

GNSO gTLD Registries Stakeholder Group Statement

Issue: Post Delegation Dispute Resolution Process (PDDRP)

Date: 1 April 2010

Issue Document URL: <http://www.icann.org/en/topics/new-gtlds/draft-trademark-pddrp-clean-15feb10-en.pdf>

Regarding the issue noted above, the following comments and questions were approved by the ICANN GNSO gTLD Registries Stakeholder Group (RySG) as recorded at the end of this document. They were developed through a combination of RySG email list discussion and RySG meetings (including teleconference meetings). After some general comments, we have attached a draft redline version of the PDDRP that reflects the principles set forth in the general comments.

General Comments/Questions

During the ICANN Board meeting in Nairobi, the ICANN Board resolved to include a final version of the PDDRP in version 4 of the Draft Applicant Guidebook based on the existing version of the PDDRP located at <http://www.icann.org/en/topics/new-gtlds/draft-trademark-pddrp-clean-15feb10-en.pdf>, but only after “ensuring that the various interests of the community are considered”. As stated on several occasions in Nairobi, we believe that there are some serious deficiencies in the PDDRP that must be addressed prior to the finalization of the policy. That said, we believe the comments below coupled with the redline version of the PDDRP attached hereto, would go a long way to resolving the outstanding issues. More specifically:

1. ICANN must be more involved in the PDDRP at outset. It is not enough for ICANN to state in the explanatory section of the DAG that it will continue to do contractual compliance, but there must be an affirmative commitment by ICANN to do this prior to a 3rd party initiating a complaint under the PDDRP. In addition, ICANN should agree to a set of service level commitments to the community to actually do such enforcement. What are the ramifications for ICANN’s failure to enforce agreements? ICANN is very good at asking others for service level commitments and it is now time to ask the same of ICANN.
2. ICANN must be more involved in Determining the Remedies Applicable to Registries for violations of the PDDRP. The RySG wants to thank ICANN for its assertions during the ICANN meeting in Nairobi that it alone has the power and discretion to enforce any remedies against Registries and that it will not rely on PDDRP panelists to make such determinations. The RySG looks forward to seeing that formally documented in the next version of the PDDRP.
3. PDDRP must not replace contractual dispute resolution mechanisms. Regardless of the determinations of any Panel, Registries must be afforded the opportunity to challenge both the panel decisions as well as the remedies enforced by ICANN under the dispute resolution mechanism in the contracts on a *de novo* basis. This must be made clear in both the PDDRP as well as in the Registry Agreements. It must be clear that the burden of contract enforcement between ICANN and the Registries lies with the actual parties to those contracts.

