ICANN
Transcription
Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working Group call
Wednesday, 20 July 2016 at 16:00 UTC.

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The audio is also available at: http://audio.icann.org/gnso/gnso-rpm-review-20jul16-en.mp3

Attendance of the call is posted on agenda wiki page: https://community.icann.org/x/9wWbAw

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Terri Agnew: Thank you. Good morning, good afternoon and good evening. Welcome to the Review of All Rights Protection Mechanisms, RPM in All gTLDs PDP Working Group Call taking place on the 20th of July 2016.

In the interest of time there'll be no roll call as we have quite a few participants. Attendance will be taken by the Adobe Connect room. So if you are only on the audio bridge, could you please let yourselves be known now?

Hearing no names, I would like to remind all participants to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this, I'll turn it back over to you Kathy. Please begin.

Kathy Kleiman: Thank you very much Terri. Hello everyone and thank you for joining our call today. I'm Kathy Kleiman, one of the co-Chairs. And I see that J. Scott Evans and Phil Corwin, our other co-Chairs are on the call today.

I wanted to make that note that because it's summertime, we're all going to be going on vacation at different times and to remind you that these calls are recorded and also transcribed and that the recordings and transcriptions are sent out after the call and they're also available on our Wiki. So if you go on vacation and want to catch up, that's a very good way to do it.

Today we have a lot of material to cover. The - many of you joined us in Helsinki either in person or remotely for the meetings we had both the outreach session and the face-to-face.

And last week we continued our detailed discussion of the trademark PDDRP, post delegation dispute resolution procedure. And what we've gotten in these discussions that we've been having are a number of issues and concerns about the PDDRP and a discussion about those issues and concerns as well as suggestions that have been sent to us via the list and in meetings about ways to change - ways we might change or modify the PDDRP.

As of Wednesday we had five responses, some very detailed and much appreciated. And of course more responses are welcome. But staff has pulled together the tremendous document, which is now posted, which compiles the issues and concerns that have been raised by working group members as well as suggestions that have been raised about possible changes to the trademark PDDRP.

And so we're going to go through this today, maybe add to it, amplify it and see - we're looking for two things, both additional issues and concerns if we have them, additional clarity on kind of both sides of the issues and concerns. Is it really an issue or concern? Is it not?

There's interesting discussion going on on some of these. And then what changes might be offered to correct what some see as an issue or concern and are there ways to find out more information if there - if we need more clarity on the issue?

And rather than my reading through everything, I'm actually going to urge the people who made some of the suggestions that you'll see in the document to join me in discussing the issue as we come forward.

So if you were involved in it, as I'm giving the overview, please feel free to raise your hand and argue for or against something that you submitted. I think that'll make it much more interesting than my merely reading through the document.

And, you know, and then the overall question at the end will be does this document encapsulate our issues and concerns or is there a lot more work to do? So let's get started.

The first issue here is does the trademark PPDRP provide sufficient mechanisms for review and possible resolution of problems prior to filing of the complaint.

So the current requirement is that at least 30 days prior to the complaint, the complainant has to notify the registry operator in writing of its specific concerns and the specific conduct (he) believes is resulting in infringement of the complainant's trademarks.

And that it's willing to meet to resolve the issue. So there's hope that in 30 days a resolution can come. The registry operator may or may not be aware of the concerns. So they just hope that this can be resolved. We're also seeing some indication that ICANN compliance may be providing an avenue for complaints and early resolution.

So the overall question is, is this an issue or concern that the working group should address and if so, what steps would you like to take. And I want to open this up to questions. And as people are raising their hands hopefully, I'll just review some of the - some of the suggestions that have been made on the list.

One is that mediation should be part of the process, which was the suggestion several times. The other is that mediation should be available at the request of the registry operator. And some are saying that mediation is a great idea and will reduce the number of complaints that proceed forward into a formal proceeding.

Another part of the discussion people have responded that the complainant and registry will already have spent a lot of time and money and it may be better to let the complaint go through or to structure the proposal to permit mediation on the skeletal complaint. So good. Petter, thank you for raising your hand. Please go ahead.

Petter Rindforth: Thanks. Petter Rindforth here. Just want to make a note what I wrote on mediation (as) together with many of the participants on this working group have very good experience of mediation as the way to solving a dispute.

And well (at the end) what came out from that may be a (salvation) of a different kind of problem that - other than that - the one that was initiated by the dispute so to speak.

So it's very, very practical way to solve some initial questions if there are parties that are on the same level so to speak. And it's also the mediator's role to make all parties heard on a practical way rather than clean legal issues.

I've seen some comments on my proposal there and I appreciate that we have a discussion that can start on this. I just wanted to also note that mediation it's not always a face-to-face meeting. There are some online mediation procedures.

