

Michelle DeSmyter:Dear All, Welcome to the Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working Group meeting on Thursday, 03 August 2017 at 03:00 UTC.

Michelle DeSmyter:Agenda wiki page:

https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_x_vQchB&d=DwIFaQ&c=FmY1u3PJp6wrcrw113mSVzgfkbpSS6sJms7xcl4I5cM&r=8_WhWIPqsLT6TmF1Zmyci866vcPSF04VShFqESGe5iHWG1BLwwhehFBfjrsjWv9&m=jPXSWSGy4AqxnG89qR4y1NufbIAc-NXhsx8t5SPuA5sU&s=vkJWhCNECu0GseE212Lmb7nr3CWnwntVjmfCrp57Q8o&e=

George Kirikos:Hi folks.

Michelle DeSmyter:Hi there George!

George Kirikos:Hi Michelle. How are you?

Michelle DeSmyter:Very well, thank you :)

Jonathan Agmon:hello

George Kirikos:Welcome, Jonathan.

Jonathan Agmon:Thanks :)

George Kirikos:It'll be interesting to see if we get more Asia/Pacific folks on today's call, given the better time slot.

Heather Forrest:Hooray Asia-Pac timezone friendly - hello everyone!

Steve Levy:I'm impressed that Petter is here at this hour! Any other Euro participants today?

George Kirikos:Hi Heather.

George Kirikos:5 am in Sweden!

David McAuley:Hello all, as a former resident of Asia-Pac region I can well understand Heather's happiness

Steve Levy:You also have my admiration, George!

Jonathan Agmon:I am also happy it is at 11am my time...

David McAuley:Thanks Mary

David McAuley:11pm here in DC

Jeff Neuman:Is anyone speaking yet?

George Kirikos:Thanks, Steve.... 11 pm isn't that bad. :-)

David McAuley:not yet Jeff

George Kirikos:(I'm not in Sweden, but Petter is)

David McAuley:Mary just said a few minutes

j. Scott:I am on the line.

Steve Levy:Oh! I thought you were also in Sweden, George!

Maxim Alzoba (FAITID):Hello all

George Kirikos:Nahhh, just Toronto here.

George Kirikos:Hi Maxim.

Maxim Alzoba (FAITID):6 am

Maxim Alzoba (FAITID):will not be able to use mic, will use chat window

George Kirikos:Are we discussing these without looking at the data??

George Kirikos:(a bit puzzled here)

Amr Elsadr:@George: There were no data requirements identified for the preamble question.

Jeff Neuman:I will ask the same question I always ask. According to this group, what do we believe is the intended purpose of the Sunrise?

Michael Flemming:For clarity, are we still commenting on the structure of the question or seeking to give answers?

Mary Wong:@Michael, I believe it is to provide at least initial answers - possibly with a view to revisiting or fleshing out when we have more data or when we get to the end of this review

Kristine Dorrain - Amazon Registry:+1 Jeff

Maxim Alzoba (FAITID):+1 Jeff

Mary Wong:@Jeff, that is one of the purposes of having this initial discussion - to get WG agreement on these fundamental questions.

Greg Shatan:@George, can you point us toward the data you rely on to state that a significant percentage of sunrise registrations are the result of gaming? Also, what are you calling "gaming"?

Maxim Alzoba (FAITID):NOTE: was the cost was the part of the intended purpose?

George Kirikos:That assumes that the sunrise registrant is the only legitimate registrant, a false assumption for commonly used terms (like HOTELS, THE, etc.).

Greg Shatan:Sunrise does not assume that at all.

George Kirikos:@Greg: when there are only an avg of 130 sunrises per TLD, 10 to 20 gamed ones is a significant fraction.

Greg Shatan:Where do you get the idea there are 10-20 gamed registrations on average?

Maxim Alzoba (FAITID):Why do we believe that the low cost was the part of the sunrise purpose?

George Kirikos:@Greg: anecdotally, from the domain blogs that have tracked all the sunrises.

Maxim Alzoba (FAITID):Historically sunrises were not about low price (even before TMCH creation)

Michael Flemming:My understanding is that the Sunrise Dispute resolution policy is to resolve disputes for when there is more than one application for the same domain.

