# Review of All Rights Protection Mechanisms (RPMs) in All gTLDs PDP Working Group - Phase 1 Initial Repot - Public Comment Input Form

This Public Comment forum seeks community feedback on the Phase 1 Initial Report published by the Review of All Rights Protection Mechanisms (RPMs) in All gTLDs Policy Development Process (PDP) Working Group.

* Required

1. Email address * George Kirikos email address (not posted here)

>>> IMPORTANT INSTRUCTIONS >>> PLEASE READ BEFORE PROCEEDING >>>

## Please submit your public comments via this form only

If you are unable to use Google forms, alternative arrangements can be made. Please contact policy-staff@icann.org for assistance.

## You can review this entire form via its PDF and Word format

To facilitate off-line work, or for those who may not have access to the form, you can download a PDF or Word version of the form below:

- <INSERT PDF LINK>
- <INSERT WORD LINK>

## There is no obligation to complete all sections within this form

Respond to as many or as few questions as desired. The only "mandatory" questions are those related to commenter's personal data in Section 1 and Section 2 of this form.

## You may enter general comments in the last section (Section 11)

There is an opportunity to comment on the general content of this Initial Report and provide input that may not be tied to any specific items that the Working Group is seeking community input.

## There is a limit of 2,000 characters (about 350-400 words) for each "comment box" question

In the event you reach the character limit, you may send an email to policy-staff@icann.org, and the Working Group Support Staff will assist you and manually enter your responses.

## To stop and save your work for later, you MUST (to avoid losing your work):

1. Provide your email address above in order to receive a copy of your submitted responses;

2. Click "Submit" at the end of the Google Form (the last question on every page allows you to quickly jump to the end of the Google Form to submit);

3. After you click "Submit," you will receive an email to the above-provided email address; within the email, click the "Edit Response" button at top of the email;

4. After you click the "Edit Response" button, you will be directed to the Google Form to return and complete;

5. Repeat the above steps 2-4 every time you wish to quit the form and save your progress.

## When the commenter hits the “Submit” button, all submitted comments will be displayed publicly via an automatically-generated Google Spreadsheet

Note: Email addresses provided by commenters will not be displayed.

## The final date of the Public Comment forum is 23:59 UTC on 4 May 2020

This form will be closed by 23:59 UTC on 4 May 2020. Any comments received after that date/time will not be reviewed/discussed by the Working Group.

## Other Important Instructions

- This is a standard format for collecting public comment. It seeks to:
  -- Clearly link comments to specific sections of the Initial Report
  -- Encourage commenters to provide reasoning or rationale for their opinions
  -- Enable the sorting of comment so that the Working Group can more easily read all the comments on any one topic

- You can easily navigate from section to section in the form. There is a table of contents below so that you can “fast forward” to the desired section by hitting “next” at the bottom of each section.

- Since some of the preliminary recommendations and questions for community input are related, they are placed next to each other for easy reference. In addition, some of the questions for community input have been divided into multi-part questions so that feedback on these questions would be clear.

- Please click the link contained in the Google Form to read the details and context of each preliminary recommendation, community question, and individual proposal.

- Your comments should take into account scope of the PDP Working Group Phase 1 work as described by the Charter.

- It is important that your comments include rationale. The Working Group is interested in your reasoning so that the conclusions reached and the issues discussed by the team can be tested against the reasoning of others. This is much more helpful than comments that simply “agree” or “disagree”.

- Where applicable, you are encouraged to reference sections in the report for ease of the future review by the Working Group.

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## Section 2: Consent & Authorization

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN Privacy Policy ( https://www.icann.org/privacy/policy), and agree to abide by the website Terms of Service (https://www.icann.org/privacy/tos).

2. Please provide your name: *George Kirikos

3. Please provide your affiliation *Leap of Faith Financial Services Inc.

4. Are you providing input on behalf of another group (e.g., organization, company, government)? *NO.

   *Mark only one oval.*

   Ye

   s

   No

5. If yes, please explain:

Save Your Progress

6. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

   *Mark only one oval.*

   Yes

   No, I would like to continue to the next section

## Section 3: URS Preliminary Recommendations & Community Questions

- This section seeks to obtain input on all the preliminary recommendations and questions related to the Uniform Rapid Suspension System (URS).
- Related URS preliminary recommendations and questions are placed next to each other for easy reference.

### URS Recommendation #1

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/byCJBw Note:

URS Recommendation #1 has an associated URS Question #1 below.

7. Please choose one of the following responses for URS Recommendation #1:

   *Mark only one oval. Do not support recommendation.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

8. If you wish to (a) propose changes to URS Recommendation #1; and/or (b) provide a rationale for your response, please do so here.

As a preliminary matter, the URS should be eliminated, for reasons which will be elaborated upon in other sections. [You can assume this statement into all of my future responses below, without being explicitly made again.]

However, if the URS is retained, one must remember that it was only intended to be applicable for "slam dunk" disputes, which should be so compelling, regardless of who the registrant is behind the domain name. If the outcome of the dispute would turn based on who the registrant is, then the dispute was inappropriate/weak from the start, and should have gone another route (UDRP or courts). One doesn't need to know the identity of the registrant for FAMOUSBANK-login-here.TLD with a phishing page, as that's a slam dunk case for the complainant. Where the dispute involves "POPULARSURNAME.TLD", and an aggressive trademark holder's case would fail if the respondent happens to share that surname, then that case perhaps shouldn't have been brought in the first place, unless it was "obviously abusive" (e.g. via phishing content, etc.), rather than "possibly abusive, depending on who registered it"

It also needs to be made clear that in the event a Complainant amends their complaint (i.e. if the above is ignored), the time limit for a response must also be adjusted accordingly (i.e. the time to respond needs to be measured from the date the amendment is delivered to the Respondent).

## URS Question #1

Please find the link to this Question and its context here: https://community.icann.org/x/cCaJBw

Note: URS Question #1 is related to URS Recommendation #1.

9. URS Q1a. Should URS Rule 15(a) be amended to clarify that, where a Complaint has been updated with registration data provided to the Complainant by the URS Provider, there must be an option for the Determination to be published without the updated registration data? Yes.

*Mark only one oval.*

- Ye
- s
- No

No opinion

- Other:

10. URS Q1b. If so, when, by whom, and how should this option be triggered?

At the option of the registrant, if and only if they are a natural person covered by applicable privacy legislation.

11. URS Q1c. Are there any operational considerations that will need to also be addressed in triggering this option?

Most likely yes, but not a major issue for me, so I'll leave it to others to argue about.

URS Recommendation #2

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/hCGJBw

12. Please choose one of the following responses for URS Recommendation #2:

*Mark only one oval.* *Support Recommendation with minor change.*

- ( ) Support Recommendation as written
- ( ) Support Recommendation concept with minor change
- ( ) Significant change required
- ( ) Do not support Recommendation
- ( ) No opinion

13. If you wish to (a) propose changes to URS Recommendation #2; and/or (b) provide a rationale for your response, please do so here.

This recommendation should be clarified to ensure that any time measurement for responding is based on the last method used for sending notices. For example, if a URS provider sends notices on April 25th via email (which might have been visible in the WHOIS), but sends out notices by mail/courier or FAX on April 28th, after obtaining that data from the registry (had it not been visible in the WHOIS), then the time to respond needs to be based on the April 28th date, and not the earlier April 25th one.

## URS Recommendation #3

Please find the link to this Recommendation and its context here: https://community.icann.org/x/hiGJBw

14. Please choose one of the following responses for URS Recommendation #3:

*Mark only one oval.* *Significant change required.*

- ( ) Support Recommendation as written
- ( ) Support Recommendation concept with minor change
- ( ) Significant change required
- ( ) Do not support Recommendation
- ( ) No opinion

15. If you wish to (a) propose changes to URS Recommendation #3; and/or (b) provide a rationale for your response, please do so here.

This recommendation should be an embarrassment to ICANN, given that it uncovered non-compliance by providers not sending the required notice. As such, there should be consequences to those providers, to ensure that it doesn't happen again.

Furthermore, the actual recommendation is not robust, in that there is ambiguity about "predominant language", and also suffers delays when the WHOIS is redacted due to GDPR (as one must wait for the underlying data to be disclosed, to determine where the respondent is located).

Instead, the working group should adopt Individual URS Proposal #34 (from Zak Musovitch and myself), as it is a proven method (long used for the UDRP) based on the language of the registration agreement. That registration agreement language is known even if the WHOIS is redacted due to GDRP, because the identity of the REGISTRAR is known at all times (regardless of whether or not the WHOIS is redacted).

As discussed in the body of URS Proposal #34 (evidence section)

https://community.icann.org/display/RARPMRIAGPWG/URS+Proposals?preview=/93126760/96207628/URS-Proposal-34.pdf#URSProposals--986447092

the higher default rate for Chinese registrants can be explained due to the language barriers, and Individual URS Proposal #34 is superior to this "recommendation" in addressing that major problem.

## URS Recommendation #4

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/XyCJBw Note:

URS Recommendation #4 has an associated URS Question #2 below.

16. Please choose one of the following responses for URS Recommendation #4:

*Mark only one oval.* *Significant change required.*

- ( ) Support Recommendation as written

- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

17. If you wish to (a) propose changes to URS Recommendation #4; and/or (b) provide a rationale for your response, please do so here.

I reiterate that it would be best for the URS to be entirely eliminated, as its benefits are outweighed by its costs. Adding additional layers of bureaucracy to handle compliance issues demonstrates that there are some members of the community who will always be arguing for additional costs to be incurred in trying to "fix" a broken procedure, rather than doing the proper thing, namely eliminating that procedure completely (in favour of the courts and/or the UDRP). In essence this would be a "dispute resolution procedure" for the "dispute resolution procedure"!! Indeed, given ICANN itself has not had a great track record in reigning in their contracted parties, I do not have much confidence that their compliance department would be up to the job. Regulators tend to have a history of being captured by those they purport to regulate.

The amount of time and money spent evaluating this procedure has been extraordinary (likely into the millions of dollars, if one evaluates the hourly value of the volunteer and staff time to date). A "URS commissioner" and/or "standing committee" isn't free.

This report has been devoid of any economic rationales for its recommendations, nor does it even attempt to weigh the costs against the benefits, including for this recommendation. Essentially, this recommendation is asking for ICANN to spend more money to hire someone to do something. That costs money. That might be attractive to some in the ICANN community who are looking to get hired, but the rest of us actually end up paying those costs, directly or indirectly.

In conclusion, it's time to recognize that the URS is beyond being fixed. It was an experiment that failed, and should be retired. All is not lost, though, as complainants have other options (courts and/or UDRP, to name a few).

URS Question #2

Please find the link to this Question and its context here: https://community.icann.org/x/XyCJBw

Note: URS Question #2 is related to URS Recommendation #4.

18. URS Q2a. What compliance issues have Registries and Registrars discovered in URS processes, if any?

N/A (not a registry or registrar)

19. URS Q2b. Do you have suggestions for how to enhance compliance of URS Providers, Registries, and Registrars in the URS process?

Create contracts with explicit third party beneficiary clauses. Then, if there is a breach, allow those contracts to be enforced in court. But, read above, the URS should be eliminated in its entirety, and not persist. See also URS Individual Recommendation #33, which called for fixed-term contracts for URS providers, with explicit consequences for non-compliance. The current "accredit and forget it" model doesn't work, and has led to URS providers who are too comfortable. They should always be aware that someone better can come along and replace them.

## URS Recommendation #5

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/cSCJBw Note:

URS Recommendation #5 has an associated URS Question #3 below.

20. Please choose one of the following responses for URS Recommendation #5:

*Mark only one oval. Support Recommendation as written.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

21. If you wish to (a) propose changes to URS Recommendation #5; and/or (b) provide a rationale for your response, please do so here.

This again is an embarrassment, that one would even need to make a recommendation like this. This points to deeper organizational problems, that they can't deliver services with basic functionality. ICANN likes to brag that they're a "world class" organization, but they can't even accomplish many of the basics.

To reiterate, though, the URS should be eliminated as policy. Trying to do too many things at once stretches one's limited resources, and leads to embarrassment like this, where one has to recommend that parties "keep contact details up to date". No kidding!

## URS Question #3

Please find the link to this Question and its context here: https://community.icann.org/x/cSCJBw

Note:
• The Working Group recommends that public comment be sought from Registry Operators.
• URS Question #3 is related to URS Recommendation #5

22. URS Q3a. Question to Registry Operators -- Have Registry Operator experienced

any issues with respect to receiving notices from URS Providers?

*Mark only one oval.* *Other (N/A - not a registry operator)*

- Ye
- s
- No
- Not sure
- Other:

23. RS Q3b. Question to Registry Operators -- Were these notices sent through appropriate channels?

*Mark only one oval.* *Other (N/A - not a registry operator)*

- Ye
- s
- No
- Not sure
- Other:

24. URS Q3c. Question to Registry Operators -- Did the notices contain the correct information?

*Mark only one oval.* *Other (N/A - not a registry operator)*

- Ye
- s
- No
- Not sure
- Other:

URS Recommendation #6

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/iCGJBw Note:

URS Recommendation #6 has an associated URS Question #4 below.

25. Please choose one of the following responses for URS Recommendation #6:

*Mark only one oval.* *Do not support Recommendation.*

- ( ) Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

26. If you wish to (a) propose changes to URS Recommendation #6; and/or (b) provide a rationale for your response, please do so here.

I reiterate that it would be best for the URS to be entirely eliminated, as its benefits are outweighed by its costs. Adding additional layers of bureaucracy to handle creation of "educational materials" and "documentation" demonstrates that there are some members of the community who will always be arguing for additional costs to be incurred in trying to "fix" a broken procedure, rather than doing the proper thing, namely eliminating that procedure completely (in favour of the courts and/or the UDRP).

The amount of time and money spent evaluating this procedure has been extraordinary (likely into the millions of dollars, if one evaluates the hourly value of the volunteer and staff time to date). Spending hundreds of thousands of dollars more to create educational materials, for a procedure that is used a couple of hundred times a year? That's a waste of money, that could be better spent on other things.

Economics involves trade-offs and making choices. There are unlimited wants, but limited resources to satisfy them. Resources would be better spent eliminating the URS completely, and diverting any additional investment into the UDRP.

This report has been devoid of any economic rationales for its recommendations, nor does it even attempt to weigh the costs against the benefits, including for this recommendation. Essentially, this recommendation is asking for ICANN to spend more money to hire someone to do something. That costs money. That might be attractive to some in the ICANN community who are looking to get hired, but the rest of us actually end up paying those costs, directly or indirectly.

In conclusion, it's time to recognize that the URS is beyond being fixed. It was an experiment that failed, and should be retired. All is not lost, though, as complainants have other options (courts and/or UDRP, to name a few).

If this proposal gets adopted, it must be costed out entirely (i.e. explicit cost attached) BEFORE it goes to the GNSO Council and/or Board, and the community must be made aware that those costs meant lower expenditures on some other project (which might have a bigger impact).

## URS Question #4

Please find the link to this Question and its context here: https://community.icann.org/x/iCGJBw Note:

URS Question #4 is related to URS Recommendation #6.

27. URS Q4a. What content and format should these educational materials have?

Precious resources (including my time) should be spent elsewhere, as discussed above, and the URS should be eliminated entirely.

28. URS Q4b. How should these educational materials be developed?

If ICANN foolishly proceeds with this "make work" project, which will squander more resources, then there should be a competitive tender that specifically EXCLUDES anyone associated with this working group (past or present members/observers). There is a huge conflict of interest in arguing for ICANN to spend money to develop educational resources, and then have that same party line up to line their pockets with contracts or grants which result from that recommendation.

Given many problems with the URS occur due to lack of any response from registrants, at least two-thirds of any money spent should be devoted to educating registrants on defending complaints, rather than educating complainants (most of whom are already knowledgeable about making complaints).

29. URS Q4c. Who should bear the cost for developing these educational materials?

Since URS providers and INTA (and its members) have been the ones who've most pushed for the URS' adoption, the cost should be borne entirely by trademark holders and URS providers. A one-time levy of USD $50,000 per URS provider, as well as an ongoing fee of $10 per TMCH recordal per year would suffice, to ensure that the appropriate parties who've advocated for the URS end up paying for it.

30. URS Q4d. Should translations be provided?

*Mark only one oval.* *Yes.*

- Ye
- s
- No
- No opinion
- Other:

URS Recommendation #7

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/iiGJBw

31. Please choose one of the following responses for URS Recommendation #7:

*Mark only one oval.* *Support Recommendation as written.*

- [ ] Support Recommendation as written
- [ ] Support Recommendation concept with minor change
- [ ] Significant change required
- [ ] Do not support Recommendation
- [ ] No opinion

32. If you wish to (a) propose changes to URS Recommendation #7; and/or (b) provide a rationale for your response, please do so here.

This is “low hanging fruit”, since it should be a basic part of procedural fairness to have reasons. These are disputes with penalties (suspension of the domain name), and registrants are entitled to know exactly why they were found in violation of a policy, if their domain is suspended. Alternatively, complainants that fail should similarly understand why they didn’t meet the burden required. Errors in that analysis or reasoning can be used to appeal the decision, but can’t be detected if there are no reasons provided at all, or if those reasons are otherwise inadequate. Furthermore, frequent or severe errors should have consequences for URS providers and/or panelists, but can’t be detected if no reasons are provided.

To cite some law in Ontario, Canada, where I’m from, note: Megens v. Ontario Racing Commission, 2003 CanLII 26509 (ON SCDC):

https://www.canlii.org/en/on/onscdc/doc/2003/2003canlii26509/2003canlii26509.html

“One aspect of fairness is the duty to give reasons for the decision on the merits and as to penalty. There is a minimum standard that must be met, and the full extent of the duty to give reasons may vary depending on the circumstances including the operative statute, the importance of the decision to the party and how closely the tribunal process resembles the judicial process. The obligation to provide reasons is not satisfied by merely reciting the submissions and evidence and stating a conclusion.”

## URS Recommendation #8

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/jCGJBw Note:

URS Recommendation #8 has an associated URS Question #5 below.

33. Please choose one of the following responses for URS Recommendation #8:

*Mark only one oval.* *Do not support Recommendation.*

- [ ] Support Recommendation as written
- [ ] Support Recommendation concept with minor change
- [ ] Significant change required
- [ ]

Do not support Recommendation

No opinion

34. If you wish to (a) propose changes to URS Recommendation #8; and/or (b) provide a rationale for your response, please do so here.

The supporting rationale came from a tiny sample (not statistically significant) of URS practitioners that were dominated by those representing complainants (only 1 out of 14 had represented respondents). See: https://community.icann.org/download/attachments/86606544/URS%20Practitioners%20Survey%20Summary%20Results%2012%20June%202018.pdf?version=1&modificationDate=1528859972000&api=v2

Thus, it's a recommendation that came from a very unrepresentative sample. Looking at Registry Requirement 10, it seems fine as-is, without any changes. One should not allow any implementation team to modify that policy based on views from that unrepresentative group.

## Question #5

Please find the link to this Question and its context here: https://community.icann.org/x/jCGJBw Note:

URS Question #5 is related to URS Recommendation #8.

35. URS Q5. Should the Registry Requirement 10 be amended to include the possibility for another Registrar, which is different from the sponsoring Registrar but accredited by the same Registry, to be elected by the URS Complainant to renew the URS Suspended domain name, and to collect the Registrar renewal fee?

*Mark only one oval.No.*

Ye

s

No

No opinion

Other:

## URS Recommendation #9

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/jiGJBw

36. Please choose one of the following responses for URS Recommendation #9:

*Mark only one oval.* *Significant change required.*

- ( ) Support Recommendation as written
- ( ) Support Recommendation concept with minor change
- ( ) Significant change required
- ( ) Do not support Recommendation
- ( ) No opinion

37. f you wish to (a) propose changes to URS Recommendation #9; and/or (b) provide a rationale for your response, please do so here.

The current language policies are broken for the URS. Instead, the working group should adopt Individual URS Proposal #34 (from Zak Musovitch and myself), as it is a proven method (long used for the UDRP) based on the language of the registration agreement. That registration agreement language is known even if the WHOIS is redacted due to GDRP, because the identity of the REGISTRAR is known at all times (regardless of whether or not the WHOIS is redacted).

As discussed in the body of URS Proposal #34 (evidence section)

https://community.icann.org/display/RARPMRIAGPWG/URS+Proposals?preview=/93126760/96207628/URS-Proposal-34.pdf#URSProposals--986447092

the higher default rate for Chinese registrants can be explained due to the language barriers, and Individual URS Proposal #34 is superior to this “recommendation” in addressing that major problem.

## URS Recommendation #10

Please find the link to this Recommendation and its context here: h ttps://community.icann.org/x/kCGJBw Note:

URS Recommendation #10 has an associated URS Question #6 below.

38. Please choose one of the following responses for URS Recommendation #10:

*Mark only one oval.* *Do not support Recommendation.*

- ( ) Support Recommendation as written
- ( ) Support Recommendation concept with minor change
- ( ) Significant change required
- ( ) Do not support Recommendation
- ( ) No opinion

39. If you wish to (a) propose changes to URS Recommendation #10; and/or (b) provide a rationale for your response, please do so here.

(same answer as URS Recommendation #6) I reiterate that it would be best for the URS to be entirely eliminated, as its benefits are outweighed by its costs. Adding additional layers of bureaucracy to handle creation of "educational materials" and "documentation" demonstrates that there are some members of the community who will always be arguing for additional costs to be incurred in trying to "fix" a broken procedure, rather than doing the proper thing, namely eliminating that procedure completely (in favour of the courts and/or the UDRP).

The amount of time and money spent evaluating this procedure has been extraordinary (likely into the millions of dollars, if one evaluates the hourly value of the volunteer and staff time to date). Spending hundreds of thousands of dollars more to create educational materials, for a procedure that is used a couple of hundred times a year? That's a waste of money, that could be better spent on other things.

Economics involves trade-offs and making choices. There are unlimited wants, but limited resources to satisfy them. Resources would be better spent eliminating the URS completely, and diverting any additional investment into the UDRP.

This report has been devoid of any economic rationales for its recommendations, nor does it even attempt to weigh the costs against the benefits, including for this recommendation. Essentially, this recommendation is asking for ICANN to spend more money to hire someone to do something. That costs money. That might be attractive to some in the ICANN community who are looking to get hired, but the rest of us actually end up paying those costs, directly or indirectly.

In conclusion, it's time to recognize that the URS is beyond being fixed. It was an experiment that failed, and should be retired. All is not lost, though, as complainants have other options (courts and/or UDRP, to name a few).

If this proposal gets adopted, it must be costed out entirely (i.e. explicit cost attached) BEFORE it goes to the GNSO Council and/or Board, and the community must be made aware that those costs meant lower expenditures on some other project (which might have a bigger impact).

If ICANN foolishly proceeds with this "make work" project, which will squander more resources, then there should be a competitive tender that specifically EXCLUDES anyone associated with this working group (past or present members/observers). There is a huge conflict of interest in arguing for ICANN to spend money to develop educational resources, and then have that same party line up to line their pockets with contracts or grants which result from that recommendation.

Given many problems with the URS occur due to lack of any response from registrants, at least two-thirds of any money spent should be devoted to educating registrants on defending complaints, rather than educating complainants (most of whom are already knowledgeable about making complaints).

If money is to be spent, it should come from URS providers and INTA members, since URS providers and INTA (and its members) have been the ones who've most pushed for the URS' adoption. Tthe cost should be borne entirely by trademark holders and URS providers. A one-time levy of USD $50,000 per URS provider, as well as an ongoing fee of $10 per TMCH recordal per year would suffice, to ensure that the appropriate parties who've advocated for the URS end up paying for it.

URS Question #6

Please find the link to this Question and its context here: https://community.icann.org/x/kCGJBw

Note: URS Question #6 is related to URS Recommendation #10.

40. URS Q6. Who has the responsibility for developing the uniform set of basic FAQs for URS Complainants and Respondents?

If ICANN foolishly proceeds with this "make work" project, which will squander more resources, then there should be a competitive tender that specifically EXCLUDES anyone associated with this working group (past or present members/observers). There is a huge conflict of interest in arguing for ICANN to spend money to develop educational resources, and then have that

same party line up to line their pockets with contracts or grants which result from that recommendation.

Given many problems with the URS occur due to lack of any response from registrants, at least two-thirds of any money spent should be devoted to educating registrants on defending complaints, rather than educating complainants (most of whom are already knowledgeable about making complaints).

URS Question #7

Please find the link to this Question and its context here: https://community.icann.org/x/dSCJBw

41. URS Q7. What mechanism do you suggest that allows a URS Provider to efficiently check with other URS and UDRP Providers in order to ensure that a disputed domain name is not already subject to an open and active URS/UDRP proceeding?

