

March 29, 2010

Mr. Rod Beckstrom, CEO
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way
Suite 330
Marina del Rey, CA 90292

RE: National Arbitration Forum comments on Uniform Rapid Suspension System

Dear Mr. Beckstrom, Mr. Dengate-Thrush, and members of the ICANN Board:

The National Arbitration Forum is surprised to learn of Mr. Dengate-Thrush's recent comment that the Board was nearly ready to vote on the Uniform Rapid Suspension System ("URS") as it stands because there has been little substantive objection. As a longtime Uniform Domain Name Dispute Resolution Policy ("UDRP") provider, the Forum is disappointed that it has not been approached by ICANN staff regarding suggestions for this process, despite the Forum's repeated offers. Over the past couple of years, the Forum has called for enhancements to the UDRP Rules to move the UDRP Rules forward with technology and to address loopholes and procedural problems inherent in the UDRP. Through this we have hoped to influence not only the UDRP as a dynamic process but other processes that might develop out of it. We have done this by submitting multiple letters through the open public comment periods—notably two for the URS.

We have reviewed the URS and are concerned to see that many of the problems inherent in the operation of the UDRP are ignored in the URS—leaving items open for interpretation by any providers that would be selected. As we know from the UDRP, intellectual property holders ("complainants") often are frustrated by many of these loopholes and inconsistencies across providers and it seems only logical that ICANN staff should be discussing these issues with the current UDRP Providers to avoid similar problems with the URS. The Forum urges ICANN to learn from the past and not repeat some of the features that make the UDRP a sometimes cumbersome process. As a longtime UDRP Provider, the Forum has a great deal of insight that it could bring to bear in outlining how the URS is implemented, as a procedural matter.

From a general standpoint, the Forum notes that the URS is intended to be cheaper and faster. However, the process adds intermediate steps and redundancies for Providers that necessarily increase the cost of administering the process (as compared to the UDRP). Additionally, the process has not reduced the overall time for the dispute by any significant amount. The only person getting less time to do their job is the Examiner...the one person who the Forum believes should probably not be rushed, if quality results are to be obtained. And, from the Provider's and Examiner's standpoints, URS cases will effectively be exponentially longer because a case that was once closed in around 45-50 days will now need to remain available for re-opening anytime up to two years later (assuming the Examiner is still available to re-hear the case).

The Forum hereby submits its specific comments for consideration. The Forum is available for consultation and comment on the likely effect of any proposed solutions, indeed, the FORUM strongly encourages ICANN to reach out to the Forum for consultation on matters with which the Forum has significant experience: the procedural implementation of domain name dispute systems.

	URS Rule	FORUM Comment
1.	A few paragraphs/procedures are not enumerated	Providers use enumeration to cite to the Rules. Paragraphs 5.3 and 8 have sub-bullets that are not enumerated in a way that could be easily citeable
2.	URS 1.2 “The fees will be non-refundable.”	The Providers do not have the discretion to refund fees for any reason? What about the portion of the fee collected for the Examiner?
3.	URS 1.4(b)	We believe the rule calling for the Complainant(s) name should be a separate sub-rule from that calling for a recitation of Respondent(s) information.
4.	URS 1.4(e) “...the Complainant holds a valid registration issued by a jurisdiction that conducts a substantive examination of trademark applications...”	Can an Examiner use common law rights as a bolster for registered rights? For instance, if a Complainant brings forth rights in a trademark that is a full name, but the domain name is for a commonly-used nickname for that product, can Complainant bring evidence of its common law rights in addition to information regarding its registered marks?
5.	URS 2 Fees “Fees are thought to be in the range of USD \$300 per proceeding....”	This portion is undetermined. As set forth, the URS creates a more substantial burden on the Provider...obligations that do not exist under the UDRP. The Forum points out that this does not lend itself to DECREASING fees to parties.
6.	URS 3 “Complaints will be subjected to an initial administrative review...”	What period of time does the Complainant have to fix any omissions? The UDRP calls for five days (which many filers feel is too short). However, increasing this will, of course, increase time to decision.

