

## **Feedback on URS and Charter Questions from ICANN60 on 28 October and 02 November**

### **Proposed New Questions:**

#### Questions from ICANN60:

- Since a domain can be registered for up to 10 years, can a registration that is subject to URS complaint before the determination, or even without filing a response, extend the domain registration up to 10 years? It is unclear if the losing respondent had renewed prior to the URS decision. That for a period of 10 years whether then the domain would be suspended for 10 years?
- What's the preparation for the URS providers? We know a lot about the preparation for the UDRP providers – but what's the backgrounds of the URS providers and what's their preparations? So, the arbitration form self-reviews might be – or whatever's in the first question – might be useful as guidance for other questions we might asking. Kind of how is the UDRP doing it? Should the URSP be doing something similar?
- A more general question which is whether there should be some kind of alternative to the URS – a summary procedure in the UDRP. In the UK and (unintelligible) that's what they have. You can ask for a summary judgement and then basically it's not motivated and obviously the fee is lower. A number of other CCTLD's apply this model. So, that may be something that this working group would like to look into.
- Suggestion for the Sub Team to create a question re: Technical difficulties for the registry operator to implement URS. Specifically, under URS the registry operator is required to suspend the domain name, however registry operators do not control the DNS and so it's really complicated for a registry operator to really learn how this works.

#### Proposed Questions from the RPM PDP Working Group list after ICANN60:

- Whether the type of clear and convincing evidence that you are allowed to submit (within whatever size limitation) in support of the URS should be limited as implemented to a printout of the website, or is this far too limiting, and really should be content neutral to cover the evolving threat landscape like spear phishing attacks, etc.?
- Whether any superfluous overlap is created between:
  - A respondent's right to *de novo* appeal within fourteen days from a determination; versus
  - A respondent's right to *de novo* review within six months from a notice of default; versus
  - A respondent's right to request a seven-day extension to respond during the response period, after default, or not more than thirty days from a determination.”

#### Comments on the above proposal:

The entire section in the Rules (Rule 6) relating to Default is impractical. Consider 6.1: ... [if] Registrant does not submit an answer, the Complaint proceeds to Default.” Default is not a thing. There is a Determination, but all Complaints go to

an Examiner. (See 6.3) I protested this when it was created as nonsensical then and I maintain it's still nonsensical. It simply doesn't **\*do\*** anything.

Rule 6.2: "Registrant will be prohibited from changing content..." - is not enforceable. First, it's not directed to anyone, and second, only the webhost can prohibit content changes...not a registry or registrar.

Rule 6.4: This one is just weird. I am not even sure what the compromise was here. If you're a registrant and your super important domain name was taken away and its either a) worth a lot or b) your business site, I hope you'd notice in less than six months.

Rule 6.5 involves a giant headache for registries and registrants who have to somehow retain the nameserver information for these sites for at least six months after a Default. Surely the technically-minded registry operators on the WG can suggest a more efficient way to do this?

Rules 6.4 and 6.5 contradict:

6.4 --Registrant has a right to **seek relief from Default via de novo review**

6.5 --filing a Response after Default is **not an appeal**

If we can clean up the intent and practice relating to Defaults (your #2), then at least # 1 in your list makes sense because it applies to both parties.

Regarding #3, the first extension mirrors UDRP and the other two come after notices are sent out (so as options to hold on for a second if the registrant somehow didn't get the first notices). I don't think there is so much overlap as just administrative inconvenience and uncertainty for complainants.

## Comments on Specific Charter Questions:

### Response to Complaints; Defenses; Standard of Proof

*Is the URS' 'clear and convincing' standard of proof appropriate?*

General Comment: The rationale for the clear and convincing standard of proof in a URS case rather than the preponderance of the evidence, burden of proof an UDRP, is that the URS should be a supplement to the UDRP for a clearly black and white case if not shaded gray cases. In which basically when you look at the registration it is just about evident on the face that it is infringing.

