

## Adobe Connect chat transcript for 27 July 2016:

Terri Agnew:Welcome to the Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working Group held on Wednesday, 27 July 2016 at 21:00

Terri Agnew:wiki meeting page: <https://community.icann.org/x/PgabAw>

Mary Wong:@Terri, if you switch I'll be in trouble with my Mac/PDF conversions!!!

Maxim Alzoba (FAITID):Hello Everyone

George Kirikos:Has anyone compared the attendance on these 5 pm (Eastern time) calls, to see if we're getting diversity in participation, etc?

Maxim Alzoba (FAITID):we need 10 minutes more

Mary Wong:@George, that's something staff will be asking the co-chairs to review. However, it's notable also that we've not received any complaints about any of our call times from Members located in, say, the Asia Pacific region.

Paul Tattersfield:Hi George one difference it's darker here :)

Philip Corwin:Hello all

George Kirikos:That's true, Paul. :-)

George Kirikos>Welcome, Phil.

Steve Levy:Hello all

George Kirikos:On the mailing list, there was some discussion about adding a "limitation period" to the PDDRP. Is that a topic/issue that we can add to the agenda? (not necessarily this meeting, but in the coming meetings)

George Kirikos:(see the discussions at: <http://mm.icann.org/pipermail/gnso-rpm-wg/2016-July/date.html> )

Mary Wong:Hi George - do you mean the suggestion at the bottom of Page 6, or a broader one that we should add?

George Kirikos:A different one, Mary. Statute of limitations in a given jurisdiction might bar a lawsuit after a certain time (e.g. 2 years, in Ontario). Allowing a PDDRP, where an ordinary lawsuit in the courts would be barred by the statute of limitations, doesn't make sense.

Mary Wong:@George, thanks - we will note it.

George Kirikos:Adding a limitation period to the PDDRP would "clean up" that anomaly

Petter Rindforth:agree with Brians suggestion

Darcy Southwell:Agree that provider feedback would be helpful to this WG in evaluating the feasibility of a consolidated/joint compliant mechanism.

Philip Corwin:I think George is talking about something like laches -- that a complaint has to be brought within a set time from when the offense is alleged to have arise. Something like a statute of limitations, to use another metaphor. That seems worthy of looking at.

Kristine Dorrain (Amazon Registry):My concern is the perception that brand owners may "gang up" on smaller registries.

Philip Corwin:Agreed Kristine. I will speak to that.

George Kirikos:@Mary: the relevant jurisdiction would be the location of the registry operator, it seems. See: <http://mm.icann.org/pipermail/gnso-rpm-wg/2016-July/000371.html>

George Kirikos:(although, perhaps that's a topic for debate)

Kurt Pritz:As Brian's email indicates, each dispute resolution provider has their own approach to consolidation. As I recall, when the PDDRP was created, it was vague on consolidation because it was recognized that each provider had different consolidation mechanism and that ICANN would not be in the business of specifying a certain consolidation mechanism or picking the methodology of one of the providers. Each of the providers has a different mechanism and the complainant(s) are able to select the provider that has the consolidation mechanism that best suits the complainant(s).

Griffin Barnett:Support the idea of getting provider feedback regarding the joinder issue  
George Kirikos:Question: should there be the ability to consolidate \*across\* providers? (e.g. someone files a case at WIPO, and someone else files at NAF, against the same registry operator with similar facts, etc.)

Mary Wong:@George, @Phil - on the "statute of limitations" point, which jurisdiction ought to govern?  
Scott R. Austin:I think J Scott's reading of Brian's email is accurate.

Kristine Dorrain (Amazon Registry):<Former NAF hat on> As a provider, and on a purely administrative level, joinder/consolidation/whatever is a nightmare.....<former NAF hat off>

Paul McGrady:As long as the "joining together" was voluntary, not an involuntary "class action."  
George Kirikos:@Mary: I would say the statute of limitation in the jurisdiction???????????????? of the registry, given that's the sole "mutual jurisdiction" (as per the message in the link directly above)

Mary Wong:@Kurt, notwithstanding Kristine's comment (sorry), could the Procedure not simply mandate consolidation and/or joint filing, and leave it to each Provider to achieve each according to its own practices?

