CHARTER FOR PROPOSED PDP TO REVIEW ALL RIGHTS PROTECTION MECHANISMS IN ALL gTLDS

Working Group (WG) Charter

WG Name:	**TBD**	
Section I: Working Group Identification		
Chartering Organization(s):	GNSO Council	
Charter Approval Date:	TBD	
Name of WG Chair:	TBD	
Name(s) of Appointed Liaison(s):	TBD	
WG Workspace URL:	TBD	
WG Mailing List:	TBD	
GNSO Council Resolution:	**Title:**	TBD
	Ref # & Link:	TBD
Important Document Links:	• GNSO Working Group Guidelines • GNSO PDP Manual • The Current State of the Uniform Domain Name Dispute Resolution Policy: Final Issue Report, October 2011 ("UDRP Final Issue Report") • Staff Paper on Rights Protection Mechanisms in the New gTLD Program: Revised Report, September 2015 ("RPM Staff Paper") • Metrics compiled on the new RPMs collected for the Competition, Consumer Trust and Consumer Choice Review: https://www.icann.org/resources/reviews/cct/metrics#rights%20protection%20mechanisms	
Section II: Mission, Purpose, and Deliverables		
Mission & Scope:		

Background

The question of who legally has rights to, or is the legitimate holder of, a domain name can be open to dispute. In relation to domain name disputes concerning the registration and use of legally protected trademarks, the Uniform Dispute Resolution Policy (UDRP) is the longest standing alternative dispute resolution procedure. As a result of the New gTLD Program, several new rights protection mechanisms (RPMs) were developed to mitigate potential risks and costs to trademark rights holders that could arise in the expansion of the gTLD namespace, which included certain safeguards to protect registrants who engage in legitimate uses of domain names: the Uniform Rapid Suspension System (URS); the Trademark Clearinghouse (TMCH) and the associated availability through the TMCH of Sunrise periods and the Trademark Claims notification service; and the Post-Delegation Dispute Resolution Procedures (PDDRPs).

Prior to the launch of the New gTLD Program, on 3 October 2011 ICANN staff had published a Final Issue Report on the current state of the UDRP. The recommended course of action in that UDRP Final Issue Report was not to initiate a PDP at the time, but to hold off launching any such PDP until after the new URS had been in operation for at least eighteen (18) months. In addition, the September 2015 revised RPM Staff Paper had explicitly noted that some of the concerns identified by the community for consideration as part of a review of the RPMs might be appropriate topics for policy development work.

The UDRP has not been subject to comprehensive review. There has also not been a full review of all the RPMs developed to date by ICANN, to consider whether or not they are collectively achieving the objectives for which they were created.

Mission and Scope

(a) A Two-Phased Approach

This PDP Working Group is being chartered to conduct a review of all RPMs in all gTLDs in two phases: Phase One will focus on a review of all the RPMs that were developed for the New gTLD Program, and Phase Two will focus on a review of the UDRP. , by the completion of its work, the Working Group will be expected to have also considered the overarching issue as to whether or not all the RPMs collectively fulfill the purposes for which they were created, or whether additional policy recommendations are needed, including to clarify and unify the policy goals.

At a minimum, in each Phase of this PDP, the Working Group is expected to first assess the effectiveness of the relevant RPM(s), for which the Working Group should seek the input of experienced online dispute resolution providers and other subject matter experts, as may be appropriate. The Working Group should also consider the interplay between and complementary roles of each RPM in seeking to more fully understand their overall functioning and effectiveness.

In public comments to the UDRP Final Issue Report, the RPM Staff Paper and the Preliminary Issue Report for this PDP, various community groups and participants had identified a number of issues that they considered appropriate for review in a PDP. As such, and following its preliminary assessment of the effectiveness of the relevant RPM(s) in each phase of its work, the Working Group should consider the suggestions that have been made to date by the community

regarding improvements or modifications to the RPM(s) in question. These community suggestions are attached to this Charter and they are intended to provide a framework and starting point for the PDP Working Group at the appropriate stage in its work, with further modifications, additions and deletions to be determined by consensus of the Working Group.

