

**ICANN
Transcription
Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working
Group
Wednesday, 27 July 2016 at 21:00 UTC.**

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Terri Agnew: Thank you. Good morning, good afternoon and good evening. Welcome to the Review of All Rights Protection Mechanisms, RPM, in all gTLDs PDP Working Group call taking place on the 27th of July, 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 room so if you are only on the audio bridge could you please let yourselves be known now?

Beth Allegretti: Hi, it's Beth Allegretti. I'm only on audio.

Terri Agnew: Thank you, Beth. Hearing no more names I would like to remind all participants to please state your name before speaking for transcription purposes. And to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this I'll hand it back over to our host today, J. Scott Evans. Please begin.

J. Scott Evans: All right, there. How are you all today? We are going to start today's discussion by continuing through the summary of issues list that had been put up and we have gotten ourselves partway through last week. I think we had gotten through the discussions with regards to possible addition of mediation as one viable option in the PDDRP process, and also there was some discussion about whether there should be a mechanism for some sort of consolidated complaint.

I think there was a lot of discussion last week and during the following week on email about the – of a class action. And I think we recently had some discussion as of today from Brian Winterfeldt that sort of puts forth the concept of having some sort of consolidated compliant mechanism as opposed to a class action as it's understood in general legal parlance or legal nomenclature is what he thinks might be more valuable.

So one of the things that we may want to consider doing, and I'll put the question to the group, is at least initially talking to the providers and seeing if that is a concept that they believe already exists and if not, if that's a concept that they believe could exist. I'll take a queue real quick on whether we should reach out to our three providers and ask that particular question as we begin.

I understand we haven't had a consensus yet on whether this is something we would add and there has been some discussion on the list and some opposing views raised. But before we do, you know, that we should look at the issue, I think, thoroughly and get input from all sides, but I put that to the group now is do you think we should reach out on this idea of a joint complaint as opposed to a class action? If that's something that we should explore.

Just for those of you that may not be attorneys or familiar with this at least in the United States a class action is where one party is identified, one or more

parties are identified that are supposedly representatives of a large class or group of potentially similar situated people.

And generally it's brought in consumer-type actions so if you all are Verizon customers that had a Verizon contract within a certain period of time, they might choose J. Scott Evans as a person who suffered certain damage and then file an action. And my name, as a class action, as a representative plaintiff saying that I am one of many that are similarly situated and seek relief for me along with all class members that are similarly situated. So that's a class action.

I think what Brian was describing was something more of a joint complaint where separate parties would represent their own interests, the action would only be in a consolidated way. So they would file a joint complaint with each setting out their own grievances with regards to the registry operator, not saying that they were representative to any class. And only every joined party would be a party to the action or a party that would be entitled to any type of relief. So that's the distinction is there. I hope I've been clear. I see that Greg Shatan has raised a hand so with that brief explanation I'm going to turn to Greg.

Greg Shatan: Thanks, J. Scott. Greg Shatan for the record. First, I think it does make sense to reach out to the providers to see how they, you know, would handle this currently. And I think there are actually two different aspects to this question with regard to parties. One would be whether a complaint can be brought jointly with two or more parties on the complaint simultaneously.

And the other is whether cases can be consolidated, whether cases that are brought separately two parties can be put together and consolidation sometimes in litigation, I believe, can even occur where the parties may not want the cases to be consolidated but at least the question here, you know, would be whether two cases that initially were brought independently can be turned into one action. So I think there's two questions; a complaint with more

than one complainant on it and then consolidation of two separate complaints at some point.

J. Scott Evans: Okay, is I'm seeing in the chat room that Petter Rindforth agrees with Brian's suggestion and Brian's suggestion is the one that led me to suggest along with input from staff, that we may want to seek provider feedback. And then I see that Darcy Southwell in the chat room has stated that she agrees that getting feedback from the providers would be useful.

Scott, I see that your hand is up. Scott Austin. So I'm going to call on you real quick.

Scott Austin: Yes, thank you, J. Scott. Scott Austin for the record. I think that Brian makes a good suggestion, and as a panelist on the UDRP, I can't specifically speak for my provider, but I can tell you that there are instances where we already have multiple parties on a complaint, usually in the instance where you have an affiliation and the affiliation is a corporate one such as a subsidiary and a parent.

However, that being the case, there are instances where there are multiple parties on, you know, the complaint. The question I guess is, is these are similarly situated parties, that is they have marks that have been maligned by the same registry, you know, would the same chase law that's there already be taken or be acceptable?

The other issue is the consolidation, and Brian has rightfully pointed out, is I guess (unintelligible) in the rooms without much support. But I think it would be much easier to tweak that. I think the idea of some kind of a class action aspect under the UDRP rubric or structure is ridiculous and impossible and quite frankly I think it'd be a fiasco because you're not usually using the federal rules anyway, you do not have discovery, you do not have just a myriad of other things that normally occur in any kind of a class action situation.