	URS Rule	FORUM Comment
8.	URS 4.1 “Notices should be ...understandable...globally.... Implementation options shall be determined.... Specifically, the notice should be in the language....”	This process cannot be approved without the answer to this question. The Forum notes that there are significant problems with the language of proceedings and summarizes problems and proposed solutions below. Leaving this for the Provider(s) to sort out later would be an abdication of ICANN’s responsibility.
9.	URS 4 (generally)	The time limits should include an exception for weekends.
10.	URS 4.2 “Within 24 hours of receipt...the Registry Operator shall “lock” the domain,...”	<p>The Forum is pleased that the URS language includes a specific discussion of locking the domain (a piece notably absent from the UDRP, making enforcement of locking very difficult). The Forum also commends the drafters for including a prohibition on deletion of the domain and asks ICANN to also consider preventing expiration of the domain pending the URS outcome. For instance, the provision in the EDDP numbered 3.7.5.2 could require domain names to be held pending the outcome of the dispute (usually fewer than 60 days)—currently the EDDP makes this optional; if a domain name expires and is deleted at the Registry during a proceeding, Complainants experience significant frustration.</p> <p>The Forum further suggests ICANN take this a step further and outline penalties for Registries who consistently ignore Provider requests.</p>
11.	URS 4.3 “...the URS Provider shall notify the Registrant...at the addresses listed in the Whois contact...”	If the Whois lists a privacy service, does the Provider need to do anything else?

	URS Rule	FORUM Comment
12.	URS 5.5 "...and the URS Provider determines that the Response is compliant with the filing requirements of a Response.... All materials submitted are considered by the Examiner."	<p>The UDRP does not provide for any compliance check for Responses. We believe that is the correct approach for two reasons. 1. Respondents are typically unrepresented by counsel and unsophisticated in legal matters; 2. all communication in a case is forwarded to the panel and the panel determines whether or not to consider a response (and UDRP panels usually do, in the interest of fairness)—this point should inform ICANN that it's a matter of fundamental fairness to allow Respondents to respond however they can, with the Examiner making inferences from omissions as appropriate.</p> <p>Additionally, letters may come from Respondents in a variety of languages. It should not be incumbent on the Provider to translate all documents—it is logical to simply pass them on to the Panel who speaks the language.</p> <p>Assuming that Respondent would have at least as many days as Complainant to fix any deficiencies, this adds time and more work from the Provider into the mix and has no substantive benefit.</p>
13.	URS 5.7 "The Registrant may also assert defenses...by showing one of the following factors...."	Presumably, the list of defenses are non-exclusive? Can Respondents make other arguments to support a finding of no bad faith?

	URS Rule	FORUM Comment
14.	URS 6 Default. (Generally)	This entire section is a lot of words without any significance. This section goes into declaring a case in “default” and how that declaration can be lifted, then says “All Default cases, however, proceed to Examination.” There is no practical effect of calling a case “in default.” The only thing under the UDRP that is done when a case defaults, is that an email is sent to the parties notifying them of default and Examiner appointment. There is no substantive effect. If a declaration of default is intended to have a substantive effect, that needs to be clearly stated here.
15.	URS 6.2 “...notice of Default...via mail and fax to Registrant.”	The Forum doesn’t believe mail and fax notifications are necessary. If the case was served with mail and fax notices and there is no Response, sending a notification of default to Respondent via those mechanisms are unlikely to provoke a Response—email should be fine, other methods increase cost and time to the Provider.
16.	URS 6.2 “During the Default Period, the Registrant will be prohibited...”	By whom will the Registrar be prohibited from changing content? What is the penalty if the Registrar changes content? Who monitors to determine if content changes (since the URS is submitted, presumably, with screen shots of the website taken at the time the URS was filed)? Most importantly: Why can the content not change during the “default period” but it can change during the Response period—presumably if a Respondent was going to change the content it would be at first notice of the dispute, not 20 days later when it finds out its in “default”?

