
ICANN Transcription

RPM Sub Group A

Tuesday, 7 July 2020 at 1300 UTC

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JULIE BISLAND:

Good morning, good afternoon, good evening. Welcome to the RPM Sub Group A Call on Tuesday, the 7th of July 2020.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. I just want to remind all participants to please state your name before speaking for transcription purposes. Please keep your phones and microphones on mute when not speaking to avoid background noise. And as a reminder, those who take part in ICANN multistakeholder process are to comply with the Expected Standards of Behavior. With this, I will turn it over to David McCauley. You can begin, David.

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DAVID MCAULEY: Thank you very much, Julie, and hello, everyone. Welcome to this meeting on July the 7th of the Sub Group A of the RPM PDP. We're considering public comments on non-URS matters. And what we will do is first review the agenda today. I will then ask for Statements of Interest. After that, we're going to turn to Ariel, who will step us through a wrap-up of action items from our last meeting, and we'll then turn to the work at hand.

Today what we have on the agenda for consideration is Trademark Claims Rec 5 and Trademark Claims Question 2. We're going to take the question first so that we'll see if there's information there that will inform our discussion about Recommendation 5. We will then turn to Trademark Claims Rec 6, and then turn to the only recommendation with respect to the Trademark Post-Delegation Dispute Resolution Policy.

So that is the agenda. It's a brief one. Can I ask now if anybody has any updates to their Statements of Interest? If so, please raise your hand or ask to be acknowledged on the audio. I'm not hearing anyone or seeing any hands, and so we will move on. Ariel, could you take us through the wrap-up from the last meeting part of the agenda?

ARIEL LIANG: Okay. Thanks, David. In the last meeting what the subgroup has reviewed Sunrise Question 5 and the Trademark Claims Recommendation 1 to 4, and there's one more question in review. So just very briefly, there's no outstanding action item. Most of the

conclusion is that if the subgroup is going to refer to the working group, the recommendations are usually maintained as is, but there are a number of comments from public comments that the subgroup wish to flag to the working group.

So for example, the TM Claims Recommendation 1, there are several comments that the subgroup has a flagged and there are some suggested potential revision to the wording of the recommendation, but that's up to the working group to decide. And then for the other recommendations, mostly they remain as is but there are some comments that the subgroup wish to flag to the working group. And this document has already been circulated in the subgroup so I trust that everybody got a chance to review them. And so I don't think there's some more stuff I need to mention during the call today.

DAVID MCAULEY:

Thank you, Ariel. I forgot to mention at the end of our agenda, we'll have a session for AOB, if there is any. So having said that, what I want to do is move on to our work agenda right now as I mentioned just before but I'll mention a couple of preliminary remarks.

First, please remember our remit – and I'm paraphrasing now, obviously I'm not going to be reading from it – but we are looking for new and material perspectives, any new facts that might make a material difference pro or con to any recommendation. We're looking for suggestions of any solution that we haven't considered and we're looking for widespread and substantial opposition to

any recommendations that we may not have thought of before. And again, I'm paraphrasing.

So now I'm going to start with Trademark Claims Question #2, but I will note that I'm toggling between screens, I will be paraphrasing but I will not be looking at the queue for a minute or two while I sort of tee up this discussion. So turning to Trademark Claims. Julie, if you feel any need to interrupt, just please go ahead and interrupt. Turning to Claims Question #2, the question roughly is, "Is there a use case for exempting a gTLD that is approved in subsequent expansion rounds from the requirement of a mandatory claims period due to a particular nature of that gTLD?"

And the suggestions were maybe a highly regulated gTLD, .brands gTLD. And this question is in two parts, obviously. We saw that there seemed to be a fair amount of comments in favor of exemptions for brands, for instance, from the Business Constituency for brands and those that adopt Spec 13. That's INTA, Com Laude, IPC. IPC also suggested a compromise whereby we might let trademark owners opt out of Trademark Claims service just for .brands. And Wikimedia/Yale Law School was in that group, and Jason Schaeffer was, the Hermes group also.

The contracted parties expressed exemption in the terms of those who are exempt from Spec 9, which is the Registry Code of Conduct. American University suggested registries dedicated to non-commercial speech. The Domain Names Rights Coalition said they can imagine any number of gTLDs in which one would not need a claims period, things like research, education, etc. Tucows thought the exemption should be applied for the Claims

Service. It would have no benefit to individuals who are against this. So what I'd like to do is tee this question up to ask us here. If we think there's anything any information within the answers that we should flag – I mean, obviously this is not a recommendation so we're not going to be pro or con, but are there bits of information that we want to flag to the working group? I will try and sit very still and ask. Does anybody have anything they want to flag?