So you have essentially a summary proceeding and a class action is anything but. And it really requires, and in fact probably exceeds the limitations even of many courts to do it the proper way. So at any rate I think the consolidation route does have some possibilities. I also was wondering about whether there would be the possibility of impeding other parties who were similarly situated. There may be instances where there have been other cases and there may be a need to bring in somebody that may not come of their own free will as well to join.

And then the other question, in an interpleader action there are instances where something that is a res can be sort of put into the center of the action and then decided upon. And I guess my question would be whether that could be something that could be applied to domain names. I just wanted to throw that out for consideration. Again...

J. Scott Evans: Great.

Scott Austin: ...those are fairly complex – yes.

J. Scott Evans: Thank you. I'm going to call on Phil next but I want to read a comment that's in the chat from Kurt Pritz. And he states, I quote: "As Brian's email indicates, each dispute resolution provider has their own approach to consolidation. As I recall, when the PDDRP was created, it was vague on consolidation because it was recognized that each provider had different consolidation mechanisms and that ICANN would not be in the business of specifying a certain consolidation mechanism or picking the methodology of one of the providers. Each of the providers has a different mechanism and the complainants are able to select the provider that has the consolidation mechanism that best suits their complaint."

So that's the – Kurt's comment, just to address that quickly as I remember Brian being – if he's on the phone he's free to correct me – I think he thinks or

believes, from reading the rules, that all consolidation – and this is something we can ask the providers – seem to be post-filing consolidation. Meaning that several separate people have filed a complaint against one registry and then for administrative convenience the provider has decided to consolidate all the cases into one action before one panel.

I think Brian asked the question, given that that seems to be what they're stating, it doesn't seem to be a provision for joint filing of complaints. So in other words, does the complainants themselves decide to file a consolidated complaint. And that – we would seek clarification on that as well.

So I just want to bring that forth and I think that was stated in his note. If anyone's read it and disagrees with me, I welcome you to correct me. I'm going to go to Phil Corwin's hand was up and then I'll have called on Greg and then Scott. So, Phil.

Phil Corwin: Yes, thanks J. Scott. Phil Corwin for the record. Three quick comments on this. One, I was already going to say that I certainly had no objection to reaching out to the providers and finding out what that consolidation means. I have to say Kurt's statement concerns me a bit that consolidation might mean something different at different providers. It's always – I think it's always been the goal for all the ICANN RPMs that they be uniform. And that there couldn't be any gaming the system by going to different providers with different substantive roles.

So I want to, you know, I'm not ready to say there's something wrong going on but I want to go in and if there are differences I think we ought to think about, you know, making them more uniform so that it's the same system no matter which provider you go to. So one, on four, finding out what they provide, how they handle consolidation and are there significant substantive differences.

Second, I'm not opposed to the concept of consolidation given that the cost to bring one of these actions and given that in a lot of them you're going to be trying to demonstrate a pattern and practice of encouraging infringement. I don't see anything inherently wrong with the concept of allowing, you know, trademark owners who believe they've been infringed by the same bad policy to join together to share the cost of an action.

Third point, having said that, I agree with Kristine's comment that brand owners may gang up on a smaller registry and even beyond that, I would want to make sure there's very strong procedural and substantive protection so that the mere fact that let's say half a dozen major brands have filed a joint action against a particular registry is not determinative and that there still has to be an inquiry into each and every allegation of infringement that is actually taking place. So those are my thoughts at this point and I'm happy to yield the floor. Thank you.

J. Scott Evans: Thank you very much. Greg.

Greg Shatan: Thanks. Greg Shatan for the record. And just briefly, and I worked on the group that, you know, put the PDDRP together in the first place. I don't recall anything in our work that indicated that we could not or should not consider consolidation as kind of a policy or a design level. So I would reject Kurt's idea that somehow we can't consider consolidation and have to leave it to the individual providers.

Indeed, it's kind of absurd because there was no PDDRP before this. So, you know, everything is kind of new anyway. And it's a different kind of case, you know, because we're looking at a pattern or practice, you know, at least at the second level, at a pattern or practice of, you know, that actively encourages or – I don't remember the exact words, you know, the sale of trademark infringing domain names. So by definition you, you know, may have a bunch – number of different complainants around.

So I think that to the extent that we want to deal with this in this group there's absolutely nothing stopping us from doing so. Thank you.

J. Scott Evans: Thank you very much. Scott.

Scott Austin: Sorry. Yes, just as a follow up – this is Scott Austin. And I think somebody's got their mic unmuted. There's a lot of background noise.

