

**ICANN  
Transcription  
Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working  
Group call  
Wednesday, 03 August 2016 at 16:00 UTC.**

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at: <http://audio.icann.org/gnso/gnso-rpm-review-03aug16-en.mp3>

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Coordinator: Recordings have started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening. Welcome to the Review of All Rights Protection Mechanism RPMs in all gTLDs PDP Working Group call taking place on the 3rd of August 2016.

In the interest of time, there will be no roll call, as we have quite a few participants. Attendance will be taken via the Adobe Connect so if you are only on the audio bridge, could you please let yourselves be known now? Hearing no names, I would like to remind all of you to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking so you do not cause interruption.

With this, I would now like to turn it back over to our moderator, Phil Corwin.  
Please begin.

Phil Corwin: Well, good morning, good afternoon and good evening to everyone to our - welcome to our first call of the month of August, named after the Roman Emperor, Augustus. And I'm glad to see there's still good participation as we get into the heart of the summer. I know many people have holiday plans. I will not be on next week's call because I'll be on holiday.

I'm joined today by cochair, Kathy Kleiman, J. Scott Evans, our third cochair, is speaking at Stanford University this morning and cannot be on this call but will be reviewing the transcript. So let's get right into our agenda. We have a lot to cover today. We've gone through the roll call and there are no updates to SOIs, so let's get to Item 2, agree on follow up questions to the trademark PDDRP providers on joint complaints and consolidation. Staff, do we have draft of those questions that we can look at for this discussion?

Okay. So first we've got draft follow up questions to the three potential providers of the PDDRP who are waiting anxiously for a case (everybody) filed. Question 1, "Do you agree that the trademark PDDRP in its present form, does not permit the filing of a joint complaint by multiple different trademark holders even against the same registry operator for the same allegedly infringing behavior in respect of different trademarks?"

I've got a comment on that. But let's get through these four questions, discuss them and then look at the survey questions for IPC and BC members.

Second question, "Under your supplemental rules, is consolidation of several complaints by the same trademark owner against different registry operators permitted? If so, what are the limitations?"

Three, "Under your supplemental rules and consolidation of several complaints by different trademark owners, including unaffiliated entities against the same registry operator, permitted? If so, what are the limitations?"

Excuse me. Four, "What is your view on the proposal to add the express possibility of a joint complaint to the trademark PDDRP and/or your supplemental rules, which essentially would clarify pre-filing and post-filing consolidation of complaints and minimize any administrative burdens of consolidation on your organization while also maximizing efficiency and cost effectiveness for complaints?"

So those are the four questions. And I know you can all read them but I'm reading them out because we always may have participants who are only on phone and not able to look at the screen.

Let me start off the discussion with a couple of quick comments of my own on these and then others, I hope, will weigh in. I think on Question 1, it ought to be stated, "Does or does not permit." It ought to be neutral and not prejudge any conclusion from the folks we're asking.

Question 2 and 3, I think in addition to asking what are the limitations, I think we should ask what are the procedural steps for bringing a joint complaint, if it's permitted, or for consolidation of several separate complaints against the same registry alleging essentially the same violations.

And on Question 4, I think we should aim to, again, my personal view is that all of these RPMs of which the PDDRP is one, should be uniform regardless of the providers. So I would hope that if we make any changes, if we decide that any are needed, it's made to the policy itself and not - we don't depend on supplemental rules which can differ from provider to provide. The supplemental rules should not be to set the policy, it should be about administrative matters and handle it in a way that's non-prejudicial to either the complainants or the party that's responding.

So those are some personal comment on my own on these four questions. I'm hoping to see some hands raised and get some further input on them. In the absence of any hands we'll conclude that you think these questions are just fine and don't need any tinkering at all.

Kathy and then Kurt is after Kathy. Go ahead, Kathy.

Kathy Kleiman: Hi, Phil. Hi everyone. I came in a little late, Phil, so maybe you already said this, but I just want to check that since we received these questions so recently that we're just beginning the discussion on them and we'll be continuing it next week? Just wanted to double check that we have two bites at the apple on this one.

Phil Corwin: Yes, that's fine with me. This is, I believe, the first time we're seeing these questions and I think we're always hesitant to wrap up anything in just one meeting. I'll note again, I won't be on the call next week but I think I've already said everting I have to say about these questions, the proposed questions in their current form. So it's fine with me if we discuss them, circulate them, because we have a - about 2/3 of the working group members are not on this call so we need to get feedback if they have any by email.

So give it a week, have a discussion now, give time to the other members to respond by email and them wrap them up next week and get them out. Was that it, Kathy? If it is, I'll go on to Kurt.

Kathy Kleiman: Actually let me follow up. Maybe...

Phil Corwin: Sure.

Kathy Kleiman: ...maybe after the call staff could include the recommended changes, the changes that have been recommended and haven't been objected to on the

call and recirculate it so that the people who are reviewing it after the call kind of have an updated version.

