

Attendance:

David McAuley
George Kirikos
Greg Shatan
Griffin Barnett
Jason Schaeffer
Kristine Dorrain
Maxim Alzoba
Michael Karanicolas
Mitch Stoltz
Philip Corwin
Susan Payne
Zak Muscovitch

Apologies:

Petter Rindforth

Staff:

Julie Hedlund
Ariel Liang
Mary Wong
Michelle DeSmyter

AC chat:

Michelle DeSmyter:Dear all, welcome to the Review of all Rights Protection Mechanisms (RPMs) Sub Team for Sunrise Data Review call on Wednesday, 27 March 2019 at 18:00 UTC.

Michelle DeSmyter:Agenda wiki page: <https://community.icann.org/x/qw5IBg>

David McAuley:Hi Michelle - I am #8222

Michelle DeSmyter:Hi David! Thank you, this is noted.

David McAuley:I'm a tad early ans we tend to start at 5 past due to prior call ..

David McAuley:Hello George, small group so far

George Kirikos:Hi folks.

David McAuley:We will probably get underway at 5 min past

George Kirikos:Hi David. The other sub team call just finished, so folks should be joining here soon, given the overlap of membership.

David McAuley:Thanks

David McAuley:Thanks Julie

Mitch Stoltz:Hi Julie et al. I'm dialed in at x9333.

Michelle DeSmyter:Thank you Mitch, this has been noted.

Maxim Alzoba:Hello all

Greg Shatan:You can turn it over to me for traffic and weather.

Maxim Alzoba:what page are we on

George Kirikos:Q2, page 11

Julie Hedlund:@Griffin: I didn't catch all of that -- could you write it in the chat?

George Kirikos:This question bleeds into Q3, as I mentioned last week, so I think when we look at Q3, we'll be better able to understand Q2.

Griffin Barnett:In writing: Registry Operator pricing should not discriminate against brand owners or otherwise have the effect of circumventing the reasonable use of the Sunrise mechanism

Julie Hedlund:@Griffin: Thanks so much!

Griffin Barnett:My pleasure

Griffin Barnett:I agree with Susan that the RA would be the mechanism by which this is implemented, but for our purposes I think it might be enough to just capture a policy statement/recommendation

michael karanicolas:Or compliance felt the complaints didn't warrant action...

Griffin Barnett:@Michael, they might not do anything because there isn't an explicit contractual basis

Griffin Barnett:If we add that, then there would be

Griffin Barnett:ICANN tends to take a very strict/narrow reading of what the RA/RAA requires, in my experience

Griffin Barnett:I agree we can make our own recommendation on this issue

Julie Hedlund:@All: We have an open line. Can everyone mute when not speaking?

Griffin Barnett:Especially if it is kept at the sort of high level, and doesn't get into more specific issues of registry pricing (e.g. ICANN dictating specific pricing levels/caps)

Griffin Barnett:Circumvent the circumvention?

Maxim Alzoba 2:<COMMENT> Despite multiple mentioning of Picket Fence and that pricing can not be regulated by policies - it was not added to the text </COMMENT>

Maxim Alzoba 2:yes

Kristine Dorrain:+1 Maxim, pricing is outside the picket fence.

Griffin Barnett:I'd like to understand that better - surely without "regulating" pricing we can say pricing can't be used as a means of circumventing another mandatory policy, e.g. RPM?

Griffin Barnett:Is that considered regulating pricing?

Kristine Dorrain:@Griffin, that seems easy, but imagine implementing that. What price point is deemed circumvention?

Maxim Alzoba 2:@ Griffin, There is a lot of assumptions in this phrase, and it is loaded

Griffin Barnett:It's not about a specific absolute price, it's about discriminatory pricing

Griffin Barnett:i.e. comparing Sunrise pricing against other registry pricing levels

Griffin Barnett:Courts make determinations on discriminatory/unfair business practices all the time - it's possible

Maxim Alzoba 2:any kind of pricing regulation is outside of picket fence

Griffin Barnett:(courts or regulatory agencies, etc. I should say)

Maxim Alzoba 2:decisions of relevant courts are obligatory anyway

Maxim Alzoba 2:*courts

Maxim Alzoba 2:COMMENT Please add to the notes that Registries can not check if something is a TM with TMCH due to implementation </COMMENT>

Susan Payne:surely according to our timeline we look at the individual proposals after we have done the subteam ones?