It strikes me frankly that much in the comments we've considered already, but this particular question is open now if there's any comments. I don't see any hands, but I will wait for just a brief period of time. And if I don't see any, we'll move to question 2B. Actually, it simply says if the working group recommends exemption language for the appropriate dark rails –

JULIE HEDLUND: Excuse me, David. When you have just faded out, I'm wondering if maybe we could do a dial up to you? You were fading in and out for the last like couple minutes.

DAVID MCAULEY: I'm very sorry about that.

JULIE HEDLUND: That's okay. Sorry too. Perhaps we can go ahead and just preempt it and dial out to you if everybody will wait for a moment.

DAVID MCAULEY: Please do.

JULIE HEDLUND: Thank you very much for that. Julie Bisland, please go ahead and contact David.

DAVID MCAULEY: Again, my apologies to the group.

JULIE BISLAND: Thanks, Julie. David, dialing out to you. All right, I'm going to mute your microphone. Oh, you did. Thank you.

JULIE HEDLUND: Julie, is David now in? He should be on phone audio.

JULIE BISLAND: So, David, I'm trying to unmute your phone so you should be able to – there you go.

DAVID MCAULEY: Thank you very much. I was unmuting and then being muted. So just one of those bizarre circumstances. Apologies, everybody. I'm sorry about that. But I now see a hand in the queue from Phil, and then we'll go to Paul. Phil, go ahead please. Phil, you may be having the same problem with double mute or whatever it is.

PHILIP CORWIN: Yes. Sometimes I forget to double unmute. I only single unmute but now I think you can hear me. Is that correct?

DAVID MCAULEY: Yes. Yes, we can.

PHILIP CORWIN: Thanks. And speaking in a personal capacity, I don't know that in the responses, there's anything new here. Because the fact that we suggested in the question certain potential exemptions from mandatory Trademark Claims indicates that we had a fairly robust discussion, but I think that when you look at these answers in combination with the community reaction to Trademark Claims Rec 5 that this is related to, it appears to me that there's fairly broad support in the community for a uniform claims period and the possibility of exempting .brands. There's somewhat lesser support for exempting so-called highly regulated TLDs and then we would have to, if we went that way after struggle with – maybe not struggle but at least come up with some acceptable definition or at least guidance for the IRT. But I think there's not much new here in responses but it doesn't form what we may want to do with TM Claims Rec 5 in terms of recommendation for the consensus call determination when we get to it. Thank you.

DAVID MCAULEY: Thank you, Phil. Speaking in my personal capacity I agree with what you just said. Paul's hand has now gone down. Before we move on, as I said, in my personal capacity I tend to agree with Phil, but before we move on, let's move from the Question 2 to

actually verbalizing what the recommendation is in Trademark Claims Recommendation #5. I will read it quickly here.

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 initial 90-day period when a TLD opens for general registration.

And so as I said, I think Phil very adequately summed up a reasonable approach to both Trademark Claims Question 2 and Rec 5, but I'm asking for any hands or anybody to speak up on audio if they want to make a comment here. You can see with respect to – Ariel, could you move the screen to Trademark Recommendation #5? You can see that there's a high level of support that there are requests for change. I might talk just briefly about a little bit of that. There was a request for – Com Lauds basically was making the point. Brand TLD should be exempt. Tucows again said registry operators ought to be able to request an exemption if the service would provide no benefit. Significant change was asked for by Jason Schaeffer, by INTA, .brands, Operators group, IPC, Brand Registry group. Contract party – it was categorized as saying no, but basically made the statement as I summarized in the question, if the registry is exempt from Spec 9. It seems to me that Phil's summary is very accurate.

Not much new here. We should send this up to the working group. There is some sentiment, obviously, for allowing Brands, especially, and also highly regulated TLDs to have some form of exemption. We're not going to decide that at this level. So I think we're basically done with Question 2 and Recommendation 5 unless somebody would like to raise their hand to make a

comment or speak up. And if we do move on then, Ariel and Julie, I think in the summary, if you could make a summary of the comment that Phil made in his personal capacity, I think that would be appropriate treatment for what we've just discussed, unless I see any objections. Okay, Ariel is making a point. "CPH comment seems new, flagged on an earlier comment." Okay.

So we're making great progress. I don't see any hands so I'm going to move then to Trademark Claims Recommendation #6. Let me read it very quickly, if I can find it. "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."

On this screen, you can again see this fairly strong support for this. "There are indications that some significant change might be required. INTA and the grants community support expanding the matching criteria to include marks contained variations." So not exact match but mark contained variation and they encourage the working group not – we might want to flag this for the working group to reconsider this section with this in mind. It's not new, at least not. I don't believe it's new but that is something we could mention, a Request for Reconsideration. I'm not sure what will happen with it but there were some non-support. And again, we get into marks included. So I believe that we discussed this, but I think we can flag it, just to mention to the full working group, while we discussed this number of commenters suggested again that marks contained within the TLD ought also be considered in this respect. Any questions, any hands, any concerns that you wish to state with respect to Trademark Recommendation #6?