Maxim Alzoba (FAITID):+1 WMichael

Greg Shatan:@George, links please. Also, those blogs tend not to be neutral reporters. Again, what are you calling "gaming".

George Kirikos:@Greg: read the mailing list, those links have been sent before.

Michael Flemming:Not necessarily to challenge the registration of a Sunrise domain by a certain applicant

Heather Forrest:+1 Jeff re opportunity, not guarantee

Greg Shatan:I've read every email on this list.

Maxim Alzoba (FAITID):@Greg, in Russia, small company selling drills, came to TMCH with the equivalent of word "we" in russian

Greg Shatan:If you want too make claims, back them up.

Kristine Dorrain - Amazon Registry:From the Applicant Guidebook: The proposed SDRP must allow challenges based on at least the following four grounds: (i) at time the challenged domain name was registered, the registrant did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration; (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.

Greg Shatan:Maxim, was that the trademark they used to sell drills?

George Kirikos:@Greg: those claims have been backed up. I won't constantly repeat myself, when it has already been posted.

Michael Flemming:Thank you Kristine.

Maxim Alzoba (FAITID):no, it was one of the trademarks they used to participate in sunrises

Maxim Alzoba (FAITID):they also obtained quite many domains with generic terms

Greg Shatan:No need to repeat yourself, George, you can send them to me offlist.

George Kirikos:@Greg: that would be repeating myself.

Greg Shatan:So you're telling me and everyone for the group to go fish for your "proof." Thanks for the help.

Mary Wong:If it is helpful - in the Protecting the Rights of Others Working Group that was part of the 2005-7 GNSO PDP on New gTLDs, this was the definition offered for Sunrise: "A process in which owners of Legal Rights have the opportunity to register domain names before the Landrush process open to the public."

George Kirikos:@Greg: you're saying the blogs where "THE" was discussed hasn't been posted to the mailing list already?

George Kirikos:Use a search engine for your email.

David McAuley:Helpful, thanks Mary

Greg Shatan:George, I do.

Phil Marano:It would be interesting to hear from contracted parties their views on how sunrise may mitigate legal risk or

related costs, at a minimum at least potentially decreasing the number of demand letters, takedown letters, subpoenas or legal actions (without respect to the merits of those actions for the moment) by providing trademark owners some priority to defensively register domain names.

Maxim Alzoba (FAITID):I can not use mic, and a contracted party j. Scott:maxim. Sorry to hear that. If you will type a statement I will read it

Greg Shatan:@George, those blogs do not in any way demonstrate that 10-12 sunrise registrations were "gamed" on average. As a matter of fact, I've already refuted much of what was in those blog posts.

Maxim Alzoba (FAITID):I am not sure that the cost was the part of the sunrise purpose, at least it was not in AGB. Historically Sunrises were not about low price.

George Kirikos:So, Greg, you're saying there *are* blog posts, after all? And they were posted to the list? :-) And I didn't have to post them, because they already were posted on the list? :-)

Maxim Alzoba (FAITID):And contracted parties (new ones) relayed on AGB and existing policies when became Applicants, and later Registries.

Sara Bockey:very distorted

George Kirikos:Lots of noise (perhaps turn off speaker).

Rebecca L Tushnet:I'm sorry, can you slow down?

Kristine Dorrain - Amazon Registry:Apologies. I struggle with being heard when I'm home.

Kristine Dorrain - Amazon Registry:Yes, thanks, J. Scott.

Kristine Dorrain - Amazon Registry:My point was that, to Phil, we might not get good info on *why* new gTLD registries participated because it's wasn't voluntary, even if we would have done it on our own.

Kristine Dorrain - Amazon Registry:I think we can agree that the PURPOSE of sunrise was not pricing. Sunrise was primarily, as I recall, requested by the IPC.

George Kirikos:Yet, when I've brought up the topic of examining the TMCH fees, folks roll their eyes.....hmmmm.

