

December 7, 2010

Members of the ICANN Board
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 Members of the ICANN Board:

We have reviewed the URS as codified in the most recent Proposed Final Applicant Guidebook. We are pleased to note that some of our practical suggestions are implemented in this version. We would like to continue to highlight places in the proposed URS that we predict will increase time and cost to parties and providers or cause confusion.

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. In fact, many URS cases will effectively be exponentially longer because a case that was once closed in around 45 days will now need to remain available for re-opening anytime up to two years later.

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.

We begin with a comparison of timelines between the UDRP and the URS, and follow that with a list of suggestions that could speed up the process further. We then provide a table of our comments, followed by a few more in-depth comments below that.

Timeline comparison:

	Complaint Filed /lock obtained	Deficiency Check and Period/ lock obtained	Com-mence-ment	Response Period	Panel Appoint-ment	Panel Delibera-tion	Time to Issue Decision	De Novo Review	Appeal	TOTAL
UDRP Min	Day 1	Day 1	Day 1	Varies, but usually Day 20	Day 21	Day 24	Day 24	None	None	24 days
UDRP Max	Day 3 (ignoring exceptionally long wait for a lock)	Day 8	Day 9	Day 29	Day 34	Day 48	Day 51	None	None	51 days (assuming no party-requested extensions or Stays)
URS Min	Day 1	Day 1	Day 1	Likely will vary, say Day 14	Day 15	Day 17	Day 17	Day 47	Unknown	Varies from 17 days to 2 years
URS Max	Day 1	Day 4 (ignoring long wait for lock) If non-compliant, the clock starts over.	Day 4	Day 18	Day 15	Day 29	Day 30	Day 60	Unknown	Varies from 30/60 days to 2 years

This demonstrates that a URS is likely to take in the region of 17 days to 2 years; the majority of UDRP cases are resolved in 24-51 days, with an average of 42 (for the Forum).

Some suggestions for improving the predictability of the timeline and making the URS faster and more efficient:

1. Because there are long DeNovo and Appeals processes, consider eliminating an Examiner Determination for Default cases (this would actually make the Default section have some meaning). This would also eliminate questions about having multiple Determinations for one case.
2. Permit/offer an incentive to Providers who use an entirely online portal/ case management interface (supplemented with paper/fax notices of commencement) which can streamline the process of sending and receiving documents.
3. Shorten the permitted length of the pleadings to make the Determination easier for the Examiner, which owing to anticipated lower fees, who likely be preparing very short decisions.

4. Consider what the next steps will be if a Registry Operator doesn't notify the Provider of the lock in a timely manner...how long must the Provider wait to proceed (if in fact the Provider will be instructed to proceed)—this might not be fodder for the Guidebook, but an accompanying best practices document could iron this out ahead of time.

Summary of specific comments:

	URS Rule	FORUM Comment
1.	URS 1.2 and 5.4 “There will be a 5,000 word limit, excluding attachments, for the Complaint/Response.”	<p>Five thousand words is what some Providers allow for UDRP. If this is to be faster, and the Panel deliberation time is to be shorter, the materials submitted should be much less. It may even be beneficial to impose a page limit on exhibits.</p> <p>Additionally, the Forum prefers a page limit for the Complaint, as documents are sometimes sent in a format in which it's impossible to do an electronic word count. Thus adding time and expense to the process.</p>
2.	URS 1.2(d) “For each domain name, the Complainant should include a copy of the currently available Whois information”	Suggestion: say “shall” if it's a requirement, otherwise it's a suggestion and won't be picked up in the deficiency check as a problem.
3.	URS 2 Fees “A “loser pays” model has not been adopted for the URS.”	Because the URS is written now in Rule form, the commentary seems superfluous.