There is a basic technology called a “database”. Obviously a centralized database would solve the problem.

Alternatively, amending the list of available EPP codes, currently seen at:

https://www.icann.org/resources/pages/epp-status-codes-2014-06-16-en

so that there’s a new status code like “clientHoldUDRP” or “serverHoldURS” would also work. Ultimately, this accomplishes the same thing as a centralized database, but via the distributed WHOIS database instead.

URS Question #8

Please find the link to this Question and its context here: https://community.icann.org/x/kiGJBw Note:

The Working Group recommends that public comment be sought from Registry Operators.

42. URS Q8a. Question to Registry Operators -- What issues have you encountered with respect to implementing the HSTS-preloaded domain suspension remedy, if any?

While I’m not a registry operator, I feel compelled to answer, given that it was I who first discovered the HSTS issue, and brought it to the attention of the working group in May and June of 2018, see:

https://mm.icann.org/pipermail/gnso-rpm-wg/2018-May/003106.html
https://mm.icann.org/pipermail/gnso-rpm-wg/2018-May/003112.html
https://mm.icann.org/pipermail/gnso-rpm-wg/2018-May/003119.html
https://mm.icann.org/pipermail/gnso-rpm-wg/2018-June/003139.html

and made the accompany URS Individual Proposal #4:

https://community.icann.org/download/attachments/93126760/URS-Proposal-4.pdf?version=1&modificationDate=1537972993000&api=v2

which the working group did not publish in the initial report. Renee Fossen of NAF falsely described that proposal as "moot",

https://mm.icann.org/pipermail/gnso-rpm-wg/2020-January/004151.html

as some "technical guidances" had changed as a result of my discovery and analysis (without properly crediting me for that research, by the way). Obviously "technical guidance" that can be changed "out of band" like that, without GNSO involvement, can be changed again to revert to its prior state, and thus cannot be compared to a binding policy like the one I proposed. Thus, my proposal was not "moot". Indeed, the "context" provided by NAF (page 35 of the report) indicates that they are not technically competent. This isn't meant as an insult, but just a statement of fact. Anyone after doing appropriate searches in Google, or consulting with technically-minded individuals, could discover resources on how to setup automated renewal of SSL certificates. The fact that NAF is renewing them manually is their own fault, and demonstrates their incompetence (again, not an insult, but a statement of fact, literally "not having or showing the necessary skills to do something successfully."). It took me less than a minute to determine that they are using LetsEncrypt Wildcard SSL certificates (e.g. from the Novartis.app URS suspension page, via https://www.adrforum.com/DomainDecisions/1880633D.htm ). Then, using that magical tool called "Google", I typed in "auto renew letsencrypt wildcard" and followed the links! That's it.

It should be an embarrassment to the Working Group that the registry operators' time is being wasted on stuff that should never have appeared in this report. This is what happens when a working group is captured, as I documented at:

https://freespeech.com/2020/04/16/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-2/

and has lack of broad representation from other groups (including ones with technical backgrounds, like myself, who was unfairly banished, as per https://freespeech.com/2019/04/05/update-my-participation-rights-have-now-been-eliminated-at-icann-working-groups/ ). Again, there are no "issues", except those deriving from lack of competence.

43. URS Q8b. Question to Registry Operators -- What would need to be done to help resolve the issues you have encountered?

See my answer above to prior question. 1. Hire competent people. 2. Learn to use Google. 3. Don't ban people from the working group that actually are competent and know how to use Google!

URS Question #9

Please find the link to this Question and its context here: https://community.icann.org/x/ICGJBw

44. URS Q9. Are the non-refundable, late Response fees paid by Respondent reasonable?

Yes, as presently stated. But, they have a captive audience, so they need to be capped, to ensure that they are not high in comparison with fees for complainants.

URS Question #10

Please find the link to this Question and its context here: https://community.icann.org/x/liGJBw

45. URS Q10a. Are penalties for Complainant or Respondent who abuses the URS process sufficient?

The answer to this question should be kept in mind when considering unbalanced proposals like Individual URS Proposal #15, which seek entirely unbalanced penalties for registrants. In my view, the entire URS policy should be eliminated, as a failed experiment.

If the policy is retained, penalties should be assessed only by courts, not the URS system itself. Thus, penalties should be anticipated within the complaint and response process, but evaluated within the court system. An explicit "costs" clause should be added to the complaint and response, such as:

"In the event of any litigation between the parties relating to this Agreement and their rights hereunder, the prevailing party shall be entitled to recover all reasonable litigation costs and reasonable attorneys' fees and expenses from the non-prevailing party."

46. URS Q10b. If not, should they be expanded?

*Mark only one oval.*

- Ye
- s
- No
- No opinion
- Other: The answer to this question should be kept in mind when considering unbalanced proposals like Individual URS Proposal #15, which seek entirely unbalanced penalties for registrants. In my view, the entire URS policy should be eliminated, as a failed experiment.

If the policy is retained, penalties should be assessed only by courts, not the URS system itself. Thus, penalties should be anticipated within the complaint and response process, but evaluated within the court system. An explicit "costs" clause should be added to the complaint and response, such as:

"In the event of any litigation between the parties relating to this Agreement and their rights hereunder, the prevailing party shall be entitled to recover all reasonable litigation costs and reasonable attorneys' fees and expenses from the non-prevailing party."

47. URS Q10c. If they should be expanded, how?

The answer to this question should be kept in mind when considering unbalanced proposals like Individual URS Proposal #15,

which seek entirely unbalanced penalties for registrants. In my view, the entire URS policy should be eliminated, as a failed experiment.

If the policy is retained, penalties should be assessed only by courts, not the URS system itself. Thus, penalties should be anticipated within the complaint and response process, but evaluated within the court system. An explicit "costs" clause should be added to the complaint and response, such as:

"In the event of any litigation between the parties relating to this Agreement and their rights hereunder, the prevailing party shall be entitled to recover all reasonable litigation costs and reasonable attorneys' fees and expenses from the non-prevailing party."

**********
NB ALL OF THE ABOVE HAVE ALREADY BEEN SUBMITTED
**********

Save Your Progress

48. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

*Mark only one oval.*

- ( ) Yes
- ( ) No, I wish to continue to the next section

## Section 4: TMCH Preliminary Recommendation

This section seeks to obtain input on the preliminary recommendation related to the Trademark Clearinghouse (TMCH)

### TMCH Recommendation #1

Please find the link to this Recommendation and its context here: https://community.icann.org/x/mSGJBw

49. Please choose one of the following responses for TMCH Recommendation #1:

*Mark only one oval.* *Significant change required*

- ( ) Support Recommendation as written
- ( ) Support Recommendation concept with minor change
- ( )

Significant change required

Do not support Recommendation

No opinion

50. If you wish to (a) propose changes to TMCH Recommendation #1; and/or (b) provide a rationale for your response, please do so here.

As a preliminary matter (which I'll expand upon later in other parts of this questionnaire), the TMCH should be eliminated. Its minor benefits have not outweighed its costs, which have included a 93.7% cart abandonment rate, as per the Analysis Group report, as I cited in my Individual Proposal (which was wrongly rejected due to a captured working group within the subteams). See:

https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

for that Individual Proposal, which cites the various data sources. See:

https://community.icann.org/pages/viewpage.action?pageId=102146375#SunriseClaims--324377862

for the numerous other Sunrise & TMCH proposals I submitted. [in the "Individual Proposal tab]

It is noteworthy that this report did not publish meaningful quantitative data such as this abandonment data from the Analysis Group report. Nor did it report on the 99%+ reduction in sunrise utilization, compared to past sunrises (which was arguably one of the reasons for having the TMCH, to have economies of scale for the trademark validation for sunrises which were expected to be popular, but instead were a bust, just like the entire new gTLD program). The top 10 most popular strings in the TMCH were all common dictionary words like "ONE" or "HOTEL", and there was enormous gaming (on a relative basis, given the sunrises were so unpopular), for terms like "HOTEL" or "HOTELS", and other strings as noted in posts like:

https://docs.google.com/document/d/1PSjuohvTGkXbmK5eNGSEi_R0qw6GvI3Hv3MtpK83tuc/edit
https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003651.html

which linked to numerous supporting articles.

The Trademark+50 should not be expanded upon further. The exact match should be retained, otherwise inferior "typo" trademarks could be used to capture superior non-typo domain names (e.g. "Flickr" could be used to capture "Flicker" during sunrises). Much greater limitations would be needed to reduce gaming in sunrises, beyond those considered, as I proposed via my Proposal #3, which would have seen the Uniregistry anti-gaming clauses adopted, see:

https://community.icann.org/download/attachments/102146375/Proposal%233.pdf?version=1&modificationDate=1553614262000&api=v2

Restricting domain transfers to ensure that trademarks are transferred along with sunrise domains would massively hit the gamers, yet this simple proposal was blocked from consideration in the captured working group. No reasonable justification exists for not considering a serious proposal like this. It can only be explained by capture by insiders who wish to perpetuate the gaming that has been going on in sunrise periods.

Similarly proposal #4 would have seriously addressed gaming:

https://community.icann.org/download/attachments/102146375/Proposal%234.pdf?version=1&modificationDate=1553614273000&api=v2

but was again not considered for public comment. Of course, sunrise itself should also be eliminated, as was proposed (but was prevented from being considered for public comments due to the capture of the working group). Capture of the working group is

documented at: https://freespeech.com/2020/04/16/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-2/ among other sources (I had also warned about it in my Section 3.7 appeal which I quote from on that blog post).

Save Your Progress

51. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

*Mark only one oval.*

- Yes
- No, I wish to continue to the next section

## Section 5: Sunrise Service Preliminary Recommendations & Community Questions

This section seeks to obtain input on all the preliminary recommendations and questions related to the Sunrise service offered through the TMCH.

### Sunrise Recommendation #1

Please find the link to this Recommendation and its context here: https://community.icann.org/x/rSGJBw

52. Please choose one of the following responses for Sunrise Recommendation #1:

*Mark only one oval.* *Significant change required.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

53. If you wish to (a) propose changes to Sunrise Recommendation #1; and/or (b) provide a rationale for your response, please do so here.

Sunrise should be eliminated entirely, as was proposed in individual proposal #1 in the subteam (but which was blocked for consideration/publication for public comments by a captured working group). See:

https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

Mitch Stoltz made a similar proposal, proposal #8, see:

https://community.icann.org/download/attachments/102146375/Proposal%238.pdf?version=1&modificationDate=1553789243000&api=v2

It is noteworthy that this report did not publish meaningful quantitative data such as the 99%+ reduction in sunrise utilization, compared to past sunrises. The top 10 most popular strings in the TMCH were all common dictionary words like “ONE” or “HOTEL”, and there was enormous gaming (on a relative basis, given the sunrises were so unpopular), for terms like “HOTEL” or “HOTELS”, and other strings as noted in posts like:

https://docs.google.com/document/d/1PSjuohvTGkXbmK5eNGSEi_R0qw6GvI3Hv3MtpK83tuc/edit
https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003651.html

which linked to numerous supporting articles.

## Sunrise Recommendation #2

Please find the link to this Recommendation and its context here: https://community.icann.org/x/ryGJBw

54. Please choose one of the following responses for Sunrise Recommendation #2:

*Mark only one oval.* *Do not support Recommendation.*

- ( ) Support Recommendation as written
- ( ) Support Recommendation concept with minor change
- ( ) Significant change required
- ( ) Do not support Recommendation
- ( ) No opinion

55. If you wish to (a) propose changes to Sunrise Recommendation #2; and/or (b) provide a rationale for your response, please do so here.

Sunrise should be eliminated entirely, as was proposed in individual proposal #1 in the subteam (but which was blocked for consideration/publication for public comments by a captured working group). See:

https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

Mitch Stoltz made a similar proposal, proposal #8, see:

https://community.icann.org/download/attachments/102146375/Proposal%238.pdf?version=1&modificationDate=1553789243000&api=v2

Rather than expanding sunrises via expanded matches, they need to be shrunk or eliminated entirely.

## Sunrise Recommendation #3

Please find the link to this Recommendation and its context here: https://community.icann.org/x/siGJBw

56. Please choose one of the following responses for Sunrise Recommendation #3:

*Mark only one oval.* *Support Recommendation as written.*

- ◯ Support Recommendation as written
- ◯ Support Recommendation concept with minor change
- ◯ Significant change required
- ◯ Do not support Recommendation
- ◯ No opinion

57. If you wish to (a) propose changes to Sunrise Recommendation #3; and/or (b) provide a rationale for your response, please do so here.

There's no need to create even more complexity surrounding these sunrises. Instead, the entire concept of a mandatory sunrise is broken, and should be eliminated, as was proposed in individual proposal #1 in the subteam (but which was blocked for consideration/publication for public comments by a captured working group). See:

https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

Mitch Stoltz made a similar proposal, proposal #8, see:

https://community.icann.org/download/attachments/102146375/Proposal%238.pdf?version=1&modificationDate=1553789243000&api=v2

Rather than expanding sunrises via expanded matches, they need to be shrunk or eliminated entirely.

## Sunrise Recommendation #4

Please find the link to this Recommendation and its context here: https://community.icann.org/x/tCGJBw

58. Please choose one of the following responses for Sunrise Recommendation #4:

*Mark only one oval. Do not support Recommendation.*

- ( ) Support Recommendation as written
- ( ) Support Recommendation concept with minor change
- ( ) Significant change required
- ( ) Do not support Recommendation
- ( ) No opinion

59. If you wish to (a) propose changes to Sunrise Recommendation #4; and/or (b) provide a rationale for your response, please do so here.

There should be full transparency, just as there should be for the TMCH itself (and WHOIS). More importantly, there should be consistency and an underlying principle behind all of these various databases. It's the height of hypocrisy to want certain databases to be public, but then argue vehemently that others should be private, when all of them have comparable data (lists of domain names, lists of trademarks, etc.). We're not talking about highly sensitive personal health data, but just lists of strings.The benefits outweigh the exaggerated costs.

## Sunrise Recommendation #5

Please find the link to this Recommendation and its context here: https://community.icann.org/x/tiGJBw

60. Please choose one of the following responses for Sunrise Recommendation #5:

*Mark only one oval. Do not support Recommendation*

- ( ) Support Recommendation as written
- ( ) Support Recommendation concept with minor change
- ( ) Significant change required
- ( ) Do not support Recommendation
- ( ) No opinion

61. If you wish to (a) propose changes to Sunrise Recommendation #5; and/or (b) provide a rationale for your response, please do so here.

Sunrise should be eliminated entirely, as was proposed in individual proposal #1 in the subteam (but which was blocked for consideration/publication for public comments by a captured working group). See:

https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

Mitch Stoltz made a similar proposal, proposal #8, see:

https://community.icann.org/download/attachments/102146375/Proposal%238.pdf?version=1&modificationDate=1553789243000&api=v2

It is noteworthy that this report did not publish meaningful quantitative data such as the 99%+ reduction in sunrise utilization, compared to past sunrises. The top 10 most popular strings in the TMCH were all common dictionary words like “ONE” or “HOTEL”, and there was enormous gaming (on a relative basis, given the sunrises were so unpopular), for terms like “HOTEL” or “HOTELS”, and other strings as noted in posts like:

https://docs.google.com/document/d/1PSjuohvTGkXbmK5eNGSEi_R0qw6GvI3Hv3MtpK83tuc/edit
https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003651.html

which linked to numerous supporting articles.

Ultimately, sunrises were pushed for by a small group of ICANN insiders who captured various groups, and that wanted to go to the “Front of the Line”, as if a trademark is so special that it trumps all other potential uses of a term. Trademark laws give curative rights, but don’t preemptively restrict speech. As we’ve seen from actual usage of sunrises, it’s been a bust, and it will be even less popular for future niche gTLDs in future rounds of the failed new gTLD program, as most of the more common terms that might have utility as a TLD have already been applied for in the past rounds.

With fewer broken policies to maintain and have to review, there’d be less required in the future in terms of ongoing policy review, etc. (which uses up precious time of volunteers, staff, etc.). It’s better to focus on doing a few things very well, rather than have a hodgepodge of numerous procedures or systems that are performing poorly.

## Sunrise Recommendation #6

Please find the link to this Recommendation and its context here: https://community.icann.org/x/uCGJBw

62. Please choose one of the following responses for Sunrise Recommendation #6:

*Mark only one oval. Do not support Recommendation*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

63. If you wish to (a) propose changes to Sunrise Recommendation #6; and/or (b) provide a rationale for your response, please do so here.

First of all, did anyone even bother to proofread these proposals? Rather than being independent and discrete, they repeatedly overlap with one another! Sunrise Recommendation #5 fully includes everything in Recommendations #6, but then also tosses in a separate point about their length! In other words, Rec #5 already argued for mandatory sunrise (i.e. "current requirement for the sunrise period be maintained"), which is then duplicated in Rec #6 that the mandatory sunrise be maintained (without mentioning anything about length). This should have been 2 separate recommendations that didn't overlap (i.e. one focused only on length, and another on whether it should be mandatory), otherwise this sets up potentially conflicting advice, and potentially confusing public input.

That being said, sunrise should be eliminated entirely, as was proposed in individual proposal #1 in the subteam (but which was blocked for consideration/publication for public comments by a captured working group). See:

https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

Mitch Stoltz made a similar proposal, proposal #8, see:

https://community.icann.org/download/attachments/102146375/Proposal%238.pdf?version=1&modificationDate=1553789243000&api=v2

It is noteworthy that this report did not publish meaningful quantitative data such as as the 99%+ reduction in sunrise utilization, compared to past sunrises (while the report did note the 64,000 sunrises across 484 TLDs on page 42 of this section, it didn't post the prior data, or what the expectations were prior to the new gTLD RPMs being mandated). The top 10 most popular strings in the TMCH were all common dictionary words like "ONE" or "HOTEL", and there was enormous gaming (on a relative basis, given the sunrises were so unpopular), for terms like "HOTEL" or "HOTELS", and other strings as noted in posts like:

https://docs.google.com/document/d/1PSjuohvTGkXbmK5eNGSEi_R0qw6GvI3Hv3MtpK83tuc/edit
https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003651.html

which linked to numerous supporting articles.

Ultimately, sunrises were pushed for by a small group of ICANN insiders who captured various groups, and that wanted to go to the "Front of the Line", as if a trademark is so special that it trumps all other potential uses of a term. Trademark laws give curative rights, but don't preemptively restrict speech. As we've seen from actual usage of sunrises, it's been a bust, and it will be even less popular for future niche gTLDs in future rounds of the failed new gTLD program, as most of the more common terms that might have utility as a TLD have already been applied for in the past rounds.

With fewer broken policies to maintain and have to review, there'd be less required in the future in terms of ongoing policy review, etc. (which uses up precious time of volunteers, staff, etc.). It's better to focus on doing a few things very well, rather than have a hodgepodge of numerous procedures or systems that are performing poorly.

## Sunrise Recommendation #7

Please find the link to this Recommendation and its context here: https://community.icann.org/x/uiGJBw

64. Please choose one of the following responses for Sunrise Recommendation #7:

*Mark only one oval.* *Significant change required.*

Support Recommendation as written

Support Recommendation concept with minor change

Significant change required

Do not support Recommendation

No opinion

65. If you wish to (a) propose changes to Sunrise Recommendation #7; and/or (b) provide a rationale for your response, please do so here.

Small tweaks like those suggested by this recommendation won't be effective, given one can't even see the data in the TMCH to make a challenge. The entire system is broken, and it should be eliminated. The fact that the working group killed the various proposals before they could even be published in the initial report for comment demonstrates the extent of total capture of the working group by those who want to preserve and perpetuate a flawed system.

Sunrise should be eliminated entirely, as was proposed in individual proposal #1 in the subteam (but which was blocked for consideration/publication for public comments by a captured working group). See:

https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

Mitch Stoltz made a similar proposal, proposal #8, see:

https://community.icann.org/download/attachments/102146375/Proposal%238.pdf?version=1&modificationDate=1553789243000&api=v2

It is noteworthy that this report did not publish meaningful quantitative data such as as the 99%+ reduction in sunrise utilization, compared to past sunrises (while the report did note the 64,000 sunrises across 484 TLDs on page 42 of this section, it didn't post the prior data, or what the expectations were prior to the new gTLD RPMs being mandated). The top 10 most popular strings in the TMCH were all common dictionary words like "ONE" or "HOTEL", and there was enormous gaming (on a relative basis, given the sunrises were so unpopular), for terms like "HOTEL" or "HOTELS", and other strings as noted in posts like:

https://docs.google.com/document/d/1PSjuohvTGkXbmK5eNGSEi_R0qw6GvI3Hv3MtpK83tuc/edit
https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003651.html

which linked to numerous supporting articles.

Ultimately, sunrises were pushed for by a small group of ICANN insiders who captured various groups, and that wanted to go to the "Front of the Line", as if a trademark is so special that it trumps all other potential uses of a term. Trademark laws give curative rights, but don't preemptively restrict speech. As we've seen from actual usage of sunrises, it's been a bust, and it will be even less popular for future niche gTLDs in future rounds of the failed new gTLD program, as most of the more common terms that might have utility as a TLD have already been applied for in the past rounds.

With fewer broken policies to maintain and have to review, there'd be less required in the future in terms of ongoing policy review, etc. (which uses up precious time of volunteers, staff, etc.). It's better to focus on doing a few things very well, rather than have a hodgepodge of numerous procedures or systems that are performing poorly.

## Sunrise Recommendation #8

Please find the link to this Recommendation and its context here: https://community.icann.org/x/vCGJBw

66. Please choose one of the following responses for Sunrise Recommendation #8:

*Mark only one oval.* *Significant change required.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required

Do not support Recommendation

No opinion

67. If you wish to (a) propose changes to Sunrise Recommendation #8; and/or (b) provide a rationale for your response, please do so here.

Did anyone actually proofread these recommendations? #8 here is phrased in a “negative” manner, i.e. “the working group does not recommend”, as opposed to an affirmative recommendation, to “do something” or “maintain something”. Very sloppy! It should have been rewritten to be consistent with the rest of the document (although, to the extent the rest of the document is sloppy, I suppose this fits right in).

Anyhow, sunrise should be eliminated entirely, as was proposed in individual proposal #1 in the subteam (but which was blocked for consideration/publication for public comments by a captured working group). See:

https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

Mitch Stoltz made a similar proposal, proposal #8, see:

https://community.icann.org/download/attachments/102146375/Proposal%238.pdf?version=1&modificationDate=1553789243000&api=v2

It is noteworthy that this report did not publish meaningful quantitative data such as as the 99%+ reduction in sunrise utilization, compared to past sunrises (while the report did note the 64,000 sunrises across 484 TLDs on page 42 of this section, it didn’t post the prior data, or what the expectations were prior to the new gTLD RPMs being mandated). The top 10 most popular strings in the TMCH were all common dictionary words like “ONE” or “HOTEL”, and there was enormous gaming (on a relative basis, given the sunrises were so unpopular), for terms like “HOTEL” or “HOTELS”, and other strings as noted in posts like:

https://docs.google.com/document/d/1PSjuohvTGkXbmK5eNGSEi_R0qw6GvI3Hv3MtpK83tuc/edit
https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003651.html

which linked to numerous supporting articles.

Ultimately, sunrises were pushed for by a small group of ICANN insiders who captured various groups, and that wanted to go to the “Front of the Line”, as if a trademark is so special that it trumps all other potential uses of a term. Trademark laws give curative rights, but don’t preemptively restrict speech. As we’ve seen from actual usage of sunrises, it’s been a bust, and it will be even less popular for future niche gTLDs in future rounds of the failed new gTLD program, as most of the more common terms that might have utility as a TLD have already been applied for in the past rounds.

With fewer broken policies to maintain and have to review, there’d be less required in the future in terms of ongoing policy review, etc. (which uses up precious time of volunteers, staff, etc.). It’s better to focus on doing a few things very well, rather than have a hodgepodge of numerous procedures or systems that are performing poorly.

Sunrise Question #1

Please find the link to this Question and its context here: https://community.icann.org/x/viGJBw

68. Sunrise Q1. What remedy(ies) would you propose for any unintended effects of the Sunrise Period that you have identified in your public comment?