*Should the Response Fee applicable to complainants listing 15 or more disputed domain names by the same registrant be eliminated?*

- Is the question intended to suggest that the response fee it should be put forward as a question when the sub group [team] gets going?
- The sub-team would be free to modify this question to include all possibilities from requiring response fee. Are we eliminating the response fee in all cases? Or adjusting this 15 to a higher or lower number? So, we will leave that to the sub-team when they get to it.

### Remedies; Appeals; Costs

General Question: Does the infringing site stay up for six months appeal period? Response: Okay, well since the answer is the chat, I won't make up my own but I'm pretty sure once it's determined it goes to that URS page, it's redirected, that the registrant who's found to have acted in bad faith registration and use that content is taken down.

*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?*

- This sort of remedy of perpetual block to basically block a domain like (unintelligible) normal process the name will be blocked only for the period of time that the domain name holder has registered.
- [With] Perpetual block but I understand is that if you win the URS that name will be blocked forever or for a longer period of time that goes beyond the time that the domain name holder has registered for. This goes beyond the scope of the URS.
- Note that under the current URS that the complainant has the right to extend the suspension for one additional year beyond what the domain was registered.
- So in the event that the trademark registration that the (unintelligible) was abandoned the trademark owner would lose their rights possibly. But the lock would remain perpetually despite the fact that the complainant would no longer have rights.
- The problem goes both ways. I think it is provided that the trademark may not be no longer there if it is at perpetual block. And the fact that I am blocking a domain name that was supposed to be already open to the public is also problematic.

- If domain name holder only has it for two years and (unintelligible) perpetual block I am taking out of these probably legitimate users or legitimate holders. So if you want to take it back for you just UDRP.
- The idea of this is that I am blocking someone that is specifically using it in a harm's way to my trademark. So I think it goes overreach in both sense.
- If there was any sort of talk of having a perpetual block there would also be a mechanism that would need to be put in place.
- So if someone did have legitimate rights they could then put that forth and obtain the domain for legitimate rights. Similar to how I think (unintelligible) defensive blocking mechanism.
- If you own a blocked domain you have paid for it but someone comes along. It is a third party and they have legitimate rights. They can establish those legitimate rights and obtain the domain for legitimate purposes.
- We can look at the private mechanisms for some precedence for adjustments we might think about when we get into the substance of URS after the sub-team develops the refined questions.

*How can the appeals process of the URS be expanded and improved?*

- Out of 780 cases filed of which I think just over 700 were decided against the registrant. There has been some use but very limited use of the appeals mechanism.
- 14 cases in which an appeal was found which is somewhat more substantial use of the appeals process and for a RPM that has a fairly high burden of proof.

Misuse; "Repeat Offenders"; Language

*Has ICANN done its job in training registrants in the new rights and defenses of the URS?*

- At least one quite large European company requested us as registry to give explanation why the domain is still in duress and they don't have ability to register it. It means they decided to use URS instead of UDRP. I am not sure if it is an abuse or misunderstanding from their part. But it could be due to lack of training of registrants.
- And if we see like pattern that this particular party registered 10 or like 12 domains and they lost it as a result of URS process. So my thinking was in case they had the same repeated cycle of doing wrong things.
- I would presume a compliant would rely upon an attorney to file a URS. And if an attorney reads the URS policy they should note what the available remedies are. And if they have hired an attorney who doesn't understand it they have not hired very good counsel.
- It is quite clear when you read the policy what the available remedies are. Anyone who files a URS thinking that they can get a domain transfer to their control for proactive use has been very poorly informed by counsel.
- Do we need to add a question that says, "Has ICANN done a good job of training complainants concerning what the remedies are under the URS?"

