
ICANN69 | Community Days Sessions – GNSO - New gTLD Subsequent Procedures PDP Working Group (2 of 2)
Wednesday, October 14, 2020 – 16:00 to 17:00 CEST

TERRI AGNEW: Good morning, good afternoon, and good evening; and welcome to the New gTLD Subsequent Procedures Working Group Call, Session 2 of 2, taking place on Wednesday, the 14th of October, 2020 at 16:00 CEST.

Please note all Working Group members have been promoted to panelists. Panelists can activate their mics and type in “Zoom Chat Pod.” To do so, please remember to select All Panelists and Attendees in the drop-down menu so all can read your comments. Panelists cannot ask questions via the Q&A pod, so we ask that you kindly type them clearly in the chat pod.

We are welcoming observers on our call today. A warm welcome to you all. Observers on this call are still silent, meaning you cannot activate your mic.

As a reminder to all, this call is being recorded. Recordings will be posted on the ICANN69 website shortly after the call ends. All panelists must remember to state their name before speaking. All participants on the call must abide by the ICANN Standards of Behavior.

With this, I’ll had the floor back over to co-chair, Jeff Neuman. Please begin.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

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JEFF NEUMAN: Thank you very much, Terri. Welcome back, everyone. This is the second session. This session only runs an hour. We're just going to continue where we left off. If you missed the first session, you missed some excitement, but you can catch up. I'm told the recordings will be up on the ICANN schedule within 24 hours. The sessions from yesterday, some of them were up a lot sooner than that, but at the latest, 24 hours from now.

Let me just see if there are any questions before. Anne, I saw your hand raised and I want to start with your question. Anne, go ahead. I think it's going to be what I was going to start with, but why don't you just go ahead.

ANNE AIKMAN-SCALESE: Thanks, Jeff. It was the one that I asked out of order because I didn't understand originally that we were doing this topic by topic; which was the board and ICANN Org's expression in both comments relative to whether or not [inaudible] call into question, at this stage, the issue of whether or not community applications should proceed on a priority evaluation basis.

And I wondered if Avri could—I don't know if Avri's on this call, but...

JEFF NEUMAN: Before Avri jumps in, let me just do a little introduction and bring everyone up to speed; and then I'll turn it over to Avri.

These comments actually relate to a number of different topics including PICs and registry voluntary commitments, as well as one area within string similarity; and so, it relates to language. Well, let me just read the comment that ICANN has, and then I'll go over the questions.

And I did just shoot over an e-mail to Avri and Becky a few minutes ago, so I don't expect them to have full answers. I'll forward it to the group as well, unless Steve, Julie, or Emily could do it because I CC'd you guys, and Cheryl.

But essentially, what the ICANN board says in the Registry Voluntary Commitment section—which applies to the community section as well, sort of—is that “The language of the Bylaws, however, could preclude ICANN from entering into future registry agreements (that materially differ in form from the 2012 round version currently in force) that include PICs that reach outside of ICANN’s technical mission as stated in the Bylaws. The language of the Bylaws specifically limits ICANN’s negotiating and contracting power to PICs that are ‘in service of the Mission.’ The Board is concerned, therefore, that the current Bylaws language would create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments.”

Has the PDP Working Group considered the specifics in the ICANN Bylaws as part of our recommendation or implementation guidance, and with respect to communities it essentially says a similar thing but just says that—the whole notion of CPE is based on prioritizing

registries that qualify as a community-based application and then depend on enforcing those commitments?

And so, the question becomes, does the whole notion of having new contractual requirements that are different from those that were in 2012—because those were specifically grandfathered into the Bylaws—Does that present a problem from ICANN’s perspective? And the specific question that I’ve asked back is, does the fact that these registries—whether it be PICs or voluntary commitments or commitments as a community—they’re making these commitments voluntarily?

They’re not being, at least with respect to communities—and most of the RVCs and PICs (we’ll talk about some different ones later on) are doing those voluntarily and ICANN is not doing the content regulation, but is rather just ensuring a registry is essentially doing the job it said it would do and living up to its own commitments.

So, the question back is, why is there a belief that enforcing what a registry said it was going to do—why is that interpreted as potentially being content regulation?