((Crosstalk))

Phil Corwin: Good idea that I second, Kathy, okay. Kurt, please go ahead.

Kurt Pritz: Thanks, Phil. I certainly agree with you on Question Number 1 about making it neutral. And then, you know, I apologize for not knowing the rules too well but if there are rules that sort of govern joint complaints or even, you know, in the numbers of the rules if we could cite what we think the governing sections in the rules are for the provider that might be helpful to them.

And then in Question 4, I would seek to make that more neutral too. So what's your view on the proposal to add the possibility of a joint complaint. You know, and then say with the goals that, you know, this would clarify pre-filing or post-filing consolidation and administrative burdens, etcetera. So not assume that it would essentially do these things but just with the goal that it would do these things to get their opinion whether these calls would be realized or not.

Phil Corwin: I think that's a useful suggestion, Kurt. Thank you. Kathy, did you have another comment or is your hand just up as a matter of history?

Kathy Kleiman: Matter of history. Sorry, I'll take it down, Phil.

Phil Corwin: Okay. Do we have any other - I'm checking the chat room to see if there's anything - yes, Mr. Barnett agrees that any changes should be at the policy level rather than supplemental rules. And but the supplemental rules can accommodate any amendments. And Mary notes that working group members should send comments to the mailing list between now and the calls next Wednesday and, Lori Schulman, welcome to the call.

Seeing no further hands, I'm going to go onto the second item on this sheet, which are the draft survey questions from members of the Intellectual Property Constituency and the Business Constituency. Before I read them, I'm going to raise the question for discussion once I go through them whether there's anyone else we should be asking.

Clearly IPC and BC are the two GNSO constituencies most likely to have members who would be interested in bringing a PDDRP against a registry, but I'll raise the question of whether anyone else should be the recipient of any other stakeholder group or constituency should be targeted by these questions.

Four questions, again, "Are you aware of the trademark post delegation dispute resolution procedure that was developed as a rights protection mechanism for the 2012 new gTLD program?" So that's a question and measure basic awareness.

"Have you or your clients considered using it?" That's the second question. Question 3, if you or your clients have considered filing a complaint but did not proceed, what were the reasons?"

Four, "Has there been any registry conduct that you believe constitutes a substantial pattern or a practice of specific bad faith intent to 'profit' from the sale of domain names at the second level that you believe a TM PDDRP should but currently does not address?"

I don't - I don't have any personal - other than raising the question of whether there should be other recipients besides BC and IPC members, I think these questions are fine. And I particularly think Question 4 has merit because we're talking kind of a vacuum that has two aspects. One, there have been no complaints brought under this RPM.

And, two, no one so far within this working group, has identified any particular registry as engaging in conduct which should be subject to an RPM of this type but was not either for a reason that it's not covered by the scope or the RPM or that there are impediments in the design of the RPM. So I think, you know, it's good to try to find out if anyone thinks there's a registry that is engaged in questionable conduct, you know, to put some meat on the bones of this discussion.

So I'm going to stop there and see if others have comments on the wording of these questions as well as the question of whether anyone besides BC and IPC members should receive these questions. And I note in the chat room, I'll take you in a second, Kathy, that Paul McGrady suggests changing "clients" to "people or entities you represent."

And Paul suggests they go out to everyone. I invite Paul either in the chat room or on the phone to clarify who he means by "everyone" so that no one can claim later they weren't given the same voice as IPC and BC members. And Kathy says I would revise Question 4 to start "Has there been a new gTLD registry conduct?"

So, okay, Kathy, your hand is raised and Greg Shatan is after you. Go ahead.

Kathy Kleiman: Thanks. Let me second what I think Paul has recommended, which is that these questions should go to everyone. I think as a matter of course, even if constituencies, other constituencies and stakeholder groups don't choose to respond, they're not interested, I think when we send out survey questions it should go to everyone. In which case I would use words like "clients" as Paul has suggested to "people or entities you represent" but also members. That may be an issue for Business Constituency of their own members or of another stakeholder group involving members and users. So I would change - I would expand to what Paul has included as well as including members and circulate it to everyone.

And then in Number 4, it looks like I left out a Y. So has there been any new gTLD registry conduct that you believe, dot, dot, dot because that's the scope of the current...

Phil Corwin: Right.

Kathy Kleiman: ...PDDRP. Thanks.

Phil Corwin: Okay. And I think on the question of who gets it I think I agree, let's just - cost us nothing to distribute it to the entire ICANN community and that way anyone who has useful opinions or data can weigh in and we avoid the charge that we were selecting in some biased manner.

And now I call on Greg Shatan, rhymes with Manhattan, is that correct, Greg?

Greg Shatan: That's correct, Phil.

Phil Corwin: Thank you, Greg.

