



# NEW gTLD Program

## Uniform Rapid Suspension (URS)

### EXECUTIVE SUMMARY

The purpose of this posting is to provide a summary and analysis of Public Comments on the Final Implementation Recommendation Team Report including a proposal for a Uniform Rapid Suspension Service (URS).

Listed below is a summary of comments on the Implementation Recommendation Team (IRT) URS proposal that were received through public sessions held in Sydney, New York and London, as well as those comments received through ICANN's Public Comment Forum.

The full text of comments submitted to ICANN's Public Comment forum in response to the IRT Final Report (29 May 2009-07 July 2009) may be found at <http://forum.icann.org/lists/irt-final-report/>. And a full listing of comments received during the public sessions in Sydney, New York and London can be found in a companion document to the ones posted here.

Following the summarized comments is an analysis and discussion of the proposal and feedback from the global Internet community, as well as a balancing of those interests.

A proposed URS Procedure is under consideration by the GNSO and published for community input alongside Version 3 of the Applicant Guidebook and should be read in conjunction with the analysis below.

### KEY POINTS:

- Adoption of a proposed URS implementation procedure as a best practice for new gTLD registry operators, is published along with this document and will be considered by the GNSO.
- The standards for a URS proceeding should be similar to those of a UDRP Proceeding, but the burden of proof should be higher.
- The URS is an implementation of a rights protection mechanism; it does not supplant, but compliments the UDRP.

### SUMMARY OF COMMENTS

#### Comments rom Public Consultations in Sydney, New York and London

##### Overview

The URS is designed to go after bad actor cybersquatters, not for the more fringe scenarios where there may be some alternative generic meaning to a trademark or in some jurisdictions a free speech or other fair use scenario. How the URS works: ICANN would select a neutral dispute resolution provider. It would involve a complaint, notice to the registrant, an answer, case

evaluation, a decision by a qualified legal expert to be chosen by the dispute resolution service provider and then means for appeal. Once the complaint is lodged with the third party dispute resolution service provider, the web site will immediately be “frozen” (not shut down but cannot be transferred). If the complaint is successful, the site will remain frozen, and the content will come down and instead will redirect to a standard URS process page. If the complainant wins and there is an appeal, the web site goes back up during that appeal process. There are also provisions to deal with abuses by aggressive trademark holders. If there has been an abuse of the system three times, that particular complainant will be locked out of the system for one year. It is important to note that there is no transfer of the domain name happening; we are not looking to replace the existing UDRP but are solely looking for the removal of the abusive content. R. Pangborn. Both the URS and the UDRP are intended to be alternative dispute resolution procedures that complement existing national legal procedures. In the IRT report discussion of the URS, it was made clear that the court option would always remain available. E. Min.

### **What constitutes “abuse” of the process is unclear**

Whether the balance of the process is tilted too much in favor of complainants centers around what the threshold is for determining whether it’s a clear-cut case as well as what abuse looks like. J. Buchanan.

### **URS –agreement modification for changing domain name settings**

Responding to J.C. Vigne inquiry, the new TLD agreements will establish the ability for registrars to change the settings of the domain names in the context of the URS where the domain name is “frozen.” J. Neuman.

### **URS should go through the normal ICANN policy process**

The “URSP” is a major new policy which should go through the normal ICANN policy process. P. Corwin. J. Buchanan.

### **Opposition to URS; it will replace the UDRP**

The statement on page 25 of the final IRT report that the URS is intended to supplement and not replace the UDRP is completely erroneous. In an April letter WIPO has stated that in analyzing 400 UDRP cases, an expedited suspension mechanism (ESM) limited solely to identical matches would capture a significant majority of UDRP disputed domain names. Is it not reasonable to assume that an ESM which extends to confusingly similar names would capture the vast majority of UDRP cases and would in fact be the new UDRP at all new gTLDs? P. Corwin. URS will replace the UDRP. K. Kleiman. WIPO shares the IRT’s view for the need of a rights protection mechanism that would narrowly complement the UDRP, not replace it. It is not the case that the ESM would cover the vast majority of disputed names if we limited it to identical. The April WIPO letter says that the vast majority would be covered if we include the category of disputed domain names that include identical and also domain names that incorporate the trademark in its entirety. E. Min.

### **URS would be an inefficient and unfair process**

The harm could be addressed more fairly and efficiently by, e.g., putting the registration on hold until a UDRP hearing has been conducted. That is better than the risk of the applicant investing

in the web site only to lose it summarily. URS should be reserved for cases with identical marks or marks already the subject of a finding of rights. P. Argy.

### **URS process is unclear**

Much clearer instructions are needed for URS; so far as described the URS process seems a bit like “I know it when I see it” and does not appear to be clear cut. D. Yee.

### **WIPO comments on IRT final report URS proposal**

There are some significant differences between the WIPO ESM proposal and the final IRT report URS proposal. The final IRT report is a shift from the draft IRT report in that it requires a full examination by a panelist also in cases of default. WIPO believes it would be more efficient to filter out these default cases but without a full examination by a panelist. There should be a process for a domain name registrant that did not respond within the time period to put up a claim and assert legitimate interests and if those interests are proven to retrieve that domain name. Also, the WIPO proposal recommended that the suspended domain name be put on some sort of reserve list so that it cannot be registered immediately thereafter. The IRT is recommending that the domain name be suspended for the duration of the life of that domain name registration. In practice it will probably mean a suspension for a few months, maximum, and then it will go back to the pool and be subject to cybersquatting again. Providing a remedy of such limited effectiveness would force trademark owners into engaging repeated serial URS proceedings in lieu of defensive registrations. E. Min.

### **Technical and email privacy concerns**

How will the URS deal with the 65,534 other ports allowed by the TCP/P protocol; how will incoming email be dealt with for the suspended domain, a crucial privacy issue which could lead to interception of e-mail? P. Vande Walle. The name servers will be redirected to the name servers of the service provider who will display that page, so all of those applications will be shut down, including email. J. Neuman. Some controls are needed on where it gets redelegated to and what that other party is allowed to do. That other provider could actually intercept email if it set up MX records. B. Tonkin.

### **Notification—14 days is unworkable**

The 14 days response period is unworkable. There should be a possibility to extend it given how long certified mail can take and problems with email reliability and spam. P. Vande Walle. This point is valid and it is actually one of the reasons why the IRT differed from WIPO and required an evaluation in the case of a default, because of scenarios where notice is not effectively delivered in a timely way. J. Neuman. The default answer that is built into the process anticipates the scenario where you are on vacation during the registry of your domain and did not receive the notice in time. R. Pangborn. The 14 day notice period is unfair and inadequate and will lead to gaming of the system. K. Kleiman.