George Kirikos:(likely huge profits by the TMCH operator, given their monopoly)

Jonathan Agmon:+1 Kristine

Michael Flemming:The TMCH fees aren't necessarily as exorbitant as the individual Sunrise prices.

Rebecca L Tushnet:Though it doesn't protect everyone with an interest: if you just own a hotel, you can't participate in Sunrise for HOTEL

Kristine Dorrain - Amazon Registry:@George, the TMCH fees a

different fee from Sunrise fees.

Greg Shatan:George, I never said they didn't exist, or that they weren't posted. I thought you were referring to other blogs, since the ones you posted didn't prove your point.

Kristine Dorrain - Amazon Registry:the brand owners don't like the per-domain sunrise registration fees.

George Kirikos:@Greg: in your opinion.

Greg Shatan:@George: and yours.

George Kirikos:It seems to have proved the point in other people's views, given there's a proposal on the table to eliminate the sunrises.

Michael Flemming:That was the intention of the TMCH or are we considering those together?

Kristine Dorrain - Amazon Registry:To Jeff's point, not that the STI itself is binding, but as reference, this is what it says: There is a consensus³ among the members of STI that though this was not a rightsprotection mechanism, the creation of a Trademark Clearinghouse (TC) to be operatedby an arms-length contractor, would be a beneficial implementation tool for rightsprotection mechanisms, such as sunrise or TM Claims, and therefore should be includedin the New GTLD program, except as indicated below. The STI recognizes that aTrademark Clearinghouse could serve as a convenient location to store registeredtrademark information in a centralized location on behalf of trademark holders, and couldcreate efficiencies for trademark owners, as well as registries which will benefit fromhaving one centralized database from which to interact to obtain the necessarytrademark information to support its pre-launch rights protections mechanisms

Greg Shatan:That's your proposal George. I'm not surprised you convinced yourself. And I question whether that is "on the table."

Greg Shatan:@Rebecca, are your referring to a Sunrise for the .HOTEL gTLD?

George Kirikos:@Greg: no, that's the EFF member's(Jeremy) proposal. Keep trying, you might get something correct tonight, though.

Kristine Dorrain - Amazon Registry:(copy paste from PDF removes formatting, sorry)

Kristine Dorrain - Amazon Registry:I believe it may actually have been Kurt Pritz's proposal.

Greg Shatan:I'll take my batting average over yours. And you've made that proposal often enough. Don't be shy.

Jonathan Agmon:I agree with Jeff

David McAuley:low audio

Justine Chew:Can't hear Steve?

Kristine Dorrain - Amazon Registry: Steve, those are questions 4 and 5. :) You're getting ahead of us.

Heather Forrest: Just adding some data to Jeff's helpful historical context: Three of the four new gTLDs created in the first 'proof of concept' expansion round (.info, .name and .pro) that launched with a sunrise based eligibility in the sunrise period on ownership of trademark rights. The fourth, coop, used different criteria, for obvious reasons.

Steve Levy: Sorry about the audio

Michael Flemming: I agree with that

Kristine Dorrain - Amazon Registry: And that's where Steve's reminder for balance and relative harms comes in.

David McAuley: I agree with what J. Scott just said

Rebecca L Tushnet: I can live with J. Scott's version, in the language of the poll

Maxim Alzoba (FAITID): also making prices low will not help brand owners, those whose business is not only selling domains

Greg Shatan: Also support J Scott's summary.

Jonathan Agmon: I also agree with J. Scott

Kristine Dorrain - Amazon Registry: Yes to both.

Greg Shatan: I think price gouging is one of those unintended consequences.

Greg Shatan: Though it occurred only in a small minority of gTLDs.

Justine Chew: Yes, agree with J. Scott and Mary. Can we put in a reference to the AGB clauses mentioned by Kristine to the first bulleted question so we all know what "intended purpose" is once and for all.

Scott Austin: +1 J. Scott.

Michael Flemming: This question is merely asking "is it", we address what those cases of abuse are in later questions.

Phil Marano: Agree that circumvention of sunrise through pricing can be considered an unintended effect.

George Kirikos: Some of the TMs that were registered back for the .EU sunrise gaming are likely still alive, so creation date of TM isn't a good test.