Greg Shatan: Although, if you went back to the old country, you were right, but not in the old country. In any case, couple of points. One, I think that, you know, this is not just going to go to IPC members but rather we're going to use, to the extent we can, organizational members to distribute it to their members. That's not always the easiest. It sounds easy but it's not easy necessarily. Lori Schulman can attest to that. But, you know, this is not just, you know, a member survey.

But that said, there's no reason not to, you know, make it, you know, generally available understanding that, you know, cases can be brought by those, you know, with trademarks, at least that's what it appears to be kind of have to have an (ox being gored) to be a plaintiff. So I think commenting specifically on the questions, Number 4, perhaps should be split into two questions.

You know, the first could be, you know, has there been any registry conduct you believe constitutes a substantial pattern or practice of specific bad faith intent to profit from the sale of domain names at the second level? Question. End of question. That, you know, covers the issue which is kind of alluded to in Number 2 of whether there is activity, whether or not it's covered.

Then we could either have a couple of sub questions about whether it was - whether you believe it was covered or wasn't covered and - because right now we're only asking about behavior that - behaviorally sounds like it might be PDDRP-able but which, you know, conclusion was reached that in fact it was outside the scope of the PDDRP as it exists.

So I think we would want to ask whether people are aware of conduct that is PDDRP-able and which is within the remit of the PDDRP for a number of reasons I don't think we should ask any more specifics, although people obviously could volunteer them. But shouldn't be a requirement to kind of say okay, well who you talking about? Thanks.

Phil Corwin: Yes, thanks Greg. I thought that was a very useful comment. I'd like to - I see that Kathy has proposed in the chat room adding an additional sub-question at the end, "If so, why?" Question mark. George has some ideas on how this should be drafted.

I think I would suggest that rather than having - it looks like Question 4 should be two or three separate questions under one heading rather than three separate questions would be my view on that. But I think all those comments in the chat room are good. And I'd ask staff to all them and the verbal input we've gotten into consideration and redraft Number 4 to take all that into account.

I want to bring up the issue of time span for these questions. The first four just go to the providers. I think we can give them a fairly short window to

answer. They're familiar with the issue so I think a, you know, a few weeks is more than sufficient for them to get back to us on this. I think on the four questions going out now to the whole ICANN community and - which including the GAC, I thought that was a good suggestion from Paul in the chat room.

We want to get their input as well. We're trying to integrate them into the policy process. And then we've got trade associations in both the IPC and BC and they need time to survey their members. So I think, for the second set of questions I think we're looking at a longer - giving people somewhat longer time to respond probably into, I would say, first or second week of September rather than later this month.

What do people think of that? And, Kathy, I see your hand up.

Kathy Kleiman: I'm happy to defer to Mary because she may be thinking the same thing I do, which is that we have to check the calendar and our timeframe. And then I'll go back in the queue, Phil, if I might?

Phil Corwin: Sure. Mary.

Mary Wong: Thanks, Phil and thanks, Kathy. This is Mary from staff. It was a related point to what Kathy's just said, but in addition to checking our timeline, just to give a perspective of what the other stakeholder groups, constituency, SOs and ACs are being asked by various GNSO groups at the moment, Number 1, we did send out our initial outreach letter to all these groups at the end of May. So far we've only gotten one response from the Registry Stakeholder Group.

We understand that the ALAC and possibly the NCSG is considering giving us some sort of input. But for those groups that indicated they wanted to, we've already asked them to please try and send us something in August, since the original deadline was July.

The new gTLD subsequent procedures working group has also sent us initial outreach letters, and some of you probably have seen that. And there's been a few groups who have also indicated they need more time to respond to that solicitation as well. And for that working group I believe they've only received input from the GAC so far. So it does seem to staff that the various ICANN groups are being asked quite a few things by various groups, all for good reason, but all at the same time.

And lastly, more specifically to our work, I think we might want to think about what other potential questionnaires or surveys we might want to do in the very near future. For example, it is likely that we're going to want to do one about the TMCH and the associated RPMs dealing with that.

Not to say we don't send this out now given our time, but we might want to also have some kind of indication to these groups that there may be other things forthcoming so that, A, they can prepare and, B, we don't seem to be adopting an ad hoc or piecemeal approach. Thanks, Phil.

Phil Corwin:

Okay. Let me respond, Mary, before letting Kathy chime in. I think to some extent, you know, I wouldn't characterize it a piecemeal approach but we're doing this Phase 1 on the new TLD RPMs in stages. And we're going to be, you know, we're not going to be asking every question on every subject we'll be dealing with down the road simultaneously. So I think it's unavoidable.

I'd agree, you know, with the end during the community discussion of the transition and accountability everybody was trying to drink from two firehoses at once. Now we're down to one somewhat smaller firehose on Work Stream 2 accountability issues, but we have a huge number of major policy PDPs going forward that were kind of put on hold while we were dealing with that.