4. Requirement for Registries to put up 50% of costs – The requirement for Registries to fund any or all of the PDDRP proceeding up front must be removed. The notion of requiring a defendant in a proceeding to pay any money up front is not required in any other dispute proceeding, including the UDRP, URS or for that matter in any court proceeding. The RySG believes that requiring the Registry to pay any fees up front can and will be used as a tool by overzealous trademark owners to extort a settlement or other undesirable outcome from the Registry. This combined with the fact that multiple trademark owners can bring these actions at the same time will certainly pose an unjustifiable burden to Registry operators. We see no justification or compelling reason at all to require a Registry to pay fees up front.
5. Ability of Panel to award monetary damages must also be removed. The determination of damages (or financial harm) in a trademark dispute is one of the most complex adjudicatory decisions that can be made by a court of law, much less a panel of arbitrators. The award of monetary damages in a court of law is usually only made after (i) extensive discovery of damages is performed by the parties, (ii) there is an opportunity by both sides to present evidence and (iii) an actual hearing is held in which witnesses and testimony are subject to cross examination. Under the PDDRP, none of the basic tenets of due process are applied. Rather, ICANN has proposed that we have 1 panelist who is not an expert in determining damages, no hearing, no presentation of evidence, no cross examination and a 20 page limit in complaint and response. This draconian process is not allowed in the UDRP, proposed URS, or even ICANN's Independent Review Process and must not be done here. Moreover, the remedies possible for each of the parties to the dispute are completely disproportionate – a trademark holder may only be banned from filing other PDDRP complaints (which in and of itself is not effective, since most likely even with this ban, those parties will file complaints under other pseudonyms or individuals) and a Registry would effectively be risking termination of its Registry Agreement with every complaint plus monetary damages above and beyond paying for the procedure. The RySG cannot support this.
6. Must specify Safe Harbors for Registries – Like the UDRP, examples should be given as to what would be affirmative defenses for Registries; otherwise it will take expensive litigation to determine this. It is our understanding that even the World Intellectual Property Organization supports the notion of having such safe harbors. It is still unclear to the RySG what would constitute a pattern of bad faith, making the necessity of having safe harbors that much more important.
7. Quick Look / Standing: We agree there should be a quick look prior to when the Registries must respond to a complaint IF ICANN is not involved as recommended by the Registries in Point #1 above. However, if there is a quick look it needs to be more robust. It is not enough that there is a check that the complainant is a trademark owner, but at the very least the trademark owner must allege with specificity that one or more of its own legitimate trademarks have in fact been materially impacted by a Registry Operator's affirmative conduct. In addition, the notion of a "confirmation of complainant as a trademark holder" needs much more definition. Does this mean that the complainant must have an actual trademark registration? If so, that must be from a jurisdiction that (i) actually conducts substantive review and (ii) is one in which the Registry Operator would be subject to personal or subject matter jurisdiction. In other words, the fact that there is a trademark registration in a country in which the Registry operator would not be subject to personal jurisdiction otherwise should not be eligible to be used as the basis of a PDDRP action. Stated more simply, if the action could not have been brought in court because

there would be no personal or subject matter jurisdiction, the action should not be allowed to be brought through the PDDRP. To allow otherwise would be to create legal rights that would not otherwise exist and would contradict the sentence in the explanatory note which states: "The Trademark PDDRP simply provides a limited avenue in which to pursue rights that already exist."

8. Additional Comments. Please see the redline to the PDDRP supplied by the RySG for additional comments and concerns.

Level of Support of Active Members: Supermajority

- # of Members in Favor: 12
- # of Members Opposed: 0
- # of Members that Abstained: 0
- # of Members that did not vote: 1

Minority Position(s): N/A

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General RySG Information

- Total # of eligible RySG Members¹: 14
- Total # of RySG Members: 13
- Total # of Active RySG Members²: 13
- Minimum requirement for supermajority of Active Members: 9
- Minimum requirement for majority of Active Members: 7
- # of Members that participated in this process: 13
- Names of Members that participated in this process:
 1. Afiliias (.info & .mobi)
 2. DotAsia Organisation (.asia)

¹ All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the "effective date" set forth in the operator's or sponsor's agreement (RySG Articles of Operation, Article III, Membership, ¶ 1). The RySG Articles of Operation can be found at <<http://gnso.icann.org/files/gnso/en/improvements/registries-sg-proposed-charter-30jul09-en.pdf>>. The Universal Postal Union recently concluded the .POST agreement with ICANN, but as of this writing the UPU has not applied for RySG membership.

² Per the RySG Articles of Operation, Article III, Membership, ¶ 6: Members shall be classified as "Active" or "Inactive". A member shall be classified as "Active" unless it is classified as "Inactive" pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a RySG meeting or voting process for a total of three consecutive meetings or voting processes or both. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a RySG meeting or by voting.

3. DotCooperation (.coop)
 4. Employ Media (.jobs)
 5. Fundació puntCAT (.cat)
 6. Museum Domain Management Association – MuseDoma (.museum)
 7. NeuStar (.biz)
 8. Public Interest Registry - PIR (.org)
 9. RegistryPro (.pro)
 10. Societe Internationale de Telecommunication Aeronautiques – SITA (.aero)
 11. Telnic (.tel)
 12. Tralliance Registry Management Company (TRMC) (.travel)
 13. VeriSign (.com, .name, & .net)
- Names & email addresses for points of contact
 - Chair: David Maher, dmaher@pir.org
 - Vice Chair: Jeff Neuman, Jeff.Neuman@Neustar.us
 - Secretariat: Cherie Stubbs, Cherstubbs@aol.com
 - RYSG representative for this statement: Jeff Neuman, Jeff.Neuman@Neustar.us