Avri, I’ll throw it over to you, not expecting a full answer, but some thoughts.

AVRI DORIA:

Hi. Let me try and approach some of these. And also, you’ll find that there will be differences in some of the emphasis of comments that

Org gave versus ones that the Board gave; and so, I'm really only talking about the Org ones.

I think a couple issues got sort of pressed together in the exposition you just gave. One set of issues relates to, if there are commitments that ICANN is responsible for enforcing for such, then can we do it? In other words, do we have the ability now? When there is a specific set of identifiable contractual conditions that have been reached, they are able to take enforcement actions.

Now, if it requires making an interpretation—a look at content; a complaint comes in about content—is that an activity that ICANN Org can actually engage in if there's some sort of specific other criteria?

The Board's also trying very much to stay away from solutionism from trying to say, "We've got an idea of what the solution should be. What we're really looking at is the issues." We're certainly not asking the SubPro to solve the legal problems, but we are looking for it to have discussed and looked at the legal implications of some of the conditions that were put in during the Transition and into the Bylaws that sort of says, "ICANN needs to not take content-based action."

Are there other ways for us to do the job? I don't know. It's a question for you at the moment in terms of, are there contentless or non-content interpretation non content-based actions?

So that's one set of issues, and we can get deeper into that. And if we get very deeply into it, Becky—who's my co-liaison—may, as a lawyer, be better at putting some of them in proper terminology.

In terms of the CPE, two things to say. We're not trying to make a comment about whether there should be priority or not. That was a policy issue in that. What's being looked at, however, is the results of the CPE from last time. The fact that nearly all of them ended up in reconsideration or more basically being seen as sort of an indicator that there are some issue in the whole CPE process itself.

And I know, and I've sat through many of the sessions where a lot of, Well, if it was this points or if they got the points this way instead of that way, then that might help." And perhaps it does. Perhaps once you look at it and say, "Yep. CPE was challenged all the time—last time because of XYZ, and we have closed the doors on XYZ with the following considerations," then that's a good answer.

We're basically looking at things and sort of saying, "Gee. Is there a problem here? Is there something we would have to deal with? Is there something that would force the board into the adjudication process?"

Okay. If it happens every once in a while, that's one thing for interpretation. But if, in something like CPE, you see it happening with every one of the judgments, you start to wondering, "Does the mechanism work?"

And that's really the question that's being asked? Is this a working method? Have you shored up, fixed it enough so that it is a working method? So those are at least two of the issues. There may have been a third that was mixed in there, but that's the kind of issue, and

sort of the way of looking at it. So, in no way is the Board saying, “We can’t do this.”

And then there’s other discussion going on that—I don’t know to what degree SubPro or the GNSO Council takes an approach to it, but it’s something that the Board’s being addressed about a lot on—can you do things in the contracts that aren’t enabled by the policy? Can you do things in contracts that may violate the Bylaws?

Now, the answer to that one seems to be no—or, we shouldn’t. So, how do we basically deal with the mission statement of no-content mission?

I don’t know if that helps at all, but that’s a first approach to trying to answer some of the questions you’ve asked.

JEFF NEUMAN:

Thanks, Avri. I think that’s a helpful explanation. I think a lot of this is going to be sort of a legal interpretation, so Becky will be kind of instrumental in that. The Working Group discussed some of this on one of its previous calls, it might have been the last one.

I think that—well, a couple things. One is that the way we framed it is that there are ways to do this by treating it as a breach of contract that ICANN could then, by having, let’s say, an outside panel make a determination on whether—in a PIC DRP, for example—there was some violation. And then ICANN would only be taking a breach of contract action if the registry is not doing what it said it would do, not

what ICANN imposed on it to do. I think that's a distinction that we would like to sort of explore.

But the other thing that's equally important is, I think that the community, if there is an issue with the Bylaws... Bylaws can always be amended, right? So, if the community substantially supports the notion of having these types of narrow PICs—or allowing these scenarios in which it's not regulating content, per se, but actually just seeing if a registry is living up to its contractual commitments—if amendments to the Bylaws are needed, there is a process for doing that. It all depends on the community's desire to want to have this.