So I know everyone's very busy. Plus, it's August and a lot of people are just away at various points. Nonetheless, I think to finish up on PDDRP we need to get some responses on this as soon as possible. I would propose for discussion that for the - we're looking at finalizing these questions on the call

next week, the call of August 10. I think it's reasonable on the first four to ask the providers to get back to us by the end of the month. We're not looking at a huge amount of time for them to do it, you know, it might be a few hours work max for them to answer those questions.

For the questions for the community, I think we have to, you know, set a time limit, you know, request perhaps mid-September understanding that they - we may have to go out again mid-September and say, hey, we haven't heard from you. We're giving you another two weeks.

And we may, on some of these issues, reach preliminary conclusions but keep them kind of open awaiting some feedback on some of these questions, and we may, at some point, have to go back during a meeting and make adjustments, not major adjustments but fine-tuning. So those are my thoughts.

Kathy, what are your thoughts?

Kathy Kleiman: Thank you, Phil and everyone. I agree that we should be trying to push the timeline on this. We don't have that much time for the PDDRP and we are going into the trademark clearinghouse and other things quickly. So these are short questions, I would ask for - I would give a deadline but actually urge the groups to respond as soon as possible if they can.

And I know it's August and I know that's hard so I'd try to keep our list of questions down as narrowly as possible. And I'm with you that the providers hopefully can respond by the end of the month.

What I wanted to respond to is the call for specifics and the question that Greg raised about that. I think George's phrasing is a good one in the chat room where he says, "For Question 4 or maybe the multiple parts of Question 4, instead of making it a yes/no question, we should really say if your answer is yes, please give us information." And this corresponds with what Darcy

Southwell has been asking us. And I don't think she's on the call right now, where she says, do we have specific examples of registry behavior that doesn't meet existing standards?

She's also been calling for the last few weeks for specific examples. And that's really what we're going to need for the evaluation is there something that's going on right now out there that people can tell us about that should have been covered and wasn't? Or somehow fell through the cracks. I think that will be the most helpful. So the more that people can provide us with concrete information, the better we'll be able to process it and process it fairly quickly.

Thanks, Phil.

Phil Corwin: Yes. Thanks, Kathy. Let me raise a question and I may be off base here, but I'm - what is the - when we get these answers back, particularly to question - proposed Question 4 for the ICANN community now, not just IPC and BC members, and obviously members outside the community if they belong to various groups that are in the community.

Are these answers going to be just aggregated and anonymized? I can imagine that some parties who might think that a particular registry is engaging in, you know, objectionable practices might be reluctant to state that publicly if they believe they're going to be identified and that that some legal liability might attach to such an allegation. Can I ask staff, what - how do we handle this? And I'll ask the group whether they think that's a valid concern or not. Yes, Mary.

Mary Wong: Hi, Phil and everyone. This is Mary from staff. Phil, how we normally would do these things is to use the Survey Monkey tool that I think others have responded to some of our surveys with before. And in that one you can do two things. One, you can obviously make a very clear notice if the results are going to be shared broadly or not or put in a report somewhere, etcetera.

You also don't have a way to verify who is responding so someone could respond and put a name that is theirs if they wished, or they could not place an affiliation with a particular group. We normally do ask kind of like the statement of interest which ICANN group are you a member of, or most closely affiliated with? And we just have to take people's responses at face value.

So these are the tools that we have and we can obviously tinker with them as the working group prefers. But hopefully that goes some way to answering your question.

Phil Corwin: Okay so just to clarify, and I'm not quite sure when a - someone fills out this Survey Monkey to these draft questions, are they identifiable or not identifiable? Or even if they are identifiable, do the report - does the results reported back to this working group - are they aggregate results without identifying specific parties who may have said something?

And I'd suggest that when we send out these questions we should be clear to folks on whether or not their answers are going to be anonymous. Because that may influence what they're willing to share.

Mary Wong: Hi, Phil, this is Mary again. Right, and I think in connection with your last comment, Susan has a comment in the chat, to ask respondents to anonymize or perhaps not name the registries since we're not using this exercise to police anyone. And I think we'd all agree with that.

So in relation to reporting, the person administering the survey, say staff, we would obviously see all the responses that come in. So there could be 200 different responses or more, and we've had quite a few in some of our public comment periods.

We would obviously see all of those. We can forward all of them to the working group. What we can't do is sift out the information at least so far as I'm aware. We can also generate an aggregated report that has bar charts and graphs that show the percentage of yeses and no's and things like that. So I guess the short answer is there are various ways of doing it. But the name that the person or the entity that the person wishes to identify with as they put on the survey response they would be there to the extent that we circulate that individual response.

Phil Corwin: Okay. You know, based on that I would suggest that we amend Question 4 or make it quite clear that we're asking them to identify specifics of objectionable registry conduct but do not - but not to include the name of the registry. That seems to be a consensus growing in the chat room that would probably get us better information if people aren't worried about potential liability.

I will say, you know, there are some - I'm guessing there are some practices that folks might object to that have been engaged in by a significant number of registries and one could not pick out any specific one.

