

Attendance – 10 Members

Crystal Ondo
David Maher
George Kirikos
Jay Chapman
Paul Tatterfield
Philip Corwin
Susan Kawaguchi

Audio Only:

Paul Keating
Petter Rindforth
Zak Muscovitch

Apologies:

Jim Bikoff
Nat Cohen
Osvaldo Novoa

Staff:

Mary Wong
Steve Chan
Berry Cobb
Dennis Chang
Andrea Glandon

AC Chat:

Andrea Glandon:Welcome to the IGO-INGO Access to Curative Rights Protection Mechanisms Working Group call held on Tuesday, 12 June 2018 at 16:00 UTC.

George Kirikos:Hi folks.

Susan Kawaguchi:Hello All

Steve Chan:@George, I am on Chrome and a Mac and was lucky enough to have no issues with adding the plugin.

George Kirikos:Not on my normal computer, but I'm here.

Paul Tattersfield:Hello Everyone

George Kirikos:That's my setup too, Steve, currently. But my main system is a Chromebox, for security.

Steve Chan:Ah, ok, so that's the setup that worked. Got it.

George Kirikos:For reference, my own analysis of the consensus designations is at: <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001274.html> (Google sheet is at [Andrea Glandon:Paul Keating is working on joining, he is having some AC issues.](https://urldefense.proofpoint.com/v2/url?u=https-3A_docs.google.com_spreadsheets_d_e_2PACX-2D1vQgB2sY5AgaBZUHsHJJPLIsAwTFj-2D0i3FsammN5q-2DiD1QCQ-5FEMBC8LTzZ30TGvrf6Fw-5FmUvlnHa9DV9_pubhtml&d=DwlCaQ&c=FmY1u3Pj6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=k7uKdjSb7_ZjItyVqrCYHo_rKms9SFxImbYEJqG-y9I&m=oZe_W3EGZ8VGYLRTvi8JmUJyQ_TzQJK2iox7AGF4PC8&s=E6DqoBwkjFR6sSLshauBh7_qegqii7S2F0cwgrts1E&e=)</p></div><div data-bbox=)

George Kirikos:That's very positive, to release some of the time pressure/stress. We're almost there, but 5 days isn't enough.

Mary Wong:As the substance of Recommendations 1-3, and to some extent, 4, were agreed to previously (in some cases at the Initial report stage back in January 2017), it may be helpful for progress to focus on whether the group agrees with the designated consensus levels.

George Kirikos:Mary: see the emails of last night: <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001281.html>

Philip Corwin:For the record, I disagree with the statement George is making.

David Maher:@Phil +1

Mary Wong:The intent behind Rec 1 (as shown by the text in both the Initial Report and draft Final Report) was to take care of the INGO part of the PDP.

Mary Wong:The report text does make clear that the Small Group Proposal for a separate DRP was not accepted by the Working Group. To the extent that the WG agreed (and continues to agree) that Rec 1 was intended to take care of INGOs, staff does not think it is necessary to add a recommendation for INGOs.

George Kirikos:Read page 7: <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001281.html>

Mary Wong:The report does include text that makes it clear there will be no separate DRP for INGOs.

George Kirikos:BUT IT NEEDS TO BE AN ACTUAL RECOMMENDATION.

George Kirikos:That's what I'm saying.

Philip Corwin:Section 4k of the UDRP states, "If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name." Subsection ii will have to be amended to Option 1 or 3 for Recommendation 5 is adopted, so why are we spending time on this matter?

Mary Wong:@George, why?

George Kirikos:Make it a separate one, if need be.

George Kirikos:@Mary: because it was a charter question.

Mary Wong:@George, that is true but the report makes it clear that the WG answered the Charter questions.

Philip Corwin:George, Option 1 for Recommendation 5, vitiating or canceling the prior UDRP decision, will require a change to the UDRP. There's no way around that.

Philip Corwin:Canceling a prior UDRP decision is a VERY substantive change for INGOs.

Mary Wong:@Phil, yes

George Kirikos:@Mary: it answers things via a recommendation, though.

George Kirikos:@Philip: it's not a substantive change to the UDRP process, though.