We are moving quickly. I don't see any hands. And so, Ariel, let me ask you, do you have a sense for how we would summarize this or do you need any further information?

ARIEL LIANG: The understanding I have is just to summarize that the recommendation be referred to the working group as is, as the public comment didn't raise any new or material facts/solution. But the working group should review the public comments in general to deliberate whether further revision is needed. That's my understanding.

DAVID MCAULEY: Okay. You might add a phrase that we simply noted that a number of commenters again raise the idea of marks contained within the registry TLD name. Thank you.

If we don't see any hands, which I don't, I'm going to move on and we're through with Trademark Claims and moving on to the Trademark Post-Delegation Dispute Resolution Policy where we just have one recommendation. It's about consolidation. I will pull up my other notes and I'll just briefly go through it.

"The working group recommends that Rule 3(g) of the TM-PDDRP be modified to provide expressly" – and frankly, in my opinion, the word expressly is critical word here – "that multiple disputes filed by unrelated entities against the registry operator may be initially submitted as a joint complaint or may at the discretion of the panel be consolidated upon request." And then there are further words making sure this is limited to cases where the registry operators

engaged in conduct that has affected the complainants in a similar fashion and where it would be equitable and efficient in the circumstances.

So let me just read ICANN Rule 3(g). It says, "If a PDDRP complaint is filed against a registry operator against whom another PDDRP is active, the parties to both disputes may agree to consolidate, see the provider's supplemental rules regarding consolidation." So it looks for coordination with the provider's rules. I went on and looked at what WIPO provided and WIPO basically has a rule. I wrote it down but I can't find it right now. Let me see if I can get it and bear with me just one second. WIPO Rule 12 says as follows: "Pursuant to Rule 3(g) of the rules where a registry operator is the subject of two or more complaints under the procedure, the WIPO center may in its discretion choose to consolidate disputes, provided all parties agree."

So what the recommendation that's on the table from the working group says is let's make this express that consolidation is appropriate in the cases mentioned. So now you can see on the screen what kind of support this has. I didn't see any specific opposition, some suggestions for change. I'd like to open it to the floor to see if there's any questions, any comments.

The Business Constituency mentioned price gouging and some concern that may not have been considered when this was initially proposed. You can see their comments. But we are on track to have a very quick meeting. And I see Phil has a hand up. Phil, go ahead, please.

PHILIP CORWIN: Can you hear me?

DAVID MCAULEY: Yes, we can hear you.

PHILIP CORWIN: Okay. All right, the suggestion by the BC and the IPC to expand the TM-PDDRP to also cover agree just pricing is a new suggestion. I don't recall it being discussed within the working group. I think it's new. So I'm only noting that. Of course, we know that those two stakeholder constituencies support it but we don't know if there's any broader support within the community because it wasn't before the community in the initial report. So I'm not saying that this is something that should be added, I'm simply noting that it appears to be a new thought about, another potential change to the TM-PDDRP. What we do with it I think is up to the working group, but I just wanted to call it out. Thank you.

DAVID MCAULEY: Thank you, Phil. Paul, please go ahead.

PAUL MCGRADY: Thanks. Yes, this is a new idea. We've not seen a lot of those in this process, but this is a new idea and I do think it is a useful idea. It's meant to address some concerns that have been kicked around in the working group and no solutions came up. And so this to me is definitely worth not only preserving in the record but

sending back to the full working group saying, “Here’s a new idea that we should discuss.” Thank you.

DAVID MCAULEY:

Thank you, Paul. And I see agreement from Paul Tattersfield in the chat. And so, Ariel, I believe that’s how we want to sum this up. In other words, to note, especially the BC, I can’t remember if anyone agreed with that, comments with respect to price gouging. In the actual I think there’s six points they lay out. We want to flag that for consideration by the full working group.

Let me ask, Paul, is that a new hand? No. Okay. So if there are any other considerations or is there anything else that somebody would like to bring up, either on this last recommendation or we’ll also say for any of the others because we’re about to go to Any Other Business? I’m not seeing any hands. We’re going to wrap up earlier, we’re going to give everybody a lot of time back, but I want to mention that we will finish – whoops, I see a hand from Phil. Go ahead, Phil.

PHILIP CORWIN:

Yeah, David, I just wanted to say I believe I’m they only full working group co-chair on this call this morning. So as we wrap up Sub Group A, I wanted to thank you for taking on the chairmanship of the subgroup. I wanted to thank all the participants for getting this work done and ahead of schedule. And so on behalf of myself and Brian and Kathy, I want to just thank everyone. We can check off another goalpost as we approach the final report. Thank you.