If sunrise is to be retained (which I've argued already that it should not exist), then I reiterate the fixes I previously made (that got killed in the subteam in my absence after I was unjustly banished from the working group, as per https://freespeech.com/2019/04/05/update-my-participation-rights-have-now-been-eliminated-at-icann-working-groups/ and all these proposals should have been up for discussion in the initial report. See:

A] Individual Sunrise Proposal #2: Further detail in the PDF, but briefly:

If the sunrise procedures are retained (a separate proposal calls for its elimination), then all details of any trademark relied upon to secure a sunrise registration shall be made public, in order to permit utilization of the SDRP. Details should include all information provided to the TMCH (e.g. country, registration number, TM registration date, TM owner, goods and services, etc.). Without limiting an implementation review team, such publication might be implemented by making it public at the source (the TMCH) or via the WHOIS (which had been done in the past).

https://community.icann.org/download/attachments/102146375/Proposal%232.pdf?version=1&modificationDate=1553614254000&api=v2

B] Individual Sunrise Proposal #3: Further detail in the PDF, but briefly:

If the sunrise procedure is retained (a separate proposal calls for its elimination), then the Uniregistry "Sunrise Registration Anti-Hijack Provisions" shall be made standard for all future TLDs, as per Section III of:

https://www.uniregistry.link/wp-content/uploads/2015/07/Acceptable-Use-Policy-and-Terms-of-Service-2017.pdf

"1. Registered Names obtained in accordance with the Sunrise registration process shall be solely registered to the qualified applicant thereof who is the owner of the trade or service mark registration on the basis of which the Sunrise registration was allocated. Such Registered Names shall be restricted from transfer to any other registrant, absent submission to the Registry of evidence of assignment, license or other authorized acquisition of rights in the underlying trade or service mark giving rise to Sunrise qualification, and shall remain subject to the provisions of the Sunrise Challenge Policy.

2. Registered Names obtained in accordance with the Sunrise registration shall not be maintained using a privacy or proxy registration service."

https://community.icann.org/download/attachments/102146375/Proposal%233.pdf?version=1&modificationDate=1553614262000&api=v2

C] Individual Sunrise Proposal #4: Further detail in the PDF, but briefly:

If the sunrise procedure is retained (a separate proposal calls for its elimination), then the Uniregistry "Substantive Ineligibility" clause be included as a minimum standard for SDRP disputes, as per clause 2.1.2. of:
https://www.uniregistry.link/wp-content/uploads/2015/07/SEPRP.pdf

"2.1.2. Substantive Ineligibility i. Token use or Non-use: The trademark registration on which the domain name registrant based its Sunrise registration is not the subject of actual and substantial use in commerce in the issuing jurisdiction on which the TMCH entry is based, or has been unused in such jurisdiction for a sufficient period to constitute abandonment thereof in such jurisdiction; or

ii. Pretextual Sunrise Registration: The domain name is otherwise a non-exclusive and generically applicable term having a primary meaning in relation to goods or services other than those for which the trade or service mark was obtained; and the domain name is not used or under demonstrable preparation for use, or held to prevent infringing use, by the registrant in connection with the goods and/or services on which the subject trademark registration is based. The following circumstances in particular shall, without limitation, constitute evidence of Pretextual Sunrise Registration:

(a) The registrant's use, licensing or offer of licensing of use of the domain name for the primary purpose of exploiting such nontrademark primary meaning; or

(b) Circumstances indicating a pattern by the Registrant or in concert with others, of Sunrise Registrations based on formal claims of trade or service mark rights in alleged marks which are otherwise non-exclusive and generically applicable terms having a primary meaning in relation to goods or services other than those for which the trade or service mark was obtained; and

(c) As an aggravating factor in connection with any of the circumstances above, whether the term in question is particularly generically applicable in connection with the TLD in which the Sunrise Registration was made

https://community.icann.org/download/attachments/102146375/Proposal%234.pdf?version=1&modificationDate=1553614273000&api=v2

## Sunrise Question #2

Please find the link to this Question and its context here: https://community.icann.org/x/wCGJBw

69. Sunrise Q2a. Have you identified abuses of the Sunrise Period?

*Mark only one oval.* Yes

Ye

s

No

Not sure

Other:

70. Sunrise Q2b. To the extent that you have identified abuses of the Sunrise Period, if any, please describe them and specify any documentation to substantiate the identified abuses.

I had attempted to document abuses in the working group, but the co-chairs put up major obstacles, as did staff (who failed to compile various data sources) with unrealistic deadlines, and specific formatting requirements that did not apply to data sources that had been submitted by others. This was documented in paragraphs 9 and 10 of the PDF attached tot:

https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003633.html

for the Section 3.7 appeal I made (which was not treated seriously, as I've pointed out elsewhere, including at https://freespeech.com/2020/04/16/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-2/ ).

I now include the same articles (including the comments to the articles, which often contained compelling data/insights) documenting abuses of the sunrise, I attempted to bring to the attention of the group, but which were ignored!

https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003651.html

Additional examples were documented at:

https://docs.google.com/document/d/1PSjuohvTGkXbmK5eNGSEi_R0qw6GvI3Hv3MtpK83tuc/edit

but were not brought to the attention of the public in this report, which falsely claims that there's "lack of concrete evidence". It was buried in the subteam work which was captured, as was the entire working group.

Note:
• The Working Group recommends that public comment be sought on questions #3a-d from Registry Operators.

• The Working Group asks Registry Operators to be specific about which program(s) (i.e., ALP , QLP , and/or LRP ) they are referring in their responses to all questions and what the shortcomings of each of those mechanisms are.

• The Working Group also recommends that public comment be sought on question #3e from non-Registry Operators.

71. Sunrise Q3a-1. Question to Registry Operators -- If you did not attempt an ALP, QLP, or LRP, was the reason for not taking advantage of those programs related to how they integrate with Sunrise? N/A (not a registry operator)

72. Sunrise Q3a-2. Question to Registry Operators -- Were you able to achieve your goals in a different way (such as by combining any or all of these programs)? N/A (not a registry operator)

73. Sunrise Q3b-1. Question to Registry Operators -- If you did attempt an ALP, QLP, or LRP (or combination) but didn't successfully use any, was the reason you did not take advantage of those programs related to how they integrate with Sunrise ?N/A (not a registry operator)

74. Sunrise Q3b-2. Question to Registry Operators -- Were you able to achieve your goals in a different way? For instance, some Registry Operators may have used the QLP 100 (Section 3.2 of Registry Agreement Specification 5 ) (plus IDN variants) in combination with registry-reserved names to obtain the names they needed. Did you do this? N/A (not a registry operator)

75. Sunrise Q3b-3. Question to Registry Operators -- If so, were you able to reserve or allocate all the names you needed to? N/A (not a registry operator)

(or combination), did you experience any unanticipated trouble with integrating the Sunrise Period into your launch? N/A (not a registry operator)

77. Sunrise Q3c-2. Question to Registry Operators -- Specifically, were you able to allocate all of the names you needed to allocate under those programs before the Sunrise Period? N/A (not a registry operator)

78. Sunrise Q3d-1. Question to Registry Operators -- For each issue you have identified in your responses to questions #3a-c, please also include a suggested mitigation path. What do you suggest the RPM Working Group consider to help alleviate the pain points and make those programs more useful and functional, while still respecting the trademark protection goals of the Sunrise Period? N/A (not a registry operator)

changes to these programs before another round of new gTLDs (that is, are these issues worth “holding up” another round for, or are the work-arounds tolerable)? N/A (not a registry operator)

80. Sunrise Q3e. Question to Non-Registry Operators -- Did you experience struggles with the way ALP, QLP, or LRPs (or a combination) integrated with Sunrise, either as registrar, as a brand owner, or as a domain name registrant? N/A (never attempted to use them, as we have no interest in new gTLDs)

Sunrise Question #4

Please find the link to this Question and its context here: https://community.icann.org/x/xCGJBw Note: The

Working Group recommends that the following guidance be sought from Registry Operators.

81. Sunrise Q4a-1. Question to Registry Operators -- If you had/have a business model that was in some way restrained by the 100-name pre Sunrise limit for names registries can reserve under Section 3.2 of Registry Agreement Specification 5, or the practical problems with the ALP, please share your experience and suggested path to improvement. N/A (not a registry operator)

82. Sunrise Q4a-2. Question to Registry Operators -- What was your work-around, if any? For instance, if you withheld names from registration (“reserved” names), how well did that work? N/A (not a registry operator)

83. Sunrise Q4b-1. Question to Registry Operators -- If the Working Group were to identify specialized gTLDs as a key concern that required changes to the way the Sunrise Period operates, are there other TLDs, besides GeoTLDs that did or will encounter the same problem? N/A (not a registry operator)

84. Sunrise Q4b-2. Question to Registry Operators -- What suggestions do you have for work-arounds or solutions that will not diminish the protections available from the Sunrise Period (balanced with the need to finish this work in a timely manner)? N/A (not a registry operator)

85. Sunrise Q4c-1. Question to Registry Operators -- Did you initially intend (prior to the implementation of Sunrise rules in the original Applicant Guidebook) to offer a special Sunrise before the regular Sunrise that targeted local trademark owners?

*Mark only one oval.*N/A (not a registry operator)

Ye

s

No

Not sure

Other:

86. Sunrise Q4c-2. Question to Registry Operators -- For instance, would the ability to offer a special “pre-Sunrise” Sunrise solve any problems?

*Mark only one oval.*N/A (not a registry operator)

Ye

s

No

No opinion

Other:

87. Sunrise Q4c-3. Question to Registry Operators -- If so, would you have validated the marks in some way?N/A (not a registry operator)

*Mark only one oval.*

Ye

s

No

No opinion

Other:

88. Sunrise Q4c-4. Question to Registry Operators -- How would you have resolved conflicts between trademark holders that got their domains during the first Sunrise and trademark holders who had an identical trademark in the TMCH that was registered prior to Sunrise?N/A (not a registry operator)

## Sunrise Question #5

Please find the link to this Question and its context here: https://community.icann.org/x/xiGJBw

Note: The Working Group recommends that public comment be sought from trademark holders who use non- English scripts/languages.

89. Sunrise Q5a. Question to trademark holders who use non-English scripts/languages -- Did you encounter any problems when you attempted to participate in Sunrise using non-English scripts/languages?

*Mark only one oval.* Other (N/A, own no non-English trademarks)

- Ye
- s
- No
- Not sure
- Other:

90. Sunrise Q5b. Question to trademark holders who use non-English scripts/languages -- If so, please describe problems you have encountered. N/A

91. Sunrise Q5c. Question to trademark holders who use non-English scripts/languages -- Do you have suggestions on how to enable trademark holders who use non-English scripts/languages to effectively participate in Sunrise? N/A, own no non-English trademarks

Save Your Progress

92. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

*Mark only one oval.*

Yes

No, I wish to continue to the next section

## Section 6: Trademark Claims Service Preliminary Recommendations & Community Questions

- This section seeks to obtain input on all the preliminary recommendations and questions related to the Trademark Claims service offered through the TMCH.
- Related Trademark Claims preliminary recommendations and questions are placed next to each other for easy reference.

### Trademark Claims Recommendation #1

Please find the link to this Recommendation and its context here: https://community.icann.org/x/2yGJBw Note:

Trademark Claims Recommendation #1 has an associated Trademark Claims Question #1 below.

93. Please choose one of the following responses for Trademark Claims Recommendation #1:Significant change required

*Mark only one oval.*

Support Recommendation as written

Support Recommendation concept with minor change

Significant change required

Do not support Recommendation

No opinion

94. If you wish to (a) propose changes to Trademark Claims Recommendation #1; and/or (b) provide a rationale for your response, please do so here.

The "context" provided is extremely misleading and incomplete, falsely claiming that the Working Group "could not determine the extent of deterrence that occurred, if any". It was documented in the Analysis Group report that there was a 93.7% abandonment rate, as was cited in my Individual Proposal #1 at:

https://community.icann.org/pages/viewpage.action?pageId=102146375#SunriseClaims--324377862 [list of all individual Sunrise & Trademark Claims Proposals]
https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2 [Proposal #1]
https://newgtlds.icann.org/en/reviews/tmch/revised-services-review-22feb17-en.pdf [Analysis Group report, pp.16-18]

This 93.7% abandonment rate was already adjusted, to eliminate 2 registrars with very high abandonment rates which might have been "mining" the service for data, as was noted in footnote 55 on page 17 of the Analysis Group report, which states:

"As discussed in Section IV, there are two registrars that averaged downloads of more than 20 trademark strings per download, which is large compared to the average of fewer than five trademark strings in the downloads of other registrars. We also exclude downloads made by ICANN's monitoring system. The exclusion of the two registrars does not significantly impact our results. Inclusion of the two registrars shows that 99% of registrations are abandoned and 0.5% of completed registrations are disputed."

The erroneous statement in the report that the Working Group allegedly "could not determine the extent of deterrence that occurred, if any" simply demonstrates the high degree of capture by trademark maximalists in the working group, who refused to acknowledge any deleterious effects caused by their pet projects in the real world. As Table 1 (on page 9 of the Analysis Group report) demonstrates, the most common terms that registrants were attempting to register were terms like:

SMART, FOREX, HOTEL, ONE, LOVE, CLOUD, NYC, LONDON, ABC, LUXURY

Had these been famous and distinctive fanciful marks such as "Google" or "Verizon" or "Exxon", a sound statistical case might have been made by the brand protection lobbyists who've captured this working group for the retention of the TMCH and the Trademark Claims notices. But, anyone who is open-minded, fair-minded, and seeks to engage in evidence-based policymaking can plainly see that these are commonly used dictionary terms and acronyms that have multiple legitimate uses, which no firm can claim exclusivity, and the Trademark Claims notices are having a chilling effect on legitimate registration attempts for these terms.

As such, the Trademark Claims notices shouldn't be merely "tweaked", as this Recommendation #1 suggests. Instead, the Trademark Claims should be entirely eliminated, as I proposed in my Individual Proposal #1 which had been killed (in my absence, as I was already unfairly banished, as per

https://freespeech.com/2019/04/05/update-my-participation-rights-have-now-been-eliminated-at-icann-working-groups/ ) by a captured working group that is dominated by trademark maximalists.

As I also noted in my Sunrise proposal #2 at:

https://community.icann.org/download/attachments/102146375/Proposal%232.pdf?version=1&modificationDate=1553614254000&api=v2

(which also impacts trademark claims) the Trademark Claims notices omit essential details to even allow registrants the ability to easily identify which trademark is being asserted against their registration. While that obviously would need to be fixed if the Trademark Claims notices are to be retained, the preferred course of action is to follow where the evidence has led us, namely that the policy has failed as it is causing massive abandonment of legitimate registrations.

## Trademark Claims Question #1

Please find the link to this Question and its context here: https://community.icann.org/x/2yGJBw

Note: Trademark Claims Question #1 is related to Trademark Claims Recommendation #1.

95. Trademark Claims Q1a-1. Have you identified any inadequacies or shortcomings of the Claims Notice? Yes

*Mark only one oval.*

Ye

s

No

Not sure

Other:

96. Trademark Claims Q1a-2. If so, what are they?

As I noted in my Sunrise proposal #2 at:

https://community.icann.org/download/attachments/102146375/Proposal%232.pdf?version=1&modificationDate=1553614254000&api=v2

(which also impacts trademark claims) the Trademark Claims notices omit essential details to even allow registrants the ability to easily identify which trademark is being asserted against their registration. While that obviously would need to be fixed if the Trademark Claims notices are to be retained, the preferred course of action is to follow where the evidence has led us, namely that the policy has failed as it is causing massive abandonment of legitimate registrations. [see my full answer re: Trademark Claims Recommendation #1 which talked about the 93.7% abandonment rate, the top 10 most frequently reported strings, and so on, which support elimination of the Trademark Claims notices]

97. Trademark Claims Q1b. Do you have suggestions on how to improve the Claims Notice in order to address the inadequacies or shortcomings?

Yes, one can eliminate them entirely. As I noted in my Sunrise proposal #2 at:

https://community.icann.org/download/attachments/102146375/Proposal%232.pdf?version=1&modificationDate=1553614254000&api=v2

(which also impacts trademark claims) the Trademark Claims notices omit essential details to even allow registrants the ability to easily identify which trademark is being asserted against their registration. While those could be added in a so-called "improved" claims notice, the preferred course of action is to follow where the evidence has led us, namely that the policy has failed as it is causing massive abandonment of legitimate registrations. [see my full answer re: Trademark Claims Recommendation #1 which talked about the 93.7% abandonment rate, the top 10 most frequently reported strings, and so on, which support elimination of the Trademark Claims notices]

Trademark Claims Recommendation #2

Please find the link to this Recommendation and its context here: https://community.icann.org/x/3SGJBw

98. Please choose one of the following responses for Trademark Claims Recommendation #2: Do not support Recommendation

*Mark only one oval.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

99. If you wish to (a) propose changes to Trademark Claims Recommendation #2; and/or (b) provide a rationale for your response, please do so here.

The preferred course of action is to follow where the evidence has led us, namely that the policy has failed as it is causing massive abandonment of legitimate registrations. [see my full answer re: Trademark Claims Recommendation #1 which talked about the 93.7% abandonment rate, the top 10 most frequently reported strings, and so on, which support elimination of the Trademark Claims notices]

I will also note that the Working Group recommendation trying to “improve” the Claims notices recognizes that the language of the registration agreement is critical. Yet, when it came to recommendations related to the URS, the language of the registration agreement was IGNORED! (i.e. URS Recommendation #3 wrote about the “predominant language of the Respondent”).

As I noted in my response to URS Recommendation #3, working group should adopt Individual URS Proposal #34 (from Zak Muscovitch and myself), as it is a proven method (long used for the UDRP) based on the language of the registration agreement. That registration agreement language is known even if the WHOIS is redacted due to GDRP, because the identity of the REGISTRAR is known at all times (regardless of whether or not the WHOIS is redacted).

As discussed in the body of URS Proposal #34 (evidence section)

https://community.icann.org/display/RARPMRIAGPWG/URS+Proposals?preview=/93126760/96207628/URS-Proposal-34.pdf#URSProposals--986447092

the higher default rate for Chinese registrants can be explained due to the language barriers, and Individual URS Proposal #34 is superior to this “recommendation” in addressing that major problem.

Thus, in order to ensure consistency in the approach towards language considerations, it becomes clear that the language of the claims notices should be identical to the language of the URS. This reinforces the need to adopt Individual URS Proposal #34, not only on its merits, but for the same reasons that language is used for the Trademark Claims notices!

This inconsistency should have been caught earlier by those who remain in the working group (I’ve been banished unfairly, as noted at https://freespeech.com/2019/04/05/update-my-participation-rights-have-now-been-eliminated-at-icann-working-groups/ ), but it demonstrates that recommendations are being made in a haphazard fashion by a captured group that is simply “going through the motions”, stumbling forward without reference to any strong underlying principles.

Trademark Claims Recommendation #3

Please find the link to this Recommendation and its context here: https://community.icann.org/x/3yGJBw

100. Please choose one of the following responses for Trademark Claims Recommendation #3:Do not support Recommendation

*Mark only one oval.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

101. If you wish to (a) propose changes to Trademark Claims Recommendation #3; and/or (b) provide a rationale for your response, please do so here.

The preferred course of action is to follow where the evidence has led us, namely that the policy has failed as it is causing massive abandonment of legitimate registrations. [see my full answer re: Trademark Claims Recommendation #1 which talked about the 93.7% abandonment rate, the top 10 most frequently reported strings, and so on, which support elimination of the Trademark Claims notices]

Furthermore, the issue of "pre-registrations" can easily be dealt with by restricting the scope of the Claims Notice to recordals that predate the general availability of the TLD by a set period (e.g. 30 days, if that's when pre-registrations begin, or some similar term).

## Trademark Claims Recommendation #4

Please find the link to this Recommendation and its context here: https://community.icann.org/x/4SGJBw Note:

Trademark Claims Recommendation #4 has an associated Trademark Claims Question #2 below.

102. Please choose one of the following responses for Trademark Claims Recommendation #4:Do not support Recommendation

*Mark only one oval.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

103. If you wish to (a) propose changes to Trademark Claims Recommendation #4; and/or (b) provide a rationale for your response, please do so here.

The preferred course of action is to follow where the evidence has led us, namely that the policy has failed as it is causing massive abandonment of legitimate registrations. [see my full answer re: Trademark Claims Recommendation #1 which talked about the 93.7% abandonment rate, the top 10 most frequently reported strings, and so on, which support elimination of the Trademark Claims notices]

## Trademark Claims Recommendation #5

Please find the link to this Recommendation and its context here: https://community.icann.org/x/4yGJBw Note:

Trademark Claims Recommendation #5 has an associated Trademark Claims Question #2 below.

104. Please choose one of the following responses for Trademark Claims Recommendation #5: Do not support Recommendation

*Mark only one oval.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

105. If you wish to (a) propose changes to Trademark Claims Recommendation #5; and/or (b) provide a rationale for your response, please do so here.

The preferred course of action is to follow where the evidence has led us, namely that the policy has failed as it is causing massive abandonment of legitimate registrations. [see my full answer re: Trademark Claims Recommendation #1 which talked about the 93.7% abandonment rate, the top 10 most frequently reported strings, and so on, which support elimination of the Trademark Claims notices]

## Trademark Claims Question #2

Please find the link to this Question and its context here: https://community.icann.org/x/5yGJBw Note:

Trademark Claims Question #2 is related to Trademark Claims Recommendations #4 & #5.

106. Trademark Claims Q2a. Is there a use case for exempting a gTLD that is approved in subsequent expansion rounds from the requirement of a mandatory Claims Period due to the particular nature of that gTLD? Such type of gTLD might include: (i) “highly regulated” TLDs that have stringent requirements for registering entities, on the order of .bank; and/or (ii) “Dot Brand” TLDs whose proposed registration model demonstrates that the use of a Trademark Claims Service is unnecessary.

No. This is the height of hypocrisy, that the brand owners are happy to shift compliance costs upon others (registrars, registries, registrants), but when it happens to impact themselves (for their dot-brand), they seek an exception to save money and reduce their own costs. A brand holder finds it incomprehensible and unimaginable that one of their own would engage in cybersquatting, and they don’t even want to go through the hard work of applying the Claims Notices to themselves. They want to give themselves a different set of rules to follow, than everyone else. That’s just wrong, and exposes how they seek to perpetuate injustice.

107. Trademark Claims Q2b. If the Working Group recommends exemption language, what are the appropriate guardrails ICANN should use when granting the exception (e.g. Single-registrant? Highly-regulated or manually hand-registered domains? Something else?)?

No. This is the height of hypocrisy, that the brand owners are happy to shift compliance costs upon others (registrars, registries, registrants), but when it happens to impact themselves (for their dot-brand), they seek an exception to save money and reduce their own costs. A brand holder finds it incomprehensible and unimaginable that one of their own would engage in cybersquatting, and they don't even want to go through the hard work of applying the Claims Notices to themselves. They want to give themselves a different set of rules to follow, than everyone else. That's just wrong, and exposes how they seek to perpetuate injustice.

Trademark Claims Recommendation #6

Please find the link to this Recommendation and its context here: https://community.icann.org/x/5SGJBw

108. Please choose one of the following responses for Trademark Claims Recommendation #6:Do not support Recommendation

*Mark only one oval.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

109. If you wish to (a) propose changes to Trademark Claims Recommendation #6; and/or (b) provide a rationale for your response, please do so here.

The preferred course of action is to follow where the evidence has led us, namely that the policy has failed as it is causing massive abandonment of legitimate registrations. [see my full answer re: Trademark Claims Recommendation #1 which talked about the 93.7% abandonment rate, the top 10 most frequently reported strings, and so on, which support elimination of the Trademark Claims notices]

To be clear, I don't support expanded match, as that would further increase the chilling effect on registrants. Short trademarks in particular (one letter) would match nearly everything with expanded matches (all you need are all 26 of them to be entered into

the TMCH by gamers, 36 if you include digits for numeric domains), and it would lead to utter chaos. Don't say no one warned you. Folks gamed "THE" as we know. Do you really want a trademark claims notice for every domain containing "THE"!!???!!! Ludicrous.
Had the TMCH been properly restricted to only the most famous and/or fanciful marks, with a strict limit on number and that had manual review by a balanced group (including free speech advocates), then one could have seen support for inclusion of matches for terms like "Google", "Verizon", "Paypal", or other brands (especially financial) that have been abused. There'd need to be a careful balancing. However, the trademark maximalists only see things in black and white, and want the same protection for "THE" and "Google", even though they have much different economic impacts and trademark strength. This shows the failure of the working group, where balanced solutions that folks like myself could live with are crowded out by the extremists who engage in trademark maximalism.

Save Your Progress

110. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

*Mark only one oval.*

Yes

No, I wish to continue to the next section

## Section 7: TM- PDDRP Preliminary Recommendation

This section seeks to obtain input on the preliminary recommendation related to the Trademark Post-Delegation Dispute Resolution Procedure (TM-PDDRP).

