

Terri Agnew:Welcome to the IGO-INGO Access to Curative Rights Protection Mechanisms Working Group call on Thursday, 15 June 2017 at 16:00 UTC for 90 minutes

Terri Agnew:agenda wiki page: https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_x_SEfwAw&d=DwlFaQ&c=FmY1u3PJP6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmkXhFzL7ar9Qfqa0Algn-H4xR2EBk&m=94kudPvxsE4Kv6BchTINVXy_Uhf4K5cGOJwfk32Ib-A&s=tWz0YM622-NQssQii9SogtfAHC5py1wAc2SrUPdpivk&e=

George Kirikos:Hi folks.

Petter Rindforth:Hi there!

Paul Tattersfield:Hi

Philip Corwin:Hello all

Terri Agnew:Welcome Paul Keating

Paul Keating:Hello all.

George Kirikos:Can we get the documents in PDF format, by the way? (as I noted on the list) The spreadsheet in particular is causing me problems.

Berry Cobb:@George - I will do the XLS in PDF after the call. It will take me time to size each sheet so that it will print in PDF in a useful way. Some tabs have over 3000+ rows. Apologies for not thinking of it prior to the call.

Paul Tattersfield:I think the spreadsheet will require a lot of reformatting to get in a pdf format because of the quantity of data

Mary Wong:The impact analysis document has also been posted to the WG wiki space as a PDF:

https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_x_SEfwAw&d=DwlFaQ&c=FmY1u3PJP6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmkXhFzL7ar9Qfqa0Algn-H4xR2EBk&m=94kudPvxsE4Kv6BchTINVXy_Uhf4K5cGOJwfk32Ib-A&s=tWz0YM622-NQssQii9SogtfAHC5py1wAc2SrUPdpivk&e=

Mary Wong:@Paul T, yes

Mary Wong:@Steve, thank you - nothing from me

George Kirikos:Or, save the spreadsheet in Open Office or Google Docs formats, instead, if Excel will export to those.

George Kirikos:Since, Excel format is causing various problems.

Berry Cobb:@George, I will try that as well.

George Kirikos:(e.g. Intro Tab is completely blank for me in one piece of software, normal in other)

Paul Tattersfield:the raw data is very useful. If you have the correct software it is far easier to analyse it in a spreadsheet format rather than a pdf

George Kirikos:2nd setence is now answered by "yes", since the lawsuit is over at that point, so they can transfer.

Berry Cobb:I'd just add to this document (not including George's comments) is really just meant as a starter draft to spur deliberations on the advantages/disadvantages. The content statements are very much in raw form, and it is up to the WG to decide whether they are useful or should be amended.

George Kirikos:Mute?

Paul Keating:To Clarify: the court's order must be to dismiss as a result of teh NGO's motion or defense asserting immunity.

George Kirikos:3 years, yes.

Mary Wong:@Paul, to the extent that the vitiation is contingent on a court's substantive ruling (rather than just a ruling that an IGO has immunity), that will probably need to be clarified and added to the Final Report.

Paul Keating:@PHIL, Option 1 changes the UDRP. We must insert the vitiation language.. Otherwise, the Respondent would lose the domain based upon the post-UDRP dismissal based on immunity.

Paul Keating:@Mary, I agree completely. The vitiation must be limited to a dismissal based upon immunity.

George Kirikos:@Paul: it doesn't change the UDRP. It negates the UDRP --- it's an instruction to the registrars, that they are to ignore the UDRP ruling.

Mary Wong:@George, that is why the staff is raising the concern we did - how is that dealt with legally?

George Kirikos:It's like saying a registrar is free to ignore a court action, if it's not brought in a competent forum.

George Kirikos:e.g. someone sues me in Iran, which has no jurisdiction over a matter. Tucows is free to ignore anything coming from an Iranian court.

Paul Keating:Easy. Domain is transferred based on the UDRP.

Paul Keating:THis is the same that would occur if the case were dismissed for any reason.

Philip Corwin:I greatly respect Paul's opinion on UDRP matters, and his response is consistent with that of other UDRP panelists and litigating attorneys that I have discussed this with.

George Kirikos:IGOs are trying to have it both ways, then, that they're concerned about "Mutual Jurisdiction" being a waiver, and then arguing that it's not a waiver. Option 1 helps clarify that.

George Kirikos:Option 1 is consistent with the 'grand bargain' that created the UDRP, that it was not intended to create any new rights that were superior to those from the courts.

Mary Wong:@Paul, agree - that's why we are raising the issue. As things stand, the fate of the panel decision lies with the court - there is no rule about vitiation.

Philip Corwin:Concur that Option 1 would require some change in the UDRP -- as would Option 2. They are equivalent in that respect.

