ICANN
Transcription ICANN Hyderabad
Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Update
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James Bladel: Okay good morning. We're going to go ahead and get started so if folks are
still streaming into the room if you could find your seats and of course
councilors, make your way to the table that'd be great.

We are trying out something new. One of the takeaways we had from the
Helsinki meeting was that the working weekend of GNSO meetings could
practically be compressed into a single day, and that's what we're going to
attempt today. It's going to be a long day but it's going to be just one.

And for the first part of today we're going to focus on updates from our
ongoing PDP and the leadership of those working groups. So let me just
quickly pull up the agenda here. And I don't know if the recordings are ready
and we've got green lights. Great, thank you.

So and if anyone has any updates to the agenda please let me know as we
get started. Let me pull that up quickly and see that our first agenda item will

be from an update from the Review of Rights Protection Mechanisms for the PDP and that is chaired by Kathy Kleiman, Phil Corwin and J. Scott Evans. I see Kathy and Phil, is J. Scott here? J. Scott here remote?

Phil Corwin: J. Scott is participating remotely if he's online. But he didn't come to the meeting.

James Bladel: Thanks, Phil. So with that in mind if there are no objections we'll just kick off and I'll turn the floor over to Kathy and Phil and J. Scott.

Phil Corwin: Okay. And well we have the - I'm going to speak to the slides so we can get past the first one here. And what is this project about? Okay, we were just chartered earlier this year in March. We discussed a charter in June. Now we've been making good progress. We're sticking pretty much close to - oh thank you - that helps because I haven't logged on yet.

So we decided we've got a lot of issues to cover. This RPM - now this working group we're going to be working for the next four or five years because we have two phases. Phase 1, and so I can retire on this one. Phase 1 is the review of all the rights protection mechanisms in all the new TLDs. We're projecting finishing that middle of 2017 and delivering a preliminary report and recommendations by the end of next year and wrapping up that part.

And then we get to the really fun part early 2018 where we begin the first-ever review of the only ICANN consensus policy that's never been reviewed, which is the UDRP. And you can imagine there are - we haven't even projected how long that might take or even listed all the substantive and procedural issues that will be covered in Phase 2.

But right now we're focused on Phase 1. We're doing, as I said, good progress. We've decided to start with the least complex of the new TLD RPMs, though it's a little bit complex how to address it. It's the PDDRP, which

is the Post Delegation Dispute Resolution Process, which is a process that permits trademark owners to challenge a registry if they believe the registry is either directly infringing their marks or is encouraging registrants to infringe their marks at the second level.

The challenge here is that has never been used so we don't have any cases to look at to see how it's worked out in practice because it hasn't been used. So a lot of what we've been reviewing is to try to figure out why it hasn't been used. Is it - hasn't been used because there's no problem or at all or is it not used because the barriers to using it are too high or because the relief it promised is not substantial enough? Or, you know, to put a positive spin, because ICANN Compliance is doing such a good job policing the new registries that there's no need for it.

So we're wrapping up on that one. Meanwhile we're teeing up the Trademark Clearinghouse. We've had subgroups preparing questions. And we've got appended to our charter we have several dozen questions that have come in from the community over the course of the development of this working group. And these subgroups are basically looking at all the questions and asking which ones are duplicative, which ones don't seem that important. And combining them and other issues are coming up.

So we're all ready to get in to the review of the Trademark Clearinghouse, which is the - looking at the actual criteria for registering marks in the Clearinghouse, the costs and all of that. And then we're going to proceed to review the two RPMs which depend on Clearinghouse registration, which are the right for sunrise registrations and the generation of trademark claims notices to registrants, which we're looking at and trying to figure out.

It turns out that 94% of registrations that are begun and that receive a claims notice are abandoned so we're trying to figure out whether that's because those 94% intended to infringe and realized they might get in trouble, that their mark holder will be notified; or whether it's because a lot of lay

registrants who don't understand trademark law and don't want to hire an attorney to figure it out are just saying this isn't worth the potential problem. So we're looking at that.

And then the last item we'll be looking at in Phase 1 is the URS, which is a nice way to segue into the UDRP because the URS is a subset of the UDRP for black and white cases - allegedly black and white cases of infringement. So that's where we are.

So next slide, which may duplicate some of what I've said off the top of my head, but yes, our timelines are aggressive but so far they're proving fairly reasonable. We're pretty much adhering to them. We are coordinating with the other working group on new TLD subsequent procedures which actually the PICDRP is in their bailiwick, not in ours. But we're coordinating and the cochairs are having pretty much, like, monthly calls to coordinate. I've been trying to attend most of their meetings just to monitor what they're up so. Some of the other cochairs have been doing that.