And I think that if we should introduce mediation as one of the initial part of the dispute resolution procedure here, it has to be online to keep the cost down and to make it also efficient for both parties. So thanks. That was my initial comments.

Kathy Kleiman: Thank you Petter. Let me ask does anyone want to comment? First, does anyone oppose the addition of mediation? Would you say that this - is there general agreement that having additional mechanisms for possible resolution of problems prior to filing a complaint is probably the right way to go? Does anybody object to that? Okay.

Does anybody object to the concept of online mediation? Ah. (Susan) and then Greg. Thank you.

(Susan): Hi. I don't necessarily object to the mediation or online. But I am a little bit concerned that that could be played. And mediation depending on how it was done, maybe online could be more economical but it can be very expensive. So it would seem to me that whoever's requesting mediation may have to pay the lion's share.

We might want to put something in there that puts the burden on the entity requesting that mediation because if we have created a case of a company and feel strong about it and is going to file it, we've tried to bring the other party to the table to talk and they won't, then all of a sudden, we're required to do a mediation that is expensive and may require travel, that kind of thing, then it could be played.

And so I would want to make sure that there's some checks and balances in there for it.

Kathy Kleiman: Thank you (Susan). Important points. Greg, go ahead.

Greg Shatan: Thank you. Greg Shatan as well. And I'm not objecting to mediation either but I, you know, do think it's important, you know, recognize, you know, what mediation is, is basically a structured negotiation.

You know, so both parties have to be - if both parties aren't willing to negotiate, mediation is hollow. At least willing to hear each other out in the mediation.

You know, looking at some of the conversation on the chat, you know, needs to be clear that whatever we're doing here is going to be, you know, confidential, without prejudice, non-binding unless the parties actually do come to an agreement.

You know, there's no - the mediator doesn't, you know, or shouldn't, you know, come to a decision. The mediator is a facilitator. If the parties come to a binding decision and an agreement, then that itself should be binding but there should no - not be any, you know, expectation that the result will - that there will be a result that is binding, you know, unless it's, you know, agreed to by both parties.

And, you know, I agree entirely that there should not, you know, this mediation aspect should be as lean as possible. You know, a skeletal complaint. You know, there are always opportunities later on in the process to come back to the table to discuss a resolution.

This is kind of intended to be in early intervention at the beginning of the process, almost like the CEP and the IRP. So I think it, you know, should be fairly lightweight in terms of the burdens on both parties.

So again, you know, online mediation. And if it's - and know if one party or the other is not willing to mediate in good faith, the time period should be terminated.

Kathy Kleiman: Greg, actually you were going to - you just responded - let me double check to the question I had, which is you would require consent by both parties for the mediation; not a mandatory mediation but a voluntary.

Greg Shatan: Well, since mediation is a structured negotiation, if one party is not willing to negotiate, that's a problem. And we could make it mandatory but can you mandate that they actually, you know, work, you know, in good faith?

I mean maybe you can but it's kind of, you know, not being a mediator myself but having participated in some mediations, I see that, you know, if you don't have - if you have in intransigent party, throwing them in a room, you know, that they're not willing to be in (and actually like) to participate in is, you know, would be troublesome.

One would hope that they would be willing to participate. It should be in everybody's best interest.

Kathy Kleiman: (Good).

Greg Shatan: But, you know, some party might say, you know, this is, you know, I have nothing to talk about or I'm not willing to talk.

Kathy Kleiman: Good point. I don't know how you mandate cooperation. That's a very good point.

Greg Shatan: And we have litigation, which is, you know, or, you know, dispute resolution procedures, which is to drag the unwilling into a common place.

Kathy Kleiman: Agreed. I'm going to call on Petter next and then - but also raise a question, which is do we know if the PDDRP providers can provide mediation services or would this be outside of the current dispute providers; if there are any dispute providers online. If you could answer that question, that might be really useful right now. Petter, please go ahead.

Petter Rindforth: Petter here. Just a quick note to reply to Greg. I fully agree with you. And, I mean, that's what's mediation. It's impossible to have a mediation session if not both parties or all parties involved agrees to sit together so to speak even if it's online and discuss the topic.

But so - what can be done is that the dispute resolution provider reach out to the parties and ask or suggest then for a mediation as the initial thought. And then it of course is up to the parties to make a decision within some limit of time to see if there is a possible to solve it that way.

Kathy Kleiman: But Petter, let me as you a question. Wouldn't that require the filing of a full complaint at that point? That's what brings a PDDRP provider into the process today.

Petter Rindforth: You may be right there. We'll need to have a - some added look at that question to see if there is some kind of informal initial way to do it. But at least that it is automatically in some way in the system that mediation is provided or suggested. And then it's up to the parties to decide within some time limit to start that; and if not, to proceed with the formal dispute resolution procedure.