I can think of some other examples where if they sufficiently described the conduct you could probably guess which registry they're talking about. But I think overall Question 4 should, you know, quite clearly emphasize that we want people to identify if they believe it's occurred, objectionable registry conduct rather than - but omit the name of the registry. And so I'll put that out there. Kathy.

((Crosstalk))

Kathy Kleiman: Hey, I'm going to disagree just because I think a lot of us are talking about dotSucks. And so if there's a specific registry I think people - if they want to name it should name it. If they're not - they don't want to for liability reasons that's fine. But if they want to name it I think it's going to give us a bracket. Because if people just speak in theoretical it may be many registries that

they're referring to. But it's just one registry, if we're all focused on the same 800-pound gorilla in the room, let's talk about the 800-pound gorilla because there may be circumstances such as pricing...

Phil Corwin: Well.

Kathy Kleiman: ...that are involved. So I say the more specifics people want to give us, the better if they're willing to do it. I wouldn't force anybody to name anything, but I wouldn't bar it either. Thanks, Phil.

Phil Corwin: Okay. You know, I'm going to agree and revise my statement. Let's make it clear that they don't - that they can but are not required to name the registry. And I would just say that while the registry you cited, Kathy, may be regarded as an 800-pound gorilla by some. I can think of some other gorillas out there in the registry community that I've heard other negative comments about. And I'll leave it at that.

Mary, is your hand still up for a new comment on all of this? No. And Kathy, your hand is still up?

Sarah Deutsch: Phil?

Phil Corwin: Yes.

Sarah Deutsch: Hi, Phil. It's Sarah Deutsch. I just want to get in the queue because I'm on the...

((Crosstalk))

Phil Corwin: Sure, Sarah. Well there's no hands up so go ahead.

Sarah Deutsch: Okay. I just wanted to get back to Greg's comment earlier about, you know, in order to use the process, you have to have an ox that is being gored. So do

the survey questions kind of cover that, you know, not just a referendum on registry behavior but do you actually have, you know, would you be entitled to bring such an action if you so choose? Does that make sense?

Phil Corwin: Okay. I'm not quite clear on what you're suggesting in terms of amendment to the question, Sarah, could you...

((Crosstalk))

Sarah Deutsch: Well, would you have to own a trademark, for example, to bring this or you could still bring it as just a citizen so to speak?

Phil Corwin: Yes, I'm just assuming that, you know, this is a rights protection mechanism for trademark holders. I think that's just inherent in the RPM.

Sarah Deutsch: So would you want to have a question to confirm that you are a trademark owner I guess is the point, or you have a trademark, yes.

Phil Corwin: Okay, I'll put that out to the group, do we - should we add the question to determine whether survey respondents are trademark holders? In some case we may have trade group that are not direct holders but are representing trademark owners, who have views on that.

I see three hands on that question. Paul McGrady.

Paul McGrady: I think it's fine to ask if the direct respondent is a trademark owner, but I think we should also have an option for them to indicate that they represent entities or people who do. So for example, you know, maybe the GAC member responding may not be a trademark owner but they're there to represent their citizens and lots of their citizens will have trademarks. So I don't want someone to think that if they were not a direct owner of a trademark that their response won't be given consideration. Thanks.

Phil Corwin: Yes, and I'm seeing the chat - thank you, Paul. And I'm seeing agreement in the chat room with what Sarah is suggesting. Miss Bacon, please go ahead.

Beth Bacon: Thanks, Phil. Hi, everyone. I think that perhaps on 4 we might want to offer towards the end of the question, solicit an opinion as to why they, you know, if this pattern and practice of abusive behavior or conduct is apparent in a new gTLD for which this policy applies, we've asked the respondent to offer an opinion as to why the current policy has not been used. Because at the end of the, you know, the road we're trying to get constructive input on ways to potentially amend this policy to make it more useful or to make, you know, not amend or amend, to make it as useful as possible for its intended narrow purpose.

So if we're just asking for, you know, is there conduct you can say we need the why haven't you used this, why has this not applied to that? So I think we just need to make that clear. Thanks.

Phil Corwin: Yes, thank you, thank you. I think those are all great suggestions. And, again, I'll ask staff to - we're not going to do it now in the interest of time but to review all the oral comments from the transcript and all the chat room comments and most of them have been focused on Question 4 and, you know, within the next few days revise Question 4 to reflect them and get something out for people to look at and then for discussion on next week's call.

Let me say, we're 37 minutes into the hour. I'm always worried before these calls start that how are we going to fill up 60 minutes, and then here we are 37 minutes into the hour and still on Item 2 of a six-item agenda. So, Beth, I think that your hand is still up from your comments. There's nothing new I assume.

So I think we've had a good discussion. But I think it's time to move on to the next agenda item so we have some hope of completing the important parts of

this agenda before the call ends. So Item 3 on the agenda is to complete the working group discussion of issues and concerns with the trademark PDDRP document.