Mary Wong:@George, as noted, there is no need for a specific recommendation if it is clear. Rec 1 was developed to take care of INGOs, the remainder of the recommendations concern INGOs.

George Kirikos:@Mary: if it's "clear", then why is there a recommendation at all for INGOs?

Philip Corwin:Again George, I disagree that it is not a substantive change to the UDRP process.

Mary Wong:@George, if you recall the WG's discussions on INGOs, that is why. There was a decision to exclude INGOs from further consideration - hence Rec 1.

George Kirikos:To be proper, it needs to be a recommendation, in the recommendation text. Because that's what the Board is voting on.

George Kirikos:@Mary: we're answering charter questions, though.

George Kirikos:Where is the answer to the charter question of "Whether a separate DRP should be created for IGOs?"

Mary Wong:@George, and the report clearly says the answers are no.

George Kirikos:Nowhere.

Philip Corwin:I agree with the point that Paul is now making.

George Kirikos:But, there is a specific recommendation for the exact same question in the context of INGOs.

Mary Wong:@George, as explained, that was because the WG made a decision to exclude INGOs from further consideration.

Steve Chan:https://urldefense.proofpoint.com/v2/url?u=https-3A_gnso.icann.org_sites_default_files_file_field-2Dfile-2Dattach_igo-2Dingo-2Dcrp-2Daccess-2Dinitial-2D19jan17-2Den.pdf&d=DwICaQ&c=FmY1u3PjP6wrcrwl13mSVzgfkbPSS6sJms7xcl4I5cM&r=k7uKdjSb7_ZjItYVqrCYH_o_rKms9SFxImbYEJqG-y9I&m=oZe_W3EGZ8VGYLRTvi8JmUJyQ_TzQJK2iox7AGF4PC8&s=WtD0tKxdAZRznjlonCDDRdhIW_jx6Ww93Yqc1rQ_SM&e=

George Kirikos:If it's "obvious", Phil, why isn't it a specific recommendation then for IGOs, just like we did for INGOs?

George Kirikos:*obvious

Jay Chapman:Is there a way to alleviate George's concern - perhaps a separate recommendation specific to IGOs? It seems everyone agrees to the principal.

George Kirikos:It needs to be a recommendation, so IGOs can't keep coming back to the well on this, like they have for the last 20 years.

George Kirikos:If it's a full consensus against a DRP for IGOs, that would prevent IGOs from keep bothering ICANN about this issue.

George Kirikos:And we do have that full consensus, but it's not in an actual formal recommendation.

George Kirikos:*actual

Mary Wong:@Jay, as noted, Rec 1 was entirely predicated on the WG's decision to resolve the INGO question early on. Perhaps we can add a sentence or two in the rationale to clarify this further.

Philip Corwin:I am the last member of this WG to seek to prolong it, but 72 hours is the minimum amount of time that is reasonable for preparation of a minority statement, and drafting requires a agreed upon final report text and agreed upon consensus levels. I hope we have those today, but if we don't then the deadline for submitting minority statements should be moved.

Mary Wong:@George, that is not what UDRP jurisprudence says.

Paul Tattersfield:needs a "registered" and an "unregistered"

Mary Wong:@Paul, it is there

Paul Tattersfield:it is now if its as above then I am happy

George Kirikos:@paulT: needs to specify *trademark and servicemark* rights.

George Kirikos:as opposed to unregistered rights

Jay Chapman:Thanks, @Mary. that rec 1 should be just about INGOs - that seems fine. So why not add a separate rec for IGOs to the same effect? I'm unclear as to what the hurdle might be - ?

Paul Tattersfield:yes I agree George

George Kirikos:i.e. unregistered rights ----> change to ----> unregistered TRADEMARK and SERVICE MARK rights.

George Kirikos:@Mary: i addressed what you're talking to already on the list. You're not correct.

George Kirikos:See: <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001279.html>

Paul Tattersfield:can we just say unregistered marks?

George Kirikos:@Paul: no

George Kirikos:@PaulT even.

Mary Wong:@George, I don't want to prolong this and I accept the staff role as well as the fact that you disagree, but frankly our understanding is that passing off does not equate directly to registered trademark rights. You can succeed on a passing off action where you may fail even if you had a registered trademark.