**ATTACHMENT TO
GNSO gTLD Registry Stakeholder Group Statement on the Post Delegation
Dispute Resolution Process (PDDRP)**

**TRADEMARK POST-DELEGATION DISPUTE RESOLUTION PROCEDURE (TRADEMARK PDDRP)
REVISED – FEBRUARY 2010
INTRODUCTION**

Several community participants, including the Implementation Recommendation Team (IRT) and the World Intellectual Property Organization (WIPO) suggested that one of the rights protection mechanisms (RPM) for trademark holders should be a trademark post-delegation dispute resolution procedure (Trademark PDDRP). Various recommendations as to how such a process would be implemented have been discussed. One point that seems to be generally accepted, is that such a procedure should only afford trademark holders the right to proceed against registry operators who have acted in bad faith, with the intent to profit from the systemic registration of infringing domain names (or systemic cybersquatting) or who have otherwise set out to use the gTLD for an improper purpose. The procedure is not intended to apply to a registry operator that simply happens to have infringing domain names within its gTLD.

Some have expressed concerns that a post-delegation procedure challenging registry operator conduct might confer third-party beneficiary rights upon non-signatories to the Registry Agreement. Further, questions have arisen as to the rights of bona fide registrants (and applicability of remedies to registrars) if they are not a party to the post-delegation dispute resolution proceedings. Such concerns are understood and can be addressed differently for

alleged violations of trademark rights at the top level and for such alleged violations at the second level.

It is important to note that this Trademark PDDRP is not intended to replace ICANN's contractual compliance responsibilities. ICANN will continue to pursue its contractual compliance activities and enforcement for all of its contracted parties. This Trademark PDDRP is meant to enhance such activities and provide ICANN with independent judgment when required.

[NOTE: The RySG appreciate the statement above, but there is no affirmative obligation or commitment on the part of ICANN to do this. In addition, the statement above is so vague (and carefully written) to not specifically state that ICANN will do anything with the type of complaints described in the PDDRP. We believe is not enough to state this in the explanatory note in the guidebook, but rather there should be an affirmative commitment by ICANN to do this prior to the initiation of the PDDRP and ramifications for ICANN's failure to enforce agreements]

At the top level, the rights of a trademark holder to proceed against a gTLD operator for trademark infringement exist separate and apart from any contract between ICANN and a registry operator. The Trademark PDDRP simply provides a limited avenue in which to pursue rights that already exist.

DRAFT PROCEDURE

Parties to the Dispute

- The parties to the dispute will be the trademark holder and the gTLD registry operator. (Although there has been some suggestion that prior to commencing such a procedure, that ICANN first be notified and asked to investigate, from a practical standpoint, it does not make sense to add this layer to the procedure. It would unnecessarily slow the process.)

[SEE NOTE IN RySG Statement]

Applicable Rules

- This procedure is intended to cover Trademark post-delegation dispute resolution proceedings generally. To the extent more than one Trademark PDDRP provider (Provider) is selected to implement the Trademark PDDRP, each Provider may have additional procedural rules that must be followed when filing a Complaint. The following are general procedures to be followed by all Providers.

- In the Registry Agreement, the registry operator agrees to participate in all post-delegation procedures and be bound by the resulting Determinations, subject to the availability of contractual dispute resolution, court or other administrative proceedings as defined herein.

- In addition, in the Registry Agreement, ICANN shall acknowledge that all Determinations and remedies recommended by the PDDRP (or implemented by ICANN) shall be entitled to De Novo review through the dispute resolution processes set forth in the Registry Agreement. For the avoidance of doubt, nothing herein shall be construed by ICANN or any other party, as a waiver by Registry Operator of its right to have any and all disputes heard under the dispute resolution mechanisms in the Registry Agreement.

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Language

- The language of all submissions and proceedings under the procedure will be English.
- Parties may submit supporting evidence in their original language, provided and subject to the authority of the panel to determine otherwise, that such evidence is accompanied by an English translation of all relevant text.

