
ICANN Transcription

Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP WG

Tuesday, 18 August 2020 at 13:00 UTC

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JULIE BISLAND:

All right. Well, good morning, good afternoon, and good evening. Welcome to the Review of All Rights Protection Mechanisms, RPMs, in All GTLDS PDP Working Group call on Tuesday the 18th of August, 2020.

In the interest of time, there will be no rollcall. Attendance will be taken by the Zoom room. I would just like to remind everyone to please state your name before speaking for the transcription, and please keep your phones and microphones on mute when not speaking to avoid background noise.

And just as a reminder, those who take part in ICANN multi-stakeholder process are to comply with the expected standards of behavior. With this, I will turn it over to our co-chair, Phil Corwin. You can begin, Phil.

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PHILIP CORWIN: Yeah. Thank you. Good morning, good afternoon, and evening to everyone who has joined today's call. I'll review the agenda in a second. Anyone have statement of interest updates? All right. Hearing none, we have not too long of an agenda today.

We're going to wrap-up on the Trademark Claims recommendation, three recommendations, and a question. I took a look at them. I don't think those will take too long. And then, we're going to address a proposed recommendation from Paul McGrady on the Trademark Post-Delegation Dispute Resolution Process, and that's it. So, let's get rolling.

The first order of business is Trademark Claims Recommendation 4. This recommendation was, in general, a current requirement for a mandatory claims period being maintained, including the minimum initial 90-day period when a TLD opens for general registration.

Some working group members asked for public comment on potential exemptions, and we're going to get to the answers to that question. Those responses, you'll see, are also in the responses to some of these recommendations. So, why don't we see how the community responded on this? Was this where David McAuley was going to speak, to regard the subgroup A's review of that?

JULIE HEDLUND: David is having some issues with his network access, so I'll go ahead and just quickly go through the subgroup A deliberation summary, if that's okay.

PHILIP CORWIN: Okay. Thanks, Julie.

JULIE HEDLUND: Sure. So, the subgroup A agreed that the recommendation be maintained as-is, but two new materials/perspectives/facts raised by public comments, as flagged below, should be referred to the full working group for possible reconsideration of its recommendations.

These are, one, "RPM requirement section 3.2.5 be expressly referred as part of the TM Claims recommendation number four to confirm that there is a limited registration period after Sunrise and prior to general availability. TM Claims must operate throughout, in addition to the first 90 days of general availability."

And two, ".Brand TLDs be exempted from the TM Claims period requirement." The subgroup noted this perspective was also raised in the public comments for Trademark Claims question two.

I'm just going to move down to the comments that were referred to the working group. I think, in particular, the key issue to discuss is the highly regulated TLD exemption, because we did have a little bit of discussion on the last working group meeting and I'm being told that the analysis document is not showing up. I'm going to stop sharing and try sharing again. Hold on, please. Sorry.

PHILIP CORWIN: Okay.

JULIE BISLAND: Julie, the link that you posted in the chat; can you repost it and change it to “everyone”? You had it in the waiting room.

JULIE HEDLUND: Thank you. I think, actually ... I didn't think that was me, but let me send it to everyone. Hold on. All right. I hope you now can see the analysis document. Okay. I see David McAuley is confirming. Thank you very much.

So, these are the three comments that were passed on, but we did have some discussion about this last week, but that discussion was not completed. So, just going back to ... Let's see. I'm sorry. Okay. I'm being told that some cannot see the screen, and I apologize for technical difficulties.

PHILIP CORWIN: I'm seeing it.

JULIE HEDLUND: You're seeing it? Okay. Very good. Thank you.

PHILIP CORWIN: Yeah.

JULIE HEDLUND: All right. So, the main issue that remained from last week that didn't get discussed was the question of the highly regulated TLD exemption. I'm trying to find the text on here that is referring to that.

I see that others are saying they can see this, so that's very helpful.
Thank you.

PHILIP CORWIN: Yeah. Julie, we can see it. In regard to ... So, I think where we are on this one ... There was strong support for maintaining a minimum 90-day claims period. The subgroup decided to also encompass the LRA if a TLD offers one. They accepted that public comment.

The question is the scope of any exemptions, and I'd prefer to defer that discussion until we get to the answers to the question that's coming up in this session, where we got the community comments on, besides .brands, if anyone else should be exempted. So, we're going to get to that in a few minutes, but I'd rather see how the community respond to that question as an introduction to that discussion.

JULIE HEDLUND: Staff to display, at this point. Phil, if you're speaking ... Well, you don't show as being on mute.

PHILIP CORWIN: Yeah. Did you just hear me?

JULIE HEDLUND: I did not. No. I do now, but I did not hear what you said.

PHILIP CORWIN: Can you hear me now?

JULIE HEDLUND: Yes.

PHILIP CORWIN: All right. What I said was—let me repeat—that it seems that subgroup A [want] a strong public support for a minimum period of at least 90 days. The subgroup decided that we should include something specifically incorporating the comments on encompassing the limited registration, the LRA, if a TLD has that.

And I said, on the question of whether .brands should be exempt from the claims period, as well as whether any other types of TLD, I want to defer that discussion until we get to the answers to, I believe it's question two, where the community weighed-in on that question. So, we're going to get to it in a few minutes, but I'd prefer to defer that discussion within the group until we reach the question responses. Did you hear that?

JULIE HEDLUND: Yes, I did. Thank you very much, Phil.

PHILIP CORWIN: Okay, good.

JULIE HEDLUND: And just to note, as you were saying that we'll be coming to this, there are further details about the highly regulated TLDs issue that is part of the working group deliberation summary in recommendation number five.