## TM-PDDRP Recommendation #1

Please find the link to this Recommendation and its context here: https://community.icann.org/x/9SOJBw

111. Please choose one of the following responses for TM-PDDPR Recommendation #1: Significant change required.

*Mark only one oval.*

- Support Recommendation as written
- Support Recommendation concept with minor change
- Significant change required
- Do not support Recommendation
- No opinion

112. If you wish to (a) propose changes to TM-PDDRP Recommendation #1; and/or (b) provide a rationale for your response, please do so here.

No evidence-based reasons have been presented for an expansion of rights here, especially given the policy has never been used. While I am all for economic efficiency, there must be a balance to ensure due process rights are protection, and as such there should be careful attention paid to word limits and response times, particularly if joint filings are made abusively when there are NOT duplicate alleged abuses taking place. Respondents need to be able to address each and every specific fact pattern, and the word limits need to accommodate this in the case of multiple joint complainants.

Just like any other “class action” lawsuit or consolidated action in the courts, there needs to be a preliminary review (subject to appeal) as to whether those alleged abuses would benefit from consolidation, to determine whether the fact circumstances are similar enough to proceed via a single action.

Furthermore, the proposal currently only appears to anticipate the ability of trademark holders to request consolidation. That right should also extend to the respondent, who should be able to also seek to consolidate multiple similar complaints against them, rather than proceed one-by-one individually at greater expense. Furthermore, where later complaints are brought, the rulings should have precedential value, so that a respondent can point to a prior victory to efficiently dismiss a similar complaint brought later by a different brand owner.

Save Your Progress

113. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

*Mark only one oval.*

Yes

No, I wish to continue to the next section

## Section 8: URS Individual Proposals (Non-Recommendations)

- This section seeks to obtain input on all the individual proposals related to the Uniform Rapid Suspension System (URS). These proposals were submitted by individual working group members but did not rise to the level of becoming preliminary recommendations.

- Please note that some Individual Proposals contain associated questions that the Working Group specifically invites public comment.

### URS Individual Proposal #1

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/6iGJBw

114. Please choose one of the following responses for URS Individual Proposal #1:

*Mark only one oval.* Do not support Proposal.

- Support Proposal as written
- Support Proposal concept with minor change
- Significant change required
- Do not support Proposal
- No opinion

115. If you wish to (a) propose changes to URS Individual Proposal #1; and/or (b) provide a rationale for your response, please do so here.

The relevant section of 6.2 of the URS procedure:

http://newgtlds.icann.org/en/applicants/urs/procedure-01mar13-en.pdf

which prohibits content change should be removed, as it demonstrates how sloppy the URS was put together in the first place (Of course, the URS itself should be eliminated, as I've argued). The language appears to be intended to preserve "evidence of guilt", but this is unnecessary, given that the complaint has already been made (with evidence submitted, screenshots captured, etc.). To show why this is problematic, suppose a legitimate website was hacked [Wordpress sites get hacked all too often, but no site is 100% hack proof!] and was serving malware or other illegal content. According to section 6.2, the registrant would be forbidden from cleaning up that hack, if an opportunistic complainant filed a URS (e.g. if they had a monitoring tool that detected it before the registrant did). Furthermore, many sites are dynamic, using databases to show different content at different times and to different users. Suppose someone filed a frivolous URS against an ecommerce site like Amazon.com or Walmart.com, which shows many different products, rotating them randomly or seasonally. Are they expected to freeze product rotation on the basis of a complaint, to make their site completely static, due to a URS complaint? Of course not. But, that's what an extreme interpretation of that rule would mean.

Content of sites cannot be modified by a registrar or registry, unless they happen to have direct access to the hosting company used by a registrant (e.g. Tucows or Verisign can't prevent content hosted at Microsoft Azure or Amazon AWS hosting to be frozen). Thus, that language cannot be enforced against the registrar or registry operators, and thus is ineffective.

Lastly, the goal of the brand owner bringing the URS is supposedly to remove the trademark infringement in a rapid manner. The language of 6.2 would actually prevent a good faith domain name registrant from doing that, if there happened to be innocent or innocuous infringement happening (e.g. if a US ecommerce site was unaware of the Pakistani trademark asserted by a complainant, and out of an abundance of caution wanted to remove a certain item or link on the US store, 6.2 would prevent them). This demonstrates how sloppy and hastily-prepared the URS rules were when originally adopted, and how even now a thorough review hasn't taken place. The working group has been going through the motions, rather than doing what it should have been doing for the past 4 years. Again, the URS should be eliminated, as it is replete with issues like this which are beyond repair.

## URS Individual Proposal #2

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/fSCJBw

Note: The Working Group particularly seeks public comment from the Contracted Parties House with regard to this proposal

116. Please choose one of the following responses for URS Individual Proposal #2:

*Mark only one oval.* *No opinion.*

- Support Proposal as written
- Support Proposal concept with minor change
- Significant change required
- Do not support Proposal
- No opinion

117. If you wish to (a) propose changes to URS Individual Proposal #2; and/or (b) provide a rationale for your response, please do so here.

Not a current member of the Contracted Parties House. But, if I had to offer them a perspective, their compliance costs would be much lower with the URS being entirely eliminated (instead of tweaked with this minor proposal), as it doesn't make sense to have 2 policies (URS and UDRP) trying to do comparable things, poorly. Instead of doing many things badly, it's better to focus on a small number of things and do them well.

Furthermore, the URS' compliance costs overburden prospective registrars. One is forced to respond within certain time limits, which requires staffing, etc. That costs money. All these complex rules must be understood, and one must keep staff trained on them as they change, and so on. They must have a background that combines both technical and legal skills. If I was a prospective registrar or registry, this would be a financial deterrent, and thus has a real economic cost. The minor incremental benefits from the URS (especially since the UDRP still exists, and can be used) are outweighed by these compliance costs.

## URS Individual Proposal #3

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/7CGJBw

118. Please choose one of the following responses for URS Individual Proposal #3:

*Mark only one oval.* *Support Proposal concept with minor change.*

- Support Proposal as written
- Support Proposal concept with minor change
- Significant change required

Do not support Proposal

No opinion

119. If you wish to (a) propose changes to URS Individual Proposal #3; and/or (b) provide a rationale for your response, please do so here.

As registrants might also seek an appeal in the courts, renewals should be permitted until those judicial procedures have been exhausted (final decisions not appealed to higher courts within that higher court's time limits, etc.). This is consistent with the proposal (a friendly amendment), to ensure protection of the status quo pending appeals [proposal as written seems to only contemplate internal appeal within the URS system, rather than court appeals].

URS Individual Proposal #6

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/7iGJBw

120. Please choose one of the following responses for URS Individual Proposal #6:

*Mark only one oval.* *Do not support Proposal*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

121. If you wish to (a) propose changes to URS Individual Proposal #6; and/or (b) provide a rationale for your response, please do so here.

As someone with training in economics, this proposal might at first glance appear desirable, as it attempts to appeal to economic efficiency, which is something I can appreciate. However, it would seem to do so only at considerable loss of due process for the registrant, if such consolidation is not voluntary on the part of the registrant (i.e. in the proposal as written, the complainants unilaterally get to decide to consolidate their dispute, and the registrant can't protest this, in the circumstances where such consolidation would be inappropriate).

Furthermore, there would be a high cost upon registrants if it is alleged that they are "related registrants" when in fact they are not related (i.e. a complainant or group of complainants can make the claim that the registrants are related, to reduce their own costs, and is thus incentivized to make such claims). Word limits and other aspects of the URS procedure would need to be rewritten to balance things out, including challenges as to whether consolidation was appropriate, etc. (different domain names might have different defences, instead of identical ones).

Given these complexities, these aren't the "slam dunk simple cases" that the URS was designed for, and these disputes are inappropriate for this procedure (where panelists might be expected to spend 15 or 20 minutes total handling an "open and shut" case).

These kinds of cases are perfect though for the courts, where such consolidation (where the appropriate motions are heard from all sides) can lead to cost savings, while simultaneously preserving due process.

In conclusion, I'm sympathetic to the root cause of this, but it's just not the place for it. It's trying to make the URS the place to be for all kinds of complex disputes, whereas it should be focused on just the simplest slam dunk cases.

## URS Individual Proposal #11

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/8CGJBw Note:

URS Individual Proposal #11 has specific questions below seeking public comment.

122. Please choose one of the following responses for URS Individual Proposal #11:

*Mark only one oval.* *Do not support Proposal.*

- Support Proposal as written
- Support Proposal concept with minor change
- Significant change required
- Do not support Proposal
- No opinion

123. If you wish to (a) propose changes to URS Individual Proposal #11; and/or (b) provide a rationale for your response, please do so here.

This would create a burden for registrants (who are compelled to pay to answer the complaint) who simply registered 3 non-infringing but related domains (e.g. widget.shop, widget.store, widget.email) on a defensive good-faith basis. For example, companies like MarkMonitor will often recommend those defensive registrations, registering even hundreds of domains in good faith. See:

https://domainnamewire.com/2017/09/28/new-amazon-alexa-gadgets-lead-to-profits-for-verisign/

Many companies will often register the .com/net/org variations, for example. There is nothing “magical” about 3 registrations. This proposal attempts to prejudge the outcome of the dispute, forcing potentially innocent registrants to pay up to defend themselves. Indeed, even the UDRP allows a registrant to pay nothing to defend themselves (if they stay with a 1-person panel, rather than upgrading to a 3-personal panel).

A rule involving just 3 domain names can also be used to wear down one’s opponent and force them to spend money to defend themselves, simply by having the respondent add 2 additional domain names on a frivolous basis. For example, if Example1.TLD is in dispute, a bad faith complainant can add Example2.tld and Example3.tld to the dispute (even if there’s no cybersquatting on the latter 2 domains, as long as they are registered to the same person for all three domains), and thereby trigger additional expenses for the registrant to defend themselves, or alternatively even force the registrant into a Default situation.

If this was a dispute resolution procedure that was voluntarily entered into by both sides, who equally wish to seek out a neutral to decide a dispute, that would be different. But, this is a procedure that is often against the wishes of the registrant, where the policy is used in a predatory manner by overaggressive complainants. As such, I cannot support the proposals.

124. URS Individual Proposal #11 - Q1. Should the current Response Fee threshold of fifteen (15) domain names be lowered?

*Mark only one oval.* *No.*

- Ye
- s
- No
- No opinion
- Other:

125. URS Individual Proposal #11 - Q2. If so, what should be the new threshold?

Keep it at 15.

## URS Individual Proposal #13

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/fyCJBw Note:

URS Individual Proposal #13 has a specific question below seeking public comment.

126. Please choose one of the following responses for URS Individual Proposal #13:

*Mark only one oval.* *Do not support Proposal.*

- Support Proposal as written
- Support Proposal concept with minor change
- Significant change required
- Do not support Proposal
- No opinion

127. If you wish to (a) propose changes to URS Individual Proposal #13; and/or (b) provide a rationale for your response, please do so here.

This is unenforceable, as few (if any) registrars even have “Know Your Client” / “Know Your Customer” (KYC) rules to properly identify their registrants. That would be a prerequisite, to even be able to properly identify a “losing registrant.”

It would also require the creation of a database of “inappropriate registrants” for each domain name, creating a high compliance cost for registry operators, who don’t even normally deal with registrants (i.e. the registrars would then have to also check such a database, depending on whether there’s thin or thick WHOIS, use of proxy WHOIS, etc.).

Essentially, this is attempting to gain injunctive relief against a registrant, without the high due process protections and high burden of proof that is needed in courts to ever obtain such relief, which would be a prior restraint on speech in some cases. It’s an inappropriate attempt to turn the URS into something that it isn’t, especially when the complainant had the choice to use a UDRP instead to control the future ownership of that domain name.

Lastly, a determined cybersquatter can easily create a new entity for under $20, e.g.

https://www.gov.uk/limited-company-formation/register-your-company

to circumvent any such identical matches against a blacklist, thus making it an ineffective policy, whose minor benefits would thus be swamped by the compliance costs (which would also have collateral damages with improper matches, like we’ve seen for No Fly lists, copyright filters, etc.). There’d need to be additional rules for appeals of the blacklist, removal, etc., which would add too much complexity. Such complex matters are best left to the courts.

128. URS Individual Proposal #13 - Q1. How feasible would it be to enforce this Proposal should it be implemented?

Not feasible at all, unless one expended tens of millions of dollars per year, or even more. This is unenforceable, as few (if any) registrars even have “Know Your Client” / “Know Your Customer” (KYC) rules to properly identify their registrants. That would be a prerequisite, to even be able to properly identify a “losing registrant.”

It would also require the creation of a database of “inappropriate registrants” for each domain name, creating a high compliance cost for registry operators, who don’t even normally deal with registrants (i.e. the registrars would then have to also check such a database, depending on whether there’s thin or thick WHOIS, use of proxy WHOIS, etc.).

Essentially, this is attempting to gain injunctive relief against a registrant, without the high due process protections and high burden of proof that is needed in courts to ever obtain such relief, which would be a prior restraint on speech in some cases. It’s an inappropriate attempt to turn the URS into something that it isn’t, especially when the complainant had the choice to use a UDRP instead to control the future ownership of that domain name.

Lastly, a determined cybersquatter can easily create a new entity for under $20, e.g.

https://www.gov.uk/limited-company-formation/register-your-company

to circumvent any such identical matches against a blacklist, thus making it an ineffective policy, whose minor benefits would thus be swamped by the compliance costs (which would also have collateral damages with improper matches, like we’ve seen for No Fly lists, copyright filters, etc.). There’d need to be additional rules for appeals of the blacklist, removal, etc., which would add too much complexity. Such complex matters are best left to the courts.

URS Individual Proposal #15

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/8iGJBw Note:

URS Individual Proposal #15 has specific questions below seeking public comment.

129. Please choose one of the following responses for URS Individual Proposal #15:

*Mark only one oval. Do not support Proposal.*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

130. If you wish to (a) propose changes to URS Individual Proposal #15; and/or (b) provide a rationale for your response, please do so here.

We are strongly opposed to this proposal. It is evidence of capture of the working group that such an extremist proposal sailed through for publication in this initial report to receive public comments, when balanced proposals that were submitted (such as a statute of limitations, or adjusted time limits based on the age of the domain name) were blocked from being published for comment.

This is a Draconian and punitive proposal that seeks to weaponize the URS, to provide even greater penalties than the UDRP, and far greater penalties than even national courts would apply, without having the due process protection of even having to prove any damages (as would be required in the courts). It seeks to impose disproportionate penalties and injunctive relief, without the due process protections of meeting a high burden of proof required to ever assess such remedies.

Let's be very clear -- my company is against cybersquatting, and wants to see the bad guys punished, but this isn't the way to do it. The way to do it is via the courts, as was seen successfully in the Verizon v. iREIT matter, or the OnlineNIC case.

https://domainnamewire.com/2008/12/24/verizon-wins-33-million-in-cybersquatting-case/

Those high volume cybersquatters did change their behaviour (unlike the rationale provided by the proponents of this proposal), because they were forced out of business.

This proposal attempts to apply the same maximum "death penalty" disproportionately to all disputes, regardless of any actual damages being proven, let alone the quantum of those damages. It would suspend sites that have not even been involved in any dispute, let alone been proven to be trademark infringing.

Indeed, in court, the punishment must fit the crime. This proposal even asks for a "blank cheque" of "other possible enhanced penalties" that are undefined, but which presumably the proponents would later determine via another lopsided and captured implementation review team at a later date.

We've also seen that cybersquatters will often steal identities. There are numerous domain disputes where these have been detected, and presumably others where they've not been detected. Searching for "identity theft" at UDRPsearch.com (and checking each match manually), here are just 3 examples in the recent past:

https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2019-3215

“As it appears, Respondent has fraudulently used the identity of Complainant when registering the Domain Names.”

https://www.adrforum.com/DomainDecisions/1840174.htm

“Respondent failed to submit a Response in this proceeding. In its e-mails to the Forum Respondent states, in pertinent part: “I’m not the owner of this domain, so your mails are sent to the wrong contact.” And: “Probably you don’t understand. You are contacting wrong person/company. We don’t have this domain and we don’t care about it. Is clear? Don’t send me any communication anymore.”

https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2019-1116

“Respondent appears to have used the name of an employee of Complainant when registering the disputed domain name. In light of the potential identity theft, the Panel has redacted Respondent’s name from this decision.”

This isn’t a theoretical risk. This is actually happening today, and even happened to my own company, whose WHOIS details were copied by someone using a Chinese registrar. I pointed this out the working group in September 2018, when these proposals first originated, see the threads at:

https://mm.icann.org/pipermail/gnso-rpm-wg/2018-September/003291.html

This identity theft would mean that innocent registrants could be put on a blacklist for a “crime” they didn’t even commit, and would have to face enormous obstacles to undo such damage (as we’ve seen with false positives for No Fly lists, copyright filters, etc.). They could even be framed by competitors or enemies, who could intentionally register trademark-infringing domain names under their competitors’ identity/WHOIS, in order to get all their competitors’ or enemy’s websites and domain names taken offline.

Here are some additional supporting links on identity theft or fakery in relation to domain names:

https://www.domaintimes.info/post/identity-theft-and-fraudulent-domain-registration
https://www.adrforum.com/domaindecisions/1479484.htm
https://iplegalcorner.com/identity-theft-victims-hijacking-and-phishing/
https://giga.law/blog/2019/1/23/registrant-identity-obviously-false

This proposal would deliver the same “death penalty” punishment to a responsible registrant with a handful of “marginal” or “iffy” domains out of a portfolio of hundreds or thousands of “clean” domains, that would be given to a true unrepentant cybersquatter that owns hundreds or thousands of malware infested cybersquatted domain names (who really would be stopped by going to jail!). Everyone would be treated like infamous John Zuccarini, the moment they had 2 URS defeats. To the proponents of this proposal, all they see is “black and white”, binary solutions, rather than shades of grey that exist in the real world.

To see the danger of this proposal, you need only look at the kinds of dubious and questionable cases that are being determined to be “cybersquatting” under the URS, see:

https://freespeech.com/2019/12/03/urs-a-failed-domain-name-dispute-resolution-policy-that-icann-insiders-wish-to-impose-on-more-registrants-part-1/

where I reviewed several:

KBS.LLC -- https://www.adrforum.com/DomainDecisions/1865672D.htm

““Respondent is purportedly using the Domain Name to direct users to an inactive website that does not contain any content.”

Not only was that “passive holding” case determined incorrectly under the URS rules, but what are the true “damages” of that case? Certainly not the same as an industrial cybersquatter like iREIT (who deserved to be taken down; I was glad to see Verizon sue them!), or one engaged in phishing or malware distribution, etc.

I cited other examples, like:

CFA.CLUB - https://www.adrforum.com/DomainDecisions/1862966D.htm

“The disputed domain name resolves to an inactively held website.”

another wrongly decided case under the “slam dunk” requirements of the URS,  Contrast that with the following case:

CFA.BUSINESS - https://www.adrforum.com/DomainDecisions/1866971D.htm

which was decided correctly (nearly identical facts, different outcome) “Complainant provides evidence showing that the disputed domain name is not being used. Since the standard of review in URS proceedings is “clear and convincing”, and Complainant does not explain why failure to use the disputed domain name could constitute bad faith use, the Panel finds that Complainant has not satisfied its burden of proof for this element.”

It might have been a different outcome in court or the UDRP, but the danger for the URS is especially severe, given how cases are being handled now.

I also discussed 3 other cases on the above blog article, which for brevity I’ll just link to (but read the blog post above for details, showing how poorly the URS is being decided these days):

CFA.COMMUNITY - https://www.adrforum.com/DomainDecisions/1865703D.htm (no usable reasons, as per Professor Tushnet’s discoveries in her research)

BLOOMBERG.BEST -- https://www.adrforum.com/DomainDecisions/1846599D.htm (bizarre reasons that non-infringing links are bad!)

SKX.SCIENCE - https://www.adrforum.com/DomainDecisions/1853884F.htm (domain name parking is not bona fide use, ridiculous exaggeration)

Anyhow, these weren’t phishing or “serious cybersquatting” cases that deserve the “death penalty”, if there were 2 of them in a portfolio of other domain names that never were in dispute. These were de minimis disputes, low stakes at best.

Co-chair Phil Corwin of Verisign, who I rarely agree with, accurately described how the URS was supposed to work:

https://gnso.icann.org/sites/default/files/policy/2019/transcript/transcript-gnso-rpm-05feb20-en.pdf

"The fact remains the original concept of URS—and I was part of the decisions that created it way back in pre-history—was that it should be a slam dunk. It should be a know it when you see it. You look at the domain name, you look at the webpage and it’s clear that it either meets the standard or it doesn’t. If there’s ambiguity, if you’re not sure, it probably should be a UDRP." (page 19)

Go back and read the above cases, though, and you’ll see just how far they’ve already deviated from the “original concept.” Some want to deviate even further from that concept, rather than returning to a balanced procedure that was promised.

One of the proponents of this proposal, lawyer Paul D. McGrady, represented a complainant in a reverse domain name hijacking case for Viking.org:

https://domainnamewire.com/2011/06/01/viking-office-products-tries-to-take-sentimental-domain-name-from-altavista-inventors-widow/
https://www.adrforum.com/DomainDecisions/1383534.htm

Make no mistake that he seeks to weaponize the URS, and it would be similarly misused by complainants to attack innocent registrants, and put their entire online existence at risk, to deplatform them from owning domain names. And, it would be asymmetric too, as reverse domain name hijackers face paltry, if any, real penalties. Lose 2 URS cases, and have hundreds of thousands of domain names suspended if you are NameFind or HugeDomains as a registrant defending a case (hypothetically) worth hundreds of millions of dollars. But, lose 2 URS cases if you are Apple, or Google, as complainants (to make a hypothetical example), and would their trillion dollar market cap companies be toppled and taken offline if they lost 2 complaints? (of course not)

Even true financial criminals, like Barclays, operate entire TLDs!

http://www.circleid.com/posts/20150520_should_barclays_lose_the_barclays_top_level_domain/

They paid their $2.4 billion fine after admitting criminal guilt. Yet, they haven’t been barred from the DNS. The IP constituency is supposedly out fighting the “good fight” for intellectual property, but what about Apple, who lost a big patent case and paid out nearly half a billion dollars:

https://www.theregister.co.uk/2020/03/16/apple_pays_virnetx/

Why aren't they banned from the DNS, as IP infringers? (they own dot-Apple, of course)

Or Google (who operates many TLDs), with their copyright case in the Supreme Court with Oracle:

https://en.wikipedia.org/wiki/Google_v._Oracle_America

involving Android and Java. If they were to lose at the Supreme Court, should they face the "enhanced penalties" of being blacklisted from the entire DNS as "enemies of IP"? Certainly their "IP infringement" real world damages would far exceed 2 URS or UDRP losses in quantum, don't you think?

Every single day, there is IP crime on Amazon.com or Alibaba.com or YouTube.com, or even Gmail.com. Amazon.ca (here in Canada) was just put on a US government list of "notorious sites" for counterfeits:

https://www.politico.com/news/2020/04/29/trump-administration-amazon-foreign-websites-220766

Why aren't these sites taken offline completely, if 2 counterfeits are ever found on them? Or if 2 pieces of spam or phishing or other crime are sent from a domain name like Gmail.com? One needs to look at the big picture, and carefully weigh the good against the bad, and measure each carefully. This URS proposal doesn't attempt to weigh the good against the bad at all, and instead just assumes the "bad" has infinite weight justifying the death penalty.

Even the CASE Act, which has been highly criticized by the EFF, and which would be an electronic "small claims" court for copyright in the USA:

https://www.eff.org/deeplinks/2019/09/congress-continues-ignore-dangerous-flaws-case-act

doesn't go so far as to have a "death penalty" (although $30,000 would hurt some people). But, at least that CASE Act has an "opt out" mechanism or provision (which would need to be properly designed, as the EFF criticized that too), so one can go to court, and have a full dispute under "real law" with real penalties, with need to prove damages, etc. This URS proposal would impose far higher and Draconian penalties, with no ability to opt out. No sane individual would ever "opt in" to it as a domain name registrant.
This would be MANDATORY, imposed on registrants as a requirement of registration.

Here's a counterproposal: make the URS as crazily lopsided as you want it, but allow me (and others) to opt out of it cleanly and permanently (so I can run my business under the national laws and courts where I reside, here in Canada). I'll take that bargain, and so would many others, who would then not have to waste their time arguing about such policies at ICANN, and could move on with their lives. But, the proponents of this captured PDP want to make these lopsided policies *mandatory*, essentially rewriting and overruling national laws, with no way to avoid them, even if one is a law abiding citizen in a jurisdiction with sane national laws (i.e. my company operates in Canada, with strong IP protections, and is happy to be bound by them).