### **URS modifications suggested**

- (1) There should be a competitive service provider process.
- (2) There should be a separation between the business processes and adjudication process in the URS. Complainants would have the ability to select the supplier of their choice who would provide those business processes. The adjudicator would be assigned, as opposed to the current UDRP system which allows complainants to shop for adjudicators.

(3) Fundamental fairness needs to be at the core of the process. An adjudicator must qualify for the post; they could be a panelist in the existing UDRP but they would then forgo the ability to appear before the panel, such that practitioners would have a choice. They could be on either side as complainants or respondents. They could either be panelists in the process or they could choose to be advocates in the process. The UDRP lacks that fundamental principle of administrative fairness. E. Noss.

### **Criteria**

Regarding terms – registered and used in bad faith, will there be an “and” or an “or” word used in the criteria used by the examiner? Also, page 35 is confusing and may need to be revised. Victoria B. The intention is not to create new criteria and to use the same criteria as the UDRP. B. Tonkin.

### **Deterring URS abuse**

While the URS is sound, as established eNOM believes it will be abused. To reduce abuse, the URS should be made more expensive to use, and the threshold under which you can be deemed abusive should be lowered. R. Tindal.

### **Effort should go to fixing the UDRP**

The URS seems like a Band-Aid for the UDRP. If the URS is a supplement, why isn't it more of a feeder into the UDRP process? Ed. J. Buchanan.

The URS is designed to address in a faster and less expensive process for brand holders the substantial number of UDRP cases that go unanswered (we understand it is 70% of the UDRP cases are clear cut and there's never an answer). The URS remedy does not require transfer or acquisition of the domain name, unlike the UDRP. The URS remedy is for slam-dunk cases where you just want to take down the name. Upon URS initiation the domain name would be frozen for transfers, and there would be notice, via email, registered letter and another email, of the URS complaint. Fax notice is being examined. The standard of proof for the URS complainant would be clear and convincing evidence that there is no contestable issue. Every complaint will go to an examiner who will look at the merits of the case regardless of whether an answer is filed or not. If the examiner finds in favor of the complainant, then the domain name is frozen at the registry and the DNS record associated with the domain name is updated to redirect web traffic to a website with a standard URS process page. That means that the website would resolve to a standard error message that is hosted by the third party provider. Complainants must agree to indemnify third parties based on the representations in the complaints. Complainants are subject to a ban if they abuse the system by filing three abusive complaints, and there are rights of appeal. [Male not identified]

### **Unfairness**

The URS will replace the UDRP with a faster, cheaper and fundamentally unfair process. Domain name registrants will lose their domain names and website speech before they even know a challenge has been filed. What is needed is UDRP reform, not its replacement. K. Kleiman.

### **Improvement suggestions**

The URS is very important to trademark owners but it only allows for domain names to be frozen, which isn't adequate protection for trademark owners. Domain names should also be available for transfer to the trademark owner. Further, the URS is not “rapid” enough. P.

Flaherty. What is the basis for claiming that the URS will open up a lot of abuse by trademark owners? No model should be based on the fringe cases. It should be based on the 95% of cases that are legitimate. B. McMurtrey. If 5% of the URS cases are abusive in some way, we should find a way to minimize that, and the notion of a bond or something of that nature is worth considering. R. Tindal.

### **Qualification to use it**

If there is a minimum number of domain names that must be registered by a registrant in order to qualify for using the URS, that seems to allow hackers to know how to game the system and avoid enforcement by registering N minus one domain names. M. Trachtenberg. The URS is trying to get at bad actors who really have a lot of domain names. R. Tindal. The concept of aggregating domain names and looking at the number is in the proposal. J. Neuman.

### **Potential abuse**

URS is potentially the most powerful RPM in the IRT report but it should be modified. Demand Media is concerned that the URS will be abused by some overreaching trademark holders, malicious parties and competitors. Demand Media would like to see more discussion on possibly increasing the URS claim fees or compressing tiers so that there is less potential for abuse (e.g., the National Arbitration Forum is on record saying that \$200 is not an amount that any capable adjudicator is going to be able make judgment upon). Also, if the intent is to go after serial cybersquatters, then the minimum threshold of names subject to a claim should be raised. R. Tindal.

### **Timing and other requirements**

The URS is not very rapid—we have to wait until after an examiner who is paid \$100 gives an opinion. It has a poor notification system. Facts should be included in the process and exhibits should be transmitted electronically.

### **Trademark law interpretations**

Despite the requirement that the trademarks have to be registered in a jurisdiction with a substantive review process, there are limitations –e.g., the U.S. has a substantive review process but you can also submit a declaration under Section 2F and claim acquired distinctiveness which is viewed only on an ex parte basis and only on a prima facie case basis. So you get registered trademarks for the likes of “Cheap Auto Insurance” used to sell insurance; it is doubtful that those are the types of trademarks that the IRT had in mind but those are the trademarks that nevertheless can fulfill the rules. There are also figurative marks issues; e.g., in the UDRP context and presumably the URS the owner of a figurative mark “cars” could claim all rights to the word “cars” and challenge the domain of a registrant who is using it in pay per click (PPC) to sell automobiles.

### **Burden of proof**

The burden of proof standard—a well-developed U.S. standard being imposed on the rest of the world—provides no absolute rules for the panelist and the rest of the world will not be able to appreciate that standard. There is no concept of legitimate interest. Bad faith is all-inclusive.

### **Suspension; abusive complaints**

The suspension concept creates difficulty. Trademark holders, as part of their obligation to police their marks, should keep the names. For example, Verizon claims publicly to have recovered nine million new users, new customers, based upon the domain names that they have recovered through the dispute process. In that context the suspension concept is hard to understand. The whole concept of abusive complaints is far too tolerant.

### **Expedited domain name suspension mechanism**

This would apply to the second or third levels, and while akin to the URS has these significant differences: (1) in case of a respondent default, there will be an automatic suspension, but at the same time there would be adequate safeguards to protect rights of registrants who for a legitimate reason were unable to respond in time. There would be a very low burden on the registrant for responding to the complaint; (2) the remedy provided would be of a more lengthy duration—at least a few years, not just through the life of the domain registration itself—so that trademark owners would not be perpetually engaged in these URS proceedings and the system would be more cost-efficient. Eun-Joo Min.