As I said, the PDDRP, there's no hard data because it hasn't been used. These are complex issues although, you know, we can deal with them. The views so far - I want to say - well it says there are divergent views - the cochairs so far, which is myself, Kathy and J. Scott Evans, who's also a member of the BC but former - just past president of the International Trademark Association, in terms of our role, which is administering it, we've been getting along very well and haven't had any divergent views on the right way to administer this working group.

So that's working out very well with the leadership of the group. And we have a lot of members and observers. I think our membership ranks are up to about 150 and about 70-80, observers. There's a lot of people globally involved with this. And that may grow when we get to Phase 2 which is the UDRP.

So next slide. And, yes, as I said, we're really focusing on what data is out there and what additional data would be useful for our work and isn't available yet. For example, it turns out that for Trademark Clearinghouse there's only so much data available from the Clearinghouse. For example, on the claims notice, they can tell you how many were generated and how many registrations didn't continue on to completion but they can't tell us why. So we're preparing questions to go to registrars and other parties who might be able to shed more light on that aspect of it.

Yes, so we're going to be in touch with service providers, registries, registrars, registrants, other supporting organizations and advisory committees. We're really casting a wide net to try to gather the most information available on this. And also one of our charges is to develop a methodology which can be used for any future review of this type, though I don't think one will be undertaken very soon after we finish our work.

And given that the UDRP part, it's the first review in 20 years, I doubt - I think whatever we do on that is going to be - whatever changes we recommend to the extent they're adopting will be the rules for at least a decade. I can't imagine anything this complex being launched again anytime soon.

And we're thinking about holding a face to face meeting of our working group at one of the first two meetings next year. It would have been premature to do it at this meeting. Also it would have been hard to get people - a lot of people to come to this meeting. And there's some community liaisons have been appointed.

And next slide, and yes, we've got an open working group meeting on Monday starting at 11:00 am in this very hall. And I'm going to stop there, invite Kathy to add anything. I don't know if J. Scott is on the line if the wants to add anything. And then we can open up for any questions about our work and in terms of staying on schedule, we're only halfway into our half hour so we're doing good in that role. Thank you. Kathy.

Kathy Kleiman: I know we want to open up to questions from anyone. This is Kathy Kleiman for the record, and pleased to have the invitation to be here to join Phil for the update.

I just wanted to highlight a few things basically echoing what Phil said. This is a dynamic working group. It's got about 150 members from all stakeholder groups and about 50 participate actively in our weekly calls. So that's tremendous. We do divide up into subgroups to handle certain things, so people are really dedicating a lot of time to this working group.

We will be doing outreach to registries and registrars so I know we're going to be asking for information that takes some time to put together but the more data we can get the better our analysis will be. So we're really looking forward to those responses.

And we're just at the beginning really, we're just diving in now to our work on the Trademark Clearinghouse, which we'll be doing for the next six months. So if anyone is interested or you know of anyone who's interested specifically in the Trademark Clearinghouse along with the sunrise period and the trademark claims notices now is the time to kind of join and hook up on that particular issue.

Otherwise I'd be happy to - well, we should see if J. Scott is on the line and joining us for any comments. And then we can open up to questions that people might have. J. Scott, are you with us? Okay, we're told J. Scott is not on the line. He will be joining us remotely for the main working group call. But that's the beauty of having three cochairs is someone's always there so.

James Bladel: Thank you, Kathy. Thank you, Phil. Concise update and appreciate you hitting those highlights. I have a question but I see we have a queue. And of course anyone from the Council or anyone from the room that'd like to ask

questions of Kathy, Phil and potentially J. Scott please get in the queue. But first up we have Jeff.

Jeff Neuman: Hi. Good morning. Jeff Neuman. Question I have for the Council based on this - the work of this working group, I think one area that you can assist on is that there's a view of some in the Rights Protection Mechanism Working Group that really the working group is there to review the existing mechanisms and not start from square zero, not start from scratch. There's a view of a lot of other people in the working group that believe this is an opportunity to start from scratch and review every single aspect as if these processes were not even created in the first place.

And I think one thing that the Council can do is provide guidance on its intention behind the creation or the initiation of this PDP because one of the frustrations that I've had as a member of the group, is that we seem to be going back to before these rights protection mechanisms were created and trying to justify why these rights protection mechanisms were put into place, or put into effect in the first place. And I have a - for me I have the feeling that that bogs us down too often.

So I guess, again, just to kind of restate, it would be great if the Council could express its view on whether this group was really just to review the existing mechanisms and improve the efficiency of them, or whether it was the intention to really start from scratch and do kind of this complete bottom-up review. I hope that made sense.