We're going to discuss within the Working Group whether this is something we want to keep and recommend, but I'm not sure the Working Group needs to be constrained by the current Bylaws at this point because those can always be changed if it the desire of the community; and there's a process for that.

Go ahead, Avri. Yeah, please.

AVRI DORIA:

If I can respond. If there is, indeed, a—you're right. The board is constrained by the Bylaws. If the recommendation that comes out of GNSO Council includes a recommendation for a Bylaw change that makes things work, that's a different story. Or, if we end up with recommendations that can only be solved with a Bylaws recommendation, then the Board would look at it.

And then, yes, we would go through a whole Bylaws change process with community consultation and community comment and EC involvement, and that whole process. But, as things stand now—and basically what we’re saying is, “Please notice this. Please take it into consideration. Please give a solution or tell us why we’re wrong.”

But these are the questions we’re having in the effort of, we’ll ask our questions now as opposed to shocking you later when you have a final product that says, “Oh, but we had question A,B,C,D.” No. At this point it was, let’s look at it and see what questions we have, what issues we may have to deal with when, if it came in this shape now, what might we have to do? So, that’s really the point of it. As I said, not trying to predicate a solution or a particular solution path, but just say, “These are the questions that sort of got us wondering at the moment.”
Thanks.

JEFF NEUMAN:

Thank, Avri. I see there’s a queue, so I’m going to get to that in a second.

I think, at this point, I’m not sure the Working Group has the ability. It’s more of a legal determination by, let’s face it, the counsel of ICANN to determine whether this is a violation of the Bylaws or whether doing this would violate the Bylaws. I think at this point, all we as the Working Group and then the GNSO Council could say is, “Look, Board. If you think there’s an issue with this under the current Bylaws, then do what you need to do to fix that.” Right?

We wouldn't say, "Amend your Bylaws," because I don't think anyone in the community would say it's definitively a violation of the Bylaws because we're not really qualified to make that legal determination. So, it may come across more as—and again, this is all predicated that the community wants this and this is our final recommendation—but we could say, "You know what? The community really wants this to happen. If the Board believes this is not currently allowed in the current Bylaws, then Board, do what you need to do. Start the process you need to do to allow it,"—I think is more how it could come across.

Alan, Kathy, Justine, and Paul. Alan, go ahead.

ALAN GREENBERG:

Thank you. Jeff, you actually hit on what I was going to say, essentially. The wording in the Bylaws is...I guess I'll say interesting. It doesn't say the new registry agreements past those signed as of the 1st of October 2016 can't be changed or can't be different.

It says, "the underlying form of the registry agreement must not change"—at least the way I read this—and, from my perspective, saying we have different wording in the PIC which relates to content, but it's the same general form of [content]. It's a PIC in that spec in the overall recommendation. That doesn't change the form, and therefore it should be enforceable.

But that really becomes a question of, will ICANN legal counsel accept that compliance can enforce it, or will we find out way down the line that someone says, "Oh, no. It's the same form, but the wording is

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different, therefore it doesn't count"? So, it really is a determination from ICANN Org and directed by the Board whether this is going to be enforceable or not if we follow the same form but with PICs that are specific to the TLD that we're looking at and the registry that we're looking at.

We really need input as to whether the wording allows us to have a new applicant specify new PICs which are related to content, and will they be enforceable under this wording. From my perspective, I think they are. I think it's allowed, but the question is, will ICANN react that way? Thank you.

JEFF NEUMAN: Thanks, Alan. Next is Kathy.

KATHY KLEIMAN: Hi. Thank, Jeff. And thanks, Avri. I read the transcript of the last meeting, which I couldn't attend because I was teaching, and we had a number of comments—frankly, from the same constituency—that just basically, as I interpreted them, said to ignore what the Board had said (ignore what was coming in on the advice).

I'm concerned. We've talked a lot about PICs for the people who are following us. We put them into two categories: mandatory PICs (Public Interest Commitments that were decided together by the community after 2012—after the New gTLD program was started. But at the time the mandatory PICs were opened, also voluntary PICs were opened;

and they became a kitchen sink, a complete dumping ground for anything the registry wanted to do, including things that completely deprived registrants of their rights and due process, and kind of entered utterly into content.

