybe if we go to the government and get them involved, they'll listen." "Okay,

so let's sue. Maybe if we sue someone somewhere, they will listen to our concerns."

That morphs into stage 4 which is depression. "All right. We're just not going to get involved anymore. It is too much." "We've got 10,000 domain names as it is." "We don't need any of these things. We've got consumers contacting us all the time, we're out." "Our consumers are going to go absolutely nuts. They have enough trouble finding us as it is." "We just can't deal with this anymore." "How on earth are we supposed to afford this?"

Believe it or not, big companies have to budget. Their budgets don't include these types of numbers. They are big numbers still for companies even if they are a Fortune 500 company.

This leads to stage 5, which is, hopefully, the inevitable acceptance. And I have on here this sort of asterisk in terms of "It hasn't happened yet." And now I think we are into this acceptance stage, to a degree.

What we hear is, "Okay, it is going forward. There is going to be a business model for us somewhere, right?" "Let's sit down."

April 11th you are going to get that e-mail from your CEO or your I.P. marketing department that says, "Great, we are going to apply for dot show, dot movie, dot shop, dot cool and our dot brand. I will let you get a part-time paralegal to help run these things." And, "Oh, by the way, it is 190,000 for all these, right? So can we break that up into a couple different invoices that we pay over the next year or maybe we can put it off to the next budget because we didn't budget it for this fiscal year."

By the way, you talked to our dealers and told them not to apply, right? You have gone through that whole process?

Then I think there is a unique stage to the ICANN stages of grief for brands, which is stage 6. And that's the delusional stage. And for a lot of brand owners, they believe that this community is, like, perhaps a lot more traditional business communities. So go out, find out what your competitors are doing. That way we'll know if we should be there or not.

Just get the application filled in. We'll worry about the string later. This is the manner of delusion. A lot of brands don't understand this is not a domain name. They don't get that. "The details can come later. Just get it. We will decide how to use it when the time is right," and "Then sign your contract to the registry provider, but we'll figure out exactly what we want them to do later. They won't mind."

And who should we apply as? Well, who owns our domain names? Just use them. It is not a big deal, right?

So these are the stages that brands go through. I would have to say, though, in my dealings with a lot of brands and talking to brand owners, they may be at this point where they are recognizing that they should get something in but they haven't left stage 2. They're angry, and they're still very angry.

And while you've had a number of years to process what's going on and to talk about it and we've gone over what should or should not be there, most brand owners haven't. They're new to this. And they are

very angry, and they are filing these applications. But you have to understand, they are going to be coming to the table very angry.

So, again, I just wanted to give you a bit of that perspective because I think it's important to know when you're dealing with brand owners, rightly or wrongly, this is how they're viewing these things.

[Applause]

KEVIN MURPHY: Hello, everybody. My name is Kevin Murphy. I'm the editor of Domain Incite. For the benefits of the scribes, that's "incite" with a c, like to incite a riot. Branding isn't really my thing.

We are going to start off by letting the panel introduce themselves with a short statement about how they view the defensive application problem, how likely they think it is going to be and a brief overview of that position.

So can we start with Jeff down at that end?

JEFF BRUEGGEMAN: Thanks, Kevin. Jeff Brueggeman with AT&T. We have been one of the companies that has been participating in this process for a long time. We have filed extensive comments throughout the new gTLD program, and we always tried to provide a very fact-based balance set of responses.

One thing I wanted to highlight back in April of 2009, we submitted an economic study with some data pulled together from a number of

global companies about the issue of defensive registrations. And it showed that all of us had thousands of defensive registration as well as a high percentage of registration that we view to be defensive, which is, in other words, not providing unique content or otherwise something that we would have done commercially.

And I also want to just give a flavor of why this is important to us. It is not just a cost issue, and it is not just a trademark issue. It is a brand and a customer issue. And I've got some examples of very common types of domain names like ATT Quality, ATT Family, ATT Confirm that have been used to put sexually explicit content on the Internet by a disgruntled former employee to sometimes redirect customers to competing services. And then in at least one case, we thought it was a phishing site that seemed to be trying to get you to provide some information about your mobile service.

So we really take this issue seriously, as something where we're trying to protect our customers.

One of our design parameters for the new domain program is the goals should be to keep bad domain names out of the system in the first place. Yes, we have to have good responsive mechanisms, but let's do everything we can to address that. We certainly would prefer to have a process for some kind of a "do not register" list at the top level as a way to ensure that that happens.

That said, we also see that there are practical things put into the process. There is the opposition process. There is the registration fee that will help to mitigate our concerns at the top level.

We are exponentially more concerned about the second level and what happens when generic domain names are put out into the system if there is not some kind of a protection. I know we are going to get into the details of that later. But I wanted to tie this back into a broader point that while we're talking about defensive applications today, I think it is critically important that we deal with the second level.

I'm worried if we put that off, that we not have this be positioned as an11th-hour issue that's being raised because we have been consistently raising this as a concern for the past three to four years.

And I do think we may be in a better position to evaluate those concerns once we see what the applications are. But it really should be part of our thinking now. Thank you.

KEVIN MURPHY: I can't see who's next. Is it Stacey?

STACEY KING: I guess in terms of the defensive application issue, I think there are lots of reasons that brands see it as defensive applications. And some of them, I think, are maybe outside of this forum. So you are talking about competition issues. Are my competitors going to be there? That's not something we should be talking about necessarily here. That's a business decision.