PHILIP CORWIN: Okay. All right. So, let me open it to discussion. Is there any discussion on the subgroup's recommendation that we adopt the recommendation and tweak it a bit to make sure that it incorporates covering the limited registration period, if a TLD has that? We'll get to the issue of exemptions in a few minutes.

I don't see any hands raised, so I'm going to assume, if I don't see any hands or hear anyone speak out, that we're going to go with this claims recommendation, with that additional reference to cover the limited registration period if there is one. We'll get to the question of exemptions in a few minutes.

So, if there is no discussion, we can probably close out TM Claims number four and move on. All right. Why don't we just move onto number five? Oh, here we are. Oh, wait. Just give me a moment to ... I'm just trying to see the difference between ... There is not much difference between four and five, is there? Staff?

JULIE HEDLUND: Recommendations four and five are related? So, technically, Recommendation 4 can't really be closed out until Recommendation 5 is addressed.

PHILIP CORWIN: Okay.

JULIE HEDLUND: It might be ... Since the working group had considered the subgroup A deliberations on the previous call but had not closed out either four or five, we suggested maybe we start with the working group deliberation summary, and in particular—

PHILIP CORWIN: Sure.

JULIE HEDLUND: Where the working group did not reach agreement on whether highly regulated TLDs should also be exempted. I can highlight that text on the screen, here. I'll move out, though, to the start of it. Did you want staff to read this section?

PHILIP CORWIN: No, I'll take care of that. All right. So, we didn't reach agreement on whether highly regulated TLDs should also be exempt from the mandatory claims period. I think there is pretty broad agreement that .brands subject to Spec 13 shouldn't be covered because there is only a single registrant in all the domains. That was my personal comment.

Getting back to the text, Jason Schaeffer suggested that the working group consider recommending the exemption of the highly regulated TLDs, as they're not in the same class as open TLDs, and safeguards are put in place.

Working group members opposed such an exemption, and those who did expressed the following opinions, including that highly regulated TLDs who still permit registrations to third parties are not sufficiently closed and sufficiently low-risk that there is no defined category of what a highly regulated TLD is. That's a term reflecting GAC advice, but it's not a defined policy term, that there is no [you clear] in uniform requirements or vetting and verification processes across highly regulated TLDs, and the standards vary a great deal.

There is no widespread support for exempting highly regulated TLDs based on the public comment responses and the personal comment—those are, I think, the responses to the question which we're going to get to in a minute—and that if highly regulated TLDs are going to agree to a TM vetting process, they can just use the existing claims service.

And then, the working group noted that the New TLDs Subsequent Procedures PDP has been discussing whether to affirm the framework for highly regulated strings. There are several categories, each with a specific set of safeguards – [that is], public interest commitments. All right. That may be relevant to our work. I'm not sure we want to try to adhere to what's going on in that other working group. So, is there anything else, here, relevant, Julie, or can we open it for discussion? Hello?

JULIE HEDLUND: [inaudible] for discussion.

PHILIP CORWIN:

Oh, okay. I didn't hear you the first time. All right. So, let's open this up. A starting point is that there is broad agreement, I think, from the public comments and within the working group, for exempting .brand TLDs that are subject to Spec 13 from a mandatory claims period.

A proposal has been made to also exempt so-called "highly regulated TLDs," and quite a number of objections have been brought up to that suggestion. Is there further discussion on that point? All right. I'm not seeing any hands up or hearing anyone speak out. So again, let me just review.

I just want to repeat the recommendation we're revealing here, which is, "The working group recommends that the current requirement for a mandatory claims period should continue to be uniform for all types of gTLDs in subsequent rounds, including for the minimum 90-day period when a TLD opens for general registration." Julie, do we have a specific recommendation from subgroup A, Julie or David McAuley, for amending that to exempt .brands?

JULIE HEDLUND:

Thank you. I'll also note that, as we said here, it was Jason Schaeffer who was suggesting that the working group should consider recommending the exemption of the highly regulated TLDs and, as far as we can tell, he is not on this call today. I'm just noting that.

Subgroup A just asked for the working group to consider the public comments, and also for TM Claims question two. So perhaps, if you

wish, we could also look at the public comments for TM Claims question two. And actually, I see Ariel has her hand up. Maybe she'd like to speak to this.

ARIEL LIANG: Thanks, Julie.

PHILIP CORWIN: Yes, Ariel. Go ahead.

ARIEL LIANG: Thanks, Phil. I believe that the working group already discussed the subgroup A's deliberation. So, what staff captured was our understanding of the working group agreement in the last call. Julie, if you could scroll to the first paragraph, under "working group deliberation summary"? Yes, right here.

What staff understood is that the working group agreed that this recommendation needs to make clear the Spec 13 .brand TLDs and the Spec 9 exempt TLDs should be exempt from running the mandatory claims period. The modification of the recommendation is to make this exemption language clear. So, that's what we understood from the last meeting. The same kind of exemption language will be applied to Recommendation 4. In terms of Q2, it's the same deliberation, so I don't think we need to ... Yeah.

PHILIP CORWIN: All right. So, I see the language the working group has agreed to adopt for both four and five is this language, "With the exception of

those gTLDs who receive exemptions pursuant to Spec 13 and Spec 9, section six of the Registry Agreement.”

So, we have agreed to that. The remaining question is exemption for highly regulated TLDs. That was a proposal for Jason Schaeffer. Jason is not with us today. But based on the recording of public comments on that proposal, in the opinion of this co-chair, there does not seem to be wide support for that proposal for an additional exemption. In fact, a great number of concerns have been raised about it.

