Presentation from the Uniform Rapid Suspension (URS) Documents Sub Team

Status Update Presentation to the Working Group

Wednesday, 01 August 2018

ICANN

Working Methodology & Current Status

⊙ **Current Status:**

- Identified various data sources corresponding to the URS Topics Table agreed by the Working Group, including:

  - URS Data Staff Compilation Report (v. July 9, 2018)
  - URS Practitioners Survey Results (v. June 12, 2018)
  - URS Providers Survey Results (v. June 15, 2018)
  - Staff Summary Table of De Novo Review cases
  - Staff Summary Table of Claims Denied/Respondent Prevailed cases
  - Rebecca Tushnet's research

    – *See https://community.icann.org/x/NgdpBQ for all documents*

- Reviewed relevant results from each data source, including specific URS cases (Appeals, De Novo Review, Respondent Prevailed); and

- Developed specific potential recommendations for full Working Group consideration

Section (Topic) A: The Complaint

- <u>Administrative Review</u>: data (especially Providers' feedback) did not indicate need for additional policy work

- <u>Expanding standing</u>: to allow marks that were abusively registered but not confusingly similar – suggestion noted, but data (especially Practitioners' feedback) did not indicate need for additional policy work

- <u>Filing Period & Word Limitation for Complaints</u>: Practitioners' feedback noted

  - NB: any additional policy recommendations must keep in mind that URS is intended to be a lightweight alternative to UDRP

- <u>Types of Marks</u>: no data to show this is an issue; better addressed as part of Trademark Clearinghouse discussion

Action Item: staff to find out if decoding software (public or from TMCH) is available to read SMD files, and whether it is possible to add relevant trademark info to an SMD file

Section (Topic) B: Notice

◉ <u>Notice to Respondents</u>: Providers' feedback may determine need for additional policy work (no specific issues identified by Practitioners)

◉ <u>Role of Registry Operators & Registrars</u>: Providers' feedback indicates this generally works well though some operational/compliance issues noted

Action Item: contact registry operators of the top (e.g., 25) gTLDs where URS cases have occurred (noted in the URS Staff Compilation Data Report) about:

○ Reported difficulty/delay in responding to queries, e.g., registrant verification and lock requests, by some registry operators;

○ Reported difficulty in some cases with implementing settlements involving a transfer at the registrar level

○ Different registry email addresses from the contact noted in ICANN's repository; need for reminders concerning compliance with response & implementation issues

NB: timing TBD depending on Sunrise/Claims survey issuance dates

Section (Topic) C: The Response (Duration, Fees, Other Issues)

- ⊙ <u>General</u>: based on Practitioners' survey results & Sub Team review of cases where a Response was filed, no additional policy work seems to be needed

  Of the 827 cases decided through end-2017:

  - o 27% of the cases saw a Response filed to the Complaint
  - o 23% of the cases saw a Response filed within the initial 14-day response period
  - o 13% of the cases where a Response was filed resulted in the claim being denied

- ⊙ <u>Response Fee for 15+ Disputed Domains</u>: review of the six "15+" cases (all default) did not indicate any basis for making policy conclusions

  - o This can be flagged for community input in the Phase 1 Initial Report

Section (Topic) D: The Standard of Proof

- ⊙ <u>Change to the Clear & Convincing Standard</u>: Review of Practitioners' survey results & 59 cases where Respondent prevailed do not indicate a need to change the standard

  - ○ 28 cases saw a Response filed
  - ○ Remaining 31 cases (no Response filed) saw Complainant's claim denied due to inability to satisfy one or more of the three prongs

- ⊙ <u>Creation of an Examiners' Guide</u>:

  - ○ Checklist of basic elements that should appear in any Determination (see IRT Report), e.g.,

    - • Trademark(s) at issue, domain(s) in dispute, relevant dates (filing, Default, Appeal, etc.), grounds/rationale for decision corresponding to the three prongs