George Kirikos:Sound is fine.

Susan Payne:not that this prevents George raising it within this subteam discussion

Julie Hedlund:@Maxim: Your comment is captured in the chat room. The notes do not duplicate the chat room and are just some high-level thoughts. The transcript, chat, and recording are the record of the meeting.'

Maxim Alzoba 2:+1 Mitch, it is even benefit, for example local TM owners, who can not use TMCH for multiple reasons can not register during the Sunrise

Griffin Barnett:That's why we need a standard

George Kirikos:Right, what's the standard for "too high"? Supply = 1, Demand = uncertain..... Draw the graph of that supply/demand, and it's indeterminate, basically a negotiation, "what the market will bear".

michael karanicolas:I agree with Mitch that the extraordinary nature of the benefit conferred by sunrise is worth bearing in mind when considering the costs

Griffin Barnett:Again, it's not about pricing be "too high" in the absolute, but where it is clear in relative terms the pricing is being used or has the effect of eliminating the utility of Sunrise iin comparison to the prices set for other registry launch phases or GA pricing

Maxim Alzoba 2:it looks like circumvention of a picket fence protection

Mitch Stoltz:Who gets to decide if pricing is "relatively" too high?

George Kirikos:@Griffin: true, that's the tricky thing to define. It's "easy" if it's something like FaceBook.TLD = \$1 million, music.tld = \$100; But, there are many "non easy" examples, e.g. "ado.TLD" = \$500,000 (dictionary word) vs. abgh.TLD = \$50K. UDRP panel messed up that one.

George Kirikos:(court case settlement reversed that outcome)

Griffin Barnett:@Mitch, could be through some kind of challenge mechanism

Maxim Alzoba 2:but the same definition could apply for 50USD sunrise vs 15 USD General Availability

Mitch Stoltz:@Griffin resolved by whom?

Griffin Barnett:an indepenent DRP provider potentially

Griffin Barnett:But again, we are going down the road of implementation rather than policy

Susan Payne:there are some examples in here, previously raised in this

WG: <https://community.icann.org/display/RARPMRIAGPWG/Additional+Documents+and+Materials+on+the+TM-PDDRP?preview=/61606586/62399692/Collated%20Examples%20of%20Perceived%20Registry%20Conduct%20within%20TM-PDDRP%20scope%20-%202017%20Oct%202016.pdf>

Maxim Alzoba 2:I have to remind all of us , that if the proposals undermine ability of Registries to have a sustainable business models, it will constitute a danger to security and stability of the Internet

George Kirikos:That's why the "passive holding" test, if it's properly implemented one, is the right way forward, if sunrise continues (as I said, I think sunrise should be toast).

Griffin Barnett:Sorry but how is the failure of a registry to have a sustainable business model a danger to SSR?

Zak Muscovitch: Maxim, if the policy stated that Sunrise registration prices should not exceed regular registration prices, would that infringe upon the picket fence? Isn't that similar to the non-discriminatory renewal pricing that Greg mentioned?

Maxim Alzoba 2: registries, there is an ability to ask ICANN, how many financial models had premium pricing (of all applications)

Maxim Alzoba 2: premiums is one of the methods to still survive (registries have to pay bills, even if having no registrations)

Maxim Alzoba 2: *survive

George Kirikos: Here's the Passive Holding section of the WIPO Overview, that folks might find useful: https://urldefense.proofpoint.com/v2/url?u=https-3A_www.wipo.int_amc_en_domains_search_overview3.0_-23item33&d=DwIFaQ&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=8_WhWI

[PqsLT6TmF1Zmyci866vcPSFO4VShFqESGe_5iHWGIBLwwwFbfrsjWv9&m=ZOFw8JObceIsHd5Oile9iLHx-jx9I2f6uxxF-DaVF-c&s=hFZBAf85AF555M3tU-FeV9iYb5vOxgD1EQfwa7Irw2k&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A_www.wipo.int_amc_en_domains_search_overview3.0_-23item33&d=DwIFaQ&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=8_WhWI) The key is (iv) the implausibility of any good faith use to which the domain name may be put.

