

Attendance:

Brian Beckham
Cyntia King
David McAuley
Georges Nahitchevansky
Gerald M. Levine
Greg Shatan
Griffin Barnett
Dina Solveig Jalkanen
Jason Schaeffer
Jay Chapman
Paul Tattersfield
Petter Rindforth
Rebecca L Tushnet
Scott Austin
Zak Muscovitch

Audio Only:

John McElwaine
Kathy Kleiman

Apologies:

Justine Chew
Susan Payne
Paul Keating
Phil Corwin

Staff:

Berry Cobb, Mary Wong, Andrea Glandon

AC Chat:

Andrea Glandon:Welcome to the RPM Sub Team for URS Documents call held on Wednesday, 25 July 2018 at 17:00 UTC.

Andrea Glandon:Welcome Zak!

Zak Muscovitch:Many thanks, Andrea :)

Brian Beckham:For attendance, I got a note from David MC that he will be late, and Phil is on vacation

Andrea Glandon:Thank you, Brian

Berry Cobb:For those with phone #s, can you please id yourself in the chat.

Berry Cobb:Hand raised

Brian Beckham:Thx Berry (and Mary)!

Mary Wong:Hopefully we captured the sense of agreement accurately - but this is why Berry and I thought it will be helpful to spend this brief time during this call going through these, just in case there are corrections we should make.

Andrea Glandon:If you are showing up in AC as a phone number, please let me know your name so that you can be recorded for attendance. Thank you!

David McAuley (Verisign):Andrea, I am number ending 8222

Andrea Glandon:Great, thank you!

Brian Beckham:welcome David

David McAuley (Verisign):Thanks Brian

Mary Wong:I've only reviewed the 6 cases where there was a response after the 14-day period but before the 6-month time frame is up; i.e. the "de novo review" cases. I have yet to do the others.

Mary Wong:And these 6 cases are noted in the other document (on Final Determination/De Novo Review) - for all the 29 cases where there was a Final Determination (and, as noted, 6 saw the Respondent ultimately prevailing).

Rebecca L Tushnet:Small clarification: we don't have access to responses directly. This is what examiners said about responses/defenses if any

Berry Cobb:Yes correct. Thank you for the clarification Rebecca.

Griffin Barnett:Sounds like someone else other than Brian may need to mute - heard some background noise

Griffin Barnett:Yes we hear you Brian, don't worry about it :)

Berry Cobb:Hand raised

Berry Cobb:Hand Raised again. ;-)

Gerald M. Levine:There ARE a VERY good number of rights holders choosing the UDRP rather than the URS

Berry Cobb:I'd not on p.4 that there is a downward trend of #URS cases filed up to 2017

Berry Cobb:*note

Cyntai King:Intersting a cursory look seems to show that after the doamin suspension ends, the domains expire & are picked by drop-catch

Cyntai King:Apologize for my horrible typing today - bandaids are not good typing aids.

Griffin Barnett 2:@Cyntia - A drop-catch by the brand owner, or by third parties?

Cyntai King:A NEW registrant

Berry Cobb:@Cyntia - that is the case for a small subset of domains, but not on ALL. There's and equal distribution mostly that the domain is still suspended, brand protection, and not registered after suspension.

Gerald M. Levine:I agree with Greg. The remedy doen not work for many rights holders

Griffin Barnett 2:@Cyntia - thanks, that's concerning

Berry Cobb:Hand raised.

Georges Nahitchevansky:The remedy issue was also an issue of concern that emerged from the practitioner's survey

Cyntai King:@Berry - understood. Thx

Brian Beckham:I suggest we include this idea of peeking in on what happens when the suspension ends - later - in our report; perhaps in phase II to inform questions about the relation between the URS and UDRP

David McAuley (Verisign):Interesting point, Berry

Cyntai King:Hand raised

Berry Cobb:The issue in future analysis is access to the Whois data. ;-)

Paul Tattersfield:It seems just an inordinate waste of money for many brands to defensively register them in many extensions

Cyntai King:Actually, I was just wondering if it were possible to prevent domains from being listed by drop-catch services when they expire or the suspension is lifted. Not necessarily a change to remedy.

