

**Temporary Drafting Group
Trademark Post Delegation Dispute Resolution Procedure (PDDRP)
Excerpts**

I. THRESHOLD

Previous language on the “Quick Look”:

The Provider shall perform an initial “quick look” review to ascertain, before a Response is due, that the Complainant is in fact a trademark holder. (Explanatory Note: This quick look process, inserted in response to public comment as a measure to screen out frivolous Complaints, is still under development.)

Draft Proposed Language for Threshold Review (to replace Quick Look):

Once the Panel is established and before the respondent is required to submit a substantive response, the Panel shall perform an initial “threshold” review to ascertain the following:

1. The complaint is a trademark holder;
and
2. The complainant has asserted facts with sufficient specificity that, if everything the complainant asserted is true, states a claim under the Top Level Standards herein.

OR

The complainant has asserted facts with sufficient specificity that, if everything the complainant asserted is true, states a claim under the Second Level Standards herein.

Issues for discussion:

1. If there is to be a threshold review of each complaint under the PDDRP, the Panel should be making the decision, not the Provider. This would mean that the respondent might need to be involved in the selection of the Panel. For example, if the PDDRP is revised to allow for either party to elect a three-member Panel, the respondent will need to be involved before the threshold review takes place. Thus the respondent will need to file some notice of appearance and should have the opportunity, if it chooses, to file papers regarding the threshold review.
2. The above leads to another issue as to whether all three Panelists (if three are allowed which is what ICANN is inclined to propose) would be selected by the Provider or each party would select one and the party-selected Panelists will choose a third to head the Panel. If the Provider selected all three, then the respondent’s involvement could be limited to simply electing a one or three-member Panel, not selection of the Panelists.

3. If the respondent files papers in the threshold review process, what fee, if any, should the respondent be required to submit? In this circumstance, ICANN recommends that respondent at least pay a filing or administrative fee.

II. SAFE HARBORS

The group has not submitted any suggested safe harbors. The discussion at the last call was that the group thought the standards needed to be determined before safe harbors could be agreed.

III. STANDARDS

Top Level:

A complainant must assert and prove, by clear and convincing evidence, that the registry operator's affirmative conduct in its operation or use of its gTLD string that is identical or confusingly similar to the complainant's mark, causes or materially contributes to the gTLD doing one of the following:

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

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

Second Level:

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

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

(ii) unjustifiably impairs the distinctive character or the reputation of the complainant's mark, or

(iii) creates an impermissible likelihood of confusion with the complainant's mark.

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