J. Scott Evans: It may be me, I'm in an airport, I apologize.

Scott Austin: The consolidation of cases is usually where the same parties of multiple actions, for example, I'm in a consolidation right now between an opposition before the TTAB, a cancellation before the TTB – TTAB, and frankly, a counterclaim within the opposition but essentially is another cancellation. But the point I'm trying to make is, the parties are the same. It's just you're consolidating cases.

It seems to me that, and I want to make sure it's not missed, we're really asking if we can have multiple complainants that really are arguing the same case. That is that the same defendant, the respondent, the registry at issue, has violated the requirements or the terms of its agreement or the agreement with ICANN by engaging in this conduct. And it'd have to be clear and convincing evidence.

The other thing, I think is, I don't know that there's going to be the number of parties that you typically would have in a consume class action because that can be huge, monstrous. This could be merely four or five. And I understand Kristine's comment in the chat about it being a nightmare if you have a consolidated – a number of cases, perhaps in a typical UDRP because then you're going to have so many different bits of evidence and so many different questions about, you know, who really contributed what and which infringement is occurring.

In this case it sounds to me like you're going to have each party lining up to say that there is evidence there has been an infringement or there's evidence of the (unintelligible) and they will each have their shot or their attempt to submit that evidence to the parties that are – or to the panelists that are arbitrating. That's all I wanted to – the point I wanted to make.

J. Scott Evans: Thanks, Scott. Okay at this juncture I think we've covered this enough. Here's what I'm going to suggest. I'm taking chair's privilege here to move us along. I'm going to ask that Brian Winterfeldt, if he's on the call if he would make an indication I've seen in the listing if he could show me by giving me a green arrow or something to know he's hearing me, work with staff briefly to put together – okay it says Brian can't be on the call.

So I'm going to reach out to Brian, since this was his idea, and see if he can work with staff based on what we heard today and put together a list of questions that we would submit to the PDDRP providers and then that would be submitted to the list for consideration. And then we could send it off and just get written responses to that, the various providers.

If that is something that seems acceptable to the group, if you would indicate – giving me some indication by at the top giving me an arrow or an – I mean, a checkmark or an X so I know that everyone is – thinks that that seems to be a reasonable way forward? Okay, I see one green check, so far I see more coming. So it looks like that is going to work for us. If I scroll down I see no Xs at this point.

So if that's acceptable I'd like to do that because I do think that we should at least take this information so that we can see sort of how they view and what they consider now to be the procedure. And so we can get a better insight into that and if it's something that they have strong feelings about one way or another.

So with that I'm going to pull us off that topic and then ask that we go back to the subjects that are center so we can just get sort of narrow our list down, issues that we want to consider exploring. So I think the next question – and I don't think we got to it but, Mary, you have to keep me honest here. I think we need to start with Roman Numeral 3, is that not correct, regarding the accessibility of the PDDRP. Bottom of page 4, okay that's where I am.

So you see there if you're online – for Beth I'll read – “The overarching issue is the trademark PDDRP too difficult to access? Is it not being used because the burdens are too high? Or the remedies too uncertain?” And then sub-issues that are more specific under there, “Are current requirement for the burden of proof and remedies are set up in Section 7.17 and 18 of the TM-PDDRP rules.”

And I think I've seen some discussion on the list regarding the burden of proof, which is, as we all know, is clear and convincing, which is a higher standard than the normal standard which is preponderance of the evidence. So is there any discussion here? Would anyone like to weigh in about whether we need to look at that burden of proof issue, if that's something we need to consider that might need to be changed?

Beth Allegretti: They, J. Scott, it's Beth Allegretti.

J. Scott Evans: Yes, ma'am.

Beth Allegretti: As a non-lawyer here – for the non-lawyer can you just quickly tell me the difference between clear and convincing and preponderance of evidence?

J. Scott Evans: Sure. Sure. It's a little hard to – for people to understand so I'll do the best I can and try to use a law school professor's approach. Generally, a preponderance of the evidence standard is considered like greater than 50%. So just a little bit over the scale of 50%. Whereas a clear and convincing standard would be generally – and this is all rough and it's just to give you

sort of a way to visualize it, would be about an 80%-85% standard meaning you would have to have much more direct proof and less inference than you probably would in a preponderance case.

Most civil cases in the United States are decided on a preponderance standard. There are some cases where there is a clear and convincing standard. They are rarer than preponderance cases because they are more difficult to prove. Is that helpful at all, Beth?

Beth Allegretti: Yes, no that was great. Thank you.

J. Scott Evans: Okay.

Beth Allegretti: And so the PDDRP is clear and convincing?

J. Scott Evans: That's correct.

Beth Allegretti: Okay. All right thanks.

J. Scott Evans: Okay? Greg.

Greg Shatan: Thanks. Greg Shatan for the record. This was certainly a subject of a great deal of discussion when the PDDRP was first put into place. And, you know, without ever having had a PDDRP take place it's not clear, you know, how this will work in practice of course. Clearly, though, I would think that the clear and convincing standard is a disincentive to bringing a case because for instance, in your – using your percentages if you were to say that it's twice as likely as not that the harm occurred and there was a violation, you'd still lose.

