
ICANN79 | CF – Plenary Session: Community Consultation on PICs and RVCs
Monday, March 4, 2024 – 10:30 to 12:00 SJU

BECKY BURR:

Welcome, everybody, and thank you all for coming to this session. We have 90 minutes today to talk about a subject that could easily take a full day. So I want to say in advance that we're not going to get through every aspect of this, and this is really the beginning of a conversation which we need to have pretty quickly because we want to get it resolved.

If we could go to the agenda slide today, we're going to do a very quick, actually, drive-by review of the input that we've received on the implementation framework from the ICANN community groups. And then in order to carry on the tradition (the Steve DelBianco stress test tradition), we've come up with three hypotheticals that we hope will really put the issues before us in a very concrete way so that we can dig in.

We have a wonderful panel if we can go to that slide today. Alan Barrett, who with me, co-chairs the Board's Next Round Caucus. Notice I did not say SubPro Caucus. And then we have a group of folks from the community: Jeff Neuman, Justine Chew, Kathy Kleiman, Nigel Hickson, Steve DelBianco, and Thiago Dal Toe. These people were ... I didn't select the GAC people. The GAC selected themselves. But otherwise what we did was we looked for people in the community who had expressed, over time, well-developed views. We wanted to get a broad range of views. And so that's the makeup of the panel.

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And just to go to the next slide, which I'm going to go through really quickly. For those of you who have not spent your life thinking about PICs and RVCs, here's just a little recap. In 2012, PICs and registry voluntary commitments appeared pretty late in the game as we were marching towards launch of the 2012 round to address GAC advice regarding sensitive and regulated strings to resolve objections or reflect commitments that were contained in community gTLDs.

In 2016 as part of the accountability enhancements associated with the IANA transition, there were some clarifications made in ICANN's bylaws with respect to ICANN's remit related to regulation of content. And there's a prohibition on regulating content that was introduced, and (this is sort of infrequently noted, but was important at the time) the picket fence that had been contained in the registry accreditation agreement and the registrar agreement only (but not in ICANN's constitutional documents) was incorporated into the bylaws. And the picket fence, as anyone who has not heard me say too many times, really set out the scope for which the community could develop consensus policy.

Coming to the next round, the SubPro PDP and the community and the GNSO Council recommended that we continue to require the mandatory 2012 public interest commitments for sensitive regulated and industry strings, and the Board has adopted that.

So I want to make sure everyone knows we're not talking about getting rid of the mandatory public interest commitments today. What we are talking about is the voluntary commitments, which we have thankfully renamed (the SubPro) registry voluntary commitments. And the SubPro

recommended, and the Board agreed, that we would permit applicants to propose additional voluntary commitments so long as ICANN and the applicant agree that the commitments are enforceable under the ICANN bylaws, and as a practical matter.

We have a slide on the difference between PICs and RVCs, but I think the bottom line is the PICs are the mandatory commitments that are in there that were the product in 2012 of discussions with the Government Advisory Committee.

Registry voluntary commitments (can you go to the next slide, please?) in 2012 varied quite widely, and they permit the applicant to respond to comments, objections, and the like. So today we are talking about registry voluntary commitments, not the PICs.

If we go to the next slide (and I'm sorry, I'm rushing through this because I'm really anxious to get to the discussion part), one of the things that is going to be a significant topic of discussion is, whatever we do, what's the framework, how is it going to be enforced, and the like? We have a couple of things that we would like to assume for purposes of our discussion today, but we are not saying that the door has closed on these.

One is that Org proposed an implementation framework which allowed applicants to submit commitments. There would be an evaluation of whether the commitments were clear, effective, and enforceable. If ICANN and the applicant can't agree, the commitments wouldn't be approved. Only approved commitments, only commitments that ICANN believes it can enforce as a legal and practical matter (and when I say "legal," I mean consistent with the bylaws) will be introduced into

the contract. That doesn't mean applicants can't set up their registries to operate, in a way, with additional rules, but ICANN is not going to accept commitments that it is not prepared and able to enforce. And then ICANN would enforce the registry's commitment to comply with these decisions.

So, moving to the topic that we're going to talk about today, we really want to focus on the question of whether ICANN is permitted under the bylaws to implement content restricting commitments, commitments that affect or relate to the content of second-level registrations pursuant to the GNSO recommendations and, if so, how is that going to work?

I'm going to turn to Jamie Hedlund, who I forgot to mention is part of this panel. Sorry, Jamie.

JAMIE HEDLUND:

No offense.

BECKY BURR:

You were over to the right there. And he's going to take us through the next couple of slides.

JAMIE HEDLUND:

The next slide. So, overview/input received. So we received comments from the GNSO and the ALAC, and there was general consensus on the question (next slide, please) on the question of whether there should be a bylaws amendment to allow content- restricted RVCs, but for very different reasons.

In one set of comments, their view was there should not be a bylaws amendment because ICANN is prohibited under the bylaws from regulating content, and an amended bylaw would open the floodgates toward ICANN becoming a content regulator or content police. Another opposite view but also supporting the notion that no amendment was necessary, was the view that the content-restricted RVCs allowing those is not the same as regulating content and that those are permitted under the existing bylaws and therefore no bylaw amendment would be necessary.

Now back to you, Becky.

BECKY BURR:

If we can go to the next slide, just to frame the conversation, I want to bring to top of mind the relevant provisions of ICANN's bylaws that are relevant for us today here, and this relates to the mission. To be clear, we are not talking about ICANN's mission as it relates to root servers, numbers, and protocols. What we're talking about here is ICANN's mission related to gTLDs, so do not be misled that I'm telling you this is ICANN's entire mission.

But as to names, ICANN's mission is to ensure the stable and secure operation of the Internet's unique identifiers by coordinating the allocation of top-level domains and by coordinating policy to the extent that policy is reasonably required where coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security, and stability of the DNS. The bylaws now contain some further explications in Annex G1 and G2, articulating the picket fence to help provide a gloss on what it means, what would be a policy

where uniform or coordinated resolution is reasonably necessary. That's not something new that was introduced in 2016. That was a fundamental part of the bargain in 1998 and has been in the registry agreements, in the registrar accreditations agreement, since day one.

In 2016, we added a couple of additional provisions as well: a clear statement that ICANN cannot act outside of its mission. a clear statement that outside the express scope of its mission, ICANN is not permitted to regulate or restrict content carried or provided by services that use the DNS system. And there's a proviso in there that says, for the avoidance of doubt, and notwithstanding anything I've just told you, ICANN does have the ability to negotiate, enter into, and enforce agreements, including public interest commitments, which we should now read to include registry voluntary commitments, with any party in service of its mission.

So with that background, that brings us to the questions of the day.