(b) Coordination with Other Parallel Efforts

In the course of its work, the Working Group should monitor the progress of and, where appropriate, coordinate with, other ICANN groups that are working on topics that may overlap with or otherwise provide useful input to this PDP. In particular, this PDP Working Group shall maintain a close working relationship with the Competition, Consumer Trust and Consumer Choice (CCT) Review Team and the PDP Working Group on New gTLDs Subsequent Procedures. To facilitate interaction between the two GNSO PDPs, a GNSO community liaison, who is a member of both PDP WGs, shall be appointed by both Working Groups as soon as both Groups have taken up their work. In addition, the RPM PDP Working Group should also take into consideration the work/outcome of the TMCH Independent Review, the CCT Review, and any other relevant GNSO policy development projects.

In addition to any flexibility provided by the GNSO Operating Procedures, Working Group Guidelines and the PDP Manual, the Working Group should, at the conclusion of Phase One of its work, assess the need for modification to this Charter and, if appropriate, submit a request to the GNSO Council accordingly for the subsequent phase(s) of its work.

In addition, the GNSO Council, as the manager of the policy development process, should be kept informed at all times about coordination efforts with the CCT Review Team and the PDP on New gTLD Subsequent Procedures. In case of conflict between these groups, the Council shall take appropriate action to align work processes if and when necessary.

Objectives & Goals:

In addition to an assessment of the effectiveness of each RPM, the PDP Working Group is expected to consider, at the appropriate stage of its work, the overarching issue as to whether or not all the RPMs collectively fulfill the purposes for which they were created, or whether additional policy recommendations are needed, including to clarify and unify the policy goals. If such additional policy recommendations are needed, the Working Group is expected to develop recommendations to address the specific issues identified.

The Working Group is also directed to bear in mind that a fundamental underlying intention of conducting a review of all RPMs in all gTLDs is to create a framework for consistent and uniform reviews of these mechanisms in the future.

Deliverables & Timeframes:

In addition to the PDP deliverables prescribed in the ICANN Bylaws and the PDP Manual, the Working Group shall provide a first Initial Report to the GNSO Council at the conclusion of Phase One of the PDP. The Report shall be put out for public comment and also inform the GNSO Council about the progress of the Working Group. At a minimum, the Report shall outline the Working Group's progress and any preliminary recommendations it may have developed with regard to its work in Phase One. The first Initial Report shall also highlight any relevant findings,

information or issues that may have emerged during Phase One and any issues or recommendations that the Group believes should be considered by the PDP Working Group on New gTLD Subsequent Procedures, and/or that the Working Group considers relevant to its work in Phase Two.

Phase Two of the PDP Working Group shall focus primarily on the review of the UDRP. However, during this Phase the Working Group is also expected to review its first Initial Report, taking into account public comments received, and/or feedback submitted from the New gTLD Subsequent Rounds PDP or other ongoing efforts. Before concluding its work the Working Group shall take into account any relevant developments from the New gTLD Subsequent Rounds PDP WG and/or other relevant ICANN review or policy development work. The Working Group's second Initial Report shall be completed and published for public comment, as per the PDP Manual. The Working Group shall then review all comments, complete its Final Report and submit it, as per the PDP Manual, to the GNSO Council for its consideration and further action.

Section III: Formation, Staffing, and Organization

Membership Criteria:

TBD

Group Formation, Dependencies, & Dissolution:

TBD

Working Group Roles, Functions, & Duties:

TBD

Statements of Interest (SOI) Guidelines:

If a Working Group is formed, each member of its will be required to submit a SOI in accordance with Section 5 of the GNSO Operating Procedures.

Section IV: Rules of Engagement

Decision-Making Methodologies:

The PDP Working Group will be expected to adhere to the rules in the GNSO PDP Manual and Working Group Guidelines.