So where is that document? And this is a seven-page document. And I'm not going to read through the document because reading a seven-page document would take the remainder of the call time and then some. So why don't we give everybody a minute - apologize to those on the phone. But just to scroll through it and to see if you have any concerns or suggestions with this document as it now stands.

And stipulate for the record that we'll leave - because we don't have the full membership of the working group on the call, and we - it's a long document with a short amount of time for oral discussion that will leave it open for input on the working group email list through next week and then lock it down. Does that seem a reasonable way to proceed? I'm not seeing any objections.

Okay, Mary says we're down at - so, Mary, we've reviewed a lot of this and we're down near the end of Page 5 in terms of our discussion. Okay. So Mary is saying we've gone through a lot of this and should just review the last page and a half here starting on Page 6, Roman Numeral 3, suggestions.

All right, this is short enough I can quickly go through it and then we can have a short discussion on this. Suggestions as to whether the working group would strengthen and/or clarify remedies under the trademark PDDRP. And these are from the working group list.

Look at the sufficiency of relief, are the current remedies too weak or too nonspecific. What would be more meaningful remedies? Improve clarity in certain areas, noting that Section 18.6 of the PDDRP states quote, "Imposition of remedies shall be at the discretion of ICANN but absent extraordinary circumstances those remedies will be in line with the remedies recommended by the expert panel." Unquote.

Then it goes on to note that it doesn't set forth what circumstances might be considered extraordinary. So I'm - personal comment, I'm not surprised by that because extraordinary circumstances are ones that are egregious and not easily imaginable in advance.

Continuing for the text, "In the event ICANN deviates from a panel recommendation is there a mechanism to challenge the deviation within the PDDRP? Is it possible that ICANN could adopt harsher penalties rather than what was adopted by the panel?"

And I'm just thinking out loud, besides remedies within the PDDRP I think we might ask, although the answer might be no, whether there's any mechanism under the new accountability procedures that could be used if ICANN - if a panel found a serious violation and recommended a substantial penalty and ICANN deviated from that recommendation.

Item 4 - small - Roman Numeral 4. "Suggestion relating to whether working group should require additional pre-complaint notification." And this is improving the notice requirement, "The notice should also specify the goods or classes in which the asserted trademark is registered and contain a link to a public source to determine the classifications."

Small Roman 5, "Suggestion regarding whether the working group should change the time limit for filing a complaint and limit the filing of complaint until after general availability."

And then on the last page, Clause B, "What types of questions might the working group pose to ICANN Compliance, external legal counsel and other appropriate parties and would use cases be appropriate?"

Responses from the working group list, "Yes in a conditional way if there are realistic scenarios that are reasonably likely to be encountered." Another yes

specifically related to how it would work if put into practice. And no, although a great idea, they require a great deal of time and are largely met with - I won't respond to a hypothetical type response.

And then additional issues, concerns and suggestions raised by working group members, first point, apply the first do no harm rule, insufficient information currently available to determine whether this RPM is being used because it's significantly flawed or because a scenario for which it designed has not occurred.

A personal comment, that's what we're trying to find out with our additional questions. Another point, someone disagreed that the objective here is to make the - this RPM more useful to trademark owners before adopting that as a goal we should be sure that trademark owners need something more from ICANN and that the - this RPM is the right place to give it to them.

For provider follow up, what type of determination decisions might be given precedence in a PDDRP dispute. Should UDRP decisions be giving any precedence or weight? What about court decisions and case law?

And finally, follow up with the Registry Stakeholder Group has informal pre-complaint notification procedure ever been invoked? If so, were the issues resolved without there being need to invoke the RPM?

So that's the remainder of the document that we hadn't reviewed up until now. And the floor is open for discussion of any and all of them. Kathy, please go ahead.

Kathy Kleiman: Hi, Phil. Thanks. I think C, bullet point 2 on Page 7 is interesting. But disagree that the working group's objective is to make the PDDRP more useful to trademark owners. Of course that's part of the objective, but I think in the charter, in the issues report and in the guidance we were given from Council, it's really about balance. You know, is it balanced? Is it useful to protecting

legitimate trademark needs as well as being fair and balanced to the registries and ultimately to the perhaps millions of registrants that may be within a - that may be within the - that have registered domain names within that gTLD.

To that end, let me add a new question and concern. Should there be kind of a statute of limitations, a timeframe under the existing owner where this action can be brought? Something to consider. Because obviously if you're changing ownership and so dotApple goes from someone who's agreed to a set of conditions on how they won't use it, and then it goes to someone new, a new owner who violates that completely and doesn't believe in that agreement, obviously one would think the PDDRP could and should be used.

But under an existing owner, is there a statute of limitations after which, you know, kind of leave them alone? So let me raise that. But again, bullet point 2 and C is really about balance. I don't know who said it but I think it's something to really keep in mind. Thanks.