Lawyers who represent complainants want to tip the balance (that is already lopsided in their favour, compared to the due process protections in real courts), and have captured the RPM PDP working group to do so. They could even exploit such an unbalanced proposal by inappropriately threatening any registrant who had "1 strike against them." They'll use the threat of this disproportionate penalty to target domains held in a portfolio that they want, saying "You better give us this domain, or else if we win a URS or UDRP, *all* of your domains will be suspended and blacklisted."

This is truly about expropriation of property, rather than fighting cybercrime (which is best done via the criminal laws and civil court systems, so they can be permanently locked out after full due process).

The URS and UDRP were meant to reduce the administrative costs of enforcing disputes, thereby lowering the burden on the court system. This proposal would actually increase the burden on the courts, because good faith registrants (and even completely innocent registrants affected by identity theft) who are wrongly caught in its net would have to appeal to the court system to undo the Draconian penalties that are disproportionate to any reasonable standard of crime and punishment.

Indeed, this proposal is so lopsided and disproportionate, entirely beyond what a reasonable court would ever apply as a penalty in all but the most extreme cases, it could be determined to be a contract of adhesion that is later attacked in the courts to throw out the entire dispute resolution methods (including the good parts that are more balanced), given the oppressive penalties involved. What will happen then, if a court eliminates them entirely from application for certain registrars in certain jurisdictions?

If one looks at the registrar and registry contracts with ICANN, even they are not so Draconian, and they typically offer the ability to "cure" issues that come up. e.g. the standard new gTLDs registry agreement has sections 4.2 and 4.3:

https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html#article4.3

which allows breaches to be “cured” within 30 days or 10 days, as the case may be (depending on the clause involved). They do not lose their entire portfolio of gTLDs (e.g. in the case of Donuts, Google, or other multi-TLD owners) if 2 minor breaches take places (which aren’t cured). Similar language applies to registrars, in their agreements with ICANN. The punishment must be proportional to the crime.

The proposal makes numerous false and unsupported claims, and is not backed by statistical or economic data that would justify its adoption. For example, they claim that repeat offenders “meet little if any sanction”, when in fact the URS causes the offenders to lose their domain name, a loss of their asset as they are unable to renew it. That is a real loss for the registrant. If the domains in question are of little monetary value, that implies that this was a low value dispute. If it was actually a high value dispute involving hundreds of millions of dollars in trademark infringement, it begs the question as to why the trademark holder didn’t file a court case, to seek actual or statutory damages. If it was because they couldn’t identify the registrant, it demonstrates that the underlying deterrence issue doesn’t involve damages at all, but rather involves identity verification instead.

Lastly, no such Draconian powers should ever be granted to private dispute resolution providers/panelists like NAF (who’ve already faced controversies in the past with consumer arbitrations, see their track record at https://en.wikipedia.org/wiki/Forum_(alternative_dispute_resolution)#Controversy ) with limited oversight and accountability. The higher the stakes involved (and suspending an entire portfolio worth millions or hundreds of millions of dollars is not a “small claims” issue), the greater the degree of due process that is warranted. That due process happens in the courts, with discovery, cross examination, and careful assessment of penalties (if any) after arguments are made concerning damages.

In conclusion, we are vehemently opposed to URS Individual Proposal #15.

131. URS Individual Proposal #15 - Q1. Is the proposed definition of "repeat offender" in this Proposal appropriate?

*Mark only one oval.* No

Ye

s

No

No opinion

Other:

132. URS Individual Proposal #15 - Q2. Is the proposed definition of "high-volume cybersquatting" in this Proposal appropriate?

*Mark only one oval.* *No.*

Ye

s

No

No opinion

Other:

133. URS Individual Proposal #15 - Q3. How feasible would it be to implement this Proposal?

This is entirely unfeasible. I repeat my prior answer (to Q #130) in full here.

We are strongly opposed to this proposal. It is evidence of capture of the working group that such an extremist proposal sailed through for publication in this initial report to receive public comments, when balanced proposals that were submitted (such as a statute of limitations, or adjusted time limits based on the age of the domain name) were blocked from being published for comment..

This is a Draconian and punitive proposal that seeks to weaponize the URS, to provide even greater penalties than the UDRP, and far greater penalties than even national courts would apply, without having the due process protection of even having to prove any damages (as would be required in the courts). It seeks to impose disproportionate penalties and injunctive relief, without the due process protections of meeting a high burden of proof required to ever assess such remedies.

Let's be very clear -- my company is against cybersquatting, and wants to see the bad guys punished, but this isn't the way to do it. The way to do it is via the courts, as was seen successfully in the Verizon v. iREIT matter, or the OnlineNIC case.

https://domainnamewire.com/2008/12/24/verizon-wins-33-million-in-cybersquatting-case/

Those high volume cybersquatters did change their behaviour (unlike the rationale provided by the proponents of this proposal), because they were forced out of business.

This proposal attempts to apply the same maximum "death penalty" disproportionately to all disputes, regardless of any actual damages being proven, let alone the quantum of those damages. It would suspend sites that have not even been involved in any dispute, let alone been proven to be trademark infringing.

Indeed, in court, the punishment must fit the crime. This proposal even asks for a "blank cheque" of "other possible enhanced penalties" that are undefined, but which presumably the proponents would later determine via another lopsided and captured implementation review team at a later date.

We've also seen that cybersquatters will often steal identities. There are numerous domain disputes where these have been detected, and presumably others where they've not been detected. Searching for "identity theft" at UDRPsearch.com (and checking each match manually), here are just 3 examples in the recent past:

https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2019-3215

"As it appears, Respondent has fraudulently used the identity of Complainant when registering the Domain Names."

https://www.adrforum.com/DomainDecisions/1840174.htm

"Respondent failed to submit a Response in this proceeding. In its e-mails to the Forum Respondent states, in pertinent part: "I'm not the owner of this domain, so your mails are sent to the wrong contact." And: "Probably you don't understand. You are contacting wrong person/company. We don't have this domain and we don't care about it. Is clear? Don't send me any communication anymore."

https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2019-1116

"Respondent appears to have used the name of an employee of Complainant when registering the disputed domain name. In light of the potential identity theft, the Panel has redacted Respondent's name from this decision."

This isn't a theoretical risk. This is actually happening today, and even happened to my own company, whose WHOIS details were copied by someone using a Chinese registrar. I pointed this out the working group in September 2018, when these proposals first originated, see the threads at:

https://mm.icann.org/pipermail/gnso-rpm-wg/2018-September/003291.html

This identity theft would mean that innocent registrants could be put on a blacklist for a "crime" they didn't even commit, and would have to face enormous obstacles to undo such damage (as we've seen with false positives for No Fly lists, copyright filters, etc.). They could even be framed by competitors or enemies, who could intentionally register trademark-infringing domain names under their competitors' identity/WHOIS, in order to get all their competitors' or enemy's websites and domain names taken offline.

This proposal would deliver the same "death penalty" punishment to a responsible registrant with a handful of "marginal" or "iffy" domains out of a portfolio of hundreds or thousands of "clean" domains, that would be given to a true unrepentant cybersquatter that owns hundreds or thousands of malware infested cybersquatted domain names (who really would be stopped by going to jail!). Everyone would be treated like infamous John Zuccarini, the moment they had 2 URS defeats. To the proponents of this proposal, all they see is "black and white", binary solutions, rather than shades of grey that exist in the real world.

To see the danger of this proposal, you need only look at the kinds of dubious and questionable cases that are being determined to be "cybersquatting" under the URS, see:

https://freespeech.com/2019/12/03/urs-a-failed-domain-name-dispute-resolution-policy-that-icann-insiders-wish-to-impose-on-more-registrants-part-1/

where I reviewed several:

KBS.LLC -- https://www.adrforum.com/DomainDecisions/1865672D.htm

""Respondent is purportedly using the Domain Name to direct users to an inactive website that does not contain any content."

Not only should that "passive holding" case determined incorrectly under the URS rules, but what are the true "damages" of that case? Certainly not the same as an industrial cybersquatter like iREIT (who deserved to be taken down; I was glad to see Verizon sue them!), or one engaged in phishing or malware distribution, etc.

I cited other examples, like:

CFA.CLUB - https://www.adrforum.com/DomainDecisions/1862966D.htm

"The disputed domain name resolves to an inactively held website."

another wrongly decided case under the "slam dunk" requirements of the URS, Contrast that with the following case:

CFA.BUSINESS - https://www.adrforum.com/DomainDecisions/1866971D.htm

which was decided correctly (nearly identical facts, different outcome) "Complainant provides evidence showing that the disputed domain name is not being used. Since the standard of review in URS proceedings is "clear and convincing", and Complainant does not explain why failure to use the disputed domain name could constitute bad faith use, the Panel finds that Complainant has not satisfied its burden of proof for this element."

It might have been a different outcome in court or the UDRP, but the danger for the URS is especially severe, given how cases are being handled now.

I also discussed 3 other cases on the above blog article, which for brevity I'll just link to (but read the blog post above for details, showing how poorly the URS is being decided these days):

CFA.COMMUNITY - https://www.adrforum.com/DomainDecisions/1865703D.htm (no usable reasons, as per Professor Tushnet's discoveries in her research)

BLOOMBERG.BEST -- https://www.adrforum.com/DomainDecisions/1846599D.htm (bizarre reasons that non-infringing links are bad!)

SKX.SCIENCE - https://www.adrforum.com/DomainDecisions/1853884F.htm (domain name parking is not bona fide use,

ridiculous exaggeration)

Anyhow, these weren't phishing or "serious cybersquatting" cases that deserve the "death penalty", if there were 2 of them in a portfolio of other domain names that never were in dispute. These were de minimis disputes, low stakes at best.

One of the proponents of this proposal, lawyer Paul D. McGrady, represented a complainant in a reverse domain name hijacking case for Viking.org:

https://domainnamewire.com/2011/06/01/viking-office-products-tries-to-take-sentimental-domain-name-from-altavista-inventors-widow/
https://www.adrforum.com/DomainDecisions/1383534.htm

Make no mistake that he seeks to weaponize the URS, and it would be similarly misused by complainants to attack innocent registrants, and put their entire online existence at risk, to deplatform them from owning domain names. And, it would be asymmetric too, as reverse domain name hijackers face paltry, if any, real penalties. Lose 2 URS cases, and have hundreds of thousands of domain names suspended if you are NameFind or HugeDomains as a registrant defending a case (hypothetically) worth hundreds of millions of dollars. But, lose 2 URS cases if you are Apple, or Google, as complainants (to make a hypothetical example), and would their trillion dollar market cap companies be toppled and taken offline if they lost 2 complaints? (of course not)

Even true financial criminals, like Barclays, operate entire TLDs!

http://www.circleid.com/posts/20150520_should_barclays_lose_the_barclays_top_level_domain/

They paid their $2.4 billion fine after admitting criminal guilt. Yet, they haven't been barred from the DNS. The IP constituency is supposedly out fighting the "good fight" for intellectual property, but what about Apple, who lost a big patent case and paid out nearly half a billion dollars:

https://www.theregister.co.uk/2020/03/16/apple_pays_virnetx/

Why aren't they banned from the DNS, as IP infringers? (they own dot-Apple, of course)

Or Google (who operates many TLDs), with their copyright case in the Supreme Court with Oracle:

https://en.wikipedia.org/wiki/Google_v._Oracle_America

involving Android and Java. If they were to lose at the Supreme Court, should they face the "enhanced penalties" of being blacklisted from the entire DNS as "enemies of IP"? Certainly their "IP infringement" real world damages would far exceed 2 URS or UDRP losses in quantum, don't you think?

Every single day, there is IP crime on Amazon.com or Alibaba.com or YouTube.com, or even Gmail.com. Amazon.ca (here in Canada) was just put on a US government list of "notorious sites" for counterfeits:

https://www.politico.com/news/2020/04/29/trump-administration-amazon-foreign-websites-220766

Why aren't these sites taken offline completely, if 2 counterfeits are ever found on them? Or if 2 pieces of spam or phishing or other crime are sent from a domain name like Gmail.com? One needs to look at the big picture, and carefully weigh the good against the bad, and measure each carefully. This URS proposal doesn't attempt to weigh the good against the bad at all, and instead just assumes the "bad" has infinite weight justifying the death penalty.

Even the CASE Act, which has been highly criticized by the EFF, and which would be an electronic "small claims" court for copyright in the USA:

https://www.eff.org/deeplinks/2019/09/congress-continues-ignore-dangerous-flaws-case-act

doesn't go so far as to have a "death penalty" (although $30,000 would hurt some people). But, at least that CASE Act has an "opt out" mechanism or provision (which would need to be properly designed, as the EFF criticized that too), so one can go to court, and have a full dispute under "real law" with real penalties, with need to prove damages, etc. This URS proposal would impose far higher and Draconian penalties, with no ability to opt out. No sane individual would ever "opt in" to it as a domain name registrant.

This would be MANDATORY, imposed on registrants as a requirement of registration.

Here's a counterproposal: make the URS as crazily lopsided as you want it, but allow me (and others) to opt out of it cleanly and permanently (so I can run my business under the national laws and courts where I reside, here in Canada). I'll take that bargain, and so would many others, who would then not have to waste their time arguing about such policies at ICANN, and could move on with their lives. But, the proponents of this captured PDP want to make these lopsided policies *mandatory*, essentially rewriting and overruling national laws, with no way to avoid them, even if one is a law abiding citizen in a jurisdiction with sane national laws (i.e. my company operates in Canada, with strong IP protections, and is happy to be bound by them).

Lawyers who represent complainants want to tip the balance (that is already lopsided in their favour, compared to the due process protections in real courts), and have captured the RPM PDP working group to do so. They could even exploit such an unbalanced proposal by inappropriately threatening any registrant who had "1 strike against them." They'll use the threat of this disproportionate penalty to target domains held in a portfolio that they want, saying "You better give us this domain, or else if we win a URS or UDRP, *all* of your domains will be suspended and blacklisted."

This is truly about expropriation of property, rather than fighting cybercrime (which is best done via the criminal laws and civil court systems, so they can be permanently locked out after full due process).

The URS and UDRP were meant to reduce the administrative costs of enforcing disputes, thereby lowering the burden on the court system. This proposal would actually increase the burden on the courts, because good faith registrants (and even completely innocent registrants affected by identity theft) who are wrongly caught in its net would have to appeal to the court system to undo the Draconian penalties that are disproportionate to any reasonable standard of crime and punishment.

Indeed, this proposal is so lopsided and disproportionate, entirely beyond what a reasonable court would ever apply as a penalty in all but the most extreme cases, it could be determined to be a contract of adhesion that is later attacked in the courts to throw out the entire dispute resolution methods (including the good parts that are more balanced), given the oppressive penalties involved. What will happen then, if a court eliminates them entirely from application for certain registrars in certain jurisdictions?

If one looks at the registrar and registry contracts with ICANN, even they are not so Draconian, and they typically offer the ability to "cure" issues that come up. e.g. the standard new gTLDs registry agreement has sections 4.2 and 4.3:

https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html#article4.3

which allows breaches to be "cured" within 30 days or 10 days, as the case may be (depending on the clause involved). They do not lose their entire portfolio of gTLDs (e.g. in the case of Donuts, Google, or other multi-TLD owners) if 2 minor breaches take places (which aren't cured). Similar language applies to registrars, in their agreements with ICANN. The punishment must be proportional to the crime.

The proposal makes numerous false and unsupported claims, and is not backed by statistical or economic data that would justify its adoption. For example, they claim that repeat offenders "meet little if any sanction", when in fact the URS causes the offenders to lose their domain name, a loss of their asset as they are unable to renew it. That is a real loss for the registrant. If the domains in question are of little monetary value, that implies that this was a low value dispute. If it was actually a high value dispute involving hundreds of millions of dollars in trademark infringement, it begs the question as to why the trademark holder didn't file a court case, to seek actual or statutory damages. If it was because they couldn't identify the registrant, it demonstrates that the underlying deterrence issue doesn't involve damages at all, but rather involves identity verification instead.

Lastly, no such Draconian powers should ever be granted to private dispute resolution providers/panelists like NAF (who've already faced controversies in the past with consumer arbitrations, see their track record at https://en.wikipedia.org/wiki/Forum_(alternative_dispute_resolution)#Controversy ) with limited oversight and accountability. The higher the stakes involved (and suspending an entire portfolio worth millions or hundreds of millions of dollars is not a "small claims" issue), the greater the degree of due process that is warranted. That due process happens in the courts, with discovery, cross examination, and careful assessment of penalties (if any) after arguments are made concerning damages.

In conclusion, we are vehemently opposed to URS Individual Proposal #15.

## URS Individual Proposal #16

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/9CGJBw Note:

URS Individual Proposal #16 has a specific question below seeking public comment.

(for Individual URS Proposal #16 above, Do Not Support Proposal)

135. If you wish to (a) propose changes to URS Individual Proposal #16; and/or (b) provide a rationale for your response, please do so here.

First of all, the proponents incorrectly describe this as a "right of first refusal" (ROFR), which is not accurate. Under a true ROFR, it would imply that if someone else attempted to register the domain name (after the domain name expired, was deleted, and became available for registration by anyone), then the registrar or registry would have to consult with the winning complainant, to see whether they wanted to exercise the ROFR, before allowing any third party to register it. That's how a ROFR works, but that's not what is being proposed (we would oppose a ROFR too, just for the record).

What is actually being proposed is a "Transfer Option" after winning a URS dispute, or an "Additional Suspension Option", which is a variation where instead of taking ownership (as they would under a Transfer Option), they would simply continue the suspension (which is kind of the same as a Transfer Option but without the ability to use the domain name!).

This is a dangerous proposal which would end up causing a huge shift in disputes from the UDRP to the URS, because the remedy would be the same (transfer of ownership of the domain name), but at much lower cost to the complainant, and with much lower due process for the registrant (less time to respond to the dispute, lower word limits, lack of 3-person panel, etc.). While proponents of the URS might claim there is a higher evidentiary standard ("slam dunk" in the URS , aka "clear and convincing" vs. "clear cut" in the UDRP aka "preponderance of the evidence"), in practice the distinction means little. I refer back to the cases I cited previously in my response to URS Individual Proposal #15, discussed at:

https://freespeech.com/2019/12/03/urs-a-failed-domain-name-dispute-resolution-policy-that-icann-insiders-wish-to-impose-on-more-registrants-part-1/

where highly questionable cases are being improperly decided in favour of URS complainants (random acronym domains that aren't being used at all, common surnames, etc.).

The implicit assumption behind this proposal is that there is no other possible legitimate owner than the complainant for the domain name in dispute. While that might be true for a certain class of domains (e.g. FAMOUSBRAND-LOGIN-here.TLD), it is certainly not true for acronyms and dictionary word domains that are commonly in dispute, and have multiple competing uses and potential owners. As such, there is no reasonable basis to award such domains to a complainant that hasn't gone through the full UDRP instead, with its stronger due process protections for registrants.

At present, reverse domain name hijackers already use the UDRP as a game of chance. They know that even if there is a 5% chance of winning a dispute for a domain name worth $100,000, they will take the chance if it only costs them $1,000 or $2,000 to "buy a ticket" to that game. If the cost of playing that game is lowered to the level of the URS, they'll start targeting even more domain names for reverse domain name hijacking (i.e. domains that were either lower value, or even lower chance of winning suddenly become "profitable" for their reverse domain name hijacking games.

In conclusion, this proposal would have highly negative impacts for registrants, who would be exposed to more reverse domain

name hijacking attempts , and would cause the caseload to shift from the UDRP to the URS.

136. URS Individual Proposal #16 - Q1. How feasible would it be to implement this Proposal?

While technically easy to implement such a solution, it would have a huge negative impact on registrants, and as such should not be adopted.

## URS Individual Proposal #22

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/gSCJBw Note:

URS Individual Proposal #22 has specific questions below seeking public comment.

Do not support proposal (for Individual Proposal #22 above).

138. If you wish to (a) propose changes to URS Individual Proposal #22; and/or (b) provide a rationale for your response, please do so here.

While I am theoretically in favour of a “loser pays” system (my company has never lost a court case, either domain dispute or not involving domains!), this isn’t the way to do it, because of major problems of identity theft, and lack of “Know Your Customer” / “Know Your Client” (KYC) rules in the domain name industry. As I discussed at length in my answer to URS Individual Proposal #15, this means that penalties can be assessed to the wrong person, who is completely unrelated to the domain name registration.

Courts have discretion to award costs in litigation (depending on the jurisdiction), and exercising that discretion would require additional panelist time and effort, which might perversely increase the burden on the procedure. Indeed, a major factor in determining who should bear costs is a determination of whether or not the side who seeks costs beat a pre-litigation settlement offer. For example, if in a contract dispute a complainant offered to settle for receiving $100,000, and after trial was awarded $250,000, the judge would see that the complainant did better than the settlement offer, and likely award legal costs (usually on a tariffed scale, not true actual costs in most cases) to the complainant (in addition to the $250,000, in this example). Had the complainant in this case only been awarded $75,000 after trial, i.e. still prevailed, but did worse than offer to settle, then costs would most likely not be awarded. In the URS (and UDRP for that matter), often the complainant would have made no attempts to settle before launching the domain dispute. [The URS (or UDRP) might be the first time that the domain name registrant ever became aware of a dispute.] There’s no mechanism to formally record those settlement offers, if any, to show them to the panelists after the dispute is decided, within the current URS (or UDRP) procedures.

We’ve seen that cybersquatters will often steal identities. There are numerous domain disputes where these have been detected, and presumably others where they’ve not been detected. Indeed, such penalties would cause an increase of the use of those stolen identities by cybersquatters, to avoid the penalties (that would be their natural reaction to such a policy change), which would cause greater impacts on the innocent.

Searching for “identity theft” at UDRPsearch.com (and checking each match manually), here are just 3 examples in the recent past:

https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2019-3215

“As it appears, Respondent has fraudulently used the identity of Complainant when registering the Domain Names.”

https://www.adrforum.com/DomainDecisions/1840174.htm

“Respondent failed to submit a Response in this proceeding. In its e-mails to the Forum Respondent states, in pertinent part: “I’m not the owner of this domain, so your mails are sent to the wrong contact.” And: “Probably you don’t understand. You are contacting wrong person/company. We don’t have this domain and we don’t care about it. Is clear? Don’t send me any communication anymore.”

https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2019-1116

“Respondent appears to have used the name of an employee of Complainant when registering the disputed domain name. In light of the potential identity theft, the Panel has redacted Respondent’s name from this decision.”

This isn’t a theoretical risk. This is actually happening today, and even happened to my own company, whose WHOIS details were copied by someone using a Chinese registrar. I pointed this out the working group in September 2018, when these proposals first originated, see the threads at:

https://mm.icann.org/pipermail/gnso-rpm-wg/2018-September/003291.html

This identity theft would mean that innocent registrants could be put on a blacklist for a “crime” they didn’t even commit, and would have to face enormous obstacles to undo such damage (as we’ve seen with false positives for No Fly lists, copyright filters, etc.). They could even be framed by competitors or enemies, who could intentionally register trademark-infringing domain names under their competitors’ identity/WHOIS, in order to hurt their competitors or enemies.

If you’re looking for the “right way” to implement “loser pays”, then there are at least 2 alternatives: (i) make the registrar of the losing domain dispute pay (this would be complex, and require registrars to assess the risk of all their customers, credit worthiness, KYC, etc.; unlikely to happen, but would actually be a good thing, long-term), or (ii) implement a “loser pays” at the next level (appeal stage) of the dispute, once it gets to the COURT SYSTEM. This would be done by inserting a standard clause into the URS, such as “In the event of any litigation between the Parties, to the extent a Party has prevailed in such litigation, the non-prevailing Party shall pay the reasonable legal fees and expenses of the prevailing Party.” Adding such a clause “raises the stakes” somewhat for both sides symmetrically, and ensures that neither party takes it to court on a frivolous basis, as they could lose on legal costs, esp. in jurisdictions that generally don’t award costs (such as the USA) without such clauses. But, again this is too much to expect out of a simple dispute system without much due protection that is decided in 20 minutes by a panelist for a couple of hundred bucks.

139. URS Individual Proposal #22 - Q1. Is a "loser pays" model appropriate for the URS?

*Mark only one oval. No.*

Ye

s

No

No opinion

Other:

140. URS Individual Proposal #22 - Q2. Please provide input on the definition of specific criteria mentioned in this Proposal (e.g., “repeat offender” over a defined time period, and “high-volume cybersquatting”).

