

March 31, 2010

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

RE: National Arbitration Forum comments on Registry Restrictions Dispute Resolution Procedure

Dear Sir/Madam:

The National Arbitration Forum has reviewed the proposed Registry Restrictions Dispute Resolution Procedure (RRDRP) and, as an accredited dispute resolution provider, the Forum offers some unique insights that few other commentators to these processes have. With over ten years of experience handling domain name disputes, the Forum is well-suited to offering some practical advice regarding the procedural implementation of new Policies.

First, and generally, the FORUM agrees that the RRDRP and the Trademark Post-Delegation Dispute Resolution Procedure (Trademark PDDRP) could and should be combined. Second, some of the Forum's comments are questions to ICANN Staff. The Forum encourages ICANN staff to evaluate the questions as the answers will determine the direction this Procedure would go. The Forum encourages ICANN staff to consider the Forum's comment to the URS, as some of the problems inherent in the URS proposal carry through here. The Forum is available for consultation and comment on the likely effect of any proposed solutions.

	RRDRP Procedure	FORUM Comment
1.	Paragraphs/procedures are not enumerated	The Forum encourages ICANN to enumerate all procedures and sub-procedures/rules using standard outline format, in the final draft. This will make referring to specific provisions much simpler.
2.	Standing Section, Paragraph 2: Established institutions and individuals associated with defined communities are eligible to file a community objection.	See #5, below. This section should point out that there will be an initial determination regarding standing, if that is the case.

	RRDRP Procedure	FORUM Comment
3.	Complaint Section, Content Subsection, Paragraph 1: The name and contact information...of Complainant...and, to the best of Complainant's knowledge, the name and address of the current owner of the registration.	Because this procedure is a dispute resolution mechanism against a registry, it appears the word "registration" is an error. We believe the word is supposed to be "registry."
4.	Complaint Section, Content Subsection, Paragraph 4: A statement that the proceedings are not being brought for any improper purpose.	The Forum has found that the UDRP-provided language, which includes a statement of good faith, and an indemnification of the Provider and Panel (except in cases of deliberate wrongdoing) is very effective and leaves little to the complainant's imagination.

	RRDRP Procedure	FORUM Comment
5.	Administrative Review of the Complaint Section, Paragraph 1: All Complaints will be reviewed within five business days of submission by panelists designated by the applicable RRDRP provider to determine whether the Complainant has standing to request relief and has complied with the procedural rules.	<p>A compliance check is an administrative function that the Forum believes Panelists will be reluctant to perform. It also provides absolutely no consistency for complainants. A complainant could have a complaint declared compliant by one panelist, only to have its next complaint thrown out with no refund by the next one for what is perceived to be a procedural defect. The Forum believes the deficiency check should be done by the Provider, as in the UDRP.</p> <p>The Standing determination could either be done by an attorney within the Provider (with the Panel to ultimately review that determination in its analysis of all of the merits of the case) or the Standing determination could be deferred until the Panel is appointed. (In the UDRP, many Panelists consider the Policy para 4(a) requirement discussing complainant's rights to be a "standing" issue—this issue is always a determination made by the Panel.</p> <p>If a panelist is to be selected at this point, this is the point where appointment time must be allocated (instead of 21 days being available for panel appointment later in the process, see comment#11)</p> <p>Finally, this sentence doesn't seem to comport with the next paragraph which suggests the provider is conducting the compliance review.</p>
6.	Administrative Review of the Complaint Section, Paragraph 2: If the RDRP provider finds that the Complaint does not comply with procedural rules, the complaint will be dismissed and the proceedings closed....	The Forum strongly suggests that there be a "deficiency period" as provided in the UDRP, during which a complainant can remedy the defects of its case. If a complainant unwittingly omits a procedural element, dismissal without a chance to cure appears to be quite harsh.