Kathy Kleiman: Okay. So let me summarize. Not seeing any providers raising their hand, thank you Petter. So let me summarize some of the suggestions I'm hearing. And I know - I believe it's Mary who's probably taking the wonderful notes and capturing them on the right side under agenda notes.

But I'm hearing that we're interested in online mediation to keep costs down; perhaps a process that allows the filing of a skeletal complaint to invoke the mediation procedures.

Obviously it should be mutual to go into mediation. And that we want to explore whether this is an offering that all of the providers can provide. So - but there seems to be general agreement that there should be another informal initial way to use Petter's words of resolving in addition to the complainant contacting the registry.

I'm not hearing anyone asking for that to be revoked for 30 days - the 30 day notice, which is a current requirement, then adding the option of mediation - of an online mediation. Terrific.

Can I ask - there is a note about additional avenues for information. And somebody has written to the working group recommending that we reach out to Nominet, which has experienced panelists and mediators, to obtain some first-hand accounts and guidance.

I was wondering if whoever made that suggestion could provide us with additional information and maybe it's Bradley Silver. Thanks Bradley. Go ahead.

Bradley Silver: Sorry. It's not actually me. I had a comment about what you were saying just before you began that train if I may.

Kathy Kleiman: Please go ahead.

Bradley Silver: And that was, you know, just wanting to make sure that the mediation procedure contains sufficient incentives to make it an avenue for early resolution as opposed to just an additional hurdle before the PDDRP can be instituted.

And some of the things that I was thinking about are, you know, wondering what incentives would exist or could be considered in order to make that happen.

And we spoke about making it non-binding but that having one of the parties turn it down, you know, I see in the notes a suggestion that that may have an implication on PDDRP costs later on, which I think is definitely worth considering.

But I also thought about how easily it could become a hurdle and just an additional layer of complexity before filing a PDDRP, which I found a bit puzzling in light of the fact that the PDDRP is, you know, it's not like we're seeing many instances of it being invoked.

So we certainly shouldn't be thinking about speed bumps to ensure that spurious complaints are dismissed early. That doesn't seem to be a real world problem at the moment.

But it also, you know, I also thought about how considering that the next step would be the consideration of the, you know, the threshold - the threshold consideration that mediation may be something worth considering once that requirement has been satisfied because at that point the respondent - the registry will be in a position to know that the complaint is a strong one or at least satisfies certain basic criteria and there would be an incentive to resolve it as opposed to, you know, proceeding immediately to the PDDRP state.

So I'm just suggesting that for consideration as, you know, part of this idea that we need to make sure that there are incentives to have mediation be a way to resolve the process before we get into a full blown UDRP as opposed to a mere hurdle.

Kathy Kleiman: Thanks Bradley. Don't get off the phone yet. Let me ask you a question. There are two different proposals on the table then. One is that mediation could be invoked through mutual agreement on a skeletal complaint.

But you're now recommending that it go through a threshold review, which would I believe require a full complaint. Let me check with you on that if that's what you're recommending.

Bradley Silver: I'm recommending that we consider both. You know, I don't have a well formed idea on how to ensure that, you know, which one of those will meet the criteria of making sure that it's a - it's something that (achieves) towards resolution. Both may have merits. But I just wanted to put the other on the table then for us to consider.

Kathy Kleiman: Okay. Thank you very much. Does anybody want to respond or weight in kind of a full complaint with the initial administrative threshold review, which is indeed part of the rules of the PDDRP versus kind of a lighter mechanism to enter into mediation?

If not, Mary, if we could make a note of that as an issue now raised. We have kind of two avenues to enter into the mediation process that are proposed. Greg, go ahead.

Greg Shatan: Just as another twist to the issue as mentioned in chat that it may make sense to require a first response from the respondent as well as a complaint from the complainant. And looking very quickly at the mandatory mediation that (George) posted in the chat, I see that it comes - it's supposed to - it's triggered by a time period that starts with the filing of the (defense).

So, you know, it seems to me that if you're going to have a mediation and if it's anything more than just kind of a truly skeletal just almost a sentence that perhaps the playing field should be leveled in that, you know, each party

should have a chance to state something once especially if you're going to, you know, have a full complaint.

You're going to kind of have a situation where one party knows what the other is thinking but not vice versa. And that probably is not a good starting point for a structured negotiation.

Kathy Kleiman: That's a good point. Thank you Greg. And I'm just - for the person who's coming in on audio, there's an active discussion going on in the chat room with Paul Keating noting that a full complaint is required because a claim must be fully understood gamesmanship must be avoided and most importantly the provider must be there to provide the structure to the mediation.