I think the three things that are generating concern the most, the first is people who are new to the process and they don't necessarily

understand what it's about and they have got a lot of concerns because of that.

This has been going on a long time, but the vast majority of the world has never heard of this. It's just true. It is just the way it is. Consumers don't know about it, and businesses don't know about it. They are hearing about it for the first time.

And I think that has been exaggerated a bit, the fear, by the second thing for me, which are a lot of consultants who are using scare tactics and going to businesses and telling them about what's going to happen if they don't register. And that's created another big fear among brand owners, who again are hearing it for the first time.

And the third thing, which I think you will hear a lot of us say over and other, is really a concern over the second level. So I realize we are not talking about the second level here today, but it is really important to remember this is why there's so much concern. Brand owners as a whole do not feel that there are adequate protections at the second level. And we've had to deal with all the problems at the second level to date. And when you add 500, 1,000, 2,000 new gTLDs, it is overwhelming.

When they look at the process that's in place for protecting the second level, they don't feel it is going to help them. And so they're looking now at how do they get through that. If ICANN is not going to help them, how do they get through that? That's where you are seeing a lot of the concerns.

KEVIN MURPHY: Okay. We have Nick Wood.

NICK WOOD: Thanks, Kevin.

My mother told me a long time ago I should never say to people "I told you so." She said it was impolite. It was arrogant. It never comes over well. But, ICANN, I told you so.

I was a member of the IRT with Stacey here. And back two or three years ago, we came up with a report. And we suggested what we felt was a reasonable tapestry of protections including a globally protected marks list, a version of a blocking list. And we asked ICANN to investigate this. We said it was urgent because it was the most requested mechanism by trademark owners, by trademark associations, by a lot of people across two years of comment periods. It is what they wanted.

We asked ICANN to consult. We asked them to talk with WIPO, with the U.S. PTO. We asked them to talk to trademark associations. But nothing happened. It was in our final report. But when the PowerPoint went to the board, the GPML had disappeared.

So here we are again. And in a minute I think you are going to see five -- lots of requests for a version of the block list. And we're looking at it 40 days, 30 days before the closing of the application process. So that is a great shame.

But I need to say "I told you so" again because those of us who work in the trademark community, who participate in ICANN, also warned you

that there were dark forces out there and that we were the reasonable guys. Not everyone is interested in participating in ICANN, but almost everyone in the brand world these days feels they have got skin in the game when comes to the Domain Name System.

And so we said to you, Please listen to us. We are trying to be reasonable because we attend ICANN meetings. We are part of the community, and we value what ICANN does. And one day these dark forces might awaken, and that's what happened with the ANA and CRIDO. I know we have a representative of CRIDO, and I'm really, really pleased they are here. But it is kind of three years too late.

And I feel relatively -- as someone from a different part of the trademark community, I feel relatively pained that actually all of the trademark community is being accused of trying to claw back this process because it has been discussed and developed. And many of us put in a lot of work for it.

So, Judith, I'm interested in listening later to what you have to say.

But what then about defensive registrations? Is there a need for this? There's absolutely a need for some brand owners to think about defensive registrations. And you might think why? Because it is $185,000 and there is a legal rights objection system and surely that's enough.

But actually I have got to say "told you so" again, because one of the things that many I.P. organizations asked for was for co-existence agreements to be taken into account. And you haven't done that.

The string process, the string created by ICANN has instilled fear to a degree into brand owners. And it's driving some defensive applications.

Now, I'm sitting here today representing Marques, the European Brand Owners Association. And I also run a small registrar that works with brand owners. And I'm also doing some consultancy for some of our clients who are thinking about applying.

I'm -- one of the big problems -- and Bruce Tonkin raised it the other day and expressed it very well, is if you take a company like Audi and you take a big German supermarket chain like Aldi, they could well be placed into string contention, and probably they should be placed into string contention.

But actually they need to be able to get out of string contention by some means other than an auction because in the real world, people do not confuse a supermarket with a German car. But there is no mechanism for that.

So what I would like to see and many I.P. owners would like to see is a mechanism that goes string contention, then there is a right turn which says: Is there a co-existence agreement? If not, would you like to fill in this co-existence agreement? And if you can, then go ahead. That would be really helpful. So that's my rant. I'm sorry to repeat myself.

KEVIN MURPHY: Thanks, Nick.

STEVE DelBIANCO: Steve DelBianco with NetChoice, and I'm policy chair with the business constituency. So I wanted to give some remarks on behalf of the BC, which is, I guess, the silent majority here at ICANN.

Majority because the BC's members are responsible for most of the registrations and resolutions that happen on the Internet, for all of commerce and content. That's really where we fit into it.

And silent, well, because when it comes to defensive applications at the top level, we haven't been all that noisy, partly because the BC supports a well-structured expansion of new gTLDs. And the BC seems pretty pleased with legal rights objection, government objections that can be used to stop abusive applications at the top level.

But our remaining concern about the top level -- and we put this in our comments -- is for a business that has a name that it can't win or block because it is a common term -- I will use an example that I mentioned briefly the other day -- dot apple. Let's suppose that dot Apple Computer has no interest in getting the dot apple TLD at all. They wait to see what happens in the application window.

But an applicant, say, who wants to propose dot apple to serve the apple growing and apple producing and apple marketing industry and they make that clear in the promotional materials and their announcements for the TLD, maybe question 18 where they declare the mission and purpose, question 28 on reporting abuse, the application includes that's what they want to do.