Status Reporting:

At a minimum, the Working Group should provide periodic updates at appropriate intervals to the GNSO Council, including a first Initial Report at the conclusion of Phase One of its work, and a second Initial Report upon the conclusion of Phase Two (as described above).

Problem/Issue Escalation & Resolution Processes:

These are expected to be resolved in accordance with the procedures in the GNSO's Working Group Guidelines.

Closure & Working Group Self-Assessment:

If a Working Group is formed it will close upon the delivery of a Final Report, unless assigned additional tasks or follow-up by the GNSO Council. A self-assessment of its work will be carried out following the conclusion of the WG's work**.**

Section V: Charter Document History

Version	Date	Description

Staff Contact:	Lars Hoffman, Mary Wong	**Email:**	Policy-Staff@icann.org

Translations: If translations will be provided please indicate the languages below:											

ATTACHMENT – LIST OF POTENTIAL ISSUES FOR CONSIDERATION IN THIS PDP[1]

The issues that are listed here reflect the suggestions that have been made to date by the community regarding improvements or modifications to the RPM(s) in question and should form part of the discussions of the PDP Working Group. The Working Group may decide to address all, some or even additional issues to these.

General:

- Do the RPMs collectively fulfil the objectives for their creation, namely "to provide trademark holders with either preventative or curative protections against cybersquatting and other abusive uses of their legally-recognized trademarks? In other words, have all the RPMs, in the aggregate, been sufficient to meet their objectives or do new or additional mechanisms, or changes to existing RPMs, need to be developed?
- Should any of the New gTLD Program RPMs (such as the URS), like the UDRP, be Consensus Policies applicable to all gTLDs, and if so what are the transitional issues that would have to be dealt with as a consequence?
- Whether, and if so to what extent, changes to one RPM will need to be offset by concomitant changes to the others

Potential issues concerning the UDRP:

- Are the UDRP's current appeal mechanisms sufficient?
- Should there be a limit to the time period allowed (e.g. similar to a statute of limitation) for bringing UDRP complaints?
- Are free speech and the rights of non-commercial registrants adequately protected in the existing policy?
- Should there be a formal (mandatory) mechanism of early mediation?

[1] As the list was derived from various community suggestions in different forums, they are not listed in any particular order of importance nor has staff attempted to analyze the merits, relevance or significance of each issue.

- Are the current time limits of the UDRP (for filing, response, determinations and appeals) adequate?
- Should there be rules for the appointment of UDRP panels, such as formalized rotations?
- Under what circumstances (if any) should/could UDRP proceedings be anonymized?
- Should there be clearer policy guidance on a registrar's obligations if a case is stayed or suspended?
- Should the possibility of laches be recognized in UDRP proceedings; if so, how can this be expressly addressed?
- Should "or" be introduced instead of "and" in the bad faith requirements?
- Should there be an introduction of a "loser-pays" scenario?
- Should monetary damages be awarded? The UDRP (unlike court proceedings) does not allow this, but there are examples of ccTLD registries now applying monetary damages
- Should the relevant time periods be reduced?
- Should filing fees be lower?
- Should injunctive relief be available?
- Should there be a bad-faith presumption for repeat/serial offenders?
- Should repeat/serial offenders be blacklisted from new registrations?
- Should permanent suspension be added as an additional potential remedy under the UDRP?
- How should the privacy and proxy services which are now frequently used by registrants to shield their identity be more efficiently removed in the course of a UDRP proceeding?
- Should the UDRP be revised to cover challenges to trademark-infringing content even in the absence of trademark infringement in the domain name? Should a failure to respond result in an automatic
- default victory for the complainant?
- Should a failure to maintain an active credit card with the registrar in order to fulfil any "loser pays" obligations result in an automatic default victory for the complainant?
- Does there need to be a severe penalty to deter Reverse Domain Name Hijacking attempts?
- Major UDRP decisions of 2011-2015 should be taken into account
- Should the term "free speech and the rights of non-commercial registrants" be expanded to include "free speech, freedom of expression and the rights of non-commercial registrants" to include rights under US law and the United Nations' Universal Declaration of Human Rights?
- Are the critical concepts of "fair use" and "fair dealing" fully and accurately reflected in the UDRP (and also URS and TMCH rules)?
- Are generic dictionary words being adequately protected so that they are available for all to use as allowed under their national laws and international treaties? E.g. sun, windows.
- Are last names and geographic places adequately protected so that they are available for all to use as allowed under their national laws, e.g, Smith, McDonald, Capitol Hill Cafe, Old Town Deli?
- Now that Reverse Domain Name Hijacking is a regular finding of UDRP panels, indicating that domain name registrants are being abused by complaints brought against them in the UDRP process, what penalties and sanctions should be imposed on Complainants found to be reverse domain name hijackers? How can those penalties and sanctions be aligned so as to be fair, as compared to the loss of a domain name taken from a registrant found to be a "cybersquatter"?
- Are free speech, freedom of expression and the rights of non-commercial registrants uniformly protected in the existing UDRP (and URS and TMCH) policies and their implementation procedures? As currently phrased, the "potential issue" asks if it is "adequately protected," but where we find differences among Panelists of different countries, we should ask if free speech is "adequately and uniformly protected" – as equity and fairness lies in both.
- Should defenses be expanded, e.g., as seen in Nominet's policy and the URS?