### **URS Supplements UDRP**

URS is meant to supplement UDRP not to supplant it, by creating for brand owners a faster, less costly process for slam-dunk cases to get these domain names down. A neutral provider would be appointed through ICANN. There would be two ways for a brand owner to file a complaint. Pre-registering through the IP Clearinghouse would be cheaper because you would not have to provide evidence with each filing—it would already be on file. There would be need to be submitted by the complainant a form complaint and screenshot of the website filed with the URS provider. Following an initial examination confirming requirements are met, within 24 hours the domain name would be frozen and could not be transferred. At that point the site is still resolving. The registrant is given notice of the complaint by email and certified mail, and we are looking at fax also, and has 14 days to respond via a form. There is an opportunity for the registrant to claim that the complaint is abusive. If no response is filed, then there is a default. The examiner considers the complaint, whether there is an answer or not, and the examiner gives a response. If the examiner finds that it is a clear cut case they will keep the name frozen until it is up for renewal and the domain name will no longer resolve to the active web page; it will go to a page that says it has been taken down, and there will be a notation on the Whois record that it has been taken down. This will give notice to people who may be trying to buy the name from the registrant who may be trying to transfer it, and also gives notice to people who may want to register the name when it is up for renewal. If brand owners want the name transferred, then they can use the UDRP or courts for that, not the URS process. At the end of the registration the name would be up for renewal—brand owners could try to get it or there may be someone else with a legitimate right to the name. The domain name registrant can appeal the decision subject to certain time periods. In the case of an appeal to the URS ombudsman, if it is determined that the examiner overstepped the bounds then the amount of the appeal will be refunded to the appellant. Complainants have to indemnify third parties based on representations in the complaints. Complainants are subject to a one year ban from the URS system for filing 3 abusive complaints. S. King.

### **URS appeal process**

There are two types of appeals—a default situation type and a substantive decision by the panel. If there's a substantive decision by the panel, an appeal to the ombudsman would not

unfreeze the name. The only time the freeze is lifted is if it's a default and the domain name holder wants to appeal to a court. Male unidentified responding to A. Mills.

## **IRT PUBLIC FORUM SUMMARY OF COMMENTS**

**URS Support.** AIM supports the URS system. AIM (23 June 2009). C. Speed (2 July 2009). Microsoft (2 July 2009). F. Drummond (3 July 2009). Nestle (3 July 2009). MARQUES (3 July 2009). K. Grabienski (4 July 2009). CAC (4 July 2009). Telstra (6 July 2009). M. Murphy (6 July 2009). Experian (6 July 2009). ECTA (6 July 2009). UBS (6 July 2009). PMI (6 July 2009). COA (6 July 2009). IPC (6 July 2009). SIIA (6 July 2009). Yahoo! (6 July 2009). URS should be mandatory. Regions (3 July 2009).

**URS—burdens on trademark owners.** With the URS, trademark owners face increased costs in filing repetitive complaints for the same domain after a locked registration expires. ICANN needs to revise the URS to strengthen the remedy. IOC (6 July 2009).

**URS—operator.** A provider such as WIPO should be used for URS implementation. Regions (3 July 2009). IRT should recommend some additional qualifications for the sole source URS provider, including that the provider have no financial connection or affiliation with ICANN, considerable experience handling international domain name disputes and the financial resources, databases and staff to handle the large number of domain name actions that will inevitably flow from the introduction of new TLDs. Verizon (7 July 2009).

**URS--modifications.** URS is the most important of the RPMs; without it there is little protection at the second level other than what exists as consensus policy. Several modifications should be made to the URS: complainants should be allowed to use the information already contained in the IP Clearinghouse; explicit coding of bad faith with clear examples; automation support of the URS; consideration of the ancillary costs that must be paid in addition to URS direct costs (e.g. monitoring of suspended names to “snap back” names once dropped, acquisition costs in a namespace without price controls, and/or costs associated with repeating URS procedures when names are serially abused). MarkMonitor (2 July 2009). Com Laude supports the URS but would like to see competing panelists. Com Laude (3 July 2009). Tucows (4 July 2009). The service providers must compete, arbitrators must be experienced and neutral, and cases should be randomly assigned. P.R. Keating (6 July 2009). The URS is a welcome addition for brand owners facing greater potential exposure to cybersquatting. ICANN may also wish to consider allowing prevailing complainants a means to either automatically receive the domain name at the expiration of the registered term or the first option to purchase it. These could be optional services to be offered for an additional fee. Pattishall McAuliffe (17 June 2009). The complainant should be given the right of first refusal to register the domain once it comes up for renewal. BBC (6 July 2009). The availability of a longer freeze period (e.g., five years) should be explored. Adoption of URS for new gTLDs is an opportunity to explore the concept for use with existing gTLDs, which would promote uniformity of enforcement across gTLDs. Time Warner (6 July 2009). COA (6 July 2009). SIIA (6 July 2009). If transfer is not an option, then domain suspension should be indefinite to avoid the need for serial enforcement actions. The respondent should bear the burden of proving it has legitimate rights in the domain, not merely supplying “evidence”. INTA IC (6 July 2009). URS should offer an option beyond suspension of the domain name—e.g. the domain name could be put on hold indefinitely but allowing transfer of the domain name would provide the trademark owner with greater relief. CADNA (7 July 2009). The URS “takedown” process must have a fixed expiry (e.g.



90 or 120 days) and must be used as a tool to clean up unlawful registrations at launch, not for routine trademark enforcement. If the URS is intended to be more than this, it must go through the normal GNSO policy development process before implementation. ALAC (7 July 2009). Any takedown system must be balanced by a put back system and fair dispute resolution processes. How will URS deal with overreaching claims or conflicting rights from different territories? V. McEvedy (7 July 2009).

**URS—business process from adjudication.** The concept of competitive URS service providers depends upon separation of URS-related business processes and the actual adjudication. Any URS service provider should be able to work with any adjudicator. Adjudicators should be assigned on a random basis. Also, the URS adjudicators cannot be advocates under the existing **UDRP**. ICANN should with the help of the community accredit adjudicators and URS service providers and also assign the adjudicators to specific matters. Tucows (4 July 2009).

**URS--transfers of suspended domain names.** As part of any URS, trademark owners should be offered the ability to have transfers from suspended domain names to their legitimate websites. Adobe (25 June 2009). URS is fair for small Internet users and gives them a tool to fight back; it would be preferable also to have the ability to apply for a transfer under the URS. K. Handy (4 July 2009). If the trademark owner has to bear the URS complaint costs, then the trademark owner should have the right to a transfer of the domain name without the need for a UDRP or legal action. UBS (6 July 2009). The URS should be made more streamlined and a transfer remedy is essential to its effectiveness. Playboy (6 July 2009). Without the transfer option, the trademark owner is left with having to incur costs to file lawsuits or UDRP actions and will end up in a perpetual monitoring situation. A remedy that allows a domain name to be put on hold indefinitely and provides a transfer option would be more effective. Verizon (7 July 2009).