JAMIE HEDLUND:

Thanks. And so, to ensure that implements the recommendation effectively and appropriately, we have the following questions. When does a commitment rise to the level of regulating content? May a registry make commitments that differ from consensus policy requirements—for example, require publication of all registrant data in a public RDDS without any redaction? Near and dear to my heart is head of compliance. What should compliance monitoring look like, particularly in the absence of a third-party monitor? And then, finally, as I've mentioned before, so far we've received input only from the

GNSO and the ALAC. So what are the other groups' views on whether or not bylaw amendments are necessary?

BECKY BURR:

Okay, now we're moving into the meat of this. Just so everybody knows what's going to happen, we're going to do a quick overview of the three hypotheticals that the group has looked at for some proposed commitments and assumptions regarding compliance mechanisms. Each of the hypotheticals has a couple of restrictions. One is registration eligibility restrictions. Another is an acceptable use policy that contains restrictions. And then there are a variety of others that we'll talk about.

After we go through these, each of the panelists is going to have an opportunity to respond and, we hope, get into a dialogue and a conversation about these registry commitments. These are people who have been thinking and talking and discussing in lively ways these issues for a number of years. Comments and questions from the audience—we will take those if we have time, using the Q&A pod in Zoom.

So let's jump into the hypotheticals. The three strings that we propose to dig into as our stress tests are dot-election, dot-cancer, and dot-designer. We're contemplating an application for a dot-election string top-level domain designed to help Internet users who are seeking info on elections to find information regarding the candidates, issues, and et cetera, dot-cancer to disseminate patient centered, evidence-based health, medical, and other information related to cancer prevention and treatment, and finally, dot-designer to enable fashion brand

owners to sell their products online and distribute product related information.

In each of these cases, we've suggested that the restrictions that are being discussed come from a variety of places. So in the dot-election string, we imagine that the GAC submitted early warnings on this string and the applicant proposed restrictions based on that to address those GAC early warnings. On dot-cancer, we're contemplating restrictions that were proposed to address objections of any sort. That could be community objections, public interest objection, GAC objections, and the like. And then for dot-designer, we're talking about restrictions that just came in with the application as part of the applicant's desire to proceed.

I want to acknowledge right now that in the comments we received in this consultation, on the question of what the enforcement mechanism/the compliance mechanism, is, there's a lot of views on it. It's a very important topic. We don't have time to dig into it today, but I promise you we will.

So for purposes of our discussion today, and not as a foregone conclusion in real life, we're going to assume that the registry operator is going to be required to appoint an independent oversight board of some kind for purposes of monitoring and auditing the registry operator's compliance, in which the registry operator has ensured that the oversight board is obligated and authorized to annually review restrictions and propose updates to align with industry best practices as they emerge to annually audit the registry operator's compliance with those commitments and report on the results to ICANN to review

and issue binding determinations in response to audit findings or complaints alleging that the registry is failing to fulfill its commitments, including its commitment to investigate and suspend, which you will see is in there, and to immediately report non-compliance by the registry operator to ICANN if such non-compliance is not remedied within a special time, a specific period of time.

For those of you who are familiar with various industry self-regulatory schemes in the consumer protection area, for example, this is a pretty standard practice where the government says, “Okay, you're going to be the first line on enforcement and compliance. We're going to depend on you for enforcement and compliance. But if somebody who has committed to abide by the rules that you self-regulatory organization establish refuses to do that, we will take a look at the failure to comply with to abide by a voluntary commitment to comply with the standards set out by that body.”

And then the final assumption that we're going to take here is that the ICANN's compliance role is going to be limited. It's going to step in if the registry operator fails to cure non-compliance identified by the board within a specified time, and whether it's an oversight board or refined [PIC drip], whatever it is, they've committed to abide by the findings of that board and have failed to do so if there's a final arbitration or a final determination by an arbitrator or a court that the registry operators breached its commitments, or if the ICANN determines that the registry operator has failed to meet its contractual obligations (and this should just say to meet its reporting obligations) or its commitments, for example, to stand up the body and the like. But we don't mean its substantive commitments.

Okay, let's move on. Sorry for all of this preliminary stuff. The first type of commitment we're talking about is registry eligibility restrictions. In dot-election, the proposed restrictions are that registrants can only be candidates on a ballot in an official government election from legally organized and recognized political associations in the relevant jurisdictions. And the identity of registrants needs to be verified. In dot-cancer, we're talking about registrants who are licensed medical providers and registrants acting on behalf of an accredited medical association or licensed medical institution. And the registrants have to provide proof of that licensing or association. And finally, in dot-designer, registration would be restricted to trademark holders or their licensees for fashion brands, and they have to provide proof of trademark rights before acceptance of the registration. And then eligibility needs to be confirmed by the registrant and verified by the registry operator periodically.

So let's jump in and start talking about these registration eligibility criteria. Go for it. Alan. You're on.

ALAN BARRETT:

Okay, thank you. Thank you, Becky. And thank you to all our panelists for what we're about to discuss. So what we're going to do here is use these hypothetical TLDs and hypothetical commitments as a way to explore the boundary of what is or is not acceptable and enforceable under the ICANN bylaws and as a practical matter of enforcement. So for each of these hypothetical commitments, we'd like to explore whether they are regulating content within the scope or outside the scope of ICANN's bylaws, can they be enforced by ICANN both under the

bylaws and as a practical matter, and can they be included in the registry agreement? Then I think we're going to assume that if they can't be included in the registry agreement, then maybe the operator, the applicant for the TLD, could try to place them somewhere else outside the registry agreement. But that would not be enforceable by ICANN.

So let's go back to the hypothetical one page back in the slides, and then let me invite all our panelists to give your opinions. And we're going to be limited to one minute each on this commitment-type- one of registration eligibility restrictions.

Okay, who wants to go first? Okay, Steve.

STEVE DELBIANCO:

Thanks. I doubt there will be much disagreement on the eligibility restrictions here. The answers to the three questions, according to the BC and IPC were no, yes, and yes—that it's not an instance of regulating content. So it can be in the ICANN contract.

But keep in mind that aside from the assumption that they have a third-party monitoring service, ICANN could enforce this directly, even if it meant they had to look at a website of a registrant to determine if they were eligible. And that is looking at content.

But if ICANN anticipates there'll be so many questions with fine-grained distinctions, then it makes sense for ICANN to request that the registry applicant fund and set up a third-party that could take care of monitoring the details of whether a candidate was properly licensed in their jurisdiction. Or a designer. Did a designer actually have the required trademark license?

And I believe that ICANN could change his mind over time. But from the outset, this one is fine and should be allowable and enforceable. Thank you.

ALAN BARRETT: Okay, thanks very much. Who wants to go next? Nigel?

