ICANN Transcription
Review of all Rights Protection Mechanisms in all gTLDs PDP WG
Wednesday, 19 October 2016 at 2100 UTC

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The audio is also available at:

http://audio.icann.org/gnso/gnso-rpm-review-19oct16-en.mp3

Michelle DeSmyter :   Good morning, good afternoon, good evening to all. Welcome to the Review of all Rights Protection Mechanisms in all gTLDs PDP Working Group call on the 19th of October 2016 at 21:00 UTC.

In the interest of time today, there will be no roll call as we have quite a few participants. Attendance will be taken via the Adobe Connect room. So if you're only on the audio bridge as the moment, please let yourself be known now.

Beth Allegretti: Hi it's Beth Allegretti. I'm only on audio.

Michelle DeSmyter :   Thanks, Beth.

((Crosstalk))

Michelle DeSmyter :   Okay thank you. As a reminder to all participants, please state your name before speaking for transcription purposes. And please keep your phone and the microphones on mute when not speaking to avoid any background noise.

With this, it is my pleasure to turn to call back over to Kathy Kleiman.

Beth Bacon: My apologies, this is Beth Bacon. I'm also only on the audio, sorry.

Michelle DeSmyter :   Thank you, Beth.

Kathy Kleiman: Terrific, thank you Michelle and thank you all for joining us today. This is Kathy Kleiman and I'll be chairing today's meeting. I don't believe J. Scott is going to be able to join us today; however, the other co-chair, Phil Corwin is on the line.

We have a lot to do today, but let me pause for a second to ask if there are any updates on statements of interest. And I should note for people coming in that hands are raised because we did a quick straw poll while we were waiting to see who from – who attending the working group today would be in India. And a number of people will be there, which is terrific.

But feel free to put down your hands unless you wanted to say something. Reg did you want to – Reg or Petter did you want to say anything about statements of interest? Reg go ahead if you'd like to say something.

Man: You're welcome.

Kathy Kleiman: Okay. So today we are rolling back a bit. We've been working on the trademark clearinghouse. And now we're going to be rolling back to the trademark PD-DRP.

So let me provide a quick summary of where we've been on this. And if you'd like to add to it, staff or participants, please raise your hand. So we spend pretty much May to September working on the PD-DRP.

I'm going to drop the TM for these purposes because it's a tongue twister. And our work will end up focusing a lot on some of the procedural aspects of the PD-DRP. Questions about volunteer and mediation consolidation.

And in fact what we have up here, and we'll focus on it in a second, is the results. We sent two surveys to PD-DRP providers. And we got the last ones back, so the results of the second one back in late September. So that's now part of our per view to review.

And we asked them – they gave us some really good answers about – questions about mediation and consolidation of claims. And this is really something we're going to be talking about extensively at our face-to-face meeting in India.

So we're really starting two meetings intended to focus. And perhaps appropriate wrap up, our PD-DRP work, at least for the moment. Today's discussion will be about the community survey. And we'll get to that in a second. But India's discussion will be about these responses to these follow up questions that are now in front of us on the screen that we sent to the providers and that they responded to.

In addition, we've invited the providers to join us at the meeting in India. So take a look, you know, take a look just to refresh your recollection on the questions, on the follow up questions we sent to the PD-DRP providers about filing joint complaints by multiple different trademark holders.

There's also a question – I think there's an echo now. There's also a question about filing against multiple registry operators. And there's also questions about mediation.

And so Mary has sent around the link, and perhaps you could put it in of the chat room or in the agenda notes as well, of our PD-DRP Wiki page where you can see the full responses of the providers. And we'll of course send that around before India.

So that's the more procedural side of where we were on the PD-DRP review was waiting for these follow up responses from providers. And some other thoughts on procedural changes that we had been evaluating. Mary does everyone control the slides or do – are you controlling them?

Mary Wong: Kathy the slides aren't synched.

Kathy Kleiman: So can we look at the – okay they're un-synched now. Great. And so the main part of our discussion today, if you page down to Slide 3 is the GNSO RPMWG community survey. The 16 responses that we received to a number of questions that were sent out.

As you know, there's been discussion on the list about these responses. And the co-chairs did urge that people go back and look not just at the consolidated results, but the individual results. As in this particular case, their A short and B provide, you know, some interesting insight that people have commented on the list.