Apple Computer looks at this and says, Well, we don't think we need to try to pursue a legal rights objection. Well, be fine with that.

What happens two years later when dot apple, the apple growers, they decide their registry needs to make a little bit more money and they start allowing others to buy names like computer.apple, phone.apple, tunes.apple, things like that -- And I would like to hear from trademark experts here about whether Apple Computer really could file a UDRP or URS on things like phone.computer. It doesn't seem likely. They are just generic words.

Now, Apple Computer would then turn to ICANN and ask ICANN to enforce the promises that were made in the application promises it relied upon when it decided not to file a legal rights objection.

They are going to learn that ICANN can only enforce registry restrictions, say, to apple growers and so on if they are a community-based application. And if the apple growers weren't community based, sayonara. Nothing you can do about that.

Bruce has suggested to me the other day -- Bruce Tonkin -- that Apple Computer might be able to find a post-delegation dispute resolution process on a trademark basis against that apple TLD.

But there is a line in that TM PDDRP that says, quote, a registry operator is not liable under this for any domain name registration that's registered by a different person, a person or entity unaffiliated with the operator.

If it happens to be a clever marketer who buys computer.apple or phone.apple, that clever marketer is going to be able to monetize that space and a PDDRP won't do a thing to the apple operator.

This may not be a case where one bad apple spoils the other whole bunch, but one mad apple is going to spoil ICANN's lunch for sure.

[Laughter]

I know these are clever ideas for monetizing the space. But when you ask: What's so bad about computer.apple? Well, you are missing my point entirely. We are not worried about whether it is an appropriate business model. This is about whether ICANN can keep its promises and hold registry applicants to their promises. That's the big concern.

Let me just close to say 2012 is a leap year so with that extra day, the BC filed comments not only on defensive applications at the top level but we talked about second level.

It has already been filed. I will highlight one of them for you. It was a "do not register" at the second level, not top level, but at the second level, similar to what ICM offered in XXX where the trademark holder would pay a fee, so it is not free, to prevent registration at the second level of names that match the trademark term or use the trademark term, so Paypal.whatever, Paypal.verify, Paypal.account, and all those different variations of a trademark name that are used to cheat customers of members of the BC. That's really vital, I think, for a TLD program that has some integrity. Thank you.

KEVIN MURPHY: Thanks, Steve.

Alan.

ALAN GREENBERG: Thank you. I'm Alan Greenberg. I'm the ALAC liaison to the GNSO but I'm not representing either of those organizations here.

Most of what I was going to say has already been covered by people before. Steve channeled parts of it. Nick channeled other parts.

I think I'll highlight something that Stacey implied, that the term "defensive registration" -- "defensive applications" has been used incorrectly in many of the cases.

Much of it is just competition. "My competitors may be doing this so I better do it too."

If that's bad, then I guess we shouldn't have had the Web, because some people built Web sites before others and other ones had to match them.

So -- but that being said, there are defensive ones that we're talking about and there are being examples made.

It is unfortunate we're at this stage, and a small end -- number of days before the end of the period and now we're talking about it when so many of these things had been raised earlier.

It's not clear what we can do at this point other than talk about it.

I've looked at a lot of the solutions that have been proposed. Most of them, I think, would attract vast numbers of lawsuits towards ICANN, and I'm not sure we really want to do that, and I'm not sure how effective some of them would be.

But it is a real problem. It's unfortunate. Maybe we'll come up with some bright ideas by the end of this session. I'm not particularly optimistic. Thank you.

KEVIN MURPHY: Thanks, Alan. Konstantinos.

KONSTANTINOS KOMAITIS: Thank you, Kevin.

My name is Konstantinos Komaitis and I am a senior lecturer at the University of Strathclyde. I'm also the chair of the noncommercial users constituency and I was a member of the STI.

However, I will speak to you today in my -- on my only personal capacity and as someone that has researched the tension between trademarks and domain names for the past 12 years.

I have to admit that I was quite baffled when I saw the title of this panel.

I don't think that we are talking about defensive registrations. I think, as my friend and colleague Avri Doria said, these are competitive applications.

And the reason for that is that by the time we say the words "defensive" -- the two words "defensive registrations" into the same sentence, we automatically talk about cybersquatting, and I don't think that at the top-level domain name, we can even talk about cybersquatting. I don't think that there are people out there waiting and they're willing to

spend resources and a lot of money just to piss off some trademark owners and brand owners.

However, in a more general and the much bigger picture, this issue here that we are discussing right now represents the problem that we always have had in the context of the domain name system: How to put trademarks that are highly territorial in nature within a global ecosystem of domain names.

So what we're doing here is that we're essentially asking people to compete, and this competition is going to be unfair.

The example that came to my mind automatically was "delta." I know that in the United States only, there are thousands, possibly, of delta trade- -- of trademark owners that, one way or the other, they have the word "delta" incorporated within their names.

So the question is, why should, for example, the bigger, the more -- the stronger brand owner at the level of the auction end up getting exclusive rights to the term "delta"?

So -- and I would like also to take this a little bit back.

We are talking about brand owners and we're not talking about trademark owners here.

I mean, there are small- and medium-sized enterprises that they really want also to be part of this whole process and it's very important that we make them part of this whole process.

I've heard also the GPML being used, and I know that most of you in this room know where I stand on the issue of the GPML.