NIGEL HICKSON: Yes, good afternoon. No, yes, and yes. Yeah, I like that. This is perhaps one of the easier ones, as Steve has said. But I think it raises the fundamental issue of whether these commitments that people enter into are enforceable. And anyone coming to this for the first time might think, well, this is new, this is interesting, but of course, this isn't the first time. We have examples at the moment, whether they be dot-bank, I think, or dot-pharmacy, or various others, where we already have commitments from the registry operator that they will only allow certain types of registrants to register or to have names. Therefore, yeah, done.

ALAN BARRETT: Okay, thanks very much. Now I'm going to go to Justine.

JUSTINE CHEW: Thank you. Firstly, thanks for inviting and having me on this panel. So from the ALAC perspective, the answer is similar to what we've heard before. It should be no, yes, and yes. I want to make sure I don't get it wrong. In terms of what has been said already, I won't repeat it, but also we recognize that registries need to have some flexibility in how they

want to operate the TLD. So insofar as they are themselves saying that “We want to do this,” that's fine. So long as it doesn't contradict any ICANN bylaws or any ICANN consensus policies, we are okay with it. And in this case, we don't see any prohibition against that. Thank you.

ALAN BARRETT: Thanks very much, Justine. Kathy, do you want to go?

KATHY KLEIMAN: Sure. Thank you. And, Becky, I know what I'm supposed to say, but everybody who knows me knows I'm not going to say that. Right? Becky shared with you the mission of ICANN, which is critical. I'm going to share with you a few more founding principles, because I think one of these examples violates them. In what I teach my students ... I teach law students about the founding of ICANN. And we founded ICANN on four principles: stability, competition, private bottom-up coordination, and representation. We reaffirmed these commitments in our mission, but we also reaffirmed them in the new bylaws in 2016 in our own fundamental commitments, the commitments that run everything, and in our core values. And so we have this competition, and the competition is what we're going to echo in just a second.

So from a content point of view, election and registrants identities should be verified. That's fine. Registrants providing proof of a medical license makes sense and is consistent with what we did with sensitive strings in 2013. But designer? Requiring that you have to have a trademark to go into designer may violate our competition rules, may violate our commitment to respect the creativity, innovation and flow

of information. It's one of the principles proposed for the review of these that we put this out for public comment. And what will designers say in developing countries if they don't have trademarks? They could be long- standing brands or new designers, those who don't have trademarks yet. This was an issue we dealt with in 1995, and we're dealing with it again. I would question designer under our competition rules. Thanks.

And again, others have told you the registry can enforce it themselves. The question is whether ICANN can put it into the contract and enforce it for them. Thank you. And thanks for the extra time.

ALAN BARRETT:

Okay, thanks, Kathy. Some of the other panelists didn't use all their time, so I'm okay to give a few extra seconds to you. Okay, Jeff?

JEFF NEUMAN:

Thanks. I think my answer is similar to most of the panelists here, which was the no, yes, and yes. I don't have the questions right in front of me, but I believe that's the order. I agree in one sense with Kathy that competition is important, which means that we must allow registries to introduce innovative and new models. Whether that's in the contract or not is really what we're focusing on. And so I'm glad Kathy said at the end that registries can still do it, whether or not it's in the. So that's what's important. Again, competition: number-one goal. And I also think I want to spend the last couple of seconds ... We need to separate in enforcement two components: one, the decision of whether an entity is or is not compliant, and two, the sanction or remedy, if they're found

not to be. Distinguishing between those two, as we did in the assumptions, is key and will apply in the next discussion, more so with content. Thanks.

ALAN BARRETT: Okay, thank you, Jeff. And then finally, let's go to Thiago for the last word on this commitment, type one.

THIAGO DAL TOE: Thanks. I'll be very brief. I'm going to follow the lead from my colleagues here. I'll say no, yes, yes.

ALAN BARRETT: Okay, let's see the next slide so we can remind ourselves of the questions. So we've all heard no, yes, and yes. No, they're not regulating content, considering the scope of the mission, yes, they can be in the registry agreement, and yes, they can be enforceable, although I understood Kathy had a slightly different opinion on the restriction proposed for dot-designer around trademarks. Okay, thanks.

Next slide, please. So now we're going to look at a type of commitment which is possibly more controversial. So in this one, it's about acceptable usage policy. So previously we looked at who is allowed to register. Now we're looking at what the registrants can place in their content. So the hypotheticals are that the registry operator will prohibit the use of the domain name for certain purposes. For dot-election: may not distribute content that incites violence may not distribute content

that constitutes hate speech, may not distribute content contrary to applicable law. For dot-cancer, the hypothetical restrictions: may not distribute content that is false or misleading, may not distribute content that includes research that has not been peer reviewed. And for dot-designer, the hypothetical restriction is: may not distribute content that facilitates the sale of counterfeit goods.

Now, we do anticipate there going to be a bit more controversy around these, so we're going to allow three minutes for each panelist. Who wants to go first here? Steve? Okay.

STEVE DELBIANCO:

Yeah, sure. Glad to. So these acceptable use policies are really about conduct of the registrant conduct—conduct—and most often that's done through the content that surfaces on the pages that they display. DNS abuse for instance is about the conduct of phishing scams, and that's in our contracts today. But you only know whether that conduct is done when you read the content of the e-mails that are intended to fool the people that are victimized. So user-generated content, for instance, on Twitter, Facebook and YouTube, would present a whole new level of pain for the registrants in these domains. So I hope they'll take that on board before they decide to do that.

And as for whether they can be in the contract, ICANN can enter into contracts requiring the registry operator to honor its content policies. We did it in 2012 where the standard PICs involved content, too. Spec 11-3A, I remind you, included phishing, piracy, trademark, copyright infringement, fraud and deceptive practices. Those all involve the examination of the content on websites.

So Spec 11, as we've already discussed (Becky laid it down), is going to be in all of the next round registry agreements, and it is the firm expectation of all of the governments in GAC that subsequent rounds will include those PICs and safeguards, and they will rely on that as to whether to file or to withdraw an objection. Just consider the risks to ICANN if those governments and GAC later find out that, "Oh, I'm sorry, ICANN cannot or will not enforce the RVCs, PICs and safeguards." That's going to present in many respects an existential risk for ICANN, particularly in a WSIS+20 environment.

Now, as for the last question—is it practicably enforceable by poor Jamie?—I would say there's a world where Jamie would look at these registry operators proposing these RVCs and right from the start insist that the operator set up a third party and pay for them to monitor and report quickly, not just once a year through audits, but as complaints come in. And that'd be necessary. I think that ICANN enforcement in that case is simply responding to a report by a third party that a registry operator has violated their contract. I don't see where it is even relevant which terms of the contract they violated. What ICANN has done is taken the role of enforcing a contract with a reliance upon a third party that has said they have broken their contract promises.