Communications and Time Limits

- All communications with the Provider must be submitted electronically.
- For the purpose of determining the date of commencement of a time limit, a notice or other communication will be deemed to have been received on the day that it is transmitted to the appropriate contact person designated by the parties.
- For the purpose of determining compliance with a time limit, a notice or other communication will be deemed to have been sent, made or transmitted on the day that it is dispatched.
- For the purpose of calculating a period of time under this procedure, such period will begin to run on the day following the date of receipt of a notice or other communication.
- All references to day limits shall be considered as calendar days unless otherwise specified.

Standing

- The mandatory administrative proceeding will commence when a third-party ("Complainant"), or its agent, has filed a Complaint with a Provider asserting that the

Complainant is a trademark holder (which may include either registered or unregistered marks) claiming to have been injured by the registry operator's manner of operation or use of the gTLD.

- The Provider shall perform an initial "quick look" review to ascertain, before a Response is due, that the Complainant is in fact a trademark holder and that such trademark owner has alleged with specificity that one or more of its own trademarks have in fact been materially impacted by a Registry Operator's affirmative conduct. (Explanatory Note: This quick look process, inserted in response to public comment as a measure to screen out frivolous Complaints, is still under development.)
- If the Provider finds that the Complainant is not a trademark holder or that such trademark owner has not alleged with specificity that one or more of its own trademarks have in fact been materially impacted by a Registry Operator's affirmative conduct, the Provider will end the proceedings on the grounds that the Complainant lacks standing.

Commented [n1]: This requirement (with the edits) should be moved to be ICANN's responsibility even prior to the PDDRP action commencing.

Standards

(Explanatory Note: Parties have suggested that registry operators be held liable for infringing conduct within their registry both at the top level and the second level. Contemplation of holding registry operators accountable for registrations in its gTLD has resulted in a number of comments regarding the standard to be applied to the registry operator, whether intervention rights should be permitted, and whether the net result of extension to the second level has a *de facto* effect of requiring registries to police all domain names and content of websites for trademark infringement. The standards below take into account the various and often competing comments and suggestions.)

- **Top Level:**

A complainant must assert and prove, by clear and convincing evidence, that

the registry operator's affirmative conduct in its operation or use of its gTLD string that is identical or confusingly similar to the complainant's mark, causes or materially contributes to the gTLD doing one of the following:

- taking unfair advantage of the distinctive character or the reputation of the complainant's mark; or*
- unjustifiably impairing the distinctive character or the reputation of the complainant's mark; or*
- creating an impermissible likelihood of confusion with the complainant's mark.*

An example of infringement at the top-level is where a TLD string is identical to a trademark and then, ~~contrary to declared intentions not to infringe the rights of the mark holder,~~ the registry operator holds itself out as the beneficiary of the mark.

Commented [n2]: This clause is problematic in that we believe a registry as part of the registry agreement reps that it will protect the legal rights of others. One could interpret that therefore that every registry always declares not to infringe the rights of every mark holder.

- **Second Level**

Complainants are required to prove, by clear and convincing evidence that, through the registry operator's affirmative conduct:

- (a) *there is a substantial pattern or practice of specific bad faith intent by the registry operator to profit from the sale of trademark infringing domain names; and*
- (b) *the registry operator's bad faith intent to profit from the systematic registration of domain names within the gTLD that are identical or confusingly similar to the complainant's mark, which:*
 - (i) *takes unfair advantage of the distinctive character or the reputation of the complainant's mark; or*
 - (ii) *unjustifiably impairs the distinctive character or the reputation of the complainant's mark, or*
 - (iii) *creates an impermissible likelihood of confusion with the complainant's mark.*

In other words, it would not be enough to show that the registry operator was on notice of possible trademark infringement through registrations in the gTLD. An example of infringement at the second level is where a registry operator has a pattern or practice of actively encouraging registrants to register second level domain names and to take unfair advantage of the trademark to the extent and degree that bad faith is apparent.