Phil Corwin: Right. Some quick personal comments, all of these RPMs should be balanced. There should be certainly substantive and procedural due process for the party it's brought against. But these RPMs, the rights being protected are trademark rights. Whether it should be made more useful is - we'd have to determine that it's not useful now for - because there are some deficiencies in its design. So we're considering all that.

So far as a statute of limitations or a Laches doctrine, personally I don't object to that concept. I don't think it hinges on ownership though you could have an owner of a registry, you know, engaged in no bad conduct for a few years and then under economic pressure begin to engage in practices to invite registrations that could possibly be actionable.

So I think any time limit should be based not on change in ownership or launch of the TLD but the date on which the conduct that's being questioned

arose. If it started at the beginning of the registry operation it should start then; if it started two or three years in it should run then if we're going to have one. And if it starts with a new owner it should start from there. If we're going to get into that type of limitation on actions.

And that would depend on one's view of whether a registry operator after operating in a particular manner for a substantial amount of time should assume that its conduct is non-objectionable and not be hit with an action years after it first arose.

Kathy Kleiman: Right. Right, thank you.

Phil Corwin: Okay. Okay I'm just reviewing the chat room while waiting to see if any other hands get raised on this. Yes, Mr. DeLuca raised the question, "Would UDRP decisions be applicable to disputes? These disputes..." You know, not directly but if the alleged conduct was something that was clearly - had been found in a variety of UDRP decisions, that is the conduct by second level registrants to constitute infringement under line of UDRP cases. That might be taken into account. Again, that's a personal view.

Mr. McGrady, please enlighten us.

Paul McGrady: Thanks. Paul McGrady for the record. I'm generally squeamish about the idea of putting into these various policies limitations on timing. I think it probably presupposes a more in depth understanding of ICANN policies across the legal community that doesn't exist. And to me that adds a layer of complexity.

That said, in the event we were going to go down this path, I think the next question would be what would that look like. And since what this policy really is, is a third party - the means for a third party to complain essentially to a neutral about a breach of a contract between ICANN and a registry, well, you know, breach of contract statute of limitations generally in the US tend to be about t10 years. And so if we are going to introduce a statute of limitations I

think it probably needs to correspond with, you know, what the subject matter of this thing is.

But that having been said by suggesting 10 years, I'm not suggesting that we go down the path. I think it's - I think, again, you know, that adds a, you know, essentially it bakes in a defense and adds a layer of complexity in using this policy, which was already, you know, properly complex enough. Thanks.

Phil Corwin: Okay. Thank you, Paul. Susan Payne. Go ahead.

Susan Payne: Hi. Thanks. Susan Payne for the record. I was going to say a lot of what Paul just said so I won't repeat what he said. But I would just add I think that given that we are generally taking this principle of kind of do no harm and what is the issue we're trying to fix here, you know, we haven't even had any cases brought yet. We certainly haven't had cases where anyone would argue that it was out of time or inappropriately late.

So I think, you know, with that principle of what is it we're trying to fix and not - if it isn't broke don't fix it, you know, I think we would need to be really cautious about limiting the time to bring an action bearing in mind we've had none whatsoever since this has been set up.

Phil Corwin: Okay. Excuse me. Thank you, Susan. George Kirikos. Go ahead.

George Kirikos: George Kirikos for the transcript. Respectfully I disagree with the last two commentators because when this policy was drafted, obviously, they didn't take into account this issue. And I think as time go by, you know, we want to kind of get rid of some of the absurdities that could exist under the contract.

The PDDRP and other ICANN rights protection measures are alternatives to the courts, they're not replacements for the courts. And so it would create an absurdity that ICANN has a dispute resolution mechanism as an alternative to the courts that could allow a complaint to be sustained when the underlying

action could never be heard in court. So - because of the statute burden. So we should, you know, make sure that that kind of loophole or anomaly or absurdity is taken care of.

Phil Corwin: Yes, thank you, George. I think you raise an interesting question where it's clear that the UDRP is an RPM designed to supplement trademark infringement suits. I leave it to more expert trademark practitioners than myself whether the type of action permitted theoretically up to this point by the PDDRP is a supplement for an available legal action or is something that doesn't correspond to any identifiable legal action.

Having said that, I saw George's comment that the - if there is a statute of limitations should be tied to the jurisdiction of the registry and statute of limitations there. I've got to disagree. I think if we do anything in this area it's got to be uniform for all registry operators. It can't be two years in one place, five in another and unlimited in a third.

My final personal comment on this, is that I'm not arguing either way but I think if a registry, you know, dotApple, although there is not dotApple right now but if there was one operated by a party other than Apple Electronics, if it was targeting Apple, Apple would know pretty quickly and wouldn't be unaware for years that that infringement was going on.

If another registry was actively encouraging infringing registrations, I think fairly soon the trademark community as a whole would be aware of that just being privy to all kind of trademark publications myself if there was a bad actor registry it wouldn't be too long. So I think the idea that it would take years and years for a trademark owner to even be aware of the potential harm is not a convincing argument to me.