	URS Rule	FORUM Comment
17.	URS 6.3 “If the Registrant fails to answer....”	This whole clause (after the first sentence) should be in the Appeals section, not in the Default section, or placed in a new section called Re-Opening (as the case by this point is closed). A more detailed look at the de novo review process is outlined below, but it adds several layers of complexity and burden to the Provider.
18.	URS 7.2 generally	This section is a comment to ICANN staff, not a Rule. The URS should not be approved until this item is fleshed out. The Forum provides more in-depth commentary on this issue below.
19.	URS 8 “The Domain was registered and is being used in bad faith.”	A couple WIPO Panelists have recently been very vocal about their UDRP cases essentially omitting the “and” from this element of the UDRP. The Forum is aware that there was a significant debate on the inclusion of “and” in the URS (rather than “or”). How will the URS prevent erosion of the URS’s use of “and”?
20.	URS 8 (generally)	This section reads like an instruction/training guide to Examiners. The Forum suggests separating out “should” and “example” language from absolute rules and guidelines for the process.
21.	URS 10 (generally)	The Remedies section does not address how long the Registry has to implement the Determination. The Forum has seen countless cases where a Complainant prevails but the registrar drags its feet for up to a year to transfer the name.
22.	URS 10 “Option for successful complainant to pay to extend...”	Several questions about this: <ol style="list-style-type: none"> 1. Must this fee be paid up front at the conclusion of the URS? 2. Is the Registry paid directly? 3. If the fee need not be paid immediately, who notifies the Complainant when the fee is due?

	URS Rule	FORUM Comment
23.	URS 11.2 (generally)	Assuming there is more than one Provider, who tracks findings of abuse across Providers? Is the complainant obligated to self-report prior findings of abuse to the Examiner? What if the complainant fails to do so? Should the Examiner know about prior abuse findings? If this responsibility is allocated to the Provider, note this sharply increases Provider responsibility and intervention once again.
24.	URS 11.3 “A finding of abuse can be appealed...to determine solely if the Examiner abused his/her discretion, or acted in an arbitrary or capricious manner.	This paragraph is rife with ambiguity and requires significant consideration before this can be approved. Assuming the appeal can be made to the same Provider, and assuming any Provider/Examiner fee is paid by the appellant, are any additional pleadings allowed by either the Appellant or the original Registrant? What is the remedy, overturning the entire Determination or just the finding of abuse”? Does the second Examiner modify the first Examiner’s written Determination? Can a substantive appeal be ultimately filed simultaneously with the appeal of the finding of abuse? Should Providers have a special sublist of Appellate Examiners (perhaps the ones with significant experience)? Should Appellate Examiners be three member panels?
25.	URS 12. Appeals (generally)	The Forum has in-depth comments on this paragraph below, and notes that this greatly increases the costs of administering the program to the Provider.
26.	URS 12. “A URS Determination should not prejudice the party in UDRP or any other proceedings.”	The UDRP requires Parties to disclose any other legal proceedings the Parties have been a party to with respect to the domain name. Does URS 12 negate that requirement under the UDRP?

URS 4.1: Language Provisions.

Under the UDRP, Rule 11 states that all cases shall proceed in the language of the registration agreement, except that the panel may determine otherwise. This sounds like a great solution, except, in practice, it doesn't work. When a complainant files a complaint, the Provider requests verification of the domain name from the Registrar, including information on the language of the Registration Agreement. If the Registrar provides information that the language was other than English, the Complainant is required to translate the complaint. Complainants often protest, claiming the Respondent has a command of the English language or making other arguments as to why the case should go forth in English. Complainants ask for the Panel to make the determination. This creates a problem because a Panel cannot be appointed at this stage of the proceedings. If a single Panelist were appointed in advance of the proceedings commencing and the Respondent being offered a chance to respond, the Respondent would lose its opportunity to request a three member panel.

