

November 20, 2009

Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way
Suite 330
Marina del Rey, CA 90292

RE: National Arbitration Forum comments on RPMs for new gTLDs

Dear Members of the GNSO Council,

The National Arbitration Forum would like to offer its comments to the proposal before the GNSO Council (“GNSO”) regarding the Uniform Rapid Suspension System (“URS”). We highlight a few areas we have not yet commented on and we reiterate some of the points we raised with respect to the IRT final report because we believe they are important enough to merit continued dialogue.

First, the Forum supports the current proposal wherein the URS is optional for registries in new gTLDs. While the Forum still articulates its position that the URS is no substantial change from the UDRP, except inasmuch as it attempts to reduce the fee paid per domain name contested (leaving the costs of the process unchanged), the Forum supports the idea that the requirement of a URS should go through ICANN’s policy development process (PDP).

The Forum offers the following substantive comments and questions for the GNSO’s consideration as it finalized the URS procedure.

1. Section 1.4, which outlines the Complaint requirements, is significantly stripped down from the Complaint requirements in the UDRP. The procedure mentions that Determinations can be appealed to a court of competent jurisdiction; is there a provision for jurisdiction to which the complainant submits, or must a losing Respondent always appeal its case in Complainant’s jurisdiction?
2. We note that the extremely abbreviated nature of Section 1.4 will make the initial review easier. Will there be a deadline for the initial review? The UDRP requires the deficiency check be done within three days.
3. Section 3 requires an initial review by the URS-DRP. If a formality is missing from the complaint, will the complaint be rejected as anticipated by the IRT, or is there a deficiency period? The UDRP allows for a deficiency period.
4. Section 4.1 requires the provider to request a lock within 24 hours of determining if the complaint is compliant per section 1.4. The Forum recommends the URS continue the current common UDRP practice of requesting a lock on the domain name(s) as soon as the case is filed. If there is non-compliance, the lock can be lifted, but if there is a weekend or some other extenuating circumstance, the

- absence of the immediate lock has proven time and again (as often seen when registrars do not comply with the provider's request to lock immediately) to be detrimental to complainants.
5. The Forum notes that Section 4.2 does address the pending status of eUDRP, but strongly advocates for an entirely electronic service, with the exception of hard copy letters (as suggested by WIPO in its eUDRP proposal); as requiring service by mail will be entirely cost-prohibitive.
 6. The Forum does note that the Providers are generally allowed to set page limits under the UDRP but asks the GNSO to offer suggested guidelines for the length of submissions. If this is to be an expedited and inexpensive process, requiring the panel to read voluminous exhibits attached to a short complaint will frustrate the intent of the process.
 7. Regarding section 5.1, the Forum is opposed to the refunding of any fees in this process. Requiring routine refunds makes the process significantly more complex and costly for the URS-DRP. The hallmark of the URS is supposed to be simplicity. Additionally, this section discusses the refund of fees if the Respondent prevails. If a Response is filed in a case, it is very likely that the case is not one of clear cut abuse as intended by the IRT. Therefore, additional review and analysis will be required by the panel and additional fees will be needed for payment to the panel regardless of the prevailing party.
 8. Section 5.5 requires a compliance check of the Response. The Forum, in its experience, notes that Respondents are often unsophisticated and occasionally do not speak the language of the proceedings. The Forum requests the GNSO to clarify what would make a response non-compliant such that the case is now considered a default case. The Forum also respectfully requests the GNSO to clarify if, in the URS, as in the UDRP, all case documents ultimately be sent to the panel, regardless of compliance, giving the panel the authority to accept or reject each submission.
 9. The Forum requests clarification on section 6.1: is there any substantive effect achieved by labeling a case as a Default?
 10. The Forum requests clarification on section 6.2: What changes with respect to Respondent's ability to access the website at the moment of Default? The lock has already occurred. What changes in section 6.2 with respect to the lock and does the URS-DRP have to give any instruction to the registry or registrar?
 11. There was discussion at one point that the Determination be a simple form noting who won with little or no discussion of the merits of the case. What is the GNSO's opinion on the substance of the Determination issued by a panel? Should the substance vary if the case is considered a Default?
 12. If more than one URS-DRP is approved, who is responsible for policing complainant's number of abusive complaints under Section 10.2? Must the URS-DRPs search the other providers' databases or is it up to Respondents to submit the information to the panel for review and determination?
 13. To whom may a complainant appeal in section 10.3 if it objects to a finding of "abusive complaint"? What are the procedures for appeal and who will handle them?

14. Regarding section 11(b), appeal to a court of competent jurisdiction, the Draft Procedures do not specify the jurisdiction in which complainant can be sued. The UDRP defines competent jurisdiction by using the two jurisdictional choices available in the Registration Agreement (through the RAA—they are location of Registrar and location of Registrant) and allowing Complainant to agree to one of those jurisdictions (of its choice).
15. What language is the URS to be conducted in? The UDRP specifies the language of the proceedings as the language of the registration agreement (e.g. it varies by registrar).

Finally, the Forum comments on the Draft Registry Agreement Excerpt. The Forum strongly suggests that the Registry agreement outline what will happen if a Registry fails to implement the Panel Determination (preferably within an established time period). Additionally, the Forum suggests the Agreement define what will happen if a Registry fails to lock a domain name within the time established in the URS.

The Forum thanks the GNSO for considering its thoughtful comments and invites the GNSO to contact the Forum with any further questions or if the Forum can be of any help in the formulation of this process. The Forum is encouraged that the IRT's recommendations were not adopted wholesale and that many of the points adopted in the draft appear to be included after significant thought.

Sincerely,

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