We have six minutes left so I'm going to - George, did you have further statement?

George Kirikos: Yes, just wanted to point out that...

Phil Corwin: Just real quick so we can wrap up here. Thanks.

George Kirikos: Just wanted to point out that the PDDRP in itself allows for the appeals to the court and that appeal is to the jurisdiction of the registry operator and so the time limit should definitely be by the statute of limitations in that registry operator's jurisdiction. Otherwise, you know, it would create nonsense and that might be different for different jurisdictions, like if you're in Ireland you might have one time period just as in United States it would vary from state to state.

And in other countries as well, by province or by country itself depending on whether the suit is brought.

((Crosstalk))

George Kirikos: ...or federally.

Phil Corwin: Okay, thank you George. I'm going to ask Susan to make a quick comment and then we're going to move on to...

Susan Payne: Yes, Susan. And just...

Phil Corwin: ...for next steps.

Susan Payne: ... a very quick other point which is just we have to remember, again, that this is about patterns of action and so, you know, if we start getting into discussions about when is the appropriate cutoff we have to be very careful about that. But, you know, a pattern of action doesn't occur on the first incidence. And so we would need to be starting to build something in that allowed for an actual pattern to materialize before we started cutting people off from any remedy.

I think this is quite - this is a really complex area. And again, I'm just saying I'm not sure we've got a problem here that we need to fix and I think we should be careful about trying to fix something that we don't need to fix.

Phil Corwin: Okay. Appreciate that. This is a complex - just our short discussion of this has already identified how complex it is. I note Jon Nevett noted in the chat room that the statute of limitations for breaching contract in California, which is a very relevant jurisdiction for ICANN, is four years so you can't sit on your rights for more than four years if you think there's a contract breach.

Although this action allows that parties not a litigant or a complainant is not a party to that contract to allege a breach and bring an action. But it's - I think the chairs will consult with staff and see if we need to pose some questions for the full working group on this concept and get some feedback. I think it's too complicated and we don't want just the participants in today's call to be deciding it completely. So let's think about that.

And moving on, I'm going to turn to staff to bring us to a very quick discussion of next steps for completing our review of the trademark PDDRP and then very quick review our timeline and tell us about next week's meeting that I will not be participating in. So, staff, turning to you. Go ahead, Mary.

Mary Wong: Thanks, Phil. Hi, everybody. It's Mary from staff again. So the work plan that we had approved tentatively at least, has us completing the PDDRP review by late or end August. We would then be scheduled to begin on the TMCH review. So there's really two I guess dependencies. One is given where we are, in these discussions for the PDDRP, not only are we waiting for additional follow up and responses and surveys, but there's also a few fairly I guess complicated issues including the last one that was just discussed. Whether that's a realistic timeline.

And secondly, on the review of the TMCH - can I just ask whoever has got their mic on to mute please? Is that better? Yes, thank you very much. And so on the TMCH staff is working with the sub team that has been meeting every week to see what kind and how much information they can bring back to the group by the end of August.

We're hoping that the sub team can give at least a sort of preliminary report to the group next week but we'll need to double check that with them. So at the moment we have these dates on our schedule but it seems to staff that it's quite likely that we might need to extend some of those timelines. Phil.

Phil Corwin: Okay. Thanks for that. And I'm getting an echo here. Yes, whoever has their line open or their speakers on, please remedy that. Terri, are you on the line because - let's try again okay it's gone.

All right, so it's one minute before the top of the hour. I'm going to just supplement what Mary said, as I suggested earlier in regard to the questions we're planning to send out to the broad ICANN community about this, I think we can probably meet our deadline of reaching final preliminary decisions on PDDRP by the end of the month, but I think we probably want to keep it open and wait for the answers to those questions. You know, so I don't think anything prevents us from reaching preliminary conclusions and recommendations but reserving the right to amend them based on additional information that comes in during Phase 1 of this review.

So - and it now being the top of the hour, Mary time is this call next week for those who will be on it? Is it the 1600 UTC or a different time?

Terri Agnew: Hi, Phil. This is Terri. And just to confirm, the next RPM working group meeting will be the Wednesday the 10th of August at 1700 UTC.

Phil Corwin: Okay thank you, Terri. So for all who will be participating next week, the call will start one hour later than today's call. And with that I thank you all for

giving up an hour of your time to our work and enjoy the rest of the day and I won't be on next week's call but I will catch up and be on the call two weeks from now. Thank you very much for participating. Good-bye.

Kathy Kleiman: Thanks, Phil. And have a good vacation.

Phil Corwin: Thank you, Kathy. Bye-bye.

Terri Agnew: Once again, the meeting has been adjourned. Thank you very much for joining. Operator, (Aubrey), if you could please disconnect all remaining lines including recordings. And just as friendly reminder for everyone to disconnect your liens and have a wonderful rest of your day.

END