The enormous problems discussed above (due to fake identities and/or identity theft) make this not feasible. If you actually want to talk about “repeat offenders” as if this proposal “had legs”, one would need an extremely high bar to be met, one that would be met in the court system (e.g. hundreds of URS losses, i.e. a truly monstrous cybersquatter). One would need to meet the high burden for such injunctive relief in the courts to be recreated in the URS system, which frankly it’s unsuited for. As we’ve seen from the Draconian URS Proposal #15, this is ripe for abuse, where a working group dominated/captured by trademark maximalists can’t be trusted to come up with a balanced definition that would stand up to court challenges on appeal. To have a “prior restraint” on an activity truly requires a high standard to be met, and is best dealt with in the courts (like the hundreds of obvious typosquatting domains in the iREIT/Verizon litigation).

Unfortunately, most industrial-level cybersquatters nearly always use fake identities (otherwise, police would catch up with them, or they’d be named in civil suits), so it’s an exercise in futility trying to get penalties that will catch them.

When the cost of creating a new corporate entity is low, under $20:

https://www.gov.uk/limited-company-formation/register-your-company

it would be trivial to circumvent any such rules, as one can simply create a new “clean” corporation in minutes online, and avoid penalties against a past entity.

There should be no “fixed number” as a definition, as that’s best left to the discretion of real courts, who could look at the totality of circumstances, including the proportion of “good” domain names in a portfolio.

For example, should we set a fixed number of “bad emails” per day coming from a domain name, before that domain name is suspended? Is 100 spam/phishing emails/day “bad? Well, it sounds bad, but then if you consider the domain name to be Hotmail.com or Gmail.com or Outlook.com, then you can see why such a fixed number would cause problems. One has to look at both the good and the bad, and weigh the two, and that’s something best left to the courts.

If you still want a number, I can live with 200 domain name dispute losses. That would have caught both iREIT and OnlineNic. If you want to penalize smaller cases, use the court system.

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141. URS Individual Proposal #22 - Q3. Please provide input on the specific item(s) that should be paid in a “loser pays” model (e.g., administrative fees, attorneys’ fees).

Just administrative fees, if this ever came to pass (which we oppose). The stronger path would be, as noted would be to incorporate costs at the next level (appeal stage) of the dispute, once it gets to the COURT SYSTEM. This would be done by inserting a standard clause into the URS, such as “In the event of any litigation between the Parties, to the extent a Party has prevailed in such litigation, the non-prevailing Party shall pay the reasonable legal fees and expenses of the prevailing Party.” Adding such a clause “raises the stakes” somewhat for both sides symmetrically, and ensures that neither party takes it to court on a frivolous basis, as they could lose on legal costs, esp. in jurisdictions that generally don’t award costs (such as the USA) without such clauses.

142. URS Individual Proposal #22 - Q4. Please provide input on the enforcement mechanism of the proposed "loser pays" model.

Ultimately this is going to be unenforceable against most true cybersquatting registrants, who use fake identities, etc. The only true way to get enforcement would be to penalize the registrar (whose identity is obviously verified by ICANN compliance when they enter into contracts), who can then build up a risk assessment model of their clients. Unfortunately, that's too complex to ever implement!

For losing complainants, they should put up the money at the time the dispute is brought (i.e. $300 URS fees, plus another $500 or whatever security deposit). Complainant would get back the $500 if they win, but the respondent/registrant would get the $500 for the time/trouble of responding).

This would all be an administrative and legal nightmare, though, so I don't recommend it (despite liking loser pays in the court system itself). One might have to use collection agencies, for example! Also, what if the "winner" is in a country with economic sanctions (Russia, Iran) where one isn't allowed to send money to various places, etc.

Or, one could get involved unwittingly in money laundering, if the stakes are high enough and the costs are high enough. For example Fred wants to launder money to Doris. So, Fred intentionally cybersquats on a bunch of domains, where Doris has a trademark (filed in Benelux or wherever it can be done fast and cheap with little oversight). Doris creates "disputes" against Fred, and "wins" $10,000. Fred pays NAF the $10,000 (business expense) in dirty money, who then sends the $10,000 to Doris, which has now been "cleaned" via NAF. Do this at scale, using multiple identities, and you can engage in money laundering, tax evasion, and other economic crimes.

That's why one has to be very careful when transmitting money, or being a financial intermediary. ICANN, its registrars, its registrars, and its dispute resolution providers aren't going to be up to the task. We see how the URS and UDRP are already being abused. Add more money to the equation, and watch that abuse rise.

## URS Individual Proposal #26

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/9iGJBw

143. Please choose one of the following responses for URS Individual Proposal #26:

*Mark only one oval.* *Support Proposal concept with minor change*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

144. If you wish to (a) propose changes to URS Individual Proposal #26; and/or (b) provide a rationale for your response, please do so here.

It would be best if these are also published in a standard XML format, so that it's machine-readable, for all the same reasons as Individual URS Proposal #29. This would allow automated tools to parse the data, and link it with eventual machine-readable decisions in XML, for academic study, research, analysis of disputes, etc.

This proposal is important in order to be able to identify potential conflicts of interests, or other patterns of misbehaviour amongst panelists and providers, so I support it.

We know from past criticisms/controversies involving NAF, that they were forced out of consumer arbitration, see:

https://web.archive.org/web/20120616154326/http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf
https://www.citizen.org/news/new-public-citizen-report-shows-that-credit-card-companies-set-an-arbitration-trap-to-ensnare-consumers/
https://en.wikipedia.org/wiki/Forum_(alternative_dispute_resolution)#Controversy

That demonstrates the dangers that lurk when there isn't proper oversight of providers and panelists. When the stakes are high (a multimillion dollar domain name), the due process protections for the parties involved must be high. The URS is really just designed for de minimis disputes, and is unsuited for these higher stakes disputes.

## URS Individual Proposal #27

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/_CGJBw

145. Please choose one of the following responses for URS Individual Proposal #27:

*Mark only one oval.* *Support Proposal concept with minor change*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

146. If you wish to (a) propose changes to URS Individual Proposal #27; and/or (b) provide a rationale for your response, please do so here.

It would be best if these are also published in a standard XML format, so that it's machine-readable, for all the same reasons as Individual URS Proposal #29. This would allow automated tools to parse the data, and link it with eventual machine-readable decisions in XML, for academic study, research, analysis of disputes, etc.

This proposal is important in order to be able to identify potential conflicts of interests, or other patterns of misbehaviour amongst panelists and providers, so I support it.

We know from past criticisms/controversies involving NAF, that they were forced out of consumer arbitration, see:

https://web.archive.org/web/20120616154326/http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf
https://www.citizen.org/news/new-public-citizen-report-shows-that-credit-card-companies-set-an-arbitration-trap-to-ensnare-consumers/
https://en.wikipedia.org/wiki/Forum_(alternative_dispute_resolution)#Controversy

That demonstrates the dangers that lurk when there isn't proper oversight of providers and panelists. When the stakes are high (a multimillion dollar domain name), the due process protections for the parties involved must be high. The URS is really just designed for de minimis disputes, and is unsuited for these higher stakes disputes.

## URS Individual Proposal #28

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/_iGJBw Note:

URS Individual Proposal #28 has specific questions below seeking public comment.

147. Please choose one of the following responses for URS Individual Proposal #28:

*Mark only one oval.* *Support proposal as written*

- Support Proposal as written
- Support Proposal concept with minor change
- Significant change required
- Do not support Proposal
- No opinion

148. If you wish to (a) propose changes to URS Individual Proposal #28; and/or (b)

provide a rationale for your response, please do so here.

There should be defined and significant financial consequences for bias, fraud and other violations of the policy by panelists, ones that are enforceable by both parties (complainant and respondent/registrant) in courts if need be (rather than relying on ICANN compliance), via explicit third party beneficiary language.

149. URS Individual Proposal #28 - Q1. Please provide input on the suggested elements of the proposed “Panelist Conflict of Interest Policy”, should it be developed by the Working Group and applied to all URS Providers.

There should be defined and significant financial consequences for bias, fraud and other violations of the policy by panelists, ones that are enforceable by both parties (complainant and respondent/registrant) in courts if need be (rather than relying on ICANN compliance), via explicit third party beneficiary language.

150. URS Individual Proposal #28 - Q2. Please list existing conflict of interest policies that can serve as examples for the proposed "Panelist Conflict of Interest Policy".

Will leave this to others.

URS Individual Proposal #29

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/-CGJBw Note:

URS Individual Proposal #29 has a specific question below seeking public comment.

151. Please choose one of the following responses for URS Individual Proposal #29:

*Mark only one oval.* *Support Proposal as written*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

152. If you wish to (a) propose changes to URS Individual Proposal #29; and/or (b) provide a rationale for your response, please do so here.

For the record, this was my own proposal, so I support it for the reasons cited in the original full document (only partially reproduced in the report, see:

https://community.icann.org/download/attachments/93126760/URS-Proposal-29.pdf?version=1&modificationDate=1537973003000&api=v2

including the evidence from Rebecca Tushnet's research assistant.

I note with interest that Renee Fossen of Forum/NAF has provided very high estimates of the alleged "costs" in opposition to this proposal. They appear exaggerated. In particular, one need only ask what Professor Tushnet's RA's costs were to tag the various desired data elements (one would want to tag more than she did, e.g. registrar, creation date, and other data elements of importance), and know that you wouldn't want to actually pay "Harvard" prices to do a one-time processing of the past decisions (one could outsource it via platforms like Mechanical Turk, where folks in India or the Philippines will do it for pennies, nickels and dimes). [indeed, recall that The Analysis Group paid a mere 75 cents per long survey response

https://mm.icann.org/pipermail/gnso-rpm-sunrise/2018-December/000106.html (read this to find the reference!)

for work done in this PDP, which I highly criticized, but that kind of monotonous grunt work is perfect for doing this kind of XML migration/tagging/conversion] As for the costs she cites for "future" cases, those appear far too high. She should ask how much money it cost Ariel Liang of ICANN to create the Google Form for this comment period, which is essentially doing a comparable thing, taking input, and then converting it into standard formats in a database (which in this case is using Google Spreadsheet as the database, which can be converted to CSV or XML or whatever format ultimately desired, to be machine readable. So, look at Renee's numbers but take them with a grain of salt.

You need only look at NAF's issues with Wildcard SSL (page 35 of the Initial Report), where they complain about needing to *manually* monitor and renew the certificates, to understand that they don't know what they're talking about (as I pointed out in response to that separate question, it can be fully automated, so they were just doing it wrong).

In any event, it affects providers equally. If NAF isn't up to it, hold a competitive tender and I'm sure others would love the contract to meet any RPF that ICANN creates.

153. URS Individual Proposal #29 - Q1. What are the cost and benefits of implementing the Proposal?

For the record, this was my own proposal, so I support it for the reasons cited in the original full document (only partially reproduced in the report, see:

https://community.icann.org/download/attachments/93126760/URS-Proposal-29.pdf?version=1&modificationDate=1537973003000&api=v2

including the evidence from Rebecca Tushnet's research assistant.

I note with interest that Renee Fossen of Forum/NAF has provided very high estimates of the alleged "costs" in opposition to this proposal. They appear exaggerated. In particular, one need only ask what Professor Tushnet's RA's costs were to tag the

various desired data elements (one would want to tag more than she did, e.g. registrar, creation date, and other data elements of importance), and know that you wouldn't want to actually pay "Harvard" prices to do a one-time processing of the past decisions (one could outsource it via platforms like Mechanical Turk, where folks in India or the Philippines will do it for pennies, nickels and dimes). [indeed, recall that The Analysis Group paid a mere 75 cents per long survey response

https://mm.icann.org/pipermail/gnso-rpm-sunrise/2018-December/000106.html (read this to find the reference!)

for work done in this PDP, which I highly criticized, but that kind of monotonous grunt work is perfect for doing this kind of XML migration/tagging/conversion] As for the costs she cites for "future" cases, those appear far too high. She should ask how much money it cost Ariel Liang of ICANN to create the Google Form for this comment period, which is essentially doing a comparable thing, taking input, and then converting it into standard formats in a database (which in this case is using Google Spreadsheet as the database, which can be converted to CSV or XML or whatever format ultimately desired, to be machine readable. So, look at Renee's numbers but take them with a grain of salt.

In any event, it affects providers equally. If NAF isn't up to it, hold a competitive tender and I'm sure others would love the contract to meet any RPF that ICANN creates.

The benefits allow much better analysis of decisions and panelists. We'll be able to better scrutinize the outcomes and detect problems such as biases due to language issues or other factors. Future evidence-based reviews of the URS (and later the UDRP) can be better informed by more academic studies which would happen because of the readier access to open data (since it would all be machine readable, and researchers wouldn't need to spend money/resources to parse it manually).

URS Individual Proposal #31

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/-iGJBw

Note: URS Individual Proposal #31 stems from one of the general overarching Charter questions -- "General Overarching Charter Question #2: 2a. Should any of the New gTLD Program RPMs (such as the URS), like the UDRP, be Consensus Policies applicable to all gTLDs? 2b. If so, what are the transitional issues that would have to be dealt with as a consequence?"

Commenters have an opportunity to provide input on this general overarching Charter question in Section 10 of this form.

154. If you wish to provide (a) a response to URS Individual Proposal #31; and/or (b) a rationale for your response, please do so here.

We are strongly opposed to the URS becoming consensus policy applicable to legacy gTLDs like dot-com. Indeed, we proposed (which was blocked for publication in the initial report by the captured working group) the opposite, via Individual URS Proposal #32:

https://community.icann.org/download/attachments/93126760/URS-Proposal-32.pdf?version=1&modificationDate=1537973004000&api=v2

that it be eliminated. It should be a consensus policy to BAR the imposition of the URS upon registrants, both for dot-com and for all other gTLDs.

Verisign has a direct financial incentive to having the URS be "imposed" as a consensus policy on dot-com, as they can then argue for an additional 7% fee increase (outside the 4 out of every 6 years that the current contract allows). See page 17 of the latest amendment at:

https://www.icann.org/sites/default/files/tlds/com/com-amend-3-pdf-27mar20-en.pdf

"(iii) beginning on October 26, 2018, Registry Operator shall be entitled to increase the Maximum Price by an amount sufficient to cover any additional incremental costs incurred, or to be incurred, by Registry Operator due to the imposition of any new Consensus Policy……"

Due to lack of oversight by ICANN as to the true costs, and ICANN's ability to ignore all public input, Verisign could and likely would seek the entire 7%, regardless of their actual costs, which would be an annual extra $80 million+ (145 million dot-coms, times 7% of $7.85/yr, although it grows each year, as they impose the 4 of 6, and so basically they'd get up to 1 extra for each consensus policy, for those 2 other years). An annuity of such an amount (as it would be that extra amount every year!) would exceed $1 billion in present day value, given the low interest rates these days.

As I noted in Individual URS Proposal #32, the URS has been a failure. This Initial Report didn't even point out the declining usage over time of the procedure, to educate readers as to the true facts. There have been fewer than 50 URS complaints in total across hundreds of new gTLDs, plus dot-org, representing more than 35 million domain names, in 2020 so far (NAF's website search is broken as I type this, so I can't get the exact figure, but it was accurate as of a few days ago when I was last checking). So, extrapolating to all of 2020 (given we're one-third through the calendar year at the beginning of March), that means on the order of 150 cases. Why would one spend the countless resources reviewing the URS with such paltry volume?

Review the cases I brought to light in December 2019:

https://freespeech.com/2019/12/03/urs-a-failed-domain-name-dispute-resolution-policy-that-icann-insiders-wish-to-impose-on-more-registrants-part-1/

that show how the URS in practise is getting the decisions wrong. Why would anyone that is fair minded (as opposed to reverse domain name hijacking trademark lawyers) want to expose legacy registrants to that mess?

The URS should be eliminated, as its purported benefits do not exceed its costs. Thus, on a cost benefit analysis, it should be dropped, with focus to return to the UDRP instead.

The URS was only accepted "at gun point" by the community under the new gTLD program, due to exaggerated claims of an impending cybersquatting apocalypse if new gTLDs were introduced. The program was held hostage unless additional RPMs were added. Like many folks making predictions about new gTLDs, the proponents of additional RPMs beyond the UDRP proved to be completely wrong about huge waves of cybersquatting. Since those predictions were wrong, the policy outcomes of the past that were based on and justified by incorrect expectations should be undone. The purported benefits of the URS flow mainly to the largest corporations (who dominate the list of complainants), who can certainly afford a UDRP. The compliance costs on registrars, registries, and registrants exceed any benefits.

Rebecca Tushnet's research, see: ("Complainant Analysis" tab in spreadsheet of
https://mm.icann.org/pipermail/gnso-rpmwg/2018-May/003037.html

) shows top 21 complainants accounted for 314 of 787 non-withdrawn complaints, demonstrating that benefits flow to a small group of large multinational companies who can certainly afford a UDRP (as does the full complainant list for all complaints).

The marginal cost of a UDRP relative to a URS is relatively small (a few hundred dollars). Given roughly 200 cases per year, paying $500 less (for a URS, instead of a UDRP), is a mere $100,000/year total saved by all these large multinationals combined, which is ultimately a rounding error.

Looking at NAF (via domains.adrforum.com), the typical time to complete a "default" UDRP (majority of URS cases are defaults) is quite fast (e.g. 27 days for clips4sale.com), only marginally slower than a URS (e.g. 16 days for geeks-quad.online). Thus, the speed benefit of a URS vs. a UDRP is small.

One can shut down abusive sites even faster using Section 3.18 of the 2013 RAA for registrars, complaints to ISPs, and by using blocking mechanisms such as Google's Safebrowsing https://safebrowsing.google.com/

Compliance costs for registrars and registries can be much higher, though, as noted by Jonathan Frost within the thread at https://mm.icann.org/pipermail/gnso-rpm-wg/2018-September/003270.html There are also new burdens on registrants having to respond to URS complaints faster than a UDRP (less due process). There's also the burden of supporting (and reviewing!) 2 separate DRPs, rather than a single DRP.

This is an overarching question, that hasn't truly been addressed by the sub teams or the Working Group to date. The purported benefits have been greatly exaggerated, and the real compliance costs for registrars, registries and registrants far exceed the

benefits.

Registrants themselves weren't surveyed, and it appears that registrars/registries were never surveyed as to their compliance costs either, for supporting multiple DRPs. Sub teams also didn't consider the marginal benefit of the URS, relative to only the UDRP.

The Sub Teams really focused only on providers and TM holders, and not the other stakeholders. Thus, to the extent that the Sub Teams collected data, it did not collect data from all stakeholders to be in a proper position to look at overall costs and benefits,
especially compared to a UDRP-only alternative. The evidence from Jonathan Frost, for example, is the tip of the iceberg.

What's even more important to consider is that the value of dot-com domain names can be 100 times greater (or more) than the value of new gTLD domains (for which the URS was solely designed for). Thus, the stakes are much higher for any domain dispute involving a dot-com, rather than for a different extension. As such, a procedure like the URS with its very limited due process is inappropriate given the higher stakes involved.

Indeed, dot-coms might have been registered for 10 or 20 years, and there is simply no "urgency" to take down those long-registered sites. We had submitted Individual URS Proposal #5, which explicitly called for a limitation period to address this:

https://community.icann.org/download/attachments/93126760/URS-Proposal-5.pdf?version=1&modificationDate=1537972993000&api=v2

but this too was barred from publication in the Initial Report by the captured working group. Without the safeguard of that equivalent of a "statute of limitations" protection, then an enormous number of non-urgent disputes could be filed using the limited due protection of the URS, putting them at risk of losing their domain names, or having them wrongly suspended. In either case, there'd be enormous damage caused to legacy dot-com owners, given the high stakes and high rates of false positives that would occur.

In conclusion, the threshold for adding a new consensus policy, one that would impose major costs on registrants (as this would for increased reverse domain name hijacking attempts) should be very high. It should be based on solid empirical and statistical evidence, which is very lacking. The fact that there have been so many other URS proposals by the trademark lobby trying to expand its power says everything, as that's an implicit admission that it's been ineffective and they seek to "fix it". Expanding an untested and changed URS (i.e. a URS 2.0 so to speak) to reach and target dot-com registrants is simply unacceptable.

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/ACKJBw Note:

URS Individual Proposal #33 has a specific question below seeking public comment.

155. Please choose one of the following responses for URS Individual Proposal #33:

*Mark only one oval.* *Support Proposal as written*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

156. If you wish to (a) propose changes to URS Individual Proposal #33; and/or (b) provide a rationale for your response, please do so here.

For the record, this proposal was submitted by me, so I stand by it for the full reasons in that proposal, see:

https://community.icann.org/download/attachments/93126760/URS-Proposal-33.pdf?version=1&modificationDate=1537973004000&api=v2

Only an excerpt of the full reasons got posted in the report, which excluded important details such as:

“Formal fixed term contracts with ADR providers are not new. Forthright (which is or was closely related to NAF) had a three year contract with New Jersey, for example, to administer its PIP arbitrations:

https://www.prnewswire.com/news-releases/forthright-awarded-new-jersey-no-faultarbitration-contract-114724104.html “

I asked about NAF’s business practices in March 2018:

https://mm.icann.org/pipermail/gnso-rpm-wg/2018-March/002803.html

and ensuing thread, e.g. Paul Keating’s posts at:

https://mm.icann.org/pipermail/gnso-rpm-wg/2018-March/002830.html
https://mm.icann.org/pipermail/gnso-rpm-wg/2018-March/002833.html

NAF’s answers to my questions were inadequate, see pages 35-36 at:

https://gnso.icann.org/en/meetings/transcript-rpm-review-15mar18-en.pdf

There should be a high bar to retain such a trusted position as a URS provider, and one needs to retain and check for that trust every year. Given NAF’s controversial past:

https://en.wikipedia.org/wiki/Forum_(alternative_dispute_resolution)

it behooves us to make sure that safeguards exist, just like those that protected consumers in credit card arbitrations from the issues surrounding NAF.

In particular, NAF and other providers typically compel participants to waive the right to sue them (or panelists), except in very limited circumstances (e.g. fraud). Those circumstances need to be expanded, to include negligence, to ensure that providers and panelists take their roles more seriously, and with greater care to get to the correct decision. Holding the providers and panelists accountable in civil litigation when they make major avoidable errors (i.e. negligence) is vital, given the damage that can be brought upon registrants losing their valuable domain names (and the high costs to undo that damage in the courts).

157. URS Individual Proposal #33 - Q1. What additional elements, if any, that need to be included to enhance ICANN's Memorandums of Understanding (MOUs) with URS Providers and enforce their compliance?

In particular, NAF and other providers typically compel participants to waive the right to sue them (or panelists), except in very limited circumstances (e.g. fraud). Those circumstances need to be expanded, to include negligence, to ensure that providers and panelists take their roles more seriously, and with greater care to get to the correct decision. Holding the providers and panelists accountable in civil litigation when they make major avoidable errors (i.e. negligence) is vital, given the damage that can be brought upon registrants losing their valuable domain names (and the high costs to undo that damage in the courts).

Registrants should be third party beneficiaries, to be able to hold providers and panelists directly accountable should ICANN compliance fail to do proper oversight (which is often the case).

URS Individual Proposal #34

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/AiKJBw

158. Please choose one of the following responses for URS Individual Proposal #34:

*Mark only one oval.* *Support Proposal as written*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

159. If you wish to (a) propose changes to URS Individual Proposal #34; and/or (b) provide a rationale for your response, please do so here.

For the record, this proposal was submitted by me (jointly with Zak Muscovitch), so I stand by it for the full reasons in that proposal, see:

https://community.icann.org/download/attachments/93126760/URS-Proposal-34.pdf?version=2&modificationDate=1576694291000&api=v2

which went into more detail than was published in the initial report. It is egregious that the initial report was only published in full in English, as I noted at:

https://freespeech.com/2020/04/17/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-3/

preventing global stakeholders who aren't fluent in English from fully participating in this comment period on an equal footing with those who are fluent in English.

1. nTLDstats.com shows that the largest number of registrations come from China, see: https://ntldstats.com/country If there was to be a default language, it should be Chinese, not English! (we are not proposing this) Many popular registrars also from China: https://ntldstats.com/registrar

2. Chinese registrants respond at much lower rates than those from the USA, see: https://mm.icann.org/pipermail/gnso-rpm-wg/2018-August/003248.html which can likely be explained by language issues (19.8% vs 35.8%).

3. Professor Tushnet's dataset also showed that there were 252 cases involving a registrant from China, and 159 cases with a USA registrant. See:

https://www.dropbox.com/s/1dodxsqkauqp1vr/URS%20Case%20Review%20-%20Final.xlsx?dl=0

As already pointed out in responses to other sections/questions of this report, adopting this proposal also solves numerous other issues (e.g. there's perfect clarity as to the identity of the registrar at all times, and so this proposal's rules don't depend on what's in a potentially redacted WHOIS, unlike other rules that exist or are proposed elsewhere by others).