So right now we have a summary and staff will be going through it for us. Let me ask Mary or David to present this. Thank you.

David Cake: Hi Kathy, this is David Cake. I'll be presenting some (unintelligible). Apologies (unintelligible). Really this information has already been shared over the mail list. This is just an opportunity to walk through these results. And then to highlight a couple of the key questions, which (unintelligible).

And then open up for a general discussion. So if you – I'll just, for the purposes of this portion, I'll synch the slides and then un-synch them once we've completed this area.

So just to know that we had – Kathy said we had 16 responses, as we had mentioned. But they didn't respond to every question. And that was available.

And turning to the first question we have here, although it says Question 2, and that's because (unintelligible) from the question. And that's what the first question was.

So we're starting at Question 2. And that's where we are looking at the affiliations of those who have responded to the survey. And as you can see, by far the largest responders (unintelligible) are RFC with six of the respondents, 37.5% coming from that constituency.

And (unintelligible) is just to go through all of the slides first of all, and then we can have discussion (unintelligible) first. So that's Question 2. And (unintelligible) Question 3, you'll see that in relation to this area we were able to – again, the question was whether – for respondents to identify themselves either as trademark owners or as a registrant, trademark owner or as non-applicable.

And as you see, 37.5% of those responders were trademark owners or representatives of trademark owners.

Turning now to Question 4. This is where we started to get into substantial questions, just identifying the participants. The question as you can see was are you (unintelligible) the PD-DRP (that we) developed as a (registered) protection mechanism in 2012 for the new gTLD program. Of the respondents, there was obviously a very high rate of awareness, 73.68% of the respondents.

Then Question 5, have your clients (unintelligible) present all the members considered using it. Seventy-five percent responded in the negative. So 12 of those who answered this question.

And then (there was) Question 6. Question 6 and I believe question – yes, Question 6 and Question 8 are those where we asked for some further elaboration on the reasons why the respondents may or may not – to provide more descriptive response to particular questions.

In relation to Question 6, which was if you, our client or persons of interest you represent all your members have considered filing a complaint, but did not proceed to what were the reasons.

And you'll see there there's some more detailed responses than others. But in general, they simply note that they haven't considered do so. And we've (unintelligible) in just a couple more minutes to allow everyone to scan through the responses.

But you'll note that of those who have considered using those number of facts (unintelligible). And they were particularly high range of proof, high levels of cost and a lack of precedence.

So moving on to question 7. The question that are the second level has there been any conduct by the new gTLD registry operators do you believe constitutes a substantial pardon or practice of specific bad faith intent to profit by the sale of trademark and trademark infringement of domain names and bad faith intent to (unintelligible) registration of domain names which are identical or confusingly similar to one or more marks which one takes unfair advantage of the (distinctive) character, reputation of the marks, to (unintelligible) distinctive character or reputation of marks (unintelligible) confusion.

So again, you'll see that the majority of respondents answered that question in the negative – 60.7%.

Question 8, you know, this is one of those sections where there's a (fair back). The following questions refer back to Question 7. And again, as a result there have only been responses where a person had answered yes to Question 7. So it has a reduced number of responses.

If your answer to Question 7 was – is yes. Why do you think the PD-DRP has not been used even as this behavior is apparent to new gTLD registrars? Again, there's some quite extensive responses. There are a few – a number that are quite relatively detailed. But again, I'll just leave these up for now before scrolling into the next slide for people to read them.

Turning now to Question 9, again this refers back to Question 7. And reads if your answer to 7 is yes, do you believe the PD-DRP in its current form address is the problem? Of the six persons who responded to that question, five of them said no. That's 83.3%.

Question 10, when asked if your answer to Question 7 is yes, do you believe the PD-DRP in its current form addressed the problem? Five of those, again 83.2% answered yes.

So those are the results of this – the GNSO TM PD-DRP Survey. I'm un-synched those slides. And then I'll turn it back over to Kathy to chair a discussion of these results.

Kathy Kleiman: Terrific. David, thank you for the presentation and thank you and Mary for the excellent slides and survey compellation. So let me start with a theoretical question, which is really what is the purpose of our surveys?

In the ICANN world they serve many purposes. And we don't always do them very well, as people pointed out on the list. But some surveys, and of course

we do get a low turnout on this. But we do get a diverse turnout from registries, registrars, IPC, BC, even a CCNSO participant who did not name themselves.

