

**Uniform Domain-Name Dispute-Resolution WEBINAR
TRANSCRIPT**

Tuesday 10 May 2011 at 1500 UTC

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(The participants are not mentioned individually as over 130 attended the webinar.)

Coordinator: Excuse me, everyone, it's the Operator. I need to inform all parties that today's conference is being recorded. If you have any objections you may disconnect your lines at this time. And you may begin.

Margie Milam: Good morning, good afternoon and good evening to all of you. Welcome to the UDRP Webinar. My name is Margie Milam and I'm a Senior Policy Counselor at ICANN and I will be your moderator today.

Due to the large number of participants we're going to mute all of the lines except for the presenters at the start of the call. There will be an opportunity for questions at the end of the session. If you want to pose a question please put it in the chat area and we'll do our best to answer it at the end of the session.

You'll also be able to hear audio through the audio - Adobe Connect window. And if you are listening in through Adobe Connect you won't want to call in to the telephone line. There will be an echo if you're listening in on the Adobe Connect line and also on the telephone line.

And I'm pleased to introduce you to the current state of the UDRP Webinar. Today's speakers will provide you with a wide variety of perspectives on the UDRP and its administration and each speaker will be allocated five minutes to provide their perspective on this important topic.

As you can see from today's agenda we have an action packed schedule here. There are speakers from all aspects of the UDRP. Speakers from the provider community. We will also have a speaker from ICANN Compliance, from the registrars, panelists, complainants, and we will also have the perspective of academics. And at the very end of the session we will have a Q&A where we'll go over the questions from the chat.

To give you a background as to why we're having this session, in February of 2011 the GNSO Council requested an issue report on the current state of the UDRP. Staff is currently preparing this UDRP issue report and is trying to gather data and research in order to deliver this report to the GNSO Council.

So today you will hear from experts on - their perspectives on the UDRP and its effectiveness and whether it should be modified or improved. Once the session is over we'll take this information, evaluate it, and publish a preliminary issue report at the end of this month. The estimated date for that publication will be May 30th of this month.

A public comment period will be opened at that point in order to solicit input from the community. And we will also have a session at the ICANN Singapore meeting to explore the issues in the preliminary issue report and to get feedback from the community.

After the Singapore session we will publish a final issue report that will take into account the information from Singapore, the information from the public comment forum, and this will be presented to the GNSO Council so that they can determine whether they should commence a policy development process on the UDRP.

And so all of this work today is a preliminary opportunity to explore the issues and to hear from the experts on the efficiencies, the inequalities and any improvements in the process or the policy itself.

And with that, we're going to start with our first set of panelists that will provide you the perspective from the UDRP providers. As you can see we've invited representatives from all of the providers that are approved by ICANN and they will provide you with their unique perspective, having administered the UDRP over several years.

And we begin now with Erik Wilbers from the World Intellectual Property Organization organization. Erik?

Erik Wilbers: Thank you very much. Is it wise to enter into an ICANN UDRP process? What is the likely outcome and is the UDRP really the issue? Here are the views of the WIPO arbitration and mediation center. In addition to this presentation ICANN and WIPO also are posting a fuller WIPO letter on the issue.

ICANN adopted the European WIPOs recommendation, the 1999 WIPO report provided UDRP blueprint, building on exhaustive international consultations. Since then, and always on a non-profit

basis, WIPO's arbitration and mediation center has processed some 20,000 UDRP cases.

It has furthermore created a range of globally unique UDRP resources with the WIPO U.S. (prudential) overview and the WIPO (legal index) as notable examples.

Every year WIPO (unintelligible) to discuss UDRP and WIPO hosts UDRP workshops attended by parties and council from around the world. Nobody has invested more into the continued health of the UDRP mechanism. We care about it.

UDRP was designed to resolve certain online infringement of trademark rights occurring across national jurisdictions, while retaining court options. As an expedient alternative to those court options the UDRP has won international respect, as but one measure of how this legal system has held up, only the rarest of the tens of thousands of UDRP decisions have been successfully challenged in court.

In different ways the UDRP has worked to the benefit of all DNS (actors), owners of trademark rights, domain name registrants and registration authorities. Any destabilization of the UDRP will necessarily impact all of these parties.

The overall UDRP framework does not seek to micro legislate for issues and moments in time. Its non-exhaustive concepts of respondent rights and legitimate interests, and of bad faith, are subject to panel interpretation in light of evolving legal norms and business practices.

Similarly, panels have appropriate procedural powers. Building on this flexibility the UDRP represents the collective wisdom and public stewardship of hundreds of UDRP panelists across jurisdictions exercised over the course of tens of thousands of recent decisions.

Examples of practical issues addressed include privacy in proxy registration services, multiple parties and consolidation principles, language requests, consideration of supplemental filings and suspension procedures to facilitate party agreed supplement.

The list is long with these and many other issues continuing to be streamlined by UDRP panelists in (live) cases everyday. In this way UDRP has developed incrementally as a public system of jurisprudence over more than a decade.

Irrespective of one's views on the UDRP's functioning, it must interoperate with other RPM's being developed for new gTLDs. This concerns, in particular, the URS. which also addresses registrant behavior.

But the URS is as yet unsettled and presents serious issues in terms of its workability. Also, its procedural and jurisprudential interaction with UDRP remains largely unaddressed. And even if such issues were satisfactorily resolved, the URS will need to settle in practice in a DNS expanded by hundreds of TLDs.

The operational UDRP must remain anchored to absorb the effects of this DNS expansion, especially now it would be unwise to risk a destabilization. Now at a time when trademark owners are being asked to buy into an unprecedented DNS expansion, certain registration

interests, joined by other ICANN stakeholders are advocating UDRP investigation.

Of course there are numerous ways in which UDRP might be amended from an IP rights holder's perspective. For example, it could operate on condensed timelines and default summary decisions. Calls have been made for damages options and loser pays models.

UDRP could also be expanded to address certain forms of intermediary behavior. Other interests are record with wish lists that apparently includes the UDRP definition of service (quoting) itself.

On its part WIPO has deep insight into practical options for UDRP modification, but the process and timing must be right. Any reconstruction of the UDRP framework should be the balanced result of serious appropriately resourced expert deliberations grounded in a constructive vision for UDRP.

The anticipated ICANN process does not inspire confidence that it would meet these standards. Even when it comes to trademark policies IP institutionally appears to occupy only a minor ICANN role. Indeed, the more vocal advocacy observed thus far does not suggest a desire to enhance UDRP's effectiveness.

The present state of the URS illustrates the risks of subjecting an RPM to recycled committee processes, open market for lobbying, and line item horse trading. Stakeholders should not be naïve about the genesis of the envisioned revision process, nor optimistic about its likely outcome for UDRP if moved forward.

The mechanism tweaked in certain micro ways, but over burdened and diluted as a whole. The spotlight today should not be on UDRP but on the persistent practice of cyber squatting. Especially a revision of the UDRP that would include the definition of cyber squatting must first examine this illegitimate business itself.

Instead of allowing the UDRP to be placed in the (dark) ICANN should transparently address the following three issues: First, the relationship between cyber squatting and the activities, revenues and budgets of DNS actors. Second, the incidence of UDRP cyber squatting findings in relation to wider trademark abuse in the DNS overall with filed UDRP cases merely representing the tip of the iceberg. And third, the degree of proportionality between trade rights enforcement burdens and domain name registration opportunities in the DNS.

Coming now to my conclusion here for WIPO, the UDRP functions today as the unique result of care invested by many stakeholders over more than ten years for public and private benefit. WIPO urges ICANN to recognize the overall positive functioning of the UDRP today and not to add the UDRP to the issues which ICANN has to manage.

Subjecting the UDRP model to a decision process weighted against legitimate IP interests will not produce positive net results for this mechanism and may have ripple effect across the DNS.

If this UDRP revision effort should go ahead WIPO will take great interest. However, ICANN revision of the UDRP is a choice, it is not an inevitability. For a number of reasons we counsel, "Don't go there."
Thank you.

Margie Milam: Hello, and now our next speaker will be Kristine Dorrain from the National Arbitration Forum. Kristine?

Kristine Dorrain: Hi, thanks, Margie. Can you hear me?

Margie Milam: Yes, we sure can.

Kristine Dorrain: Okay, great, thanks. My name is Kristine Dorrain and I'm speaking on behalf of the National Arbitration Forum. The forum has been a UDRP provider since 1999. We have handled over 16,000 disputes to date.

Just for a little background on most of those listening, we have submitted a letter outlining our key comments and responded to the GNSO's questionnaire with as much detail as possible. And I believe those are both linked up on the wiki for the people who would like to review our full comments.

I have a few points to highlight today. I first want to be really clear that the forum's position is that the UDRP is functioning as it is currently written. We are not advocating making changes, and believe that changes will only serve to make everyone less satisfied with the process.

However, we do note that there are places in the UDRP that the drafters could not have forecasted to be procedurally problematic at the time the UDRP was drafted.

First, the forum takes no official position on the substantive portion of the UDRP which is Paragraph 4, A through C, but urges the GNSO to consider the flexibility the UDRP has provided to date and to be wary

of making changes that could limit the future flexibility of the UDRP to accommodate changes in domain name registration practices, particularly because we don't yet know what effect the new gTLDs will have on domain registration practices.

But because the GNSO has asked for feedback on how well things are working there are a few places of friction we'd like to highlight. For instance, the period between the filing of the complaint and its commencement has many places of confusion, frustration and conflict. It is during this period that the provider requests information needed in order to properly process the case and requests that the domain names at issue be locked to prevent transfer in accordance with UDRP Paragraph 8.

We call this requesting verification. At that point registrars either respond promptly, delay but eventually respond, or never respond. During this time domain names will sometimes become deleted or change hands. When we notify ICANN we are reminded that the UDRP doesn't expressly require the registrar to lock the domain names or to provide us with the information we are required to obtain.

To be clear, the UDRP requires the provider to have certain information and requires that the domain name not be transferred, but does not provide any mechanism for either one to happen.

Another problem during this period involves the expired domain deletion policy which doesn't appear to address domains that are deleted or expire while the provider is waiting to proceed with verification. Tangentially, we note that the EDDP appears to be a very weak document with little help to UDRP parties regarding deleting and

expiration at varying points in the process and leaving too many optional courses of action on the table.

We would like to see some of these issues included not in an ancillary document such as the EDDP but within the UDRP itself so it's clear what the requirements are.

Additionally, because the UDRP requires complainants to send a copy of the complaint to the respondent before the case has actually been accepted by the provider, before the domain name is locked, and before the case has actually commenced, this permits a lot of activity with respect to the domain name that slows down and frustrates the process.