URS Individual Proposal #36

Please find link to this Individual Proposal and its context here: https://community.icann.org/x/BCKJBw

160. Please choose one of the following responses for URS Individual Proposal #36:

*Mark only one oval.Do not support Proposal*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

161. If you wish to (a) propose changes to URS Individual Proposal #36; and/or (b) provide a rationale for your response, please do so here.

This is yet another one-sided and lopsided proposal that would reduce registrants' rights to appeal an adverse ruling, claiming that the time to appeal is "excessive".

One of the proponents of this proposal, lawyer Paul D. McGrady, represented a complainant in a reverse domain name hijacking case for Viking.org:

https://domainnamewire.com/2011/06/01/viking-office-products-tries-to-take-sentimental-domain-name-from-altavista-inventors-widow/
https://www.adrforum.com/DomainDecisions/1383534.htm

Make no mistake that he and others in the trademark lobby seeks to weaponize the URS (see our comments to URS Proposal #15), and this is yet another example of them trying to limit registrants' due process rights. They falsely claim that "if a losing Respondent doesn't notice that its domain name has been suspended within thirty (30) days one may safely assume that the domain is of little importance to the Respondent and they have consciously foregone the opportunity to formally respond in the URS proceeding".

Is that a joke? They completely ignore the fact that ICANN has a mandated policy regarding how expired domain names are handled, including the requirement for a "Redemption Grace Period" (RGP), because ordinary registrants often do NOT notice these things quickly [even some of the largest companies in the world have missed renewals of their domains or SSL certificates]. Even with those policies in place, valuable domain names are often unwittingly allowed to expired, get suspended, and even then are not rescued during the RGP. Registrars, registries and even ICANN have spoken out during this pandemic (COVID-19 health crisis) on the need to protect registrants who might have missed renewing their domains.

See: https://domaininvesting.com/xyz-centralnic-fee-waiver/

or

https://blog.verisign.com/domain-names/verisign-will-waive-wholesale-restore-fee-to-help-registrants-keep-their-domain-names-during-covid-19-crisis/

or use your common sense. Unfortunately common sense has often been missing in this captured working group. The one-sided nature of this proposal is evident, given that the captured working group completely blocked for publication and comment in this initial report my company's balanced proposals for a limitation period for filing a URS complaint.

We had submitted Individual URS Proposal #5, which explicitly called for a limitation period to address this:

https://community.icann.org/download/attachments/93126760/URS-Proposal-5.pdf?version=1&modificationDate=1537972993000&api=v2

For the trademark lobby, they feel it's fine to take 10 or 20 years or more to bring a complaint, they have no problems at all with that. They don't "safely assume" that the "trademark infringement or cybersquatting" is of "little importance" to the trademark holder, or that a trademark complainant has "consciously foregone the opportunity to formally file a URS proceeding", to compare and contrast with the language of this proposal #36. Heck no, the trademark lobby wants to give trademark holders all the time in the world, unlimited amounts of time, to file complaints.

The captured working group even blocked from publication our Individual Proposal #8:

https://community.icann.org/download/attachments/93126760/URS-Proposal-8.pdf?version=1&modificationDate=1537972994000&api=v2

to give respondents more time to respond based on the age of the domain name (3 extra days per year that the domain name has existed, up to 60 days total). Trademark lawyers know that in real litigation, time is measured based on service of documents, where there is a much higher probability of actual notice. Those time limits need to often be calculated based on the Hague Convention, in international disputes, with rules meant to balance both sides. Under the URS (and UDRP), the time limits are much lower for respondents, and are already tilted in favour of complainants. This proposal seeks to tilt them even more in favour of complainants. We say "No", and this is why the entire URS should be scrapped, to ensure that these manipulated and

unbalanced processes are not unleashed against even more registrants.

Save Your Progress

162. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

*Mark only one oval.*

Yes

No, I wish to continue to the next section

## Section 9: TMCH Individual Proposals (Non- Recommendations)

- This section seeks to obtain input on all the individual proposals related to the Trademark Clearinghouse (TMCH). These proposals were submitted by individual working group members but did not rise to the level of becoming preliminary recommendations.
- Please note that some Individual Proposals contain associated questions that the Working Group specifically invites public comment.

### TMCH Individual Proposal #1

Please find the link to this Individual Proposal and its context here: https://community.icann.org/x/eCCJBw Note:

TMCH Individual Proposal #1 has specific questions below seeking public comment.

163. Please choose one of the following responses for TMCH Individual Proposal #1:

*Mark only one oval.* *Do not support Proposal*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

164. If you wish to (a) propose changes to TMCH Individual Proposal #1; and/or (b) provide a rationale for your response, please do so here.

As a preliminary matter, the entire TMCH should be eliminated. If it's retained (which it shouldn't be), education should be done by a neutral third party, rather than the TMCH provider (or providers, if more are added in the future). TMCH providers ultimately serve the interests of trademark holders, who pay them money. Their interests are not aligned with domain name registrants.

165. TMCH Individual Proposal #1 - Q1. Should education about the TMCH and its services be provided?

*Mark only one oval.* *Yes*

Ye

s

No

No Opinion

Other:

166. TMCH Individual Proposal #1 - Q2. If there should be education about the TMCH and its services, how and by whom should such education be provided?

As a preliminary matter, the entire TMCH should be eliminated. If it's retained (which it shouldn't be), education should be done by a neutral third party, rather than the TMCH provider (or providers, if more are added in the future). TMCH providers ultimately serve the interests of trademark holders, who pay them money. Their interests are not aligned with domain name registrants.

TMCH Individual Proposal #2 (1 of 2 proposals concerning design marks)

Please find the link to this Individual Proposal and its context here: https://community.icann.org/x/eyCJBw Note:

TMCH Individual Proposals #2 & #3 have a specific question seeking public comment below.

167. Please choose one of the following responses for TMCH Individual Proposal #2:

*Mark only one oval. Do not support Proposal*

- Support Proposal as written
- Support Proposal concept with minor change
- Significant change required
- Do not support Proposal
- No opinion

168. If you wish to (a) propose changes to TMCH Individual Proposal #2; and/or (b) provide a rationale for your response, please do so here.

As a preliminary matter, the entire TMCH should be eliminated. There's been massive gaming of the TMCH rules, and it's unclear if this is going to be an improvement.

TMCH Individual Proposal #3 (2 of 2 proposals concerning design marks)

Please find the link to this Individual Proposal and its context here: https://community.icann.org/x/eyCJBw Note:

TMCH Individual Proposals #2 & #3 have a specific question seeking public comment below.

169. Please choose one of the following responses for TMCH Individual Proposal #3:

*Mark only one oval. Do not support proposal.*

- Support Proposal as written
- Support Proposal concept with minor change
- Significant change required
- Do not support Proposal
- No opinion

170. If you wish to (a) propose changes to TMCH Individual Proposal #3; and/or (b) provide a rationale for your response, please do so here.

As a preliminary matter, the entire TMCH should be eliminated. There's been massive gaming of the TMCH rules, and it's unclear if this is going to be an improvement.

171. TMCH Individual Proposals #2 & #3 - Q1. Do you have suggestions for ways to reconcile TMCH Individual Proposals #2 and #3?

Reconcile them both by eliminating the TMCH entirely..

TMCH Individual Proposal #4 (1 of 2 proposals concerning geographical indications)
Please find the link to this Individual Proposal and its context here: https://community.icann.org/x/CSKJBw Note:

TMCH Individual Proposals #4 & #5 have a specific question seeking public comment below.

172. Please choose one of the following responses for TMCH Individual Proposal #4:

*Mark only one oval.* *Significant change required.*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

173. If you wish to (a) propose changes to TMCH Individual Proposal #4; and/or (b) provide a rationale for your response, please do so here.

As a preliminary matter, the entire TMCH should be eliminated.

GIs are not trademarks, and it would be a huge expansion of rights beyond those that exist in the real world to allow those terms to be added to the TMCH. There is not universal recognition of GIs, period. It's an "unsettled" area of IP law.

Further, the language around 3.22.3 regarding "statute" and "treaty" should be more carefully reviewed. There might be statutes in some banana republics that are gamed to capture common acronyms or dictionary words in the future, if one is inviting them like the text appears to do! (recall many of these countries have commercialized their ccTLDs, to raise money, or have tiny populations, etc.). One can have all kinds of "statutes" that are not at the national level, even (e.g. state, provincial, municipal, and so on).

TMCH Individual Proposal #5 (2 of 2 proposals concerning geographical indications)
Please find the link to this Individual Proposal and its context here: https://community.icann.org/x/CSKJBw Note:

TMCH Individual Proposals #4 & #5 have a specific question seeking public comment below.

*Significant change required.*

175. If you wish to (a) propose changes to TMCH Individual Proposal #5; and/or (b) provide a rationale for your response, please do so here.

As a preliminary matter, the entire TMCH should be eliminated.

GIs are not trademarks, and it would be a huge expansion of rights beyond those that exist in the real world to allow those terms to be added to the TMCH. There is not universal recognition of GIs, period. It's an "unsettled" area of IP law.

Further, the language around 3.22.3 regarding "statute" and "treaty" should be more carefully reviewed. There might be statutes in some banana republics that are gamed to capture common acronyms or dictionary words in the future, if one is inviting them like the text appears to do! (recall many of these countries have commercialized their ccTLDs, to raise money, or have tiny populations, etc.). One can have all kinds of "statutes" that are not at the national level, even (e.g. state, provincial, municipal, and so on).

176. TMCH Individual Proposals #4 & #5 - Q1. Do you have suggestions for ways to reconcile TMCH Individual Proposals #4 and #5?

Reconcile them both by eliminating the TMCH entirely.

# TMCH Individual Proposal #6

Please find the link to this Individual Proposal and its context here: https://community.icann.org/x/CyKJBw

Support proposal as written

178. If you wish to (a) propose changes to TMCH Individual Proposal #6; and/or (b) provide a rationale for your response, please do so here.

I had pointed out before:

https://mm.icann.org/pipermail/gnso-rpm-wg/2017-March/001119.html
https://mm.icann.org/pipermail/gnso-rpm-wg/2017-March/001120.html

That Deloitte's validation services were to be non-exclusive, as Fadi Chehade had blogged.

Also, most crucially, it stated "ICANN may audit Deloitte's performance (and revenues/costs) to confirm that the costs and fees for validation services are reasonable."

To my knowledge, ICANN has never done this. I've asked for copies of the contract in the past, and have been ignored (as well as the top 500 TMCH terms, and been ignored on that too).

TMCH Individual Proposal #7

Please find the link to this Individual Proposal and its context here: https://community.icann.org/x/DiKJBw

179. Please choose one of the following responses for TMCH Individual Proposal #7:

*Mark only one oval.* *Support Proposal as written*

Support Proposal as written

Support Proposal concept with minor change

Significant change required

Do not support Proposal

No opinion

180. If you wish to (a) propose changes to TMCH Individual Proposal #7; and/or (b) provide a rationale for your response, please do so here.

This was debated to death in the Working Group, and the trademark lobby demonstrates its ongoing hypocrisy and double standards. They want WHOIS to be public so they can easily pry into things, but want to keep the TMCH secret.

It's not enough to block this good proposal by simply saying there are "diverging opinions", thereby maintaining the flawed status quo. When the working group has been essentially captured by the trademark lobby, they need to be able to back their positions more strongly, rather than relying on a numerical advantage to maintain that "2+2=5", when it's obvious that "2+2=4". This database should have always been public, given the underlying trademarks are public too.

Brandholders claim to be concerned about "inferences". One can make "inferences" about strategies using all kinds of data, yet we don't block from public view all that other data (e.g. court filings, C&D letters, domain registrations, financial reports, etc.). Any "inferences" are self-inflected re: the TMCH, as the trademark holder has the option to select which marks to seek recordals in the database. They can choose all, or none, or something in between. Most trademark owners only own a relatively small number of marks, so are not impacted. The largest trademark owners can seek bulk discounts, if they truly wanted to, or fight back against the Deloitte monopoly on validation to seek lower costs.

Ultimately, the main reason it's secret is to protect those who've been gaming it. That is simply wrong, and shows a failure of ICANN to design robust systems that will not be gamed ad nauseum (as they were in all past sunrises).

Save Your Progress

181. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

*Mark only one oval.*

Yes

No, I wish to continue to the next section

Section 10: Overarching Charter Questions

- The Working Group's Charter includes several general, overarching questions as well as a number of additional questions that the Working Group is expected to address at the conclusion of Phase 1 or Phase 2 of its work, as appropriate.

- The Working Group invites community input on three (3) general and three (3) additional overarching Charter questions, which may help inform the Working Group's overall work toward the Final Report.

182. General Overarching Charter #Q1. Do the RPMs collectively fulfil the objectives for their creation, namely "to provide trademark holders with either preventative or curative protections against cybersquatting and other abusive uses of their legally-recognized trademarks? In other words, have all the RPMs, in the aggregate, been sufficient to meet their objectives or do new or additional mechanisms, or changes to existing RPMs, need to be developed?

They should all be eliminated, as they've been spectacular failures. The purported benefits have been small, much lower than was predicted prior to their adoption. These benefits have been swamped by their costs imposed upon others, whether it be higher compliance costs, or gaming, and so on.

183. General Overarching Charter #Q2a. Should any of the New gTLD Program RPMs (such as the URS), like the UDRP, be Consensus Policies applicable to all gTLDs?

Definitely not. There's no point in discussing TMCH or sunrise, in relation to already launched legacy gTLDs like dot-com. In theory, one could have a "permanent TMCH claims notice" applicable to all gTLDs, but with that 93.7% abandonment rate we saw in the data, I think it's clear that's never going to happen for dot-com!

As for the URS, we reiterate our prior response that it would be unacceptable.

We are strongly opposed to the URS becoming consensus policy applicable to legacy gTLDs like dot-com. Indeed, we proposed (which was blocked for publication in the initial report by the captured working group) the opposite, via Individual URS Proposal #32:

https://community.icann.org/download/attachments/93126760/URS-Proposal-32.pdf?version=1&modificationDate=1537973004000&api=v2

that it be eliminated. It should be a consensus policy to BAR the imposition of the URS upon registrants, both for dot-com and for all other gTLDs.

Verisign has a direct financial incentive to having the URS be "imposed" as a consensus policy on dot-com, as they can then argue for an additional 7% fee increase (outside the 4 out of every 6 years that the current contract allows). See page 17 of the latest amendment at:

https://www.icann.org/sites/default/files/tlds/com/com-amend-3-pdf-27mar20-en.pdf

"(iii) beginning on October 26, 2018, Registry Operator shall be entitled to increase the Maximum Price by an amount sufficient to cover any additional incremental costs incurred, or to be incurred, by Registry Operator due to the imposition of any new Consensus Policy……"

Due to lack of oversight by ICANN as to the true costs, and ICANN's ability to ignore all public input, Verisign could and likely would seek the entire 7%, regardless of their actual costs, which would be an annual extra $80 million+ (145 million dot-coms, times 7% of $7.85/yr, although it grows each year, as they impose the 4 of 6, and so basically they'd get up to 1 extra for each consensus policy, for those 2 other years). An annuity of such an amount (as it would be that extra amount every year!) would exceed $1 billion in present day value, given the low interest rates these days.

As I noted in Individual URS Proposal #32, the URS has been a failure. This Initial Report didn't even point out the declining usage over time of the procedure, to educate readers as to the true facts. There have been less than 50 URS complaints in total across hundreds of new gTLDs, plus dot-org, representing more than 35 million domain names, in 2020 so far (NAF's website search is broken as I type this, so I can't get the exact figure, but it was accurate as of a few days ago when I was last checking). So, extrapolating to all of 2020 (given we're one-third through the calendar year at the beginning of March), that means on the order of 150 cases. Why would one spend the countless resources reviewing the URS with such paltry volume?

Review the cases I brought to light in December 2019:

https://freespeech.com/2019/12/03/urs-a-failed-domain-name-dispute-resolution-policy-that-icann-insiders-wish-to-impose-on-more-registrants-part-1/

that show how the URS in practise is getting the decisions wrong. Why would anyone that is fair minded (as opposed to reverse domain name hijacking trademark lawyers) want to expose legacy registrants to that mess?

The URS should be eliminated, as its purported benefits do not exceed its costs. Thus, on a cost benefit analysis, it should dropped, with focus to return to the UDRP instead.

The URS was only accepted "at gun point" by the community under the new gTLD program, due to exaggerated claims of an impending cybersquatting apocalypse if new gTLDs were introduced. The program was held hostage unless additional RPMs were added. Like many folks making predictions about new gTLDs, the proponents of additional RPMs beyond the UDRP proved to be completely wrong about huge waves of cybersquatting. Since those predictions were wrong, the policy outcomes of the past that were based on and justified by incorrect expectations should be undone. The purported benefits of the URS flow mainly to the largest corporations (who dominate the list of complainants), who can certainly afford a UDRP. The compliance costs on registrars, registries, and registrants exceed any benefits.

Rebecca Tushnet's research, see: ("Complainant Analysis" tab in spreadsheet of
https://mm.icann.org/pipermail/gnso-rpmwg/2018-May/003037.html

) shows top 21 complainants accounted for 314 of 787 non-withdrawn complaints, demonstrating that benefits flow to a small group of large multinational companies who can certainly afford a UDRP (as does the full complainant list for all complaints).

The marginal cost of a UDRP relative to a URS is relatively small (a few hundred dollars). Given roughly 200 cases per year, paying $500 less (for a URS, instead of a UDRP), is a mere $100,000/year total saved by all these large multinationals combined, which is ultimately a rounding error.

Looking at NAF (via domains.adrforum.com), the typical time to complete a "default" UDRP (majority of URS cases are defaults) is quite fast (e.g. 27 days for clips4sale.com), only marginally slower than a URS (e.g. 16 days for geeks-quad.online). Thus, the speed benefit of a URS vs. a UDRP is small.

One can shut down abusive sites even faster using Section 3.18 of the 2013 RAA for registrars, complaints to ISPs, and by using blocking mechanisms such as Google's Safebrowsing https://safebrowsing.google.com/

Compliance costs for registrars and registries can be much higher, though, as noted by Jonathan Frost within the recent thread at https://mm.icann.org/pipermail/gnso-rpm-wg/2018-September/003270.html There are also new burdens on registrants having to respond to URS complaints faster than a UDRP (less due process). There's also the burden of supporting (and reviewing!) 2 separate DRPs, rather than a single DRP.

This is an overarching question, that hasn't truly been addressed by the sub teams or the Working Group to date. The purported benefits have been greatly exaggerated, and the real compliance costs for registrars, registries and registrants far exceed the benefits.

Registrants themselves weren't surveyed, and it appears that registrars/registries were never surveyed as to their compliance costs either, for supporting multiple DRPs. Sub teams also didn't consider the marginal benefit of the URS, relative to only the UDRP.

The Sub Teams really focused only on providers and TM holders, and not the other stakeholders. Thus, to the extent that the Sub Teams collected data, it did not collect data from all stakeholders to be in a proper position to look at overall costs and benefits,
especially compared to a UDRP-only alternative. The evidence from Jonathan Frost, for example, is the tip of the iceberg.

What's even more important to consider is that the value of dot-com domain names can be 100 times greater (or more) than the value of new gTLD domains (for which the URS was solely designed for). Thus, the stakes are much higher for any domain dispute involving a dot-com, rather than for a different extension. As such, a procedure like the URS with its very limited due process is inappropriate given the higher stakes involved.

Indeed, dot-coms might have been registered for 10 or 20 years, and there is simply no "urgency" to take down those long-registered sites. We had submitted Individual URS Proposal #5, which explicitly called for a limitation period to address this:

https://community.icann.org/download/attachments/93126760/URS-Proposal-5.pdf?version=1&modificationDate=1537972993000&api=v2

but this too was barred from publication in the Initial Report by the captured working group. Without the safeguard of that equivalent of a "statute of limitations" protection, then an enormous number of non-urgent disputes could be filed using the limited due protection of the URS, putting them at risk of losing their domain names, or having them wrongly suspended. In either case, there'd be enormous damage caused to legacy dot-com owners, given the high stakes and high rates of false positives that would occur..

In conclusion, the threshold for adding a new consensus policy, one that would impose major costs on registrants (as this would for increased reverse domain name hijacking attempts) should be very high. It should be based on solid empirical and statistical evidence, which is very lacking. The fact that there have been so many other URS proposals by the trademark lobby trying to expand its power says everything, as that's an implicit admission that it's been ineffective and they seek to "fix it". Expanding an untested and changed URS (i.e. a URS 2.0 so to speak) to reach and target dot-com registrants is simply unacceptable.

184. General Overarching Charter #Q2b. If so, what are the transitional issues that would have to be dealt with as a consequence?

Our answer to the prior question was "Definitely not." implying that we shouldn't be answering this, and that its responses would only come from those who do want to impose the URS on everyone.

Those proponents of ever expanding trademark maximalism would underestimate any transitional costs. Instead, there would be huge negative impacts on affected parties such as registrants, and even registrars who would face a huge compliance cost as long-registered legacy dot-com domain names are attacked by a weaponized URS, that was never intended for anything but "small fry" de minimis disputes involving relatively worthless new gTLD domain names.

If the URS were ever to become consensus policy, it would need to be dramatically improved as per many of the individual proposals I submitted on behalf of my company (i.e. limitation period, adjusted time to respond for older domain names, and so on -- I'll be resubmitting those in an answer to a later question, be sure!), in order to achieve balance. All of those sound proposals that were blocked from publication in this comment period due to a captured working group would need to be independently and fairly examined by a broader group than exists at present. We're talking about affecting 145 million domain names in dot-com that are far more valuable than the throwaway and relatively worthless domains registered in the new gTLD program. The utmost care must be taken in creating policies that will harm them.

185. General Overarching Charter #Q3a. Will changes to one RPM need to be offset by concomitant changes to the others?

There are overlapping issues and interactions amongst the various RPMs, which should be minimized in properly designed systems, to avoid duplication and other negative effects. For example, lax acceptance into the TMCH has impacted sunrise periods, due to gaming.

The URS and the UDRP already have great overlap. The URS can be considered as a variation of the UDRP, comparable to the subset of those UDRP cases where only cancellation was sought (as opposed to transfer). Suspension in the URS is equivalent to a delayed cancellation (with an interim suspension page), whereas the UDRP cancellation is more immediate (once appeal period to the courts has elapsed).

It is better to have policies that are orthogonal to one another, rather than ones that are so similar.

186. General Overarching Charter #Q3b. If so, to what extent?

Changes need to be evidence-based, and prioritize the ones with the greatest impact. This report has had many dubious and questionable proposals because they fail to properly weigh the costs and benefits. It fails to even seek out reliable data on the nature and size of the expected problems or benefits. It completely ignores the oversight costs, including the enormous costs of volunteer time to monitor and engage with this very working group. It's time to trim the number of RPMs to a more manageable level, with smaller and more focused policies that are easy to implement and review. It's better to do a small number of things well, rather than try to do too many things and fail miserably at all of them (which is arguably the case with these RPMs).

187. Additional Overarching Charter #Q1. Do the RPMs adequately address issues of registrant protection (such as freedom of expression and fair use)?

No. I submitted numerous individual URS proposals which were not included for publication in this report, which attempted to address those very issues affecting registrants (which I will resubmit in response to a later question). In particular, ensuring the right to access the courts in all jurisdictions is not interfered with, which we spent over a year of work on in the IGO PDP, and which is an obvious problem. All of those registrant protection mechanisms were not thoroughly reviewed, as they were simply dismissed by the captured working group that is dominated by the trademark lobby. Shame on them for making a mockery of this working group which is supposed to deliver a balanced review on these serious topics. As I noted on my blog at:

https://freespeech.com/2020/04/16/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-2/

there are just a tiny number of actively engaged members representing “registrant protection” issues, and they were overwhelmed by the trademark lobby. That small minority should have called out the co-chairs for not addressing this capture, through greater outreach. Of course, I did personally call that out via my section 3.7 appeal within the working group (which was ignored/dismissed and not taken seriously, before I was unfairly banished), but it would be better to have all of the remaining pro-registrant voices walk out jointly or be banned, to make evident that the capture is real, rather than have them stay silent or be bullied into submission, essentially becoming complicit in the destruction of registrants’ rights through their silence.

188. Additional Overarching Charter #Q2. Is the recent and strong ICANN work seeking to understand and incorporate Human Rights into the policy considerations of ICANN relevant to the UDRP or any of the RPMs?