  - ○ Unlikely to be as comprehensive as the WIPO UDRP Overview
  - ○ Should not attempt to draw lines around what is a "hard" vs "easy" case

Section (Topic) E: Defenses

- No indication from data or Providers' & Practitioners' feedback that there is a substantive issue to be addressed
- On delay/laches: no data to indicate that policy work is required
  - Search of FORUM database reveals no cases where "delay" or "laches" was an issue
    - (Note that the URS is still relatively young)

Section (Topic) F: Remedies

- Practitioners' feedback, disputed domain lifecycle (post-suspension), IRT/STI/CCT-RT/INTA Survey reports indicate that suspension remedy is "working as intended"
  - Full Working Group to deliberate broader question of whether any policy change is needed to the suspension remedy, taking into account other Sub Teams' reports
    - It is noted that some stakeholders wish to see it changed
    - This can be flagged for community input in the Phase 1 Initial Report
    - NB: any additional policy recommendations must keep in mind that URS is intended to be a lightweight alternative to UDRP

- One possible recommendation (not affecting the suspension remedy) could be to disallow domains emerging from suspension being listed by drop-catch services

Section (Topic) G: Appeals
Section (Topic) H: Overlapping Process Steps

- ⊙ Reviewed all 14 Appeals and 30 De Novo Review cases
  - ○ Complainant prevailed in 12 out of 14 Appeals
  - ○ Complainant prevailed in 24 out of 30 De Novo Review cases

- ⊙ Administrative Recommendations:
  - ○ Suggest form/template elements to be included in Determinations – to ensure clarity, consistency and precision (e.g., appeals-specific nomenclature)
  - ○ For appeals: suggest that procedural history consistently indicate what happened previously (e.g., Default) and subsequently (e.g., Appeal)

- ⊙ Other Recommendations:
  - ○ Sub Team noted that there are up to three instances where, for a defaulting Respondent, an examination of the merits of the case can occur (default, final (up to 1 year if extended), appeal);
    - • Complainant has no explicit opportunity to address a response filed for a de novo review
      - – Working Group to deliberate this as a broader policy question

Section (Topic) I: Costs

- <u>On Response Fees</u>: see Section C for recommendations

- <u>On "loser pays" model</u>: full Working Group to determine if policy deliberations/recommendations are needed, based on feedback from Providers & Practitioners
  - Complainant prevailed in 12 out of 14 Appeals
  - Complainant prevailed in 24 out of 30 De Novo Review cases

Section (Topic) J: Language

- <u>Recommendation</u>: consider developing guidance for Examiners to assist with deciding what language to use in the URS proceeding and Determination (e.g., as in WIPO Overview § 4.5)
  - Several cases noted possible difficulties with language for some Respondents (staff is currently reviewing these cases as coded by Professor Tushnet)
  - Determinations in all 14 Appeals and 29 out of 30 De Novo Reviews were issued in English
  - Providers' feedback and related follow up by Providers' Sub Team may identify other specific issues for policy/operational changes

Section (Topic) K: Abuse of Process

- ◉ No specific recommendation from Documents Sub Team based on available data
  - ○ Providers' feedback has detailed information about current practices
  - ○ No determinations of an abusive complaint have been made
    - • A few Respondents have alleged that Complainants have engaged in abuse of process

Section (Topic) L: Education & Training

- ◉ Documents Sub Team has raised the idea of someone (ICANN? Providers?) creating a (possibly multilingual) basic FAQ for case parties

- ◉ Providers Sub Team may have additional suggestions

Potential Recommendations

Section (Topic) M: URS Providers

- ⊙ No specific recommendation from Documents Sub Team based on available data

- ⊙ Providers & Practitioners Sub Teams may have additional suggestions

Section (Topic) N: Alternative Processes to the URS

- ⊙ No specific recommendation from Documents Sub Team based on available data
  - ○ Note that URS is already an alternative to the UDRP

Thank You and Questions