Complaint

- **Filing:**

The Complaint will be filed electronically. Once reviewed for technical compliance, the Provider will electronically serve the Complaint and serve a paper notice on the registry operator that is the subject of the Complaint consistent with the contact information listed in the Registry Agreement.

- **Content:**

- The name and contact information, including address, phone, and email address, of the Complainant, and, to the best of Complainant's knowledge, the name and address of the current owner of the registration.
- The name and contact information, including address, phone, and email address of any person authorized to act on behalf of Complainant.
- A statement of the nature of the dispute, which should include:
 - The particular legal rights claim being asserted, the marks that form the basis for the dispute and a short and plain statement of the basis upon which the Complaint is being filed.
 - A detailed explanation of how the Complainant's claim meets the requirements for filing a claim pursuant to that particular ground or standard.
 - A detailed explanation of the validity of the Complaint and why the Complainant is entitled to relief.
 - [A statement that the Complainant has at least 30 days prior to filing the Complaint notified the Registry in writing of \(i\) its specific concerns and the specific conduct it believes is resulting in infringement of Complainant's trademarks and \(ii\) its willingness to meet to resolve the issue.](#)
 - Copies of any documents that the Complainant considers to evidence its basis for relief, including web sites and domain name registrations.
- A statement that the proceedings are not being brought for any improper purpose.
- Complaints will be limited to 5,000 words or 20 pages, whichever is less, excluding attachments, unless the Provider determines that additional material is necessary.
- At the same time the Complaint is filed, the Complainant will pay a non-refundable filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within 10 days of the receipt of the Complaint by the Provider, the Complaint will be dismissed without prejudice.

Administrative Review of the Complaint [NOTE – How does this relate to the Quick Look described above? Perhaps Quick Look section should be moved here].

- All Complaints will be reviewed by the Provider within five (5) business days of submission to the Provider to determine whether the Complaint contains all necessary information and complies with the procedural rules.
- If the Provider finds that the Complaint complies with procedural rules, the Complaint will be deemed filed, and the proceedings will continue. If the Provider finds that the Complaint does not comply with procedural rules, it will dismiss the Complaint and close the proceedings without prejudice to the Complainant's submission of a new Complaint that complies with procedural rules. Filing fees will not be refunded.
- If deemed compliant, the Provider will serve the Complaint on the registry operator.

Response to the Complaint

- The registry operator will file a Response to each Complaint. The Response will be filed within ~~twenty-sixty~~ (2060) days of service the Complaint. Service will be deemed effective, and the time will start to run, upon confirmation that the electronic Complaint and the written notice was sent by the Provider to the last known address of the registry operator.
- The Response will comply with the rules for filing of a Complaint and will contain the name and contact information for the registry operator, as well as a point by point response to the statements made in the Complaint.
- The Response should be filed with the Provider and Provider should serve it upon the Complainant in electronic form with a hard-copy notice that it has been served. Service of the Response will be deemed effective, and the time will start to run for a Reply, upon confirmation that the electronic Response and hard-copy notice of the Response was sent by the Provider to the addresses provided by the Complainant.
- If the registry operator believes the Complaint is without merit, it will affirmatively plead in its Response the specific grounds for the claim.

Reply

- The Complainant is permitted ten (10) days from Service of the Response to submit a Reply addressing the statements made in the Response showing why the Complaint is not "without merit." A Reply may not introduce any new facts

or evidence into the record, but shall only be used to address the statements made in the Response. Any new facts or evidence introduced in a Complaint must be disregarded by the Panel.

- Once the Complaint, Response and Reply (as necessary) are filed and served, a Panel will be appointed and provided with all submissions.

Default

- If the registry operator fails to respond to the Complaint, it will be deemed to be in default.
- Limited rights to set aside the finding of default will be established by the Provider, but in no event will they be permitted absent a showing of good cause to set aside the finding of default.
- The Provider shall provide notice of Default via email to the Complainant and registry operator.
- All Default cases shall proceed to Determination on the merits.