And that's not a – that really puts a lot of burden on the complainant, you know, gives a lot of protection to the respondent. You know, to be fair, you know, there were, you know, good reasons or, you know, reasons that were well argued as to why that was fair in this particular case. If we want to

reopen that can of worms, you know, I'd be in favor of it because I think it does have, you know, issues attached to it.

You know, the only things that normally get, you know, clear and convincing aside from criminal cases or criminal procedures are things like paternity and child custody and right to die cases, things like that where there's something really dispositive that's really close to the loss of liberty that once sees in a criminal case.

So I cautiously say that we should reopen it. On the other hand, we could spend months discussing it like we did before and come to the same conclusion. So I say that cautiously. Thank you.

J. Scott Evans: Okay.

Sarah Deutsch: They, J. Scott, this is Sarah Deutsch. Can I just get in the queue whenever you...

J. Scott Evans: Yes. I have one hand ahead of you, Sarah, and then I will call on you. And I'm hoping very much I'm pronouncing this name correctly, is it Brian Cimboric?

Brian Cimboric: Yes, J. Scott, it is. This is Brian Cimboric with Public Interest Registry. I think that the – and I circulated a comment to this effect on the list, but I think clear and convincing is the proper standard here. I think that given the potential severity of the remedies available the PDDRP including suspension of the registry agreement if ICANN Compliance agrees, I think that a higher standard than just the 51% preponderance of evidence that you discussed is required.

And it's actually – it's similar to – it would be the appropriate standard if this were before a court, in my opinion, because the clear and convincing evidence standard is usually used not just in instances which Greg described,

but also any time equitable remedies are involved. And I kind of see suspension of the registry agreement as an equitable remedy or at least akin to an equitable remedy within the ICANN sphere. It's – we're not talking about money damages; we're talking about a registry possibly losing...

((Crosstalk))

Brian Cimboric: And given the severity of the remedies available, I think that the higher standard is required.

J. Scott Evans: Okay thank you, Brian. Sarah, I promised you next and then I do see we have a couple of other hands and I will be calling on you. Sarah.

Sarah Deutsch: Okay. Thanks, J. Scott. As someone who in a past life had some experience bringing some litigation actions, at least against registrars, who were bound by courts to have acted in bad faith, I can tell you that when the case starts out, you probably have what is more akin to a preponderance of evidence. But in my experience it took hundreds of thousands of dollars, if not more, to go through discovery. And at that point you had your clear and convincing evidence and then, you know, the court would rule.

So in this case in order to get that off the bat it would be extremely unlikely which would mean suing in federal court first and then going back and filing a PDDRP second, which kind of, you know, undermines the whole reason for the remedy to begin with.

J. Scott Evans: Okay. Thank you, Sarah. I think I see Rebecca next – Rebecca is it Tushnet? We're not hearing you. You can either put it in the chat and I'll read it to the group since I can't hear you. Does anyone else hear her? And I'm missing her? Okay she says she's sorry so perhaps she'll get to us in the – in the meantime, Paul, do you want to go ahead and we'll – if we can find Rebecca we'll let her have a turn.

Paul McGrady: All right, thanks, J. Scott. This is Paul McGrady for the record. I'm a little concerned, just feeling a little cautious that we're trying to fix something that we don't know whether or not it's broken because we've never had one of these complaints filed. And so again we're sort of diagnosing this in a vacuum. I'm wondering if anybody has ever heard of a brand owner who was going to bring this and then decided that they would not meet the higher evidentiary standard, even though they would have met the lower evidentiary standard. I think it would be good to hear from anybody who found themselves in that circumstance.

But absent some sort of anecdotal evidence like that, I'm wondering whether or not we're fashioning, you know, a prescription for a disease that we're not even sure is out there? Thanks.

J. Scott Evans: Okay. Thanks, Paul. I'll call on Scott but I want to see by a show of hands maybe what we need to do at this point is, because I'm seeing – not everybody is here, just put out a call for consensus on – to the whole group via email whether that is an issue that we need to explore. And if we don't get consensus then we'll move on.

I'm a little concerned to dismiss it just for 23 people out of 120 working group members and claim that we have some sort of consensus even though I do see that there are people agreeing with both Paul and Brian. I want to be fair to Rebecca Tushnet, she said that she was in agreement with Brian's comment. And then I see that several people in the chat room have agreed with Paul. And I think Paul's basic comment was are we fixing something we have no evidence is broken?

With that I'm going to turn to – we've got three more hands up. I'm going to go to Scot Austin, then Phil Corwin, then Renee Reuter. Start with you, Scott.