So, unless anyone wants to intervene, I think we’re going to close out recommendations four and five with the adoption of this language that I just quoted and that is highlighted on the screen, and we’re not going to adopt the further recommendation of an exemption for highly-regulated TLDs, which, as noted, is not a defined term for policy purposes.

Does anyone object to that manner of closing out these questions, or is that okay with folks? I see Paul McGrady saying he agrees. David McAuley agrees that it’s consistent with the discussion, and David, of course, chaired subgroup A. So I think, getting some support and seeing no objections—Greg Shatan supports, Susan Payne supports—we’re done with the four and five.

We can look quickly at the answers to question two, now, but I think there is not much to add from them. Can we just stop on question two for a second, so everyone can remember what it asked? And then, we’ll go to the deliberation summary. Okay.

So, the question was whether there was a use-case for exempting a gTLD approved in subsequent expansion rounds from the requirement of mandatory claims period due to the particular nature of the TLD.

Then it notes it might include highly regulated, that we just discussed, or .brands, which we also just discussed. If the working group recommends exemption language, what are the appropriate guardrails ICANN should use when granting the exception – single registrant, highly regulated, or manually-hand-registered domains? Something else? Okay.

So, that reviews the questions, basically asking to consider what we have just discussed and what the appropriate guardrails would be. Julie, do you want to take us through the relevant parts of the deliberation summary?

JULIE HEDLUND:

I'm slow coming off mute. So, the subgroup A deliberation summary is for the working group to consider the public comments for TM Claims question two with those for TM Claims Recommendation 5, and then also that they inform the working group's decision with respect to TM Claims Recommendation 5.

Again, going back to what we just read for Rec 5, the subgroup noted that there seems to be broad community support for a uniform claims period, as well as exempting Spec 13 registry operators/.brand TLDs from the claims period, and also community support for exempting highly regulated TLDs, but did not appear as widespread as that for Spec 13.

And then, subgroup A noted the Contracted Parties House's proposal of exempting registry operators who are exempt from Spec 9 from partaking in the Trademark Claims period, and that that should be referred to the full working group. And then that was, of course, similar to the proposal in the context of Rec 5, Recommendation 6, which we'll be looking at next, and Sunrise question four.

Other than the CPH comment, subgroup A agreed that the public comments had not raised any new or material perspectives, facts, or solutions which the working group had not considered in making this recommendation. And then, for the working group deliberation summary, there is a reference back to the discussion under TM Claims Recommendation 5.

PHILIP CORWIN:

Okay. Thank you, Julie. So this is informative, and the summary of the public comments accord with my reading of them. I just reviewed that this morning, again, before the call. There was broad support for exempting .brands. This issue of Spec 9 exemption was raised by the Contracted Parties House and in the mandatory language we just reviewed. We're going to cover Spec 9 TLDs, as well.

There was less broad support for exemption for highly regulated TLDs, and, in the subsequent working group discussion of that proposal, numerous objections and concerns were raised.

So, I think this just reinforces the decision we just agreed to take in regard to recommendations four and five. But if anyone else thinks

there is more to discuss here in regard to the public comments in response to this question, I'm happy to open the floor and hear from anyone at this point. I'm not seeing any hands raised or hearing anyone, so I think we can close out discussion of the responses to this question and move onto the final Trademark Claims recommendation, number six.

Okay. And number six is, "In the absence of wide support for a change to the status quo, the working group recommends that the current exact matching criteria for the claims notice be maintained."

I remember very robust discussions within the working group on this issue, as well as a failure to reach wide support for any change in either direction in regard to exact-match requirement.

The deliberation summary: "Subgroup A agree that the recommendation be maintained as-is. The public comments have not raised any new or material perspectives, facts, or solutions which the working group had not already considered in making this recommendation, and the recommendation did not receive widespread or substantial opposition from [interest] or community members which the working group had not considered in developing it."

"Nevertheless, subgroup A noted that several commenters, including INTA, GBOC, IPC, [cum laude and marks], suggested extending the current matching rules to any variation in which the mark contained variation."

That was also a proposal received—I'm speaking personally, now—when the working group initially developed this

recommendation, but we could not get broad support, much less consensus, on changing the exact match requirements to something that was broader.

So, I think that sums it up. Does anyone believe there was anything new, innovative, or whatever, in the public comments that we have overlooked somehow and that merits further discussion, before we close out claims recommendation number six?

I'm not seeing any hands, and I'm not surprised by that. So, we're going to close out number six and adopt the recommendation as put out to the ICANN public. And now, I think that closes out our consideration of all the Trademark Claims recommendations.

Excuse me. Just going to have a sip of water, here, and then we'll proceed to what I believe is our last item of business today, which is a review of the public comments on the Trademark Post-Delegation Dispute Resolution Process, recommendation number one. We're going to be discussing a proposal from Paul McGrady that relates to this. So, let me ...

This is a long recommendation. It's not short like the ones we have just gone through. We recommended that rule 3(g), the TMPDDRP, be modified to provide expressly that multiple disputes filed by unrelated entities against a registry operator may be initially submitted as a joint complaint or may, at the discretion of the panel, be consolidated upon request.

This recommendation is intended to clarify the fact that the TMPDDRP permits the joint filing of the complaints and the consideration of complaints by several trademark owners, even if

these are unrelated entities against a registry operator, in the case where that registry operator has engaged in conduct that has affected their rights in a similar fashion, and it will be equitable and procedurally efficient to permit the consolidation.

To the extent that a TMPDDRP provider's current supplemental rules may not permit the filing of a joint complaint, or the consolidation of several complaints, the working group further recommends that these providers amend their supplemental rules accordingly.