So, I think the Board is raising some very, very important issues, and I have to say no, I don't think we've really considered these issues. I think we do need to consider these issues, and I don't think shunting them aside and saying we're going to ask for a Bylaw change is right. The world has changed since 2020. We know have Bylaws that we have adopted as a community as part of the accountability mechanisms for independence from the U.S. government.

So, these are constraints. I think we have to operate within those constraints and come back and think about these RVCs, our new term private Public Interest Commitments. I think we have to rethink them. I think we've been given some new guidance, so I'd like to urge that the Working Group stop rejecting the argument about the content PICs, the concerns that have been raised. I think we've now been told at some of highest levels that we need to pay more attention to these. Thanks.

JEFF NEUMAN:

Thanks. And I will read some of the chat after we get through Justine, Paul, and Jorge. Justine, go ahead.

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JUSTINE CHEW:

Thanks, Jeff. I'm having a look at the ICANN Bylaws, in particular Section 1. Obviously, this is up to legal interpretation, but I look at it from the point of view that the restriction on content isn't the be-all and end-all. As far as I can see, the mission of ICANN, as upheld by the ICANN Board, also involves enforcing bottom-up consensus-based multistakeholder processes which are designed to ensure the stable and secure operation of Internet's unique name systems.

So, stability and security are also part of the ICANN's mandate, not just restricting content, right? So, for me this question—especially in relation to string similarity evaluation, in so far as it comes on string similarity evaluation using PICs to differentiate between the uses of singular and plural word—that goes very much into the stability and security aspects of the mission, rather than content.

For the other ones, maybe it's a little bit iffy, but the Bylaws Section 1.1D also has a provision that says what is done, notwithstanding the foregoing (which refers to the mission above), "ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments, with any party in service of its Mission."

So, I'm not quite sure where the Board is coming from in this respect. Thank you.

JEFF NEUMAN:

Thanks. Paul and then Jorge. Kathy, I'm going to assume that that's a leftover hand. Paul, go ahead.

PAUL MCGRADY:

Thanks. First, I wanted to dispel any confusion by any of the 82 attendees who are on this call but may not have been on the last call. I don't know of anybody that was saying that we should just summarily reject the Board's [inference] here. I would respectfully disagree with my good friend Kathy on that point.

I do think that we're trying to understand where the Board's coming from. As Justine just mentioned, it's not necessarily obvious or clear to us, and we are sort of in a pickle between trying to decipher the Board's position—decipher what the general counsel of ICANN's position may be—and also try to figure out how to not get set back months behind on our work because many of the [thornier] solutions that we came up with here really rest on PICs and RVCs. And a lot of the GAC concerns rest on PICs with sensitive strains which were big news in the last round, right?

So, that's kind of where we're coming from. It's not that we're trying to reject anything or hide our heads in the sand. This is a confusing space, so I would like to thank Avri for her inputs. I understand that we may—I hope we hear further from Becky and some of the more legal details from where they're coming from.

But for right now, if I could ask just a very narrow question. The question isn't PICs or RVCs specifically as tools; it's PICs and RVCs as they pump into what some perceive to be content issues, correct? So,

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it's not that we have to throw out all PICs and RVCs everywhere. It's just as they bump into content. That's the issue, right? Thank you.

JEFF NEUMAN:

Thanks, Paul. I think it's actually broader than that. It's not just PICs. It's anything in the contract, in theory, whether its PICs or whether its RVCs or whether it's a contractual provision against fraud—I think it comes up as well. It's essentially anything that in any way could tangentially cover the content that is associated with the TLD.

I'm going to go to Jorge then Avri, and then I'll jump in with some of my own thoughts. I'll put myself in the queue after Avri.

Jorge.

JORGE CANCIO:

Thank you, Jeff. This is Jorge Cancio from the Swiss government—a GAC representative typically, but I'm speaking here in my personal and my national capacity; and also in my capacity of someone who was very much involved in the drafting of that part of the Bylaws in 2016.

I think that, as many of the pieces we agreed in 2016, this was a good compromise; and compromise means that it allows for different readings. So, I understand that there might be a reading in the line of, well, what if what is being proposed by the Board in its question (because it's not proposing anything; it's just posing a question), but at the same time, there are many other readings, I think.