Paul Keating:@Peter - would the UDRP be handled by WIPO :-)

Philip Corwin:Does it matter which accredited UDRP provider handles the UDRP if the judicial appeal (or arbitration per Option 2) is a completely de novo procedure per the national law it was brought under?

George Kirikos:Who is talking?

Terri Agnew:Paul, we can hear you

Philip Corwin:Whether WIPO should be permitted to handle a post-UDRP scenario under Option 2 is something we should discuss in another meeting when we discuss potential elements of an Option2 procedure.

Terri Agnew:Paul Keating is speaking

Paul Tattersfield:yes

Philip Corwin:Prior post should have read "post-UDRP arbitration scenario"

George Kirikos:Also, which remedies, etc (in law, transfer of the domain need not be the required remedy).

George Kirikos:Trying to reinvent/copy the law --- that reinforces that the court of law is the ideal forum.

George Kirikos:Since, any differences would be biased in favour of IGOs. i.e. basic game theory is that IGOs would only assert that immunity if they believe that it's a benefit to them.

George Kirikos:Basic forum shopping.

Mary Wong:@Paul, thanks for the topic suggestions - another we'd add is, what are the arbitration rules that would apply

George Kirikos:"We're going to follow Canadian law, but with less qualified decision-makers" === bad

Jay Chapman:A lot of work, Paul K, but I don't disagree

George Kirikos:Option 3 = limit the scope of the immunity waiver.

George Kirikos:Paul had proposed that years ago, but it hadn't been seriously considered by the group.
Philip Corwin:@Paul--detailed discussion of key elements of a post-immunity arbitration can certainly consider waiver of monetary damages and other key issues

Paul Keating:correct

George Kirikos:What Paul was saying, though, was to KEEP IT IN THE COURTS, but limit what the court can consider (i.e. only consider the fate of the domain).

George Kirikos:i.e. the "cause of action" that can be brought by a loser in a UDRP is only about the fate of the domain name, not \$100,000 ACPA damages, or employment issues with an IGO, or fraud by the IGO, or other causes of action.

George Kirikos:But, the IGO explicitly must waive immunity and agrees to the court's jurisdiction, but only to the extent that it concerns the fate of the domain.

Paul Tattersfield:I think we need to remember the IGO's are looking to seize other people's property not defend their own property, limiting their liability runs the risk of frivolous UDRPs

Jay Chapman:Hard to imagine any court granting a judgment against an IGO other than in a case of an abusive filing

Paul Keating:@Paul - That is indeed a risk. You would end up with a RDNH finding, a post UDRP court action and a Post-UDRP judgment confirming possession to the Respondent. The only other "remedy" would be the sharing factor. That is enough for me given the limited number of UDRPs we are discussing here.

Philip Corwin:So Option 3 would be to eliminate the possibility of arbitration but require the domain registrant to waive any possibility of monetary damages? Does ICANN have authority to limit the scope of national laws?

Paul Keating:@Phil We need to modify the UDRP and the RA. That is, however, the case with any of the options we are considering.

George Kirikos:@Phil: it'd be saying that the scope of the UDRP waiver is only with respect to the domain name aspect. If someone wanted to raise the "damages" issue, the IGO could properly assert immunity, i.e. they would argue they *didn't* waive that issue for immunity.

Jay Chapman:Paul, do you have an outlined version of "Option 3" you could share via the email list?

George Kirikos:Likelihood = 3, Impact = 1

Paul Keating:@George, I think part of the bargain would be to eliminate the potential for a damage claim regardless of the NGO's position relative to immunity. Otherwise they will insist on the arbitration process.

George Kirikos:(negligible damage)

George Kirikos:They already successfully used licensee.

Paul Keating:I have one somewhere. I had sent this out as an option earlier. I will try to dig up the email.

Jay Chapman:Thx

Paul Tattersfield:By agreeing to mutual jurisdiction they waive immunity

George Kirikos:Option 1 says "court is supreme" --- entirely consistent with the premise that the UDRP was created not to supercede laws.

Mary Wong:@Paul T, that is a fundamental challenge regarding Rec 4 as it stands (irrespective of whether Option 1 or 2, or some other option, is preferred)

George Kirikos:Courts should be deciding which ones are IGOs.

George Kirikos:An IGO that has no connection to Canada (no treaty rights, etc), e.g. some of these Asian or European or Caribbean or African IGOs would have no treaty rights in Canada or the USA.

George Kirikos:If Canada/USA is not a member of the "Pacific Islands Forum", for example, their IGO has no special rights, even if they're on the GAC list.

George Kirikos:Same for OPEC.