I think that it is a very dangerous thing to reopen. I think that even WIPO has not managed to come up with a list for, oh, so many years now of what we consider -- of what they consider, better yet, marks that deserve this special and supernova status of protection. And from a purely legal point of view, courts cannot even determine what famous marks are.

They say that they're being judged on a case-by-case basis. And there has been a very, very interesting U.S. Supreme Court case on the Victoria's Secret mark that actually allowed a Victor's Secret that was selling sex toys and lingerie to exist.

So there's not really -- it is very difficult to come up with that list.

So what I want -- what I want us to do, yes, it is great that we're discussing all these issues, but at the same time we need to see how the current protection mechanisms are going to play out before we even reopen the debate as to whether new ones should be in place.

My understanding is that we have multiple ones. There is the legal rights objection mechanism. You have the GAC -- the objection mechanism that can go through the Governmental Advisory Committee. WIPO has been working on a formal objection and dispute resolution process.

So there are legal tools out there.

And before we reject them, before we say that we have a problem, let's test them and see what -- how they will work.

Thank you very much.

KEVIN MURPHY: Thanks.

And finally, we have Judith Harris from ReedSmith.

JUDITH HARRIS: Is it on? Okay. Yes. And I asked if I might have a permit -- permission to speak for a second or two just about who I am, who we represent, because this is my very first time at an ICANN meeting, and I think it's important that you all know who we are, what we think in a general sort of way, before we address the specific question on the table.

I would only like to say, in response to Stacey's stages of grief, that I think she was talking about me and our group, and -- at least in part. Usually when I've gone through a grieving process in the past, somebody at some point has made me dinner and brought it to me or sent in a tray of cookies, and I haven't gotten that response yet, but -- and I don't even know -- before I came, I didn't even know if I would be willing to eat it if somebody had cooked it for me.

But I do want to say, to start out, that I am a newcomer here. When I put on my nametag with the green badge, I really was concerned that it would be like putting on a scarlet letter.

I want to thank ICANN and everybody for giving me such a warm and welcoming reception, being so warm to us. I -- even though I just learned about this panel, I -- and my computer crashed this morning so I'm here naked --

[Laughter]

-- but nonetheless, nonetheless, it's a wonderful opportunity for us and we appreciate it and I thank you.

So my name is Judy Harris and I'm a partner in the law firm of ReedSmith, based in their Washington office. ReedSmith is a global firm of more than 1500 attorneys. We've got 22 offices around the world.

We represent the Association of National Advertisers and have for a long time, and I want to emphasize that unlike many issues that come to Washington lawyers, but very much like the ICANN process itself, this was a bottoms-up process within ANA.

Our members came to us and said, "What is this we're hearing about? What do we need to know about it?" Et cetera.

And Stacey is right. We went through a lot of those various stages that she laid out.

I -- I think that we -- where did I write down what she said? But I mean, I think that we were -- we're not in depression yet. I don't think we ever spent much time in anger. I do hope that there's still time for us to be in negotiation, although, you know, I realize now -- and have all along, but I realize in a different way now, having attended this meeting, that there is a very, very complicated process at play here.

And I want to say, for the record, that there is nothing about the position that we have taken that should be interpreted as us opposing the creation of new TLDs.

We definitely do not oppose the creation of new TLDs.

We understand that there is an important place for them. We understand that iTLDs can really be of enormous import in furthering the ways in which the global Internet can be used for good, et cetera.

And I also want to emphasize that we don't in any way oppose the multistakeholder process. We are -- we've learned a lot about it and we're starting to understand it quite well.

We support it, we're glad to be participating in it, but we do believe that the best way to preserve the multistakeholder process is by doing all we can to make the perception out there of ICANN be that it's operating fairly, consistently with the Affirmation of Commitments, et cetera.

So a little word of history.

When folks in the ANA came to us and asked about this and we started studying it, we formed a coalition, the ANA formed a coalition. That coalition now has about 160-plus members, some of the very largest associations not just in the United States.

You know, things like the Chamber of Commerce, the Association of Auto Manufacturers, and I could go on and on and on.

Then also, companies. It's been the larger companies that have taken the lead on this, for obvious reasons. They have the resources to do so. But there's -- it is not a problem, as many of you have pointed out, with respect to the large companies alone.

Nonetheless, our organizations includes entities like Siemens, GE, Procter & Gamble.

Many of these entities don't just have a few brands. Some of these entities literally have thousands and thousands of brands. And I'm not going to get into the arithmetic here, but it's an enormous effort for folks to monitor and keep on top of their brands in order to protect the values that -- the resources they've invested, the time they've invested, in imbuing those brands with value.

So we set up this coalition, and as I said, I'm now here -- now here attending the first meeting.

I'd like to say we did file comments, and many of CRIDO's members --

CRIDO, by the way, stands for the Coalition for Internet Responsible Domain Oversight. We have a Web site www.crido.org. All of the 160 members -- and that list is growing daily -- appear on that, as do a lot of other of our work.

But we have filed comments on the need for a "do not sell" list, we've called it, at the top level.

We certainly recognize that the problems on the second level are even greater, and we intend to be involved, to the extent you'll let us and we can, in trying to solve the problems at the second level. But I believe today, we're focused on the first level.

And what I'd like to say -- and then I'll, you know, I'll let it go -- is that we really believe that addressing this problem now, late as it is, could really save a lot of big problems down the road for ICANN, not just for the individual rights holders.