For the avoidance of doubt, the working group notes that, one, the filing of a joint complaint or consideration is to be permitted only where the complaints relate to the same conduct by the registry operator as a top or second level of the same gTLD for all complaints, and two, all the trademark owners have satisfied the threshold review criteria specified in Article 9 of the TMPDDRP.

And this recommendation is intended to apply to two distinct situations: one, where several trademark owners join together to file a single complaints, and the other where several trademark owners each file a separate complaint but request that these be consolidated into a single complaint after filing a personal comment.

I think everyone is aware that we're talking about a rights protection mechanism for which not a single complaint has been filed up to this point in time. It was the first item we began reviewing when this working group was in its early days, and so far as I know, between then and now, no one has made use of this PDDRP protection mechanism.

So, let's get to the deliberation summary. All right. Subgroup A noted that the BC and the IPC [similar] proposed wording adjustments to allow brand owners to use the existing procedure to seek recourse against registry operators engaging in egregious pricing practices, as well as several guide rails that will prevent overreach.

The subgroup agree that BC's and IPC's comments included new material perspectives/solutions that should be referred to the full working group for possible reconsideration of its recommendation. They may inform the working group's decision developing any revised language or implementation guidance, or any additional URS recommendation, should it choose.

Subgroup A also discussed ICANN Org's comments. Several members believe that ICANN Org's concerns may be misplaced. As TMPDDRP is an expensive process, the consolidation of multiple disputes against the same registry operator may provide efficiency and other benefits to counter-balance ... I'm going to stop there.

I believe that Paul McGrady's proposal builds on the BC and IPC comments, which the subgroup A concluded encompass new material. But what was the ...? Yeah. Before we get to that, can we ...? Because you have available for viewing ICANN Org's comments, since we just referenced them, to remind everyone in the working group of what ICANN Org said. Once we review that, we'll move onto Paul McGrady's proposal. Here we go. All right.

So, ICANN Org said they believe that this recommendation is feasible to implement and may provide increased operational

efficiency. However, it may also impose additional cost and resource burdens on providers to support this function. I assume that's providers of the PDDRP itself, not providers of the ... Yeah.

So, that would be the providers' personal comments, and I think it is reflected in the summary of the subgroup's consideration that they didn't find substantial merit in this concern because of the tight restrictions on when a joint complaint could be brought, or when individual complaints could be consolidated. It basically would have to all target the same conduct or type of conduct by the same registry operator.

So, let me open it, here. So, does anyone believe that ICANN Org's comment presents anything we need to consider that would require us to reconsider the recommendation? All right. So, I'm not seeing any hands, so I'm going to presume that the working group shares subgroup A's view that the ICANN Org comment does not impose any requirement to reconsider or amend the recommendation.

So with that, let's go onto Paul McGrady's proposal. Councilor McGrady is with us, I know. So, Paul, I'm going to give you the opportunity to present your proposal. I'd like you to specifically note how it builds off the BC and IPC comments and what new elements it contains that would change the current operation of the PDDRP, and then we can open it to discussion. So Paul, are you prepared to proceed?

PAUL MCGRADY:

Yes. Thanks, Phil. I appreciate that. This is Paul McGrady for the record.

PHILIP CORWIN: Thank you, Paul.

PAUL MCGRADY: Thank you. Let me see if I can get to that, to the e-mail I sent. I had it ready.

PHILIP CORWIN: It's on the screen.

PAUL MCGRADY: Oh, it's on the screen. Even better. Oh, good. Okay. Let me see if I can ... Well, there is also a link to it. That's great. Okay. So, yeah. First of all, thank you, everybody, for giving me a chance to present this. The IPC and BC comment, basically, said that they think there is an opportunity here to address some of the concerns about circumventing Sunrise by certain business practices of registries. And so, I kind of took a look at that and thought, "Yeah, I think that there is an opportunity, here."

But also, when I sat down to think through what that was and then eventually put something into writing, I did my very best to pretend as if Maxim were sitting next to me, because I want to make sure that we are being respectful of the "picket fence," as it is referred to, and to make sure that we aren't building something that contracted parties are going to not be able to live with when it comes to consensus call time.

So, here is what I came up with. The idea is that we would amend the trademark PDDRP to include a second potential claim, specifically that provider operates the gTLD in a manner that circumvents the purpose of the rights protection mechanism and/or takes unfair advantage of complainant's trademark; that the burden of proof for that claim, like the others, would be on the brand owner or owners bringing the complaint.

We would eliminate the "and" between sections 6.2.1(a) and (b), making it an "or B," which makes the trademark PDDRP, I believe, a little more of a useful tool for this purpose and, frankly, more useful in general for other forms of abuse. As well, the TMPDDRP didn't get a lot of action over the last eight years, and I think this is probably a reason why.

I also think it's important to more clearly explain the standard of proof for successful complainants, and I'm putting out here proposed text for consideration that, "Complainants are required to prove, by clear and convincing evidence, that, through the registry operator's affirmative conduct, there is a substantial pattern or practice of specific bad-faith intent by the registry operator to profit from the goodwill associated with the complainant's marks, as evidenced by the manner in which the registry operator offers Sunrise registrations or reserves and sells trademark terms."

So, a fairly high burden of proof, and then a requirement that ICANN actually implement adverse decisions and awards against providers – a policy. Now, putting on my Maxim hat, I thought, "Okay. What are the safeguards that registries would be looking for?"

And so, I think these should be baked in, as well, that higher prices without something more are not de-facto price-gouging for purposes of showing the bad faith; that it is understood that registries often charge slightly higher prices for Sunrise registrations based on their cost.

