

Registries Stakeholder Group Meeting with ICANN

Marina del Rey

13 April 2010

PDDRP Agenda

1. ICANN involvement at outset.

- must be an affirmative commitment by ICANN to do this prior to a 3rd party initiating a complaint under the PDDRP
- Supported by RySG, INTA, IPC, Nevitt, IOC
- No comment opposed involvement

2. ICANN must be more involved in Determining the Remedies Applicable to Registries for violations of the PDDRP.

- Reaffirm statements made in Nairobi by ICANN staff that ICANN alone has the power and discretion to enforce any remedies against Registries and that it will not rely on PDDRP panelists to make such determinations
- Relates to #3 below; If ICANN does not have final word on remedy, then decision/remedy will not be able to be challenged under contract.

PDDRP Agenda

3. PDDRP must not replace contractual dispute resolution mechanisms.
 - Registry must be able to challenge substance of decisions along with proposed remedies under dispute resolution mechanism in contract.
 - Only way to challenge remedies is for ICANN involvement.
 - ICANN must acknowledge that all Determinations and remedies recommended by the PDDRP (or implemented by ICANN) shall be entitled to De Novo review through the dispute resolution processes set forth in the Registry Agreement. (See RySG redline)
4. Ability of Panel to award monetary damages must also be removed
 - Supported by RySG, WIPO, Nevitt comments
 - Determination of damages is extremely complex and usually only done by extensive discovery, expert testimony, etc.

PDDRP Agenda

5. Requirement for Registries to put up 50% of costs
 - Must be removed.
 - Not required in any other dispute proceeding, including the UDRP, URS or for that matter in any court proceeding.
 - Can and will be used as a tool by overzealous trademark owners to extort a settlement or other undesirable outcome.
6. Must specify Safe Harbors for Registries
 - Like the UDRP, examples should be given as to what would be affirmative defenses for Registries; otherwise it will take expensive litigation to determine this.
 - Still unclear to the RySG what would constitute a pattern of bad faith, making the necessity of having safe harbors that much more important.

PDDRP Agenda

7. Quick Look / Standing

- Quick Look should not be substitute for ICANN action;
- Quick look in ICANN draft too weak; only requires that complainant be a “trademark owner”; Trademark owner must allege with specificity that one or more of its own legitimate trademarks have in fact been materially impacted by a Registry Operator’s affirmative conduct.
- Trademark must be from a jurisdiction that actually conducts substantive review.

PDDRP Agenda

8. Number of panelists should be at least 3

- Supported by RySG, INTA, IPC, NCUC, Nevitt,

9. Additional Topics in RySG Redline

- Requirement to consult with Registry prior to bringing action.
- Time period for Registry to respond to a complaint.
- Reply by Complainant shall not introduce new facts.
- Availability of a hearing.
- Payment of penalty fees should not be to provider

Unilateral Amendment Agenda

1. Review & Discussion of Public Comments
2. Progress Report from John Jeffrey re. Nairobi commitment of Staff to work on this issue.
3. Discussion of Concerns of the RySG & Others
 - a. Need for global amendment?
 - b. Innovation and diversity concerns – One size does *not* fit all
 - c. Limitations on amendments:
 - “Picket Fence”
 - No change to Consensus Policy (including Emergency Policy)
 - Fees paid to ICANN
 - Term of Agreement
 - Other

INTA Comments - Recommendation # 1

- “. . . ICANN has the ability to unilaterally amend a uniform registry agreement with respect to provisions that are critical to the security and stability of the Internet DNS, while carving out certain provisions for negotiation between ICANN and individual registry operators.”
 - *The RySG agrees & notes the base agreement already allows this via the emergency specification process.*

INTA Comments - Recommendation # 2

- “. . . at least the following four provisions should be subject to unilateral amendment by ICANN at anytime in order to address potentially changing circumstances that jeopardize the stability and security of the DNS: 1) Right to Audit; 2) Private Registration and Registrar Data Escrow Requirements; 3) Operator Training and Testing Requirements; 4) Data Retention Requirements.”
 - *The RySG notes:*
 - *Right to audit is already covered.*
 - *Private registration is a consensus policy issue.*
 - *Escrow is already required.*
 - *Data retention requirements are already required.*
 - *Operator training & testing requirements need clarification.*
 - *Other areas noted by the IPC could be discussed.*

INTA Comments - Recommendation # 3

- “. . . the terms in any new gTLD registry agreement for certain types of registries may not be subject to standardizations.”
 - *The RySG agrees.*

RrSG Comments

- “. . . the RrSG reaffirms its position that any process which permits unilateral contract amendments is unacceptable.”
 - *The RySG previously stated a similar position.*

Jon Nevett's Comments

- “There is no need for a new amendment process on top of the three that already exist -- agreement between the registry and ICANN; Consensus Policies through community Policy Development Process; and Temporary Policies established unilaterally by a two-thirds vote of the ICANN Board.”
 - *The RySG agrees.*
- “For issues outside of the picket fence and outside of the Consensus Policy or Temporary Policy procedures, there may be some benefit in a new amendment procedure to assist with scalability and consistency among registry agreements. Such a new procedure should not -- in any way -- grant ICANN the ability to unilaterally amend the registry agreement. Rather, it should be a fair process that includes consensus support from the registry community, as well as input from the rest of the community. Moreover, the subject matters of any new procedure should be limited and specifically outlined in the registry agreement. Some issues, such as registry fees to ICANN, the scope of Consensus and Temporary Policies, the term of the agreement, and the subject matters covered by Consensus and Temporary Policies should be specifically exempt.”
 - *Assuming it is decided that there is a need for unilateral amendments in some very limited cases, the RySG agrees.*

BC Comments

- “The BC believes that neither the ICANN staff nor the Board should be able to amend registry agreements without community involvement and input from registry operators. All changes -- regardless of the issue -- must be transparent and exhibit the appropriate level of accountability to the community.”
 - *To the extent that unilateral changes are needed at all, the RySG agrees.*
- “ICANN needs to strike a balance in the manner in which registry agreements are amended. In the BC¹'s view, neither the current ICANN proposal nor the RySG proposal succeeds in doing so yet.”
 - *The RySG is here to work on solutions.*

Richard Tindal's Comments

- “. . . the unpredictability and risk to registries and their customers dictates that any change mechanism for new TLDs must be intrinsically conservative (difficult to unilaterally impose on registries). On balance, I prefer the mechanism proposed by the Registry Constituency at the Washington DC consultation in January this year. Namely, a good faith negotiation every three years to effect changes. ”
 - *The RySG agrees.*