It is possible that if we create a "do not sell" list of some sort, we might eliminate the need for batching.

I know that there's been discussion everywhere I've gone at every meeting about how to do batching, how it could result in litigation, how can you be fair, how can you whatever.

There's a possibility that if we create a "do not sell" list and we allow folks who have already applied for defensive registrations to withdraw those applications and go on the "do not sell" list, and we allow those who are still getting ready or thinking about filing defensive applications to be put on the list instead, we might find that the actual applications of those who want to operate a "do not" -- who affirmatively want to be registries might stay in the 500 or so vicinity.

Also, I think it could really help with Department of Commerce oversight later and move that process forward, when they've got to evaluate the success --

KEVIN MURPHY: Sorry, Judy.

JUDITH HARRIS: Okay. All right. Sorry.

KEVIN MURPHY: We're kind of running out of time for questions here. I'll have to cut you off there.

Could the person with the clicker get us through to the recommendations slide, please. Is that Stacey still?

I don't have the clicker. Who has got it? Ah. Thank you.

Okay. So I think in the interest of timing, we'll probably just summarize these and then go to comments from the floor.

We have basically these are the very, very high-level summaries of what was proposed in the ICANN public comment period.

The first three or four basically are variations on the "do not sell" list or the GPML, I guess, albeit with less granularity and less detail than the GPML had.

We also have an idea in that, basically an extra refund window between May 1st, 2nd, when the applications are announced, and a week or a month later when the applicants could get a substantial refund in excess of the $130,000 currently allowed by the guidebook.

That would be for defensive applicants to quickly withdraw and, you know, have not invested as much money in something they don't really want.

Batching order. That would be -- some people suggested there should be -- community, IDN, and geographic gTLDs should be processed first, followed by brands and generics at the end.

That's basically a kind of a way of kicking it down the road a bit while the community works on further rights protection mechanisms.

And the last two on the list are ways of, I guess, re-architecting the program to make it less of a -- less open to all comers.

So we have an open mic.

KATHY KLEIMAN: Thank you for a very interesting panel and for those --

This is Kathy Kleiman, and I was on the STI group as well, the -- which was the cross- -- for those who don't know, it was the cross-constituency group out of the GNSO that looked at the IRT report that so much time had been spent but only by a few constituencies and I was there on behalf of the NCUC which had not been included in the original IRT report.

So let me -- let's remember what the GPML was. And please remind me if I'm remembering it wrong.

But it was going to be ICANN creating the first internationally -- the first list of internationally famous marks. One that doesn't exist at the World Intellectual Property Organization, one that doesn't exist anywhere.

And that would come to ICANN to create that list.

It was supposed to be small. Even though we hear that there are thousands of brands that now would have liked to have qualified, the GPML was supposed to be very small.

But it would have reserved these words from the top level and also at the second level, of all new top-level domains.

So what I'm holding up here is Deloitte's brand list, the list of remarked marks in dot co, and as you know, it includes the words like "sky," "total," "caterpillar," and "virgin."

The idea that these words would be reserved from all top-level domains and all second-level domains as a first call, that you'd have to prove some right to these words, seemed to us -- those of us who are arguing against it -- to be insane. And I'll posit that again.

So my daughter would have had to go to caterpillar -- my daughter loves bugs, and assuming we got a dot bugs, the idea that we would have to go through Caterpillar to prove some kind of right in the word "caterpillar" or "beetle" seems, again, absurd.

But let me go back to Steve DelBianco's comment about dot apple.

Here's where something seems to make sense. And in this, I speak only for myself. That if you have a dot apple of the apple growers and they're coming in positing that they will not deal in electronics or computers, then some kind of reservation of marks at the second level in order to affirm that application, a very narrow defensive registration perhaps -- and I might get shot by some of the people I know for this -- seems to make sense because it's case-specific and context-specific.

Thank you very much.

KEVIN MURPHY: Any panelists like to respond to that?

Steve?

STEVE DelBIANCO: Thank you. Kathy, you talked about "caterpillar," and I can be sympathetic with that because think about the BC's concern at the second level. We talked about dangerous. Konstantinos said it's dangerous to allow reservation of trademarks.

No. What's dangerous is to have thousands of sites in some of the generic words -- a dot shop or a dot Web -- thousands of sites that attempt to defraud people of donations, defraud you of banking, defraud of you e-commerce and payments. And that happens now. So that's where the danger lies.

So "caterpillar"? I don't buy bulldozers on-line, so it's unlikely to be a place where fraud is going to occur with Caterpillar the manufacturer. But there are the kinds of names that have experienced a lot of fraud and some of the comments filed I believe by Stacey and Nick's organization talked about maybe focusing our efforts on trademarks and similar names where there has been a long history of fraud that has -- that has cost consumers. And that really gets us to where the dangers are.

KEVIN MURPHY: I think Stacey wanted to comment as well.

STACEY KING: So one of the comments I would have is that when the GPML was -- was suggested by the IRT, I think there was an understanding that this is something we would sit down and work out the criteria around.

I think part of the problem, to be quite honest with you, is there is a bit of hysteria within ICANN that believes all trademark owners are here to tell you that you can't use generic terms in their generic way, and that we're going to sit down and say every term that would otherwise be generic should go onto the GPML.

There are people within our community who believe that.

There is no doubt about that.

But I think you also were dealing with a lot of trademark owners who were trying to sit down at the table and have a discussion about it and kind of felt like it got cut out at the outset.