*What sanctions should be allowed for misuse of the URS by the trademark owner?*

- On the URS why can't we simplify the process for them as like sanctions?
- I think that is going to need to be massaged by the sub-team because they are already built into the URS sanctions for abusive complainants.
- So the question needs to be rephrased to something like are the available sanctions appropriate? Should they be narrowed or expanded or whatever. But the question as stated kind of implies that there are no sanctions available for abuse of the process when they are already are.

*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 there be more severe sanctions if you repeatedly abuse the URS as a complainant.
- Unclear whether repeat offenders means repeat complainant offenders, you know, complainants that repeatedly misfile.
- Or does it mean the repeat cyber squatter offenders?
- This question is about multiple abuse by the respondent for want of a better word. The two sides of the same coin. Because of course there are sanctions in relations to misuse of the URS by the trademark owner but there are no sanctions if you are a repeat offender, a multiple cyber squatter.
- If a registrant has a history of losing RPMs of being judged as cyber squatter multiple of times. Then the burden of proof, the meeting of the burden of proof has eased considerably in terms of bad faith use and registration.
- As to whether there should be additional sanctions that is open for discussion by the sub-team. But I think clearly you have identified a question that needs to be refined or split into two parts. Because if it is not clear to you two experts it is not a clear question. It needs to be made better.
- Could we split this question into two – just for sake of clarity – in like the first about abuse by the complainant – the second is abuse by – by the frequently losing party.

*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?*

General Question: Why was the complaint forced to be in English? Isn't that detrimental respondents from non-English countries? Response: We'll look into that and it's certainly a topic that would be relevant for the working group to look at going forward. It happened sometime during the development of the rules and we will look into that background to find the documentation for it. But to the extent it makes a difference it was developed for the rules rather than the procedure

Questions about Providers (applicable also to the Uniform Dispute Resolution Policy in Phase Two of this PDP)

General Question: Are we going to review/discuss the providers' supplemental rules for example to what (extent) may the supplemental rules effect the policy? Response: At some point in our review of the URS, we more likely than not will review those supplemental rules just to make sure that they're simply administrative in nature and have not in some way changed the balance set in the URS policy.

*Assess the benefit of the Arbitration Forums self-reviews, including the WIPO Advanced Workshop on Domain Name Dispute Resolution, May 2015, in which inconsistencies of decisions, including in the free speech/freedom of expression area were candidly discussed and contemplated.*

- I would like to move that this first question be stricken. First of all, it's outdated – second it involves CDRP – third it's inaccurate.
- Well, you've mentioned three strikes against it and it certainly is clear on its face that it's outdated since we are now in 2017 and WIPO was issued a – the three zero version of guidance.
- I would expect the working group to get into this – that there are very explicit requirements for URS providers to follow set forth in the applicant guidebook and in addition to that there URS providers unlike UDP providers are under a rudimentary contractual relationship with ICANN in the form of a memory of understanding which imposed additional requirements as to how they administer the – this RPM. So, I would expect in the course of our work on the URS we'd be taking some look at whether the providers are actually acting in a way that is consistent with both the applicant guide book and MOU requirements.

*Are Providers exceeding the scope of their authority in any of the procedures they are adopting?*

- The Sub Team should consider bifurcating this question. The first part would be whether the providers are administering the URS in a manner that's consistent with the requirements and the guide book and the MOU. The second would be whether there are supplemental rules which are supposed to be administrative rules are in any way inconsistent with those provisions and we certainly will look into the relationship between ICANN and the providers.

*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 procedures are evaluated by ICANN at the request of the providers? I have no idea what that means.
- This question either needs to be discarded or radically revised because it is not clear whether it's talking about ICANN the organization or ICANN the multi-stake holder community under a GNSO charter is conducting this RPM review. So, we [the RPM

PDP Working Group] are reaching out to all members of the community to provide us with input on how the URS is doing. If it's talking about ICANN organization it is not clear that it's their job.

- But if it's something about how does the PDP process operator get input from the multi-stake holder community – that is not a question for this RPM PDP working group to be asking or answering. I mean that is a question that goes to the heart of PDP process.