

SUMMARY of the IPC MEETING

26 February 2010

Held at Baker Hostetler LLP, 45 Rockefeller Plaza, New York

Attendees in person & on-line included:

Al Tramosch	Holly Ross	Nancy Hegarty
Amadeu Abril i Abril	I Beskin	Nick Ashton-Hart
Andy Coombs	J Scott Evans	Nick Wood
Brian Beckham	Jeffrey Yapo	Paul Jackson
Brian Winterfeldt	John McElwaine	Paul McGrady
Claudio Di Gangi	Jonathan cohen	Roberta De Mesme
David Taylor	Karen Galbraith	Russell Pangborn
Elisa Cooper	Ken Taylor	Sam Mosenkis
Ellen Shankman	Kristina Rosette	Sandy Hu
Eric Brunner Williams	Kristine Dorrain	Sheldon Klein
Fabricio Vayra	Kurt Pritz	Stephane Tronchon
Faisal Shah	M Sharkey	Steve Metalitz
Frank Schulz	Mark Bohannon	Vicky Sheckler
Fred Felman	Melanie Roberts	Victoria Carrington
Herschel Perel	Mike Palage	Victoria McEvedy

Notes:

- 1) The attendance list may not be complete. All those who participated on-line were asked to submit their contact details but not all responded. Several people logged on using aliases or incomplete names such as "M".
- 2) The notes below are intended as a summary record of the meeting. A verbatim recording in MP3 format will be made available from the IPC website at www.ipcconstituency.org. The summary was prepared by Nick Wood of Com Laude.
- 3) Attendance at the meeting was lower than anticipated because severe weather in the New York area had led to the cancellation of planes and trains.
- 4) The facilities for remote participation were not as effective as hoped thanks to problems with the internet connection and the conference lines which meant that for much of the time remote participants could hear discussions but could not be heard. However, one remote participant emailed stating, "The call is better than the average ICANN call for sound and meeting management".

Introductions

J Scott Evans (JSE), President of the IPC welcomed participants, thanked David Einhorn of Baker Hostetler for providing the room and Nancy Hegarty of Thomson Reuters for sponsoring the lunch. He explained that the meeting would feature discussions with Kurt Pritz over elements of concern to the IPC in the new gTLD programme which would be chaired by Steve Metalitz and sub-divided into

four sessions, presentations from WIPO and NAF, an informational update for members on how to participate in ICANN matters with a focus on the Nairobi meeting, an update on matters before the GNSO (all of which would be open to general participation) and a final session restricted to subscribed members of the IPC.

Session One (Chair Steve Metalitz)

Review of IPC Comments on Draft Applicant Guidebook vs. 3 with Kurt Pritz, Senior VP, Services, ICANN

Kurt Pritz, Senior VP Services, was thanked for attending the meeting in circumstances made difficult because of the impact of snow storms on air and rail travel in particular. KP reported on the following areas:

The Evaluation Process

A number of evaluators had been interviewed including major consultancies such as Deloitte, Ernst & Young, KPMG. A methodology for the evaluation was being considered that featured a high level overview of all applications by one organisation to ensure consistency with in-depth evaluation provided by regional experts. This methodology was being favoured because it appears to be the best way of avoiding conflicts of interest. All these candidates to run the evaluation function said that it would be difficult to retain competent evaluators if the identities of individual evaluators was made know, so it is unlikely that applicants will be informed of the identity of evaluators. Members of the IPC requested that the background checks into applicants should go further than involvement in UDRP cases – for example seeking information on patterns of abuse, the domain holdings of applicants etc. It was pointed out that an organisation such as Pirate Bay which has no record of domain abuse but has been responsible for copyright infringement on a massive scale could in theory not be required to disclose this in its application under the proposed evaluation process.

KP confirmed that work on the Evaluation process was continuing.

Community Objections

Whilst it is possible to stop any application with a successful Legal Rights Objection, it is unlikely that a Community Objection will stop a Community-based application if the applicant can demonstrate a community of support. Thus an organisation that applies with a small but identifiable community of interest is likely to survive a challenge from a larger community that does not submit an application.

KP stated that, “This is close to being confirmed”.