And so now you are seeing a reaction from some of those entities that maybe are on the other side that are calling for these things again, and it may be, going forward, that it's a very different discussion than what might have occurred perhaps before.

KATHRYN KLEIMAN: Just a quick response. From the perspective of the community, there were so much -- so much of the IRT report that was accepted. Massive new rights protection systems. So let me just share that.

And also that -- and we haven't talked about it -- there's a spectrum. It's not just apple growers but remember Apple Records and Apple Computers, and that apple -- and that they merge into each other. The world is a world of grays, not black and whites.

KEVIN MURPHY: Thanks. We'll take another question from the floor.

WERNER STAUB: My name is Werner Staub. I would like to make two points. One of them is about what Steve said in respect to applicants, standard applicants, being held about -- on their promises.

You know, I actually made the same statement many, many years ago.

And when I made that statement, it appeared as being, you know, anti-standard applications, antibusiness, whatever, but it is really about being truthful. And, you know, we cannot say that it is okay for people to be untruthful, unforthcoming about their intentions.

Of course there are many details in applications that are not the essence. It's about the essence in it. And I think we fail to identify the key terminology.

Most probably the word "externality" or "external costs" is one of the critical elements in respect to holding a standard application to its promises. You know, they promised implicitly not to cause externalities or only within an acceptable scope, and it turns out to be different, and they should certainly be held to that.

And it's just a matter of clarification of putting that into the guidebook.

It would also be helpful for those people who thought it would be good to avoid a community-based application, even if they are a community. And we've seen a couple of them who have said, "Oh, we are a community but we're applying the standard because we are afraid of being held."

You know, there's nothing to be afraid about. The community is supposed to do its job and the community has rules. That's the very idea of a community.

Now, the other thing I would like to address is the avalanche that we're dealing with, which is under pressure.

People are being asked to leave a stadium which is full, at the same time, through the same door, and they're being told that they will not be able to leave after. You know, you have to run now!

Now, this is the best way to create a panic. Again, this is something I said a long time ago for many different reasons. We have still the ability to announce the next round now, we get down the number of applications radically, and through the combination of these two, we can then, you know, let those who really want to go for the TLD go ahead and not be afraid that they may be left behind by their competitors because their competitors got this easier way of communicating with customers and they don't.

And I see -- for those that we've seen in terms of applicants, most of them are not concerned about the brands being used by somebody else, they're concerned about not being able to play in that field whilst the other ones are going to have an advantage for years.

KEVIN MURPHY: Yeah. Jeff?

JEFF BRUEGGEMAN: Yeah. I think this has been a good discussion and I certainly agree with Kathy's point that this is a black-or-white issue. I think to some extent what we're talking about is let's have more of the discussion before the application is granted or before the domain enters the system, and there are going to be shades of gray.

I'd rather have that discussion -- and I think part of the reserve list is it forces a discussion. It doesn't say you have an unequivocal right to keep generic terms out of the root. It just says if something is going to be ATT family, then I would know about it ahead of time and if somebody has a different argument, we would have that debate before I'm having to file a UDRP after the fact.

So I think some of this can be done in a -- there shouldn't be a blanket right but can we move it up into the process so that we're trying to keep things from happening ahead of time.

And I think this idea of the -- the commitment is a good way to solve some of that. If you could get a commitment "I'm going to use it for this, I'm not going to use it for that," that's the type of kind of real-world solution that can help solve some of these issues.

KEVIN MURPHY: There is a -- I'm sorry. I just wanted to say we've got 10 minutes left and then it's the public forum, so if we could keep questions and answer to like one minute, we should be able to get most of the queue.

ELLIOT NOSS: Yeah. So --

KEVIN MURPHY: I think Alan wanted to actually respond first.

ALAN GREENBERG: Part of what I was going to say is the open forum opens in 8 minutes or 7 minutes in this room.

ELLIOT NOSS: Which is now repetitive. Thanks.

ALAN GREENBERG: Yeah. It would really be nice if we could focus on things which are implementable in this round, not point out things we should have done last time. It's a bit late for things that should have been done but we didn't.

ELLIOT NOSS: Okay. I have to preface my comment by saying, again, you know, I love when you guys are dealing with the -- you know, "We are the good IP lawyers, it's the bad guys," you know, so -- and I want to make public a statement that I've made to a number of the IP community that does come to these meetings that nobody has ever taken me up on, because there are some very bad practice actors out there.

I -- when -- I say I am happy to help you guys go after bad registrars. We show -- we show up arm in arm to compliance. We can get things done.

Will you please also be arm in arm with me to go after bad actors in the IP community.

[Applause]

I would greatly appreciate that.

And I did want to sort of -- Nick, I think -- I think both Nick and Steve's point, you know, this will be -- Nick, your point around the contention with Audi and Aldi, I think that they could get through with standstill agreements with the two of them. I do think that under the rules, that would make it through. I think it will be interpretation, but I do think so.

And Steve, you know, to your point with "apple," I do think that the PDDRP would capture the example you gave because there would be that -- that -- it's not just that they're registering names for themselves but that they're part of a conspiracy.

But most importantly, Steve, on your example, there will be zero type-in traffic on an unsuccessful apple fruit community TLD that then had to resort to selling generics.

So I think there would be no issue there with being able to monetize a domain name like that.