Scott Austin: Okay, I'll be quick because essentially I think that this does apply; the clear and convincing is right because you're talking about a loss of substantial

money and property. And clear and convincing is used in instances with wills and trusts, frequently, where there's fraud and essentially where there's things where you have a significant loss like first amendment rights and so forth. And I think given the fact that a registry is a pretty expensive item that that's probably why they went with that standard.

J. Scott Evans: Okay. Next would be Phil.

Phil Corwin: Thanks, J. Scott. Phil Corwin for the record. I'm reluctant to look at lowering the burden of proof and I'll tell you why. One, Greg told us that a great deal of discussion went into setting this standard. Two, we can, let's be real, if we propose to lower it, we're going to get very strong pushback from the registries - from registries and the Registry Stakeholder Group.

Three, I wouldn't be concerned about that if we had clear evidence that there were, you know, multiple registries who were out there encouraging infringing registrations and they would have been subject to some discipline under this type of motion but for the high standard. But so far we have no actual citing of any particular registry as being a potential target of this type of action. So those are my notes.

Going on, we might want to discuss, you know, adding to actual encouragement, looking at willful blindness or the other things. But in that regard, we have to recognize that registries mostly have no control over who registers domain at them. It's done through a registrar; it's an automated process. It might be different if the registry and the registrar integrated and they have some active marketing program that encourages the infringing registrations, but - so maybe look at that. But on lowering the burden of proof, given all the prior discussion, the prospective pushback and the lack of any clear notice that there's bad actor registries out there, I don't think it's worth spending a lot of time on. Thank you.

J. Scott Evans: I see that Paul Keating has raised his hand. Thank you, Phil.

Paul Keating: Yes, this is Paul Keating for the record. I tend to agree with both Paul and Phil. I'm not opposed to going out and finding out if there have been cases where people have been discouraged by the existing policy from raising a claim, but I think we should - that's the only way that we can deal with the issue. I would suggest asking the IP constituency, perhaps the registries themselves if they'd had inquiries or the ADR providers that are - have been appointed by ICANN. They would know if anyone had contacted any of them.

But we would also - I would second the concern of Paul's which was anecdotal evidence is not evidence in this context. So it would - the information coming back would have to be pretty specific to motivate me to want to change something that hasn't been used since it was created. So I think this discussion has gone well beyond the point, and absent some concrete evidence that it is a problem, I'm opposed to trying to fix it.

J. Scott Evans: Just for the record I want to -- this is J. Scott for the record -- I want to clarify a couple of things. First Paul, the - each provider did say that in their opinion they thought the burden of proof was the problem. So that's as close to any evidence we can get at this point, but they all three said that. So I just want to make sure that's there for the record.

But I do think that I'm hearing here and seeing in the chat box a great amount of people who feel like this perhaps is not a can of worms or an issue that we want to address. So I think that we should do a call for consensus to the entire working group via e-mail about whether this is an issue that we need to continue considering or one that we should just move away from. Is that something that people are willing to support and we can put that out the next week?

Paul Keating: This is Paul Keating for the record, jumping in, sorry. I'd suggest doing it in a way that's a little bit easy to, you know, kind of gets us statistical results from. So rather than email, do some sort of online polling mechanism where people

can just click in and say yes/no, and then you have it all tallied right there. You can save staff from having to read 120-some odd emails and the replies to all that will come along with them.

J. Scott Evans: Yes. Yes okay. Generally when I do a call for consensus I just way we're going to consider it consensus unless we hear an objection but since we have doodle polls, is that something, Mary, we think we could put out?

Mary Wong: J. Scott, this is Mary. Yes we can do that. And I'll just take the opportunity to note that this is an issue that we can park for now but that it maybe something also that the working group can come back to, assuming that the poll is in the negative.

J. Scott Evans: Okay. All right. So we'll do a doodle poll within the next week on the issue of whether we want to consider this particular comment that this particular issue in going forward is something that we want to.

Now the next issue I see for discussion is suggestions - there were some suggestions related to whether substantial infringement exists by the registries in the market today. And I believe this was something that was raised by Denise Michel from Facebook when we had our discussions at Helsinki. And there may have been a little bit further discussion on the list, but - so on the list it looks like there was some further discussion around what substantial infringement is, what that bad faith tenet is, as you'll see it's listed on the next page, which I believe it's Page 5 of the seven-page document.

So you see those particular issues there. The question is -- and I guess this all relates to some of the things we've wanted to look at -- is do we believe -- I think Phil raised this in his comments -- that there is some sort of substantial infringement going on out there that either doesn't address because of one fact or another, one being the high burden of proof or the cost or whatever, or it just doesn't - simply doesn't cover it.

So is there any comments with regards to these particular issues? Rebecca, I see your hand is still up and I'm assuming that's from earlier. So I'll give you an opportunity if it's not to speak. Ah, it's gone down, so I assume I was correct. Does anyone have comments with regards to these thoughts that I just - that are listed here on our document? Greg Shatan.