Morality & Public Order

The role of the independent objector is crucial. A process will be found to ensure that frivolous objections can be dismissed quickly.

Auction Procedures + Letter of Credit

The IPC is concerned about the process if a winning bidder defaults. Should there be a new auction or should the second highest bidder be awarded the name? A suggestion that the proposed financial

instrument (Irrevocable Letter of Credit; Escrow) that applicants must provide should be increased to ensure that winning bidders do not default was made but not uniformly supported. This led to a discussion on the report by KPMG that the cost of maintaining a registry for three years could be as high as \$250,000 per year. It was suggested that whilst this might be appropriate for current gTLD and ccTLD registry operations, it might be unnecessarily high for Private Brand Registries not distributing domain names to any external parties where there would be no hurt or need for continuity if the business ceased to trade. KP stated that the Letter of Credit must be appropriate in the view of the evaluators to cover the applicant's business plan.

Community Priority Evaluations

It is not certain how applications in a Contention Set where Community Priority Evaluation is required will be scored, and whether the threshold required in order to "succeed" in this evaluation will be set at 14 or 13. KP said, "If it is your 'label' like Dot Navajo and there is a strong, strong link, you should get it. However if it is a bunch of people's labels', if you have less right to get it or to exclude others, then who scores highest is going to win". Applicants to become evaluators had been asked to provide worked examples during their presentations, for example where there were multiple applications for *.bank*. In their scoring they had been able to distinguish between applications but scores fell on both sides of either proposed threshold.

KP reported that this issue was still open. Members of the IPC suggested that ICANN considers the value of creating an appeal mechanism because, "If you do not offer your own appeal, losing applicants are going to appeal through the courts" (JSE).

Whois Obligations and Registry Pass Through to Registrars

The IPC is pleased with the requirement for Thick Whois but asked ICANN to look again at the language used in some prior agreements with registries (e.g., *.asia*) that obligate the registry to require registrars to satisfy standards with respect to Whois accuracy. The benefit of pointing out "Best Practice" to potential applicants was supported. KP undertook "to look again at the language used in the *.ASIA* agreement" (Appendix 5).

Limitation on ICANN's Ability to Redelegate a .brand TLD

The IPC has suggested that special provisions need to be made for Private Brand TLD applicants who wish to terminate a registry for internal business reasons because it would not be appropriate for ICANN to redelegate a registry based on a trade mark. KP used Dot Post as an example and said, "ICANN is open to this...We'll add to the contract that applicants have the right to opt to have it (a registry) shut down". One solution may be for applicants for such registries to be able to pay a fee to ICANN to keep the abandoned TLD dark in the future. The issue of redelegations following bankruptcy was also discussed because an administrator in bankruptcy may take control of a registry as an asset to be disposed of to the benefit of creditors, regardless of ICANN's plans for re-delegation.

Session Two

EXPRESSIONS OF INTEREST (EOI)

JSE as President of the IPC introduced a discussion on the EOI by stating that the membership of the IPC, as reflected in the comments submitted to ICANN, were divided between those who broadly supported the EOI and those who were against it – with all members being concerned that it should not be introduced until ICANN has addressed the over-arching issues.

KP introduced what he sees as the benefits of the EOI as: (1) To ascertain the number of applicants; (2) To identify areas of possible string contention; (3) To identify areas where objections are likely; (4) To inform the economic issues debate; (5) To identify unanticipated issues; (6) To hasten the launch of the new gTLD programme by answering/identifying issues in advance.

KP further summarised key elements of the EOI proposal including: (1) Mandatory participation for inclusion in Round 1; (2) Requirement for a deposit of \$55,000, non-refundable unless 1st round is cancelled; (3) Publication of the character string and the applicant's details ("Questions 1 – 14 of the application form to be answered"); (4) EOI to be launched only after a "fully-executed communications plan"; (5) No evaluations to be made during the EOI process.

KP stated that the EOI would not launch before a) Draft Applicant Guidebook Version 4 was published and b) Resolutions had been found for three major issues: trademark protections; the number of characters allowed in an applicant's string; and the vertical integration of registry operators and registrars.