So, I feel that the reading of the question coming from the Board goes very much in the direction of trying to limit as much as possible any risks, any legal dangers. But, I feel that this is only one view of that section of the Mission, which is much wider; and as I said, it was the result of a good compromise during the 2016 discussions and negotiations.

So, if we look at the Bylaws text first of all, as Justine has said, what does the Mission really cover? So, there are many general or undefined legal terms there. So, that's the first point.

The second point is what does, really, "the restriction or the prohibition of ICANN imposing regulations on content" mean? What does it really mean? So, that's also an open question.

And then we go to other parts of the compromise of 2016 because it appears, from what people are saying, that the grandfathering was only covering what existed in 2016, but that's not true. It really extends to any new terms, or PICs, that are more or less the same, or similar, or analogous to the pre-2016 PICs. So, that's set in the Bylaw itself.

And when it says that it would cover terms that do not vary materially from the form, etc., that existed in October 2016, there was obviously an intention behind that trying to allow for similar PICs in the future, very explicitly.

And finally, we have, as Justine mentioned, the little roman four (iv) that explicitly, again, allows for new PICs to be agreed and to be

enforced in the future. And this is no accident. This was the result of very long negotiations.

So, I think that it's also very important for this Working Group to look at the overall interpretation and also at the history of the creation of this piece of the Bylaws—and not only at this piece of the Bylaws from a risk-averse or risk-limitation approach which lingers a little bit behind the question from the Board. Thank you very much.

JEFF NEUMAN: Thanks, Jorge. Avri, and then I put myself in the queue, and then Anne.

AVRI DORIA: Okay, thanks. I can try and hit a couple of the points. First of all, thank you very much for taking these into consideration and thinking about them and talking about them. And in a large sense, what the questions are meant to do is to elicit answers, perhaps policy-based answers, that sort of direct the Board in such.

I cannot say, as a Board, that we won't always do a risk analysis and ask questions about things that may or may not be risky. Everybody is risk averse to some degree. To what degree are we being risk-averse? Sure, it is part of the fiduciary responsibility, so I think the Board will always take blame for being cautious about risk.

But I think what Justine asked as a question of what's the Board trying to do, I think it's very much, "Get clarification on these. Get discussion. Get an understanding of the policy basis for that." I think, on the

grandfathering clauses, I was really quite surprised to hear the interpretations today. Those are interpretations that I had not heard before, but I'm happy to hear them.

It's basically finding a set of answer to these questions on making... The proposal that you just put forward, Jeff, on how somebody else is making a decision—an external body is making a recommendation and it kind of activates a contractual [condition...possibly.] It's for you all to recommend those kinds of mechanisms, and if there is an objective mechanism—or a relatively objective mechanism—that doesn't involved an interpretative problem related to content, there may be a solution.

It's really jut opening up the question and basically looking for the policy-based answer, the legal what will come beside it. Legal can come talk. Becky, as I said, who's able to talk legal much better than I can hand-waive it, is, as I say (one of the two of us)—she's just following different tracks with the Board today.

So, it's the conversation. It's the thinking about it, and it's getting a policy-based answer to what is being recommended because the Board always has to go back to that bottom multistakeholder process answer on these questions. There's the legal that constrains us, and there's the bottom-up multistakeholder process policy view that tells us what we can and can't do.

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JEFF NEUMAN:

Thank, Avri. And definitely, we do appreciate all of these comments, and we're glad to get it now as opposed to—as I've seen some of the chat comments—after the Council approves it.

And I guess this is sort of just my own personal view. I don't think we could get agreement within this group on one interpretation of what the Bylaws mean.

The second point is, even if we did it's really irrelevant. There's one entity, and one entity alone that is responsible for interpreting its own Bylaws—and that's the Board. And so regardless of whether we say we think it's in scop or not, the Board ultimately, at the end of the day, has to make that determination. So, we could spend a lot of time talking about whether we think it violates the Bylaws and, still, it's not going to mean anything.

We have to decide as a Working Group what we think the policy should be and what we want to happen. And the community then needs to, obviously, affirm that through its processes—through the public comment period and everything.