**URS—Costs.** Rather than a system of shared costs, the URS should have a loser pays system because they are most effective in preventing abuse. AIM (23 June 2009). Time Warner (6 July 2009). Yahoo! (6 July 2009). Verizon (7 July 2009). CADNA (7 July 2009). The URS lacks a loser pays mechanism which leaves trademark owners with the financial burden of pursuing cybersquatters without any means of compensation, which is unsatisfactory to trademark owners. LEGO et al. (29 June 2009). The costs of the process should be shared between complainant and registrant. The proposed cost of \$100-\$200 should be per complaint rather than per domain. Setting a fee that is too high would lead to frustrations as brand owners are drawn back to the UDRP. C. Speed (2 July 2009). The URS system should be low cost and cost effective, and not just regarding the initial dispute. The IRT should advise ICANN about ways to obligate the losing party in a URS claim to pay the associated expenses of the prevailing party so that infringers are held accountable. IHG (2 July 2009). Given administrative costs, if anything in excess of 75% of the domain names are found to be abusive then the complainant should receive a full refund, but if fewer than this, the refund can be prorated between the parties. BBC (6 July 2009). It is unclear why the trademark owner has to bear the cost burden where a URS complaint is successful. This is unsatisfactory and is not a suitable deterrent for cybersquatters. UBS (6 July 2009). Because collecting from an unresponsive “loser” may prove difficult, ICANN should be prepared to assume the burden of funding such payments, presumably through the fees it will collect from new gTLD registrations. Time Warner (6 July 2009). ICANN should allow the providers to set their fees; market dynamics will keep fees low. Cheap pricing proposed by the URS sounds good but based on NAF experience there will not be a provider who can provide fair, neutral and complete decisions for this fee amount. NAF (6 July 2009).



**URS support but address potential for claimant abuse.** URS is one of the best mechanisms because it focuses on actual infringement and can potentially be applied to existing TLDs. As the IRT stated, URS is only for cases where there is an allegation of actual, infringing use (typically via a website) as opposed to just registration of a name. To address possible claimant abuses, there should be a higher per name fee for URS claims and a lower threshold for suspension from the system or other penalty for claimant abuse. Fees should be raised by 50%, the size of the tiers should be reduced from 100 names to 10 names and the abuse threshold should be reduced from three to two cases. ENOM (22 June 2009). Since the sanction would potentially be very harsh (e.g. banned from using URS for 1 year), examiners should look at complaints very carefully before deciding that a complaint is abusive; however, this cannot be done if the sole purpose of the URS is to provide a very speedy assessment. C. Speed (2 July 2009). To prevent system misuse, further amendments should be made to the URS form --complain, answer and decision --to address registrants demonstrating interest and good faith. Nestle (3 July 2009). No strike policy should be implemented, but if it is, it should also account for the number of successful challenges brought by a trademark owner. IOC (6 July 2009). Abusive complaint sanctions are potentially valuable for the process, and sound panelist training also must be a requirement. NAF (6 July 2009). URS must have substantive penalties and other disincentives to abuses of the URS process. ALAC (7 July 2009).

**URS—registry penalty.** There should be a penalty for registries failing to reply within 24 hours regarding verification and a lock. Weekend and holiday times in various countries also need to be factored in to the response timing process. NAF (6 July 2009).

**URS support but concerns about potential problems.** The URS proposal may have potential to reduce trademark abuse, but it may also create new problems --e.g., (1) what stops a third party entity from intercepting the suspended/error page and causing parked pages/ads to be delivered instead; and (2) how will the proposal deal with cybersquatting/typosquatting issues (i.e. any remedy short of transfer of domain name will merely prolong brand owner aggravation). G. MacRobie (4 June 2009).

**URS—pre-registration.** Is pre-registration feasible if there are 200 new gTLDs? Why should the proposal “no pre-registration” cost more than the pre-registered user fee? The pre-registration is an extra service with a price; however if the brand owner decides not to pre-register and submits the data each time the brand owner wishes to complain, the brand owner should not be penalized. Nestle (3 July 2009). MARQUES (3 July 2009). UBS (6 July 2009).

**URS—recovery of domain by brand owner.** If the brand owner wanted to register the domain name but came in second, how could the brand owner recover the domain before the validity of the domain has lapsed? Does the brand owner have to rely on UDRP? Nestle (3 July 2009). MARQUES (3 July 2009).

**URS—improvement suggestions.** If the form becomes too standardized, cybersquatters will use general comments to justify the registration and the whole benefit of URS could vanish. MARQUES (3 July 2009). PMI (6 July 2009). The sentence “not known by name” is too vague because it could include any nickname or given name. Instead “family name” or “commercial name” could be used to increase precision. The Form Decision should describe more precisely terms like “pattern”, “sold for commercial gain”, “sold for profit”, etc. MARQUES (3 July 2009). ICANN needs to consider limitation of evidence --i.e. how to limit the volume of materials that are submitted in the URS filings, which has been an issue in the UDRP. NAF (6 July 2009).

**URS Technical Issues.** The proposed web-centric approach to URS is technically unsound and does not work for other services running on one of the many other ports allowed by the TCP/IP protocol. P. Vande Walle (24 June 2009). Several technical issues affecting registries need to be clarified. E.g., there is no single EPP status that provides the functionality referred to as “freezing” a registration in the IRT report. If URS is adopted, it will be critical in the implementation plan to define exactly which statuses apply and analyze their impacts. In addition it is unclear how a third party provider would accomplish the task of posting a standard page on the domain name, and this issue and others need to be explained and clarified. RyC (6 July 2009).

**Process for considering URS.** Because it is controversial, the URS should be considered apart from the TLD process; that way it will not slow down the less controversial proposals such as the IP Clearinghouse. It can then be looked at properly and can form part of a full review of the UDRP. Wrays (6 July 2009).