Griffin Barnett:@Kristine -- can you elaborate on what administrative difficulties were involved in consolidation? Presumably, if we had an actual joint complaint option, rather than post-filing consolidation, this could possibly alleviate those burdens.

Philip Corwin:@Paukl--agreed, any consolidation must be purely voluntary, not forced  
Paul McGrady:Hard to hear.

Greg Shatan:Gerald Levine's mike is on.  
Kristine Dorrain (Amazon Registry):@ Mary, UDRP does that. Says consolidation of complaints (but not not explicitly across parties) is ok then leaves it to the providers.

George Kirikos:If one recalls the Verizon lawsuit against iREIT, attorney David Steele was able to show a "pattern of cybersquatting" for each letter of the alphabet, see: <http://www.loffs.org/verizon-vs-ireit/verizon-ireit-exhibit5.pdf>

George Kirikos:That didn't require multiple parties in a complaint -- just a single complainant, showing lots of cybersquatting against famous brands.

George Kirikos:The entire statement of claim for that lawsuit is at <http://www.loffs.org/verizon-vs-ireit/> (that was Exhibit 5, to demonstrate the "pattern")

Justine Chew 2:I note and agree somewhat with what Scott is saying re consolidation - which is why it is important to have enough substance is captured in the complaint filed.

Greg Shatan:George, thanks for that. We should certainly allow that kind of evidence to be presented without those other entities being parties. In other words, we certainly should not require multiple parties if the evidence involves multiple marks with different (unrelated) owners.

Chris Thomas:okay  
Griffin Barnett:Agree with Greg -- joint complaint would be voluntary, but a single complainant should certainly have the option and ability to proceed on its own

George Kirikos:Agreed, Greg. One could also do it by having a single complainant, with supporting affidavits (i.e. "evidence") from other brandowners who are not parties.

Mary Wong:Yes  
Mary Wong:Bottom of Page 4  
Greg Shatan:@Justine Chew, don't you think that's already dealt with by the Threshold Review?

Chris Thomas:Standard should be changed to a lower standard  
Brian Cimboric:Nice job, J Scott. Here's also a link that does a pretty good job:  
<http://www.legalmatch.com/law-library/article/clear-and-convincing-evidence-standard.html>

George Kirikos:A lower standard might be dangerous, given that this is supposed to be a more informal process than the real courts (i.e. without all the due process protections).

Mary Wong: Note that the URS uses a "clear and convincing" standard, on the basis that the URS should only cover "slam dunk" (American slang for obvious) cases.

George Kirikos: UDRP was supposed to be the same, only for the "clearcut" cases of cybersquatting.

John McElwaine: From 9th Circuit jury charges: When a party has the burden of proving any claim or defense by clear and convincing evidence, it means that the party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt.

Griffin Barnett: George -- can you cite a source for that? I was always under the impression that UDRP was intended (and has consistently been) under the preponderance of evidence standard (see, e.g., WIPO Overview of UDRP, at 4.7 <http://www.wipo.int/amc/en/domains/search/overview2.0/#47>)

Darcy Southwell: Agree with George Kirikos re the dangers of a lower standard - not only is this not a court proceeding but the PDDRP remedies can be extreme

Mary Wong: Brian's (and Beth Bacon's from PIR) suggestion to lower the standard is captured under III(iii) near the bottom of Page 5.

Petter Rindforth: I accept "clear and convincing", especially if we can add the possibility of several complainants -- at least for the second level disputes

Brian Cimboric: Hi Mary - just a clarification, Beth and I don't want the lower standard, we want the higher Clear and Convincing evidence standard

George Kirikos: Griffin: I think you'd have to go back to the 1990's, when the UDRP was being designed (i.e. Kathy, etc. who were there could comment).

Mary Wong: @Griffin, to add to your point about the standard of proof for the UDRP (vs URS), the idea was that the URS would be more suitable for the very obvious cases, with those less clear more likely to be determined under the UDRP.

Rebecca Tushnet: I'm sorry.