Furthermore, when domains are removed from the complaint, which could be for any number of reasons, it can be very confusing to potential respondents to have received a complaint from the complainant, which is this never actually served on them because they are not a respondent in the case when it finally commences.

The forum frequently encounters very confused domain name registrants who don't know why there was a complaint notice in their email in-box when there is no formally commenced case against them.

Our second biggest sticking point regards the WHOIS and the name of the respondent. The forum follows ICANN counsel on this point but it would help immensely if it could be codified somewhere who the correct respondent is and put that issue to rest once and for all.

This is particularly an issue if the domain name registrant is using a WHOIS privacy service because the provider is responsible for the service of the case documents upon the parties it's imperative that the determination of the respondents identity be correct. Additionally, the presence of WHOIS privacy data causes a lot of conflict as to the mutual jurisdiction of the case.

The third and final point I will make is that Rule 11 regarding the language of the proceedings is written such that allowing a panel to make a determination of the language of the proceedings before the proceeding commences is a procedural impossibility. The forum would recommend any UDRP changes address that issue.

In concluding, the approval of an entirely electronic process at the end of 2009 was a great step forward for the UDRP. The forum and its parties have expedited our process by an average of three days per case and realized a significant paper reduction.

I thank the GNSO for their time and for soliciting the comments of the providers. Again, I emphasize that in spite of these sticking points the UDRP is actually working as expected and possibly better than expected in the majority of cases and the forum does not recommend a PDP at this time. Thank you.

Maggie Milam: I'll now introduce Dennis Cai from the Domain Name Dispute Resolution Center in Hong Kong.

Dennis Cai: Yes, everyone, this is Dennis Cai on behalf of the Asian Domain and Dispute Resolution Center. And my remark will be very brief and mainly on the procedural issue.

First, and importantly, we echo that over the past more than ten years UDRP has been approved as the most effective way for resolving domain in dispute. It has also been adopted as the model for many (unintelligible) dispute resolution policies such as .cn and .hk. These UDRP based dispute resolution processes are also the (unintelligible) offering disputing policy, speedy, flexible and cost-effective way of resolving that domain name dispute.

By taking this opportunity we would like to address some procedural issue for better implementation of the UDRP. Firstly, under the UDRP when a complainant is filing a complaint with a provider the complainant is required to notify the respondent of the complaint which is usually prior to the provider sending notification to the registrant.

What happened is before the registrar locked up the disputed domain name the respondent, who has been advised of the complaint, will move the registration to another registrant and change the registrant's name. To prevent this we understand that the rules for (proxy) and domain name dispute resolution removed this requirement on the complainant in a revision of the rules in 2007 which suggests that ICANN reconsider taking appropriate approach to address this issue.

Secondly, we suggest that the timeframe for appointment of a panel to be more flexible. Currently under the UDRP the administrative panel, both single member panel and three member panel shall be appointed within five days of the receipt of the response.

There is often insufficient time to have a panel appointed. In particular, we are listening (unintelligible) is important for the appointment.

Certainly, in addition to the complaint and response many cases we handle are with supplemental submission from the parties, the majority of which are unsolicited.

As a result the administrative proceeding will drag on. In view of this the rules for (proxy) and domain name dispute, the (CNDLP), also introduced a provision to prevent it which provides that as to the addition of documents submitted by either party beside a complaint and the response the panel will not accept them in principle unless the parties have additional agreement or the panel has made additional decision in that respect.

We believe that inclusion of similar provision will help keep the UDRP proceedings simple and fast. Nonetheless we are of the view that the UDRP is generally working well and we believe that it will be working well for resolving applicable disputes and applicable domain name disputes. That's my comments and thank you very much.

Maggie Milam: Thank you, Dennis. And now we're turning to Tereza Bartoskova from the Czech Arbitration Court. Tereza?

Tereza Bartoskova: Hello, I'm here. My name is Tereza Bartoskova, I'm from the Czech Arbitration Court, and I would also like to make some comments on UDRP as the other providers.

On the globally the Czech Arbitration Court is also the opinion that the UDRP has been working very well in the past ten years. However, there are some procedural issues and some of them were already identified by the other providers. So I'll try to be very brief.

First of all, we are of the opinion that the UDRP lacks some clear guidance for registrars concerning UDRP procedures and that there should be set some concrete rights and obligations towards the providers and also of the providers or the registrars.

So the - many have already mentioned that there should be a clear obligation of the registrar to log the domain name and provide the verification regarding the domain name to the provider.

I would add some additional points that the registrar should make to the providers because if there is suspension of the preceding there is no clear instruction for the registrars as to if they should or should not remove the registrar lock from the domain name. So this should be probably clearly stated. And also some timelines should be probably given as to the - providing the (unintelligible) of the registrars.

The other point we would like to make is that electronic communication is at the moment really crucial to UDRP and a lot of the work has already been done with the last amendment of UDRP rules concerning electronic communication.

We still think there are some points we could make regarding this. For example, there is an obligation of the provider to send the full text of the complaint, including all the annexes to the respondent in the beginning of the proceeding. But there is a problem that the annexes might be very extensive and this results in the risk that the email will not be delivered to the respondent and a risk of the respondent not being properly notified of the proceeding thereby.

Another point we would like to make is also the one already mentioned, it is the possible changes of who has information of the domain name holders at the starting of the procedure. The complainants are here in a very difficult position because they are often unable to find out who the domain name holder is before they file a complaint and they only find out the real identity of the domain holder after the registrars provides the verification.

Then they are forced to amend the complaint accordingly and there is also connection to the language problem here because finding out what the language of the registration agreement before the proceedings start is more or less impossible. So this should be probably addressed.

It is, to some extent, solved by the existing case law because there have already been some decisions which state that the - in such a case the complainant should not be forced to amend the complaint, but in any case this question about if this should be actually followed by case law or if there should be some clear guidance's directly in the UDRP.

The final point is merely a technical question of distribution of the fee in case a complainant asks for a single member panel and the respondent asks for a three member panel, because in such case the fee should be equally divided along - between the parties, but there's a risk that the - half of the fee which was - which should be paid by the complainant can be higher than the fee originally paid as an initial fee.

So there's a question what to do if the complainant refuses to pay the rest of the fee because there are no guidance's in the UDRP as to the -

if the UDRP provider is entitled to terminate the procedure in such case or not.

So those would be the points raised by the CAC, merely technical and procedural. On the whole we do think UDRP has worked well and there are unfortunately some procedural issues. Okay, so, Margie?

Margie Milam: Sure, thank you very much, Tereza. Our next speaker is from ICANN staff to provide you the compliance perspective. We have Khalil Rasheed from the ICANN compliance staff to address issues related to the UDRP. Khalil?

Khalil Rasheed: Thanks, Margie. Good times wherever one happens to be at this particular hour. I know it's morning, noon or night depending on where you are in the world.

I intend to actually keep my comments short and turn it over to Statton, as I intend to do more listening than talking. I have actually noted many of the issues which the providers have discussed thus far. But from our perspective ICANN is committed to enforcing the UDRP in a fair, impartial and consistent manner.

Protecting registrants and Internet users continues to be a core aspect of our compliance work here. You may recall there was a time that ICANN did not have an active role in enforcing UDRP decisions. However, since about 2007 we have actually on boarded a system for receiving complaints of non-implementation of UDRP decisions. We've also conducted registrar outreach and education at regional gatherings, ICANN meetings, etcetera.

As a result of our work we've also issued three notices of (reach) to registrars for failure to comply with the UDRP. Two notices were for failure to implement UDRP decisions; one was for failure to communicate plans to implement a decision.

Also, we receive about three to four complaints per month of alleged UDRP non-compliance. This has been a steady decline since about 2009 when we were receiving maybe seven to nine. So it appears that most UDRP decisions are implemented without incident and we look forward to continuing to monitor compliance with the UDRP or any revised version thereof.

So with that, I'll turn it over to Statton and if anyone has questions I'm happy to take them.

Statton Hammock: Thanks, Khalil. This is Statton Hammock with the Registrar Stakeholder Group. I want to first thank Margie and the ICANN staff for organizing the Webinar and inviting the registrars to contribute its views on the UDRP.

With input from my colleagues in the Registrar Stakeholder Group I've compiled a list of difficulties our industry has experienced with the current UDRP process. But we've also made a short list of some recommended changes and improvements we'd also like to see considered.

These lists, I should say, are by no means exhaustive, but they do cover a range of problems from a registrar's perspective and so I'll just run through my three slides that I've prepared here.

First, in terms of challenges that we're facing the current policy doesn't require that registrars receive a copy of the complaint and in some cases registrars aren't provided with all of the contact information for the disputing parties and therefore are unable to make the proper implementation of the lock or do the correct communications to the parties involved in the dispute.

Second probably that we're facing is that the policy doesn't contain any provision addressing the necessity of paying renewal fees while a complaint is being adjudicated. If a domain name were to expire, for example, during a UDRP process registrants need to be involved that they must renew their domain name. And currently that's not part of the UDRP rules.

The third difficulty is nothing in the current policy requires a prevailing party or gaining registrar to act within a certain timeframe after a decision, that would require a transfer if that were the outcome of the UDRP complaint.

Registrars have to rely on the prevailing party to get back with them and proceed with the transfer and sometimes this can take place, you know, over weeks or months and sometimes more time can lapse and because registrars may have a different process for doing the actual transfer, that problem - that timeframe gets extended even longer and longer. So having prevailing parties provide more information to effectuate the transfer would be helpful to the registrars.

The fourth item is some clarification around the meaning of maintaining the status quo which is in Section 7 of the policy. It's not entirely clear. There's actually no mention or explanation of what a legal lock is or

when it must go into effect or when it should be removed. And one of the themes in some of these problems and issues we've compiled is a lack of clarity in some of the language in the current policy.

Number five is actually one that Tereza mentioned in her remarks was that there's also no guidance to a registrar and what it is to do is a UDRP claim is stayed or suspended for whatever reasons. You know, there's no guidance on whether the legal lock should be maintained in place or removed and it would be helpful if a revised UDRP rules would have some specific guidance on that.

Item six, the policy doesn't address privacy in proxy registrations or require complaining parties to amend the complaint once an infringing party is identified under those mechanisms. And it would be helpful to see some more guidance in the UDRP for that.

Item number seven is addressing the conflicts of laws problems. There's no guidance in the current policy that registrars can look to to understand what to do if a UDRP decision conflicts with another court order in a jurisdiction where the parties are from. And that's a problem that we've faced - that many of us registrars have faced before, and we could really use some specific guidance on that.

And finally, the policy doesn't require registries to communicate to registrars when a decision has been implemented at the registry level. And again, we would like to see that addressed so that we would have better communication and understanding so we could communicate with our customers.