In other words, a \$20.00 second-level domain name in Land Rush, just because it's twenty bucks and it's \$150 in Sunrise doesn't mean that anything nefarious is going on. Sunrise can be expensive to run. It's very manual, and time-consuming, and all that.

Price gouging does not include listing an otherwise generic term at a higher price, unless it is specifically targeted based upon the top-level domain name term. So, everybody's favorite example here is that if we listed apple.computer for a million dollars, that would be a problem, but if we listed apple.food for a million dollars, that wouldn't be a problem, because apples are food. So, we're trying to be sensitive to that issue, as well – not trying to give brands more room than they have.

The policy is only meant to address concerns about behavior of a registry operator that shows a pattern of bad faith, not a few isolated incidents that people get grumpy about. That is why the standard of proof is high.

The system would be loser-pays in order to reduce the risk of frivolous complaints. We don't want brand owners with bees in their bonnets filing complaints that don't have a lot of merit. That could be very harass-y, and so that's important. I'm not sure harass-y is a word. I think I might have just made that up.

Ultimately, Compliance must still determine the appropriate remedy. Having a registry operator canceled may be an inconvenience or an unhappy outcome for a registry. It could be a real problem for registrants. And so, we do need this safety valve, here, on what should be done.

And then, just a catch-all, one of these savings clauses that the changes to the policy that I'm proposing aren't meant to create new rights, but merely propose a new way forward to existing policies and procedures. In other words, the real policy, here, is that the Sunrise should be effective and registries should not take advantage of that.

And so, that is the proposal. It is put out humbly and with the hope that we can talk through the issues. It's not meant to be a "my way or the highway" kind of thing. Something like this, I think, we can thoughtfully discuss, and I appreciate the time. I see Maxim's question. Phil, should I go ahead and try to address that?

PHILIP CORWIN:

Well, Paul, before you do, I just want to clarify a few things about your proposal, and then open it for discussion. I want to thank you for all the work that went into this, for trying to build on the BC and IPC proposals.

What I wanted to clarify was this: under "amended TMPDDRP is needed," as I understand it from reading this, the only specific and mandatory language to the actual rules for TMPDDRP you're proposing is the language in quotation marks at the third bullet point.

I just want to clarify that, for purposes of this discussion, the other bullet points listed under “amended TMPDDRP is needed,” as well as the bullet points under “safeguards for registries,” are more conceptual in nature, rather than specific proposals for amending the language, and that depending on how the discussion goes over the next few minutes, if there is support for any of that—fairly broad support—we probably have to develop a proposed amendment to the TMPDDRP and bring that back for some further discussion.

So, am I correct that, other than the language in quotation marks, the rest of this is conceptual in nature and not a specific proposal to amend the PDDRP? It’s not the exact language that would be used; is that correct, Paul?

PAUL MCGRADY:

Phil, thank you. So, the answer to that is kind of “yes and no.” No, in a sense that I think, or the first bullet point under “amended the TMPDDRP,” with a new claim, that naturally would fit in as a 6.2.1(c). And so, that is both a concrete proposed language, but at the same time, it is highly ... It’s conceptual because we have got to talk about the concepts first. I just wanted to put out something concrete as a starting point for the conceptual discussion.

And then, I also think, in the second bullet point, changing “and/or,” this little conjunction right there in between A and B, is both a concrete idea and also a concept that makes these ... You can prevail by proving any one of these, hopefully, three elements.

But that having been said, yes, Phil, this is all meant to be a conceptual discussion, and I don’t expect ... Unless everybody just

says, "This is the best thing we've ever heard. Let's adopt it and move on." I won't fight a victory.

But what I expect is that, yes, this is something that we're going to have to probably take out to the small group that has been looking at new ideas and giving everybody who wants to a chance to wordsmith and mess around with the ideas. But that's assuming that this gets enough traction on today's call, which I hope it does, for us to keep talking about it. Thanks.

PHILIP CORWIN:

Okay, Paul. And I'm going to ask you one more clarifying question before opening this up to working group discussion. In the current PDDRP, at 6.2, which is a complaint based upon second-level domains, the current requirements are for the complainant to prove the conjunctive, to prove both A and B. You are proposing in your second bullet point to make it disjunctive, to change it from "and" to "or." Can you just give us some rationale for that part of your proposal?

PAUL MCGRADY:

Sure thing, Phil. I'm going to pull up a copy. I'm going to pull up the PDDRP itself so that I make sure that I'm getting all the words right and not just operating from memory. Let's see, here. I'm on WIPO's page. Maybe the introduction link.

PHILIP CORWIN:

Yeah. Well, it's on the screen, but we have to scroll down a bit to show all of 6.2.

PAUL MCGRADY:

Yeah. So, I've got it up here from the WIPO site. So, 6.2, the second level. So, "Complainants are required to prove, by clear and convincing evidence, that, through the registry operator's affirmative conduct, A, there is a substantial pattern or practice of specific bad-faith intent by the registry operator to profit from the sale of trademark-infringing domain names and," currently written, "the registry operator's bad-faith intent to profit from the systematic registration of domain names with the gTLD that are identical or confusingly similar to the complainant's mark, which take unfair advantage of the distinctive character, or the reputation of, the complainant's mark, or," and it goes on to list several other things.

So, one, we're talking about, for A, there is a substantial pattern or practice of specific bad-faith intent by the registry operator to profit from the sale of trademark-infringing domain names. So that, to me, is [what's up], that the registry operator is basically running a shop that they intend to make money off of infringing domain names, and that's the reason why they are, basically, in business.