The subsequent discussions were wide ranging: Should the details of applicants be published (no consensus); Should EOI applicants be "locked" preventing transfers of an EOI before full application opens to minimise "gaming" (broad support from the IPC though KP said, "Transfers might work to the benefit of the community if resources flow in"); was the Bertrand De La Chappelle/"French" proposal to allow any party to bid on terms submitted during the EOI workable? (no consensus though KP pointed out that this would "penalise innovation in favour of the wealthy"); Was the term EOI mis-leading: would it not be better to call it "Stage One of the Application Process"? (Broad consensus in support of this by both the IPC and KP who stated that "a new gTLD Pre-acceptance campaign is essential").

Concerns were raised over the limited number of issues which KP had said needed to be resolved before the launch of the EOI. KP stated, "This is not an exhaustive list". It was pointed out that any decision to advance the EOI at Nairobi would be premature as, for example, the GNSO Working Group to look into vertical integration has not even been constituted yet.

The possibility of creating streams of applications was raised. KP said, "We have received many proposals for special accommodation" citing requests for community or not-for-profit TLD applicants to be given "a break on the fees". However he did not expect any special accommodation would be provided for Brand TLDs which he felt offered the IP community, "the path to better protection, the path out of the Wild West". He said, "the fewer categories the better".

Session Three

Rights Protection Mechanisms

KP described how RPM had been refined from the IRT's report through comments and public meetings to the STI's proposals and the current staff papers. He outlined how there was a package

of Pre-Launch and Post-Launch measures and mechanisms including: Pre-Launch: The Clearinghouse to support IP Claims and Sunrise schemes; Post-Launch: The URS, The Post Delegation process, Thick Whois and the UDRP.

In regard to The Clearinghouse, there was consensus from the IPC that more work needed to be done on the eligibility of different types of rights. The IPC were unanimous that all types of rights in so far as they are protected in the country from which a validation request emanates should be eligible for inclusion in the Clearinghouse and described the current staff proposals as “fuzzy” with no clear definition of what “Substantive Review” meant. The WIPO representative reported on the concerns its members would have if a Clearinghouse did not offer equitable access to marks registered according to national laws at “official national and international trade mark registries” and suggested that broader eligibility criteria could be balanced by a Challenge Process so that marks in the Clearinghouse “which had not been used legitimately” might be removed.

KP acknowledged that ICANN was “not yet clear” on all the details of the Clearinghouse but stated that he felt the costs of inclusion in the Clearinghouse should be borne by the participant. It was noted that ICANN’s former position that the Clearinghouse operator should not be an existing contracting party had been dropped. Questions on the Clearinghouse included one member of the IPC asking how the Clearinghouse would allocate domain names: it was pointed out that this lack of understanding of the functionality of the Clearinghouse (which does not allocate any domain names but simply validates right) was shared by others in the broader ICANN community. The importance of clear communication from ICANN to rectify such misunderstandings was acknowledged by KP.

In order to accommodate time pressures, there was only a brief discussion on the URS with KP reporting on the proposal from ICANN staff for De Novo review up to two years after the determination. There was also brief discussion on the Post Delegation DRP with the IPC requesting more clarity on what constituted Affirmative Action and whether a Failure to Act might ever be sufficient grounds for a complaint.

Session Four

Overarching Issues

KP provided a brief overview of progress on the Overarching issues.

Root Zone Scaling: reports are being prepared by the RSSAC and the SSAC. The ICANN staff has provided RSSAC with “projected delegation rates.” A low level of activity might feature 108 new TLD delegations a year; an “extremely high level of activity” might see 263 delegations a year. While some scenarios prepared by staff would yield a delegation rate as high as 917 per annum, KP stated that if more than 500 applications were received in the first round, they could not all be processed simultaneously and instead a batch system would be used.

Economic Impact: a study has been commissioned from Greg Rosston of Stanford and Michael Katz of Berkeley which would consider: (1) the cost of defensive registrations; (2) a metric to assess benefits & costs; (3) a process to assess “net economic consumer harm” on individual applications. IPC members had concerns that additional questions should be considered including the demand for new gTLDs and the impact they would have in the marketplace and whether this study would be sufficiently global (other studies by US academics had been too US focussed). The first phase of the

study is to be released around March 15. The IPC was unanimous that the EOI should not be taken as a demonstration of economic demand.