Paul Tattersfield:thats a very good suggestion Cyntai

Brian Beckham:@Cynthia, we can certainly capture that as a proposal (not being extremely familiar with the ins and outs of drop catching myself)

Gerald M. Levine:Not jurisprudential but there are views that would be helpful to parties

Mary Wong:Staff can take a look at the language/definitions of the Procedure and Rules around "de novo review" and "appeals" - we see what David M was saying about looseness of terminology, and will be happy to highlight these for the Sub Team/WG.

Berry Cobb:As you can see on the screen, Mary put together an analysis of the 29 cases that ARE De Novo Review.

Berry Cobb:The 10 supplied in the email from Brian were a search of the provider site that did not result in a proper export.

Berry Cobb:These 29 were found from Rebecca's coding sheet where her team marked if a case shows a response after the 14 days but prior to the 6 month deadline.

Griffin Barnett 2:Agree with David, some machine-readability of determinations would clearly be helpful!

Griffin Barnett 2:Also agree with David on substance on the repeated and duplicative opportunities for de novo review / appeal - it's unnecessary, goes too far, and undermines the finality and certainty of determinations under the URS

Rebecca L Tushnet:How many times has a default led to both a de novo initial rule and an appeal?

Rebecca L Tushnet:*ruling

Berry Cobb:from our findings, 2

Mary Wong:Agree with David - someone who responds within the 14-day period (i.e. not a default) has two shots - initial determination plus appeal. Someone who does NOT respond within the 14 days but responds within the 6 month period has 3 shots - default, final, appeal

Rebecca L Tushnet:That's not true, Mary

Rebecca L Tushnet:You don't have a shot if you default

Rebecca L Tushnet:If a complainant can't prove a case without anyone in opposition, they shouldn't win

Berry Cobb:1571774, 1637103 are two where a de novo review occurred and an appeal.

Mary Wong:Sorry for shorthand - basically, "shot" = there is a chance the Default Determination can be in the Respondent's favor.

Rebecca L Tushnet:But in due process terms these are very different things

Rebecca L Tushnet:Strongly agree with formatting recommendations/procedures

Scott Austin:Agree with Mary. This is different approach to default as the examination still proceeds.

Mary Wong:Hand up

Mary Wong:Basically, what I meant to say was that for Default cases there are 3 possible instances of a determination - Default, Final, Appeal. For non-Default cases (i.e. where the Respondent responds within the initial 14-day period), there are 2 possible instances for a determination - Final and Appeal.

Griffin Barnett 2:Cases in default, like any other case, should have the opportunity for an appeal

Griffin Barnett 2:but not both an initial de novo review then also an appeal after the outcome of any initial de novo review

Mary Wong:@Griffin, at all possible instances of a determination (Default/Final/Appeal), it is always a de novo review.

Griffin Barnett 2:Especially because the panel still makes a substantive determination on the merits

Mary Wong:(under the current procedure)

Griffin Barnett 2:Yes exactly, that's why both are not necessary

Brian Beckham:Just a clarification @Rebecca, even default cases are reviewed, so the Respondent does have a shot at a denied case

Rebecca L Tushnet:It's not unfair.

Mary Wong:All Default cases are required to go through a substantive review by the Examiner, on the clear and convincing basis.

Rebecca L Tushnet:If you have an initial response, the examiner is supposed to (1) see if the main case has been made out and (2) evaluate any response

Griffin Barnett 2:It is unfair - to complainants and all the other parties involved in handling a URS

Rebecca L Tushnet:Those happen in the same way for a defaulter, just in 2 parts

Griffin Barnett 2:because they must be at the ready to not only react to a de novo review that could be opened at any time up to a year after a default determination, but then also potentially any further appeal

Rebecca L Tushnet:That's not an accurate description of a US default--you still have to make out your case

Rebecca L Tushnet:I can't sue you, have you not show up, and hold you liable for hitting me with your car

Griffin Barnett 2:no one is arguing the complainant doesn't need to still succeed on the merits

Rebecca L Tushnet:when you didn't do that

Griffin Barnett 2:*succeed

David McAuley (Verisign):well stated, Mary, and generous

Rebecca L Tushnet:@Griffin, that's no different when you file anything: there might be a response!

