

**NCUC Comments**  
**on the**  
**Post Delegation Dispute Resolution Procedure (PDDRP)**

1 April 2010

The Non-Commercial Users Constituency (NCUC) believes that the Post Delegation Dispute Resolution Procedure will create many problems both for the Registries – at an individual level – as well as the whole registration system – at a more collective level. It will upset the boundaries of the current registration culture and this will have a further impact on the rights of individual domain name registrants. We believe that this proposal is not well considered, it contradicts basic legal principles and seeks to create an extra-judicial system that lacks substantive, procedural and remedial balance. If it goes forward, there must be substantial substantive and procedural changes that a) protect the Registries, their use of ordinary words and common surnames, and the global, regional and local communities that they serve.

- NCUC’s prime concern is that the justification for the creation of such a system is very weak. Registries are not content-controllers and should not be asked to operate as such. Registries assign domain names on a ‘first-come, first-served’ basis and their rights and responsibilities are strictly limited to their contractual clauses. –When assigning domain names, Registries are not meant to conduct a thorough examination of whether the registration of the domain name infringes any trademark rights; their liability in relation to trademarks only extends to a contractual clauses which places the burden of proof upon Registrants to ensure that their registration constitutes a non-infringing act. (11. **REPRESENTATIONS AND WARRANTIES**. You agree and warrant that: (i) *neither your registration nor use of the any of the Network Solutions services nor the manner in which you intend to use such Network Solutions Services will directly or indirectly infringe the legal rights of a third party*, - NSI Registration Agreement). Subjecting, therefore, Registries to the PDDRP process with potentially detrimental results and considering that a domain name registration is not by itself (and neither should it be) a conclusive determination of trademark infringement, ICANN is encouraging a system where Registries should be ‘forced’ to provide a check for the content of the domain name. This is illegitimate to the extent that Registries do not have such an authority nor should they be forced to perform one
  
- NCUC further believes that this Post-Delegation Dispute process raises significant and complex legal issues (like privity of contract), which seriously jeopardize the rights of domain name holders and users. The system does not allow registrants to be part of the dispute, which will ultimately determine the future of their service providers and, lead subsequently, to the revocation and sudden elimination of their online businesses, free speech websites and information-based platforms. Registrants constitute the sole entities that can attest to the content of their websites and should be part of this process.

This process is tilted towards securing a very trademark-oriented DNS. It is obvious that the trademark community is pushing for a more controlled system

of domain name registrations and seeks to achieve this at two different levels: against registrants **and against Registries**. The trademark community has its disposal *three different protection mechanisms* – the *Uniform Domain Name Dispute Resolution System (UDRP)*, the *recently established Uniform Rapid Suspension System (URS)* and now the *Post-Delegation Dispute Resolution Procedure (PDDRP)* – a structure, which taken as a whole, is over-excessive and can easily be abused by the trademark community.

- WIPO's assumed involvement in the PDD process is problematic and we anticipate that it will also be biased towards trademark owners based on our past experience with WIPO's practices within the UDRP process. We believe that this system provides room for trademark abuse.
- This PDD? process will also have an impact on the registration culture. It will shift competition from price to other criteria, encouraging trademark competition between registries. It will encourage an environment distinguishing between trademark-friendly and non trademark-friendly Registries and can lead to potentially more confusing and stringent domain name registration practices.
- The PDDRP also places a veil of uncertainty over Registries, which will further impacts on the whole registration culture and, ultimately, Registrants. Unless carefully structured, the PDDRP process will most likely raise the registration bar criteria significantly, making more difficult for domain name holders to register names and thus enter the DNS. Even if we accept the potential threat to trademark owners and their rights, trademark law categorically rejects the idea of raising the bar for new entrants. Through various limitation and restrictions (genericness doctrine, principle of territoriality, International Class of Goods and Services) trademark law assists and encourages entry to new participants and free speech advocates.
- It should be anticipated that the PDDRP will open the floodgates to litigation and law suits. Parallel litigation should be expected to the extent that registrants or registrars will proceed to courts to ensure that their contractual rights are safeguarded. Anyone with a trademark, or anyone who later gets a trademark, even from a race-to-register jurisdiction such as Tunisia will bring an action because the stakes and rewards are so high.

The PDDRP must introduce a statute of limitations. Given the nature of this process, any trademark holder can turn against a Registry at any given time. This gives trademark owners too much discretion and given the abstract nature of the process it creates a system that can easily be abused. Trademark owners can proceed to collect data of potentially infringing domain names against any Registry and compile portfolios establishing a pattern in the space of five or ten years. This process makes Registries liable to trademark manipulation and abuse for the period of their life and creates instability in the registration process.

- The PDDRP must allow Registries adequate response to reply. 20 days is simply not enough, especially when the trademark owners have unlimited time to prepare their Complaints in conjunction with their outside law firms. This is

not a rapid takedown system, but a TLD approved pursuant to a tough scrutiny and review of the ICANN TLD application process.

- The PDDRP must allow Registries to make their case before a panel of 3-5 Panelists as both the rights of Registry and all their Registrants are now on the line.
- The PDDRP must allow Registries to appoint half the Panelists, and together with the Complainant to choose the forum in which the complaint will be heard. This is not a UDRP, but the arbitration of a critical contract issue of a global Registry business. Forums to date are known for their biases and self-selected procedures and panellists for pre-determined outcomes. A more neutral set of forums and panellists must be allowed in this extraordinary circumstances of challenging a gTLD.

The PDDRP must recognize that the use of ordinary words and surnames is a right reserved to all communities and all peoples. Our NCUC representatives from developing countries are deeply concerned that their cultural terminology is being hijacked by trademark owners in developed countries who register the same terms. A lawsuit before WIPO would simply put out of business a small registry seeking to preserve and share its cultural heritage – a right accorded it in the new TLD application process. The ICANN process must continue to protect these rights for which members of the GAC, the NCUC, the Registry and Registrar communities and so many others have fought for.

In conclusion we feel that the PDDRP process is not considered thoroughly and leaves many questions unanswered, whilst failing to address significant legal issues. The PDDRP procedure is unimaginative to the extent that it seeks to address a contractual issue through an administrative procedure that resembles the UDRP (which is a process with different scope and mandate).

We are very concerned, therefore, that this process will further impact the legitimate, non-commercial rights of Registrants, it will provide room to the trademark community to abuse a system and receive excessive benefits. We are concerned that this system will ultimately lead to a more controlled registration environment by the trademark community and it will create an atmosphere of fear in the registration process. It will, therefore, have a severe impact upon the relationship between Registries and Registrars, Registries and Registrants and Registries and ICANN. It will create a dystopian registration environment driven by trademark interests and control.