

REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP) (15 Feb.-1 April 2010)

Source: The text of the comments may be found at <http://www.icann.org/en/public-comment/#rrdrp>.

SUMMARY OF COMMENTS

General Process Comments

Support for RRDRP. It is helpful to have a mechanism in place that empowers communities after the community-based gTLD is established, inasmuch as it is crucial that the registry uphold the commitment it has made to representing the community in question and fulfilling the obligations inherent in that commitment. *NAF (31 Mar. 2010)*. The RRDRP is necessary to preventing abusive practices in domain name registrations, but as proposed the RRDRP could be more balanced in its approach. *INTA Internet Committee (1 April 2010)*.

Seek further comment on the RRDRP. The RRDRP should not be included in the 4th Applicant Guidebook; this proposal requires further deliberation and feedback. The proposal raises concern that it will jeopardize the rights of noncommercial and individual users. NCUC is concerned that by allowing “community” objections to new gTLDs, ICANN invites lobbying for gTLDs and an opportunity to give special privileges to an arbitrary and immeasurable “community” at the expense of noncommercial, non-institutional, new innovative “communities”. Arbitrary, unquantifiable and broad-based “community” objections may be a remedy that is worse than the disease it seeks to cure. *NCUC (2 April 2010)*.

Domain name registration “policing”. The RRDRP encourages “policing” of domain name registrations by registries and gives registries no other option but to proceed to check content; this is highly illegitimate. First, registries are not meant to perform such control and asking them to do so upsets the registration culture and ultimately harms users. It will raise costs of registrations and create an environment based on fear and intimidation. Second, how does ICANN expect registries to understand the needs, particularities and ethos of the various communities? With this procedure it needs to be anticipated that registries will perform domain name checks without giving regard to communities and their needs. *NCUC (2 April 2010)*.

Abuse of process concerns.

The proposal gives too much discretionary power to providers and their examiners, raising abuse of process concerns. It is unfair to provide examiners with discretion to decide whether evidence in the original language should be accepted, whether discovery will be part of the dispute or whether there will be any hearings. The proposal fails to provide incentives for fair dispute resolution as it fails to account for the protection of community standards that have been established by national and international laws. By giving such discretion to panels, ICANN is proposing a system that encourages the abuse of this discretion depending on which of the parties the examiner will seek to satisfy. *NCUC (2 April 2010)*.

Add an internal appeals process. The RRDRP should have an internal appeals process and should encourage parties to use it. A court procedure would be very expensive and arduous for many communities. Objections should not be taken lightly, as this concerns the rights of communities that have been established through norms and laws. To think that these will be solely dependent upon a single examination by a single examiner is not only dangerous but it will create more problems than it seeks to prevent. *NCUC (2 April 2010).*

Same set of rules for RRDRP providers. CADNA questions whether it is wise for different RRDRP providers to operate under different rules; this could prove detrimental. Equality across providers will make the entire RRDRP process fairer for all participants. *CADNA (1 April 2010).*

Combine RRDRP and PDDRP. The RRDRP and Post Delegation DRP (PDDRP) should be combined. *NAF (31 Mar. 2010).* ICANN should combine the RRDRP and the PDDRP. Improvements may be realized through economies of scale by combining the procedures. The providers selected to implement both procedures will likely be the same; the procedures in both are very similar. Combining RRDRP and PDDRP ensures uniformity in the processes and reduces the likelihood of leaving any particular group without a remedy under the procedures. Combining them makes it possible for a complainant to plead alternative grounds for standing. It also eliminates the possibility that changes will unintentionally be made to one procedure and not the other. *INTA Internet Committee (1 April 2010).* Creating one procedure with registry restrictions and trademark violations as distinct causes of action could also allow dispute resolution providers to develop greater depth of experience. *INTA Internet Committee (1 April 2010).*

Do not merge the RRDRP and PDDRP. These two processes concern a different subject matter, are distinct in nature and should remain distinct in practice. The mere fact that both procedures seek to create liability for registries means nothing. To encourage a smooth environment under the new gTLD program, ICANN should ensure that the policies it seeks to create are subject-specific and do not confuse parties. Merging the two procedures would be confusing, and providers would have to deliberate with the same degree of expertise and precision on issues of both trademark law and other rights, which is both problematic and illegitimate. *NCUC (2 April 2010).*