Griffin Barnett 2:@Rebecca, that car accident example is not on point here; in this context we are talking about a situation where a complainant brings a URS - the appropriate respondent is identified and appropriate steps taken to effectuate notice (in line with the URS rules) and the respondent fails to timely respond and a determination is issued in default

Rebecca L Tushnet:But one reason we have the possibility of reopening default judgments is that notice procedures, for example, don't work--and in a global system where it's really hard to tell what's going on, it makes sense to have a low standard for allowing a response

Griffin Barnett 2:so then address notice issues, don't add an extra duplicative layer of de novo review that is not technically an "appeal"

Scott Austin:Agree with Brian can't assume away the opportunity for substantive review as a "shot" What about the due process rights of the complainant who complied and appeared; Surely you aren't inferring a default that results in substantive review is the same as a default under US court system that results in no substantive review but judgement in favor of plaintiff against the defaulting party.

Griffin Barnett 2:also there doesn't seem to be evidence of widespread failures of notice here

David McAuley (Verisign):I have no issue with reopening default cases - but that should be appeal, IMO, as there was a judgment below

Griffin Barnett 2:Agree David

Griffin Barnett 2:Or I should say, widespread failure to effectuate efforts to reasonably achieve notice

Griffin Barnett 2:@Kathy - that's called an appeal

Griffin Barnett 2:I really can't understand why a defaulting respondent should have extra process rights here than any other party

David McAuley (Verisign):if de novo review remains, why does it allow up to 12 months to reply, seems unwise and un-URS-like to me

David McAuley (Verisign):But i tend to like direct appeal instead of de novo review anyway

Greg Shatan:If you sue me, and I don't show up, I can in fact have a default judgment entered against me, and then have that executed as well. "Not showing up" is not a defense.

Griffin Barnett 2:Continue to agree with David, and Greg here

Greg Shatan:Rather, you can have that executed against me, e.g, by garnish, levy or seizure.

David McAuley (Verisign):I agree with what Brian just said

Mary Wong:Staff can prepare a summary of these points for the list.

Rebecca L Tushnet:@Greg, but the question is when the default should be ignored and rendered legally ineffective, and all systems have rules for that

Rebecca L Tushnet:The question is what the rules for that should be
Gerald M. Levine: I don't know if anyone else has this problem, but voices come in and out and there are patches of silence
David McAuley (Verisign):not here Gerald - i am listening through adobe and only using phone to speak
Gerald M. Levine:Thanks, David
Cyntai King:Given the diving issues of teh URS clear violation & expedited decision, the extra-long appeal does seem odd
Greg Shatan:@Rebecca, I was responding to your statement that I got the actual facts of US procedure wrong. I wanted to set the record straight — that even if you “didn't do it”, if you don't show up, you can have a judgment entered against you. A discussion of what should be is a different thing entirely.
Georges Nahitchevansky:It seems particularly odd given that the UDRP has a ten business day period to appeal
Cyntai King:Good point @Georges
David McAuley (Verisign):I can't go too far beyond, maybe ten minutes before I have to do a task
Griffin Barnett 2:+1 Georges
Cyntai King:I'm oky for another call.
Mary Wong:If another call is scheduled, should this be before Wednesday?
Mary Wong:Since Wednesday is supposed to be a full WG call.
Mary Wong:We can send out a Doodle poll for Monday or Tuesday if that's the group's preference.
Cyntai King:@Mary - Agree
David McAuley (Verisign):go for doodle, thanks Mary
Mary Wong:ok we will send out a Doodle poll right after this call, thank you
Rebecca L Tushnet:@Greg, that's still wrong if you don't make out your affirmative case
David McAuley (Verisign):let's solve whois in last 2 min
Paul Tattersfield:thanks Brian, all
Griffin Barnett 2:Thanks Brian, all
Mary Wong:Thanks Brian and everyone!
Rebecca L Tushnet:There's no rule that suing automatically works if there's no response
David McAuley (Verisign):thanks all