Greg Shatan: I think -- Greg Shatan for the record -- I think at this point, you know, these are - we're essentially leaving this to the discretion of the panel, and I'm not sure that's a bad thing. And I think if we get into trying to define things too closely for the panelists, we might end up making it harder to deal with a case because we're not going to anticipate, you know, the facts in front of them. And - so I'm a little wary of trying to over-lawyer or over-legislate these matters. I'd love to hear from people who are actually panelists. I've never been a panelist in any, you know, sort of thing.

But I think that there is, you know, generally speaking, you know, a fair amount of room to be - to look at things. And then if we were to kind of try to ultra-define everything, it's going to be like a pinball game of, you know, where you're constantly getting knocked around between different standards that were created in a theoretical vacuum and they may be - I'm not even sure - I wouldn't say they would help one side or the other, I just think that it would kind of make the whole case much more awkward to handle. Thanks.

J. Scott Evans: Thank you, Greg. Just one point of clarification. I'm not so sure that, as I recall Denise's comments, that she was asking for us to amend the policy to seek to define substantial infringement. I was under the impression that she was more wondering whether, one of two things. One, that the practices - there were practices going on that the PDDRP is designed to cover that trademark owners (unintelligible) but they just think the PDDRP is an insufficient solution for whatever reason.

Secondly, I thought her query was and are there other behaviors going on that the PDDRP does not cover and maybe it should. So that's how I

understood her, especially when you look at the next point, which is additional avenues for information. So it talks about whether we should do some sort of survey. I don't want to dominate so I'm going to - quickly, Greg, if you want to respond to me, I'll come back to you but Paul's had his hand up for a while, Paul Keating, and I want to call on him first.

Greg Shatan: I'll reserve that.

Paul Keating: Thank you. Paul Keating. My - I have a question which is in the context of this document that we're discussing, is there any requirement in the document that the panel actually apply the applicable law and what is the applicable law? You know, we're dealing with a jurisdiction in which the registry exists but under what law does the dispute have to be resolved? And when you're talking about these concepts, phrases like substantial infringement or just infringement itself, bad faith, et cetera, you go around the world and different jurisdictions have completely different standards for what these are.

And if we're attempting to clarify the documents where clarity is lacking, perhaps a provision in there that the panelists in resolving the dispute shall actually apply the governing law might be a place to start. And that would defer the standards to that jurisdiction and it would also protect both parties knowing that their dispute is going to be actually governed by a legal standard, an adopted legal standard that everybody can read and understand. Thank you.

J. Scott Evans: Okay thank you. I think Greg you had wanted to reserve a spot to reply to me and then I'll go to Scott Austin.

Greg Shatan: Thanks. Just briefly responding to the actual question as opposed to the question I made up and then answered, I would say that, you know, I would be in favor of a survey and, you know, think that that would be something that, you know, would be good to get some, you know, obviously it could be supported by ICANN in some fashion. Thanks.

J. Scott Evans: Okay. Scott Austin? There you go.

Scott Austin: Yes, I'm sorry but I think that the UDRP I think is what as a panelist I'm most familiar with, and I think that those rules have now, with the benefit of many, many cases since 1999 or early 2000, have been fleshed, that there is some guidance and some direction. But believe me, it has taken a lot of years and there's still a significant number of conflicts. People still forum shop, they still try to determine what case law is really going to benefit them the most.

In this particular case, there are PDDRP rules and I think to a certain extent there's reliance upon some of the UDRP materials. But I'm not sure where it goes after that. So I think the question of what law applies - I'm seeing some things in the chat room now that also talk about, you know, jurisdictional preferences and whether or not the panelists can decide that, because as was mentioned, bad faith could be in a lot of different ways, you know, articulated in different locations.

But bad faith has always pretty much been articulated in accordance with the policy under the UDRP. I mean there's some specific examples given. It's not exhaustive but there are some specific examples that give guidance in terms of the way the policy is interpreted through the rules and through the supplemental rules in certain areas. So I guess my question is do we have enough of those without making them burdensome but at least enough to provide guidance? Because I - this was the question that I asked the last time at the meeting, you know, what law does apply and what's the scope of that law.

J. Scott Evans: Thanks, Scott. I'm now going to go to Phil Corwin.

Phil Corwin: Thank you. I just unmuted. Phil here. Again on the - without changing the standard, I did have one thought in looking at the definition on bad faith intent that's in the memo in front of us on Page 5, and I've been thinking about this.

It says there's got to be a substantive pattern or practice of specific bad faith intent to profit from the sale of domain names and infringe the complainant's trademark. And I'm focusing on the word profit. Profit would normally be understood to mean monetary gain. That's how you would naturally read the word profit. I'm not sure if it's supposed to have a broader meaning.