ICANN compliance role. It is to be hoped that ICANN's compliance program will soon be robust enough to be able to promptly handle post-delegation disputes without the need for third party intervention through an RRDRP and PDDRP process. It is a concern that through establishing an RRDRP and PDDRP process ICANN may completely remove itself from addressing certain situations that initially fall squarely within ICANN's compliance responsibilities. *INTA Internet Committee (1 April 2010).* NCUC opposes the way ICANN seeks to exclude itself from the whole RRDRP process. ICANN should take responsibility in creating a safe and trustworthy environment and this policy fails to do this. *NCUC (2 April 2010).*

Analysis and Proposed Position

One group objects to the "PDDRP and not that allowing 'community' objections to new gTLDs, ICANN invites lobbying for gTLDs and an opportunity to give special privileges to

an arbitrary and immeasurable 'community' at the expense of noncommercial, non-institutional, new innovative 'communities.'" This group further objects on the grounds that the PDDRP calls for registries to police registrations and that it gives the Dispute Resolution Panel too much discretion, which could lead to abuse. While calling for an internal appeals process, the group does not believe that combining the RRDRP with the Trademark post-delegation dispute resolution procedure (PDDRP) is appropriate. (Others suggest that the two procedures should be combined and all of the providers selected for the RRDRP should follow the same procedures.) Finally the same group expresses concern that ICANN seeks to remove itself from the post-delegation process.

To clarify, the RRDRP is not a mechanisms by which to object to new gTLDs. Those objections are covered as part of the pre-delegation objection process allowing for established community-based institutions to object to an application that claims to represent a particular community. The RRDRP is limited to objections that a registry is not living up to the promises it made in its application and registry agreement.

Given that an operator of community-based registry has made promises to limit the scope of the registry, it is important that it comply with those registry restrictions – particularly to members of that community. Thus, the RRDRP envisions a WDPRS-like process as a first step to alert the registries to possible violations. Such a process could assist any "policing" it appears may need to occur. Further, the more involved portion of the RRDRP provides for an independent panel to determine if the names in the registry do not comply with the contractual restrictions. If so, it will then be up to ICANN to impose the appropriate remedy.

With respect to the comment to guard against providing the panel with too much discretion, the intent is for the Panel to have the authority to determine if a particular domain is or is not in compliance with the registry restrictions. Contrary to the suggestion that a Panel will seek to satisfy one party over the other, a Panel is a neutral body and will makes it determination on the facts of the case. If the registry is found to be in compliance with the registration restrictions in its agreement, then the complaining party has every right to claim that a Panelist abused his or her discretion. Thus, an internal appeal can be brought, but limited to the grounds of panelist bias or abuse of discretion.

At present it is not envisioned that the RRDRP and PDDRP will be combined. The type of claims are different and the processes and skills necessary for each are distinct. In terms of procedures, it is the case that the overall procedures must be followed by all dispute resolution providers and panels that will administer and preside of the proceedings. However, each provider shall be empowered to develop supplemental rules as needed.

Procedural Aspects

Standing.

The standing determination could either be done by an attorney within the provider (with the panel to ultimately review that determination in its analysis of all of the merits of the case) or the standing determination could be deferred until the panel is appointed. (In the UDRP many panelists consider the Policy para. 4(a) requirement discussing complainant's rights to be a "standing" issue—this issue is always a determination made by the panel.) If a panelist is to be selected at this point, this is the point where appointment time must be allocated (instead of 21 days being available for panel appointment later in the process). *NAF (31 Mar. 2010)*.

Paragraph 1 does not seem to comport with the next paragraph which suggests the provider is conducting the compliance review. *NAF (31 Mar. 2010)*.

There is ambiguity in the present draft as to whether individuals have standing and, if so, under what circumstances. Clarifying language is needed to confirm that standing is not limited to institutions. *INTA Internet Committee (1 April 2010)*.

Limiting standing to object to a community-based gTLD operator's ultra vires actions to only those associated with "defined communities" appears to be unduly restrictive. The fact that it is possible that the same conduct may constitute both a trademark and a brand-related community violation appears to point in favor of one procedure and procedural rules with broader standing criteria, such as likelihood of harm, rather than two separate procedures as proposed under the PDDRP and RRDRP. *INTA Internet Committee (1 April 2010)*.