And regarding this notion of whether multistakeholderism needs to be a gate on all this, I would just remind you that the contracts include requirements that were negotiated by ICANN and contract parties every day. They are not the result of policy development processes or PDPs in the picket fence, which has nothing to do with content, but rather which obligations can be jammed onto a contract party outside of

what's in the contract. So the picket fence is not about content. It's about what policies can step into a contract.

So finally, I would remind you that the new ICANN bylaws are pretty clear that ICANN has the ability to negotiate, enter into, and enforce agreements, including public interest commitments, in service of its mission.

ALAN BARRETT:

Okay, thanks very much, Steve. Okay, now I'm going to go to Jeff Neuman.

JEFF NEUMAN:

Thank you. I'll just say a couple of principles. Look, registries must have the ability to be innovative and develop new services in a responsible manner. And I want to also point out that registries are not the entities responsible for enforcing all of the world's laws, wishes, and ideals. We should not be placing registries in a position of solving all the potential problems that could, in theory, happen but in reality have never occurred, or realistically could not occur.

However, where there is a realistic, legitimate concern or objection, then registries must have the right to address those objections and concerns. If they can address those concerns, they must be allowed to continue and move forward.

And whether or not those are in a contract, I just want to make it clear that the registry should still be allowed to move forward. If there are clear, enforceable mechanisms, as in our assumptions that can be

incorporated into the registry agreement, then they should be included, or can be included in RVCs, regardless of whether anyone views them as content restrictions or not.

And I just want to clarify that if they're voluntarily agreed to by registries, and ICANN is not making the decision of whether a registry is or is not compliant, then that does not put ICANN in a position of regulating content. If ICANN is merely imposing the remedies that are contained in a registry agreement, then again, that is not ICANN regulating content, even if the decision not made by ICANN but by someone else of whether the registry is or is not compliant and it's related to content.

So if a registry and an objector agree on a solution, then ICANN must not refuse to allow the registry to go forward. If the registry and the objector cannot agree on a solution, then ICANN must decide whether the proposed solution by the registry can reasonably address the objection, and if so, allow the registry to move forward.

The only thing I want to just differentiate a little bit from what Steve has said is that I don't necessarily believe that the decision of whether they're compliant with the commitment has to be made by an independent third party. In some cases, the registry itself is the generally accepted regulator of that industry, dot-pharmacy being one example. And we should not be requiring someone who's accepted as a regulator in that space to just pay a lot of money for an independent party when the party in the best position to make that determination is, in fact, the registry. So as long as ICANN is not making the compliance decision, it has to go forward.

ALAN BARRETT: Okay. Thank you, Jeff. And congratulations. We're finishing as the bell rang. Kathy, I think you'd like to go next.

KATHY KLEIMAN: As invited. Thank you. We promised the world in 2016 we wouldn't do this. That election is going to bar the distribution of content inciting violence, constituting hate speech. Who's hate speech? How do you define it? Is this what we want ICANN doing? Dot-cancer distributing content—that doesn't include non-peer-reviewed research. My son works in an emergency room. He reads medical journals all the time. He tells me the best ones may not be the ones that are peer-reviewed. Is ICANN going to enforce what information goes in and what information goes out on a website? I know you're going to tell me ICANN's delegating it to somebody else.

But in our minority statement to the Subsequent Procedure's final report on this recommendation, some of us said, “We note the danger of not including such limitations. Without restrictions, a possible future dot-militia applicant might write registry voluntary commitments which promise to take down domain names of Black Lives Matter organizations and Holocaust remembrance groups. Similarly, a possible future dot-space industry gTLD might commit itself to taking down the domain names of competitors to space industry businesses that the registry might own.”

We promised the world we wouldn't do this. Becky read you the mission statement: "ICANN shall not restrict services that use the Internet's unique identifiers or the content that such services carry or provide."

What we didn't have a chance to read is the commitments and core values. And let me read the end of the core values. This is our bylaws. "The commitments and core values are intended to apply in the broadest possible range of circumstances. The commitments reflect ICANN's fundamental contact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities." And it goes on. So we committed to the world. We would not regulate content. These clearly regulate content.

So the answer is no, no, and no. They are not within the scope of ICANN's mission. They should not be included in the registry agreement. They are not enforceable, as a practical matter, by ICANN.

And so I think I'm going to stop there. There's a lot more I could say, but this is so clearly content. We don't want to do this. Thank you.

ALAN BARRETT:

Thanks very much. Now, I'm going to ask Nigel to say something on this matter.

NIGEL HICKSON:

Yes, thank you very much. And three minutes is a long time, isn't it? I could tell some jokes, but ... But just a couple of framing points, I suppose, really. So the Government Advisory Committee, as you saw, if you'd read through the slides, has not given a considered view on this.

It's not because governments are lazy or we just don't care. It's because this is a deeply sensitive but a deeply important issue which we are discussing. And anyone that perhaps had the privilege or the opportunity to come to a session yesterday on SubPro on the new gTLD round where we majored on this issue would have heard some of the different views expressed by expressed by governments. So that's the first point.

The second point, of course, is, as I said before, none of this is new. It is new to an extent, but none of it is new in terms of principle. And I want to refer to the communique from Washington, DC, only at ICANN 77—so, not long ago—where the GAC, in terms of our understanding, in terms of our evaluation, if you like, of the SubPro recommendations, advised the Board to ensure that any future registry voluntary commitment (RVCs) and public interest commitments are enforceable through clear contractual obligations, and that consequences for the failure to meet those obligations should be specified in the relevant agreements with contracted parties.

No, we did not say whether the bylaws should be changed. We didn't say whether ICANN Org should do this or do that. We just expressed a view that if we entered into a contract, if a contract was entered into between the registry and ICANN, then it had to be enforceable.

We have strawberries out there. Strawberries are very important, but the world has decided that only red strawberries are allowed. We can't have green strawberries. These green strawberries are taking over. We've got to stop registrations of green strawberries, but we want registrations of red strawberries, all sizes, all flavors, all types, all

diverse applications of red strawberries. And therefore we need to be able to enforce that. Now, whether that's content or not is an issue, and Kathy and others have opined on this. But if we decide as a community that that's the right thing to do (only to have red strawberries in our registration of strawberries), then that has to be enforceable. We have to find a way of doing that, and that is what we are confronted with. Thank you.

ALAN BARRETT: Okay, thank you, Nigel. Justine, I'm going to ask you to go next, please.

