

Adobe Connect chat transcript for Thursday, 24 August 2017

Terri Agnew: Welcome to the IGO-INGO Access to Curative Rights Protection Mechanisms Working Group call on Thursday, 24 August 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_mwghB&d=DwIFaQ&c=FmY1u3Pj6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAVSfpClgmKXhFzL7ar9Qfqa0AIgn-H4xR2EBk&m=DRtrcDBDQaY6Ukrlcc-YwNwqJb92yqK8p5KQ0tX3c&s=1dWgeTqCLgkHFz_1OE2V95T3xcGpGgtiWh-RtwFThg&e=

George Kirikos: Hi folks.

Steve Chan: Hi Terri. Still need to join the bridge :)

Petter Rindforth: Not sure that you can hear me today, but I am online and can hear you, so at least I'll use the chat

George Kirikos: No dial-in Petter?

Petter Rindforth: Travelling

Petter Rindforth: And spell your name online, instead of saying it 3-4 times before you will be connected

George Kirikos: Exactly, Petter.

George Kirikos: <https://www.pcauthority.com.au/News/471400,microsofts-speech-recognition-engine-is-as-good-as-a-person.aspx>

George Kirikos: Perhaps blast out an email reminder, to get the stragglers? :-)

Mary Wong: Apologies, I was on another call that ran slightly over

George Kirikos: First 2 pages are just historical, so it's actually shorter.

George Kirikos: Also, pages 15 & 16 aren't controversial.

Mary Wong: @George, and there are also page breaks between sections :)

George Kirikos: Exactly, Mary. :-)

Mary Wong: Note that much of the entries were retained from the earlier June version, with additions based on the WG's subsequent deliberations, especially on the newer Options. Please refer to the redline version to see the differences.

Paul Tattersfield: There's one going to the Supreme Court at the moment 5 years after the initial UDRP

Mary Wong: Disadvantage #2 should also be read in context of #3

George Kirikos: Forfeiting the UDRP outcome, right.

Mary Wong: We meant it as an illustration, to elicit more specific notes on what the benefits are to both sides.

George Kirikos: <https://www.icann.org/resources/pages/policy-2012-02-25-en> (see 4(k))

Petter Rindforth 2: I agree that it is important to try to make our recommendations without changing UDRP/URS, in order also to finalize without waiting for the WG dealing with UDRP, etc (starting that phase in the near future...)

George Kirikos: @Petter: Each option would change the UDRP/URS, but only in a minor aspect (i.e. 4(k)), which only affects how the registrar enforces the decision, if the court case has that immunity issue.

George Kirikos: So, from the point of view of NAF/WIPO/etc, the policies won't change at all under Options 1 or 2.

Paul Tattersfield: I believe if an IGO initiated an action in any other forum other than UDRP they would have to waive immunity

George Kirikos: Yes, #7 didn't make sense to me either.

Mary Wong: @Paul, to go to court, yes; and that is also why it is important to recall (as Phil has noted) that by submitting to Mutual Jurisdiction, an IGO is likely in some jurisdictions to be deemed to have waived its immunity as well.

Paul Tattersfield:Wouldn't the mutual jurisdiction clause be less onerous as it is only a waiver of jurisdictional immunity?

Berry Cobb:Yes

Mary Wong:@Paul, that's true too. Again it comes down to a matter of strategic choice for any complainant, in this case, IGOs.

Berry Cobb:And if it proves difficult to fill out, it can be removed before import into the final report.

Mary Wong:@George, we did not attempt to capture all possible costs and impacts - we had thought the WG could complete the exercise. We certainly did not intend to present a complete, closed, one-sided case. As Berry mentioned, this is more of a qualitative exercise so staff did not feel it appropriate to do more than present a starter draft.

Petter Rindforth 2:Although that is not likely to be used by IGO's, as we know from their comments (= using third party, etc)

Paul Tattersfield:I think it's helpful even if it's not exhaustive

George Kirikos:Calling "More consistent with the requests from the GAC and IGOs" a benefit.....is kind of weak.

George Kirikos:This "disadvantage" is the same as option #1, so it's not a biggie.

Mary Wong:@George, note that while the GAC supported arbitration, it was not for the scenario where an IGO would still have to prove immunity in a court.

Paul Tattersfield:Was anyone around when WIPO went for ADR rather than Arbitration for UDRP?

George Kirikos:<https://www.icann.org/resources/pages/policy-2012-02-25-en> Paragraph 9 already handles that, Phil.

George Kirikos:9. Policy Modifications. We reserve the right to modify this Policy at any time with the permission of ICANN. We will post our revised Policy at <URL> at least thirty (30) calendar days before it becomes effective. Unless this Policy has already been invoked by the submission of a complaint to a Provider, in which event the version of the Policy in effect at the time it was invoked will apply to you until the dispute is over, all such changes will be binding upon you with respect to any domain name registration dispute, whether the dispute arose before, on or after the effective date of our change. In the event that you object to a change in this Policy, your sole remedy is to cancel your domain name registration with us, provided that you will not be entitled to a refund of any fees you paid to us. The revised Policy will apply to you until you cancel your domain name registration

Petter Rindforth 2:I think it is the second - UDRP is mentioned as an example in the contracts

George Kirikos:Sound is good.

Mary Wong:@Phil, @George - because Option 1 would render a substantive decision void without there being judicial scrutiny. But as noted, staff supporting this group are not legal process experts.

Paul Tattersfield:Can we make it so all arbitration documents are to be published?

George Kirikos:But not better than Option #1 from registrants' point of view.