Expert Panel

- Each PDDRP panel shall consist of three (3) members. One member of the Panel shall be appointed by the Complainant, one by the Registry and the third shall be selected by the 2 appointed panelists from a list of aAppropriately qualified panelist(s) ~~will be selected and appointed to each proceeding by the~~ designated by the Provider within (21) days after receiving the response and/or reply as applicable.
- ~~The Provider will appoint a Panel, which shall consist of one Panel member, unless all parties agree that there should be three Panelists. In the case where all Parties agree to three Panelists, selection of those Panelists will be made pursuant to the Providers rules or procedures.~~
- Panelists must be independent of the parties to the post-delegation challenge. Each Provider will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing a panelist for lack of independence.

Costs

- The Provider will estimate the costs for the proceedings that it administers under this procedure in accordance with the applicable Provider rules. Such costs will be estimated to cover the administrative fees of the Provider and for the Panel, and are intended to be reasonable.

- The Complaint shall be required to pay the filing fee as set forth above in the “Complaint” section, and shall be required to submit the full amount of the Provider estimated administrative fees and the Panel fees at the outset of the proceedings. Fifty percent of that full amount shall be in cash (or cash equivalent) to cover the Complainant’s share of the proceedings and the other 50% shall be in either cash (or cash equivalent), or in bond, to cover the registry operator’s share if the registry operator prevails.
- ~~After the quick look examination and the Complainant is deemed a trademark holder, the registry operator shall be required to pay 50% of the Provider estimated administrative fees and the Panel fees to cover the registry operator’s share of the proceedings. To the extent the Complainant prevails, the registry operator will be required to pay the remaining 50% to the Provider to cover Complainant’s share of the proceedings. Failure to pay that amount shall be deemed a breach of the registry agreement. [NOTE: THIS MUST BE TAKEN OUT. IT IS NOT REQUIRED IN ANY OTHER DISPUTE PROCEEDING AND WILL BE USED AS A TOOL BY OVERZEALOUS TRADEMARK OWNERS TO EXTORT A SETTLEMENT OR OTHER UNDESIREABLE OUTCOME. WHAT IS THE COMPELLING JUSTIFICATION FOR REQUIRING A REGISTRY TO PAY THE FEES UP FRONT?]~~
- The Provider shall refund the full amount to the prevailing party, as determined by the Panel.

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Discovery

- Whether and to what extent discovery is allowed is at the discretion of the Panel, whether made on the Panel’s own accord, or upon request from the Parties..
- If permitted, discovery will be limited to that for which each Party has a substantial need.
- Without a specific request from the Parties, the Provider may appoint experts to be paid for by the Parties, request live or written witness testimony, or request limited exchange of documents.
- At the close of discovery, if permitted, the Parties will make a final evidentiary submission to the Panel, the timing and sequence to be determined by the Provider in consultation with the Panel.

Hearings

- Disputes under this Procedure will be resolved without a hearing unless, in the discretion of the Panel, extraordinary circumstances require a hearing. [NOTE: THIS MUST BE REVISITED. WE BELIEVE A HEARING IS ESSENTIAL IN THIS MANNER SO THAT EVIDENCE CAN BE PRESENTED ESPECIALLY IF ICANN IS SERIOUSLY CONSIDERING ALLOWING A PANELIST TO RECOMMEND MONETARY SANCTIONS, WHICH WE BELIEVE MUST BE REMOVED AS WELL]

- The Panel may decide on its own initiative, or at the request of a Party, to hold a hearing if, extraordinary circumstances exist. However, the presumption is that the Panel will render Determinations based on written submissions and without a hearing.
- If a request for a hearing is granted, videoconferences or teleconferences should be used if at all possible. If not possible, then the Panel will select a place for hearing if the Parties cannot agree.
- Hearings should last no more than one day, except in the most extraordinary circumstances.
- If the Expert (Panel?) grants one party's request for a hearing, notwithstanding the other party's opposition, the Expert is encouraged to apportion the hearing costs to the requesting party.
- All dispute resolution proceedings will be conducted in English.

Burden of Proof

- The Complainant bears the burden of proving the allegations in the Complaint; the burden ~~should-must~~ be by clear and convincing evidence.