JUSTINE CHEW: Sure. Thank you, Alan. So I'm going to try and not repeat what other people have said. Insofar as the at-large community is concerned, we also have emphasis on safety and security of end users. And the end users I'm talking about is the normal folk who use the Internet, not registrants per se, and not your registries, registrars, and resellers and what have you but the regular Joe on the street that uses the Internet. Kathy talked about her son saying that some of the journals are not even right. Who's to determine that? Right? I can't say that I believe her son because I have no knowledge, no background, in that area. So there has to be some kind of reliance on an acceptable authority to say what is right what is wrong.

So in that sense, what you see by way of the examples that have been given in terms of the distribution of the content, that is for, in my opinion, public interest, public good. And it's not ICANN that is demanding this. It is what the registry operator is offering to do.

And so far as ICANN is concerned, if they are the ones that's not determining whether the content or the registry operator is in violation of what they said that they would do, then it's not a content issue. It's not violating the bylaws. ICANN, at the end of day, is not doing the monitoring. It's not doing the auditing. It's just enforcing what is in the contract in terms of an obligation. And that is the general position. If there is a situation where ICANN thinks that they are in a position to do the evaluation and the auditing, that's entirely different thing. So we have to look at what the RBCs actually say.

And I want to touch upon something that I don't think anyone has addressed, which is the remedy. In the case where we say we rely on a third-party monitor to do the auditing and the evaluating and to do the first-level notification that a registry operator is not in compliance, then we need to make sure that that isn't an impediment or a roadblock somehow for ICANN to come in at the end of the day, if the registry operator is found in not compliance with its obligation. So the mechanism that we are placing in between ICANN and the registry operator mustn't prohibit or impede ICANN from enforcing a contractual obligation. Thank you.

ALAN BARRETT:

Thanks very much. Thiago, do you want to say something on this? No. Okay, Jamie, please, let's hear what ICANN Compliance thinks about all this.

BECKY BURR:

Jamie, before you go, I just want to interject one question on this. When you look at dot-election (and the commitment is that they're not going to act contrary to applicable law), what if the Board for dot-election comes forward and determines in a binding way that there's a registration that fails to comply with a local law that says you can't say anything that's inconsistent with the position of the government? There's a question of whether ICANN can enforce that. There's another question of whether ICANN should enforce that.

So I just want to throw that into the mix here, because we're talking about something pretty mechanical in terms of whether ICANN enforcing a decision of a third-party body is enforcing content. But beyond that question, which is a complicated legal question, there is a fundamental issue that we're just ignoring here. So I just want to put that on the table, just on enforceability, since I've probably stolen your thunders.

JAMIE HEDLUND:

Sure. Thanks. First of all, just to clarify, ICANN Compliance is not going to opine on whether content-restricted RVCs are permissible under the bylaws or whether an amendment is necessary. But assuming we get an RVC as part of an application, as with any proposed contractual obligation or policy recommendation, our first objective is to ensure that the obligation is clear and enforceable. And if it's not, we will put it[...] In the first instance, just to be clear, the onus is on the registry operator applicant to demonstrate the clarity and enforceability of the amendment and to demonstrate how it's going to monitor it and how

it's going to enforce it, whether that includes a third party or not (and I agree with Steve), it would be very context-specific.

So if it turns out that an RVC is permitted under the bylaws or under a change of the bylaws, and it is clear and enforceable, ICANN Compliance, if it's a content related restriction, is not going to do a substantive review or assessment of whether or not there was a violation of that content restriction in the RVC. Rather, we will look at whether, from a procedural perspective or process perspective, the registry operator fulfilled its commitment to enforce the obligation.

Just to be clear, easy example: if a third party says, "Registry X, you said you were going to do this and you didn't and you didn't cure," and then it goes back to Compliance, then we would simply implement the breach and termination provisions that already exist in the agreement, similar with DNS abuse amendments. I know there was a question there about whether there would be different mechanisms or whether different remedies were needed. We don't think there are. They exist already and we would look at it just as any violation of the agreement. Thanks. Hope that's helpful.

ALAN BARRETT:

Yes. Okay. Thanks very much. And before we move on to the next type of commitment, I'd like to highlight that the bylaws 1.1C does not say ICANN shall not regulate content, full stop. It's got a little qualifier there about "outside of the mission." And so that's really what makes all this difficult. We've got to figure out what the mission says.

Okay. All right. Now can we move on to slides to commitment type three? Now we're going to explore the possibility of hypothetical commitments where the operator commits to enforce and implement a registration policy.

So for dot-election, the hypotheticals are to require the registrants to consent to publication of their contact data in the public RDDS. That's like WHOIS. The dot-election registry operator commits to implement and enforce a policy that prohibits the registration of domain names for future speculative use. Another hypothetical dot-election will prohibit registrations of names for the purpose of blocking the bona fide registration or use by a third party.

For dot-cancer, the hypothetical is that there'll be a policy that prohibits website and any other services from distributing targeted advertising.

For dot-designer, the hypothetical is that the registry operator will prohibit registrations that involve privacy and proxy registration services within that gTLD.

So again, we're going to explore the same three questions: whether these can be enforced, whether they should be in the contract, and ... What was the third one? Can we see the questions, please? That's it, yeah. So are they regulating contact as within the bylaws? Can they be in the agreement? And are they enforceable? So once again, let's ask the panelists to weigh in. I think Steve wants to go first again.

STEVE DELBIANCO:

These are ingenious stress tests, and I could see where a hypothetical applicant for these strings would want to include them, not only to

satisfy safeguards, PICs and government objections (formal objections), but also for market competition, innovation purposes. The applicant might want to do this to attract registrants who are seeking some status as being qualified to be in a dot-designer to assure ultimately the end users that Justine talked about that they will have their privacy. Like, they won't see any ads related to the cancer that they're researching on the website. And I understand why that could be valuable. It also might be to assure users that when they're using dot-designer, they can easily learn who is operating that web page, with whom they're doing commercial operations.

But these restrictions that we just discussed are not all related to things that ICANN has developed in policy at all, but they are within ICANN's core values. Kathy only read you a few of them. Time didn't permit. But if you read on in the core values, it says, “depending upon market mechanisms to promote and sustain a competitive environment and promoting competition in the registration of domain names where practicable and beneficial to the public interests.” Those are the tests about competition. They're not something that has to live within a policy development process.

So I truly applaud the Board's inquiry and sessions like we're holding today. And before the next round is open, I would ask the Board to try to significantly reduce the risks of failing to enforce commitments that were relied upon to remove an objection, particularly by the governments. And that risk is significant.

One step would be that the Board could undertake a resolution to substantively interpret its own bylaws (that 2016 included) in light of

stress tests like this. And that kind of Board resolution is a business practice of a Board interpreting what its bylaws and articles contain.