So there was diversity, which was interesting because sometimes we only hear from one stakeholder group or the other. The other thing is sometimes we put out surveys – and I'll just throw this out. I don't know if this is our case here. But sometimes we put out surveys, especially in a working group that's very large and diverse already, to make sure that we're not missing something.

You know, is there some burning issue that we didn't see? And that's sometimes what these surveys are. Even if they're small responses, sometimes they serve that purpose of letting us know where we really have the finger on the pulse of the community and of the issues.

So with that, let me throw this open to continue the discussion we've been having on the list. Would anyone like to comment? And we'll – on any of the questions, on any of the compellation and consolidation and what we should do with these survey results?

And I will also try to read the chatroom, but probably better to raise your hand and come into – onto the phone to discuss. We're going to have a really short meeting if there's no discussion.

Beth Allegretti: It's Beth Allegretti on the audio only.

Kathy Kleiman: Go ahead Beth. Thank you.

Beth Allegretti: So my question is this. For this – I haven't – I'm new to this kind of stuff. Is this unusual to only have 16 responses when it went out to the whole community? Like what would normally – can we attribute response to the fact

that they just didn't understand or they haven't heard of the PD-DRP so (unintelligible) need to respond?

Kathy Kleiman: That's a good question. It looks like Mary would like to respond. And I have a response as well, but Mary go ahead please.

Mary Wong: Thanks Kathy and thanks for the question Beth. This is not on any way a definitive response. It's probably more speculative. But what I can say is that while we've done a number of surveys through the ICANN community, they have not necessarily gotten a whole lot of responses.

And that's due to a variety of reasons, which committee members have sent back to us. And that includes survey fatigue, too many projects going on, too many public comment periods.

So what the staff takeaway from these numbers, not just for this survey, but for others that we've done is that we never really know what the response rate might be. And we don't necessarily, for our purposes, read too much into either a survey that has, you know, a lot from one group or very few overall because we just can't tell why.

But hopefully knowing that we've done a few different types of surveys through a community, but not many have had excessively high participation rates is helpful. Thanks Kathy.

Kathy Kleiman: Thank you Mary. George I'll call you in just a second. Beth, there are certain communities like mine, the non-commercial stakeholder group that didn't respond because we had nothing burning to share.

We probably should have responded, but individual members didn't. We discussed it. There was nothing major that we wanted to see changed. So that was kind of a definitive non-response. But I'm up there with Mary. There's probably a lot of survey fatigue going on out there. George go ahead.

George Kirikos: George Kirikos for the transcript. I gave up most of my thoughts on the mailing list already. I don't think it was really a (spun) survey given, you know, only 12 people outside of the working group actually responded. The responses were from participants inside the community already.

Mary had indicated though that there is a procedure that has never been used in the GNSO Council where we can actually, you know, formally get, you know, more structured data to, you know, presumably with a result budget where they can get, you know, a much better survey because we talked about it, you know, a couple months ago.

You know, perhaps contacting the big brand owners and (unintelligible) picked a lot of UDRP filings because they would be obviously the biggest potential user of the PD-DRP. And try to canvass their opinions directly because I could see this being held in a 10, 15-minute, you know, telephone survey where, you know, somebody just is paid to ask them the questions.

And, you know, it does require some work that, you know, obviously volunteers will be (with) ready to do, but it could be outsourced. And if the GNSO has a procedure that exists that hasn't been used, perhaps this is a good time to try it out, especially, you know, the PD-DRP was supposed to be that kind of practice before we go onto some of the bigger issues like URS and UDRP.

So perhaps we should, you know, practice and do it right on this line. And then we'll have that experience of going forward with the more contentious issues.

Kathy Kleiman: Thank you George. Greg go ahead.

Greg Shatan: Thanks Greg Shatan for the record. I've had a little experience in working with people who do surveys for a living, and I'm not one of those people. But

from my limited experience with them and with us, ICANN as a general matter does a terrible job of doing surveys.

And a terrible job of publicizing surveys. You know, this is a – as far as I can tell, it's a bad survey in terms of construction. And, you know, for instance, you know, Question 7 asks whether you've seen a problem that, you know, could have been challenged by the PD-DRP. I'm, you know, shortening it massively, but that's basically what it asks.