**Objection to URS.** The URS is an extremist view of trademark rights favoring IP interests in comparison with the UDRP and goes beyond what is protected by law and due process. Comments making more balanced suggestions were ignored. Flaws in the URS include obfuscating the dual requirement of bad faith use and registration; the notice process; and failure to consider the creation date of a domain name. G. Kirikos (29 May 2009). In legal terms, the final report rises to the level of unconscionability. G. Kirikos (30 May 2009). Subjecting all domain names, irregardless of age, to the URS has not been justified. The URS should only be targeted toward the most abusive domain names where time is of the essence. The onus should be on markholders to not delay in bringing complaints. The URS should either apply only to domains younger than a certain age (e.g. 6 months) or that the time to respond to complaints be a function of the age of the domain (e.g. 15 days plus the age of the domain in months). Businesses and consumers need certainty and due process. G. Kirikos (24 June 2009). Abuse to registrants can be minimized by the Kirikos proposal that the URS only apply to domains registered in the last 6 months. If ICANN does not include safeguards for registrants, then the URS can become an easy, cheap tool for Reverse Domain Name Hijacking. M. Menius (4 July 2009). URS opens the door to reverse domain name hijacking. B. Rys (6 July 2009). YouBeats (6 July 2009). Telepathy (6 July 2009). S. Morsa (6 July 2009). G. Kirikos (7 July 2009). There is also a lack of effective or affordable substantive appeals procedures for registrants who believe that their domains have been unfairly suspended. Also, trademark interests have already voiced the goal of imposing the URS on incumbent gTLDs, including .com, soon after its adoption for new gTLDs. Kulasekaran (4 July 2009). Nation Press (6 July 2009). M. Berkens (6 July 2009). URS is harmful to small businesses and it seems that their interests were not represented when the IRT convened. There are no ramifications for filing frivolous URS cases, and there is not enough time for a domain name owner to find adequate legal representation and file a complete response. E. Silver (6 July 2009). The URS has many flaws, including its temporary nature, potential for complainant bias in its operation, short response period leading to wrongful suspensions, and weak penalties for complainant abuse. A. Allemann (6 July 2009). ICA (7 July 2009). Internet Edge (6 July 2009). See also P.R. Keating (6 July 2009). URS is widely opposed and contrary to due process. If there are truly egregious cases, then IRT should bring them forward so they can be discussed. But the URS cannot sweep in legitimate domain name registrants. NCUC (7 July 2009). The current URS does not preclude a complainant from filing a complaint as against a

domain name that clearly pre-dated the asserted trademark registration. Given the clear-cut abuse purpose of the URS, one cannot imagine an instance in which a post-domain name-registered trademark could meet the suggested standard. P. R. Keating (6 July 2009).

**URS should not be adopted.** It is a guilty until proven innocent system which would severely damage countless businesses. C. Salzano (1 June 2009). Searchen (6 July 2009). K. Leto (6 July 2009). Phil (6 July 2009). Bakuaz (7 July 2009). M. Berkens (6 July 2009). D. Wright (6 July 2009). D.T. Pryor (6 July 2009). H. Chatham (6 July 2009). M. Hiller (5 July 2009). A. Dixon (4 July 2009). Mary Anne (4 July 2009). Net41 Media (5 July 2009). E. Adkins (4 July 2009). S. Smith (4 July 2009). Kulasekaran (4 July 2009). R. Cristello (4 July 2009). D. O'Brien (3 July 2009). A. Dunn (4 July 2009). J. Burden (5 July 2009). Wayne (5 July 2009). T. Hemmingsson (4 July 2009). S. Fuchs (4 July 2009). G. Dell (4 July 2009). J. Luebke (1 June 2009). J. Kanellis (1 June 2009). A. Baler (4 June 2009). C. Seib (1 June 2009). K. Ahuja (3 June 2009). Info Vzemibg (2 June 2009). Texxmexx (2 June 2009). K. Brown (2 June 2009). D. Eliason (6 June 2009). E. Bourquin (11 June 2009). J. Freeway (9 June 2009). J. Berardi (7 June 2009). T. Jackson (2 June 2009). D. Pankaew (10 June 2009). J. Knapp (3 June 2009). J. Prescott (5 June 2009). A. Soileau (12 June 2009). S. Landis (5 June 2009). SMP Group (5 June 2009). Schneide Schneide-Produktionen (7 June 2009). G. Hyne (9 June 2009). A. Goldstein (10 June 2009). M. DeLucia (6 June 2009). J. Hinkle (6 June 2009). J. Wineman (6 June 2009). T. Vieira (6 June 2009). T. Perry (6 June 2009). J. Miramontes (3 June 2009). Razer Rage (2 June 2009). D. Brown (4 June 2009). W. Cooper (2 June 2009). R. Friedman (2 June 2009). D. Zawislak (2 June 2009). J. **Dinner** (2 June 2009). A. Verre (2 June 2009). C. Osborn (2 June 2009). D. Connolly (4 June 2009). S. Smoot (4 June 2009). S. McRoberts (2 June 2009). M. Rogers (2 June 2009). Joey (2 June 2009). A. Mansoor (2 June 2009). Nasir M. (2 June 2009).

**URS will result in gamesmanship with competitors reporting each other just to take their websites down and many other abuses.** P. Kupchick (1 June 2009). Jarrod (4 July 2009). 24-7 Outdoors (3 July 2009). D. Austin (22 June 2009). L. de Groot (2 June 2009). B. Bourque (10 June 2009). S. Karagiannis (2 June 2009). R. Schwartz (6 July 2009). A. Skara (6 July 2009).

**Instead the UDRP system should remain in place as it is not prone to the amount of anticompetitive practices and other problems that will undoubtedly result from adoption of the URS.** J. Sinkwitz (1 June 2009). D. Franklin (10 June 2009). J. McKanna (6 June 2009). B. Gray (4 July 2009). M. Marcin (16 June 2009). F. Costache (3 June 2009). N. Barrett (3 June 2009). Ratko (4 June 2009). A. Wall (3 June 2009). E. Wilhelm (2 June 2009). Yura (2 June 2009). K. Lomax (2 June 2009). A. Ripps (7 July 2009). A. Strong (2 June 2009). J. Rusca (6 July 2009). P. Kapschock (6 July 2009). K. Dabney (7 July 2009). R. Hackney (6 July 2009).

**URS puts small, less-funded webmasters at a disadvantage against bigger companies.** M. O'Brien (1 June 2009). URS will open up small independent web publishers and other smaller players to arbitrary abuse by companies. G. Carswell (2 June 2009). H. Lameche (6 July 2009). S. Roberts (7 July 2009). H. Kaspersetz (2 June 2009). A. Bleiweiss (2 June 2009). J. Gorham (2 June 2009); S. Sedwick (2 June 2009). M. Neylon (6 July 2009). B. Rys (6 July 2009). R. Gruenwald (6 July 2009). F. Michlick (7 July 2009). P. Temperly (7 July 2009).

**URS application should be reconsidered.** How the URS is applied should be reconsidered, erring on the side of caution rather than alarm. The policy should protect the rights of all not just companies with lawyers who file preemptively without proven cause. Abuse by those who file frivolously should be addressed and dealt with harshly to dissuade this behavior. C. Meade (24 June 2009).

**URS—costs of late responses in default cases.** Allowing a response at any time in a URS case poses practical cost challenges for providers. If a late response is submitted in a default case worth defending, then it should be subject to a fee to cover administrative and panel costs, payable by the respondent. NAF (6 July 2009).

