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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?

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 third 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 so that in the event that a court finds a registrant has no cause of action to bring forth an appeal of an adverse URS/UDRP ruling in that jurisdiction, that the permitted "mutual jurisdiction" be expanded to always include the United States as a potential jurisdiction that can be utilized by a registrant, with the registrar maintaining the "status quo" pending resolution of the US court case.

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 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.

This solution was actually first put forward by Paul McGrady when the problem was identified. While I don’t think that this solution is as elegant as the Notice of Objection system (first choice solution to this problem, less gaming, cleaner, faster), or even the “Vitiation” solution, both proposed separately, I do think it’s worth putting on the record, and considered, although it has a bias towards US law. The ACPA explicitly recognizes a cause of action.

These should all be considered in Phase 2 of this PDP, along with any other potential solutions.

***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 would work, given the ACPA explicitly allows these cases to go forward in US courts (the cause of action would exist). However, it might not be as preferable, for a global policy-making organization, to adopt such a solution that is so US-centric, when superior alternative options are available which explicitly eliminate the root cause of the problem (the role reversal), as the Notice of Objection system and even the “vitiation” solution do (proposed separately), and that are not US-centric.

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.