Paul Tattersfield:Given this is a third party initiated action, would a clause in a contract between a registrar and a registrant binding the registrant to arbitration be even enforceable?

Jay Chapman:I would like to speak, Phil, after the impact analysis

Jay Chapman:I need to dial in

Mary Wong:@Paul, that is the point I was trying to describe a few minutes ago.

Petter Rindforth 2:I agree that Opt 2 is good for registrants, more legally sure as the case can be treated independent of immunity claim, but it is also better for IGOs than Opt 1

Petter Rindforth 2:Meaning "domain holder"

Berry Cobb:@Phil - was only an example, not definitive.

Mary Wong:@Paul - following up, meaning that it can be a question whether a "pass through" obligation for the Registrar to include agreement to the UDRP in all its registration agreements is enough to bind a registrant to arbitration thereby.

Paul Tattersfield:I'm thinking it could possibly be even more problematic where the registrant is a consumer rather than a professional registrant especially in European jurisdictions?

Jay Chapman:Can't find the dial in number, so here it is: Phil, If an additional arbitration existed, and before even assessing the merits of registrants rights vs. IGO immunity, I have little doubt that a court would be, at the very least, tempted, and perhaps on average, inclined to use the additional arbitration's existence as a basis to punt the case away. That's a reasonable , legitimate concern for registrants

Jay Chapman:and a disadvantage for option 2

Mary Wong:@Jay, would you like us to dial out to you?

George Kirikos:That's an important point.

George Kirikos:i.e. adding Option 2 makes it more likely that a court would find "immunity".

Paul Tattersfield:Emirates case in the UK

George Kirikos:He's typing.

Paul Tattersfield:It bars UK citizens from bringing cases

George Kirikos:Hit "enter" to split your longer thoughts into multiple lines. :-)

Paul Tattersfield:my machine is so slow carry on I'll type it in the chat

George Kirikos:So, Option #3 is advocating for "quasi in rem" jurisdiction of the courts, essentially, only in relation to the domain's outcome.

Petter Rindforth 2:Can be combined with Opt 2

George Kirikos:Or Option #1. :-)

Petter Rindforth 2:It is not sure that the court will accept it

Paul Tattersfield:Here is a good summary of the Emirates case

https://urldefense.proofpoint.com/v2/url?u=https-3A_www.brownejacobson.com_about-2Dus_news-2Dand-2Dmedia_published-2Darticles_2012_04_toth-2Dv-2Demirates&d=DwIFaQ&c=FmY1u3PJP6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAVSfPcIgmKXhFzL7ar9Qfqa0Aign-H4xR2EBk&m=DRrtrcDBDQaIY6UkrIcc-YwNwqJb92yqK8p5KQ0tX3c&s=xaYV3QOQW6kUPWmKZulXorZHJdI5V3uwtjtgpB3ZLL8&e=

Petter Rindforth 2:Adding it to option 2 is a better solution

George Kirikos:Option #3 gives something to IGOs, and Option #1 gives something to registrants, so it balances things out.

Petter Rindforth 2:If the parties involved are identified, I agree. And to add it to option 2 will likely also make the arbitration phase more rare

Paul Tattersfield:I don't think 3 really adds anything that isn't already there

George Kirikos:Page 11. Only 4 pages left.

George Kirikos:It would also make vitiating more rare, too, in option #1.

George Kirikos:Option #1 for existing domains, option 2 for newly created domains, yes.

George Kirikos:Option #5 has a wrong premise, so not much discussion needed.

Petter Rindforth 2:I think we can in fact delete this option by now

George Kirikos:Canada/USA would.

George Kirikos:So, that would cover .com, at the registry level. i.e. all important domains.

Petter Rindforth 2:Mary's hand is up - probably because we asked for ICANN internal legal COMMENTS

George Kirikos:UK, common law (since many countries descend from those common law principles).

George Kirikos:I think even civil law countries would recognize it, e.g. from admiralty law.

Petter Rindforth 2:"legal comments"- Mary, is there a possibility to get legal input on this issue without extending our time?

Paul Tattersfield:Perhaps we should change the mutual jurisdiction clause to registry, registrar, registrant jurisdictions

George Kirikos:<https://www.icann.org/resources/pages/policy-2012-02-25-en> (4k)

Mary Wong:@GEorge, the question is whether those courts outside US/Canada would recognize domain names as proper subjects for in rem actions.

Petter Rindforth 2:I am not so sure that it can be generally used in Europe

Mary Wong:@Petter, thanks - yes, that was one of the concerns I tried to note.

Mary Wong:@Petter - are you asking about external legal advice on this option?

Paul Tattersfield:Could we recommend the RPM WG to look at it?

Petter Rindforth 2:No, I refer to a couple of questions discussed - it think - at last meeting, that perhaps could be investigated by your own internal legal "experts"

Mary Wong:Not international law, but national laws in differet countries about recognizing domain names under in rem actions.

Terri Agnew 2:@Phil, your apology is noted for next week

Terri Agnew 2:IGO-INGO Access to Curative Rights Protection Mechanisms Working Group call will take place on Thursday, 31 August 2017 at 16:00 UTC for 90 minutes

George Kirikos:Perhaps next call we call on each person to see which options they support, maybe on a 5 point scale?

George Kirikos:(strongly support, support, neutral, do not support, strongly oppose)

George Kirikos:"do not support = oppose"

George Kirikos:Bye folks.

Paul Tattersfield:Bye all

Petter Rindforth 2:It will be very productive!