Maxim Alzoba 2: we can just add references to texts of RA, and RAA 2013 and picket fence

George Kirikos: Email is always best, to make sure all sub team members can respond.

Maxim Alzoba 2: there is a ready text about picket

fence https://urldefense.proofpoint.com/v2/url?u=https-3A_gnso.icann.org_sites_default_files_file_field-2Dfile-2Dattach_picket-2Dfence-2Doverview-2D23jan19-2Den.pdf&d=DwIFaQ&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=8_WhWI

[qsLT6TmF1Zmyci866vcPSFO4VShFqESGe_5iHWGIBLwwwFbfrsjWv9&m=ZOFw8JObcelshd5Oile9iLHx-jx9I2f6uxxF-DaVF-c&s=ZZgANwaDNZaMEas56u7PGDiSTj2VqzBDL3BHxiSHrfM&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A_gnso.icann.org_sites_default_files_file_field-2Dfile-2Dattach_picket-2Dfence-2Doverview-2D23jan19-2Den.pdf&d=DwIFaQ&c=FmY1u3Pjp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=8_WhWI)

Julie Hedlund: +1 George on email

Philip Corwin: Question -- do we know whether Donuts makes blocking via DPML across all of its TLDs available for a TMCH-recorded mark when sunrise opens (as an alternative to registration), or does that only become available post-sunrise?

Susan Payne: Julie - building on Griffin's suggestion, mine was that we consider a PIC - registry operator should not operate its TLD in such a way as to circumvent the RPMs. This would allow for an aggrieved brand owner to enforce via the PIC DRP and not be reliant on ICANN Compliance

Julie Hedlund: @Susan: Thanks. I'll put that into the notes.

Julie Hedlund: @George: I was having a hard time catching what you were saying -- was that text that you wanted as a suggested recommendation? If so, could you type it here?

Maxim Alzoba 2: those items were 1. mentioned on F2F meetings, e-mail exchanges and I am deeply concerned about the way we conduct results of discussions

George Kirikos: @Julie: I was saying that if there's a challenge mechanism, it could be modeled on the Passive Holding doctrine test under the UDRP (with better clarity, as some panelists misinterpret that test).

Maxim Alzoba 2: @Julie, it was mentioned RPMs Sunrise Data Review Sub Team call on Wednesday, 16 January 2019 at 18:00 UTC

Julie Hedlund: @George: Thank you. I have captured that.

George Kirikos: @Julie: actual text would be an Implementation Review team task.

Philip Corwin:Re Q3 - who would make this determination of unjustified designation as premium? What standard would be applied? Mechanism would have to be fast, as sunrise is of limited duration.

George Kirikos:But, this all becomes a lot easier if Sunrise is eliminated. :-)

Maxim Alzoba 2:and Review of all Rights Protection Mechanisms (RPMs) Sub Team for Sunrise Registrations on Friday, 28 April 2017 at 14:00 UTC

Julie Hedlund:@Maxim: If your comments were made in the chat or verbally on that call then they should have been captured.

Maxim Alzoba 2:so it is more than once

Maxim Alzoba 2:These bits of information are highly relevant, and still not added to discussions section of the document

Philip Corwin:Noting further that premium and reserved names are different animals. Premium is available for registration but at a high price. Reserved is not available to anyone for registration, so no near-term threat of infringing use.

Julie Hedlund:@Maxim: But staff is not able to capture everything in the high-level notes, which are not a substitute for the recording, transcript, and chat -- those are the sources of the discussions/determinations.

George Kirikos:Normally registry operators don't interact directly with registrants, though. Usually things go through registrars.

George Kirikos:So, this would also need to be taken into account.

Griffin Barnett:Fair point George

Griffin Barnett:But there are mechanisms directly involving registrants/third-parties and registries

Griffin Barnett:E.g. PDDRP/PICDRP

Griffin Barnett:So it's not unprecedented

Julie Hedlund:@Griffin: Staff is grateful if you would type your proposed recommendation text in the chat. We are having a hard time keeping up :-)

George Kirikos:e.g. is the price of \$10,000 the price that MarkMonitor charges, but the registry operator charges \$100, which could be obtained at GoDaddy?