James Bladel: Yes, it made sense, Jeff. Thanks. And without any context or anything, I mean, we can probably put together - work on a formal response to that question coming from the Council. If you want just shoot from the hip, it sounds like the policies themselves are baked into the gTLD program, the gTLD policy and it doesn't seem like that would lend themselves to a complete rewrite of those functions.

I think the purpose of this group is to make improvements or make recommendations for improvements or identify…

Jeff Neuman: …yes…

((Crosstalk))

James Bladel: …where they're not working and not necessarily throw them out entirely or restart. But I haven't been following this issue that closely. I'm just kind of…

Jeff Neuman: So this is Jeff Neuman again. If I can give like an example? So I find that during some emails and during some calls we get bogged down into some people on, let's say, not picking on one side because there's extremists on both sides, but there's people that would say from a free speech argument, you know, why are trademarks even protected at all? And I feel like we get into this whole just down a rat hole of trying to, again, rediscuss everything that was discussed prior to creating the rights protection mechanisms in 2009, 2010.

And my fear is that that's bogging us down and we should not be starting from a square zero and having to justify why, you know, we think trademarks should be protected. That's an example of one thing.

James Bladel: Okay. Heather and then Phil.

Heather Forrest: Thanks, James. And thanks, Jeff. I think I'd like to make a more general comment about this. I've seen that too. I'm taking off my hat as the Council liaison to the RPM PDP. And say I think we're having some trouble organizationally. I think we've complained about - and maybe the problem, Jeff, that you identify to some extent is related to this and to some extent it isn't; I get that.

We're having some trouble with, you know, we've complained for years about volunteer burnout. We have lots of new blood in these PDPs. And I think the issue that you have identified actually exists in Subsequent Procedures as well. And what, let's say, going back to comments that I made in Subsequent Procedures yesterday, I think we're having a hard time as a community.

We have this new blood in and, bearing in mind, what you raised is sort of desire to reopen the can of worms, let's say, and go back to the beginning. That's not only the new folks. But I think somehow we need to work out methodologies as we're doing these reviews because Subsequent Procedures is a review as well. And to go back to the documents and the justifications that were articulated at the time that the policy was developed.

And to the extent that, let's say, my personal answer to your question of should we be reopening the can of worms, the answer to that is not until you've determined that there's something broken to fix or that something has changed. So there needs to be perhaps a two-step process in our analysis that we go back and we look at something and we say, is this working? Is it working? Is it not working?

And then, you know, and why? Why was it put into place? And let's not try and guess why; let's go back to the documents. We have reams of documents. Mind you, I know from personal experience that the URLs change with these things every six months. But we have reams of documents to go back and look. And we were happily as a community in 2006, '07 and '08, pretty good at documenting why we did things.

And so that's Step 1. So that's my personal view. I'm not speaking, let's say, in any capacity here. But before we go back to scratch let's determine that there's a reason to go back to scratch. Thanks.

James Bladel: Phil and then Kathy.

Phil Corwin: Yes. Yes, Jeff, oops, you know, we've had some of that. In fact we had the usual experience in this working group of having to demote a member to an observer and then demote - and then kick the person off the observer list because they were extremely disruptive and also were engaging in personal attacks on the chairs and other members of the working group because they had one issue that really is not within the scope of Phase 1 that they're obsessed with.

But, you know, we do have some new members, some old ones. But I don't think we've really gotten that bogged down. We're sticking pretty close to schedule. And we're certainly not - I know it's the view of the cochairs that we're not here to open the can of worms. Now particularly because we have so many people who weren't involved with the creation of the RPMs and the Applicant Guidebook, we do have to do some background work explaining how the worms got into the can to lay a base level of knowledge for proceeding.

But I know it's the view of the cochairs that our job is not to go back to the beginning and redo everything. Our job is to understand why these RPMs were created, what their purpose is supposed to be and then examine are they working effectively each of them on their own? And then how is the whole tapestry working together in terms of providing protections which are effective for trademark owners and balanced for everybody else who has an interest in the system.

So I'll stop there but, you know, part of it is we have to let some of the people involved haven't been involved with a PDP before much less one of this scope and complexity and we can't just tell them to be quiet when they go on. We do try to bring the conversation quickly back to the main focus. But I just don't perceive it as quite the problem you do. If we really start getting bogged down with people trying to question the whole, you know, premise of the RPMs I think we'll have to tell them that's not our job. Our job is to see if

they're working well individually and together. And I'll stop there and let my cochairs add to whatever she would care to.

James Bladel: Kathy.