Other Providers allow the Complainant to object to translation and serve the English language complaint with a translated Written Notice, giving the Respondent a chance to object to the case proceeding in English. This violates the UDRP Rules in two respects: 1. The presumption for the language under Rule 11 is the language of the registration agreement, subject to a panel declaration otherwise; the presumption is not that the Respondent must speak up within so many days to object to English (and this after not being able to actually read the complaint against it). 2. the UDRP process doesn't provide for a wait period; once a case is commenced, the Respondent has 20 days to submit its Response—under this interpretation of Rule 11, the Complainant would use Respondent's response period to translate the complaint (or the Provider would be unilaterally extending time periods). Furthermore, this process makes the Provider responsible for translating communications from the Respondent, to see what is being alleged.

The Forum very strongly urges ICANN to consider this practical issue and address it within the URS. The Forum further points out that if anyone is required to translate anything (complainants or the Provider), time and cost mitigation should be built into the system for such (noting that it will further slow the process).

URS 6.3: *De Novo* Review.

The possibility that a Registrant can answer at any point for two years brings up several practical considerations:

1. Is the complainant allowed to supplement its pleadings now that time has passed?
2. How much time are the parties allowed for new pleadings?
3. The Examiner is paid from the fees set in the case. If, a year after the original determination, the Examiner is no longer available to re-hear the case, who pays the new Examiner (or should the "post-30 days" response fee be high enough to pay the Examiner)?
4. Regardless of the answer in #3, is the original Determination amended (by whoever re-hears the case) or is a second Determination published—need the two be linked?

5. Is complainant obligated to keep the Provider apprised of changes to counsel? If not, what actions on a Provider's part will constitute notice to the Complainant that the case is being re-opened?

URS 7.2:

Selection of Examiners. The Forum wishes to note that its Panelists are selected via several concurrent rotations. Some practical considerations the Forum asks ICANN to contemplate before promulgating specific rotational rules are that some panelists are simply far more available than others. There are some panelists who refuse most cases, some who have conflicts, and others who take more time than the Policy and Rules have allotted to accept the case. So, while the Forum endeavors to appoint panelists in as fair a rotation as possible, there are varying considerations that should be taken into account.

URS 12: Appeals.

An Appeal process is likely to be as complex as the original process, yet, here, it is given but three short paragraphs. The Appeal section brings up at least the following procedural questions.

1. How "limited" is the right to introduce new material? Is it limited merely by the Provider's page/word constraints?
2. The URS provides that "the evidence clearly pre-dates the filing of the Complaint." Under the UDRP, where Parties refile (essentially, appeal) a UDRP decision, most panelists dismiss for res judicata—there is nothing new in the record that would lead to a changed decision. Although the URS Appeal would presumably be before a new Examiner, it's likely that the Examiner would want to see something not put forth in the original case. Therefore, ICANN may wish to consider if it really wants to limit the Appeal to essentially the record below. If so, perhaps this should really be articulated that the intent is to simply have another set of eyes review the same case materials.
3. What are the timelines for an appeal (Appellant briefs, Appellee briefs, Appellate Examiner Determination)?
4. Can an Appellate Examination be by three member panel if one or both parties agree?
5. If a Complainant loses its URS case in chief, but prevails as Appellant, does the two years of "non-resolving domain name" start with the URS filing or with the time the Appellant prevailed?
6. If a Complainant loses its URS and Appeals, the domain name must still resolve...but must another lock be requested to prevent transfer/deletion/(expiration?) of the domain name?
7. Can an appeal under 11.3 be brought simultaneously with the substantive appeal?
8. What happens to the publicly available URS Determination if an Appeal overturns the Determination below? Should it still be publicly available?

As you can see from the forgoing, there are still serious procedural issues that need to be addressed by the URS before the Board can vote to approve this rights protection mechanism. The Forum agrees that, in all likelihood, the substance of the URS is established and there is a solid consensus about this, however, for the entities who may choose to administer this system there are still a lot of open-ended questions of both practical and significant importance.

We urge ICANN to include the Forum in discussions regarding implementation of the URS before it's finally approved.

Sincerely,

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