Jeff Neuman: Part of the problem has always been with having different systems of trademark law around the world

George Kirikos: Very true, Jeff.

Jeff Neuman: Not sure we could ever solve that, but the difference between those that do substantive review and those that do not, has always been a problem

George Kirikos: What's the question?

George Kirikos: Ok.

Heather Forrest: Noting for everyone that Heather Costelloe is

observing today

Michael Flemming:I think the main issue I found was that the requirements for proof of use were different in a few cases from what the patent office would require and what the TMCH requires.

Rebecca L Tushnet:Produced by Stoller?

Justine Chew:Is there any way we can establish if the requirements set by TMCH with respect to proof of use is being applied consistently?

George Kirikos:Sound died?

j. Scott:I seem to have lost audio. Can you hear me?

David McAuley:yes

Kristine Dorrain - Amazon Registry:I hear you jeff

George Kirikos:I can hear Jeff.

Maxim Alzoba (FAITID):yes

Louise Marie Hurel:yes

Kristine Dorrain - Amazon Registry:Can't hear you J Scott

Greg Shatan:Yes, produced by Stoller. He sent it along with his "settlement agreement," so I could sign it and send it back right away.

Scott Austin:Iin addition to THE, I was also told of the abuse of the acceptance of single character trademarks, including 12578wxy, not only listed in the TMCH but verified for "Proof of Use" to trade during Sunrise

Maxim Alzoba (FAITID):for example, in the Russian Federation it is not possible to get domain apple out of hands of the company which sells apples via internet (for few years) and has a TM for that

Maxim Alzoba (FAITID):in the court

George Kirikos:Plectrums, for the .EU sunrises.

j. Scott:I am back and I hear Mary

Scott Austin:Benelux was where THE was registered.

Mary Wong:Thanks, J Scott - handing back over to you!

George Kirikos:But, the TMCH provider was supposed to go further, i.e. the "use" requirement was supposed to correct for those differences between countries.

George Kirikos:i.e. only the ones that pass the "use" test get sunrise privileges.

Michael Flemming:"Do the individuals that undergo the validation of proof of use at the TMCH possess some qualification/training or do they merely follow established guidelines?" Is that a question worth asking?

George Kirikos:Without the TMCH materials being public, there's no accountability as to the specimens of use, etc.

George Kirikos:Proof of use does appear in the USPTO TM files, which the public can inspect.

Petter Rindforth:+ Rebecca

Rebecca L Tushnet:Mary I might characterize my comments differently: (1) substantive review generally is distinct from (2) specimen of use; once you require a specimen of use, though, you could also require (3) evidence of commercial use

Greg Shatan:We can create accountability methods that don't rely on "outing". the database.

Mary Wong:@Rebecca, noted and thanks.

Jonathan Agmon:Proof of use in the Trademark registry is a concept not existing outside the US

Rebecca L Tushnet:Sorry, I'm tired, but another way to say it might be: even countries w/o substantive examination generally have a use requirement at some point in the life of the TM, and we could look to a use requirement

Mary Wong:All, if it helps, this is what the Explanatory Memorandum said when the proof of use requirement was introduced: "Proof of use from all registered trademark holders is intended to help ensure that all registered trademarks receiving the same type of advantage from a particular RPM are evaluated at substantially the same level. In other words, all registered trademarks are treated equally."

Jonathan Agmon:@Rebecca, most do not - the trademarks are subject to cancellation/revocation if they are not used.

Maxim Alzoba (FAITID):unfortunately it is not possible to distinguish business with the single model made on the stage of startup from the company trying to game the TMCH via single use items (one create, one sold, one sent to someone)

Rebecca L Tushnet:Right, Jonathan, that's what I'm saying

Rebecca L Tushnet:The burden of showing nonuse may differ

Rebecca L Tushnet:but the point is: when someone asks, at some point you have to show use

Jonathan Agmon:yes, but if there is no challenge the TM doesn't have to show use

Justine Chew:What would "commercial use" mean in the context of non-profits? Just for clarity.