	URS Rule	FORUM Comment
4.	<p>URS 3.3 Given the rapid nature of this Procedure, and the intended low level of required fees, there will be no opportunity to correct inadequacies in the filing requirements.</p> <p>URS 3.4 If a Complaint is deemed non-compliant with filing requirements, the Complaint will be dismissed without prejudice to the Complainant filing a new complaint. The initial filing fee shall not be refunded in these circumstances.</p>	<p>This isn't making things faster. Forcing a dismissal for easily corrected errors wastes time for everyone. Why not allow the parties a chance to amend the complaint to bring it into compliance rather than require a dismissal and subsequent refiling with corrections?</p> <p>This Rule is likely to cause significant inconvenience and added time for parties and the providers as well as added expense to the parties.</p>
5.	<p>URS 4.1 "Notices must be clear and understandable to Registrants located globally. The Notice of Complaint shall be in English and translated by the Provider into the predominant language used in the registrant's country or territory."</p>	<p>Is the Registrant's presumed language the language predominantly used in the country listed for the Registrant in the Whois? What if the Whois has a privacy shield—is the location of the privacy service used?</p> <p>Please clarify that, if the Respondent can't read the complaint because it's in English, it is not the Provider's job to translate it (since only the letter is in English, not the complaint itself).</p> <p>What if the Response is in the other (non-English) language—is it accepted?</p>
6.	<p>URS 4 (generally)</p>	<p>The time limits should include an exception for weekend/holiday deadlines. Or the Providers should be granted the power to make Supplemental Rules that help smooth out case administration hassles.</p>
7.	<p>URS 4.3 "All Notices to the Registrant..."</p>	<p>I believe you mean to specify all notices under Rule 4. Please clarify that this does not refer to all correspondence about the case.</p>

	URS Rule	FORUM Comment
8.	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?
9.	<p>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> <p>URS 5.6 "Once the Response is filed, and the URS Provider determines that the Response is compliant with the filing requirements of a Response, the Complaint, Response and supporting materials will be sent to a qualified Examiner, selected by the URS Provider, for review and Determination. All materials submitted are considered by the Examiner."</p>	<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 (which would add time to the process)—it is logical to simply pass them on to the Panel who speaks the language.</p> <p>Finally, because it's clear that all submissions are forwarded to the Examiner whether they are compliant or not (URS 5.6 says Providers will check for deficiencies, but says nothing about what if a Response is not compliant), a deficiency check is only needlessly adding time and energy to the process.</p>

	URS Rule	FORUM Comment
10.	URS 5.2 “No filing fee will be charged if the Registrant files its Response prior to being declared in default or not more than thirty (30) days following a Determination. For Responses filed more than thirty (30) days after a Determination, the Registrant should pay a reasonable fee for re-examination.”	<p>This has the effect of extending the case time. Currently, Forum UDRP cases (including all the ones that have 45 day stays) are around 42 days from start to finish. We routinely have cases lasting around 28 days.</p> <p>A large number of Responses arrive late (either with or without an extension of up to 20 days). So, it’s actually pretty likely that a significant number of Respondents will wait the full 30 days after a Determination to respond, thereby increasing the average amount of time a case would take under the URS, as opposed to what’s currently happening under the UDRP.</p>
11.	URS 6 Default. (Generally)	<p>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.</p>
12.	URS 6.2 “...notice of Default...via mail and fax to Registrant.”	<p>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.</p>

	URS Rule	FORUM Comment
13.	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”?
14.	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.
15.	URS 6.4 “the domain name shall again resolve to the original IP address as soon as practical,....”	Who tracks what the original IP address was?
16.	URS 9.6 “To conduct URS proceedings on an expedited basis, examination should begin immediately upon the earlier of the expiration of a twenty (20) day Response period, or upon the submission of the Response.”	This references an old timeline. The new timeline is 14 days.
17.	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.

	URS Rule	FORUM Comment
18.	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?
19.	URS 12.3. The DAG appears to be missing a page	

URS 6.4: *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. Is the original Determination amended (by whoever re-hears the case) or is a second Determination published—need the two be linked?
3. 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 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. What are the timelines for an appeal (Appellant briefs, Appellee briefs, Appellate Examiner Determination)?
3. Can an Appellate Examination be by three member panel if one or both parties agree?
4. If a Complainant loses its URS case in chief, but prevails as Appellant, does the period for the “non-resolving domain name” start with the URS filing or with the time the Appellant prevailed?
5. Can an complainant appeal under 11.8 be brought simultaneously with the substantive appeal?
6. 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,

Kristine Fordahl Dorrain
Internet Legal Counsel
National Arbitration Forum
kdorrain@adrforum.com