And Paul McGrady saying mediation is a mechanism to reach settlement or at least agreement on what issues will be left out of arbitration or litigation. Agreeing to the decision of a neutral is not mediation. It's arbitration. So that was a note to Mary.

Paul, are you on? Are you able to come on to the call to speak because I wanted to ask you about your suggestion? I wanted to - or just because we have a lot of other material. Clearly this is an issue of interest and concern to the working group and different approaches.

It was suggested that we reach out to Nominet. And Paul, if that was your suggestion, I was wondering if you could flesh out a little more of what kind of information Nominet might provide. I'm not familiar with their mediators. And then if other people have suggestions.

So Paul, can you come online? And meanwhile I'll call on Paul McGrady. Sorry. The request was for Paul Keating to come online if he could to talk about Nominet. But Paul McGrady has his hand up. Paul, can you go ahead? Sorry Paul. I'm not hearing you. Is anybody else hearing Paul? Okay. Alas,

he has having trouble with his audio. Okay. Hope you can dial back in and join us.

So Paul Keating is writing that Nominet runs a DRS process that takes place once the complaint and response have been filed. It is therefore a typical mediation process handled by Nominet. The matter is either resolved or proceeds to decision by a panel.

So I like the idea of reaching out to Nominet to find out more. Maybe even inviting them onto the call. Does anyone object to that? And does anyone have any other mediation processes that they'd like us to look to as well? Okay. Does anyone else want to say anything about mediation before we move on to the requirements for filing a complaint? Great. Thanks for that discussion.

We're now on - whoever's controlling the slides if could move to the top of Page 2. Are the requirements for filing at a trademark PDDRP complain too narrow?

Currently the rules provide for an individual complainant to file with its particular legal rights. Should this be, you know, is this an issue or concern for the working group?

And one of the suggestions that's been made for a change is that a class action option be added at least regarding second level complaints. And that there is - so one person suggesting a class action in terms of second level complaints.

Someone else has suggested some form of joining an action or consolidating cases. And there seem to be some pros and cons that you can read on this page as well. Does anyone want to talk about changing? Petter, do you want to come on? I know you were involved in this. Do we want to change the options for filing a complaint?

Petter Rindforth: Thanks Petter here. Well makes me think that I - I've put this on one of the topics because having gone through hat we have discussed in previous meetings, I thought it was an interesting issue to further consider at least. And also as someone suggested to reach out to the Registry Stakeholders Group for (detail these) as they will definitely be involved also in this.

And the reason why it may be - at least at the second level complaints may be interesting and more efficient to have some kind of transaction is that it's - at this level it's - you need to show that the registry operator has a pattern or practice of activity and (systematically) encouraging registrants to register second level domains and that this pattern or practice may be difficult to show if you're only one complainant with one specific trademark.

But as I see it this kind of dispute (in this pass) they may more practically involve a number of the trademark holders that can see this kind of practice.

Kathy Kleiman: Petter, let me ask you a question. There was a third bullet point in this area under discussion. Is that someone on the list responded that they believe the PDDRP may already contemplate consolidate complaints at least implicitly. That was the - that was the response. Do you think that's not the case? And I'd welcome anyone else's input on that.

Petter Rindforth: Well, from what I conclude I don't think it is.

Kathy Kleiman: Okay. That's easy. Does anyone disagree with that? Does anyone read the rules of the PDDRP to allow consolidation of - by multiple complainants together? Petter, thanks. Let me ask (Beth). (Beth), please go ahead.

Beth Allegretti: No. I have a question. How - this is Beth Allegretti -How - if we did a class action type of system here, which I think is a good idea, how do brand owners know that others are having issues unless we sort of talk amongst ourselves?

How would we know if there are 10 or 20 other trademark holders who are having the same kind of issue with the registry? Is that something we need to build in? Is there some sort of repository where complaints are held?

Kathy Kleiman: That's a good question. I wish the providers were online so we could ask them. I don't believe a complaint becomes public when it's filed. But I can be corrected on that. (Beth), maybe Paul Keating has a response. But it's a great question. Paul, go ahead.

Paul Keating: Hi. Can you hear me Kathy?

Kathy Kleiman: Absolutely. I can hear you and thanks for coming on Paul.

Paul Keating: (Unintelligible) (some of that). Paul Keating for the record. The complaint is not public. Matter of fact the process is not public until the decision is reached. That's been my experience and my information.

Although I would kind of sympathize with trademark holders. I don't see any difference between the not knowing in this process that we're discussing- the not knowing in real life when you have multiple claims filed in God knows what court in any jurisdiction in the world involving a - some trademark dispute in which a client might have an interest.