Keying off that, I know there's a very sensitive area, maybe one that the group doesn't want to get into at all, but I think we do know that there's a wide variety of pricing patterns among the new gTLDs. Some are quite expensive on an annual basis, others have been free or very low cost.

On the theory that there may be more infringement or infringement-related activities associated with very inexpensive domains, I wanted to put forward the concept of whether we should either say something about the word - how the word profit should be interpreted, whether it should mean a profiting in some way beyond their monetary gain or whether we want to amend that language to say profit or otherwise benefit from the sale of domain names.

So I just wanted to introduce that thought. There may be no interest in it but again I'm not for changing the substantive burden of proof but I do think that the requirement that you show profit that means there's monetary gain, it may miss other benefits that a registry would get if it encourages lots and lots of registrations at a very low or free price that might result in substantial infringement. And I throw that out there for discussion. Let's see if anyone has any merit.

J. Scott Evans: Okay. Thank you very much, Phil. Paul Keating.

Paul Keating: Yes. I put my hand down then back again because Mary was kind enough to refer me to section 12, which is the same broad language that appears in the UDRP. And as a practitioner, I've been continually frustrated by the panel's application of that kind of a phrase. They tend to create their own global concept of what is fair and is not fair, what applies and doesn't apply. A

classic example is (unintelligible) where you have a U.S. registrant, for example, and a non-U.S. complainant and the registrar itself for the domain name is in the U.S.

They don't apply U.S. law. They tend to apply it based upon where the panelist comes from. If the panelists are coming from the U.S., then they tend to be more free speech oriented. If the panelist comes from outside the U.S., they tend not to be. And the farther east you go, the more restrictive they tend to be. So I think we're - I would very much be in favor of tightening these rules up and actually obligating the panel to apply - to determine which law applies and to apply that law and not allow them to have this free rein, you know, to romp through the practices of equity. Thank you.

J. Scott Evans: Thank, Paul. I appreciate that very much. So what I think I'm hearing first of all was that the people are generally in favor of asking -- and how we do this we've yet to figure out -- are taking some sort of survey or something to find out if perhaps there - if there's a reason this isn't being used and if so what that is, or if there's certain types of, quote/unquote, substantial infringement that people believe is happening but the PDDRP does not address. Is that correct, that asking that information is something that we probably want to do?

Next I'm hearing that with regards to the overall agreements because we do have terms that are not defined, perhaps one solution to that might be specifying either a process or some sort of concrete clarification on what rule of law the panelists are to apply when determining these non-defined concepts. Was that correct?

Paul Keating: This is Paul Keating. Yes that summarizes it. Thank you.

J. Scott Evans: Okay. So with that, Mary, I think what we should do is just narrow the section down to those two questions and then we've got to figure out how we would go about getting that information. I don't know if we would go to some sort of - to the IPC and ask them to do a survey for us of their members or use one of

their members' member's to do the survey, but that's something I think we certainly should consider.

Can I get a - well Greg you're the president of the IPC right now. Is that something you could take on and report back to us that you checked in with the IPC and how the IPC feels of what - and suggest to us a methodology for getting that information? I see your hand is up.

Greg Shatan: This is - yes. To respond briefly, we've actually just recently discussed this very concept in the context of a different working group, and we really don't have the - kind of the infrastructure or capacity to actually, you know, handle kind of, you know, designing and running and collating and analyzing or even...

J. Scott Evans: No, no, please don't understand that I expect you all to do it. The question is we would do it through staff but we need a pool of respondents and how to best identify those is (unintelligible).

Greg Shatan: Yes. So the answer - again to answer the question you're actually asking as opposed to the one I've made up, yes I think we, you know, we and our members, especially our members who are organizations, could get the word out to those who could then, you know, seek - answer the survey. So we have those methods of, you know, beating the bushes for those who could answer something like this.

J. Scott Evans: Okay. Well then I would ask that - if I could ask you to sort of talk to your group and then coordinate with Mary on sort of what we feel like might be the best way to handle this and then we can bring it back to the group and then we can design something that would work within the perimeters that the group feels is best once we have that input. Is that something everybody feels is apropos at this stage?

And I see George Kirikos has made an excellent example of maybe looking at the inter-brand list and finding that. But again, we would still need some way to reach out to those inter-brand owners, so let's say we do the top 100 or top 50. We would still need some way to reach out to them, and that what I want. But I like that idea of using that list. I think that's a great idea, George. Thank you so very much for bringing that up. Greg, is your hand still up?

Greg Shatan: Just to briefly respond to that. I think that while, you know, obviously we do want to get, you know, larger brand owners in, we shouldn't ignore the, you know, concerns or questions of medium or smaller ones. So while I, you know, we can both, you know, have outreach to, you know, perhaps to particular brand owners but also have something that's, you know, more generally outreach to, you know, all brand owners or at least say all, you know, members of (Inta) and (Marks) and other, you know, such organizations.