**URS—provider escrow responsibility.** ICANN should do away with the provider escrow provisions about fee payments or if they are required then allow the provider to charge for the service. NAF (6 July 2009).

**URS Remedy effectiveness questioned.** The remedy of locking a domain name for the duration of the registration period is of limited effectiveness. The proposed URS remedy would merely force trademark owners from an undesirable cycle of renewing defensively registered domain names to a costly cycle of filing URS complaints. For this reason the WIPO AMC previously suggested the possibility of a reserved names list. It may be appropriate to provide notice to potential registrants that the domain name was previously the subject of a URS suspension and require potential registrants to make appropriate showings which may have a preventive effect. Because the proposed IRT remedy may not meaningfully address trademark owner burdens, registry and possibly registrar knowledge of re-registration of previously URS-locked domain names might be considered relevant in an action brought by a trademark owner such as a post-delegation dispute resolution proceeding under section 2.1.1.3. WIPO AMC (19 June 2009).

**URS must interoperate with UDRP.** There would seem to be clear benefit in allowing parties to opt for the possibility of filing URS and any subsequent UDRP proceedings with the same provider, e.g., in terms of party submissions, domain name lock, communications and fee management. WIPO AMC (19 June 2009). The UDRP should continue with the added layer of security offered by the URS. URS should be mandatory with all new gTLDs to fill in the gaps that other remedies have missed in the past. IHG (2 July 2009). A complainant should have the option of filing URS and any subsequent UDRP proceedings with the same provider. Regions (3 July 2009). URS needs to be far better integrated with UDRP; it should always be possible for the target of a URS to assert that a site is not infringing and to demand the UDRP. URS should not replace the UDRP. EFA (6 July 2009). The URS should aim to work well with the UDRP and consider applying a “bad faith registration or use” standard to address all forms of cybersquatting. Verizon (7 July 2009).

**Expand and Improve UDRP instead.** ICANN should expand the UDRP rather than adopting a shorter, quicker and “ready for abuse” system like URS. The UDRP should allow more room for dispute with each claim but also a minimum number of panel members should also be present. ICANN should represent both sides (domain owners and trademark holders) for fairness and balance. Small business owners should not be exposed to something as open for abuse as the URS. A. Dunn (4 July 2009). T. Hemmingsson (4 July 2009). UDRP should be strengthened. Nation

Press (6 July 2009). UDRP should become a loser pays system to balance the interests of both trademark owners and domain holders. M. Berken (6 July 2009). S. Newman (6 July 2009). Rather than the controversial new URS, reopening the UDRP would maintain the current integrity of the system while addressing the concerns of the user community. If the URS is to be accepted at all, then ICANN should fully integrate the URS and the UDRP. There could be a first tier URS process, and a second tier UDRP process. NAF (6 July 2009). If the IRT were truly interested in fighting cybersquatting it would propose a review and analysis of the UDRP; the problem of cybersquatting is essentially the same as it was when UDRP was created, and therefore the creation of a supplementary mechanism to deal with the same problem has no justification. K. Komaitis (6 July 2009). The existing UDRP should be reviewed to address fairness for both trademark holders and non-trademark users of generic words for domain names. R. Wickersham (6 July 2009). The URS will almost entirely displace the UDRP at all new gTLDs. The only proper means for revising the UDRP for all gTLDs, existing and new, is to initiate an expedited PDP to produce UDRP reforms that can be set in place before initial launch of new gTLDs in the last quarter of 2010. ICA (7 July 2009). Despite its flaw, the UDRP is still a system that works and one which can stretch its scope to incorporate novel issues of abuse. The entire GNSO and ICANN community should move to a substantive UDRP reform which is improved fairly for all parties. NCUC (7 July 2009). C. Pape (7 July 2009).

**Panelist evaluation even in URS default cases unnecessarily raises costs and burdens for trademark owners.** Given increasing levels of potential infringement, trademark owners would benefit more from a balanced default/filtering-based suspension mechanism. WIPO AMC (19 June 2009). IOC (6 July 2009). S. Donahey (1 July 2009). The IRT should provide for an automatic default procedure to ensure the URS is rapid. Examination by a neutral panelist only makes sense if there is a loser pays system. Verizon (7 July 2009).

**Clarification of URS Substantive Criteria.** The final IRT report seems to foresee certain departures from the UDRP criteria—e.g., the URS limits consideration to trademarks registered in a jurisdiction that conducts substantive examination of trademark applications. It should be clarified whether this proposal intends to exclude marks registered in jurisdictions which do not themselves undertake examination on relative grounds but do so only on absolute grounds. The URS “Form Complaints, Answers, Decisions” also do not accurately reflect the substantive criteria of the UDRP regarding “rights or legitimate interests of the domain name registrant” and “bad faith registration and use.” WIPO AMC (19 June 2009). The requirement that a complainant’s registered trademark be issued in a jurisdiction conducting substantive examination of trademark application should make clear that it only requires examination on absolute grounds (of descriptiveness, functionality, etc). In addition, a “preponderance of the evidence” standard should be used. INTA IC (6 July 2009).

**URS--Bad Faith Issues.** In addition, the final IRT report returns to the conjunctive bad faith requirement in the UDRP. A “bad faith registration or use” standard which better addresses the evolving nature of cybersquatting since the adoption of the UDRP in 1999 should be considered (e.g., a number of ccTLDs have adopted the “or” standard). WIPO AMC (19 June 2009). IOC (6 July 2009). ICANN should adopt the same provisions as the EU; the double requirements (lack of legitimate interest and bad faith) should give way to the double “or” requirement (it would be sufficient for the complainant to prove bad faith or to give a principle of proof of lack of legitimate interest). Bad faith should be proven at the beginning or later; it should not be

necessary for bad faith to be present and proven both at the beginning and afterwards. Also, licensees or distributors that still use and own a domain name with their principal's trademark after the license or trademark agreement has lapsed should be considered in bad faith. K. Grabienski (4 July 2009). Experian (6 July 2009). The four descriptions integrated into the URS regarding bad faith registrations will serve to prevent many cases of blatant IP infringement. IHG (2 July 2009).

**The URS needs adjustment to improve time and cost-efficiency.** Using postal mail is cumbersome to the process, and the mixture of design elements including timelines lacks internal balance and is not consistent with the URS's intended rapid character. WIPO AMC (19 June 2009). As now proposed the URS cannot be considered "rapid." Verizon (7 July 2009).

**URS - flawed in only considering web traffic.** Many domain names are still used primarily for purposes other than web traffic. In addition, URS may not be appropriate for all gTLDs, such as those set up for free speech purposes. EFA (6 July 2009).