And then the B, and the reason why I suggest "or" instead of "and," is a different thing. "The registry operator's bad-faith intent to profit from the systematic registration of domain names within the gTLD that are identical, or confusingly similar, to the complainant's mark, which take unfair advantage or distinctive character of the reputation."

And it goes on to list these things, but those are ... One is proving a pattern or a practice, and that can be done with data. And then,

the other one is about bad-faith intent, and that is more subjective in getting into somebody's head.

Frankly, I think B is much harder to prove than A. A, like I said, can be proven with data. You show, "Okay, they've sold 5,000 domain names. 4,999 of them are branded terms, and they basically are running a registry that is designed to rip off trademarks and confuse people."

That is different than having to say, "Oh, man. Okay. They sold 100,00 domain names, but out of those 100,00 domain names, 5,000 of which are branded, and that's bad news, I have to dig into the elements of trying to get inside the registry operator's head to prove that there is bad faith."

So, B sounds in the bad-faith world that we're used to operating in because of the UDRP. A sort of sounds in a data world, where data can prove your case.

And so, proving both the data and the bad faith, getting inside the registry's head, that could be a significant uphill battle, and I think that it is, and I think that that's one of the reasons why the Trademark PDDRP hasn't really been used, and I think that's one of the reasons, frankly because of its un-usability, why we have all of these complaints about Sunrise abuses.

And so, based on the IPC and BC's comments about how the Trademark PDDRP could be amended to address those concerns, that is why I made it an "or" instead of an "and."

So, that's the thinking there. And of course, then, the additional element. I suggested it might fit in as a 6.2(c), but it might fit in better

someplace else. So, I'm not married to where that goes, but it seems like it could fit there, again, as another "or." I hope that's helpful. I know we're kind of in the weeds.

PHILIP CORWIN:

Yeah. Thank you, Paul. All right. Thank you for that clarification and explanation. You had offered to address Maxim's question in the chat. I'm hearing some background noise. So, I'm going to ask you now, since you had offered to do that, to respond to Maxim's comment.

I'm going to see if Maxim, after you have finished, wants to respond orally to your response, and then I see David McAuley's hand up, and then I'll take any other comments on this proposal. I will note that there is a lot in this proposal and that the working group might well support some of it but not all of it.

There is a lot to unpack, here, and a lot of different parts, and a lot of things that are conceptual that, if we were to go forward with this, would probably have to be tightened up and added in formal language, but let's see if we get past the threshold of some significant support for this. So, Paul, could you please respond to Maxim's chat comment? I see Maxim's hand up. He can respond to your response, and then we can open it up further.

PAUL MCGRADY:

Sure. Thank you, Phil. Absolutely. I understand that this is going to need some tightening up, and I welcome that. I'm already thankful for Maxim's comment because I think that's part of the tightening

up process. I see that Maxim asked, “Who is going to decide what is fair?”

So, he uses the example of police.city. Would it be subject to the DRP? “City” may have at a lower price than [inaudible] registrations. And so, again, I think that ... And then, Susan tried to respond to that, about how if “police” were used for eyewear, that might be a problem, but it wouldn’t be for “city.”

And then, Maxim goes on to say that it should be in proposal, and Susan said she thought it was covered under safeguard bullet three. I [knew] the idea behind safeguard bullet three was this exact kind of thing. So, police.city would not be a problem because cities have police forces, but police.sunglasses could very well be a problem.

The ultimate decider, of course, would be the PDDRP panelists, but if there are ways to improve safeguard bullet three, put in more examples ... We could put this example in directly. Other examples, we could mess with the language. But my response to Maxim is, thank you for raising the concern. I think we can find a way to get you comfortable in this text and I look forward to your help tightening it up. Thanks.

PHILIP CORWIN:

Thank you, Paul. I’m going to call—even though his hand just went up, his comment has been there for a long time—on Maxim first to respond to you, and then move on to others.

MAXIM ALZOBA: It seems this particular DRP is quite harsh in terms of punishment. The safeguards should be quite clear, if it is accepted at all. Basically, the ability to apply this to any period will not work well for GeoTLDs, because they have QLP, which is formally a period.

But yeah, it's the time where they have their hundred names which they spend for the benefit of the TLD itself – I mean the promotion of TLD and for needs of city, etc. Since prices are ... Yeah, picket fence.

Basically, what we create here will create a situation where the ... I'd say the panel decides on what was right or wrong in the contract, basically, where the registry hasn't broken any lines in the contract.

Basically, this doesn't seem to be a good mechanism, because you have quite a lot of weak points in this idea and I'm not sure it's a good idea to support this. Thanks. Because in a situation where, on the one hand, it's a TLD, and on the other hand it's all registrants, a city itself, and registrars/registries, I'm not sure it's a fair or balanced approach. Thanks.

PHILIP CORWIN: Okay. Thank you, Maxim. I see David McAuley's hand up. David, please go ahead.

DAVID MCAULEY: Thanks, Phil. First, let me ask if you can hear me?

PHILIP CORWIN: I can hear you loud and clear.

DAVID MCAULEY:

Thank you. Apologies to this whole group. I've had some connection issues this week and past. But the first thing I want to do is thank Julie and staff for helping with the reading of Trademark Claims Recs 4, 5, 6, and question two, while I had some issues.

The second thing I want to do is thank Paul for the specific language proposal. I will, in a moment, state some concerns with it and some opposition to it in certain respects. Maybe there is some promise with the small team, but I do want to thank Paul for actually putting pen to paper and saying, "This is what this would look like," which I think is a great practice. So, with respect, I will mention my concerns. They boil down to the following.

The second potential claim that Paul would add to the Trademark Post-Delegation Dispute Resolution Policy is another iteration of what we reviewed in Sunrise recommendation number two, with respect to circumvention.

