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Proposal for URS Policy and Operational Recommendations

IMPORTANT

- *This form is used by RPM Working Group members to submit proposals for URS policy and operational recommendations. Please submit to ariel.liang@icann.org.*
- ***Proposals submitted not using the required form will not be in order and will not be discussed.***
- ***One individual form must contain only one proposal for one recommendation.***
- *Answer to every text field is required and mandatory(*).*
- *As soon as practical after receiving the submissions, staff will forward the proposals to the Working Group email list.*
- *The final date for submission of member proposals is **COB on Friday, 31 August 2018**. **Any proposal received after that date will not be in order and will not be discussed.***

I. General Questions

*1. Proponent's Full Name

If this proposal is developed by more than one WG member, please write the full names of all proponents involved

George Kirikos_____

*2. What type of URS recommendation are you proposing?

_X__ Policy

___ Operational Fix

___ Other (please specify: _____)

*3. What URS recommendation are you proposing?

Please be succinct as well as substantially specific and not general in nature. One proposal for one recommendation only.

[NB: Topic can be deferred to Phase 2 of our work, as it applies to both the URS and the UDRP.]

This is the first of three related proposals (alternatives to one another) to address the issue of access to the courts for de novo review on the merits of complaints.

I propose that the URS and UDRP be modified to implement a "Notice of Objection" modeled on a similar appeal mechanism in the British Columbia Civil Resolution Tribunal (see: https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/#what-if-i-dont-agree-with-the-decision) to set aside ADR decisions by paying a (refundable) fee, allowing disputes to proceed to courts with a clean slate, without having the ADR outcome interfere with the court case. Court costs can be assessed later as a penalty, at the discretion of the courts, if the person who filed the notice of objection did no better in court than in the ADR.

II. Justification Statement

IMPORTANT

- Must be no more than **250 words** in length for each of two sections below.
- Should state the operational or policy rationale for the proposal.
- Should cite any evidence in support of it. Such evidence may be information developed by the Sub Teams or documented in other sources.

*4. What is your rationale for the proposal? (250 words max)

As discussed at length in November 2017 at: https://mm.icann.org/pipermail/gnso-rpm-wg/2017-November/002585.html there was an underlying assumption that registrants could challenge a URS or UDRP decision in court, when these policies were being contemplated. In some jurisdictions, that has proven false, e.g. in the Yoyo.email case in the UK, also discussed at http://www.circleid.com/posts/20180103_the_udrp_and_judicial_review/ causing registrants to be seriously affected. The root cause of this issue is the role reversal that takes place, whereby a registrant is the defendant in the URS/UDRP, but under current procedures, would need to be the complainant in court to challenge an adverse ADR outcome. If a "cause of action" doesn't exist (e.g. in the UK) to bring a dispute in that jurisdiction, then the URS/UDRP outcome becomes final, which thwarts the intent and "bargain" behind the URS/UDRP, that the disputes would always be able to be determined de novo on the merits by the courts. The Notice of Objection system completely (and elegantly) eliminates that role reversal, as the TM holder would always be the complainant in court, just as would be the natural state if the URS/UDRP never existed. The Notice of Objection fee should be set comparable to the court fees in filing a statement of defense, to prevent any gaming. Futhermore, gaming is reduced due to the cost consequences upon a party making the notice of objection if they fail to do better in court than in the ADR.

*5. What evidence do you have in support of your proposal? Please detail the source of your evidence. (250 words max)

The court case (and external legal commentary) for the Yoyo.email dispute was found in the post at:

https://mm.icann.org/pipermail/gnso-rpm-wg/2017-November/002585.html

and in David Maher's article at: http://www.circleid.com/posts/20180103_the_udrp_and_judicial_review/

From discussions in the IGO PDP, Paul Keating had mentioned that there are similar problems in Australia.

While this major problem for registrants has only been documented in relation to the UDRP, it applies equally to the URS (new gTLDs are generally less valuable, and the URS is newer, so the issue hasn't arisen there yet, as there have been fewer domains where owners sought appeal of URS outcomes).

The proposed policy change/solution is consistent with a proven procedure adopted in an "offline" jurisdiction (British Columbia, Canada) made by lawmakers – instead of reinventing the wheel, we can copy successful mechanisms of others. Due to the nature of the solution, the root cause of the problem (role reversal) is obviously eliminated, and so this "quirk of process" (whereby a registrant is essentially deprived of a de novo court decision on the merits of the dispute) no longer would exist if adopted.

III. Pertinent Questions

- *The proposal must address the following three questions*
- *Can be no more than **250 words** in length for each of two sections below.*

*6. Where and how has this issue been addressed (or not) by the Working Group or the Sub Teams to date? (250 words max)

The underlying problem was first discussed in November 2017 in this PDP, as noted in the email to the mailing list posted at:

https://mm.icann.org/pipermail/gnso-rpm-wg/2017-November/002585.html

and ensuing thread. Various suggestions were briefly mentioned on the preceding conference call (that email followed from a discussing a few days orally), but no formal policy proposal was made by the Sub Teams or Working Group until now. [would be topic G.1]

*7. Does the data collected and reviewed by the Sub Teams show a need to address this issue and develop recommendations accordingly? (250 words max)

Sub Teams didn't address the issue. As noted when this came up on the call of August 8, 2018 (see the Adobe Connect chat transcript, pages 2-5 linked from https://mm.icann.org/pipermail/gnso-rpm-wg/2018-August/003210.html), this topic had been previously listed as "External appeal via filing court proceedings" on the list of questions, but apparently simply disappeared from consideration (and data hadn't been collected).

*8. If not already addressed above, on the basis of what information, gathered from what source or Sub Team, is this proposal based, if any? Please provide details. (250 words max)

Addressed above.