Clarification on standing (para. 2). This section should point out that there will be an initial determination regarding standing, if that is the case. *NAF (31 Mar. 2010)*.

Community—clarification. It is somewhat vague in the current draft as to whether the community invoked by the objector must be the same community that the gTLD at issue was meant to serve. It appears not, but this should be clarified. *INTA Internet Committee (1 April 2010)*.

Content of complaint (para. 4). The UDRP-provided language, which includes a statement of good faith and an indemnification of the provider and panel (except in cases of deliberate wrongdoing), is effective. *NAF (31 Mar. 2010)*.

Complaint-compliance check (para. 1). The compliance check is an administrative function that panelists will be reluctant to perform and provides no consistency for complaints. The deficiency check should be done by the provider, as in the UDRP. *NAF (31 Mar. 2010)*.

Compliance check—deficiency period (para. 2). There should be a "deficiency period" as provided in the UDRP during which a complainant can remedy the defects of its case. If a complainant unwittingly omits a procedural element, dismissal without a chance to cure appears to be quite harsh. *NAF (31 Mar. 2010)*.

Complaint--service (para. 1). First, as the complaint was provided electronically, why is timing determined from the date the written materials are received at an address?

Second, the RRDRP does not require use of certified mail, so what sort of confirmation will suffice? Third, establishment of a time period upon from the date materials are received in hard copy does not allow the provider to know and set a concrete deadline. The PDDRP handles this paragraph much more simply. *NAF (31 Mar. 2010)*.

Response Service (para. 2). Why is the respondent required to submit paper copies when the complainant is not? There should be a relatively paperless proceeding, with the exception of written notices. *NAF (31 Mar. 2010)*.

Response Filing fee (para. 2). If the registry fails to pay the response filing fee, is there no substantive determination? *NAF (31 Mar. 2010)*. The INTA Internet Committee suggests that the following language be added regarding the registry response filing fee (to be similar to the statement that is included in the Complaint-Content section regarding the complaint filing fee): "At the same time the Response is filed, the Respondent will pay a non-refundable filing fee in the amount set in accordance with the applicable RRDRP provider rules. This filing fee will be the same filing fee as that paid by the Complainant." *INTA Internet Committee (1 April 2010)*.

Default. *NAF* questions the need for the default section. The point that all cases proceed to a Determination on the merits negates any effect of a provider finding of "default." The presence of any discussion in this section implies that the status of "default" holds some significance. *NAF (31 Mar. 2010)*.

"Measurable harm" description. It would be beneficial for the RRDRP to provide a more detailed description of what constitutes a "measurable harm" to the community represented by the registry. The RRDRP process should establish a clearly defined, common set of criteria upon which a complaint may be filed. This will benefit communities by allowing them to recognize the type of harm they will be able to successfully demonstrate in a complaint and not waste valuable time and resources on filing complaints that will not be examined. Additionally, the establishment of a common set of criteria could de facto influence the behavior of registries in a way that prevents them from inflicting harm on the communities to begin with. *CADNA (1 April 2010)*.

English language requirement.

This requirement for the RRDRP seems somewhat prohibitive; given the global scope of the Internet it seems to violate the spirit of equal access and inclusiveness to bar trademark owners from being able to participate in this process in their native languages. *CADNA (1 April 2010)*. Not all communities are capable of representing themselves in English; they should be able to represent themselves in their own language, which will allow them to demonstrate better their objections based on the cultural, traditional and societal needs of their communities. Language is part of these cultural and traditional needs. It is unfair to oblige them to use a language that they do not necessarily feel comfortable with or is not able to clearly demonstrate their views. *NCUC (2 April 2010)*.

Panel selection and timing.

Why can't either party select a three-member panel? Parties often believe the only way a panel can be fair is to have three members. Is it because the same Panelist will perform the compliance/standing check? Why is there a period of 21 days to appoint the panel? *NAF (31 Mar. 2010)*.

The RRDRP fails to address the credential of the examiners. ICANN should create a uniform three-member panel rule ensuring at the very least that one of the examiners is knowledgeable about and has a clear understanding of the community, its history and what it stands for. Otherwise the procedure will be unfair and to a certain extent pointless. How will examiners be able to relate to the concerns and objections of the community if they do not have a clear understanding of its history and tradition? How does ICANN expect parties to place trust on such a system, when it fails to provide them with procedures that emanate from the understanding of the needs of the community? *NCUC (2 April 2010)*.