There, we discussed it as to how it would impact future Registry Agreements for new gTLDs coming down the pipe. And this would create a material change, instead, to the TMPDDRP policy.

That didn't go out for public comment. What went out for public comment was the notion of joinder of claims. And so, I think that, if you look at this whole [cloth], it would probably require another public comment. As I said though, maybe there is some promise in tweaking this in the small team.

But in addition to what Sunrise recommendation number two said about circumvention, this new proposal would add a new ground,

and that is taking unfair advantage, which is a ground that I view as vague. That would be a lot of work, to make that understandable.

The proposal also makes a material change, in my view, to the proof requirement by making the joinder between paragraphs 6.2(a) and 6.2(b) joined by the word “or,” rather than “and.” And in doing that, in my view, it’s a major change. It undercuts a lot of the protections that registries have that appeared in the language below, in section 6.2, in the “other words” language, a couple of paragraphs farther down.

With respect to the quoted language, what you mentioned, Phil, it has some tight language, but then it has, “As evidenced by the manner in which the registry operator offers Sunrise registrations or reserves and sells trademark terms.” That, to me, is extraordinarily vague and would require a great deal of work. Almost every dictionary word in every major language is trademarked. So, it just seems very vague and very broad. I’m not even sure what it means.

So, in the safeguards, I think there is some help there, but not a great deal. But what I would say is, conceptually, and then with specific language, I have concerns. I think it would require a new public comment and, if there is work to be done in the small team, I would be happy to volunteer. And again, I want to thank Paul for putting specific language on the paper. So, thanks very much, Phil.

PHILIP CORWIN:

Yeah. Thank you, David. So, just to sum up your concern that, because this goes beyond the concept of ... Well, the main concern I heard, procedurally, was that, because this goes beyond joinder

and sets up a new ground for a PDDRP, we would probably have to put it out for 21 days of public comment before proceeding to close down the final report. I'm going to call on Susan Payne and then, Paul, we'll give you an opportunity to respond to everyone after the working group comments are finished. So, Susan, please go ahead.

SUSAN PAYNE:

Yeah. Thanks, Phil. Thanks to David for raising those concerns. I think I don't entirely agree with you, but I think some of the concerns you raised are things which we practice – in a small group, if there was one, could consider and try and work on to address.

Now, speaking entirely personally, I feel that, yes, although this is something that is a change that Paul is proposing to the PDDRP, it seems to me that this is a mechanism to actually implement what we have talked about and what we have made a recommendation on in relation to Sunrise Recommendation 2, where we do have a recommendation that we should have some kind of a mechanism, or some kind of a treatment of systematic undermining of the rights protection mechanisms, and specifically the Sunrise.

And it seems to me that this is a new proposal of a way to actually do that, that I think could be quite workable if we can bottom it out. And so, whilst it is a new ground under the PDDRP, I feel like it's a perfect development of the recommendation that we did have and that we did put out to comment.

Now, I did want to comment on ... You mentioned something about this being a change to the TMPDDRP, as opposed to something

that would be applying for new rounds in new Sunrises. Whilst you didn't actually say it, I think what you were probably alluding to was the fact that this could have a sort of retrospective effect because of the fact that the PDDRP applies to all new gTLDs.

And so, we're not now talking about a mechanism that only applies to future rounds. But even that ... I think, if that was a concern—and I could understand if it were a concern because it is a change—we could address, by means of something that makes it clear that this applies to TLDs registered going forward, but it doesn't have retrospective effect, or by making it clear that what we're talking about here is ...

In any event, if we're talking about undermining the Sunrise or the claims processes, those things have happened in the already-launched TLDs and, therefore, you are going to struggle to undermine a Sunrise that has already happened two or three years ago. Owen, you are confirming, yes, that that was one.

Because I think it is a valid concern, but I do think it is quite easily addressed by us putting in some kind of an effective date language for this change. Personally, I feel that this could be a really sensible, practical way to address what we have been struggling with in Sunrise Recommendation 2. So, I certainly would be wholeheartedly in favor of us trying to spend a little bit of time seeing if we can bottom this out.

PHILIP CORWIN:

Okay. Thank you, Susan. Good comments. I appreciate your observation that this would not just be for the next round but for all

existing new TLDs, as [inaudible] in consideration. I notice Maxim has put in some more comments in the chat. I'm not going to read them.

Professor Tushnet has put in the comment that she agrees with the concern about going from "and" to "or," and her further comments on that. I see Greg's hand up. I see Maxim's hand up, again, which I think is a new hand, not an old one.

So, Greg ... And Susan, that's an old hand, I believe. You just finished. So, Greg, you first, then Maxim, and then if there are no further comments I'll let Paul respond, and then I'll suggest a way forward on this. So, Greg?

GREG SHATAN: Thanks. Can you hear me?

PHILIP CORWIN: Hear you fine, thank you.

GREG SHATAN: Great. Thanks. To some extent, Susan took a lot of the words out of my mouth, but I did want to provide further support for this. I think that this is a logical extension of what has come before and of other recommendations that we are making.

The concerns that were raised, I think I would put in the category of "constructive criticism," which I think leads directly to a small group resolving them. I think these are ... In many ways, the concerns are implicit, or they are addressed implicitly and maybe, to some extent,

explicitly, as I read it, but we can certainly do things with greater clarity.

For instance, David McAuley raises the concern regarding the use of the string in context, and I think this gets to something we have discussed for years and years, which is the concept that a string can be generic in one context and a brand in another: apple.computer versus apple.fruit.

And since we are talking about a pattern in practice, essentially, merely offering apple.computer for a million dollars without more activity of a similar nature would not be grounds for the PDDRP.