And if your answer is no, haven't seen it yet, then you're not even asked whether you think the PD-DRP is a good, better, indifferent tool if and when you see that.

So, you know, you could ask me have I seen an elephant in the wild. Nope. I haven't. Maybe I'll see one in India. Do you think this slingshot would be a good weapon?

I think I could answer that question on whether or not I've actually seen the elephant. But we didn't ask anybody who hasn't seen the elephant what they thought of the PD-DRP. So that's, you know, one thing among many.

You know, so and when George starts – started mentioning, you know, limited funding to do something a little bit more structured and mature. I'm also thinking maybe somehow we can find a way to do something a little more professional.

You know, and this is not – I couldn't do a good survey either because I don't, you know, I know enough to be dangerous. That's probably true of all of us. So, you know, if we do pursue another survey, whether it's this one or another one, I think we somehow need to get our wits about us as surveyors.

That doesn't mean we have to hire some massive, you know, Nielson type of organization. And maybe we just need a consultant for a couple of – for a few hours. Something to get us out of this.

We did a bad survey. Nobody filled it out. The results, you know, are, you know, hard – very, you know, hard to rely on because of the way it was constructed and the way the questions were asked.

And then, you know, basically we end up going around in circles and everyone tries to see in the survey what they'd like to see in it, or even if they try to, you know, deal with it honestly, it still, you know, provides more heat than light.

So I think that it would be a good idea, whether it's this or another time, to actually see how and whether ICANN could actually, you know, do a quality survey and get enough either publicity or, you know, actually have somebody – and this is where the professionals come in, you know, actually poll people. One way or the other, we could get something good out of this. Thanks.

Kathy Kleiman: Great thank you Greg. (Patter) before I call on you, let me raise just a few additional questions and try to grab some of the things that are – some of the comments coming in from the chatroom. And again, please feel free to come on the phone too. But of course, we're dealing with a new and unused proceeding. So that may limit our survey results right there.

a question for this working group is, with our massive amount of work ahead, is this the right place to go back and redo this survey? I think a lot of important points have been raised about surveys for the future that we should note. But is this the right place to go back.

And let me raise for Question 10, of those people who had a prob – you know, who had issues and concerns and then were considering the PD-DRP,

five of those people said the PD-DRP in its current form does address the problem.

So are we looking at an identifiable problem? Is there anything raised in this survey? (Christine Durand) raised that. Is there an identifiable problem. Do we want to stop and go back? Or do we want to go forward? Is there enough in this survey to kind of spark our interests, our attention?

Or do we want to go forward to some of the provider issues, some of the procedural issues and then to our other work with the TMC, URS and UDRP. What's the best use of our time? Let me call on Petter. Thank you.

Petter Rindforth: Thanks Petter here. Well it may be about survey, but it also could be that it's people are not so interested in the PD-DRP. But I thought about them, and what we discussed in the (private) meeting is to go out again with this survey.

And as Steve suggested, (unintelligible) perhaps think to show a description of what the PD-DRP is in fact. Because I think it's – I've heard a number of comments from people that I sent out reminders to that they saw the reason to participate in this survey because they hadn't used the system.

And they saw no (their clients) and didn't ask for what this system actually was. So if they had actually (done the right deal) or did the purpose of (unintelligible) dispute resolution policy, they saw no reason to file a reply.

And I would say it would be interesting to have comments also for those that are not aware of the existence of the PD-DRP. If we could briefly describe it to them, make it open comment for those replies to make some short comments that says oh, I didn't know about this system, but it looks good.

Or I would never use it anyway because of this list. I think we can, instead of spending too much time and extra money to recreate the questionnaire, to

send it out again but at a short initial information on what it actually is about. See what we can get for the additional replies. Thanks.

Kathy Kleiman: Thank you Petter. Okay, a voice for sending it out again with educational materials. Brian, go ahead.

Brian Cimbolic: Yes thanks Kathy. This is Brian Cimbolic. I echo your sentiment. I don't know that this is something that we should really be spending resources and further time on really, given the mountain that we're about to climb together.

I think that the fact that we had such low turnout is echoing something that Paul McGrady said in the chat. That's telling in and of itself. This isn't a burning question. And of the 16 responses we got, 11 answered the threshold question that addresses the very elements of the Trademark PD-DRP at the second level.