Kathy Kleiman: Thank you. Kathy Kleiman. Echoing what Phil said, we have spent a lot of time laying the groundwork explaining to the working group how things came into being, not assuming that everyone knows everything from the PDDRP, the Post Delegation Dispute Policy, through the Trademark Clearinghouse. We'll probably do the same with the URS.

But to be fair, you gave us a charter with very wide-ranging questions. And so as we address those, we're looking at some of the bigger issues and then narrowing them down. And we did this with the PDDRP; now we're doing it with the Trademark Clearinghouse. And we're going to try to do it efficiently, effectively.

But you gave us very, very wide-ranging questions and so we're trying to work through those in the best way we can and really examine whether these rights protection mechanisms, which no one's ever looked at before, you know, are fair and balanced and achieving their goals. So it's - we think we're sticking on course and on track in doing those and achieving those goals. But if you have more direction please let us know.

James Bladel: Thanks. And just checking to see if we have any other questions. Okay, we have Stephanie and the Michele and then I'll put myself in the queue. Stephanie, go ahead.

Stephanie Perrin: Thanks. Stephanie Perrin for the record. I just wanted to follow up on what Heather said because I think it was quite important. I think we are facing some challenges, not just with this particular group but with others. It's a cross between throwing the 52 cards up in the air and starting from scratch or just carrying on and detecting some flaws in what's going on.

And it does seem to me that if we're enhancing accountability at ICANN, then we have to examine the root policy that gave rise to the procedures that we're re-examining. And in many cases, this being a pragmatic organization, that lumps along and gets on, we didn't really - we may have documented how we arrived at decisions but that doesn't mean we came up with a fulsome policy. So I just wanted to put that on the record that if we're going to move up on a maturity model, we do need to examine those root questions. Thanks.

James Bladel: Thanks, Stephanie. Michele.

Michele Neylon: Thanks, James. Michele Neylon for the record. I'm going to move past this interesting discussion here but moving on to the input that you're seeking. You're looking for data from who exactly, from registries, registrars and others. And, I mean, one of the challenges, as you've already outlined in your presentation is that you don't have exact data in terms of the impact of, say, the Trademark Clearinghouse.

But you may be able to get some data even if it isn't perfect, by talking to the registries to see how many registrars actually did - carried sunrise, how many did land rush, etcetera, etcetera. Speaking as a dirty filthy registrar I can assure you that we did not carry a lot of new TLDs because of all the complications, the technical implementation of the Trademark Clearinghouse.

And then the - you have the balance between the operational implications of doing that integration that wasn't exactly optimum in terms of user experience, combined - up against the total lack of interest from trademark holders in registering marks in the Trademark Clearinghouse.

I don't know how much hard data you're going to be able to get from that but maybe some of the registries could give you some information as to when registrars started actually carrying domains. But I know for fact from basically seeing what I saw that quite a few of them just did not and that is continuing

to be an issue. Or not an issue depending which way you want to look at it. Thanks.

James Bladel: Thanks, Michele. And I went and put myself in the queue. I'll let Paul go first though. I just had a quick question for Jeff - or for Phil but go ahead, Paul.

Paul McGrady: Thanks. Paul McGrady for the record. I think this PDP is very well - being run very well. This is a big job. I participate on it. I think we're moving forward at a good pace. Everybody is getting a chance to fully vet things. So I'm very pleased with this. I'm sad to hear that it's five years out to what - until we're done. But okay.

I think one of the problems - substantive problems that the PDP has, not an administrative problem, is that we really are data - we have data poverty, right, where there's no way to reproduce, for example, the claims notices why people walked away. So, you know, if you look at that from one point of view you say they walked away because the claims notice scared everybody. If you look at it on the other side you say they walked away because they said, gee whiz, I don't want to infringe a trademark right?

And there's no way to know that. There's no way to reproduce that. And again, we have other factors. So for example, the relatively low number of sunrise registrations might be tied to a disinterest among trademark owners; it may be tied to an overwhelming number of sunrise registrations to buy. Or it may just be that the pricing of a particular registry for their sunrise is more than a UDRP complaint. Right?

And so again, we're very, very data poor. And I think one of the things that we're doing very well is that we are being respectful of our data poverty and nobody is racing to conclusions. And if we can gather data that's reliable that we can then hang concepts on I think that's terrific. And we should - we should absolutely do that.

But we also have to be a little bit humble because we didn't think about collecting the data in the first round. And as we go to the second round for subsequent procedure people, something to think about in terms of making sure that when we do the next RPM review at, you know, hopefully not a year after we finish this one in five years, but at some point in the future we'll do another one. It would be great to set up subsequent procedures in a way to where we're not data impoverished next time. Thanks.