Mary Wong:We added "trademark or service mark" in the first part of the recommendation already, to address Paul K's point.

George Kirikos:Needs to be both.

Mary Wong:It is not based in trademark rights. It is an independent common law tort.

Mary Wong:It can be used to enforce rights that are equivalent to unregistered trademarks but it is a totally separate action with a different origin and juridical basis.

Mary Wong:However, if the Working Group agrees with the alternative formulation, we will make the change.

Mary Wong:Note that the WIPO UDRP 3.0 Jurisprudential Overview states that "Also noting the availability of trademark-like protection under certain national legal doctrines (e.g., unfair competition or passing-off) and considerations of parity, where acquired distinctiveness/secondary meaning is demonstrated in a particular UDRP case, unregistered rights have been found to support standing to proceed with a UDRP case including where the complainant is based in a civil law jurisdiction". However, as noted, staff will make the change George suggested as that seems to be the group's preference.

Paul Tattersfield:If both sides get subsidies what's the problem?

Philip Corwin:I object to the acceptance of proposed language changes proposed by George or any other WG member until we see a redline of the proposed alteration of the draft report.

George Kirikos:That's fair, Phil.

George Kirikos:We're not trying to pull a fast one --- just capture everything openly.

Susan Kawaguchi:George you are making an evaluation on the types of support. If we go with "soft support" then we will need to define that

Susan Kawaguchi:you are making this much too difficult and I think we can get the same result by talking about it and agreeing

Susan Kawaguchi:this is your evaluation only

Susan Kawaguchi:I completely disagree

George Kirikos:@Susan: do you disagree that Jim Bikoff and Paul Keating were not counted properly.

Mary Wong:As explained in email, designations were made based on what members said. Where it was clear they objected, that was recorded but where it was not clear, the prudent approach was taken as members have the ability to correct the record instead of the chair/staff/other members guessing.

George Kirikos:@Mary: wrong. Paul K said it clearly, that he's against.

George Kirikos:So did Jim Bikoff.

George Kirikos:Go look at my spreadsheet.

Mary Wong:@George, Paul's email of 8 June only spoke to the six options, not the four recommendations.

George Kirikos:I didn't have to guess. Jim Bikoff confirmed my spreadsheet for his statements last night.

George Kirikos:@Mary: input isn't restricted only to the emails.

Mary Wong:That is why it was not possible to take the liberty of assuming something Paul did not write.

Susan Kawaguchi:@George in the evaluation of the consensus ALL members' viewpoints were taken into consideration. It may not have been accurately indicated in this document but in the actual decision making of consensus it was.

George Kirikos:That's a staff construct.

George Kirikos:Input is all statements PRIOR to the opening of the consensus call.

Paul Tattersfield:@ Mary this is why the process was so flawed. It should have been two separate events options 1-6 then separately recommendations 1-5 but it is too often the same little activity for days /weeks then an arbitrary unrealistic deadline on poorly defined issues.

Philip Corwin:As Option 1 would require modifications of the UDRP/URS and its accompanying rules to be given effect, it is in fundamental opposition to Option 4.

Mary Wong:We may need to ensure that we have a sufficient number that can attend next Thursday, or find an alternative day/time.

Susan Kawaguchi:we should run a doodle poll to see who is available next Thursday, many may be traveling to the ICANN meeting

Paul Tattersfield:I would like the wording I raised on Swaine on the email list added to the final report how do I go about making sure it is included please?

Susan Kawaguchi:@ George we have not had time to discuss your latest 3.7 filing with Heather so nothing to discuss on this call

Mary Wong:@Paul, staff attempted to answer your concerns in an April email.

Susan Kawaguchi:@ Paul please file a minority report

George Kirikos:@Susan: I'm supposed to have a meeting with the Chair of the PDP, independent of Heather, to discuss my concerns, as per the rules.

Paul Tattersfield:Mary that email didn't really answer those concerns Please can you send it to the email list and I'll respond

George Kirikos:But, we can discuss by email.

Jay Chapman:thanks, all

George Kirikos:Bye folks.

Paul Tattersfield:thanks all bye

George Kirikos:It'd be nice if staff could get the Adobe issues fixed with ChromeOS. It wouldn't load at all (kept making me try to login)