And I disagree with Paul that this is poor thinking. It's actually logical, in a sense, because it's irrelevant whether I think it violates the Bylaws but someone else in this group doesn't think it violates the Bylaws. This is a multistakeholder bottom-up organization, and we send recommendations to the Board. The Board needs to determine whether those recommendations should be adopted or not.

And then at the end of the day, if it's something it views that could potentially violate the Bylaws, it would then need to say to the community, "Look, we hear you. And under the current Bylaws, we have some constraints. So, if you still really want this, we need to modify the Bylaws and go through that process." And if the community accepts that through the mechanisms to modify the Bylaws, then that's great. Then it changes the Bylaws. Fine.

If the community doesn't want to modify the Bylaws, then we're stuck, right? Then we have to figure out another solution. But to spend hours and days and months talking about what happened in 2016, it's—from at least my perspective for this Working Group—it's irrelevant at the end of the day.

I'm going to go to Anne, but I really want to know—because Paul is making a lot of comments that we need a better approach. And I'd love to hear what Paul thinks is the better approach because if we accept the fact that this would violate the Bylaws, that pretty much throws out a ton of things in the New gTLD program and we might as well walk away. (Sorry, I was talking about Paul T. in this case. Thanks, Paul McGrady. Sorry about that. So this is Paul T.) So, we might as well just pack up and go home.

Ann, go ahead. Let's get on to some of the more substance.

ANNE AIKMAN-SCALESE: Thanks, Jeff. I'm going to try to stick with two minutes here. On this issue, I agree with pretty much everything Jorge Cancio said regarding

the Work Stream 2 work; and I agree that it was never intended, in terms of Bylaws amendment, that we get rid of PICs. But I think that the fact that the Board has gone ahead and made this comment about their needs, from a fiduciary duty standpoint, to limit risk means that the dialogue is upon us.

And if you are practical, I think you don't just forge ahead like a bull in a china shop and say, "Hey, Board. That's your problem because here's what we want you to do." It's difficult for me to imagine the Board sitting there and saying, "Oh, yeah. Let's amend our Bylaws so that we regulate content." Well, folks, that ain't gonna happen.

I think we need a clarification in terms of legal opinion, but I also think we need to be talking about practical solutions to limit risk because the Board is expressing a desire to limit risk.

I had suggested in the last call that this Working Group needs to consider the possibility that PICs and RVCs that dispute resolution reside outside of ICANN and reside within an independent panel because I think that significantly reduces risk for the Board. I think that we should be looking at solutions which, if they are acceptable to the community and acceptable to the Board, will expedite the process, will expedite the next round, and will not result in big debates about whether Bylaws should be amended to permit content regulation. It's not going to happen. Thank you.

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JEFF NEUMAN:

Thanks, Anne. That's the other aspect that we could spend a year or more talking about—whether a contractual requirement to enforce a voluntary commitment is actual content regulation. We can discuss it and never come to a unified solution. I think at the end of the day, you're right in the sense—and it's already built into the PICDRP—if ICANN compliance feels like the determination of whether a registry has violated its commitment turns on a content issue, it already has the discretion to farm it out to a third party. It's already there. We don't need to change a thing.

All ICANN has to do is change its internal procedures and say, “You know what? Anytime it's ever in doubt, refer it to the third party.” That's not something we need to make a recommendation...

I think we need to talk about what's the best policy, and then—and only then—we need to figure out how it gets done because we might, at the end of the day, decide, “This is not the best policy.” I can't tell you today whether we're going to have a consensus within the Working Group that all of these things apply. So, that's what we have to do. That's our task.

And I appreciate the Board's discussion, but I don't think that's the discussion that we need to have at this point in time.

AVRI DORIA:

Jeff, can I just have a quick follow-up there?

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JEFF NEUMAN: Thanks, Anne. I think Alan is next in the queue. Alan, go ahead. And then, Kathy. I see that she's trying to raise her hand. So, Alan and Kathy.