Rebecca L Tushnet:Right, but the question is whether we can think of something that a TM owner in any jurisdiction should be able to satisfy

Rebecca L Tushnet:Substantive examination, no; commercial use, possibly

Phil Marano:The TMCH is already requiring appropriate minimum forms of use given the myriad methods made available to challenge any spurious sunrise registration, TMCH record, or underlying national registration.

Jonathan Agmon:my view is that substantive examination should be sufficient

Mary Wong:@Rebecca, it seems that your point is what the Board

was trying to get at when introducing the proof of use requirement

George Kirikos:Perhaps proof of use might include affidavits by N customers, e.g. N = 3, etc.

George Kirikos:And those customers might be tested for gaming (e.g. if the only "sales" were to family members or relatives, that's probably fake use)

Michael Flemming:Customers are already required to submit affidavits, I believe.

Michael Flemming:Statement of Proof of Use

Maxim Alzoba (FAITID):@George, I am not sure that repelling startup companies is going to be an intended effect

Greg Shatan:"Bona Fide" use.

George Kirikos:@Michael: not customers of the TMCH provider, but customers of the TM holder (i.e. folks who bought the goods/services in question)

David McAuley:Agree that proof of use needs work

Kristine Dorrain - Amazon Registry:At the risk of disrupting the kumbaya moments....is there really a significant enough set of abuses to try to make the use requirement MORE stringent?

Jeff Neuman:I would like to hear from the TMCH as to what standards they used

George Kirikos:Yes, if the sunrise continues (I support Jeremy's proposal to simply eliminate the Sunrise, though).

David McAuley:+1 @Jeff

Jeff Neuman:And what evidence of abuse actually exists

Kristine Dorrain - Amazon Registry:There is gaming....all the RPMs are gamed. How many gamers are we going to shut down with changes?

Greg Shatan:Start-ups might get \$\$ from friends and family, but hopefully their sales are beyond that circle.

Maxim Alzoba (FAITID):+1 Jeff

Jonathan Agmon:My mike is not working

Phil Marano:No, just improve the challenge mechanisms.

Kristine Dorrain - Amazon Registry:I keep hearing the same 3 examples....

Michael Flemming:I agree with Jeff. I'd like to hear more about the guidelines and qualified individuals that undergo these checks.

Steve Levy:I'm only seeing 5 green checks

Rebecca L Tushnet:Kristine, I'll happily put the top 10 entries we know about into the hopper of examples

Mary Wong:@Jeff, Deloitte has this to say about verifying use: "that evidences an effort on behalf of the trademark holder to communicate to a consumer so that the consumer can distinguish the product or services of one from those of another."

Jonathan Agmon:I wanted to say that use is a delicate one

Rebecca L Tushnet:That sounds more like a specimen of use/use as a TM rather than as ornamental requirement

Heather Forrest:On this question (documentation of abuse) perhaps Mary can answer - was any data taken in the staff review?

Kristine Dorrain - Amazon Registry:@Rebecca, I think that would help, but even 10 seems really really low.

Kristine Dorrain - Amazon Registry:There has got to be a threshold for crappy behavior that it's not worth it to address...

Justine Chew:Thank you, Mary, that would help answer my earlier question.

George Kirikos:It's more than that, Kristine. e.g. see: https://urldefense.proofpoint.com/v2/url?u=http-3A_domainnamewire.com_2014_01_30_the-2Dnumbers-2Dare-2Din-2Ddonuts-2Dsunrises-2Dtypically-2Dget-2D100-2Ddomains-2Dbut-2Dthey-2Dalso-2Dgot-2Dgamed_&d=DwIFaQ&c=FmY1u3PjP6wrcrw1l3mSVzgfkbPSS6sJms7xcl4I5cM&r=8_WhWIPqsLT6TmF1Zmyci866vcPSF04VShFqESGe_5iHWGlBLwwehFBfjrsjWv9&m=jPXSWGy4AqxnG89qR4ylNufbIAc-NXhsx8t5SPuA5sU&s=NW7DCcLoaNp6NuRoyZEEIguDfJsBmwNr_FxAZNBE3pQ&e=

Scott Austin:But a should a self-serving affidavit be sufficient to overcome descriptiveness or allow a common term to be registered in the TMCH

Mary Wong:@Heather, I don't believe there was a specific data collection effort other than community input, but we will check and confirm.