So in the last slide we have a list of recommended changes and improvements based on those challenges that I identified. The first is to revise Section 7 of the UDRP to explain what is actually meant by maintaining the status quo. If we could get some description of what a legal lock is, when it should be implemented, when it will be lifted by a registrar, and what happens if a UDRP case is stayed or suspended.

Another recommendation would be to add a new provision which requires the prevailing party to initiate and complete transfer within a specified time or provide a timeline - and provide a timeline in which the gaining registrar of the transfer needs to act, and also add a provision requiring the prevailing party provide specific information needed for the transfer.

A third recommendation would be to add a provision to address the conflicts of laws clause I mentioned. Maybe a superseding authority clause could be added which shows which laws should be deferred or in the alternative a specific provision that allows registrars to keep a domain on legal lock without violation of the UDRP until all the claims related to the domain string are resolved between the parties.

And finally, we'd like to see a requirement that an arbitrator provide a prevailing party contact information with the UDRP decision. So the registrar can verify that legal counsel has authority to request transfer on behalf of the client.

And just to explain this one a little bit more, when we receive the decision often we only have the name of the counsel of the complaining party and not the contact information for the complaining

party itself and there's - that calls into question, you know, whether the registrant is giving the direction for the transfer or not.

Sometimes we've found that the counsel has moved on after representing the complaining party and it makes it difficult for us to confirm the information with the current registrant. So having the prevailing party provide specific - more specific information and have it provided to us at the time of the decision would be helpful.

And that wraps up my three slides, and I'll be happy to take any questions. Thank you. I guess I should introduce the CAC panelist, Mathew Harris who will follow on my remarks. Thank you.

Mathew Harris: Thanks, Statton, it's Mathew Harris here from Waterfront Solicitors, hopefully everybody can hear me. I'm a lawyer in private practice to acts both for complainants and respondents, or has done in the past. But my primary interest here is as a panelist, not just under the UDRP but other - but under other procedures included (.co), .uk and .eu as many people will know which is operated by the Czech Arbitration Court.

The remarkable thing about the UDRP to date is how successful it's been. Generally I would say it's a balanced tool that takes into account the competing interests and protects the legitimate interests of right holders.

I'm therefore skeptical whether formal redrafting of the UDRP itself would be particularly useful. Generally it's worked well and I have concerns that amendments to the policy may undermine its efficacy as a tool for dealing with cyber squatting.

There is one issue with the current text of the policy that many panelists have commented upon and could be improved. That is the requirement both of bad faith registration and use. There are few cases where this actually makes a difference to the outcome of the case, but it does mean that there can be some cases of extreme abuse where the policy provides effectively no remedy.

It's also something that now appears to be out of sync with the best practices followed by the policies in relation to domain names. Otherwise, I'd say that essentially concentration should be given to procedural matters that could be addressed.

There could be a greater clarity in registrar obligations, and more active ICANN control over registrars whose actions have effectively got in the way of proper operation of the UDRP, whether that be through negligence, lack of understanding or perhaps sadly even active collusion with cyber squatting interests.

The sorts of issues that panels have seen include non-compliance or late compliance with provider requests for information, provision of false information in response to requests, failure to place domain names on hold or allowing changes in registrant details after notification, different approaches to disclosure of names behind privacy services, non-disclosure of billing contact information of the sort that Paragraph 2A-1 of the UDRP rules appears to assume will be provided.

And I've even seen recently the offering of the stock Google translated Terms & Conditions where it's hard but not to reach the conclusion that

the real purpose of their offering was essentially to dictate the language in which UDRP proceedings would be operating at a language that was relatively obscure and there were few panelists in relation to what's chosen (unintelligible) to slow down the process.

There are also examples of registrars not implementing or delaying in implementing UDRP decisions, but obviously that is a post-panel decision issue. My concern here is that there's a perverse incentive to unscrupulous registrars to offer what is effectively the most UDRP unfriendly service. That, I think, is unfair to those registrars who do play with the spirit of the UDRP.

I know that ICANN has acted in the past; we had interesting perspective from ICANN compliance here. But it's remarkable in my mind how few interventions there have been, particularly so far as registrar cooperation with the policies concerned, notwithstanding the fact that I think there's been a large number of cases where panelists have expressed concern about registrar conduct.

Case D2009-1657 which is a WIPO case provides a list of these examples going back to 2006. That was a case involving Lead Networks. In the case of Lead Networks ICANN did act, but there had been 30 decisions going back to early-2008 where there were questions as to registrar conduct. And that, in turn, raises the question why had ICANN not (hid) earlier?

Statton made some interesting comments in his presentation. There was no explanation of illegal lock mechanisms in UDRP. I would suggest that what that suggests is that what we need is not a change in the UDRP itself but a separate contractually binding set of

compliance obligations on registrars, the non-compliance with which would be robustly enforced by ICANN.

I'd also suggest that there should be an overriding contractual obligation on registrars to actively cooperate in facilitating the UDRP process. I would conclude by saying I think that it's a change of this sort that should be prioritized rather than changes in the UDRP text itself.

And with that I'd hand over to Neil Brown who I understand is a panelist for the Asian Domain Name Dispute Resolution Center.

Neil Brown: That's right, Mathew, I am here in a nominal capacity, I think, representing that body. But I am a panelist with other dispute resolution providers like yourself.

By way of introduction I think I should say I actually did not know that it is the role of a panelist really to be making suggestions on changes that should be made to the policy and the rules.

To advocate or oppose changes is open to the interpretation which would be a wrong one, that I might support one side or the other. Whereas in fact I approach each case quite independently and judge it on its own facts and I would like to keep it that way both in appearance and in reality.

What I can say, however, that might be of help in your deliberations is that the policy and the rules already provide the framework for a good system. Improvements, in my view, are more likely to be found in

applying the policy and the rules properly in their own terms rather than in changing them.

In this regard I think there are several things that can be done, and in each case the theme that will be running through these few comments I'm going to be making is really a plea, I think, to give the policy and the rules and to apply them in their own terms.

Now a good starting point, I think, is to understand that the policy is a contract and attempts to put other burdens on parties that are not in the policy and the rules are unfair and will bring the system into disrepute.

The second point to make about this, I think, is to remind all concerned that the proceedings are about disputes and that their outcome should and must be determined by proof and by evidence. And when I say that I say that in contrast to assertions which we see quite a lot of as panelists.

Assertions are not evidence and they're not proof, and it is important that everyone involved in the system appreciates that. I have found myself that this is particularly noticeable when a common law trademark has to be proved and the evidence really does not come up to scratch. Often, of course, it does, but there are cases where it does not. And indeed, when I say that I'm reminded that sometimes even the proof of a registered trademark seems to be beyond some people.

Now, the importance of proof is - the importance of evidence is there throughout the policy. It's reflected in Paragraph 4A which has a very

clear injunction saying that the complaint is not proved that each of these three elements, you know the three elements, are present.

There is an obligation to prove the case and that must be remembered, I think, by everyone at every stage of the proceedings. Then as a further example there's Paragraph 4C of the policy dealing with rights and legitimate interests where the proposition is put, I think, pretty clearly, that right or legitimate interest has been established if any of the specified circumstances set out there are found to be proved by the panel.

So again, proof is required. There's also a specific reference in Rule 10B to evidence. And I think that very few examples put the point beyond dispute. It is essential that these proceedings are conducted on the basis of evidence and proof. And as I said, assertions are not proof and will not be regarded and should not be regarded as proof or evidence, especially when the injunction is quite clear that each of the elements must be proved.

The other thing to remember is really, and I know that this is perhaps a controversial issue, but decided cases are not proof, and they are not evidence. They are not precedence; there is not a system of established precedence. It is, of course, useful to see the way other panelists, indeed see the way oneself has decided previous cases. But it must be remembered that you have to go beyond that and you need evidence and you need strong arguments.

There are powers, of course, already in the rules which enable the panel to conduct proper proceedings. And as I've said before, my really single point to be made here today is that the panel is quite entitled

and quite able to conduct proper proceedings if the full (ambit) of these provisions in the rules is used.

I'm sure you're familiar with Rule 10, and I'm referring particularly to 10A, B, C and D, which deals with the powers of the panel on issues like the admissibility of evidence and giving weight of evidence and the importance of dealing with proceedings with due expedition.

They're all quite extensive powers and if they are used and applied properly and in a judicial manner then the proceedings can be good proceedings and can bring about a just result.

Rule 12 gives considerable power to request further evidence. So it's not as if the tribunal is hamstrung and cannot get to the facts. It can by using Rule 12 if it wants to. It has a very extensive power, in my view, under Rule 15A to apply principles of law that if the panel deems applicable the panel could really scarcely ask for more than that.

And again, I make the proposition that if that power is used properly and wisely it is a very effective instrument for a panel to have access to. The provisions on reverse domain name hijacking, in fact, are more extensive than I think is commonly appreciated because the obligation is a mandatory one on the panel to assign reverse domain name hijacking if the case has been made up.

It's not a discretionary remedy at all, it's mandatory. And the power can be granted even if it is not requested by the respondent. So they are simply examples. I just go back to some of the points that have been made earlier. It's quite clear that there are some practical problems arising in the administration and they clearly should be addressed. I

hope what I've been saying is not taken as a suggestion that there is no scope for improvement on those practical matters.

But the strange thing seems to be that they come up in so many cases that we seem to resolve them by some things, usually be common sense. So my final proposition is the thing that I've been trying to put here today, that is that improvements in the system are more likely to be found in applying the policy and the roles properly and fully, rather than agonizing about changing them. Okey-dokey, thanks very much and I think I hand over now to Jim Carmody. Jim, over to you.

James Carmody: Thank you very much, Neil and good morning from Houston, Texas. I've had the honor to be a panelist on UDRP cases since 2000 and I've seen remarkable changes in the way the system is administered. Both WIPO and the National Arbitration Forum have really streamlined their procedures and I see no problems whatsoever with that.

As time has gone by since 2000 I've really seen a remarkable sophistication of both the complainant and the respondent and their attorneys and hopefully the arbitrators have become more sophisticated to some extent as well.

I find that the decisions coming out of the UDRP process are very much more predictable than some of the early decisions. The bottom-line is I think that the policy as stated works very well. But I will point out some issues that I have seen highlighted by those using the system. I'm not going to recommend any solutions or agree that I think that they're issues but we might as well have them out there.

First of all, as Neil discussed, there's a question as to whether or not the panelist should rely on prior UDRP panel decisions as opposed to a greater reliance on statutes and the decisions of courts of record.

And I find that panels will have different emphasis on these matters but I find that the decisions coming out of the panels pretty much would be the same either way. In other words, once again, the policy works.

