

November 30, 2017

RPM Working Group Co-Chairs' Joint Statement Regarding URS Review

The Co-Chairs have reviewed the general and specific WG Charter questions for the URS and note that among them are several overarching inquiries:

- Do the RPMs collectively fulfil the objectives for their creation, namely “to provide trademark holders with either preventative or curative protections against cybersquatting and other abusive uses of their legally-recognized trademarks? In other words, have all the RPMs, in the aggregate, been sufficient to meet their objectives or do new or additional mechanisms, or changes to existing RPMs, need to be developed?”, and
- “Should any of the New gTLD Program RPMs (such as the URS), like the UDRP, be Consensus Policies applicable to all gTLDs, and if so what are the transitional issues that would have to be dealt with as a consequence?”

These are among the major questions to be dealt with toward the conclusion of Phase One of our work. The Objectives and Goals portion of the Charter also states, “the PDP Working Group is expected to consider, at the appropriate stage of its work, the overarching issue as to whether or not all the RPMs collectively fulfill the purposes for which they were created, or whether additional policy recommendations are needed, including to clarify and unify the policy goals”.

We also note that the Charter’s URS-specific questions deal with discrete features of this RPM – such as post-default registrant reply; the clear and convincing evidentiary standard; potential treatment of “repeat offenders” and abusive complainants; potential remedies in addition to suspension; use of expanded defenses; etc.

Finally, Additional Charter questions raise such general questions as “Are the processes being adopted by Providers of UDRP, URS, and TMCH services fair and reasonable?”, and “Are Providers exceeding the scope of their authority in any of the procedures they are adopting?” But such general questions do not specifically address whether the three accredited URS providers are acting in compliance with the URS Procedure¹ and Rules², and with the Memo of Understanding³ (MOU) entered into between ICANN and the three providers, as well as whether ICANN has undertaken any contractual compliance efforts to assure adherence to the MOU.

¹ <https://newgtlds.icann.org/en/applicants/urs/procedure-01mar13-en.pdf>

² <https://newgtlds.icann.org/en/applicants/urs/rules-04mar13-en.pdf>

³ <https://www.icann.org/en/system/files/files/naf-urs-20feb13-en.pdf> (NAF version)

Whether the providers are acting in accordance with the relevant URS requirements will be an important factor to be considered when we deal with the overarching Consensus Policy question. It will also help ensure that our discussion of other URS questions is data and fact focused, and fully informed regarding the basic elements of this RPM. And such a review would be consistent with our prior work on the TMCH, in which we reviewed the criteria for marks eligible for registration in order to assure that Deloitte and IBM were administering the TMCH in a manner that adhered to those standards.

The Co-Chairs therefore propose, for WG review and discussion, that in addition to or as focused substitutes for the above and other relevant Charter questions -- however they are reconciled or reframed by the WG -- we should address these specific questions:

- Have the accredited URS providers administered this RPM in a manner that is consistent with the applicable Procedure, Rules, and MOU?
- Has ICANN engaged in any active oversight of URS providers to ensure MOU compliance; and has it received any complaints about URS administration and, if so, how has it dealt with them?
- Have URS decisions been limited to cases meeting the “clear and convincing evidence” standard, and been properly explained? (Note: This will require a qualitative review of a statistically significant percentage of URS decisions.)
- As ICANN staff has developed data indicating that a small percentage of URS decisions have been appealed, what has been the result of such appeals? (Note: The Charter already contains the question, “How can the appeals process of the URS be expanded and improved?”, and we believe that addressing that question requires an understanding of how the appeals process has actually operated to date.)

Again, the Co-Chairs believe that this proposed review of the administration of the URS by the accredited providers, to assure compliance with the existing rules, procedures, and MOU obligations, is both consistent with our prior review of the TMCH and is of fundamental importance for addressing the question of whether this RPM should be made available for complaints regarding domains at legacy gTLDs through adoption as Consensus Policy.

And, finally, as it will be some time before we have received and analyzed the survey questions regarding Sunrise Registrations and Trademark Claims Notices, we believe the proposed questions can be addressed without any further extension of our current timeline.

We look forward to discussing these proposed questions with WG members.

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