Griffin Barnett:Also, I know in many cases there is informal discussion between a third party and a registry to discuss these kinds of issues

Griffin Barnett:So the idea here would be to try and make it more uniform and transparent

George Kirikos:Registrars would need to reveal the registry cost, which they might be barred from doing?

Griffin Barnett:Could be something done through SDRP, as Susan just mentioned

Maxim Alzoba 2:All parties who are not ICANN, Escrow Operator, Registrar are third parties for a Registry

Julie Hedlund:@Maxim: If you have specific language you would like to have included as a preliminary recommendation, if you could indicate that in the chat we can capture it (as suggested as a way to capture recommendation language).

Maxim Alzoba 2:NOTE: Registries do not have capacity to talk to all third parties / interact

Maxim Alzoba 2:Registrars are in the mass market business, not Registries

Julie Hedlund:@Maxim: Is there a way that you would like to turn that into a recommendation for Question 3? We can capture it either way, but not sure how to put it into the language of a recommendation.

Susan Payne:@Jason - yes but in the INK example that you've given all the names are \$2000, so there's no targetting of the brand owner with a higher price

Griffin Barnett:To try and capture my proposal: ICANN should establish a mechanism that allows trademark owners to challenge a determination by a registry operator that a particular domain name is a "Premium Name" or a "Reserved Name". The mechanism could be a component of an enhanced Sunrise Dispute Resolution Procedure (SDRP), where the challenger brings the issue to the registry first, with the possibility of an appeal to a neutral third party if the initial direct registry interaction does not result in the desired outcome for the challenger.

George Kirikos:7 minutes left.

Julie Hedlund:@Griffin: Staff have captured your proposal.

Griffin Barnett:If the challenger ultimately prevails, the registry operator would be required to change the designation of the domain name at issue such that it is no longer identified as a "Premium Name" or a "Reserved Name" and becomes available for registration by the challenger

Griffin Barnett:(that should be part of my proposal too)

Julie Hedlund:@Griffin: Got it.

Griffin Barnett:Thanks Julie

Maxim Alzoba 2:@Julie: here is the text

Maxim Alzoba 2:Since all registries are real-time (or almost real-time (there is no requirement to make it strictly real time with reaction in milliseconds, it is not a stock exchange after all)- Registries have to use something saying - 'this should not pass registration '(for example Registrar via SSR (interface of the RO - Registry Operator platform) sent command to register a domain... the answer should be - registered /not , almost instantly (with ability to check - why not) or Check command - to understand what is possible to do, in what state the domain is e.t.c) - so there is no time for offline checks, and all types of exclusions (due to policies of ICANN, SSAC recommendations, prohibitions due to local reasons, like prohibition of the registration, for example due to decision of the local court, or the regulator -all records are in the Reserved list ...)So changing Reserved list, will affect Registries in their ability to run real time platforms (and it is required - via SLA means in RA (registry agreement with

Maxim Alzoba 2: ICANN).And the consequences are quite unpredictable (including security and stability concerns).

Julie Hedlund:@Maxim: Your text is captured.

Kristine Dorrain:I'm multitasking a bit, but recall that a premium name is just a pricing tier.

Griffin Barnett:To also add something quickly to my proposal also: As part of the proposed challenge mechanism, a defense, or ground for denying the challenge, should be that the registry must continue to designate a certain name as "reserved" to comply with other ICANN policies or applicable law.

Julie Hedlund:@Griffin: Got it.

Griffin Barnett:SOrry, I'm kinda drafting on the fly

Griffin Barnett:Thanks

Maxim Alzoba 2:@Kristine, following the logic of 'no difference at all' it might lead to ban for using premiums at all

Julie Hedlund:@Griffin: Understood.

Julie Hedlund:-)

Griffin Barnett:The notion of challenging a premium name designation is getting at the same problem relating to discriminatory pricing targeting brands that we were talking about in Q2.... it's not an absolute challenge to something having that designation/pricing but where the "premium" status really is because of the fact that the name is a brand with substantial goodwill separate and apart from any other value the name might have

George Kirikos:Bye folks.

Maxim Alzoba 2:bye all

Griffin Barnett:Thanks all, by ebye