Secondly, and as Neil also mentioned, the question with respect to the and/or language of the bad faith registration and, or registration or, in bad faith. Another question deals with the fact that we don't have a statute of limitations discussed or provided for in the policy and whether or not laches should be taken into consideration.

A lot of panels are seeing domain names that were registered 10 or 12 years ago and that can be certainly a subject of discussion among the panelists. Another issue I hear raised by some who take - are considering the filing of a UDRP case deals with whether or not we should have our own appeal process or a trial de novo, if you will.

Obviously there are economic considerations there, and our appeal provisions are in (4K) of the policy right now, requiring the filing on behalf of a respondent of a case in 10 business days.

Last, with respect to some of the issues is the question of how do you make any changes in the policy effective on existing registrants of domains who have contractual rights with respect to their domains. And I suggest that Paragraph 9 of the policy may provide some sort of solution to that dilemma. It deals with policy modifications.

Ten years ago I had the honor and pleasure of being a member of the UDRP ICANN taskforce and it was chaired by Caroline Chicoine of St. Louis. We spent many, many weeks dealing with the issue I discussed previously, and we only after sending out questionnaires to thousands and thousands and thousands, we only got about 220 Responses.

So whatever this group decides to do I hope it is broadly broadcast and that the group has better luck than our original taskforce.

Now I have the honor of introducing David Bernstein, a fellow panelist with whom I've had a number of cases. He's a partner in the law firm of Debevoise & Plimpton and good morning, David.

David Bernstein: Jim, thank you very much and thank you again to ICANN as well. I echo what everyone else has said about our appreciation that you're holding this opportunity for collecting views.

Like Neil and Jim and Mathew and Tony Willoughby who will speak after me, I've had the pleasure and honor of deciding a number of UDRP cases as a panelist. Not just for WIPO, which is listed on the screen, but also for NAF, the Hong Kong Arbitration International Center and also for CPR which is no longer a provider.

And I've had the honor of deciding some 250 cases over the last 10 years. So I do think as a panelist I've had a unique perspective on how the UDRP has developed and how the policy has worked.

And I think as we've heard from the other speakers, there's been a long of strengths. The UDRP I believe over the last ten years has

evolved in very productive ways. I think it's been seen as providing a fair mechanism for assessing individual cases of cyber squatting.

I think it's been seen as a process that is above politics. Respondents and complainants have fair opportunities to be heard in these matters, and indeed, cases I believe by and large are decided the right way. Can any one of us point to an individual case that we think was improperly decided? Of course, that's always going to be the case with system of justice. That's the case; I'm sure, with the court systems in all of our countries.

But by and large when I step back and I look at the arc of the UDRP cases my sense is that they really are decided fairly and in an appropriate way and not only resolving each individual case but because the decisions are all published it's open for the community to see, for the community to debate the way in which the policy is developing and it's also there to provide guidance to registrants and to brand owners alike as to what kind of practices are and are not permitted in the DNS space.

I also think it's important to note that without there having been substantive changes to the UDRP over the last 11 or 12 years that the UDRP has evolved to address developing practices in the DNS like, for example, privacy and proxy issues.

And so I don't believe that we have a knee-jerk need to look at the UDRP on a regular basis or even on an every ten year basis to see how can we go ahead and make amendments that are going to improve the policy.

Now, are there improvement that could be looked at? I mean, I think it depends on your perspective. Any one of us might want a particular improvement. For example, some people have talked about the and/or issue.

There may be some people who feel very strongly that the bad faith should be changed from the conjunctive to an or and there are likely some people who would feel very strongly that if what we're talking about is a policy designed to stop abusive cyber squatting, that requiring both bad faith registration and bad faith use is perfectly appropriate.

And so it may that lots of people raise their hands and say, "Should the policy improved?" But the real difficulty will be in getting everyone on the same page, on finding some consensus on what that should be.

Now there may be some very technical points, and I think the registrars have raised some of those, as well as the providers, and indeed the amendment to enable the eUDRP are the kinds of technical changes that probably can be made from time-to-time as technical developments warrant, but I don't believe that that necessarily requires that we start an entire policy development process.

And I believe the whole idea of a PDP is probably focused more on substantive changes than it is on the kinds of technical changes like the eUDRP that could perhaps be addressed on a more ad hoc basis without the need to have a whole big debate on where the eUDRP is going.

But if we do open up the UDRP my concern is that it will, as others have said, undermine the respect that the policy has been able to achieve through the last ten years of the way in which it's developed.

It will open up the policy to being seen as something that can be lobbied and amended, much the way we see legislatures constantly fighting about improvements in the law this way or that, and whether anyone thinks that's an improvement or a bastardization of it, of course, depends on your perspective.

And I'm concerned that if we go down the road of the PDP what we'll do is undermine what is seen as a fair policy that's above politics and instead open it up to certain communities whether it's brand owners or whether it's certain types of respondents who I think many of us both on the complainant and respondent side and on the panelist side would see have been engaged in bad faith cyber squatting on a regular basis, and it would open up the UDRP to be lobbied by those entities to change it in substantive ways that I think will really do us all very - much more harm than good.

So I probably would like to end by echoing something that Neil said that I agree with absolutely completely which is that if there are going to be continued improvements in the policy and the way in which it's applied to stop the abusive cyber squatting conduct that the policy was initially crafted to do, that should come through the application of the policy.

It should come through panelists like Neil and Jim and Mathew and Tony with whom I've had the pleasure of sitting, making sure that we do hold all parties to the evidence.

I completely agree with Neil that reverse domain name hijacking is not awarded nearly enough. In fact, I myself have awarded it even in cases when parties haven't requested it, and I certainly have awarded decisions to respondents even when they haven't responded. It is important that all panelists apply the policy strictly and fairly for the greater good of the entire domain name system community.

And with that I'd like to turn this over to Tony Willoughby with whom I've - as I said, I've also had the great pleasure to sit on panels with, and Tony and I have also had the honor of presenting at the WIPO workshop on the domain name dispute resolution system. And I've met many of you through that workshop as well. Tony?

Maggie Milan: Tony, we can't hear you. Are you on mute? (Celeste), can you check to see if his line is open? Tony, we still can't hear you. Glen or Gisella?

Woman: Star 6.

Maggie Milan: We still can't hear you. Should we move on to the next speaker and then come back to Tony? Hold on, I'm getting a note from Tony. Yes, let's move on to the next speaker and then we'll come back to Tony, if you don't mind. Sorry about the inconvenience.

Well, next speaker is Aimee Gessner from BMW, and she will be providing you the complainant perspective. Aimee? Aimee, we can't hear you either. Are you on mute? Glen or Gisella, can you see if Aimee's line is open? Aimee?

Tony is on the call, I believe. Aimee, are you on the call? Or Operator, can you see that Aimee Gessner's line is open, please?

Coordinator: I am checking. And Tony, if you could press star 0 so I can see which line is you, sir, that would be wonderful.

Margie Milam: Operator, can you call Tony back, I guess? I don't know if Aimee is on the call. Do we have her on the call?

Coordinator: There we go. Aimee, I have your line open.

Aimee Gessner: Okay, thank you.

Margie Milam: Thank you, Aimee.

Aimee Gessner: Okay, so just a brief introduction. I'm Senior Trademark Counsel at BMW, a well known German car manufacturer. So greetings this afternoon from Munich.

For our umbrella organization, the BMW Group, I am primarily responsible for three main automotive brands, it's BMW, Rolls Royce and Mini. So I'm participating today as a representative of a brand owner, but also as a UDRP user and in-house counsel, and I am also a wife of a (unintelligible) workshop faculty member.

I have over 11 years experience in the domain area and being responsible also for our domain name portfolio which includes thousands of domains. I also have an interest in not over complicating the domain name registration system but wish naturally to be able to protect our most valuable assets which are our trademarks.

I do agree with all of the procedural improvements and comments about procedure that have been made today but in general regarding the policy itself it has proven very useful in our enforcement toolbox.

While the UDRP does not solve all of the trademark owners problems, compared to court options it is a simple and cost effective way to deal with clear cases of cyber squatting. It fulfills its purpose of addressing clear brand infringements at the level of the domain name itself. It has also relieved us from complicated jurisdictional issues that often arise on the borderless Internet.

The UDRP definition of cyber squatting is widely recognized and in raising the bar to bad faith it sets a clear standard for prohibiting and for sanctioning certain types of conduct.

Over the past years the UDRP has grown to be a stable and predictable system due to the very large body of published decisions, indexes and commentaries that are available to users of the system.

I also feel that the policy sufficiently balances the rights between complainants and respondents and while some may think that this is a (broad) statement coming from a complainant I would like to add that there are very many instances where there is an element of cyber squatting or other abuse by domain name registrants but where we can't succeed due to the strict requirements of the UDRP.

For example, the element requiring that registration and use is made in bad faith rather than registration or use, or because the UDRP is worded quite broadly for the legitimate interest elements and insures

that not every case of a third-party registration of a domain name is prohibited.

So, however, while I am a proponent of the UDRP, unfortunately cyber squatting has increased noticeably in the past years. And why is this the case? Well, one reason is that the UDRP cannot cure cyber squatting on its own. It's simply not a deterrent mechanism.

In fact, in negotiations with cyber squatters it is not uncommon that cyber squatters explicitly point out to us that they know that it would cost us at least \$15,000 to file a UDRP complaint and that it would be to our advantage for us to settle with them for slightly less than that amount.

Cyber squatters know that the only consequence for them is the potential loss of their disputed domain. Even if BMW were to win a case against them they can stay in business because it only takes one good settlement with another brand owner to keep the cyber squatter profitable.

Or perhaps they make enough money from their pay-per-click sites to continue registering more domains. So there's simply no deterrent effect, and also no administrative recourse against intermediaries who benefit from registration fees from known cyber squatters. Therefore other remedies which could curb cyber squatting and prevent repeated abuses would be welcomed.

Now, despite - going to my third slide now - despite this limitation of the UDRP I believe the real increase in cyber squatting has been due to other common practices that encourage it such as domain name

(tasting), pay-per-click sites, (drop catching), the increase in use of privacy registration services to hide identities of cyber squatters, and also the establishment of bogus registrars that have no purpose other than to cyber squat.

These and other practices are what make trademark enforcement measures in the area of domains nearly impossible to handle today. To give you an idea of what we face on a daily basis, which I assume is similar to other famous trademark owners, when we wish to launch a campaign for a certain product or service offering in a large majority of cases, and I would say - I would be as bold to say that it may be as many as 95% of those cases, one or more of the domains we wish to use for the campaign are held by third-parties.