J. Scott Evans: Okay we'll take that up. Paul Keating.

Paul Keating: Paul Keating. When finding out who we could contact from these larger brand owners, my suggestion would be to start with a U.S. PTO, you know, trademark search and find the attorney of record and send them an e-mail. It's an easy way of dealing with it. The other one is I think my concern was answered with George's comment, which is I would want the survey to be issued to a substantial number of people and also as broad a base of people as we can get so that we can eliminate any potential bias, whether it's real or imagined by the critics of the reports that we generate.

J. Scott Evans: All right. Thank you, Paul. Paul McGrady.

Paul McGrady: Hi there. Paul McGrady for the record. Thanks, J. Scott. I guess I'm a little bit concerned about -- and I've already started to hear criticisms of surveys that haven't already been written yet, right -- one of the things that we're doing in the subsequent procedures working group is essentially put a set of

questions out for comment. Is there a public comment option that would be more traditionally an ICANN approach here that wouldn't require constructing and finding a good enough survey sample?

Because my concern is that the IPC or one of its constituent organizations jumps through the hoop of getting this out to its membership only to have the survey criticized as not scientific at the end of the day. Why wouldn't we just as a group put this out for public comment and let the public comment on whether or not they've ever not filed one of these and if so, why. Thanks.

J. Scott Evans: Greg Shatan.

Greg Shatan: Yes. Just I think one of the concerns I have with a survey, and I'm generally actually more in favor of a survey than a public comment, but surveys designed by survey experts tend to be good surveys, surveys designed by survey amateurs tend to be troublesome and prone to criticism. I'm assuming there are no survey experts in this group who feel like contributing their efforts pro bono. I know that when I've had to, you know, get a survey done in my professional life, I've hired someone because otherwise it would, you know, be bounced out of court, you know, faster than basketball, not that I go to court much anymore. But in any case, I'm wary of amateur surveys.

J. Scott Evans: Well I mean I'm going to play the devil's advocate here. I'm not asking for an evidentiary survey, I'm asking for a simple survey that would ask the question "Are you aware of the PDDRP at ICANN? Have you ever considered using it? Yes or no. If no, why?" I mean I don't think that that takes, you know - and we can only do so much; we've only got so much time.

So, you know, the truth of the matter is people who don't like our suggestions are going to find some way to tear them down no matter what we do, or anything we do to get them done. But if we want to get input and we want to stay on a timeline, I think we're going to have to understand that we can't do everything as if it's being done by the (Pew) Institute. I mean we're just going

to have to, you know, make some calls and make it very simple and simplistic and we're just, you know, we can leave an open field, we don't even have to lead someone, just why not and give them 250 words to tell us why not, you know. So that would be my thought.

I just think, you know, at some point we have to fish or cut bait. So unless I hear substantial clamoring somewhere against that idea, I still think we should move forward with a simple survey to answer these questions. And I'm talking about something that would be no more than four questions that we would just send out. We're only seeking to inform ourselves, we're not seeking to redesign the world. We're just trying to get sort of a snapshot of what the market looks like now.

Is there - can I get an indication of whether - let's just make it easy, if anyone hugely opposes that idea. Okay. And I just want to - Mary has raised a point in a comment to me about the fact that we might not be finished by August if we consider some of these inputs. Well it may be that we are finished with discussing them and we've all got tasks and we have to circle back with them, but by August 31 we've moved on to considering other things and we'll just have subgroups working on things that come back and report to us where they are.

There's nothing to say that we can't - that we have to be completely finished with this at a date certain or that we have to allow the fact that there are certain issues that are being worked on by subgroups to keep us moving forward as a main group. I just wanted to put that out there.

So we've got no more time left. So I think Mary has listed the action items in her notes and we'll get those out to everybody. I want to thank everybody for their time. We will have a call next week. Mary, when is our call next week?

Mary Wong: J. Scott, this is Mary. I believe we revert to the 16:00 UTC time on Wednesday.

J. Scott Evans: I believe that's correct. But everyone check because you will of course get a reminder probably from staff letting you know that yes it's Wednesday August 3 at 16:00 UTC for 60 minutes we're having a call. So just to let everyone know. So I want to thank everyone very much. We'll pick up with our discussion where we've left off. And it looks like I think Phil will be our chair. So thank you everybody for your time and for the robust discussion both in the chat and on the telephone. In the meantime, have a great weekend and we'll talk to you next week. Thank you so much. Bye.

Man: Thanks. Bye.

Phil Corwin: Thank you. Bye.

Man: Thank you. Bye.

Terri Agnew: Once again, the meeting has been adjourned. (Mary) the operator, if you could please disconnect all recording lines.

END