**URS-Electronic communications.** Electronic communications should be allowed. CAC offers its experience with electronic-only in the UDRP context and would be willing to consider being a test pilot for an electronic URS process. CAC (4 July 2009).

**Notice problems.** The IRT proposal to limit notification to registrants to only two emails and one letter by post is not justified and will lead to problems in registrants receiving actual notice. Email is unreliable given the amount of spam, and international mail might not be received in time to respond to a complaint. Opt-in fax should be considered. G. Kirikos (24 June 2009). Opt-in fax and encouraging registrants to provide their physical address in the Whois database rather than an email address will encourage more accurate notice. Verizon (7 July 2009). The lack of notification by fax is unreasonable. P.R. Keating (6 July 2009). Email notification is problematic given spam as well as language issues. A 14-day notification period is unrealistic for the average individual domain name registrant. P. Vande Walle (24 June 2009). P. Temperly (7 July 2009). The 14 day period of notification should be extended. M. Jaeger (30 June 2009). NAF supports the two emails and one letter notice requirements; in particular email for "actual notice" works in the UDRP process NAF has been involved in. NAF (6 July 2009). A 14-day notice is insufficient to allow registrants to react to complaints. Email is unreliable and if used at all should only be a back-up to paper and must implement the highest security standards. Any notice needs to be done by registered or certified paper mail. Notices need to be sent in the official language of the country of delivery and include text in local language detailing recipients' rights. ALAC (7 July 2009)

**Alternative to the URS.** The existing UDRP structure should be used with minor modifications instead of the URS as proposed by the IRT. There may be ways to blend such an alternative with the URS to allow a respondent the right to opt out of the URS and force the complainant to proceed with a UDRP. The ICANN Community should consider all of the various approaches and not just those suggested by the IRT. P.R. Keating (6 July 2009).



## **ANALYSIS OF PUBLIC COMMENTS**

### **A. Organization**

- (i) How can URS be implemented absent a new policy development process?

Certain inquiries have centered on whether ICANN has the power to create the Implementation Review Team (“IRT”) and/or the power to implement any of the resulting recommendations from the IRT Final Report, such as the URS. One GNSO recommendation dictates that potential new gTLDs cannot infringe the existing legal rights of others. Initially, it was thought that the specific Rights Protection Mechanism (“RPM”) needed to implement this recommendation and to protect trademark holders’ rights would be left to the registry operators. However, public comment indicated that this was not nearly specific enough and the ICANN Board agreed. Although a group was previously assembled to try to create a universal RPM that could be adopted for the new gTLD registry operators, the efforts were unsuccessful. Accordingly, additional efforts were undertaken to determine how to achieve the specificity requested. Public commentary suggested that a group be created to further study ways in which to meet the GNSO recommendation and protect trademark holder rights. As a result, the IRT was created to help identify specific RPMs of universal applicability to gTLD operators.

While it is clear that there is opposition to the IRT’s proposal, comments from the IRT and others have supported the need for a rapid take down procedure as a RPM. The URS is one such procedure that has been contemplated and discussed as part of ICANN’s implementation plans. It is an interim implementation solution until and if policy development work is undertaken by the GNSO. The GNSO will be given an opportunity to adopt this as an interim solution or adopt an alternative solution. It should be noted that a series of dispute resolution procedures were implemented in prior TLD rounds without a formal policy development process. See <<http://www.icann.org/en/udrp/>>.

Adoption of a proposed URS implementation procedure is recommended as a best practice for new gTLD registry operators. This means that it is believed to add value to a TLD and to the namespace generally, however, it is not a contractual requirement. In the event that the URS is specified as a best practice, the relevant section of the evaluation criteria in the Applicant Guidebook would be modified to include the question, criteria and scoring shown in the mock up of the questions and criteria posted alongside version 3 of the Applicant Guidebook, to be incorporated into the overall scoring model in the evaluation of all new gTLD applicants. I.e., the URS, if adopted, will be published in the Applicant Guidebook and a point could be awarded in the evaluation for those who agree to adopt the URS. New gTLD applicants would be incented to adopt the URS based on the scoring advantage. However, a score of one on the question is not required for the gTLD applicant to pass the evaluation.

- (ii) Why have both the URS and the UDRP? Will the URS replace the UDRP?

Some have questioned the need for the URS and whether its implementation would simply override the UDRP. While it is understandable that some, at first glance, may think that the URS would undermine the UDRP, this is not the case. The URS is meant to apply to only the most clear-cut and blatant cases of abuse and not to those cases that require a more thorough

review by a UDRP panel. Indeed, as noted above, the URS is not a policy itself. Rather, it is simply implementation of an RPM.

A further distinction between the UDRP and the URS mechanism is the contemplated remedy of suspension rather than transfer. The end result is not that the prevailing party obtains control over the domain name, but that the deemed abuser can no longer control the name.

- (iii) How will the URS be run and how will it interact with the UDRP?

Comments have suggested that the URS should be a part of the already existing UDRP. While it is understandable that consistency is sought, it is not currently contemplated that the URS be part of the UDRP and, given the difference in remedy, it seems appropriate to keep the proceedings separate, although complimentary. Independent URS provider(s) will be selected through an open and transparent process to ensure that low costs and reliable, consistent service will be provided to all parties to URS proceedings. The provider(s) will not be under contract to ICANN but will be designated by ICANN as approved provider(s). The providers will also have demonstrated the necessary level of expertise to administer the adjudication of such disputes, such as exiting UDRP providers. Of course, URS Examiners will also have substantive expertise, so that the goal of expedited URS proceedings are realized.

## **B. Procedure**

- (i) Should the URS apply only to serial cybersquatters; should there be a minimum number of domain names for a claim to apply?

In response to the IRT Final Report recommending the URS, comments have suggested that applicability of the URS be limited to serial cybersquatters, and that a minimum number of infringing domain names must be challenged. Such comments have been considered, but will not be adopted for implementation at this time. There is no minimum for any of the other RPMs. It seems unfair to suggest that harm only arises after a certain number of purportedly infringing registrations. Such a position will lead to abuse of the process and would tend to indicate that volume of infringement is more relevant, even though a single case of infringement could be extremely harmful, depending on the name and circumstances. Furthermore, the requirements for a minimum can be circumvented by sharp practices and therefore would tend to obviate the purpose of the URS.

- (ii) How much time is afforded and how is notice effectuated?

Questions have arisen regarding how notice can be effectuated and whether the 14-day period provides enough time in which to respond, retain counsel, and defend. Such concerns are under consideration. It seems reasonable to provide for a limited extension of time to respond, provided that there is a good faith basis for doing so and that it does not harm the complainant, but in no event shall the extension be more than seven (7) calendar days. Furthermore, it also seems reasonable to allow for facsimile notice in addition to mail and electronic mail, to take into consideration spam filters in email preventing notice, as well as the delays which can result from using the paper mail system.