Remedies

- Since registrants of domain names registered in violation of the agreement restriction are not a party to the action, a recommended remedy cannot take the form of deleting, transferring or otherwise suspending -registrations that were made in violation of the agreement restrictions.
- The Panel ~~can~~ may recommend to ICANN a variety of graduated enforcement tools against the Registry Operator registry if it is deemed to be liable under this Trademark PDDRP, including:

- Remedial measures for the registry to employ to ensure against allowing future infringing registrations;
- ~~Monetary sanctions intended to equal the financial harm to the complainant; [SEE RYSG STAEMENT]~~
- Suspension of accepting new domain name registrations in the gTLD until such time as the violation(s) is cured or a set period of time; or, ~~in extraordinary circumstances;~~
- in extraordinary circumstances, where the Complainant can prove by clear and convincing evidence that the Registry Operator acted with malice, Providing for the termination of a Registry Agreement.
- In making its recommendation of the appropriate remedy, the Panel will consider the ongoing harm to the Complainant.
- While still under consideration, the Panel may also determine whether the Complaint was filed “without merit,” and, if so, award the appropriate sanctions on a graduated scale, including:
 - Temporary bans from filing Complaints;
 - Imposition of costs of registry operator, including reasonable attorney fees;
 - Penalty fees paid directly to the Registry Operator ~~Provider;~~
 - Permanent bans from filing Complaints after being banned temporarily.

Commented [n3]: Since when are punitive damages paid to the dispute provider? Isn't that an incentive for the Panelists to award such punitive damages? In addition, it is the Registry that suffers with frivolous actions and therefore they should be the ones compensated.

The Panel Determination

- The Provider and the Panel will make reasonable efforts to ensure that the Panel Determination is rendered within 45 days of the appointment of the Panel and absent good cause, in no event later than 60 days after the appointment of the Panel.
- The Panel will render a written Determination. The Determination will state whether or not the Complaint is factually founded and provide the reasons for that Determination. The Determination should be publicly available and searchable on the Provider's web site.
- The Determination will further include a recommendation of specific remedies and state specifically when those remedies should take effect. Costs and fees to the Provider, to the extent not already paid, will be paid within thirty (30) days of the Expert's Determination.
- While the Panel's Determination that a registry operator is liable under the standards of the Trademark PDDRP shall be followed absent extraordinary circumstances, ICANN will

review, ~~and may seek to enforce, approve and enforce~~ the recommended remedies found in the Panel Determination, or as those remedies are amended by ICANN given the circumstances of each matter. If ICANN decides to implement a remedy for violation of the PDDRP, it will wait ten (10) business days (as observed in the location of its principal office) after notifying the Registry Operator of its decision before implementing that decision. It will then implement the decision unless it has received from the Registry Operator during that ten (10) business day period official documentation that the Registry Operator has either (a) commenced a lawsuit against the Complainant in a court of competent jurisdiction, or (b) invoked its right to dispute resolution under its Registry Agreement. If ICANN receives such documentation within the ten (10) business day period, it will not seek to implement its decision under the PDDRP, and we will take no further action, until it receives (i) evidence of a resolution between the Complainant and the Registry Operator; (ii) evidence that Registry Operator's lawsuit against Complainant has been dismissed or withdrawn; (iii) a copy of an order from the dispute resolution provider selected pursuant to the Registry Agreement such court dismissing the dispute against ICANN.

Availability of Dispute Resolution, Court or Other Administrative Proceedings

- The Trademark PDDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of a Determination as to liability.
- In those cases where a Party provides the Provider with documented proof that a Court action was instituted prior to the filing date of the Complaint in the post-delegation dispute proceeding, the Provider ~~may~~ shall suspend or terminate the post-delegation dispute resolution proceeding.
- In addition, nothing herein shall preclude Registry Operator from challenging either the Determinations or the remedial actions pursuant to the PDDRP under the Registry Operator's dispute resolution mechanisms in its Registry Agreement, on a de novo basis.

Commented [JRS4]: This should be shall and not may as it will always be a registry seeking to stay the proceedings