They said they did not see a pattern in practice on that (date). So while yes, I agree that the survey isn't perfect and we received limited responses to it, those that did respond didn't demonstrate and overwhelming need or desire to overhaul it. Thanks.

Kathy Kleiman: Brian thanks for your comments. So no burning fire. I like your metaphor about mountains that we're about to climb. We certainly are. So a vote for no. Phil, go ahead.

Phil Corwin: Yes thanks. Phil Corwin for the record. Well as one of the co-chairs, if there's a significant number of folks here who think there's some burning question that hasn't been asked the right way, we can look at that. But I would have to say, not just the responses – the small group that responded and what they responded, but looking at the membership of this whole working group and just the people on this call today.

We all – a lot – a great many are very active in the domain community. If there were significant examples of registries who either had business strategies of direct infringement or encouraging infringement, I think we all would have heard about it by now.

I haven't heard any charges like that. So I think to me, I don't see the value. And once there's strong sentiment of putting out more questions. And I think what we know is that we haven't seen a big problem. That doesn't mean we should eliminate this RPM.

There may – can be future rounds. There could be future problems among the existing providers. But I think given the evidence, we ought to look at modest improvements and encouraging mediation. We should at least get something official started.

And there's a much lower cost then (want to lose step). I would be fine with allowing different mark owners to band together the funded action against a particular registry, given that it's clear that the uncertain benefits and the high cost of prosecuting this DRP are a disincentive to using it.

But I think that's pretty much the extent of it. So I would, you know, if there's strong sentiment that we need to ask more questions, I'm happy to listen. But I don't – personally I don't see a burning need. I think we can start working on finishing up this topic and move on to the more important ones that everyone's anticipating. Thank you.

Kim Kleiman: Phil thank you. And I actually agree with Phil on this. And that the issues – I see the issued ahead as the ones we're talking about. At least the issues that really seem to build on the work of the working group where a mediation consolidation and probably statute of limitations. And look forward to discussing these in India and afterwards as needed.

Mary, do you want to go now? I think your hand was up before Greg. So Mary and Greg, thank you.

Mary Wong: Thanks Kathy. I don't actually recall whether my hand or Greg's hand went up first. But from the staff side, we just wanted to follow up on Phil's comments.

And this is also because we did have a few working group members who spent a bit of time filling out a Google Document that I've already mentioned with anecdotal evidence of certain behavior and actions of registry operators.

So even as we are likely to be not resending this survey and then moving forward to try to close off this initial review of the Trademark PD-DRP, we'd like to encourage working group members to take a look at that Google Document.

It is on the working group wiki space. And we can also send it around after this call, so that if anyone feels they want to change their minds, they can do so within the next few days.

And that's really leading me to the second point I wanted to make that we can try, and we are trying to do this PDP sort of as an iterative process. So to the extent that we get new information or additional data or fresh circumstances that come to our attention that might merit us going back and doing a different survey or discussing some other related topic, we can do that later on in the PDP as well. Thanks Kathy and thanks Greg.

Kathy Kleiman: Thank you Mary and thanks for sending that link around to that document. Greg, thanks for your patience. Go ahead.

Greg Shatan: Thanks. Greg Shatan again. I disagree with the first half of what Phil said. I don't think we can say that the registries, you know, have a clean bill of health top to bottom.

You know, there may be some that are, you know relatively sketchy at this point – at the fringes, whether or not, you know, they would require a TM, PD-DRP. And anybody wants to put one together I think is still an open question.

I don't think we can – or I think that's not really within the scope of this group right now. You know, at this point the question is what should we do with the PD-DRP.

I think by and large we're beating an unborn horse here. We've never seen a PD-DRP. If we do see one or if we have a situation where we have some people really starting to say what for. The way this is structured, I would have challenged this registry's activities.

You know, then I think, you know, we look at it this time. I think the mediation idea, you know, is good because it, you know, does racket down kind of the challenge in visiting the PD-DRP.

So generally, I'm in favor of that. But I'm not in favor of kind of engaging in this, you know, close analysis of a PD-DRP that's just never been used. We have so much more stuff to do about things that are actually in the wild that a PD-DRP is really kind of the least of our worries.