And second, and finally, I would say, as another step, after the Board does that resolution, Jamie, it would be so helpful if ICANN would issue guidance to applicants as to how to phrase and construct not only their RVCs but the compliance mechanisms, the monitoring, and reporting mechanisms that we'll use that'll ensure we get better product when the applications are opened. Thank you.

ALAN BARRETT:

Thanks very much, Steve. And that is an interesting idea for the Board to resolve: something about how it interprets the ICANN bylaws.

Who wants to go next? Nigel, can I call on you again?

NIGEL HICKSON:

Yes, you can call on me. Thank you very much. So this seems to be the sort of middle case. So it's interesting that it comes at the end. And I think we are doing stress tests here. And I remember very well the excellent work that Steve did on stress tests, and I think we owe him a debt of gratitude for that.

And the stress test here is interesting because reading dot-election, dot-cancer, and dot-designer (and of course, these are just examples), I think it's slightly different context here in that with dot-election, the restrictions that we're placing on ourselves here do seem to be somewhat problematic in terms of their enforceability. They are rather

subjective. Perhaps one person's view on what speculative use is not necessarily someone else's.

So I think it's important that this is here because it makes us think, whereas dot-designer is a fairly sort of practical requirement in that you only have certain types of registrations, and perhaps it's the same for dot-cancer.

So again, we come back to this notion that if we are all agreed, (if the applicant is agreed, if the community is agreed, if the ICANN Org is agreed) on the ability to have a voluntary commitment (and that's what these are; they're voluntary commitments), then there should be a way of making it enforceable. And if there's not a way of making it enforceable, as Becky Burr said at the beginning, then clearly it can't proceed. But we should do our best for all parties to ensure that, where possible, these requirements are enforceable. So thank you for the examples.

ALAN BARRETT:

Okay, thanks very much, Nigel, for your comments. Justine, let me call on you next.

JUSTINE CHEW:

Thank you, Alan. I don't think I'll use two minutes. So from my limited experience in ICANN, just a cursory look at the bullet points that is on screen, I do not see anything that is contrary to consensus policy, or I don't see anything that consensus policy of ICANN in existence would prohibit any of these things. And you may say that we don't want privacy/proxy, but it is a fact that there is no prohibition against that.

And if a registry wants to make the registrant not hide themselves, then that's fine as well, because there isn't a prohibition against that either.

In terms of requiring registrants to publish their own data (contact data), again, there is the word “consent” in there. So if the registrants themselves consent, then what is the problem? There are also certain jurisdictions in the world that require this, may require this, may not be aligned with GDPR or whatever. So it really depends, again, on what the commitments themselves say.

But in essence, again, if they do not harm ICANN and they do not harm the end users, at the end of the day, I do not see why we shouldn't allow these. Thank you.

ALAN BARRETT:

Okay. Thank you. Jeff, I think you want to go next.

JEFF NEUMAN:

Yeah, thanks. I'm not sure I'm going to use the full two minutes, but actually, who am I kidding? I always do. It's interesting to note that all of these, except for the dot-cancer example, are actually being done by registries today—not all registries, but some—that require a lot of these things. There are, for example, registries that require certain things to be added in WHOIS; like dot-art has added a WHOIS field for artworks and other things to be put in there. So all of this stuff happens today.

Is this regulating content? The answer is yes. Is this ICANN regulating content? The answer is no, it is not. And I will stick to the point of, so long as it's not ICANN making the decision as to whether the registry is

or is not compliant, and it is some other party, and ICANN is merely implementing voluntarily agreed-upon sanctions that are in the registry agreement, it is fine.

And the one thing I want to clarify is I think Nigel said something like, if they can't agree, then it can't move forward, or something like that. I want to be clear: if they can't agree, it can't go in the agreement, but that in no way should prohibit the registry from going forward. And that's what we're talking about. And that, I think, is going to be one of the hardest things in the ICANN community because let's say the GAC has advice to do something. The registry and the GAC agree to some mechanism to do that, but ICANN determines that can't be in the contract. The registry is going to say, "Well, it can't be in the contract, but we still need to move forward." And I think the GAC would likely say, no, it shouldn't move forward if there's not a contractual obligation. And that's where the rubber is going to hit the road. And that's the difficult scenario that we know will likely happen.

ALAN BARRETT:

Yep. Okay. Thank you. Yes, that is going to be a problem. The Board would then have to decide whether or not to accept the GAC advice.

Kathy, you can go now.

KATHY KLEIMAN:

And I may take just a little extra time for my last time. So we don't know where these commitments are coming from. They could be coming from the GAC. That would hold a lot of weight, but these commitments could also be coming from the largest competitors in the world. So

where are they coming from? I know that my job on this panel is to tell you how silly some of these are and how difficult some of them are, but I'm going to tell you more than that. So let's look at these.

So dot-election requires registrants to consent to the publication of their own contact data in the public WHOIS. I don't know about your countries, but being an election candidate is a dangerous thing in my country right now. It's getting very dangerous for women, for minority candidates. They don't want to publish their home address if that's their contact information. That's just a bad idea. And we can imagine much, much worse. We haven't even talked about a screening process for what's good and what's bad, or whether we even want ICANN making that decision. And I would argue that we don't.

And for dot-cancer, what authority does ICANN have over websites anyway? This is *ultra vires*, outside the scope of ICANN's remit.

But what we really need to look at is how we're supposed to make policies. These are the exceptions—exceptions created for timely advice from the GAC within the scope of ICANN. That's what we understood in 2012, 2013. Sorry for the cold. But we committed in our mission statement that we would coordinate the allocation assignment of names in the domain name system through a bottom-up, consensus-based, multistakeholder process.

And Steve, I'm going to go to another core value. It's the fourth one: that we would introduce and promote competition and the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up multistakeholder policy development process.

So I need to tell you (and if I might have 30 more seconds, Alan) that many of these things actually invoke and are within the restrictions and invoke policies that I, others on this panel, and all of us have spent decades working on, whether it's the fair disclosure of personal data, whether it's the right balance on the rules for proxy/privacy, whether it's first come-first serve, fair use, free speech, how we protect small businesses and entrepreneurs, and trademarks and the balance with words. These are all part of what we've done in the multistakeholder process.

So when I look at these RVCs, many of them violate the commitment we made to the multistakeholder model, because they're coming into the sphere of what we make policies on together. They're not particular necessarily to these strings. They're particular to the DNS. And that we're supposed to do together.

So can we go to the questions very quickly? For many of these, some are borderline regulating content, but even if they're not regulating content, I think many of these commitments cannot be included in the registry agreement because they're not consistent with the bylaws. And that makes number three irrelevant. Thank you.