So I don't think that we necessarily need to go through the process of creating a publicly available database and then having to deal with all of the personal information and informational exchange restrictions that apply with that. I think that's well beyond what is necessary to protect the rights of IP holders in the real world.

Kathy Kleiman: Thank you Paul for that response.

Paul Keating: And I'm - just for the record, I'm completely against class actions. Okay. If one…

Kathy Kleiman: Okay.

Paul Keating: …trademark holder wishes to go after multiple - make multiple claims against what it asserts to be the same person or same registry, that's fine. But intellectual property infringement is very, very factually intensive. And it does not lend itself well to the typical connotation of a class action.

Kathy Kleiman: Okay. Mary, I hope we're capturing all of this. Thank you Paul. That makes sense. Could you also put that - could you just make sure that's captured in full because I think that's an important insight? Is there anything - oh. Also do you want to comment on Nominet for a second? Reaching out to Nominet - circling back to mediation for a second.

Paul Keating: Sure. I handled a lot of Nominet actions on behalf - largely on behalf of respondents. I think one complainant perhaps. But it's a very efficient process.

The downside is that most of them - in the weak cases the complainant walks away and the respondent is faced with a legal bill. All right. With no means of the mediation enforcing any potential claim against the complainant. That's just the way it is.

And I don't see a way around that because as many people more knowledgeable than I am on this call have said mediation is voluntary and you cannot - the minute you start imposing penalties, you're going to encourage people not to mediate, which is contradictory to what we want to do here I think.

So the results - the process in Nominet is very simple. When the DRS, the (cohort) of the UDRP is filed and the response is timely filed, then it automatically goes to mediation. And Nominet literally they have a mediator

picks up the phone and they call you and bug you by email until you respond. And they try and engage resolution of the matter.

And they - it's typical shuttle diplomacy. It's - they talk directly with the complainant and directly with the respondent. The respondent and complainant do not speak unless they want to build a bridge independently. The result is either the dismissal or withdrawal of the complaint. Usually the sale of domain names of the complainants or it proceeds to panel decision.

Kathy Kleiman: And you think that's…

Paul Keating: And it's very efficient. It's very efficient. They have one person handling the matter in charge of it. It - I've only had one person do all the mediations I've ever been involved in. They're very short. They take 10 days, 15 days at the most. And I would highly recommend that we build in a mediation process and we include policy, statements that encourages mediation.

And I would go so far as to state that if one party does not wish to participate in mediation, then the other party should have the right to raise that with the decision panel. And the panel should be able to consider that in rendering a decision as to cost.

I think that's the stick that gets used to bring everybody to the table. We have - in the U.S. for those of you who are not U.S. lawyers, we (unintelligible)…

Kathy Kleiman: Paul, let me just pause for a second.

Paul Keating: …judges to mediate. Yes.

Kathy Kleiman: Hold on just - I'm just hoping Mary is capturing all of this so that we have more to add to the mediation section that we were just working on. Sorry. Go ahead.

Paul Keating: But it's just - but the point is, is that while mediation is voluntary, in the U.S. judges browbeat counsel to mediate. And if you don't mediate, the judge really is all over you. And they're not very - they don't look at it very kindly because then they consider it to be you're wasting their time. Because if you can't resolve the dispute, they think you're being unreasonable.

And so there are ways of having these carrots on the stick incorporated into the mediation process. One of them - I think one of them is requiring a formal complaint. Whether a formal response is required, I'm not certain of because I want to prevent skeletal complaints just as a phishing expedition and the cost to respond. So this is very significant. And usually the respondent is not as well healed as the complainant.

Kathy Kleiman: Okay.

Paul Keating: And I think that allowing the deciding panelists to render their decision at least as to cost based in part upon the fact that someone didn't want to participate in mediation when they clearly could have - I think that's enough to keep people honest and put people into the mind of wanting to discuss it rationally during mediation. That's all. Thank you.

Kathy Kleiman: So carrot and stick approach. Thank you Paul. Clearly both issues that we've been discussing are reopened. One is the class action, which Paul Keating has expressed strong objection to.

And then we circled back because he had suggested that we reach out to Nominet for more mediation and they'll provide some additional insight and information and ideas about the mediation process that we might adopt. So I guess both issues are on the table. Greg, let me turn it over to you.

Greg Shatan: Thanks. Greg Shatan for the record. In this particular situation at least I think that class action is a good idea and some of the concerns raised I think are misplaced.

You know, we're talking here about a pattern or practice. So by definition it's almost certainly going to be a pattern or practice that involves more than one brand owners' trademarks. And it's possible it should involve a single one. But it's - it would have to be a - in that case a very big and possibly well-heeled complainant.