There was little comment on the progress made on solutions to minimise Malicious Conduct other than a request for more information on the High Security Zone concept as soon as possible.

After KP described how ICANN was considering whether to standardise the registry operator agreement or to negotiate each agreement separately, a JSE suggested that there might be a Base Agreement with Appendices appropriate for each operator with a well-defined mechanism for changes. He does not believe that a Form Agreement can accommodate all the variations of registry type. KP said, "The issue is how we do all that for \$25k per year?" but he agreed that a mechanism for changes is essential.

This concluded the presentation from Kurt Pritz who was thanked for his contribution and for attending the IPC meeting in person. It was agreed that the participation of KP for more than three hours was extremely valuable.

J Scott Evans resumed chairing the meeting from Steve Metalitz.

WIPO Presentation

Brian Beckham (BB) of WIPO Center made a short presentation on the Policy Input WIPO had made to the new gTLD process. He introduced WIPO's vision of a PDRP saying, "A meaningful Post Delegation holds perhaps the greatest potential to encourage responsible registry conduct in adopting RPMs to realistically address the potential for brand abuse" before describing WIPO's "serious concerns at changes made by the ICANN staff". He asked why the voice of the IPC and WIPO was not heard more clearly within ICANN in rights protection matters and suggested that the IPC might "flesh out proposals on how responsible registry behaviour could be encouraged, going above the bare minimum by defining Good Faith".

BB identified four problems WIPO has with the current ICANN approach to RPM: (1) the lowest common denominator approach; (2) Unworkable compromise; (3) a lack of synchronisation between mechanisms; and (4) a proliferation of mechanisms and providers.

JSE challenged WIPO, IP owners and all parties concerned with the protection of rights in the new gTLD process to make concrete proposals on how to make a greater impact on ICANN staff and Board. The relationship between WIPO and the GAC was discussed and the possibility of a meeting in Brussels before the start of the June ICANN meeting among representatives of the IPC, the GAC and WIPO was discussed.

BB expressed a concern that the UDRP might be opened up to a Policy Development Process by the introduction of new gTLDs. He pointed out how eUDRP and other changes including Fast Track UDRP were being introduced step by step and recommended this approach rather than a full review. Steve Metalitz thought that a PDP on the UDRP was "probably inevitable" and urged the IPC and WIPO "to set the debate so that the UDRP can be strengthened not diluted".

JSE regretted that WIPO's presentation needed to be curtailed and invited BB to participate in IPC calls in the near future when more time could be allocated for what the IPC regards as WIPO's very important contribution.

Remote Participation in ICANN Meetings & Navigation of the ICANN Website

Nick Ashton-Hart of ICANN (participating remotely) together with Fred Felman of Markmonitor and Fabricio Vayra of TimeWarner and JSE (all three acting on behalf of the IPC) gave a presentation on how members of the IPC and other parties with concerns for IP could participate in the ICANN process. Nick Ashton-Hart described how ICANN's goal was for "people in the room at ICANN meetings and people back at their desks could participate on an equal basis".

The key links for IPC members to use are:

Remote Participation Services Matrix: <http://nbo.icann.org/remote-services-matrix>

Explanation of Remote Participation Services: <http://nbo.icann.org/remote-participation>

Remote Participant Schedule: <http://nbo.icann.org/remote-schedule>

Remote Participation Services guide: <http://nbo.icann.org/remote-services-guide>

FV outlined important sessions at the Nairobi meeting for the IPC and IP specialists including:

Monday 8 March 2010:

11.00 – 13.00 New gTLD Update and EOI Panel discussion

16.00 – 17.30 Trademark protection in the new gTLDs

Tuesday 9 March 2010:

09.30 – 10.30 Introduction to new gTLDs

11.00 – 12.30 Commercial Stakeholders Group Meeting

Wednesday 10 March 2010:

15.30 – 17.30 Registration Abuse Policies Initial Report Information Session

Thursday 11 March 2010:

08.30 – 12.00 ICANN Public forum

Friday 12 March 2010:

10.30 – 13.30 Meeting of the ICANN Board

It was noted that all the above times are local Kenyan times.