ALAN GREENBERG: Thank you very much. I guess I agree with Anne. It's fine for us to say we put down what we want and it's up to the Board to either reject it or make it happen, but I think we have to look at it with some level of clarity and make sure that what we're asking for is really viable. If we're simply going to stick to our guns and say, "We're setting policy. It's not our problem to implement it and to make it legal and to make it satisfy the Bylaws," I think that's sticking our head in the sand. And I don't think we can afford to do that, especially if these are issues that are crucial to the use and...

Not to want to go into closed generics right now, but when you think about I, content is all we're talking about there—if how it's going to be used. And if we're even going to have the discussion on whether something like that is viable, we can't ignore the concept of content and we need to understand what is going to be enforceable and what isn't. Thank you.

JEFF NEUMAN: Thanks, Alan. Kathy is next.

KATHY KLEIMAN:

I'd love to take it offline about content and closed generics. I don't think that's what we're talking about. I think we're talking about who can be in the set—the community—of closed generics, of other types of communities under all three definitions that we talked about. That's different than content.

The content that most people were talking about when they were raising the concerns about the voluntary PICs was the ability to take down something because it was alleged to be copyright or trademark, or just that they didn't like it. And so, I want to remind people that private PICs were created unilaterally by ICANN CEO, basically, and through the ICANN Org. They didn't go through a policy process. We've been talking about them now—but also the PICDRP was not created through our policy process. It wasn't created like a UDRP or a URS.

And so, the idea of outsourcing it to a third party may begin to raise questions. It all circles back. I'm not sure that solves the problem because if the rules are, "I will take down anything X doesn't like for whatever arbitrary reason"—and think countries, think race, think gender, think of all of the discussions going on in the world today based on content other people don't like—ICANN has tried religiously to stay out of that, and yet the PICs kind of get us into in and we never consciously went there.

So, I just wanted to raise a larger spectrum and the larger issues in that ICANN is an infrastructure group—internet infrastructure—and so the idea of staying away from Layer 7 has been something we've

always tried to do. And so, I'm glad we're being reminded to think about that and think about ICANN's underlying content neutrality.

But when we're talking about content, we're really talking about speech someone likes and someone doesn't. That's really the essence of the Layer 7 issue and in taking down the domain name because of that speech. Thank, Jeff. Back to you.

JEFF NEUMAN:

Thanks, Kathy. The only thing I would point out from your comments is that, in fact, the Board does bring it up with respect to closed generics as well. And so, you have an argument as to why you don't think it applies.

Here's my point. We're going to have arguments on every end of the spectrum, and we can talk about it for years and then delay this process completely. At the end of the day, there's one opinion that matters and that's the opinion of the Board. Yes, that can be challenge through an IRP. I saw that somewhere.

Paul, your posting a lot on "things are wrong." I'd love you to make a comment orally, but I'd love for you to explain why it's wrong other than just putting in "Wrong."

The Board in any organization, whether its ICANN or anywhere else—and I'm saying this as a corporate attorney—the Board is vested with deciding wither something is within the Bylaws or not, and that can be challenged—sorry, Paul T. That can be challenged by someone, and

the Board could be wrong and could then face the consequences of being wrong. But, at the end of the day, it's the Board that does that not the shareholders. Again, they could challenge. Or in this case, not the members or the people in the ICANN community.

And, no, it's not the consensus model that determines whether the Board is in violation of its Bylaws. The bottom-up process can ask the Board to change its Bylaws because we really want something to happen, but we can't make that determination.

I hear what everyone's saying, but our group is basically deciding what we believe the policy should be for the New gTLD program, and if the GNSO Council agrees, it forward that to the Board. The Board then sends that out for comment, and then if the GAC and the ALAC and the other constituents of ICANN also agree that this is what we want to happen, then the bottom-up process is telling ICANN Board that we want this to happen. And then it would be up to the Board to tell us whether it can happen or if things need to be done to make it happen. That's the organization we live with.

I have sent the questions to Avri. I'm sure Avri will share them with the Board, and the Board can weigh in if it would like to. I have not seen the Board make a definitive call, in any kind of area, whether it is definitively a violation of a Bylaw or not, so I wouldn't expect that the Board will come back and say it is a violation of the Bylaws or not right now. That would be extremely rare, but we have sent the questions to the Board.