But not all trademark owners are large corporations or particularly well heeled, may not be as well-heeled as registries. I don't think any kind of presumptions about who has more money are at all useful in any of these discussions.

But I think, you know, here where we're looking at a pattern or practice, that is what is, you know, kind of at the root of the issue. You know, looking at individual infringements is part of it but I think the common issues predominate and an inconsistent adjudication would make no sense.

And as (John) noted, consolidation is already at least contemplated although oddly it's mentioned only once in the entire PDDRP. So it seems like that, you know, as well as it's implied, it's hardly been made more explicit than that.

But so clearly the idea is that you could have multiple parties with the same complaint about a pattern of practice. Again, indeed that's so much more likely than a single party.

But in order to introduce, you know, judicial economy and general economy should not require that, you know, every one of the complainants, you know, actually have to appear in the action kind of roped together. I know there are jokes about roping together, you know, lawyers and throw them to the bottom of the ocean would be a good start.

Kathy Kleiman: Yes. No.

Greg Shatan: But I think that this is not - this is not one of those cases. So I think this is a - because we're looking at a pattern of practice, something that's particularly well situated for a class action. Thank you.

Kathy Kleiman: Thanks Greg. Mary, I'm hoping we can - and you probably already are capturing it. The open question of what their consolidation is allowed by the current rules. We've now head views on both sides. And then we've heard views on both sides with very powerful arguments about why if it's not allowed whether we should allow class action. (Unintelligible) saying yes and others are not with Paul Keating saying now.

And looks like my request for input from a provider has been answered, which I appreciate. (Neda), go ahead.

(Neda): Thank you so much Kathy. This is (Neda). Can you hear me?

Kathy Kleiman: Yes I can. And apologies for mispronouncing your name (Neta). Go ahead.

(Neda): That's okay. That's okay. So yes. Just in response to a couple of questions that you had from the providers. I'll start with the mediation first. (Unintelligible) is able and willing to administer the mediation.

You know, I'm a little hesitant to fully commit to it until the working group works out the (details) exactly about what the process would entail. But yes, that's definitely something that we could comment on and provide.

There were some comments about mandatory mediation. Again, I want to stress that it is the provider or the administrator that requires the parties in compliance with the policy to go into mediation. A lot of times that frustrates the parties because, you know, when they file a complaint or ready to go before a panelist or an arbitrator to get their case heard.

I agree that if the panelists or the arbitrator demands mediation from them that's a different story than when the provider forces them to mediation because it's required by the policy or the rules. And mandatory mediation isn't something that I can highly recommend.

Regarding the claim, I think you mentioned that - somebody mentioned that the claims aren't usually public until the decisions are issued. That is correct. We are currently administering the - our domain disputes under various policies with that understanding that the claim's not public.

There was a comment about how would the trademark owners would know about other trademark owners and might want to use a PPDRP. My experience in the arbitration area in general, domain or not domain, you know, traditional regular arbitration has been that usually the rules provide for multiple complainants to, you know, whether or not multiple complainants could join together in order to file a claim is provided by the polices and the rules usually.

But I have never seen the rules getting into how those complainants could find each other. So that's something that is brand new to me at least with my experience in the arbitration if this working group determines to put that in the PDDRP. Thank you Kathy.

Kathy Kleiman: Thank you. And thanks for coming online as our provider expert. Much appreciated. Of course other providers are welcome. Ah. I was just going to - okay. So we've got Paul Keating and Greg Shatan as the next commenter. And then if people want to move on, we can talk about complaints, burdens of proof and remedies or we can continue where we are. Paul, go ahead.

Paul Keating: Thank you. Paul Keating. Well, I understand the argument for multiple brand owners' claims. I guess I'm struck with two different - I guess concerns here. One is that really what we are creating here is a private right of action in the context of a contractual relationship between ICANN and the registry.

Essentially these kinds of claims are that the registry is not abiding by the terms of its agreement and is allowing too many registrations that are say - shall we say conflictive with trademark ownership interests.

I'm very reticent to open a can of worms of (private) causes of action. I think that ICANN is well within its confines to go after and to police its own agreements. And I think that overall allowing individuals to come in and act as the policeman or a private attorney general really are disfavored in my view for any number of policy reasons.

The other concern I have is that although not as much of a grocery type business as the registrars are. Registries are also generally low volume - low profit, high volume businesses.

And I guess I am very concerned that while we're, you know, that - how do I put this? I am very opposed to the class action concept in general. And I am - I'm even more opposed to it until I understand what it is that is going to be the subject of the action. Okay.

And to what extent are we going to be imposing obligations - affirmative obligations upon registries as concerns intellectual property rights. I think that we need to remember that when we started down this path of (unintelligible) domain names, (Whipple) had it right that this is not a magical play land. It is exactly a mirror image of the real world and we shall not grant greater rights in this world than exists in the real physical world.