Objection to panel selection of experts.

The provision permitting the dispute resolution provider to appoint experts on its own motion and at the parties' expense is highly objectionable. It is unfair for the panel to introduce potentially outcome-determinative testimony through an expert that neither party has solicited and which neither party will be given a chance to cross-examine. It is particularly unfair to require the parties to shoulder an unknown expense for an expert that they had no role in selecting and whose testimony they may not have even felt was necessary to decide the case. Panel selection of the expert rather than the parties also opens the door for the panelist to influence the outcome by selecting an expert with particular biases.

There must be strict limitations if the panel is empowered to choose an expert, including: (1) a predetermined scale of fees for experts so that parties can accurately assess the potential costs of bringing a case; (2) the panel's intention to appoint an expert should be communicated to the parties at the earliest possible stage, so that the parties may lodge objections; and (3) any appointed expert should prepare a report summarizing their conclusions; this report should be provided to the parties in sufficient time to allow the parties to present contrary arguments and evidence, potentially including a rebuttal from another expert. All of these materials should form the record presented to the panel for its consideration.

INTA Internet Committee (1 April 2010).

Hearings—in exceptional circumstances.

The present draft's provision on hearings appears to be too liberal in allowing hearings to take place, would could unnecessarily require resources and increase expenses. As in the UDRP rules (UDRP Rule 13), the expert should decide, in its sole discretion, whether a hearing is necessary due to "exceptional circumstances." Whatever the criteria, they should be spelled out in the rules. *INTA Internet Committee (1 April 2010)*.

Hearing costs paid by requesting party. If a party requests a hearing over the objection of the other party(ies), and the expert determines a hearing is necessary due to exceptional circumstances, the requesting party must be required to pay the costs for the hearing (including costs for a teleconference, videoconference or web-conference, and the expert fee, but excluding the non-requesting party's attorneys' fees). If the parties stipulate to a hearing, the costs should be apportioned equally. *INTA Internet Committee (1 April 2010)*.

Remedies (para. 2). Where will the list of options come from? Will the ultimate list be limited or open to the expert's imagination? ICANN should provide the universe of remedial measures that may be taken by a panelist. To whom are monetary sanctions

paid? What are the parameters? What are examples of extraordinary circumstances for which termination of a registry agreement is an appropriate response? *NAF (31 Mar. 2010)*.

Remedy—deletion of registration made in violation of the agreement restrictions. It is too far-reaching to impose an absolute prohibition on the remedy of deleting a registration made in violation of the agreement restrictions. E.g., if the registrar is the registrant of the domain name, or is affiliated with or has some other relationship that gives the registrar control over the registrant of the subject domain name, deletion of a violating registration may be a proper remedy. This scenario demonstrates the advantage of combining the RRDRP and the PDDRP. *INTA Internet Committee (1 April 2010)*.

Expert determination (para. 3 & 4).

Is there a time period within which ICANN must conduct its review of the recommended remedies? How will the panel/provider know an appropriate date for the remedies to take effect if it doesn't yet know if the panel will endorse the remedy recommended? *NAF (31 Mar. 2010)*.

To make the procedure effective, instead of the expert recommending the appropriate remedies, the expert determination should impose remedies. To clarify issues about ICANN's ability not to follow the expert determination, the following language is suggested:

“The Expert Determination and the recommended remedies found in the Expert Determination shall, absent extraordinary circumstances, be approved and enforced by ICANN. Extraordinary circumstances are circumstances such as an ICANN finding of Expert or provider bias, or other circumstances that prejudice the neutrality of the proceeding. In the event that ICANN determines that extraordinary circumstances exist which warrant not following the Expert Determination, then ICANN may ask that the matter be re-heard by another Expert or another provider as appropriate.”

INTA Internet Committee (1 April 2010).

Availability of court or other administrative proceedings (para. 2). Does this procedure specifically eliminate the possibility that the parties can formally agree to jointly stay the proceedings for a limited time? *NAF (31 Mar. 2010)*.