I wouldn't call any work produced by ICANN as "strong." But, to the extent that Human Rights need to be reviewed, they are definitely relevant to all RPMs. These would included (but are not limited to, as I don't have enough time right now to enumerate them!):

https://www.un.org/en/universal-declaration-human-rights/

"Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Domain names are property, for Article 17!

189. Additional Overarching Charter #Q3. How can costs be lowered so end users can easily access RPMs?

Through competitive bidding, instead of creating new monopolies (as has happened with Deloitte and their validation monopoly, despite Fadi Chehade saying there'd be multiple providers).

Save Your Progress

190. Do you want to save your progress and quit for now? You will be able to return to the form to complete at a later time.

*Mark only one oval.*

Yes

No, I wish to continue to the next section

## Section 11: Other Comments & Submission

191. Are there any additional recommendations that you believe the Working Group should consider making? If yes, please provide details below.

YES!! Finally, I am resubmitting here ALL of the URS, TMCH and SUNRISE Proposals I had submitted (before I was unfairly banished from participation) that the captured working group unfairly removed from consideration by the public, via this captured working group. And some extra proposals too.

Before I do so, I want to note that I've read all the transcripts of the calls, including the processes by they were removed, and it's clear that the processes were a sham. I've blogged about it, and refer you to:

https://freespeech.com/2019/08/05/misuse-of-icann-pdp-chair-position-to-relitigate-working-group-decisions/
https://freespeech.com/2019/11/03/icann-rpm-pdp-working-group-chairs-blatantly-violate-rules/

which called it out very early. The "minority" was ignored, including Rebecca Tushnet who aptly described the situation:

https://mm.icann.org/pipermail/gnso-rpm-wg/2019-November/004101.html

"I am struggling to see why we should reopen the process for WG recommendations. If we did, I would think it would be a fair complaint that nothing is ever truly settled if some group doesn't like the results. Why shouldn't we also go through all the other subgroup individual proposals to see if they too have gained support in the meantime since they were accepted as individual proposals but not as WG proposals?

The relevant scenario for possible adoption by the WG is, I think, after we get feedback. That's why the other individual proposals are going out, right? The theory is that they might get enough support/evidence in feedback. So too here. Or there's no point to
publishing individual proposals at all, is there?"

https://gnso.icann.org/sites/default/files/policy/2019/transcript/transcript-gnso-rpm-29jan20-en.pdf

"Thank you. I'm kind of discouraged to hear that, especially since there was discussion of these individually and also as reflecting a general problem that people acknowledged, which is that there are people who can't get review of this decision. I am seeing a sort of distressing pattern here and I query whether this is actually a sort of majority support requirement which is … I said it all along. The working group has never clarified the standard for this, and unfortunately that seems to me to be reading to a fairly clearly biased set of results. Thank you. " (page 23)

"Thank you. So, again, I've got to say this is not filling me with any confidence about the standards that have been applied. So, I know, Brian, that you used the word consensus to describe what counted as sufficient, despite the fact that we've said many times that consensus is not the standard. And I think that reflects that it's proven essentially impossible not to slip back into some sort of majority or consensus approach, despite the fact that people were asked to submit proposals that address real problems if they're not workable. And something that I note that did not prevent a bunch of other proposals from clearing the bar, right? The feasibility concerns, like from many things the IP Constituency supported, which is fine but it has to be applied equally. If feasibility concerns are something to raise in feedback, then have them raise in feedback. As it is, it sounds like we're saying, "Well, the URS is supposed to be quick and dirty, so you can't have an appeal from it." That seems wrong. And I understand that appeal is not necessarily the right word. You can't get a court to decide the issue because we did it so quick. But the real problem here
I think is the standard [inaudible] which nobody has still coherently articulated. Thank you." (page 25)

I would see deeply researched proposals dismissed without justification in minutes by the group, without any serious review, because the trademark lobbyists dominated it. Half-baked and extremist proposals of those aligned with the trademark lobby sailed through (like URS Proposal #15), with even multiple sub-part questions asked in the very long Google forms and documents, with counter-balancing proposals to protect registrants utterly blocked from consideration and publication in the initial report, to educate the public and get their feedback. This working group represents ICANN policymaking at its worst, and I'm not optimistic that it can be improved (it might even reach new lows, due to PDP 3.0 and other changes to stifle the views of the public).

Some "justifications" for opposing my proposals (if they explicitly referenced both the URS and the UDRP) ignored the actual call for proposals, which specifically asked people to highlight proposals that applied to both the URS and the UDRP. See:

https://mm.icann.org/pipermail/gnso-rpm-wg/2018-August/003245.html

where I asked about this, and then the co-chairs responded with:

https://mm.icann.org/pipermail/gnso-rpm-wg/2018-August/003249.html

"A URS aspect that a WG member believes should be addressed in Phase 2 (which includes the UDRP, and possibly some aspects of the URS) of our work should be submitted now in proposal form to identify it for discussion as an issue to possibly be addressed in Phase 2.
o The member should state in the rationale the reason for such proposed Phase 2 designation for discussion in the WG.
o Absent agreement on such proposed Phase 2 designation, and if requisite support is received, the Proposal would be put out for public comment in the Phase 1 Initial Report for the purpose of soliciting public comments.
o Depending upon the public comments received on any URS proposal included in the Phase 1 Initial Report, final consideration of it may be deferred until Phase 2.
o Absent extenuating circumstances, and subject to discretion of the co-chairs or substantial support from WG members, no URS proposal from a WG member(s) will normally be considered in Phase 2 unless it has been proposed during Phase 1 in conformity with these Final Procedures." (from page 2 of the PDF)

That's why I had UDRP references for multiple proposals, and I was the only person who actually followed the spirit of the guidelines in that respect! Other people submitted proposals on "Loser Pays" or "Enhanced Penalties" that obviously apply to both URS and UDRP, yet they failed to make the designation, hoping instead to get multiple "kicks at the can", consideration in both Phase 1 *and* separately in Phase 2. Then, later of course people debated whether things should be Phase 1 or Phase 2, and it was all a mess.

But, to later reject my proposals outright in many cases because they mentioned the UDRP was simply ignoring the submission guidelines history. Shame on you.

Anyhow, here are proposals, briefly (with links to those who can read them in their entirety again), for the benefit of those open-minded members of the community (unlike the captured working group).

A] New Proposal: there should be an explicit OPT-OUT provision for the URS, simpler than the one in the the CASE ACT (for copyright arbitrations) that the EFF has blogged about:

https://www.eff.org/deeplinks/2019/09/congress-continues-ignore-dangerous-flaws-case-act

(the EFF can design a proper opt-out)

B] URS Proposal #4: suspension pages in HTTPS & HTTP
https://community.icann.org/download/attachments/93126760/URS-Proposal-4.pdf?version=1&modificationDate=1537972993000&api=v2

(NAF argued that it's "moot", but it's not; it should be embodied directly in policy, rather than in guidelines that the providers and ICANN negotiate separately, and can undo)

C] URS Proposal #5: limitation period for complaints:

https://community.icann.org/download/attachments/93126760/URS-Proposal-5.pdf?version=1&modificationDate=1537972993000&api=v2

(no brainer; forces the policy to focus on actual clear-cut cases, which are usually registered and used maliciously in the first year; the longer a domain name exists, with multiple renewals paid for, the more likely it's a valuable domain name that is unsuited for the URS; almost all the "bad" or "controversial" domain dispute decisions involved aged domains; if registered trademarks are "incontestable" after a certain time, the same should happen for domain names -- I'm aware that one can still challenge "incontestable" marks, but one loses some methods/arguments if you wait too long; the same should happen with

regards to domains, you don't have any right to use the URS after 20 years of waiting!]

D] URS Proposal #7: improve notice of complaints, with optional "legal contact"
https://community.icann.org/download/attachments/93126760/URS-Proposal-7.pdf?version=1&modificationDate=1537972994000&api=v2

(in a fair process, the domain name owner has to be given a chance to respond; this improves the odds of actual notice; if you can have faxes in notices for those who are concerned about getting notice, certainly those of us who have lawyers would want to get those lawyers the complaint ASAP, esp if we are on holiday, etc and can't respond in 14 days; I'm not going to give a lawyer ADMIN access to the domain, so they need a separate contact; this is all OPT-IN]

E] URS Proposal #8: give more time to respond based on the age of the domain name

https://community.icann.org/download/attachments/93126760/URS-Proposal-8.pdf?version=1&modificationDate=1537972994000&api=v2

(registrant has earned something through multiple renewals; there's no longer any "urgency" for a 10-year registered domain name; balances the time given for a complainant to bring a case, vs. the time to respond; if the complainant takes 10 years, they shouldn't expect a 14 day response, esp. when it would be 60+ days via the Hague Convention in court)

F] URS Proposal #35 (which modified #12): define "registered in bad faith" date to be the creation date (not changes of ownership dates)

https://community.icann.org/download/attachments/93126760/URS-Proposal-35.pdf?version=1&modificationDate=1540050863000&api=v2

(this harmonizes the policy with national law interpretations, as per GOPETS v. Hise decision; ensures trademark owners don't get better rights in the URS than they do in the courts)

GOPETS v. Hise:
http://cdn.ca9.uscourts.gov/datastore/opinions/2011/09/22/08-56110.pdf

""The primary question before us is whether the term "registration" applies only to the initial registration of the domain name, or whether it also applies to a re-registration of a currently registered domain name by a new registrant. We hold that such re-registration is not a "registration" within the meaning of § 1125(d)(1).""

G] URS Proposals #18, #19, and #20: ensure access to the courts for full de novo review on the merits

https://community.icann.org/download/attachments/93126760/URS-Proposal-18.pdf?version=1&modificationDate=1537972999000&api=v2
https://community.icann.org/download/attachments/93126760/URS-Proposal-19.pdf?version=1&modificationDate=1537972999000&api=v2
https://community.icann.org/download/attachments/93126760/URS-Proposal-20.pdf?version=1&modificationDate=1537972999000&api=v2

(3 different ways of accomplishing the same goal; a 4th way would be the Opt-Out as per the CASE Act above as "A")

These were critical issues. I encourage folks to read the extensive submissions I made in the IGO PDP on the topic, including the history of the UDRP, the "role reversal", etc.

https://mm.icann.org/pipermail/comments-igo-ingo-crp-recommendations-11jul19/2019q3/000025.html

also available at: https://freespeech.com/wp-content/uploads/2019/08/LEAP-comments-IGOPDP-final-report-20190820.pdf

especially sections 8 (starting on page 18), 9 (starting on page 20). This is solid analysis that I stand by 100%, and it's frustrating and distressing to see it not taken seriously, when I've been proven right time and again in my work on these kinds of ICANN issues for the past 15+ years. The only reason they're opposed to fixing this is that trademark holders don't want the losing respondent to have a chance to beat them in court. Period. It's about the trademark holder wanting to end the process prematurely in the event a panel finds in their favour, and not have it bashed out in court, de novo with a clean slate, with a domain owner who isn't hiding. As I documented in the history of the UDRP, these dispute resolution mechanisms were never meant to be the "final word", and should be redesigned to prevent them from mistakenly being the final word in those circumstances that exist today. This isn't about "creating a cause of action" which was wrongly asserted repeatedly. This is about

removing the “role reversal”, so that the trademark holder is *always* the complainant in court.

H] URS Proposal #23: cost recovery for registries/registrars

https://community.icann.org/download/attachments/93126760/URS-Proposal-23.pdf?version=1&modificationDate=1537973001000&api=v2

(speaks for itself!)

I] URS Proposal #30: mediation step

https://community.icann.org/download/attachments/93126760/URS-Proposal-30.pdf?version=1&modificationDate=1537973003000&api=v2

(like Nominet, to encourage settlement and needless litigation)

J] URS Proposal #32: consensus policy to eliminate URS as a policy

https://community.icann.org/download/attachments/93126760/URS-Proposal-32.pdf?version=1&modificationDate=1537973004000&api=v2

(Not just declining to make URS a consensus policy. But, making it a consensus policy to *prevent* URS from being imposed on registrants, and thereby removing it from Dot-Org, and the new gTLDs where it now exists)

In addition to the above, I resubmit the various Sunrise & Trademarks Claims Proposals that got killed in the captured subteams, and didn’t get published or taken seriously.

K] Sunrise Subteam Proposal #1: Elimination of Trademark Claims & Sunrise:
https://community.icann.org/download/attachments/102146375/Proposal%231.pdf?version=2&modificationDate=1553614357000&api=v2

L] Sunrise Subteam Proposal #2: Publication of relevant data re: TMCH:

https://community.icann.org/download/attachments/102146375/Proposal%232.pdf?version=1&modificationDate=1553614254000&api=v2

M] Sunrise Subteam Proposal #3: anti-hijack provisions

https://community.icann.org/download/attachments/102146375/Proposal%233.pdf?version=1&modificationDate=1553614262000&api=v2

N] Sunrise Subteam Proposal #4: substantive ineligibility provisions

https://community.icann.org/download/attachments/102146375/Proposal%234.pdf?version=1&modificationDate=1553614273000&api=v2

O] Trademark Claims Subteam Proposal #5: compensation for registrars for displaying notices

https://community.icann.org/download/attachments/102146375/Proposal%235.pdf?version=1&modificationDate=1553614366000&api=v2

P] Trademark Claims Subteam Proposal #6: open source software

https://community.icann.org/download/attachments/102146375/Proposal%236.pdf?version=1&modificationDate=1553614383000&api=v2

Ultimately, we all want to reduce cybersquatting. We need to “triage” the disputes, and place more emphasis on the serious cases, and filter those out for priority consideration. Focused policies on the really bad actors. Combine the URS and UDRP into a single policy, to streamline things and reduce duplication.

The trademark lobby focuses on punitive measures, the stick rather than the carrot. We should have policies to encourage good faith actors to identify themselves and reward them accordingly. If you're a client of MarkMonitor, for example, they probably know who you are (i.e. KYC rules, perhaps not to the same degree as a bank, but it's unlikely MarkMonitor clients are engaged in much cybersquatting.

Similarly, if you're a good faith domain name registrant, with a large carefully collected portfolio (e.g. Microsoft, Google, most ICA members, Telepathy, Digimedia, BuyDomains, NameFind, HugeDomains, my own company, etc.) and a track record or ability to post a security bond or some other way of proving you are who you are, you should be rewarded (e.g. able to opt out of URS, UDRP, etc. if you want, in favour of the courts).

Most of the worst actors are using fake identities, using throwaway domains and a short domain lifecycle, and emphasis needs to be to try to target those, without affecting innocent registrants. For example, developing tools that attach a "risk score" to a newly registered domain name (based on registrar, geography, WHOIS elements, etc.) and then requiring higher validation or slower resolution of certain names (e.g. if someone registers google-login-1234.TLD, perhaps that one could be prevented from being put into the zone file immediately, but be held in limbo for 7 days, to allow a challenge to take place, or to allow a registrar to get a full ID, or check against a chargeback, etc. For certain classes of domains, with relation to finance/banking or pharma (public health concerns) that are often abused, those should be the priority.

192. Are there any other comments or issues you would like to raise pertaining to the Initial Report? If yes, please enter your comments here. If applicable, please specify the section or page number in the Initial Report to which your comments refer.

Yes, that the work is a product of a captured working group, and as such is entirely unbalanced. See:

https://freespeech.com/2020/04/13/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-1/
https://freespeech.com/2020/04/16/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-2/
https://freespeech.com/2020/04/17/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-3/
https://freespeech.com/2020/04/27/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-4/
https://freespeech.com/2020/05/02/icann-rpm-pdp-phase-1-comment-period-is-another-sham-part-5/

There is a strong argument to be made for termination of the entire PDP, based on the severe and ongoing problems in it.

If it should continue, the co-chairs should be removed, and replaced by an independent and neutral facilitator, to ensure that there is a fair process going forward, including greater outreach to under-represented stakeholders (like registrants) before work continues, and definitely before any consensus call and "final" report. It might be prudent to even consider a second public comment period, given the technical issues surrounding this one.

Work habits need to be greatly improved, with work done in "bite sized" chunks, and with clear expectations on time commitments. I pointed this out in my section 3.7 appeal, which was ignored:

https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003633.html

Indeed, there probably should have been 3 or 4 smaller reports issued over the past 4 years (on the separate RPMs), with comments coming in while work continued on other stuff, e.g. one on TMCH, another on Sunrise, another on URS, etc. It would have put a much smaller burden on the public.

People come to calls unprepared. Chairs wrongly simply read from the slides, assuming people are reading them for the very first time. Most people were simply going through the motions for the past 4 years, and didn't put in the hard work.

People should be asking "What do we know now, that we didn't know 4 years ago?" and the answer is clearly "Not much." There was horrible attention paid to data collection, statistical issues, and so on, even though there was budget and time to do things right. Money, time and resources were simply squandered! I pointed this out repeatedly, e.g.

https://mm.icann.org/pipermail/gnso-rpm-trademark/2018-December/000092.html

but was ignored. Even now, there are no serious recommendations in the report as to how to do better in terms of future data

collection, to do evidence-based policymaking properly. Nada!

The report itself doesn't prioritize issues, doesn't weigh the pros and cons seriously (it sometimes enumerates a handful of them, but doesn't attempt to weight them or quantify them in any way. My background is in economics and finance, and it's possible to quantify these risks and benefits and costs and so on. That's what economists do. There are unlimited desires, but limited resources. One has to make hard choices, to satisfy as much as you can with the resources that are available. None of that is even attempted here.

A fresh reader of this report doesn't even have a clear idea of how many URS complaints there are annually, how much cybersquatting exists, how much cost savings might exist, how much compliance costs are, and other essential details.

The lack of any good content at all is made worse by its poor organization, where there's duplication in different sections of the report (i.e. recommendations up front, then one has to refer later on in the report to more details in the deliberations, etc.). It's just all over the place.
Furthermore, often the "Strongest Arguments" of each side aren't even presented, or are outright falsified. For example, page 47 claims that "there is lack of concrete evidence to substantiate the suspicion.", referencing abuse of the sunrise. There was lots of evidence presented! You might disagree with the amount of it, but saying that wasn't concrete evidence to substantiate even a suspicion? Clearly false.

Where there was evidence (e.g. 93.7% abandonment rate of the Analysis Group report), it wasn't even mentioned (e.g. on page 49 abour "Extent of deterrence")., to explain things.

Similarly on page 57, the report's authors rewrite history, about how the Individual URS proposals were handled. That history was utterly false, as discussed in the immediately preceding question on this form (where I wrote about relitigating decided issues, quoting Rebecca Tushnet too). It's clear that the processes were a sham. I've blogged about it, and refer you to:

https://freespeech.com/2019/08/05/misuse-of-icann-pdp-chair-position-to-relitigate-working-group-decisions/
https://freespeech.com/2019/11/03/icann-rpm-pdp-working-group-chairs-blatantly-violate-rules/

which called it out very early. The "minority" was ignored, including Rebecca Tushnet who aptly described the situation:

https://mm.icann.org/pipermail/gnso-rpm-wg/2019-November/004101.html

"I am struggling to see why we should reopen the process for WG recommendations. If we did, I would think it would be a fair complaint that nothing is ever truly settled if some group doesn't like the results. Why shouldn't we also go through all the other subgroup individual proposals to see if they too have gained support in the meantime since they were accepted as individual proposals but not as WG proposals?

The relevant scenario for possible adoption by the WG is, I think, after we get feedback. That's why the other individual proposals are going out, right? The theory is that they might get enough support/evidence in feedback. So too here. Or there's no point to
publishing individual proposals at all, is there?"

https://gnso.icann.org/sites/default/files/policy/2019/transcript/transcript-gnso-rpm-29jan20-en.pdf

"Thank you. I'm kind of discouraged to hear that, especially since there was discussion of these individually and also as reflecting a general problem that people acknowledged, which is that there are people who can't get review of this decision. I am seeing a sort of distressing pattern here and I query whether this is actually a sort of majority support requirement which is … I said it all along. The working group has never clarified the standard for this, and unfortunately that seems to me to be reading to a fairly clearly biased set of results. Thank you. " (page 23)

"Thank you. So, again, I've got to say this is not filling me with any confidence about the standards that have been applied. So, I know, Brian, that you used the word consensus to describe what counted as sufficient, despite the fact that we've said many times that consensus is not the standard. And I think that reflects that it's proven essentially impossible not to slip back into some sort of majority or consensus approach, despite the fact that people were asked to submit proposals that address real problems if they're not workable. And something that I note that did not prevent a bunch of other proposals from clearing the bar, right? The feasibility concerns, like from many things the IP Constituency supported, which is fine but it has to be applied equally. If feasibility concerns are something to raise in feedback, then have them raise in feedback. As it is, it sounds like we're saying, "Well, the URS is supposed to be quick and dirty, so you can't have an appeal from it." That seems wrong. And I understand that appeal is not necessarily the right word. You can't get a court to decide the issue because we did it so quick. But the real problem here
I think is the standard [inaudible] which nobody has still coherently articulated. Thank you." (page 25)

Similarly page 57 doesn't give out all the facts, that it was an ANONYMOUS survey, and anonymous surveys violate the transparency requirements of the working group guidelines, as I've pointed out in the very first Section 3.7 Appeal in the IGO PDP, and which Co-chair Phil Corwin must certainly be aware of. The rules haven't been followed, and the person calling for following the rules (myself) was unfairly banished:

https://freespeech.com/2019/04/05/update-my-participation-rights-have-now-been-eliminated-at-icann-working-groups/

Of course, I should be reinstated, if there was a fair system in place.

Page 83 misleadingly claims that the RPMs "do not preclude the initiation of legal proceedings the appropriate jurisdiction", which is a sneaky way of not talking about the severe problems about access to the courts that are addressed by URS Individual Proposals #18, #19 and #20. Initiating legal proceedings that would be dismissed due to lack of cause of actions isn't even hinted at.

Bottom of page 86 is misleading, as the UDRP itself was supposed to apply only to "clear cut" cases. The URS was supposed to apply the "slam dunk" subset of those "clear cut" cases.
Page 89 has the misleading 15 January 2020 end date for the review of the URS, ignoring the relitigation of all the Individual URS Proposals that were actually agreed upon much earlier. Same on page 93, where history is rewritten, to not mention it was agreed that all the individual URS proposals were to be published.

The report generally glosses over how poorly done the statistical work was (it cites the INTA and other work, but never mentions how bad it was, in terms of lack of statistical power or relevance).

Bottom of page 95 cites a recommendation for "continued monitoring until more data is collected and made available for review", yet where is anything related to that, going forward?

The "cost benefit" analysis on the page 96 regarding the TMCH has never really taken place, with any quantitative assessments. One is looking for OBJECTIVE analysis, but this report is often entirely subjective in nature, almost entirely written from the perspective of the trademark lobby that dominates and has captured its work.

Often when there is concrete objective data that differs from the predetermined outcome that the trademark lobby desires, great lengths are taken to dismiss and delegitimize that work (e.g. Professor Tushnet's sound academic research). There is a high degree of sophistry amongst many of the statements used to attempt to discredit facts that undermine those predetermined outcome.

One of the major problems is the lack of any deep **principles*** for policies. e.g. a principle might be one such as "we shall not make any new laws or provide any new legal rights to trademark holders" or "we shall not make policies that interfere with legal rights" (broken by the role reversal problem, addressed by URS proposals #18, #19 and $20), or that we will be "transparent as much as possible" and so on. You need principles to help to make choices, otherwise you get a number of groups that say "I want this, this and this", and others "I want that, but not this", with no justifications, just a set of wishlists.

Some of the proposed answers are just wishy-washy, without the details/evidence to back them up, to see whether they are "reasonable". e.g. on page 131, you can tell this was written by a committee:

"The Working Group did not come to an agreement as to whether the Trademark Claims service is "probably" or "likely" having its intended effect of deterring bad-faith registrations, although the Working Group could determine that the service is at least "possibly" having its intended effect. The Working Group could not determine the extent of deterrence that occurred, if any."

?!?!?!?! Most people reading that would probably give up. It's like something that would come out of the TV show "Yes, Minister." A good report would seek to make very clear recommendations in very plain language that people can understand.

Starting on page 142, a number of "Affiliations" of members are incorrect. e.g. Cyntia King is listed as an "Individual", even though her SOI shows she's in the IPC:

https://community.icann.org/display/gnsosoi/Cyntia+King+SOI

and she's listed on their website as a member:

https://www.ipconstituency.org/current-membership

There are others that are wrong, but I leave that as an exercise for staff.

I note for the record that the Google Forms were horrible, and should not be used again, Return to email comments in the future!

All in all, not ICANN's finest work. I'll be blogging about these and other issues in the months ahead, but this is sufficient for now!