One of the beautiful things about the expansion of the namespace that I think we're all going to experience is we're really going to see fundamentally different traffic patterns. You know, I've said before, I want to say again -- and then I'm finished -- you know, the reason that we have such typo squatting today -- and believe me, Tucows is a horrid, horrid, you know, recipient of tons of it -- is because we have

artificially constrained the world into dot com. Nothing will help eliminate typo squatting better than expansion of the namespace. Thanks.

KEVIN MURPHY: Thanks, Elliot. Can we just get maybe through a few more questions before we go back to the panel, just so everybody has a say? Thanks.

>> Yeah. Nick, maybe it's a difference between U.K. usage and U.S. usage, but the -- when we generally use the phrase "I told you so," it's typically after something that you've predicted that is bad comes to pass, not "I told you that we'd be coming back at the last minute with more hypothetical horrors," okay? Because what I've been telling people is that we're going to see a last-minute push, with the arguments we've had for years. The GPML list we've discussed since 2000. And what I told you so is that, you know, we'll hear them again in a last-minute push.

Because what I can't understand in terms of, for example, the ANA, the ANA commented on early phases of the gTLD application process, so this is not something that the ANA members just heard about last week, unless there is a serious communication problem.

Because I don't know how it is that you represent these members who have -- over the ANA's years of engagement in this process, have been so woefully misinformed.

And perhaps going forward, ICANN should have a body of, say, for example, intellectual property practitioners that actually communicate with and inform their -- their people that they purport to serve, as opposed to the trademark bar serving perhaps internal interests that are not reflective of those of its clients.

But the good news is, given your membership -- and there are thousands and thousands and thousands of trademarks -- as of this week there's 254 application slots open. There's a theoretical maximum of 50 applications per TAS slot.

So that's an upper bound of some 10,000 strings that we're talking about.

So the good news is, there will not be thousands and thousands and thousands of these brands being infringed upon at the top level.

JUDITH HARRIS: Can I just briefly respond to that?

First of all, I didn't say thousands and thousands. I said our members have thousands and thousands of brands, many of them. I didn't say that they were being -- all those names were being filed.

Second of all, it is true that ANA did participate in the process.

I think what's important for people with -- who live within the ICANN ecosystem to understand is that other people have different kinds of day jobs and -- and don't have either the resources, whether it comes to time or money, to monitor these kinds of things. I cannot tell you, when we started our work, how many folks came to us who had participated

in the process and who said -- not -- you know, who said that, "Look, we've been raising these same issues for years but they've, by and large, fallen on deaf ears."

So they might have been delivering to us the message "don't even try," but I maintain that it would not have made any difference, had we devoted more resources over the years to attending the process.

NICK WOOD: And John, on the point of the GPML, what we were saying two, three years ago, was a list needs to be looked at, and now we're looking at it at the very last minute. This blocking list is controversial. It could work, it might not work. But looking at it now is actually not a very good position for us to be in.

>> Mr. Palage here chaired a working group on that subject for two years. There has been -- there was extensive discussion of what a fool's errand it is to construct such a list, but Mike can speak to that.

MICHAEL PALAGE: No, I actually want to have a new idea. There we go.

[Laughter]

So here's my new idea. And it's something, actually, the board perhaps could even include in its response to the IANA RFP, if they choose to.

So here's the idea.

There are already brands that have invested hundreds of thousands of dollars to move forward in defensively registering their TLDs. That money's spent and they're in the queue and you're going to have people -- these are brands that are in the queue. It's done. It's over with.

What I -- my proposal here is how to save them money going forward, and here's -- here's the solution.

When this process started back in 2008, I began to renegotiate with dot coop their registry agreement and under their contract right now, they only pay $5,000 a year for up to 50,000 names. But a brand applying in this round right now has to pay ICANN $25,000 a year.

Dot museum, which is in the root right now, only pays ICANN $500 a year.

So to talk about the anger, there are corporations that are paying $185,000 a year and are going to go with a shelf TLD option, which means paying a registry operator $10,000 a year to have two domain names in the root and then they're going to have to pay ICANN $25,000 a year.

So that's $35,000 a year to have two domain names, second-level domain names, registered in their TLD.

So here's my option.

Provide registries or applicants that pass all the requirements and they get through the process, give them the option of not going into the root, not paying ICANN $25,000 a year and not paying their back-end registry provider.

Now, this may be taking money out of some of the providers -- including consultants like myself and others -- but if you really want to save them money, give them the option of not going into the root and you can save them $35,000 a year plus.

New idea. No GPML.

KEVIN MURPHY: That's Mike. I'm just going to say we're going to take one public comment, Carole, if that's okay, and then Bertrand, then Bruce, and then we'll go to the area of grievances.

CAROLE CORNELL: Thank you. This is from George Kirikos. Question: Tim Berners-Lee, writing against the new TLDs, wrote, "The second effect is that instability is brought on. There is a flurry of activity to reserve domain names, a rush one cannot afford to miss in order to protect one's brand. There is a rash of attempts to steal well-known or valuable domain names. The whole process involves a lot of administration, a lot of cost per month, a lot of business for those involved in domain name business itself, and a negative value to the community. Wasn't Berners-Lee correct? Given the existence of the panel here today, shouldn't we instead step back and reconsider the entire process?"

KEVIN MURPHY: We'll take that as a comment in the interest of timing.

BERTRAND DE LA CHAPELLE: Good afternoon. My name is Bertrand de la Chapelle. I am a member of the ICANN board. I'm speaking here on my personal capacity as one member of the ICANN board and not on behalf of the whole ICANN board.