And I'm very concerned when we start down the process that it's a very slippery slope. And when we get to the end and you're the registry and you're trying to manage a business and you're also having then to be - to have a department full of intellectual property lawyers with no you can't have this name, you can't have that name particularly in the context of intellectual property where it is inherently factually intensive and completely opposed to

asserting more obligations upon registries and registrars than those that already exist.

Kathy Kleiman: Paul, thank you. Before you get off the phone, I'll ask you a question. Welcome to come back online. It's a question open for everyone, which is clearly there's a difference of opinion on this. What avenues for additional information would you recommend that the working group seek?

Paul Keating: I would…

Kathy Kleiman: And I'm going to ask Greg the same question. How…

((Crosstalk))

Paul Keating: I think everybody should chip into that one. One of which is I would like to see what ICANN's enforcement policy is as to registries. I would like to see them have a commitment that they will actually police their registries, right, among other things.

I mean we're - for example, we're talking about providers who are going to render disputes who haven't talked about contracts with ICANN from the provider - the resolution provider in ICANN.

Even in the UDRP those do not exist. So it has to be - if this is a - if this is a body built upon contracts, which is what the entire domain business is, then you need to have all of the parts contracted for.

So yes. I would want for staff to come back to us and give us some information about what's going on in the enforcement side of ICANN relative to registries and registrars. And how comfortable can we become? Can we be in that process and those policies so that we…

Kathy Kleiman: Okay.

Paul Keating: …don't have to necessarily worry about building in a private right of action for the very reason that the quote unquote government is not enforcing the law.

Kathy Kleiman: Great. Thank you Paul. Greg, the floor is yours. And I'm going to ask you the same question, which is what additional avenues can we seek for information? Go ahead Greg.

Greg Shatan: First before I get to that, I think that the PDDRP is a private call to action. I don't see any problem with that. We spent, you know, dozens if not hundreds of hours debating it in the first go around of the applicant guidebook. And, you know, I don't see any issue with that.

You know, this is not, you know, merely a contractual relationship that somehow the rest of us have our noses pressed against (unintelligible) of policy based organizations, you know, that allows these relationships to exist in the first place.

You know, not in a vacuum. So I think, you know, there are probably 20 cans of worms that Paul opened and don't - we don't have the time for - to go through all of them but…

Kathy Kleiman: But I'm going fishing this weekend so I'll take some cans of worm. Thanks.

Greg Shatan: So you have some worms. Bait the hook. But I'm not going to bite at this time. But I think that, you know, reopening all those issues and, you know, and I was just feeling, you know, so sad for the poor little registries in listing to this. And I have a tiny little violin playing hearts and flowers for them.

You know, I think there are, you know, nobody's going to enter into this unless they're feeling substantially, you know, injured. This is not, you know, something that one would enter into for fun and games.

Kathy Kleiman: Okay.

Greg Shatan: The point that I raised my hand to make however was that while we're talking about consolidation and class action or some form of it, I think what we're - there's a kind of an overarching issue that those two things and a third thing all into, which is how do you deal with factual elements or, you know, occurrences that would demonstrate the pattern or practice that involves someone other than an individual complainant that is filing the case.

You may not need to have either consolidation or a class action concept if you have other ways of showing that, you know, the - that there are third party matters in which - that - or third party - actions that are involving third party trademarks that, you know, go to showing the pattern of practice.

Kathy Kleiman: Okay. So there are other ways to - can you suggest people we should talk to to find out if there are other - if there are other ways of showing patterns of abuse or practice?

Greg Shatan: Well, I mean I think we just need to look at litigations or investigations that go beyond, you know, the individual complainant. You know, off the top of my head I'm trying to think of, you know, other situations where that occurs.

You know, but, you know, not thinking of one, you know, right off the top of my but, you know, clearly…

Kathy Kleiman: Okay.

Greg Shatan: …we are looking at a kind of a unique situation here because it's this pattern of practice. Now that kind of, you know, brings me back to RICO cases, its pattern or practice, so.

Kathy Kleiman: Okay. Okay.

Greg Shatan: Maybe we need to look at those kinds of investigations.

Kathy Kleiman: Interesting. Okay. I see that Mary Wong who's our senior staffer has her hand up. So (Susan), I'm really glad you're on the line. Let me interrupt and I'm sure Mary's going to remind us of the time that we've got eight minutes left and much more than eight minutes of material to go. Go ahead Mary. But (Susan), please stay on the line.

Mary Wong: Thanks very much Kathy and thanks everybody. So this is just a follow up on some comments that - and I'm looking - I typed in the chat for those especially who are not following the AC chat.