It's definitely something to keep on the radar screen, but I don't think it's, you know, worth a huge amount of our effort at this time. Let's look at things that are, you know, functional or at least functioning whether they're dysfunctional or functional rather than this unborn horse. Thank you.

Kathy Kleiman: Thank you Greg. I think that image is going to haunt me, you know, all night beating an unborn horse. Well, but a useful one. So what we're hearing is there may not be an identifiable problem. And there may not be a burning fire here.

If anyone disagrees with that strongly, this would be a good time to come on and say so or put it in the chat room. But otherwise, we appear to be arriving at consensus that, you know, we put out a survey.

We've heard some responses. Not as many – it's not as well phrased as we'd like. And not as many people responded. But it does provide some information, some guidance.

And does not appear to be telling us there's some massive issue that all of the wonderful people in this working group have not yet identified. Terrific. Then Mary can we – in that case, and I'll wait for just a second to see if anyone else wants to comment on this.

In that case, we're going to be wrapping up early, which is great news. Mary could we circle back again to the first two slides? So let me – I know we looked at them in the beginning, but this is where the meeting is going to be. And these are the issues in India.

And they'll be informed by the second survey, the follow up survey we sent to the PD-DRP providers on joint complaints by multiple trademark holders. By joint complaints against multiple registries, which had some interesting responses from the providers about mediation.

So these are not long surveys, but they are informative. And they could take their time to write back some detailed responses. So I would urge people to look at this and see, and come to the meeting in India whether in person or remotely. Apologies to those who would have to be up in the middle of the night.

And think about these issues and how – what changes we might make to the PD-DRP that procedurally can help improve it and make it more accessible. And now to the last slide please.

Mary can you take us down because we're going to be wrapping up early, which is tremendous. But I will open for another round of comments if people want to. But I wanted to – we asked staff to put together – the co-chairs asked staff to put together a slide that just lets everyone know that our meeting will local time 11 am. in Hyderabad on Monday, November 7.

And we have an hour and a quarter. Unfortunately we're going to be cleared out for another big meeting coming in right after us. But we have a precious hour and a quarter that we will be using for our face-to-face meeting.

There will also be remote connection. And we have a lot of material to cover. We'll be doing two things actually. We'll be working on the responses of the PD-DRP providers and some of these procedural issues. We should also have back the edited, regrouped charter questions for the trademark clearinghouse from the TMCH questions sub-group.

We're hoping to have that back and introduce that. So perhaps wrapping up the PD-DRP and starting the trademark clearinghouse – continuing the trademark clearinghouse process, we should also have the providers. And we should have the providers as well in India.

We tried to have the analysis group, but they're flying back I think the day before. So let me pause a second and see. Jeff you keep asking questions about mediation.

It was – so I may be missing some nuances of what you're asking, but mediation was part of the questions we asked, but was part of the responses that we got back from the providers on what it would take for them to offer voluntary mediation type processes.

So I'm going to read the chat for a second. And would anyone – where are those responses? Mary will be sending out the links to every one of the responses – of the PD-DRP providers. It's on our PD-DRP page, which is an

interesting page. So I encourage people to go to our wiki, but we'll send out the link to make it easy for everyone to get there. Mary will you be sending that our right after the call?

Mary Wong: Hi Kathy and all. This is Mary from staff. Yes we will. And if I might just take this opportunity to let folks know that because our open meeting in Hyderabad will be part of the ICANN public meeting. That means that in particular, the link to the Adobe Connect room is not the same one as we're using today for our regular meetings.

Staff will be sending out the connection details closer to the time, but since you are looking at this slide, I just wanted to draw that to your attention. Thanks Kathy.

Kathy Kleiman: Great. Thank you Mary. Would anyone like to make any comments before we end 15 minutes early. And I will note, as Phil has written, no PD – no RPM is – no working group is locked in stone on what we're doing.

And we can revisit as we go. We're going to be doing this for a long time. We're on Phase 1 on the new gTLD mechanisms for a long time. And we can revisit as necessary.

In that case I would like to wish everyone safe travels whose going to India. And the next time we talk we will be there. Looking forward to it. It's my first trip to India, so I'm looking forward to being there.

Thank you all for the discussion on the list and the discussion here today. Take care. Thank you.

Man: Thanks, Kathy.

Kathy Kleiman: Bye.

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