DAVID MCAULEY:

Very kind. Thank you, Phil. And I too want to thank all the participants. We have looked at comments, we have flagged things we think need to be flagged, it's been very good attendance. I'm very happy, and thank you all participants. But what I was going to mention in AOB is Ariel will be doing the wrap-up from today's session and putting it out on the list. It's going to be a day or two longer than normal because she and I and Julie and others will be going over it, but we're going to go over it from top to bottom to make sure that we're putting together something that will be deliverable to the full working group, just one final check, etc. And so you've come to expect that in a couple of days. It may take just a little bit longer but our plan is not to have any further meetings. We will donate that time back to the full working group. They will not have our written report for some time, maybe a week. I don't know what it will take but we will give people a chance, obviously, when we deliver it to note concerns they might have with it. So if the full working group takes over our three meeting times, if they're so inclined, they wouldn't necessarily be addressing what we've done in the first meeting because we'll probably right around that time be delivering our report. But that's what I wanted to say in AOB. I'll ask Julie Hedlund. Julie, if you have any comments, or Ariel, then I think we're ready to wrap it up and give folks some time back.

JULIE HEDLUND:

Thank you very much, David. This is Julie Hedlund from Staff. No further comments from me. I'll see if Ariel has any. But I do want to thank you very much for your leadership of Sub Group A and

your excellent chairing. And we really do appreciate the time you're stepping up to guide this group and bring us to the end of the work early. So thank you so much for that.

DAVID MCAULEY: Thank you. Ariel, please go ahead.

ARIEL LIANG: Thanks, David. Echoing what Julie said, thank you very much, David, and everybody for the work. I just noticed one thing for TM-PDDRP Rec 1, there's also ICANN org comment regarding whether there's a possible additional cost and resource burden on providers to support dysfunction, as suggested in a recommendation. I wonder whether the subgroup wish to also flag ICANN org's comment here, as most of the ICANN org's comments have been flagged in other recommendations and questions. So I just want to quickly confirm that.

DAVID MCAULEY: Ariel, thank you for catching it. That's my bad for overlooking. Apologies for that. I do think it's worth flagging that some of the suggestions may involve additional costs. But if anybody has any concerns with that, please raise your hand now. It would be something that we simply flag in a sentence in the report. It is a fair comment, I guess. I don't see any and I appreciate the kind comments people are making. Greg, you have your hands up. Why don't you go ahead, please?

GREG SHATAN: Thanks. The comment strikes me as a little odd or maybe it's backward because ICANN org notes that it would provide increased operational efficiency, it would seem that the additional costs and resource burden in considering consolidation and it actually effectuating it would – that the benefits outweigh the burden in the sense that running multiple PDDRPs that should have or could have been consolidated is far more resource burning than the resources taken to consider and consolidate because if the consolidation is successful, you've avoided an entire additional proceeding. And I'm not sure that there are in fact any real resource burdens but it seems to me – I mean, the point I think needs to be made that the benefits of eliminating multiple overlapping PDDRPs outweighs the burden. I'm not sure what the full ICANN org comment said. I would hope that they recognize this and aren't merely flagging costs without benefits since that would be somewhat reductive. Thank you.

DAVID MCAULEY: Thank you, Greg. As Phil said in the chat, it doesn't mean we support it but I think your comment is fair. So what I'm going to ask Ariel to do is flag the comment and note that another member commented that the consolidation may provide efficiencies to counterbalance any cost.

GREG SHATAN: Farther, I would say that my comment was the benefits of consolidation would outweigh the modest burden of the process involved.

DAVID MCAULEY: Okay, thank you. I'll ask Ariel to note that. Phil, your hand is then next. Go ahead, please.

PHILIP CORWIN: Yeah. David, I agree with Greg. My personal view is that I'm not persuaded by the ICANN org comment personally, but I do you think we should follow the practice of passing on ICANN org comments on all these recommendations and questions, just so that they can be considered by the full working group during the consensus call. My recollection is that the TM-PDDRP is already quite an expensive process and that may be a significant barrier to a juice, which is why we recommend it in the initial report this ability for similarly affected trademark owners to join together and bring any other consolidator bring a joint complaint. So I think ICANN's concerns about resource burdens may be misplaced given the cost of the proceeding, but we should note it to inform the full working group consensus call discussion. Thank you.

DAVID MCAULEY: Thank you, Phil. And I think we will note the comment in the countervailing statements. Greg, is your hand a new one? It looks like it may not be.

GREG SHATAN: My hand is [inaudible].

DAVID MCAULEY: Thank you, Greg. So I believe we're at the end. I want to thank everyone again and also thank you for kind comments in chat and on phone. We can go ahead and wrap up and stop the recording. Thanks all.

JULIE HEDLUND: Thank you, everyone. And this meeting is adjourned. And thank you so much, David, for chairing.

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