James Bladel: Thanks, Paul. And that's similar, along the same lines of my question which was about the - what we would call an abandonment when someone sees a claims notice and then doesn't follow through with the registration. Phil, Kathy, any efforts to perhaps work with registrars to see if we can capture some data on that and, you know…

((Crosstalk))

Phil Corwin: Yes, James. As I said, we have these subgroups preparing very targeted questions to try to develop whatever additional data is out there. And we're just about done with preparing those questions. And we will be going to registries and registrars and trying to get that. And as I said, part of our charge is to set up a framework for any future reviews and one our recommendations maybe in the category of recommending that for any future rounds that certain types of data be captured in a much better way by the parties who can capture it so that any future review will not be so impoverished when it comes to data.

The one other thing I wanted to add to what Paul said, is that we're also - we're about to wrap up on the PDDRP but the rule we're following in this working group is that any issue, even though it may be closed in terms of moving on to the next one is not closed out completely. And as we - if new data comes in that could affect our evaluation or recommendations of something we've already touched on, we can go back before the end of this process and adjust our recommendations to take any new data into account

that affects a topic that was previously addressed. And I'll stop there in the interest of time.

James Bladel: Thanks. Any other - we're up against our - Kathy, briefly.

Kathy Kleiman: Very briefly. I wanted to cite two other sources of data that we're working with and that includes the providers and the Analysis Group, which did a detailed study on the Trademark Clearinghouse. So as we go into the trademark claims we do have these open questions, we do have some new sources - some additional sources of data. So we'll really be mining everything we can for what we have. And if anyone has ideas for other sources, please let us know.

James Bladel: Thanks, Kathy. And we're up against our time, but Donna will have the last word. Go ahead, Donna.

Donna Austin: Thanks, James. Donna Austin. So this is a question for Phil and Kathy but also for the other people that are going to provide the updates on the respective PDPs. And it's a question that relates to the GAC and some of the challenges that we're having at the moment. Whether there was, and I can't remember the correct terminology, but the quick look mechanism was that used for this PDP in that have we had a response within GAC about public interest? I think that's what the trigger is. And do we have any representation from governments on the PDP?

                  And I guess I'm just - I'm just interested to understand that, you know, I think this is probably an important thing that we need to understand as we're moving through these PDPs what involvement we have with the GAC moving along.

Phil Corwin: You know, on the first question, and then maybe - I'm just not sure if we've gone through the early look process, I apologize for not knowing the answer. On the second one, I'm not aware of any government representatives who

are participating as members or observers in our working group. I haven't reviewed the list recently. There may be. But in terms of active participants, I don't know of any government representatives.

Kathy Kleiman: To modify that just a bit, WIPO is participating so Brian Beckham participates from time to time. And I believe maybe at our meeting here, our face to face meeting.

James Bladel: Okay thank you. Okay, Marika.

Marika Konings: Yes, this is Marika. Just a quick clarification in the quick look mechanism, the main objective of the quick look mechanisms is for the GAC to be able to flag that there may potentially be public policy issues. It's not necessary for them already to identify them, it's more a signal that they indicate that they are likely interested to follow it more closely and then at a later stage be able to provide that specific input.

Donna Austin: So I guess, Marika, my question is did that actually happen? And what was the response?

Marika Konings: Yes, so I think they believe - I believe they provided input that indeed indicated that they were interested in following this PDP.

Donna Austin: So what's our next step in that process?

Marika Konings: So I think it's a good question to ask the GAC how they're planning to organize. But the way at least it's foreseen as part of the consultation group mechanism is that the yes response and the quick look mechanism basically gives a trigger to the GAC internally to put up their systems to be able to follow the PDP to be in a position when input is requested for them to be able to do so.

And I think actually we've seen, for example, in the RDS PDP Working Group where we've had, you know, we have received feedback either from individual members or as well through collective work. So I think that is a bit the - how it's envisioned. I'm not saying that's perfect yet but I think it's maybe a good question for the discussion this afternoon to ask how the GAC indeed envisions then as a next step in the quick look mechanism to provide that input on the questions that you raised.

Donna Austin: Okay. Thanks, Marika.

James Bladel: Yes, thanks. And on that last part, and this is James, on that last part let's flag this as a question for the GAC when we complete our overview of the PDPs of interest in our session with them this afternoon.

Okay, we're a few minutes over but I just want to say thank you to Phil and Kathy and all the participants on this group. So thank you for your work. We'll conclude this session and you can stop the recording, and let me know when we're ready to proceed for the next session.