No RRDRP circumvention through affiliates. In no cases should the registry be permitted to circumvent the provisions of the RRDRP through the activities of any affiliated parties. *INTA Internet Committee (1 April 2010)*.

Analysis and Proposed Position

Some questions have been raised about standing and when that is to be determined. For the sake of economy, the Panel will make a finding on standing as part of its Determination. In cases where the Panel determines that a party does not have standing the Panel will not need to reach the merits of the dispute. This version of the procedure clarifies that an individual associated with a defined community may initiate a

proceeding under the RRDRP, but, that community must be the same as the community the gTLD is meant to support.

In terms of the administrative review, one party points out that the Provider, not the Panel, should conduct this review. That is the case and has been clarified in the proposal. This same party also suggests that if the complaint is deficient there should be a chance to cure without dismissal. The effect of the published process is the same: the complaint will be dismissed but without prejudice for the complainant to file a new complaint.

Some questions about the filing of the Complaint and the Response have been raised. Others have asked for clarification relating to filing fees. Those comments are well taken and the proposal has been amended and clarified in accordance with the comments.

Some have asked for clarity around the meaning of “measureable” harm. Given that the nature of each community could be different it is difficult to describe measureable harm to community members. Thus, it is left up to the Panel to make that determination.

Some have suggested that English not be the only language for the proceedings. As drafted, English is the required language, but it will be at the discretion of the dispute resolution Panel to allow for supporting materials to be submitted in another language. Holding proceedings in languages other than English could add considerable costs and time. Instead, it was decided to maintain the UDRP standard – all formal writings must be in English.

With respect to a one-member versus a three-member Panel, the proposal has been revised to allow a party to elect to have a three-member Panel, with each party selecting one and those two panelists selecting the third. The parties will be free to select panelists they feel understand the nature of the community and harm they believe they have suffered as a result of the registry’s conduct.

One party questions the Panel’s authority to appoint experts. This option is available in case the Panel truly does not feel that it has the expertise to understand the community at issue or the harm purportedly suffered by the Complainant. With the inclusion of a three-member panel, with each side selecting a panelist, the need for independent experts seems quite remote, but a Panel should have all information at its disposal to make a fair and informed Determination.

One group suggests limiting Panel discretion to allow hearings only under exceptional circumstances and that if one party requests a hearing, that party should pay for it. It is clear that the presumption is no hearing shall take place. That said, if the Panel does think a hearing is necessary or a party requests one, the costs will not be borne by one party over the other, as the intent is the prevailing party will end up not paying anything.

One party has questioned the need for an exclusive list of remedies, asked about monetary sanctions and when termination of the registry agreement is the appropriate remedy. Another party suggests that deletion of a registration should not be excluded from the list of possible recommended remedies.

The remedies listed in the proposal are not exclusive, as there are often several ways to achieve results and there is no need to exclude any possibilities. Further, in response to

comment, monetary sanctions are no longer listed as a remedy that the Panel can recommend. As for deletion of registrations, since the registrant is not a party to the proceedings, the deletion of registrations should not be something the Panel recommends. Which leads to the fact that it will be ICANN, not the Panel, that imposes the remedies as appropriate under the circumstances. It is thought that the bar would be extremely high before ICANN terminates a registry agreement for reasons provided under the RRDRP.

Any suggestion that ICANN not have authority to impose remedies and be required absent extraordinary circumstances to follow the Panel's recommendation have been significantly outweighed by competing comments over time that ICANN must impose the appropriate remedies under the given circumstances of each situation. It is settled that ICANN shall certainly accept and be informed by the Panels' recommendations, but ICANN will ultimately make the decision as to the appropriate remedy.

Given that this is a post-delegation proceeding, nothing in the proposal would prohibit the parties from jointly agreeing to a stay of the proceedings. The proposal simply states that negotiations alone are not a reason to suspend the proceedings.

In response to the comment that registries should not be able to circumvent the RRDRP through affiliates, it is unclear how that would occur. Accordingly, this should not be a concern. If a registry operator with whom ICANN has a registry agreement is found liable under the RRDRP, that party will be the one subject to the imposition of remedies.

RESPONDENTS

Coalition Against Domain Name Abuse (CADNA)
International Trade Association Internet Committee (INTA Internet Committee)
National Arbitration Forum (NAF)
Non-Commercial Users Constituency