FV urged any IP specialist, whether in private practice or in-house, to contribute to the process by sending in e-mails in support of RPM/the IPC position or opposing measures to dilute RPM. There was concern that the Board may push through policies against the interests of the IP community

because the IPC will not be represented in Nairobi because of concerns over the security of the venue. It was noted that the Registry Constituency, like the IPC, is not holding its meeting in Nairobi (but instead in Reston, Virginia) and the hope was expressed that future meetings may be held in hub cities with easier access to all where security is not a problem. JSE pointed out that MarkMonitor was having some remote participation at its headquarters in San Francisco for brand owners on the West Coast to attend certain sessions remotely.

All participants were thanked for their presentations and insights.

NAF Update

Kristine Dorrain, Internet Legal Counsel for the National Arbitration Forum, made a short presentation on the work of NAF. She regretted that NAF had not been invited to participate in discussions on the URS and stated the NAF view is that the URS is “cumbersome” and is likely to prove costly to administer and so burdensome to complainants that it will not be effective. She asked the IPC “to consider inviting NAF to participate in further discussions on RPM”. Kristine was thanked for travelling to NYC and the participation of NAF.

GNSO Update

Kristina Rosette (KR), one of the IPC’s representatives on the GNSO and a member of the IPC leadership, gave a presentation on eight matters before the GNSO

- 1 Affirmation of Commitments Review
Members were urged to consider who might stand for appointment to participate as an independent in the Affirmation of Commitments Review. It was regretted that nominations must be made before 7 March 2010, a very short timescale. Any nominee must be prepared to contribute up to 15 days of time without recompense before the end of the year.
- 2 GNSO Restructuring / Improvements
To improve communications and efficiency, constituencies are to be provided with a Tool Kit, reported Claudio Di Gangi. There is also the possibility of some funding.
- 3 Registration Abuse Policies (RAP)
It is recommended that there be a PDP on the UDRP. As discussed earlier in the meeting, the role of the IPC must be to ensure the UDRP is not diluted but is improved.
- 4 Post-Expiration Domain Name Recovery (PEDNR)
There is so little consensus on this topic that a survey is being undertaken of GNSO representatives to identify where common ground lies.
- 5 Vertical Integration (VI)
Work is beginning but there is no definition of what Vertical Integration means. Some wording proposed by the IPC defining the scope of the review had been rejected in favour of wording supplied by NCUC representatives.
- 6 Registrar Accreditation Agreement (RAA)
Steve Metalitz of the IPC is leading one of two review teams on this issue.
- 7 Whois Studies
There is a wide divergence of opinion in the GNSO over the accuracy of the studies. The IPC position is that evidence of widespread abuse is undeniable.
- 8 Inter-Registrar Transfer Policy (IRTP)
A report is being finalised.

It was noted that this is a very significant workload. KR reported that ICANN staff had been heard voicing complaints that they had no more capacity for other issues. It was pointed out that things may get a little easier when the new gTLD process has progressed.

New IPC Members

Three new applications for individual membership of the IPC were unanimously approved:

Adam Scoville, Lisa Iverson and Monique Couture

This ended the Open Session of the IPC meeting. Thanks were repeated by JSE to all those who made the meeting possible including hosts Baker Hostetler, Thomson Reuters for sponsoring the lunch, Glen De Saint Gery of ICANN for arranging the remote participation and all the external speakers.

PART TWO: CLOSED SESSION

JSE introduced the last part of the meeting, explaining that the IPC Executive were limiting participation to IPC members exclusively in order to obtain informed opinion from members on the future direction of the Constituency.

To set the scene, Mark Bohannon, Treasurer of the IPC reported that at the end 2009, the IPC had approximately \$35,000 cash in hand with \$18,000 in membership fees outstanding. Subject to confirmation at the end of February 2010, the IPC will have \$52,000 on deposit.