We're probably not going to get to any more substance on this call because we have about five minutes left, but we need to move on with the substance. Given that we understand this may be a risk or this may require the community to go through a process to change the Bylaws, is this—along with closed generics, along with some of the DNS abuse things (by the way), along with the string similarity, along with private parties being able to negotiate settlements or negotiate joint ventures—that all of this gets thrown into the same pot.

We need to get to the substance to make sure that all of these are something that we want to continue to recommend, and then we all figure out how we make it happen. Right?

We can spend years arguing amongst ourselves whether it's a violation or not, but at the end of the day, the remedy is still the same—that if we want it, to change the Bylaws. So, I'm not sure it would change anything. And I'm sort of saying that as a lawyer, but nothing giving legal advice at all. I mean, it's what I would do as the in-house counsel. If I were the general counsel of ICANN, I would say, "There's a risk and here's why it's a risk, and we may need a Bylaw change in order to do it." That's it.

Avri, hands up? Go ahead.

AVRI DORIA:

Sorry, I never went back to the window to take it down. But thank you. Thank you for the lovely discussion. It was really quite helpful. And,

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yes, I'll be talking to Becky and we'll take it back and see what we come up with. But thanks.

JEFF NEUMAN:

Great, and thank you, Avri, or being here and discussing it—and the Board for not just this comment but all of the other ones which are incredibly extensive and gives us a lot to think about with a lot of different issues.

Anne, go ahead. You'll be the last word on this. And then I see Justine's comments, so we'll talk a little bit about the work plan. Go ahead, Anne.

ANNE AIKMAN-SCALESE:

Just very briefly, Jeff. I gather that the questions that were sent to the Board either have been sent to the list or will be sent to the list. And then the other thing I would say in terms of your point of view if you were in-house counsel is that amending the Bylaws may, in fact, increase risk rather than decrease risk.

So, in that regard, from my point of view as counsel to a lot of different both for profit and non-profit companies, I would look at your suggestion as one that would not reduce risk; whereas I see the Board's comments as comments directed at reducing risk. So, I don't think it's particularly responsive—not my determination, but...

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JEFF NEUMAN: Thanks, Anne. You're right. There are definitely options, and the least risky of anything is don't do it. Right? Don't have another round. That would be the least risky of every option. So, there's a wide range of risk, and ultimately it's the Board that will decide what level of risk it desires to take and what it needs to do if it wants to move forward with a lot of these things.

ANNE AIKMAN-SCALESE: My Covey Training and Dispute Resolution Training tells me that you look for the third alternative. You don't look to face-off as between the extremes. You look for the third alternative that's acceptable to all, and continue in dialogue.

JEFF NEUMAN: Right. It's a fair point. I think at the end of the day, our mission as a working group is to decide what policies we think should be applied towards the next round of New gTLDs. That's our mission and our charter—and certainly take note of what the Board said, have discussions, potentially, with the Board on this, and maybe different ways to achieve what we want. But we need to figure out how we improve the new gTLD program from the last round.

Really quick—I know we have less than a minute—we do have a work plan that we discussed. Steve, remind me. I believe we sent out a link to the work plan?

So, yes. It was circulated to the list. There are a lot of topics on there, so for our—you'll see the call that we have set up. We may need to modify it because if the SSAC takes us up on the offer for October 19th, then we might need to change a couple things around. But again, the work plan is assuming that we get through the topics that are on those scheduled days and do a lot of work in between. And so, everyone is expected to look at that work plan well before each meeting—and of course we'll remind everyone in the agenda what's coming up—and to read all of the comments and come prepared.

So, today I kind of pointed out areas I thought would be good to discuss, but in future calls I would like everyone to prepare in advance of those issues they would like to discuss and things that we need to get resolved because, remember, that was a draft final report. We're at the homestretch here. We've got a lot of work ahead of us. I'm excited to do it and ready to work.

The next meeting is Monday the 19th at 20:00 UTC. That will hopefully be with the SSAC. We'll confirm that. If not with the SSAC, then it will be the next few topics and we'll put that on the work plan. If it is the SSAC, there's not much to review in advance because they have not filed comments. They're going to discuss what their comments are on the list; although I will try to get them to send us at least some inclination of the issues that they want to discuss.

Thank you, everyone. Have a great rest of the meeting.

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