Heather Forrest:Thanks, Mary

Michael Flemming:Does abuse of the Sunrisses Period entail the premium names of trademarks by the Registry or do we cover that in another question?

Rebecca L Tushnet:Remember, that's the 10 most popular--a greater effect than marks that no one ever attempts to register

Heather Forrest:+1 Greg- sufficiently questionable to clarify the intended meaning

Michael Flemming:I agree with Greg. We need clarification on who the audience of this is.

Justine Chew:+1 Greg

Jonathan Agmon:+1 Greg

David McAuley:I did not catch the ambiguity that Greg did but see it now

Greg Shatan:Oh, interesting. Maybe we need to ask both questions....

Michael Flemming:Ok, so we cover the premium namees aspect in question 3. So that would not qualify for abuse here.

Greg Shatan:Most bona fide trademark owners are also

registrants, with some having very large portfolios of registrations.

Rebecca L Tushnet:Abuses of sunrise specifically?

Rebecca L Tushnet:I don't remember that from the study, but I read it a way back

Rebecca L Tushnet:(the INTA study)

Maxim Alzoba (FAITID):if we define abuse as a violation of rules - no

Greg Shatan:"preambulatory" -- excellent.

George Kirikos:Are there registries/registrars on the call?

Justine Chew:Right, based on Lori's reply, can leave questions are they are. Thanks, Lori.

Maxim Alzoba (FAITID):I think the correct way is via RySG / RrSG

Lori Schulman:You are welcome Justine.

George Kirikos:Intent behind the rules, exactly.

Maxim Alzoba (FAITID):but if we see it via stretchin the rules , yes

Maxim Alzoba (FAITID):Could we request RySG/RrSG to send answers as Registries/Registrars ?

Maxim Alzoba (FAITID):but next monday (few days) is bit unrealistic as expectation of response during summer

Mary Wong:Got it, will do, J Scott

Justine Chew:Abuses could mean different things to different people/groups. Someone should be examining all documented abuses to determine level .

Maxim Alzoba (FAITID):@Mary , could you read out my suggestion about RySG/RrSG?

Kristine Dorrain - Amazon Registry:Maxim, I suggest we just take that back to our our SG.

George Kirikos:Are we doing Q1?

George Kirikos:("if time permits" as per the agenda)

Greg Shatan:@Justine, we do need "abuse cases."

Lori Schulman:Sorry I missed most of the discussion but I am glad that I could chime in.

Greg Shatan:"ab-use cases."

Heather Forrest:Apologies in advance, I likely won't be able to join for the next rotation, which is in the red zone time in Tasmania.

Justine Chew:@Greg, yes we do need those cases, whoever is documenting them.

Kristine Dorrain - Amazon Registry:I think if people show up with abuse stories then we listen. We can decide if they are actually abuse.

Jonathan Agmon:+ Heather...

Heather Forrest:It's only summer in the northern hemisphere

Jonathan Agmon:+1...
Michael Flemming:hehee
David McAuley:Good point Heather and many of us were just in Jo'burg
Lori Schulman:Agree with Kristine. We should hear what people consider abuse and then determine if it is or if within bounds.
Lori Schulman:Yes, it's 12:09 am here.
Greg Shatan:And Winter in Australia....
George Kirikos:Why not start on Question 1, to use the final 20 mins?
George Kirikos:(i.e. to keep the train going)
Steve Levy:Thanks all. Speak with you next week!
Jonathan Agmon:Thank you all
Kristine Dorrain - Amazon Registry:Good night/morning/afternoon!!
David McAuley:Thanks all, good bye
Maxim Alzoba (FAITID):bye all
Heather Forrest:Thanks, J Scott
George Kirikos:Bye folks.
Lori Schulman:Thank you J Scott for keeping the trains running
Greg Shatan:UK/Europe try to go back to sleep....
Michael Flemming:Thanks
Lori Schulman:ciao
Greg Shatan:Night, all!