Potential issues concerning the URS:

- Should the ability for defaulting respondents in URS cases to file a reply for an extended period (e.g. up to one year) after the default notice, or even after a default determination is issued (in which case the complaint could be reviewed anew) be changed?
- Is the URS' 'clear and convincing' standard of proof appropriate?[2]
- Is there a need to develop express provisions to deal with 'repeat offenders' as well as a definition of what qualifies as 'repeat offences'?
- Should the URS allow for additional remedies such as a perpetual block or other remedy, e.g. transfer or a "right of first refusal" to register the domain name in question?
- Is the current length of suspension (to the balance of the registration period)[3] sufficient?
- Is the cost allocation model for the URS appropriate and justifiable?
- Should there be a loser pays model? If so, how can that be enforced if the respondent does not respond?
- Should the Response Fee applicable to complainants listing 15 or more disputed domain names by the same registrant be eliminated?[4]
- Has ICANN done its job in training registrants in the new rights and defenses of the URS?
- Are the expanded defenses of the URS being used and if so, how, when, and by whom?
- What sanctions should be allowed for misuse of the URS by the trademark owner?
- What evidence is there of problems with the use of the English-only requirement of the URS, especially given its application to IDN New gTLDs?
- How can the appeals process of the URS be expanded and improved?

Potential issues concerning Trademark Claims:

- Should the Trademark Claims period be extended beyond ninety (90) days?
- Should the Trademark Claims period continue to apply to all new gTLDs?
- Should the Abused Domain Name Label service be continued?
- Does a Trademark Claims period create a potential "chilling effect" on genuine registrations, and, if so, how should this be addressed?
- Is the protection of the TMCH too broad?
- Is the TMCH providing too much protection for those with a trademark on a generic or descriptive dictionary word, thus allowing a trademark in one category of goods and services to block or postpone the legitimate and rightful use of all others in other areas of goods and services? Are legitimate noncommercial, commercial and individual registrants losing legitimate opportunities to register domain names in New gTLDs?
- Is the TMCH and the Sunrise Period allowing key domain names to be cherry-picked and removed from New gTLDs unrelated to those of the categories of goods and services of the trademark owner (e.g., allowing "Windows" to be removed from a future .CLEANING by Microsoft)?
- How should the TMCH scope be limited to apply to only the categories of goods and services in which the generic terms in a trademark are protected?
- How can TMCH services be much more transparent in terms of what is offered for ICANN pursuant to ICANN contracts and policies vs. what services are offered to private New gTLD registries pursuant to private contract?

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[2] See Section 8.2 of the URS Procedure.
[3] See Section 14 of the URS Rules.
[4] See Section 2 of the URS Procedure.