ALAN BARRETT:

Okay, thanks very much. Thanks to all our panelists. So we've gone through three different types of hypothetical commitments. We've tried to explore whether or not they would be consistent with the bylaws, as well as whether or not they could be enforced.

And now I'm going to hand it back to Becky.

BECKY BURR:

Thanks, Alan, and thanks to all the panelists for these comments. I'd like to open this up into a bit of a discussion. We had a discussion yesterday as we were preparing for this. It was respectful, and we weren't yelling and interrupting over each other. So I'd like to just recreate that.

And I'm going to start with a question that I prefaced beforehand, which is, okay ... Well, first of all, we won't know until there's an IRP whether enforcing a decision of a third-party body is regulating content or not. That's a problem. If we go down the road and accept a bunch of commitments to address GAC concerns or other valid concerns, and suddenly they turn out to be unenforceable, that worries me. But more fundamental to that is, should ICANN be involved, however tangentially, in enforcing a commitment not to have speech that is contrary to established government views?

Steve, go for it.

STEVE DELBIANCO:

Thanks, Becky. The “contrary to law” was cleverly positioned about speech, but we already require all contract parties to honor the terms of the contract subject to what is applicable law. And that comes through on consumer protection, antitrust. And there may be plenty of laws regarding elections.

So it isn't a third-party monitoring service that determines that. Instead, it's the applicable law enforcement agencies and the courts that would interpret whether or not they had broken the law. And that is between the courts and the registry operator for their facilitating the

breaking of a law with a registration that lives on one of their web pages. If that makes its way to ICANN, it would be a notification from law enforcement that we have a contract with a party that is in violation of law, and that may or may not lead ICANN Compliance to say that they have violated their contract. That isn't for us to determine on the breaking of laws.

The second point I'd bring up is that, Nigel, you talked about, if they can't agree, the application can't proceed. And I wanted to comment on that because the IPC and BC had slightly different interpretations there as to whether the application could proceed. But if it did proceed, and ICANN couldn't agree that it was an enforceable and practicable contract, well, then the GAC might not withdraw their objection. The GAC might well issue consensus advice that ICANN shouldn't delegate without these contractual provisions being baked in. So it's an open question of whether it proceeds without the terms or not. And ICANN can override. The Board can override GAC consensus advice, but the standard is much higher.

And then finally, Kathy said that we cannot include these items in the contract. And Kathy, I would just suggest to you that the PICs and the safeguards that are already going to be baked into the next round include the exact same kinds of content related matters about which ICANN is committed to enforce. So by focusing on only the voluntary, I think you make the weakest possible case, because the voluntary ones are not even coming from ICANN. They're coming from the competitive, innovative applicant who wants to do something different.

KATHY KLEIMAN: Steve, if I may, we agreed that this session today is about voluntary commitments. We agreed to that yesterday; that it's the only thing we're talking about here and that everything else is out of scope. I just wanted to share that: that's where we agreed we'd start today.

BECKY BURR: And that's definitely true. So Jeff and then Nigel are in the queue.

JEFF NEUMAN: Yeah, I really think not enough attention ... There's so many people, whether it's even in the chat or it's up here, who talk in these broad terms about what it is to “regulate,” and I want to just point out that the bylaws do state that “regulate” ... When it says in Section ... where is it? Okay, C. So it's whatever that section is. C. Mission 1.1C. It defines “regulate” as “ICANN may not impose rules and they may not impose restrictions.” It doesn't say that registries can't impose rules or registries can't impose restrictions. And it does not say that ICANN cannot implement mutually agreed-upon sanctions if there's a violation. And I think people on this panel, in the comments, and everywhere else are conflating regulation as meaning the whole thing, from soup to nuts, of the initial, imposing rules and restrictions, but also all aspects of enforcement and all aspects of sanctions. And I think that's not what the bylaws state.

We should not be talking in such broad terms. And when we make statements of, “Well, this violates the bylaws,” we really need to be specific.

And I agree with everything that Steve said. The contracts currently state that if there's a violation of the law, ICANN may terminate the agreement. That doesn't mean ICANN has to make the determination if there's a violation of law. It just means that when there is a violation of law that's found by someone else, then ICANN has the ability to terminate, just like it has the ability, if the company goes bankrupt, to terminate. Well, ICANN is not making the determination that the company is bankrupt. That's made by someone else. And it also says that ICANN could terminate if the founder or officers or directors are convicted of a crime. ICANN is not determining whether they're guilty of a crime, but if they are by the U.S. or wherever, then ICANN has the discretion to impose a sanction. That's what we're talking about here.

BECKY BURR:

So I just note that you said ICANN has the discretion. That's very important and plays into this. Nigel, then, Kathy.

NIGEL HICKSON:

Yes, very briefly, and I'll be very simplistic, because I have been throughout my career. So I don't understand something here, and perhaps it's just because I don't understand it, but we went through the various scenarios, through the stress tests, and we went through, in particular the first one. And for the first one, we all said, yes, no, no, or no, yes, yes, or whatever, and we might have got it slightly in the wrong order. But we all agreed that, for instance, on dot-election, registrants' identities must be verified. We thought that was reasonable.

Okay, so this is the test. So let's assume there has been GAC advice, but it doesn't matter whether there's been GAC advice or not. It could have been an objection. It could be something else. But the agreement is that credentials have to be verified. There has to be some verification system. And the registry negotiates with ICANN, but because it knows, on the scenario that Jeff was putting forward, (and perhaps I've got it wrong) at the end of the day, that if it doesn't reach agreement, it can still go forward. Then why would it even negotiate? Why would it go into detail on how to verify registrants' credentials if at the end of the day, if agreement couldn't be reached, it could go ahead and do what it wanted.

So surely if an agreement can't be reached and there's good faith on all sides, then it can't go forward. I mean, it's common sense. It doesn't matter whether it's GAC advice or not. It just doesn't seem logical.

BECKY BURR: Kathy, go ahead.

KATHY KLEIMAN: Becky, it was a little while ago, so let me just double-check that the scenario is dot-election under national law, and ICANN is informed that there's a violation of law.

BECKY BURR: You're informed by the third party that they have violated the law against asserting views contrary to the views of the sitting government, or even if there's a conviction.

KATHY KLEIMAN:

Right: is there a line? So if it's in a commitment that ICANN is going to enforce it, then we've got an issue. And it's exactly the issue I think we want to avoid. We're trying to get ICANN out of things that relate to content and relate to the content, where there are differences between national law. So hate speech is unfortunately legal. It's legal in the United States under the First Amendment. I don't like it, but it's legal. It's illegal in Europe. Similarly, with different types of election rules, there are some countries where you cannot insult or critique or criticize existing political figures, and some where they don't. The laws that matter here are the laws where ICANN is and where the registry is. Once we put this into a PIC, into an RVC, the commitment becomes generally enforceable. This is where we want to stay out of. We really don't want to go into this area.