Most of them - most of whom are hosting pay-per-click sites or who are otherwise trying to profit unjustly by holding the domain name. Nowadays most even use proxy domain services to make it difficult for us to identify them and even almost 12 years since the UDRP was initiated on a daily basis we get offers from third-parties regarding domain names which they are now offering to us for substantial amounts of money. The cyber squatters simply have nothing to lose.

So I would like to summarize that I believe the UDRP is working fairly efficiently for its intended purpose. I believe that there are many other causes today for the steady increase in cyber squatting which ICANN should rather review.

Brand owners such as BMW are particularly concerned at this time with the expansion of the DNS and what this will cause in terms of cyber squatting and other forms of rights infringement. I believe it is not

a good time to review and possibly compromise the UDRP system. It is not the UDRP that is the problem, and I hope that ICANN and the GNSO will review the domain name system and industry in its entirety to curb the illegal practice of cyber squatting. Thank you.

Margie Milam: Now we will turn to Paul McGrady who will provide another perspective from the (unintelligible). Paul?

Paul McGrady: Good morning, everybody. I just wanted to say good morning and give a little background about me so you know where I'm coming from. I'm a shareholder of Greenberg Traurig here in the Chicago office. The thoughts I'm sharing today are not shared by all of our clients, although they probably are shared by some of the clients. So they should be taken on that basis.

I'm a veteran of around 300 UDRP cases. I've represented mostly complainants but occasionally respondents as well, and I'm also the author of McGrady on Domain Names which is a three volume treatise published by Lexis on the domain name law globally.

I was recently on a team that drafted the IPC's wish list with regard to changes we'd like to see made to the UDRP if a policy process goes forward. That list is long, and so I've focused today only on a few very important issues and I've broken them up into three sets, inefficiencies, inequalities, and unfairnesses.

Let's start with inefficiencies. The first problem is as complainants are constantly having to file multiple UDRP's against the same respondent. Because of the inability to see everything that particular respondent

has and having to file additional complaints that costs money, it's inefficiency in the system.

One solution is the registrars should provide a list of all domain names in that respondents account and any related accounts so that all the domain names can be locked down, all the relevant ones, and the complainant can be give five days to amend the complaint.

Registrars could charge for this service in order to deal with the administrative cost. But that way we know that our UDRP complaints are being handled in the most efficient way and we won't have to come back to the provider for another round or multiple rounds.

The second problem is - under inefficiencies, are who is record modification after filing but before commencement. I know some prior speakers have addressed this issue. These lead to unnecessary deficiencies issued by the providers and amendments by the complainants, all of which, of course costs both providers and complainant money.

The solution is that all domain names mentioned in the complaint should be locked down when filed with the WHOIS record information that's there at the time of filing.

That doesn't mean that a party couldn't appear and claim that they used a privacy service but they're the true party and interest or something along those lines. It's just that the burden is shifted from the cost to the provider and the cost to the complainant and instead it's the burden of self-identification after filing should be shifted to the respondent.

The second set of inequalities, one probably that I see that the UDRP proceedings cost brand owners millions of dollars a year and they cost the squatter community almost nothing.

The solution there is the loser pays model. The loser pays the provider fees as well as a set \$5000 attorney fees amount to the other side. Everyone has described how the UDRP doesn't do a good job deterring. We think that a loser - or at least I think the loser pays model would have a deterrent effect.

Another problem we see is on rare occasion a UDRP complaint is filed with absolutely no rational basis and a finding of reverse domain name hijacking is, or should be, found.

The solution there, again, is a loser pays model. What's fair for the complainant should be fair for the respondent. The loser should pay provider fees as well as a set \$5000 attorney fee and again, that should address reverse domain name hijacking. It should cut down on that front.

Also, and this has been addressed as well, the issue of whether or not the UDRP requires panelists to find a reverse domain name hijacking even if a party has not asked for it. It may say that, it may provide for that, but the cases coming out on that issue are quite muddled. So we would like to see the UDRP clarified to say that it is an issue that a panelist must address.

Last set, unfairness. And again, lots of folks have already addressed this. The problem is the conjunctive bad faith requirements allows

gaming. We'd like to see the "and" modernized in line with U.K. and A.U. policies replacing "and" with "or" so that we understand that there is a continuing obligation of good faith throughout the entire domain name registration process will cut down on a lot of unnecessary cybersquatting.

And lastly one of the unfairnesses that jumps out to the branding community is that the respondent gets to control the appeals jurisdiction through his choice of residency whether that's real or false and also its choice of registrar.

And so you end up in a situation where if there is to be an appeal it can be in a jurisdiction where the registrant may or may not actually be or in a jurisdiction where the registrar's located.

And we think one quick way simple solution to that is simply to make the additional district for ICANN is located which is the middle District of California a third choice that a complainant can select.

And so that's it for me. I have a note here to introduce John Berryhill. And I will do that.

John is a friend of mine. He and I go to ICANN meetings together. And John's a very respected domain name attorney and someone who I believe strives to look at both sides of every issue that comes up. And so John I'm looking forward to hearing from you.

Margie Milam: If you don't mind let's go back to Tony Willoughby. He did get back on the call and then we'll go to John Berryhill after Tony.

Tony are you on? Can you...

Tony Willoughby: Yes I am. Can you hear me?

Margie Milam: We sure can.

Tony Willoughby: But I'm rather sorry. I was looking forward to hearing John before I started speaking. But I've - I'm a panelist for WIPO. I've been a panelist for about ten or 11 years. I've done a lot of decisions both for WIPO and also the nominate .UK DRS.

And so set things in context. Prior to that I didn't know what a domain name was and I spent most of my time earning money litigating intellectual property disputes. And it is quite a profitable exercise.

And I suppose when ADR came in all sorts of forms I thought oh God there goes my career. But I'm absolutely sold on ADR now.

And I think the most astonishing thing about the UDRP is that it was devised in such a short space of time and it's been taken up with such gusto by such a wide variety of interests.

I think somebody mentioned earlier there are very few if any court cases which have actually slagged off the UDRP. And that I think is a huge tribute to the success of the system.

I think if one was starting again now one would well probably look at it rather differently in light of everything that's happened over the last 11 years -- different practices of one kind or another and also in light of some of the decisions that have come out.

But the fact of the matter is we're starting with a system which has got ten or 11 years of decisions. There's been a lot of consensus built up between panelists.

And some of the - what might have been thought rough areas have been smoothed out with a general development of the jurisprudence.

And the sort of sessions that David Bernstein and I and others participate in in panelist meetings in Geneva for WIPO are all designed to assist in arriving at that sort of consistency.

And I think most people now when advising a client whether it's a complainant, a potential complainant or a potential - or a registrant can be pretty certain generally which way it's going to go on the hard core cases that the cases - that the policy was there to deal with.

It is a very narrow area. It's obviously there to protect trademark owners. The whole thing is there to protect trademark owners. You can't complain unless you've got a trademark, right?

But it's not all cases of infringement. It's purely those cases where the registrant is judged to have registered the domain name in bad faith. It all goes back to his or her motivation at the time of registration of the domain name.

And of course I can understand trademark owners wanting to broaden it up to all sorts of other things not at least bad faith use.

And there are an awful lot we've dealt with and/or went over it again. But of course a lot of the other policies do have the word or in instead of the word and.

But my fear is as soon as one starts tinkering with something that's got this 11 years of development behind it could completely shatter it like a house of cards.

It's a fragile system. Its strength lies in the, I suppose the single singularity of idea of the panelist, the desire to come to a just result and also having done quite a few decisions you tend to end up with the consistency yourself whereas when you're open when I first started there were all sorts of questions that arose when I looked at the policy.

Now I'm now pretty certain from previous decisions from the WIPO overview there are all sorts of references around to help us to come to something that's fair and reasonable in all the circumstances.

I would be very worried if it got opened up too quickly without too much thought. Because as I say I think an awful lot of the strengths that we've built up over the last 11 years could be just thrown away.

So while as a - I suppose a trademark lawyer, I suppose a predominantly act for trademark owners nonetheless I think that if it was broadened now it would open it up to far too many things that could be considered.

I think - and I think it would make it much more difficult for panelists to come to consistent decisions. So my vote would be to do as little as possible to it at the moment.

I'm not sure I've got anything else to add. I basically take on most of the things that David and Matthew said.

Margie Milam: Thank you Tony. We really appreciate your comments. And now we're going to move to John Berryhill who will provide the perspective of an attorney for respondents. John?

John Berryhill: Believe that Mr. Willoughby and I are largely of one mind. And I hope that the staff report generally reflects the overwhelming sentiment expressed by several speakers that while the UDRP is not without some problems and aggravations we do run the risk of creating more harm and more problems by, you know, generally throwing the procedure open to what can often and I think Wilbers characterize the ICANN process as a frenzy of single-minded interest.

The UDRP works very well for those cases it was attended to address. And to put this in perspective that while Mr. Wilbers refers to UDRP cases as the tip of the iceberg the relative incidence of UDRP disputes to do domain registrations is so low as to be statistically nonexistent.

While we can make guesses about the size of that iceberg we're talking about a very rare event.

For domain registrants the UDRP provides an environment to present a case and have it evaluated in a way that would not be possible for many if the only alternative was litigation in an inconvenient forum.

And while trademark claimants can still litigate if they choose the UDRP can provide them with a cold dose of reality in terms of the merit

or lack thereof of their claims and the resolve of the domain registrants in meritorious cases.

The UDRP has resolve tens of thousands of cases with also a low incidence of controversy relative to any system capable of doing that.

Now most practitioners have lost cases they thought they should have won. But tinkering with the substantive elements because there's some edge case that someone thinks should have gone the other way is a hazard as is warping the UDRP around some issue or value judgments about the Internet that go beyond the scope of clear predatory domain registration.

For example Mr. McGrady mentioned the quote unfairness of domain registrants choosing to live somewhere other than Marina Delray.

But it is important in the discussion to separate proposals into procedural and substantive changes.

And I think that we can have a very productive discussion on certain procedural aspects. But substantively in an international dispute resolution system which necessarily is going to draw on different principles of law appropriately applied to the fact intensive nature of these disputes it's difficult to conceive of sort of a finer grained substantive set of principles which is going to be appropriate in all circumstances.

And to some extent while analysts have divergent opinions on certain issues, that lack of fine-grained resolution in the substance I think

provides the flexibility to provide just results in appropriate circumstances without being confined to a subsidence straight jacket.

Certainly things like some sort of early evaluation mediation, a cleaner and more uniform procedures for consent transfers would be helpful.

I think the - some of the concerns about cyber flight are overblown. Everyone knows where the registry is. It's a technical problem not a policy problem.

You're not chasing a .com name, you know, around the planet. They're all in one database that's in Virginia.

And perhaps some registry procedures relating to the UDRP, you know, if someone moves a domain that's under UDRP to a different registrar having a registry level interface can easily solve problems like that.