John McElwaine: Agree with Sarah. C&C creates a difficult standard without extensive discovery

Rebecca Tushnet: I agree fully with Brian's comments. Take a step back: what is the evidence before the group that there should be cases being brought! I have yet to see evidence brought before the group.

Griffin Barnett: Thanks Mary, that was my understanding as well -- one of the key differences between URS and UDRP is the standard of proof

Mary Wong: @Brian, oops - yes, that was what I meant!

Edward Morris: Agree with Brian and Rebecca.

Terri Agnew: @Rebecca, your AC mic is not active. To activate your mic, top tool bar select the telephone icon and follow the prompts or send me a private AC Chat with your telephone number and op can dial out to you

Kristine Dorrain (Amazon Registry): +1 Paul

Greg Shatan: Actually, I'm fairly sure that it's not true that the clear and convincing standard is used in all equitable cases. There are equitable remedies in all kinds of US civil cases decided on a preponderance of the evidence.

Laurie Anderson: +1 Paul

Darcy Southwell: +1 Paul

Renee Reuter: I think this is an issue we need to explore.

Brian Cimboric: agreed Greg - not all equitable cases, but predominately in equitable cases

Elizabeth Featherman: +1 Paul

Greg Shatan: Brian, I agree with your re-stating of that.

Kristine Dorrain (Amazon Registry): I think it's ok to explore it, but we need to first find out if any one has been deterred from using this to date.

Mary Wong: This might be something to explore in a "use case" scenario

Paul McGrady: +1 Kristine. Would be nice to know if this has been an actual problem - folks who didn't file that would have.

Laurie Anderson: +1 Kristine

Laurie Anderson: and Paul :)

Rebecca Tushnet: They didn't say burden of proof was a problem.

Kiran Malancharuvil: How do you prove a negative?

Rebecca Tushnet: They said that burden of proof was one reason people didn't use it.

Rebecca Tushnet: But that isn't necessarily a problem.

Paul McGrady: Survey Monkey

George Kirikos: +1 Paul - polls can help keep the mailing list from becoming a voting booth.

George Kirikos: (online polls, that is)

Brian Cimboric: agreed, Rebecca. I think this process was necessarily designed so it's not used frequently. It is only for extreme, bad-faith cases (at least at the second level)

Steve Levy: Would a lower burden of proof be offset by the fact that ICANN is not obligated to implement the recommended action in a PDDRP decision?

Paul McGrady: Agree with J Scott on this process. Thanks!

Griffin Barnett: Isn't the dispute resolved under the PDDRP itself?

George Kirikos: We know that appeals can be heard in the jurisdiction of the registry, so the "choice of law" provision that Paul Keating suggests makes sense.

Mary Wong: @Paul K, the wording in the PDDRP rules on your question is: "An Expert Panel shall make a Determination (Threshold, Final or Appeal) of a Complaint in accordance with the PDDRP Procedure, these Rules and any rules and principles of law that it deems applicable."

George Kirikos: @Mary: So, perhaps it should be made more explicit, that the "applicable law" would be that of the jurisdiction of the registry (i.e. to take it out of the hands of the expert panel from "deeming" the wrong jurisdiction).

Paul Keating: Thank you Mary. However, looking at the UDRP (which says the same thing) the panelists have largely ignored the concept of "governing law" and applied their own "global standards"

George Kirikos: Right, Paul. Making it explicit would reduce uncertainty, by taking the 'discretion of the panelists' out of play.

George Kirikos: e.g. an Iranian company suing an American registry operator should have to abide by US law (e.g. in regards to free speech, etc.).

Mary Wong: @Paul, @George, "any rules or principles that it deems applicable" is a fairly broad framework.

Paul Keating: @Mary, Can you point me to the language (a link) that you noted above. Thanks.

Kristine Dorrain (Amazon Registry): But the PDDRP is not about free speech. It's about: did the registry try to profit from bad faith actions. ICANN has a lot of contracts (and the registries have agreements and AUPs) that define how a registry should act.

George Kirikos: Right, Mary. It's perhaps too broad. By making it explicit, as Paul Keating seems to suggest, it would reduce uncertainty.