Mary Wong:@George, if the Canadian govt signed on to a treaty or other instrument that grants national rights to an IGO, then that IGO would have rights within Canadian jurisdiction.

Berry Cobb:To Phil's comment: Recall the NGPC's small group proposal with their version of an RPM did limit the scope to only the 192 orgs as per the 2013 GAC advice

Paul Tattersfield:@Mary I'm also troubled with the concept of IGO's being entitled to immunity when they are looking to seize the assets of others for what ever reason.

George Kirikos:@Mary: yes, if Canada was a member of OPEC, then their immunity might exist in Canada.

Philip Corwin:@Berry--thanks for noting that -- although again I'm not sure it's the task of this WG to decide which IGOs are "real"

George Kirikos:(OPEC might be a bad example, since the government might recognize them)

Mary Wong:@Paul T, thing is, whether jurisdictional immunity exists in any one case is not dependent on any motive for going to court or pleading it.

Berry Cobb:@Phil - that is perhaps correct. I'm just viewing it as a possible consideration as it can likely reconcile to the GAC advice and in terms of an IGO's concern on MJ.

George Kirikos:+1 Paul. Option 1 is more consistent with the UDRP. Says that the procedure is that the dispute should be decided by courts, not arbitrators.

Mary Wong:@Paul K, yes

Philip Corwin:Paul, your description is correct

Mary Wong:And hence the point staff just brought up, about whether agreeing to MJ in the first place = waiver of immunity (such that it cannot be successfully pleaded after the fact)

George Kirikos:@Mary: yes, the intent of the UDRP was that it was a mandatory waiver of jurisdiction. Option 1 simply clears up any loopholes, that IGOs raise doubts about.

Mary Wong:@George, but if that is the case, then how can an IGO ever successfully plead immunity where it is deemed to have ALREADY waived it?

Paul Tattersfield:@Mary I agree, I'm just concerned the working group is considering granting rights that should not be granted. I think I need to make the time to consider the principle(s) behind immunity again.

George Kirikos:When there was a dispute in the PUPA.com case, I went to court immediately, before the UDRP case was decided.

Paul Keating:@George, Excellent point. I had not thought of a pre-UDRP decision action by the respondent. That will be more difficult.

George Kirikos:(and the UDRP panel decided it would defer to the courts)

George Kirikos:(and terminated the UDRP)

George Kirikos:Tucows and others have done the same.

George Kirikos:Option 1 has fewer of these loopholes.

George Kirikos:After the filing, though, but before the UDRP was decided (i.e. after the UDRP was filed, the IGO waives its immunity).

George Kirikos:Before the UDRP is filed, there's not the explicit waiver.

Paul Tattersfield:@George before the UDRP is an offensive action rather than a defensive action that is what immunity is for to prevent offensive actions

Mary Wong:@Phil, while we haven't looked at the matter in great detail, staff is inclined to agree with you in respect of ICANN's limited authority on pre-UDRP strategies and actions.

George Kirikos:ICANN59 planning?

Philip Corwin:Well, George's scenario was a post-UDRP filing but pre-UDRP decision defensive litigation one, just to be clear. IMHO we have zero authority to opine on what a court does if litigation is filed before a UDRP is filed.

Paul Tattersfield:The data was very good thank you

Berry Cobb:@Petter - NP. I will work on other formats to present it to the WG.

George Kirikos:Did the spreadsheet look at both "www.example.com" and "example.com" URLs? I think some sites that don't resolve without the 'www' might resolve with the 'www' (common webmaster mistake).

Paul Tattersfield:We should also look at discussing the raw data at ICANN59 because on first pass at least it shows very little if not zero need for any special IGO UDRP exceptions

George Kirikos:The "raw acronym data" seems to imply that just the "apex name" was looked at (column F), not the "www" subdomain.

Mary Wong:@Paul T, @Phil - thank you, yes - sorry I forgot to mention the data sampling which does seem useful to include in the ICANN59 discussion.

George Kirikos:True, Paul. Very few cases of impersonation.

George Kirikos:And it's unclear why law enforcement hasn't been involved for those cases, or registrar/registry abuse, webhosting providers, etc.

George Kirikos:(I meant Column "E" earlier, not column F)

Paul Tattersfield:There were a few redirects to official sites but that doesn't really lead to any harm

Mary Wong:We will work with Petter and Phil on the co-chairs' strawman for Option 2.

Philip Corwin:Safe travel to all heading to Joburg

George Kirikos:Data appears faulty. e.g. it says "acp.info" doesn't resolve. But, it resolves for me.

Paul Tattersfield:thanks all bye

Jay Chapman:thanks, all

Paul Keating:goo night