

17 October 2013

ICANN

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

Dear Sirs,

Re: Revised Public Interest Commitments Dispute Resolution Procedure (PICDRP)

We write to provide comments upon the PICDRP.

We would seek to start by applauding both ICANN and the PICDRP Working Group, who have worked intensively over a prolonged period of time to finesse the document to the form now submitted for public comment. It is a testament to their hard work that the PICDRP delivers a substantially detailed and fair process. Indeed, we encourage and would support further such collaborative efforts where possible in the future. That being said, there are a small number of important comments we feel duty bound to raise.

Harm

Firstly, we respectfully request that the notion of “harm” as contained in Part B sections 1.1 - 1.3 is clarified. At present, it is undefined. The absence of any definition, or any verifiable notion of materiality to the harm allegedly suffered, simply provides carte blanche to complainants to make frivolous or vexatious complaints.

In order to counter this possibility, and to ensure fairness for all, we suggest that ICANN make a preliminary determination that material harm has indeed been suffered, to be assessed on the hypothesis that the information provided by the complainant is accurate in all respects.

If this gateway is not implemented, Registry Operators could be in the invidious position of having to run an entire PICDRP process, only for there to have been no actual harm to the complainant.

Repeat Offender

We are concerned by the criteria under Part B sections 5.2(a) and (b) whereby a Registry Operator is determined to be a Repeat Offender.

We regard it as unfair for Registry Operators to be judged on the basis of PIC claims that have only passed ICANN’s preliminary review in the case of (a), or those which fail to even pass the preliminary review in the case of (b).

The preliminary review is not substantive and relates only to the form required. No assessment of merit is made. No finding of guilt as to repeat behaviour on the part of the Registry Operator can logically or reasonably flow from such.

We invite ICANN to amend these criteria to be determinative only in the event that such are upheld after a Compliance Review or Standing Panel decision.

Multiple Complaints

Furthermore, on the issue of Repeat Offenders, we would seek to highlight a potential process improvement. We note that the PICDRP does not deal with the issue of multiple identical or similar claims. It could therefore feasibly be easy to circumvent the Repeat Offender provisions by simply orchestrating a significant number of people make the same single frivolous claim.

To plug that gap, we would request that consideration be given to adding language:

- to allow for the joining of complaints; and
- to allow for ICANN to use precedent to address complaints,

where the subject matter of multiple complaints is similar.

Such may avoid the need for multiple considerations by ICANN of the same question resulting in cost saving benefits for all parties.

Sanction

Finally, we are deeply concerned by the unbounded reference in section 5.4 to “financial sanction”. Such effectively provides for ICANN to order unlimited financial penalties. Worryingly, ICANN could order a Registry Operator to pay millions of dollars in fines, without any right of redress.

Clearly such is inequitable, arbitrary and disproportionate and we suspect not the intention of the drafters.

We absolutely understand and support the notion of penalising Registry Operators who are found to be Repeat Offenders. However, we respectfully submit that any such sanction has to be limited to either, operational sanction, the various termination rights available to ICANN under the Registry Agreement, or at the very least, financial sanction that is better particularised and limited to some monetary value.

We look forward to your response.

Yours sincerely,



David Carrington
General Counsel
ARI Registry Services