One, I fully endorse what Konstantinos was saying regarding the fact that this is not an issue at the top level of cybersquatting. This is a process that will be under tremendous scrutiny. It costs a lot of money. Cybersquatters are not going to try to grab brand names. This is simply not an issue.

Second thing is, we're talking a lot about the challenges for brand owners. There are legitimate challenges and a lot of mechanisms have been put in the applicant guidebook.

What I would like to highlight here is the extension of the rights that brand owners and trademark owners have obtained in this process that go much beyond the existing trademark regime.

If we were following the NIST classification, no brand owner that is actually producing or selling apparel should have any right of protection in a dot music. In this case, they do.

And it may be good. I don't know if it's good or not.

The fact is that the community as a whole has granted a great extension.

The second element in terms of extension is that if you think about it, WIPO has never been able to agree on a globally protected mark. Brand owners know that one of the results of this general program is that a

brand that gets a top level for its own brand or trademark is actually getting the closest thing you can find to a global single-class trademark registration, which is something that does not exist in the trademark system today, and may be beneficial to them. I ask you to ponder this.

Final point is, I take this question of so-called defensive registration particularly at heart because back in Cartagena before I joined the board -- I was about to join the board -- I made, on a personal basis, an explicit approach to the IP constituency highlighting one specific defensive problem, which is two brands having rights to the same type of string. AMEX, American Stock Exchange -- or stock market, I don't know -- and American Express. And without getting into details, I made an explicit proposal on how to handle this.

I approached explicitly the IP constituency representatives. I pushed them two times on mail saying, "Please consult your groups and give me your feedback, and if I do not get a feedback after the third thing, I will consider this is not a problem."

I did not get a feedback.

I consider that was a flaw in the process and in the interaction that the community has done.

Finally, we are entering a new phase. We are wasting a lot of time trying to reexamine what has been done in the past. Now the challenge we're facing is, there is a program.

In May, there will be a list of strings. It is our common responsibility and the responsibility of the communities and stakeholder groups to leverage every network and communication tool they have to make

people know that this list is going to come out and that there are protection mechanisms available to them.

They may not be sufficient, but it is your responsibility and ICANN's responsibility to make this communication loud and clear, and we're welcoming -- and I am welcoming in a personal capacity -- any interaction we can have with the ANA, CRIDO, and any other network -- INTA -- to put this communication together. Thank you.

KEVIN MURPHY: Thanks. Finally, Bruce.

BRUCE TONKIN: Thank you.

Let me preface my comments by stating an interest in the topic. So my name is Bruce Tonkin, and my employer, Melbourne I.T. is a registrar, so I do have an interest.

I am a member of the ICANN board and I'm not involved in any discussions on defensive applications, nor will I be voting on them, so let me declare that.

As a comment, I noticed that I still hear in this discussion a lot of blending between the first level and the second level, so -- and we actually have a different framework of protections at those two levels. It's worth understanding the fundamental difference.

So firstly, I am a supporter of legal rights.

At the top level, the fundamental mechanism for preserving those legal rights is that an application is publicly posted, and between when it's publicly posted in May and November, there is quite a large framework of mechanisms for you to have all these discussions you're talking about. You can talk to the applicants and you may convince them to withdraw. You can -- and they get a refund of some portion of their application fee if they withdraw.

You also have a legal rights objection process.

You have a confusing similarity objection process.

You can object if your community's affected.

You can object if you think they're doing something morally bad.

You can talk to your governments and they can object.

There's probably, you know, at least six, maybe 10 different ways you can stop a name being delegated.

But the fundamental approach here is the name's posted and you've got five months to have all these discussions and get rid of what you want to get rid of, if you have legal rights that are being abused, and there's mechanisms to do that.

The second level, which is defensive registrations at the second level, is still quite an open topic, I think. I don't think that's entirely solved. But let's explain the mechanism.

It's an after-the-fact mechanism and that's the difference.

At the top level, the information is posted. You've got five months to have your debates.

At the second level, when somebody registers a domain name at the second level, you then monitor how they use that name, and then based on the actual use of that name, you have URS, which is a rapid suspension mechanism, and you have UDRP, which takes a little bit longer, and also you have the courts, which might take a bit longer again, and there are ways that you can stop something.

But that's after the fact.

And the problem we have in the industry is that the -- people can make money between the time they register a domain name and the time these dispute mechanisms are resolved.

So it may be -- and this is looking at the future. I think some concept of the GPML list is still worthy of community debate, and you may have a class of names at the second level that get posted prior to being registered, and there's an ability for people to exercise their legal rights with respect to those second-level names before they get delegated.

Now, I think it's a narrow class, but I can understand that there is a requirement there, and I think the requirement is to actually treat the second level for that class like the top level and the fundamental method of doing that is you post a request to apply for a particular name at the second level -- maybe it's a Red Cross name -- and then there's the ability for the legal rights owners to examine that.

So it's something to think about.

But, you know, really I think the discussion -- what I think the gap is at the second level, I still haven't heard anyone explain what's missing at the top level that relates to legal rights.

Obviously there's other reasons why you might want to register at the top level, but I haven't heard something where your legal rights are going to be infringed.

KEVIN MURPHY: Thanks. Okay. It's obviously a complex issue. We've run out of time so we're not going to solve it today. I'd like to thank the panel and it's now the public forum.

[Applause]