JSE and Kristina Rosette then reported their concern that the new gTLD programme is placing a burden on the leadership of the IPC and a small group of other active members that is unsustainable. "Institutional fatigue" is setting in. The contributions of several members especially Steve Metalitz, Kristina Rosette, Paul McGrady and J Scott Evans was widely recognised but it was acknowledged that they cannot continue to carry such a heavy burden or to expect their employers to continue to give them time for IPC work or to cover travel costs etc. The IPC's new GNSO representative David Taylor confirmed that he is apprehensive at the amount of work required to fill this role appropriately.

JSE called for volunteers to undertake a "Future of the IPC Review". Jonathan Cohen volunteered and with the assistance of past-President Steve Metalitz, he will look at:

- The By-Laws of the IPC: do they need to be amended to enable a way of working that better suit the demands made on the IPC?
- How the IPC conducts itself: how many face to face meetings are needed? To what extent should the workings of the IPC be opened up further to the ICANN community? It was noted that IPC meetings have been open to the wider community since the formation of ICANN in contrast with some other constituencies
- The benefits of a formal process to enable officers of the IPC, its leadership or members engaged on a task for the IPC to be reimbursed for expenses occurred in performance of their duties
- How the number of members could be increased and whether the current fee levels are sufficient for the purposes of the IPC

Jonathan Cohen was urged to report as soon as he could and certainly before ICANN Brussels.

A broad ranging discussion on the future direction of the IPC ensued and a number of suggestions were made including:

- Requiring members to contribute more as many organisations do under the “Time/Talent/Treasury” principle
- Raising the funds to appoint a part- or full-time Secretary who would monitor ICANN, prepare the first drafts of positioning papers etc
- Exploiting further the resources that ICANN can offer ranging from the Constituency Toolkit to maintenance of the website. If ICANN cannot support a revised IPC website, which is currently being supported on a monthly contract in anticipation of changes, it is possible that an academic institution could be asked to maintain it
- Allowing officers to “take a holiday” from IPC work for perhaps one month a year
- Spending some of the IPC’s cash on short-term assistance in preparing position papers and comments as the new gTLD process enters a critical phase
- Appointing assistants to work with the leadership of the IPC
- Increasing membership fees significantly: it was noted that some other constituencies charge two or three times as much as the IPC
- Seeking support from wealthier IP or private institutions or agencies
- Approaching national IP organisations to join membership
- To quantify the demands that the ICANN process makes on the IPC and then to undertake a scoping exercise to match resources to them.

Paul McGrady’s offer to continue to be “An ICANN Traffic Cop” indicating which ICANN initiatives the IPC should respond to and monitoring deadlines was accepted. It was recognised that this is a very valuable service, an example of how the IPC can be effective.

There was a discussion on how the IPC should best co-operate with the Business Constituency in the Commercial Stakeholders group. It was noted that other constituencies representing business interests were being proposed and that in discussions over the STI, some members of the Business Constituency had claimed that they could represent the interests of IP owners more effectively than the IPC. In a wide-ranging discussion a number of “blue sky” suggestions were made including:

- Continuing as the IPC but with reformed By-Laws and a new way of working
- Seeking to become an Advisory Committee
- Merging with the Business Constituency

It was decided that no decisions should be made before the Review Team had reported and that careful considerations should be given to what IP interests will win or lose if the IPC changes significantly.

The principal was accepted that though there are short-term resourcing issues that must be addressed urgently, no major changes to the IPC should be made before the future shape of the IPC has been agreed: “We need to know what we want to be when we grow up” said Steve Metalitz. Once a vision has been identified, goals can be set and a way of working defined that will deliver

positive results provided appropriate resources are in place. This may require a Business Planning process.

JSE proposed one face-to-face meeting in Boston during the INTA Annual Meeting and another in Brussels immediately prior to the June ICANN Open Meeting. Nick Wood volunteered to explore if the IPC could collaborate on hosting a reception for the IP community with MARQUES & ECTA during the ICANN June meeting, perhaps with the involvement of the European Commission. It was felt that such an event could draw in people of importance in the IP world.

ENDS

This summary was prepared by Nick Wood of Com Laude. Any errors or omissions are his. To verify details in this summary listen to the MP3 recording of the meeting to be made available at the IPC website at www.IPCconstituency.org