But I think in practice the key issue that many of us have is the uniformity in the uniform domain dispute policy.

While the policy provides for, you know, supplemental rules, that provision in the policy refers to such topics as fees, word pages, limits and guidelines, file sizes, and format modalities and the means for communicating.

Now because there have been, you know, procedural gaps in the UDRP the UDRP providers have been very creative in addressing some of these procedural gaps in their supplemental rules.

A review of provider supplemental rules that have solved various procedural problems in some ways better than others I think would be helpful.

But also going forward I think that, you know, there does need to be some overview of provider supplemental rules going forward.

I believe Ms. Bartoskova -- and I apologize for crucifying your name -- you know, mentioned something like fee payment in three member panel cases.

What, you know, fee payment is a required element of a UDRP proceeding. You require a complaint, you require the fees to be paid.

If the fees are not paid then it seems a little off to say that there's no guidance in the policy for what to do when the fee isn't paid. If it's a requirement it's a requirement.

The providers use various file formats. Some of them are proprietary formats. And in the context of email communications we have issues with file names that look like viruses or spam or email systems that do not accept certain file sizes or types of file formats and notice becomes an issue there.

There are issues around deadlines and timing. It's very difficult on the face of a rotating planet to say what is 20 days from, you know, a given time in Geneva or Minneapolis or Hong Kong.

While the UDRP seems to suggest that communications are made at a time with reference to where they're being made it can be very difficult

when one has a docket that consist largely of UDRP cases sorting out well I always need to know what time it is, you know, in Minneapolis or worrying about what day it is in Geneva at a given time.

And Mr. Cai touched on the subject of supplemental filings. And in general we're lawyers, we like to get the last word. And there is an irrepressible need to do that.

But there can be a lot of procedural uncertainty, you know, in those circumstances where one or the other party simply, you know, has to drag the horse out to beat it a few more times.

And I believe panelists in general tend to find them to be unhelpful. But in a procedural review developing some sort of formalized mechanism around the treatment of supplemental filings would be helpful.

And I think as Neil put it the system relies, you know, to a large extent on having informed and educated panelists.

For example I believe Mr. McGrady mentioned things about Whois updates? Well, you know, there are conflicting ICANN policy requirements.

A registrant has 15 days to correct Whois data, you know, on notice of an error and that's outside of the UDRP.

But rather than making the case manager a punching bag for disputes over who is named in the case, you know, all of the facts including what were the Whois registration details, how were they attempted to be corrected, all of those facts can be provided to an intelligent panel

and can be sorted out without having the UDRP provider acting as, you know, a gatekeeper on well if you don't, you know, amend, you know, one word in the ten page thing that you've billed your client 15 hours for preparing we're going to kick your case out.

I think a panelist, I can't conceive of a UDRP panelists who's not qualified to get a handle on what's really going on in this dispute.

So obsessing over formalities such as who is the correct respondent doesn't strike me as a tremendously huge issue particularly if you have a registry interface in the process.

Given that if a transfer is ultimately issued the respondent's not responsible for carrying it out, the registrar is.

As written the UDRP requires communication to all known contacts associated with the domain name.

And if that's followed then a "responding party" can step up to the plate and address identification or authority issues and the panel can certainly decide that.

If a famous brand is being directed to pornography or some other abusive use, you know, then knowing that it's John Doe in Chicago instead of Jane Roe in London is not an interesting fact because quite frankly you know, abusive registration and predatory use of brands in domain names is typically a fact that's independent of who's doing it.

So but I cannot emphasize enough and I do hope that the staff is getting the message of what Mr. Willoughby expressed as the fear of

throwing open something that by and large works not without a few kinks here and there but it would be a tragedy for the process to have a reach that extends beyond its grasp.

And it is my absolute pleasure to introduce Ari Goldberger, a pioneer in domain law and for whom I have the greatest respect as a mentor and a good friend.

Ari Goldberger: Right back at you John. You know following John Berryhill is like telling your kids at dinner they can eat dessert first and have their vegetables afterwards. So I hope your appetite isn't spoiled and you still have some room for me and I hope you find what I have to say healthy.

Ladies and gentlemen, fellow council, distinguished panelists, and fellow presenters, I want to first thank ICANN and Margie Milam for putting together this very important Webinar and for inviting me to participate.

I'm proud to have had the opportunity to be a party of this process handling cases since the inception of the UDRP.

I am here to say that the UDRP is justice well served. It is fair, predictable and provides for a means of efficient and relatively inexpensive dispute resolution which we should be very reluctant to tamper with.

It has reduced cybersquatting and has preserve the rights of domain registrants where appropriate.

I'd like to give my perspective as primarily a counsel for domain registrants and an owner of domain names myself.

Indeed I have been a respondent and a defendant in court and have been on the receiving end of cease-and-desist letters myself.

I've been involved in well over 200 UDRP published decisions and many more settled. I've been handling domain name disputes since 1996 when I defended my domain name esquire.com against (Herskore) the publisher of Esquire magazine.

I spent over a year fighting for the title Esquire that I earned in law school. And my spelling was different. I thought that was wrong.

The federal court in New York agreed with me at least with respect to jurisdiction when the - and that's how the case was dismissed. And I got to keep my name.

But if I weren't a lawyer with the experience and time to fight the case I probably would have had to surrender my domain name. That would be a serious injustice.

After I won the case similarly situated domain owners with entirely generic work domain name started contacting me to help them save their names.

There was uncertainty at the time among trademark owners and domain registrants alike.

Back then there were no laws on the books in the US other than the basic Lanham Act trademark infringement laws to deal with domain name issues.

In 1996 I had to explain to the magistrate in the court of New York what the Internet and domain names were.

The litigation was complicated. The laws were being written as the claims are being made. And basically the cliché of the Wild West fit the domain name dispute resolution process and it was used as a term by many to describe the domain name, what was happening in the domain name industry of the time.

Today more than ten years after the creation of the UDRP it's a lot less wild, a lot more predictable, fair, efficient, and affordable for trademark owners and domain registrants alike.

So another cliché fits. If it ain't broke don't fix it. Ladies and gentlemen the UDRP is not broken. We have under our belt over 30,000 cases decided by dozens of intelligent, highly qualified and experienced UDRP panelists over the past ten years.

Add to that the tens of thousands of hours of research, analysis, and vigorous debate between trademark owners and domain registrants and their respective counsel.

This provides for a body of precedent which gives us predictability. It's predictability for trademark owners and domain registrants.

A lawyer can look at a dispute, do some research online and quickly determine if their client has a case. This helps foster settlement which results in less expense to both parties.

With this predictability and precedent comes fairness. Trademark owners can predict if they have a case to fight. And domain registrants can properly assess a cease-and-desist letter or a complaint by researching these 30,000 cases.

They can turn to lawyers who understand this precedent for assistance. This is very important. Without this domain owners are at a severe disadvantage giving up domain names because they don't know if they have a good case or not or if they've even done anything wrong.

Our firm has over 24 reverse domain hijacking decisions. So it's clear that unfair cases are being brought and the UDRP is being abused.

Imagine how many bogus cease-and-desist letters are sent out and how many domain registrants have surrendered their property as a result of a trumped up claim. I see dozens.

Here are just some of the cases we have won thanks to the great work of fair-minded panelists, taxanalyst.com, prom.com. It's a movie premiering on Friday also a common word, carisales.com, myroom.com, intune.com.

The UDRP is fair particularly with three member panel cases. Of the hundreds of cases we have handled rarely have we seen an unfair result.

I know many people, particularly domain registrants look at the fact that some 85% of the cases are decided in favor of trademark owners.

But although the results are unbalanced that does not make it unfair. My experience is that most of the time the results are fair and just.

Those who engage in abusive registration lose their names and those who don't generally prevail provided they file a response and are well represented by counsel when necessary.

It is my opinion that we leave the UDRP principally as is. To change it would mean walking away from a healthy body of precedent that provides for fair predictable results in a relatively inexpensive manner.

While I'm reluctant to advise any meddling with the substantive aspect of the UDRP and its established body of precedent there are a few things that would improve the process procedurally and make it more fair and efficient for both parties.

Extend the response time to 30 days. Complainants have months to build their cases with their in-house and outside counsel.

Oftentimes a UDRP is the first exposure a domain registrant has to the legal system, a regular ma and pa store, an individual not a cybersquatter going after one of BMW's domain names but a common word like cornerstore.com or computer.biz.

They have no lawyer experienced in domain names. And just finding counsel, understanding their rights and getting the funding together can exhaust a 20 day period.

Extensions are liberally granted. However there should be a not a medic extension of say 30 days just as courts do where a responder reports that they will defend a case but they are seeking counsel.

There is no prejudice to the complainant. In fact the additional time helps facilitate settlement which in my experience happens with the majority of cases.

I'd like to comment on the issue of bad faith registration or use as opposed to bad faith registration and use.

I believe that in order for the UDRP to be just it must require bad faith registration. It would be unfair for a domain owner to register a domain name and for a third party to come along later and commence a subsequent trademark use.

For example I represented the owner of trueroots.com which my client registered with a genealogical intent several years back.

The idea was true roots, you know, one's roots. Several years later an India company decided to name its long distance service True Roots.

My client prevailed in that case. There should never be a circumstance where such a subsequent use interferes with a prior registrant's good

faith registration. That is the current state of the UDRP. It is fair and should not be tinkered with.

Regarding the idea of having a trial de novo as an appeals process within the UDRP I think the founders, the drafters of the UDRP were very intelligent when they provided that anyone can seek court release at any time before the complaint is filed, when it's being file, after it's been filed, before a decision's been issued, or afterwards.

I think that's a very fair procedure, a very good failsafe. I don't think we should tamper with that either.

Latches was introduced. I believe latches has begun to be followed under the UDRP and there's no reason why it should not be.

There's no excuse for a complainant who waits ten years, files a UDRP stating well we just happened to notice this. That's an injustice that has to be corrected.

I disagree with Mr. McGrady's loser pays rule. You know, for TM owners the trademark is everything. They have unlimited budgets to protect that trademark. And if they win it's like an investment. They've got the brands.

Look at BMWs counsel who's here today. Most of individuals can't afford to have a legal team on hand.

When MasterCard sued my client for pricelist.com they put 20 lawyers on the case. My client registered the domain name two years before MasterCard even came up with the campaign.

Imagine if my client had to pay MasterCard's team of lawyers or had the fear that somehow it would lose the case and would have to pay those fees. This is a one-sided unfair proposition and I don't think it should be an amendment to the UDRP.

So my opinion is to leave the UDRP as is. At the same time we should be open to improvement to the procedural aspects of the UDRP through (modification) of the rules where these changes foster the true intent of the drafters, a fair and efficient process to resolve domain name disputes.