And this is in relation to Paul's and others' point about compliance and reporting. Compliance does provide regular reports to the ICANN community as well as a monthly dashboard. And I've typed the link in the chat.

So to the extent that the group would like compliance to provide it with further feedback, and I know several suggestions have already been made, we think it might be helpful for folks to take a look at those reports. See what is missing that they think might be relevant for our specific purposes as well as any additional questions that are based on what is already reported.

I think it'd be much more helpful for both our compliance colleagues and for this group if the specific requests were more specific in other words. Thanks Kathy.

Kathy Kleiman: Thank you very much Mary. (Susan), I'm going to - I'm going to call on you and thank you for your patience. And then I think we're going to be in a wrap up mode preparing for next week. (Susan), go ahead please.

(Susan): Yes. Thanks. It's just very briefly really. And just something that I - a reaction to what Paul was saying about the sort of private cause of action argument.

And I'm actually going to reflect something that I noticed just now that J. Scott actually put in the chat as well, which is just that is currently (drafted). This isn't a cause of action private or otherwise that you bring just because there are infringing names in the registry. There's a much higher burden than that.

There sort of needs to be really positive action on behalf of the registries that profit from the activity, you know, which, you know, the rules make it clear that that's not simply, you know, the profit that they make from selling the names.

So I think his concerns are unwarranted I think. You know, this is the really, really bad axis here and I don't think certainly at the moment we haven't talked about changing that burden of proof. Maybe we will talk about it. But I just wanted to make that point.

Kathy Kleiman: (Susan), thank you so much. There is a higher burden of proof definitely. And thank you for your comment and thank you for foreshadowing what I was going to talk about next, which is we're going to draw a line here on these issues. Thank you for the excellent discussion today.

A lot of material to be going back into our next draft of this compilation of issues and concerns for these first two items. I wanted to give you a preview of coming attractions if you haven't read through the rest of the document.

In future sessions, perhaps next week, we'll be talking about is the trademark PDDRP too difficult to access? Is it not being used because the burdens are too high or the remedies are too uncertain?

And in preparation for that it might be useful to read Section 7, 17 and 18 of the PDDRP, which set out the current requirements for the complaint, the burden of proof from the remedies and then we'll enter into a discussion about substantial infringement about changing - lowering the standard of

proof and the standard of liability. Different suggestions have come out. I'm sure that will be a very interesting discussion.

Also Section 3 on the left page, Page 4, should we be strengthening or clarifying the remedies under the PDDRP? This has already been discussed in numerous sessions so we're going to be really diving into that. And there's some other issues as well about time limits and pre-complaint notifications.

Mary, could we move to the types - the questions that we want to pose to compliance and ICANN legal counsel and others? Is there any way you could bring that up on the screen?

I wanted to point out that there's another document we're preparing now. Now leaving the issues a bit - leaving the document of issues and concerns, we are - we posed questions to the providers. They provided answers both in our meetings and in writing, which we deeply appreciate.

We now have questions we want to pose to ICANN compliance and they've actually asked us to do it in writing. And the question of whether use cases would be appropriate has come up.

So I wanted to show you. I don't want to hold you on the line more but there's a document where we're trying to capture the types of questions that the working group might pose to ICANN compliance, external legal counsel and other appropriate parties. And that has to do with a lot of the issues that we're raising that have to do with what they've seen already.

So please - and that's actually the three bullets from the responses from the working group. So please take a look at that ad. There's kind of a back and forth on whether use cases would be appropriate. And some people are saying realistic scenarios would be very appropriate and others people are saying takes a long time to develop a good use case and often they're dismissed anyway as, you know, I'm not going to respond to a hypothetical.

So please us explore what to ask ICANN compliance. And then there are additional issues, concerns and suggestions being raised by working group members. We'd like to (keep) the door open for that - open for those suggestions for at least another week. And please take a look at what people are writing.

For example, the first one is apply the rule that first do no harm. And so interesting things are being written and we're trying to summarize them here. Is there - Mary, could you tell us when our meeting is set for next week?

Mary Wong: Hi Kathy. Hi everybody. This is Mary from staff. And I'm looking to Terri and the Secretariat. I believe that the meeting next week is still Wednesday for most folks but it will be at 2100 UTC.

Kathy Kleiman: Okay. So this is our later meeting coming up next week. Great. Thank you. Would anyone like to make any closing comments in our last - in our last minutes? (Susan), is that your hand still raised or is that a new hand? Old hand or new hand? Terrific. Old hand.

Thanks very much again for a very useful and informative discussion and looking forward to continuing on the list and next week. Thanks everyone. Have a great day. Bye-bye.

Man: Thanks.

Man: Bye.

END