Mary Wong: @Paul, I believe it's Section 12 of the PDDRP Rules:  
<http://newgtlds.icann.org/en/applicants/agb/pddrp-rules-15oct13-en.pdf>

Paul McGrady: I will cede the @Paul space to Paul Keating. I can be @PMc. :)

Mary Wong: @Paul M, sorry!

Kristine Dorrain (Amazon Registry): pronounced Pee-

Greg Shatan: Phil, that's an interesting thought. I would support that.

Rebecca Tushnet: What nonmonetary gains are you thinking of? And why is encouraging lots of registrations bad?

Kristine Dorrain (Amazon Registry):Pee Mc-Cee

Maxim Alzoba (FAITID):It will broaden chance of gaming and chance to see blackmailed registries

Griffin Barnett:Agree with Phil, Greg -- could be worth exploring the concept of "profit" here

Mary Wong:Got it, J. Scott - we will give it some thought and come back with suggestions in consultation with you, Phil and Kathy.

George Kirikos:There are different lists of the world's most valuable brands. Those would be good starting points.

Mary Wong:@Greg, others - we have heard that many TM owners are suffering from "survey/response fatigue". Can you comment on that in this context?

George Kirikos:(e.g. Interbrand has a list)

George Kirikos:Forbes has a list of their top 100: <http://www.forbes.com/powerful-brands/list/3/#tab:rank>

Paul Keating:Finding top brand contacts - USPTO/OHIM trademark list and scrape the emails/contacts for attorneys of record

George Kirikos:Another source would be the largest domain name owners, via folks like DomainTools.

Philip Corwin:@Rebecca -- not exactly sure, but clearly a registry that offers free or ten cent domains thinks it is getting some benefit other than profit, because it is losing \$ on each registration. That alone is not sufficient to justify an action, unless it is intended to lead to broad infringement (under current standard).

George Kirikos:e.g. Microsoft, Verizon, Disney, Google, etc. own large domain name portfolios, and thus they're more likely to be affected by cybersquatting than others (of course, there will be some overlap with Interbrand rankings, etc.).

Mary Wong:@Paul M, it's not clear that a public comment would necessarily garner more, or more substantive and relevant, feedback

George Kirikos:Some of the ICANN-commissioned surveys, though, have been silly.

George Kirikos:(i.e the ones about how new gTLDs are perceived around the world --- the results on that one have been criticized)

Greg Shatan:I think J Scott just wrote at least half of the survey. I withdraw my concern.

Paul Keating:@George - I think you would find the vast majority of large domain portfolios (even those of large brands) to be held under privacy.

Brian Cimboric:@J. Scott - agreed. We're just soliciting some inputs here, not creating a definitive record of brand-holders as to their thoughts on the PDDRP

Greg Shatan:Let's not let the perfect be the enemy of the good.

Paul Keating:disclosure \_ I am a director of DomainTools.

Mary Wong:FYI - for simple (not data-driven/evidentiary) surveys like what J Scott is describing, we would normally use a Survey Monkey format.

Paul Keating:are teh results attributable or anonon

Paul McGrady:Simple survey is OK but highly encourage anyone who is going to criticise it later to help construct it up front rather than tear it down later.

Greg Shatan:Very good, piont @PMcG. And one that applies generally, not just here....

George Kirikos:Another list might be "The most popular filers of UDRPs".

George Kirikos:Since those brand owners are obviously more vigilant about using ICANN-created ADR procedures.

Steve Levy:Thanks all!

Greg Shatan:"Popular" might not be quite the right term. :-)

Terri Agnew:Wednesday, 03 August 2016 at 16:00 UTC for 60 minutes.

Philip Corwin:Bye all

George Kirikos:lol Greg. I stand corrected. :-)

Paul Keating:Thank you everyone.

Paul McGrady:Thanks j Scott. great call

Brian Cimboric:thanks all!

George Kirikos:Bye folks.

Darcy Southwell:Thanks, all!

Phil Marano (Mayer Brown):Thanks all, goodbye.

Paul Tattersfield:thanks all, bye.

Maxim Alzoba (FAITID):bye all

Greg Shatan:Bye all.

David Tait:bye

Elizabeth Featherman:bye all!

Reg Levy - MMX:thanks, all