Offering the hundred largest computer hardware and software manufacturers for a million dollars each—exact matches plus generic things like “company” or “software”—would be a whole different kettle of fish. Offering those all for a million dollars and offering everything else for ten cents, or whatever it might be.

I don’t think we’re looking for subtle activities, here, and maybe it will only drive people or registries toward subtle activities. My belief is that the vast, vast number of registries are not going to be anywhere close to this, and that we are really ... It’s almost like a RICO statute. We’re looking for criminal enterprise, here, that is, in its essential nature, defined by these activities.

I think I saw a comment about the TMCH. That is really beside the point. I think anybody can pull up a list of top brands from the Internet, and that’s the whole idea that you’re talking about, consumer recognition, not about what happens to end up in the TMCH or not.

So, again, I think this is all in the nature of constructive criticism. I think this is a worthy addition to our work and closes a number of gaps that we have already begun to close in other ways. So, in short, I support. Thank you.

PHILIP CORWIN:

Okay. Thank you, Greg. Maxim, I see your hand up. Could you make your follow-up comment as brief as possible? And then, I'm going to suggest a way forward on this. Go ahead, Maxim.

MAXIM ALZOBA:

Just a short few notices. First, in the policy, we don't have intentions or purposes. We do have text of policy, and either action is compliant or is not compliant. And making [quite vogue] ideas that panel has to look into the policy, and maybe into background text behind policy, is quite bad, because registries have to follow some text, not the whole set of texts in the group for six years. It's impossible.

Second, the idea that Trademark DRP wasn't used, and it means that it has to be changed, it's not [a proof], it's just an idea. Third, registries, they are actively prohibited from using TMCH. So, how do they know what is trademark and what is not? And yeah, basically, that's it.

And to say more, if we're creating something which changes the approach to pricing, it's a material change to Registry Agreements and it has to go through the procedure, which is not just the creation of policy. Thank you. It's called "contractual negotiations." Thanks.

PHILIP CORWIN:

Okay. Thank you, Maxim. One personal comment from me. I think it is clear from the existing language of the PDDRP and from ... Paul has proposed a mandatory language that a registry couldn't ... A successful complaint cannot be brought against a registry for mere negligence. There has to be a pattern and practice of affirmative bad acts to reach the high evidentiary standard being proposed.

But what I'm going to propose, here ... I think we have heard support for this proposal as it now stands; we have heard concerns raised; we have heard the suggestion from several that a small group come together to work on it further.

So, I'm going to suggest—and Greg, I think that's an old hand, unless you have something new to say on this—that we ask staff to put out a call for volunteers for a small group to work on this, to explore the concerns, to tighten things up.

I think what we would be looking for is for that small group to go past the conceptual change and to come back, if they can agree on it, with actual proposed mandatory language to the PDRP, so that, when we come back to it, we can actually focus on specific language that is being proposed for adoption.

And depending on what that language is, the working group, and then the co-chairs, can decide whether it is of such import and so new that there would be any reason to consider a short public comment period on it. So, I'm putting that out there. Paul, I see your hand up. Go ahead, please.

PAUL MCGRADY: Thanks, Phil. I appreciate that, Phil, and I appreciate the support, both from Greg on the line and also Marie, and Scott, and Susan on the small-group idea. So I, of course, would be happy to participate in a small group. Thank you for that.

And I also just wanted to thank David, and Maxim, and Professor Tushnet on the constructive criticism that this got. This was my hope for this call, that there would be people who would dig into this, and read it, and come back with ideas on how to make it better. And so, thank you for that. I hope that each of you participates in the small group so that whatever we come back with works for everybody. So, thank you.

PHILIP CORWIN: Okay. Thank you, Paul. I think we have had a very good and constructive discussion of this. People are volunteering on the list, now. Staff will put out an e-mail so that those who were not on the call also have an opportunity to participate.

Given our schedule, where I think we are supposed to get to the final report review in about three weeks, I would urge that small group to start up quickly and look to get back to us on the list with a tighter proposal, one that actually proposes specific and mandatory language to the PDDRP, within the next week or ten days. And then, once we have something concrete, we can return to it in a future call and see how the working group feels about it.

But I want to thank you, Paul, again, for the obvious amount of work that went into this. We'll see how it goes, but we have had a good,

constructive discussion today. So, that closes that out. I believe, staff, that that concludes our agenda for today, with 11 minutes left for our scheduled call. Is that correct? Julie is saying “yes.”

So, let me just say this, and then see if staff have any final words. I want to thank everyone who participated today. We closed out the remaining Trademark Claims items. We had a really good discussion of this PDDRP proposal. Next call will be Thursday at our regular time, 1 PM Eastern, which is 17:00 UTC.

I also want to note for those on the call—and staff will be putting out a notice on this—that, one week from today, the working group will be taking up the issue of general overarching question number two, which is whether any of the new RPMs should become consensus policy, which really is a question of whether URS should become consensus policy. We’re expecting a robust discussion of that question.

I believe we’re setting aside the entire working group meeting next Tuesday, one week from today, for discussion of that matter. It’s on a very important one. With that, I have nothing further to say. Staff, is there anything further you wanted to add before we let everybody hang up on the call and go back to their real work?

JULIE HEDLUND:

Thank you, Phil. We have nothing to add but we do want to thank you very much for chairing today, and thank you, everyone, for joining. So, we will go ahead and adjourn the call a little bit early and give you back a few minutes of your time.

PHILIP CORWIN: Okay. Thanks, everyone! Good call. See you Thursday. Bye-bye.

[END OF TRANSCRIPTION]