- How can the TMCH provide education services not only for trademark owners, but for the registrants and potential registrants who are equally impacted by their services?
- How quickly can a cancelled trademark be removed from the TMCH database? (note: rejected trademarks and cancelled trademarks are different, with cancelled trademarks involving trademarks that have already been issued).
- What is the effect of the 90-day Trademark Claims process?
- Should TM +50 be reversed?
- There should be a review on accessibility to TMCH for individuals, private trademark holders and trademark agents in developing countries.

Potential issues concerning the Sunrise Period:

- Should the availability of Sunrise registrations only for "identical matches" (e.g. without extra generic text) be reviewed?
- Is the notion of "premium names" relevant to a review of RPMs, and, if so, should it be defined across all gTLDs?
- Following from Question 2, should there be a mechanism to challenge whether a domain is a 'premium name'?
- Should there be a specific policy about the reservation and release of "reserved names" (e.g. modification of Section 1.3.3 of Specification 1 of the current Registry Agreement)?
- Should there be a public, centralized list of all reserved trademarks for any given Sunrise period?
- Should holders of TMCH-verified trademarks be given first refusal once a reserved name is released?
- Should Sunrise periods continue to be mandatory? If so, should the current requirements apply or should they be more uniform, such as a 60-day end-date period?
- Whether and how to develop a mechanism by which trademark owners can challenge Sunrise pricing practices that flout the purpose of Sunrise
- Whether more can be done to improve transparency and communication about various Sunrise procedures

Potential issues concerning the Trademark Clearing House (TMCH):

- Should there be an additional or a different recourse mechanism to challenge rejected trademarks?
- Should further guidance on the TMCH verification guidelines for different categories of marks be considered?
- Should the TMCH matching rules be expanded, e.g. to include plurals, 'marks contained' or 'mark+keyword', and/or common typos of a mark?
- Should notices to the trademark owner ought to be sent before the domain is registered?

Additional Questions and Issues

- Do the RPMs work for registrants and trademark holders in other scripts/languages, and should any of them be further "internationalized" (such as in terms of service providers, languages served)?
- Do the RPMs adequately address issues of registrant protection (such as freedom of expression and fair use?
- Have there been abuses of the RPMs that can be documented and how can these be addressed?
- Is there a policy-based need to address the goal of the Trademark PDDRP?

- Are the processes being adopted by Providers of UDRP, URS, and TMCH services fair and reasonable?
- Are the Providers' procedures fair and equitable for all stakeholders and participants?
- Are the Providers consulting with all stakeholders and participants in the evaluation, adoption and review of these new procedures?
- Are the Providers training both the Complainants and the Respondents, and their communities and representatives, fairly and equally in these new procedures?
- Are Providers exceeding the scope of their authority in any of the procedures they are adopting?
- Is ICANN reaching out properly and sufficiently to the multi-stakeholder community when such procedures are being evaluated by ICANN at the Providers' request? Is this an open and transparent process?
- What remedies exist, or should exist, to allow questions about new policies by the Providers offering UDRP, URS and TMCH services, and how can they be expeditiously and fairly created?
- What changes need to be made to ensure that procedures adopted by providers are consistent with the ICANN policies and are fair and balanced?
- Examine the protection of country names and geographical indications, and generally of indications of source, within the RPMs
- In the light of concrete cases (case law) and from the perspective of owners of protected signs and of marks, which are the identified deficits of the RPMs?
- Assess the benefit of the Arbitration Forums self-reviews, including the *WIPO Advanced Workshop on Domain Name Dispute Resolution, May 2015* [italics in original], in which inconsistencies of decisions, including in the free speech/freedom of expression area were candidly discussed and contemplated
- Are recent and strong ICANN work seeking to understand and incorporate Human Rights into the policy considerations of ICANN relevant to the UDRP or any of the RPMs?
- Are there any barriers that can prevent an end user to access any or all RPMs?
- How can costs be lowered so end users can easily access RPMs?