(iii) What is the standard and how will the process be initiated?

The URS is meant to apply only to clear-cut cases of abuse. There have been several comments suggesting the difficulty in identifying a particular set of standards to apply in order for a URS claim to succeed. The IRT Final Report suggests standards similar to those of the UDRP, but requiring a more stringent burden of proof requiring clear and convincing evidence when there is no genuine contestable issue. While it is appropriate that the standards or burden of proof should be significantly enhanced in order to prevail in an expedited URS claim process, rather than a UDRP proceeding, the particular URS panel should determine what evidence satisfies that burden.

Of course, the appropriate standards and how they will apply continue to be the subject of review in order to provide URS panels with as much direction as possible. To that end, comments pertaining to the check box complaint form are well taken, and while that format is currently suggested by the IRT, it is believed to be a floor, not a ceiling; certainly more evidence and more details supporting the claims and defenses can be added. Finally, some comments have suggested that the initial “lock” (that is the registry restricting changes to the registration data, including transfer and deletion, but allowing the name to continue to resolve - referred to by the IRT as a “freeze”) that can be implemented amounts to a “guilty until proven innocent” reversal of the burden of proof. ICANN understands how, at first blush, that may appear to be the case. However, the lock does not reverse the burden of proof. In fact, a successful URS claimant must satisfy a higher burden of proof to obtain relief, which is the take down or suspension of the domain. The initial lock simply prevents changes to the Whois data and transfers of the domain; the registrant will still be free to use the site during the pendency of the URS proceeding.

Finally, there have been questions directed to whether the standard for the cases should be bad faith use and registration of the domain name or bad faith use OR registration of a domain name. The rationale for the latter standard is that it captures use that was lawful at the time of registration but is no longer lawful because of a severed license relationship or a change in the web site content. It is understood, however, that there are different types of cybersquatting or other unlawful activity that can take place on the Internet. The URS is not intended to address all forms of it. Rather, the process is intended to address only a narrow form of cybersquatting and that narrow form is further limited to the clear-cut cases of abuse. As such, the standard will require both the registration and use of the domain name. If there are cases of bad faith use or bad faith registration, rights to pursue such claims still exist and the trademark holder is free to pursue those claims in courts of competent jurisdiction.

(iv) Should there be a bond?

Some have suggested that a bond be required to initiate a URS proceeding. The rationale seems to be that because the injunctive relief afforded, such amounts would deter frivolous filings and make a successful registrant whole for the period of time the domain is locked. Issues pertaining to the reasons supporting a bond and how it would be implemented are complex. In this case, because the procedure is intended to apply to only the most clear-cut cases of abuse, there are a number of other safeguards in place that would guard against harm resulting from an erroneous decision. As such, the harm that might be remedied by a bond is believed to be remote. Further exploration will be undertaken to see how to protect a domain

name registrant from the dangers of a wrongly decided case of clear-cut abuse while keeping in place the recommended prompt, cost-effective measures.

- (v) Should there be a statute of limitations?

There have been questions directed to whether there will be a limited amount of time in which to bring a URS claim. Those in favor of the time limit claim that a deadline should be imposed to bring finality and security to the registration process. No such limit is currently contemplated and, on balance, no such limit should be imposed. If there is a clear-cut case of abuse, it should be addressed regardless of the amount of time that has elapsed. Implementing a time limit on filing a claim could allow bad actors to tailor their activities to take advantage of the limitation. Moreover, as a practical matter, investigation as to when the trademark holder was on notice for statute of limitations purposes would delay the investigation as to whether there is clear-cut abuse, a delay that is not outweighed by the possibility of a benefit.

- (vi) Will there be a limit on the time to render a decision and where will the decisions be available?

It is contemplated that the provider(s) will publicly post the decisions rendered in all URS proceedings. Furthermore, the need for prompt and efficient resolution of the proceedings certainly supports the suggestion that a time limit be imposed on the provider to render a decision. To that end, it will be recommended that such decisions be rendered no later than 14 calendar days from the time that the Response is filed.

### **C. Remedy—Suspension versus transfer?**

Some comments have questioned the IRT proposal that names be suspended as a result of a URS claim rather than be transferred to the prevailing complainant. Others have questioned the limited length of the suspension. The rationale for these comments is that if transfer is not effectuated, or if suspension is limited to just the length of the life of the registration, the trademark holder may have to file subsequent proceedings to enforce its rights.

Others have suggested that the suspension is the appropriate remedy because of the nature of the RPM, i.e., that it is a cost-effective, efficient and expedited proceeding. While this is a close issue, on balance, it appears suspension for the length of the registration period is the better option. A URS proceeding (in which a suspension is the result) is an expedited, less costly procedure than a UDRP proceeding (in which a transfer or more permanence results). If transfer or a more permanent solution is what the trademark holder wants, it remains free to initiate a UDRP proceeding, the very nature of which will require more detailed analysis leading to transfer rather than mere suspension for a period of time. There are other options available as well. For example, the trademark holder can try to back order the name or register it after deletion to avoid any perceived problem of having to “re-litigate” the same cybersquatting case. The deterrent effect of filing a URS proceeding remains intact absent a transfer because the next person trying to register it will know it was the subject of a URS proceeding.

### **D. Costs**

Questions have arisen regarding who will set the fees and whether to initiate a loser pays system. The URS provider(s) revenue will flow from fees paid by complainants, thus

provider(s) will set the fees. Some comments have also suggested that a successful claimant should not have to pay because if the costs exceed defensive registration there is no need for this RPM. Such concerns are understood as it is widely accepted that any such RPM should be a cost effective procedure. The administrative burden of pursuing payment from non-responsive or losing parties in a URS proceeding would increase the cost and complexity beyond what the expedited process contemplates. While fees for a URS proceeding will ultimately be set by the providers, the loser pays system will not be adopted. The proceedings are supposed to be cost effective, as such, it is not anticipated that they will be very high.

#### **E. Abusive complaints.**

The IRT Final Report suggests that a complainant deemed to have filed three abusive complaints should be banned from the process for a year following the third abusive complaint. Some have suggested that the “three strikes” currently contemplated by the IRT Final Report does not seem to adequately address the problem of the initiation of frivolous URS proceedings. Yet, the process should not be so restrictive as to discourage bona fide URS complainants from initiating a proceeding. The three strikes approach seems like a reasonable balancing of the concerns. This can be revisited if data suggests otherwise, but given the nature of the proceeding and the burden of proof, the existing suggestion of three strikes should be implemented.