Thank you very much for your time. I would now like to introduce Konstantinos Komaitis who will provide an academic perspective on the UDRP.

Konstantinos Komaitis: Good morning good afternoon and good evening to all. I hope you can all hear me clearly. My name is Konstantinos Komaitis. I am a law professor at the University of (South) (unintelligible) United Kingdom.

And the UDRP study was part of my doctoral theses. And I'm also the author of the book on the domain name - on domain name regulation.

So far the issues that have been raised mainly have focused on the fact that the UDRP has been a successful system. And its amendment if any should provide a more robust framework for protecting trademark rights.

I would like to speak to you as a researcher and academic with almost ten years, almost the thoughts of the UDRPs of experience in analyzing and actually looking at the UDRP.

Let me say first that as far as I'm concerned the UDRP needs to be reviewed because it suffers from various procedural and substantive flaws.

And it is actually quite concerning that the UDRP has not been reviewed until now. It is one of the oldest ICANN policies. It has been ten years and it's about time we at least start discussing its various problems.

However I also do appreciate and I agree that any degree of a UDRP has to be very careful and it needs to address issues that at the time of its inception were left out of the procedure in substantive scope of the UDRP or during its ten years of education have manufactured themselves as problems.

After ten years I think that it is important that we make sure we incorporate within the policy where we failed to include in the first place that the UDRP complies with fundamental principles of justice and due process.

So what I'm planning to do is to pick and highlight six things that I consider vital and that I consider are missing from the UDRP.

And of course there are many more but I consider them to be the more important ones considering that this is a 5 minute presentation.

Before all that however let me take you back a little bit and remind this audience why we created the UDRP in the first place.

Ten years ago the UDRP was created in a legitimized based on the fact that it would be based on a very limited and specific mandate.

The UDRP was created as an additional means for additional education so as to address only abusive domain name registrations -- nothing else.

However the UDRP in ten years of operation has expanded. And it is actually right now dealing in most cases at least with more substantive and complications of trademark law like issues surrounding common law marks, consumer protection, competition law to name a few.

This is the first general problems the UDRP and if you want constitutes the opening statement of why the UDRP needs to be reviewed.

The second problem with the UDRP is a lack of checks and balances that it provides as a system of adjudication especially this system that has adjudicated in ten years more than 35,000 domain name disputes.

We have already had today ideas floating around about changing the standard of the bad faith element, bad faith registration end use, the bad faith registration or use.

This for instance will be the (unintelligible) for the whole of the UDRP because it will allow it to be further gained and abused.

The same goes for the inclusion of a loser pays model. Any amendment of the UDRP should seek to particularly strengthen and rather than compromise the policy and few very few fair provisions.

Another problem that adds to the current degree of - to the inconsistent that exists in the UDRP and I think that really is something that Mr. (Belkin) raised is the supplemental rules that exist for the various providers which vary and contribute significantly, excuse me, to the issue of forms shopping.

And of course this generates another issue. I was always wanted and I could not find an answer to that question, who's responsible for the UDRP decision?

The bad UDRP decisions if you want is that ICANN is at the center, is a panelist to whom our panels accountable when they proceed to extremely discretionary interpretations of bad faith for instance.

We need to find a way to make such rules uniform so that the UDRP after all is meant to be a uniform system.

Finally the fact of the UDRP in the various centers allow panelists to use previous cases as evidence without those cases ever having been reviewed as to their substance, fairness, and application of law is greatly concerning and problematic.

Let's not forget that the UDRP is not law. It is just an administrative process. That precedence should not be used in such an arbitrary fashion to substantiate final determinations.

I think I'm running out of time so here are the six things I think that need to be included in any review of the UDRP.

All of them constitute fundamental rules of procedure and follow the rational basis of trademark of traditional trademark law.

First of all there needs to be a clear internal appeals mechanism. There needs to be an internal appeals mechanism because appeals serve various purposes.

At the very minimum level an internal appeals mechanism will help to correct errors and indirectly review panelists and their decisions.

Secondly there needs - we need to incorporate within the UDRP a very clear values and safe harbors provision.

It is unacceptable not to have clear and explicit value provisions that allow free speech since trademark law allows it. And they are also part of the FBI recommendations when it comes to the URS.

Thirdly we need to address the issue of the very short deadlines for registrant. It is certainly unacceptable to expect the registrant to provide an answer in 40 days.

It was said before and I would like to repeat it that the complaint can take all the time in the world to draft a complaint. It also has the financial means to do so.

While the legitimate registrant be it an entrepreneur, an innovator or a small or medium-sized enterprise will need to find that lawyer, will need

to familiarize himself or herself with the whole process and also submit the response. And all that needs to be done in 40 days. We should not sacrifice due process for speed.

Number four, address the issue of buyers in forum shopping by standardizing three member panels with panels assigning - assigned on a rotating basis.

What is further problematic apart from the fact that occasionally we see huge bias on behalf of the panel is that there's no real information as to how panels are assigned. This is not transparent and providers should provide this information.

Number five we need to re-examine and identify ways to efficiently address the issue of default and differentiate between those actors that default because they're in bad faith and those default for various reasons.

This is highly tied with a short deadlines and is particular relevant to all those legitimate registrants located in the developing world do not use English as a first language or have an obscure internal connection.

And last but certainly not least make the - reverse the meaning (unintelligible) provisions stronger. And also like in the URS incorporate provisions against trademark bullying and abuse.

Thank you and I will now like to introduce a colleague, Cedric Manara.

Cedric Manara: Thanks Konstantinos. Thanks to you all for having me. I'm honored to be in this very well attending Webinar was so famous speakers.

Much has been said already interestingly mainly if not only by lawyers coming from common-law countries.

I'm from a civil law country and I see a lot of influence of common-law in UDRP but this is not my topic today.

There are many procedural issues I would like to address, have chosen to focus on documentary evidence.

There's a well-known (Romane), (Romano) principle which is that not being able to give evidence equates to not having - equates to not having a right.

And UDRP proceedings are no different. As you all know here it is critical for the complainant to give evidence of registration and use in bad faith and for the respondent to demonstrate rights and legitimate interests in the domain name.

UDRP is quick. And for the panelists to decide quickly enough, complaints or responses must not be too long. There is as you know a general 5000 words limit.

Interestingly there is not a limit for documentary evidence. I'm not suggesting here that there should be one.

But what I see is that the panelists can be confronted with a lot of documents which they may not be likely to always review properly.

In an UDRP decision where I was a panelist the complainant did not indicate in his complaint the date of the trademark registration.

This date was hidden and was hidden somewhere in the (necks). And (Bitchures) I could have not paid attention to the fact that the trademark was registered after the domain name.

And of course my opinion would have been different. So my own example is I believe not isolated. Time constraints may be a burden on the panelists which may impede a careful study of the evidence.

Furthermore evidence can be more and more complex to review. At the time UDRP rules were written the Web was as uniform as the policy. Web pages looked the same whatever the country set them.

Now do location through IP addresses is widely spread. A (parking page) may not be the same depending on where it is viewed in some countries. The (parking page) can have links to competitors of the complainants.

And it's not - and so all the countries. This is - this of course may have an effect on the demonstration of bad faith.

So I have not seen many UDRP decisions taking this sentiment into account. And it's just a humble suggestion here. But it might be good maybe to spread awareness on this issue.

Another issue with evidence in UDRP is possible forgery. Let me be clear here. I do not say that forging evidence is frequent in UDRP. I just say that it may happen and it is easier in such proceedings.

Why is it easier? It's easier because UDRP proceedings tend to be 100 persons electronic. And it makes - it's tempting to Photoshop documents to change them.

At a less sophisticated level I have had firsthand knowledge of changes made to a Wikipedia article before it's used in proceedings.

And I have seen once a complainant pasting and copying Google results in a Word document as weird as it may sound.

Again because of time constraints the panelists are not always in position to fully check the reliability of the submitted documentary evidence.

Panelists have the word of the parties who certify that the information they submit is accurate. But they only have their word. There are no sanctions internal to UDPR rules in case of breach.

One could imagine for example that a complainant found lying would be barred from using UDRP or that a respondent would automatically lose in it.

To fight against possible evidence fraud I have a simple suggestion which would be easy to implement I believe.

It would be to post along with the UDRP decision the documentary evidence that was submitted by both parties.

Such a mechanism could help prevent the making of false documents and would allow peer control. Margie and Don back to you for the question and answers.

Margie Milam: Thank you very much Cedric for your presentation. We are now at the question and answer part of the session.

We did have this Webinar scheduled for two hours but we can go excess of two hours. We probably won't go longer than a half hour extra.

And because we have such a large amount of people on the call we're going to do the questions through the chat function so that there's no telephone interference.

And what I will do is I will ask questions to the presenters and the presenters can go ahead and participate.

So my first question to the panel is - comes from Wendy Seltzer. And her question is who do you believe stands to lose from a review as opposed to a revision of the UDRP? And with that I'll invite the panelists to speak.

I understand that David Bernstein may have and John Berryhill may want to address that question.

David Bernstein: Thank you very much Margie. I mean as my comments indicated before I think the place that has something to lose from a PDP is actually the UDRP itself.

I don't think any of us can predict in advance is this going to be better for cybersquatters and allow more cybersquatting to occur and not been caught.

Is it going to be better for brand owners and allow them to prosecute these cases more efficiently and avoid taking the really hard cases to court? Where that all comes out depends of course on what the outcome of the changes are.

But as I think almost all of the panelists, I mean representatives of complainants and respondents, actual complainants and actual respondents as Ari is himself, the five panelists that you've heard, the providers I mean we all recognize that not - the UDRP is not a perfect system.

There's no perfect system of law that's out there. But it's damn good. And it's worked really, really well for the last dozen years.

And the risk of getting what we hope for if we open it up may very well be much more harm to the process than good.

And regardless of whether the ultimate changes that are made really are better or are worse from individual perspectives I do think that the policy itself suffers by being seen as something that can be politicized and can be changed too easily through a process like this especially when I noted in the in the post I put on the chat there just doesn't seem to be an overwhelming consensus in favor of needing a PDP.

So to answer Wendy's question, you know, who stands to lose the most? I think the policy itself does.

Margie Milam: John Berryhill?

John Berryhill: David stole my answer. The policy itself, you know, we have by now long-standing commercial reliance interests in what - and again there's always edge cases. There's always stones in your shoe.

But the weight of authority on many questions under the UDRP is relatively clear. And people have built up commercial expectations on both sides in this process, on the trademark claimant's process whether to bring a dispute and on the respondent's end and on domain registrant's end reliance on practices and procedures that have been deemed inbounds or out of bounds by, you know, a large body of decisions.

