



## REPLY COMMENTS OF INTELLECTUAL PROPERTY CONSTITUENCY

November 14, 2013

<http://www.icann.org/en/news/public-comment/draft-picdrp-02oct13-en.htm>

The IPC appreciates the opportunity to comment on the revised PIC Dispute Resolution Process to encourage Registry Operators to fulfill their Public Interest Commitments (PICs). This is particularly so as PICs may be designed to foster consumer protection in identifying the source of goods and services. Now also, with the NGPC's resolution to adopt further PICs in response to the GAC's Beijing Communiqué, PICs will be undertaken by all Registry Operators, and even more PICs may be required for some registries.

### The PICDRP should not be the exclusive PIC compliance vehicle

ICANN should clarify that the PICDRP is without prejudice to other means of enforcing PICs, in particular contract enforcement by ICANN or informal consultation and discussion.<sup>1</sup>

The need to investigate a possible breach may not necessarily arise solely from a third party complaint; indeed some instances of non-compliance may not be readily monitored by third parties.

Similarly, it would be beneficial to clarify that a third party could engage directly with a Registry Operator informally in order to raise concerns about PIC compliance. This would allow Registry Operators to self-regulate, e.g., via advisory councils, where appropriate.<sup>2</sup> In that case, ICANN should clarify that Registry Operators could modify PICs to improve compliance with relevant standards.

### The role and qualifications of the Standing Panel should be clarified

Given the Standing Panel's critical role, including the authority (in cases delegated to it by ICANN) to make a determination as to PIC compliance, several ambiguities should be addressed:

- Any Standing Panel decision should create a presumption which would need to be rebutted by ICANN in writing if for any reason it elects not to implement the sanctions recommended by the Standing Panel.
- ICANN should clarify whether there will be one Standing Panel (and if so for what term), or separate ad hoc Standing Panels for each PICDRP scenario.
- The qualifications required for service on a Standing Panel should be specified, and must include experience in the subject matters addressed by PIC specifications. The use of adjudicators lacking

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<sup>1</sup> See e.g., Section 1 of the comments of the COA, at <http://forum.icann.org/lists/comments-draft-picdrp-02oct13/msg00005.html>.

<sup>2</sup> See, e.g., <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1210?t:ac=1210> (providing an industry advisory council for "the recommendation of sector-specific registration policies, the formulation of guidance on [IP] and other best practices related to the gTLD," and of an Abuse Prevention and Mitigation Working Group, to "give the Applicant's team advice on abuse preventions and mitigation and how this may effect registration policies.")



subject matter expertise has already proven controversial in the pre-delegation objection arena. This should not be repeated with regard to PICDRP.

- The selection process for Standing Panel members and any compensation should be clarified.
- Panel members should be required to disclose any perceived conflicts of interest, and the parties should be able to challenge the continued appointment of a Panelist if reasonable questions about impartiality exist.
- ICANN should clarify the role, if any, a determination by ICANN under Section B.3.4 (a completed compliance investigation in which ICANN demonstrates Registry Operator non-compliance) would play in the Panel's determination.
- The Standing Panel should have the discretion to seek information from the Registry as to the meaning of its Public Interest Commitments, and similarly to obtain the views of ICANN itself and the Reporter in this regard, and it should further be provided that in all such communications, all parties and ICANN should be copied in the interest of openness and transparency.

#### Other corrections/changes should be made to the PICDRP

Corrections/changes are shown as underline where additions are suggested:

- Section B.1.2: "... The Reporter must state in detail how it has been harmed or concretely threatened with harm by the alleged noncompliance."<sup>3</sup> More generally, any "harm" standard should be interpreted to avoid screening out valid and substantive complaints while also recognizing the value of some meaningful standing requirement to help screen out vexatious or frivolous complaints. It is important to remember that the PIC Specs have been adopted to serve the public interest and not necessarily just to protect a particular party from a particular harm.
- Section B.2.2: "The Reporter's failure without demonstrable just cause to participate in the requested conference shall be grounds for ICANN's closure of the PIC report." The standard set forth in Section B.3.1 should be stated here as well (conforming changes would be needed in, e.g., Section B.2.5).
- Section B.2.4: "If the parties are able to resolve the issues raised by Reporter in the PIC report during the 30-day conference period, the Registry Operator shall inform ICANN and shall provide ICANN (with copy to the Reporter) with appropriate evidence that the matter has been resolved."
- Section B.3.2: "The Registry Operator will then have ten business days to respond to ICANN's request for explanation, and to provide a copy of the response to Reporter."
- Section B.5.3.a: "Based on the last three rolling years, factors that are relevant to the determination of whether a Reporter is a Repeat Offender, include, but are not limited to: the number of PIC reports filed by the Reporter which were resolved in favor of a Registry Operator without any substantive change in the policy, practice or behavior that gave rise to the Report." (Reports leading to changes in

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<sup>3</sup> Conforming changes will be needed elsewhere in the document, e.g., in paragraph B.1.3(iii). This issue also reflects on the qualifications for Standing Panel members and their competence to evaluate real or threatened harm.



Registry practices – at an early stage of the matter – that make it unnecessary to continue to pursue the matter should be encouraged.)

- Section B.5.4: Some appeal mechanism needs to be provided for any decision to label a Reporter as a Repeat Offender and bar it (indefinitely?) from filing any new Reports.

Finally, any suspension of a PICDRP (e.g., due to private civil action) should need to be commenced prior to the filing of the PICDRP Complaint. This would avoid gaming by Registry Operators aimed at frustrating the purpose of the PICDRP. If a complaint is within the ambit of a Standing Panel at the time suspension is sought, perhaps the Panel should have discretion as to whether to suspend action.