And I want to let you know that these issues are in front of you right now because the Subsequent Procedures Working Group couldn't address it. A letter came from M[aarten]. I see him in the audience where the Board (or he was in the audience) is concerned that the current bylaw language would create issues for ICANN to enter and enforce any content related issue regarding PICs or registry voluntary commitments. And what the minority report wrote, including me, was, unfortunately, these issues went unreviewed, unresearched and unresolved by the SubPro Working Group, including in the final report.

This is now where we're debating: what the line is between content and non-content is, content related ... ICANN should just stay out of it. We drew a bright line in the bylaws. We drew a bright line with our mission:

things that ICANN can't enforce directly can't be delegated to a third party and then enforced by ICANN. That's all under ICANN's authority. Let's just stay out of the mess.

BECKY BURR: Thanks. I've got Steve and then Jeff in the queue.

STEVE DELBIANCO: Yeah, it'll be very fast. And Nigel, the thought exercise would be that if an applicant for dot-election said they were going to do verification of candidates per applicable law but ICANN for some reason couldn't come to agreement that it was practicable and enforceable. The next step is that the applicant pulls that out of their contract. They take it out of their proposal. The application is still alive, but now that it's been modified, it's going to invite potential objections from the GAC or a government.

NIGEL HICKSON: It's still alive.

STEVE DELBIANCO: Yes, it's still alive until they withdraw or that there's an objection that kills it, because as it moves forward, it's going to encounter an objection. The GAC is likely to object with consensus advice, which really creates the presumption that it would not proceed. And there were plenty of applications in 2012 that did not proceed because of GAC advice.

JEFF NEUMAN:

Two things. First, just to correct Kathy, the SubPro did come to consensus on this issue, and the council unanimously approved it. Disagreement by one person who writes a minority report does not equal no disagreement, and that's why we're here. We're here ... Why SubPro didn't address it is because, frankly, the Board didn't bring it up until its comments to the final report, and by then we were wrapping up our work. And frankly, that was a much bigger issue since it's ultimately, at the end of the day, the Board that interprets the bylaws, not a working group. So that's the reason why we're here.

Second thing is, just remember, Nigel, that we're not just talking about here where there's GAC advice. We're talking about where there's maybe one government that submits an early warning. Or two governments. But not GAC advice. So you have to look at the reasonableness of what's being asked for in the objection and make a determination. And that's ICANN's role. The Board will have to deal with that. But yes, ultimately, it might be common sense that if it's just one government and there's no reasonable way or enforceable way to put it in a contract, that doesn't mean that ICANN Board should not let it go through. Right. So they're going to be put in a hard situation, but I just want to be clear ...

And also for everyone else, we're not just talking about government objections. We're talking about public comments to an application or objections: legal rights objection, a public interest objection. There's four of them. Community-based objection. So if there's an objection filed, and an applicant can reach a mutually acceptable agreement to

the objector and the applicant, but ICANN can't find a way to put it in the contract, why would you not let it go through? Because again, the applicant and objector came together and agreed that what the registry was going to do solved the problem. And if the problem is solved, then just because ICANN cannot put it in their contract doesn't mean it shouldn't go through.

BECKY BURR: Nigel, do you want to respond? I've got Kathy in the queue if you don't.

NIGEL HICKSON: Yes, absolutely. I wasn't trying to suggest that just because I come up with an early warning because I don't like my strawberries, all of a sudden the applicant should withdraw or anything like that. Of course not. I was really at the next stage, where there had been GAC advice on strawberries and perhaps all the community as well. We all agreed on this. So we were negotiating with the applicant. It was at that stage. And the applicant would then presumably have to come up with something that was acceptable.

BECKY BURR: Kathy, briefly, because we're getting to the end.

KATHY KLEIMAN: Two sentences. Why shouldn't ICANN just put it in the contract if there's an agreement between the applicant and the objector, whether the objector is the GAC or others? Because it may not fit within your mission and mandate. That's what we're talking about: what fits and what's

within the bylaws and what you want to enforce. And we're trying to create clear rules, clear guardrails, that are consistent with the core values. Thanks.

BECKY BURR:

Okay, we're getting down to the end. We do have a couple of comments and questions in the Q&A pod. Siva asked about dot-election and what if the registry denies access to opposition?

It's sort of what I was talking about, Siva, and I think we're getting at the same issue. There is a question of whether you want ICANN to be deciding or even enforcing somebody else's decision about whether somebody has the right to say what they're saying with regards to elections. And I think that's problematic and we're going to have more conversations about that.

Michael Palage commented on the repeated use of the word content, describing it as polarizing, suggesting that we should be talking about use of the domain name.

And he also points out that the UDRP does look at the use of a domain name. I just want to say with respect to that (and I see you sitting right in front of me), the Spec 1 ... The picket fence for registries and registrars are different. The picket fence for registries says no content. The picket fence for registrar says you can look at use of the string. And that is specifically for the purpose of deciding whether a use provides evidence of a trademark violation. So I'm not sure (we can talk about this a lot more) that that use is helpful in that context and would point out that the registry statement of the picket fence has always

prohibited content views. So let's not mix content and trademark, which we brought in since day one.

We're getting to the end of this. I just want to sum up. We've had a good discussion. It is the beginning. I think there are still a lot of issues that we have to drill down on. I in particular think we need to think hard about sort of the mechanical, yes, ICANN can mechanically enforce a decision by a third-party body with the important question of, at what point do we say no, we don't want to do that? And I think it's different to have an implied obligation to comply with applicable law in a contract, where contracting parties have the authority to enforce or not enforce, versus putting it in a PIC, where we're making a promise to the community that I can is going to do something.

So I am troubled by the ... Well, I just think it's not enough to say, "Yes, ICANN can do it," because it's not enforcing content without talking about, where's the line where we say no, sorry, that's a line too far? That is a conversation for another day.

Another important conversation is we keep talking about third-party bodies. Do we want to force every registry applicant to stand up an independent third-party body to evaluate this and impose costs on them? And what's that going to do to whom new gTLDs are accessible? I think we haven't scratched the surface on that.

I'm conscious that we need to drive this discussion to the ground in order to meet our timeline for the next round. And so we're going to do that and we're going to keep having this conversation.

I want to thank everybody on the panel for being willing to spend quite a lot of time preparing for this and participating in this. I want to thank everybody in the audience. I promise next time we'll get more participation. But there is a public forum, and you're welcome to talk about this at the public forum, and it would be great to have a lively discussion. So thanks to everybody, thanks to the audience. And more to come.

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