	RRDRP Procedure	FORUM Comment
7.	Response to the Complaint Section, Paragraph 1: Service will be deemed effective, and the time will start to run, upon confirmation that the written materials sent by the Provider have been received at the last known address of the registry operator.	<p>First, as the complaint was provided electronically, the Forum wonders why the timing is determined from the date the written materials are received at an address (which would imply that the process is waiting for mail to arrive at a physical location and not be rejected).</p> <p>Second, the RRDRP doesn't require the use of certified mail (indeed, some countries don't offer it), so what sort of confirmation will suffice?</p> <p>Third, establishment of a time period upon from the date materials are received in hard copy does not allow the Provider to know and set a concrete deadline. For instance: if service materials are sent on the 1st of a month, with a 20-day response period, the written notice cannot offer a "due date" for the response because the timeline hasn't yet begun to run until receipt of the service materials. Assuming the Provider discovers service was effected on the 5th of that month, would it be expected to notify the parties that the deadline for a Response was now the 25th? If the Registry didn't receive or refused the service, would the case be considered not served?</p> <p>The Forum notes that the Trademark PDDRP handles this paragraph much more simply.</p>
8.	Response to the Complaint Section, Paragraph 2: The Response will comply...and be served upon the Complainant in paper and electronic form.	<p>Why is the Respondent required to submit paper copies, when Complainant is not? In the interests of efficiency, economy, and the environment, the Forum encourages a relatively paperless proceeding, with the exception of written notices.</p>

	RRDRP Procedure	FORUM Comment
9.	Response to the Complaint Section, Paragraph 2: The filing fee must accompany the filing or the allegations in the Complaint will be sustained.	If the registry fails to pay, is there no substantive determination?
10.	Default Section	<p>The Forum questions the need for this section. First, the “deeming” of a Complaint to be in default is merely procedural. It has no substantive effect (at least as the Procedure is currently written).</p> <p>The second paragraph point in this section talks about the setting aside of a “finding” of default, but as the Panel makes all Determinations, any Provider recommendations are purely anecdotal—there is no “finding” to set aside.</p> <p>The point that all cases proceed to a Determination on the merits negates any effect of a Provider finding of “default.” The presence of any discussion in this section implies that the status of “default” holds some significance.</p>
11.	Expert Section, Paragraph 1: The Provider shall select and appoint a single Expert within 21 days after receiving the response.	<p>Why can’t either party select a three-member panel? Parties often believe the only way a panel can be fair is to have three members. Is it because the same Panelist will perform the compliance/standing check?</p> <p>Why is there 21 days to appoint the Panel? Is this expected to be especially difficult? If the same Panelist is doing the compliance/standing check, then the appointment process would have already been done and there is no need for additional panel appointment time.</p>
12.	Remedies Section, Paragraph 2: The Expert will have at its disposal..., including:	Where will this list of options come from? Will the ultimate list be limited or open to the Expert’s imagination?

	RRDRP Procedure	FORUM Comment
13.	Remedies Section, Subparagraphs under Paragraph 2: Remedial measures...monetary sanctions...suspension in extraordinary circumstances...	<p>Again, the Forum would like ICANN to provide the universal of remedial measures that may be taken by a panelist.</p> <p>To whom are monetary sanctions paid? What are the parameters?</p> <p>What are examples of extraordinary circumstances for which termination of a registry agreement is an appropriate response?</p>
14.	<p>The Expert Determination Section, Paragraph 3: The Determination will further include a recommendation...[and]when those remedies should take effect.</p> <p>Paragraph 4: ICANN will review, approve, and enforce the recommended remedies</p>	<p>Is there a time period within which ICANN must conduct its review? How will the Panel/Provider know an appropriate date for the remedies to take effect if it doesn't yet know if the Panel will endorse the remedy recommended.</p>
15.	Availability of Court or Other Administrative Proceedings Section, Paragraph 2: ...the conduct of any such settlement negotiation is not, standing alone, a reason to suspend any deadline under the proceedings.	<p>Does this procedure specifically eliminate the possibility that the Parties can formally agree to Jointly Stay the proceedings for a limited time?</p>

The Forum thanks ICANN staff for the opportunity to comment on the RRDRP and believes that this process, as written, could be very effective. The Forum further believes that, as both pertain to the workings of new Registries, it would be convenient to merge the RRDRP and the Trademark PDDRP into one Procedure. The Forum again offers its services to assist Staff in defining the procedural elements of this new Procedure and any other dispute resolution procedures that may arise.

Sincerely,

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