And to throw a significant uncertainty into that I think does not promote ICANN's mission of promoting stability in the DNS.

Margie Milam: Thank you John. Would any of those speakers like to address that issue?

Hearing none we'll move onto the next question. This question came from George Kirokos. George asks why don't UDRP providers provide decisions in a standard XML format?

And I don't know if any providers would like to address that issue?
Kristine or...

Kristine Dorrain: Margie my comment - this is Kristine Dorrain with the National Arbitration Forum. My comment was simply that, you know, we

wouldn't necessarily be opposed to that if that turned out to be a solution that was proposed.

As far as current process I just discovered that there is such a thing as XML. We're not necessarily very technologically on top of things.

And so it's sort of it's not a matter of, you know, a concerted effort to, you know, overcome anything or to withhold anything. It's just a matter of its simply not even being aware of what XML is.

Margie Milam: Thank you.

Eric Wilbers: I don't mind - can you hear me? This is Eric?

Margie Milam: Yes we can Eric.

Eric Wilbers: Yes okay great. I don't mind adding to that just briefly. I think this type of question, you know, as practical as it is I think shows precisely that we have to understand that there is a proper division between, you know, some practical improvements that you can make based on, you know, IT, use of IT, looking at experiences, you know, just as I think John Berryhill or whoever else it was saying, you know, just apply some common sense of the things.

But there is a division between such practical issues which I don't think firstly should be, you know, holding up 25 people in this particular call now this sort of issue and what do you do about the UDRP so to speak. And here, you know, maybe linking it to a higher level point.

I don't think that we should be too optimistic about those who are interested in discussing UDRP being able to not politicize to keep depoliticized even points that should be relatively simple and procedural.

If you put certain WIPO stuff -- and I don't mean this literally -- but if you put certain WIPO stuff in one office with let us say for example (David Bernstein), for example John Berryhill, and for example, you know, a well-meaning registrar I'm pretty sure that just like WIPO did with the UDRP that we can come out with some really straight forward improvements, you know, on a sort of process level which now WIPO panelists, you know, in conjunction where appropriate with the WIPO center are forced to put into the cases over time.

We can certainly do that. But the reality is of course that we have while we're speaking about these things, you know, people chatting about this, what the substance of what we're discussing here already in terms of, you know, with a certain amount of division or distrust or, you know, frankly speaking finding it very hard to look at this on a working level rather than an object of an ICANN discussion to put it like this.

So in conclusion there's a lot of stuff that you can do in a practical way but you have to understand how this affects UDRP and when it doesn't.

And in terms of some of the suggestions that we've heard going back to all of the speakers you've heard a lot of suggestions that really relates to for example the interaction between registrars in the process.

And some of those points are entirely valid. For example we heard one speaker say, you know, it would be nice if complainants are more communicative about how registrars can positively follow-up on a transfer. I think that's a very valid point.

Now in practice we help that along, you know, if we can, et cetera. But that of course is not something that you resolve by looking at UDRP not even at its rules and probably not even at supplemental rules.

Those are basically best practices. And I might add here that WIPO for example, maybe others have as well, has over a period of three or four years not to mention our panelists and their decisions been contributing to ICANN a lot of sometimes requested and sometimes not requested input on how you can improve matters not just for parties but also for registrars.

But I think from where we sit whatever ICANN has done with that in its processes that certainly has not led to any sort of registrar policy or let alone an amendment of the registration - registrar accreditation agreement.

Plus a lot of what I've heard today frankly speaking belongs in that corner of the DNS and not in the RPM which we are all trying to make work here.

So let's separate the little practicalities from the big procedural points and let's not be naïve about what happens if even fairly straightforward procedural points get into ICANN process.

I've used certain adjectives and we tried to think about them in a relatively objective way to describe to URS.

John Berryhill summarized them by saying a frenzy of individual interest. I think we couldn't have said it better ourselves.

Margie Milam: Thank you very much Eric. I'm going to move onto another question. This one came from Kathy Kleinman.

The question here is does the advent of the new gTLDs create an independent reason for a more detailed review of the UDRP? Do new gTLDs change the landscape a bit?

And I'll open it up to any of the presenters would like to comment on that question. Anyone?

Kristine Dorrain: Margie this is Kristine from the forum. I was just going to comment that I believe I mentioned it in my remarks but that I believe that if this is going to happen, if a PDP is going to be required or called for I think that at the minimum we're going to have to wait and see what the shakedown is and how it turns out if some of these other IP protection mechanisms that they're putting in place will suffice and, you know, not so general cybersquatting, you know, so far into orbit that, you know, it just overwhelms everybody.

And I think that by opening up a policy development process before we know what's going to happen with the new gTLDs is definitely premature.

Margie Milam: Would any other presenter like to comment on that?

Konstantinos Komaitis: Margie this is Konstantinos. May I jump in please?

Eric Wilbers: This is Eric Wilbers again. Am I over doing it if I reply here as well?

Margie Milam: Okay so I - we'll go to Konstantinos first and then Eric as well.

Konstantinos Komaitis: I think that (unintelligible) of the UDRP of the review of the URDP or revisiting the UDRP -- whichever way we put it should have happened with or without the new gTLD.

Certainly the new gTLDs impose some very indirect pressure on the whole issue because mainly the URS for example have been doing (perhaps to) the UDRP.

And it mentions the UDRP as another way for an unsuccessful URS complaint to proceed through the UDRP.

So the new gTLD process if you want and the new mechanism that we have incorporated impose some sort of an indirect pressure. But the UDRP has to be reviewed irrespective of the new gTLDs. Thank you.

Margie Milam: Thank you Konstantinos. And now Eric.

Eric Wilbers: Yes thanks. I'll keep this very short. I think three points and they came out of our statement as well.

The first one is precisely at a time like this you want to make sure that the existing system meaning the UDRP remains firmly anchored. This

is the time where trademark orders want to be able to count at least on the UDRP.

The second one is this UDRP needs to work together with the URS and the URS along with other mechanisms coming in precisely because the maintenance system is expanding.

The URS has many issues and needs to prove itself, needs to be changed and also some things need to happen before that corresponds to the UDRP. Very little thought has as far as I can see going into that relationship. So that's another reason why you don't change UDRP before you know what's going on out there.

And the third one is this. And here I really argue for zooming out a little bit from this whole story.

What you do when there is going to be between 200 and 500 ICANN's own estimates new gTLDs coming on is not that you say oh this is the time to start reviewing our enforcement mechanism.

What you do is you start to look at what is the potential for squatting in the face of, you know, this - these new domains.

And I think that is really the elephant in the room. And I don't want to insist on it because this is not the call for that and maybe it won't come to it at all.

But I really think that the question is much more about where does the squatting come from, where does the registration income that relates to squatting go, what is it from, and who's behind that?

I really think that that is frankly speaking that's a discussion that again it's not for today but it seems to me that it's pretty inevitable to discuss that before you start talking about enforcement mechanisms.

Margie Milam: Thank you. Thank you Eric. Would any other speaker like to address that question regarding the new gTLD program?

Okay hearing none we'll move on to the next question. Christina Rosette asked a question at staff regarding whether or not the UDRP rules are considered part of the consensus policy?

And just to answer that question briefly my understanding is yes that is considered part of the consensus policy.

And if you have any further questions about that we can provide more information off-line but that is my understanding.

Another question came from Phil Corwin and he directed this to John Berryhill. And I guess it had to do with the reluctance to look at the UDRP.

His question is to John Berryhill and perhaps others is a reluctance to cover all aspects of the UDRP or just the substantive?

In other words are the speakers open to looking at procedural reforms such as limiting scope of supplemental rules perhaps via a standard provider agreement?

And I'll start off with John and if any other presenter would like to address that topic.

John Berryhill: Keeps saying mute on.

Margie Milam: We can hear you now. John?

John Berryhill: Okay yes just speaking for myself and, you know, one has confirmation bias when listening to other people but I think the speakers have generally said that their recurring procedural issues and that there is a genuine hesitation to tinker with the substance again because, you know, for good or for ill.

And domain registrants, you know, can and do litigate in appropriate circumstances for good or for ill.

We have a large body of decisions constituting, you know, a galaxy with some fringes and a somewhat fuzzy defined center.

And, you know, it would really upset expectations and reliance on that body of decisions to tinker with the substance to any great extent as opposed to procedural due process issues.

Margie Milam: Thank you John. Anyone else like to comment on that?

Ari Goldberger: Ari Goldberger here. I'd like to comment.

Margie Milam: Go right ahead.

Ari Goldberger: Thank you. As I said when I spoke yes I think there are a number of areas where the procedural rules can be improved on.

You know, there are differences between the way NAS and WIPO band the other providers handle things like deadlines. If it's due on a Sunday is it - can you hand it in on a Monday?

One of my - one of the ones that I still have to deal with that's kind of interesting is because I'm a procrastinator as many of the panelists here can attest to, we often get our cases filed at ten minutes of midnight because we want to give our clients every minute of time.

But one of the interesting things is sometimes I'll file a response at WIPO and the rules are that you use the respondent's time zone or at least it's been interpreted that way but not everyone knows that.

So many times I've filed responses say at ten minutes Eastern Time where I live and that's - but it comes and as an email at WIPO for example at - on the next day.

So I have had decisions where I felt that I timely filed but I don't learn that I - that until the decision comes out that, you know, this is - Mr. Goldberger was late in filing but we're going to consider it anyway.

So I think it would be great to have uniformity in things like deadlines, times, supplementals. I think that's fair. I think it discourages foreign shopping - forum shopping.

And from a procedural view it enhances the interests, the intent of making for a very stable and efficient program.

Some procedural things stand in the way of settling cases for example. At the NAF -- and I, you know, I've only good things to say about both organizations -- there could be improvements to rules and this is an opportunity to express that. This is only constructive criticism.

But if you want to get a stay at the NAF, and generally when you get a stay it's because you're settling a case I think there's a maximum number of days.

And I think I've run up against a deadline where I needed like one more day to stay a case but that - there was a difficulty because if the case is not stayed you can't transfer the name.

If the stay is lifted and the case goes on it makes it more difficult to settle the case because you can't stay it anymore.

I think that there should be some more flexibility there. And I'm a big believer that we should extend the deadlines a little bit.

I think 20 days is too short. I think that I noticed a domain owner on the private chat - on the chat mention hey why don't you extend - provide a deadline that kind of comports with how long the domain is registered, has been registered?

But I think at least 30 days because the complaint has had months, maybe years to think about filing the case and putting it together domain or, you know, imagine a person that has one domain name has no idea, has never been to court, 20 days is a real short time to make a decision that in some cases affects a person's livelihood because

that domain name represents their whole business, you know, a store or something.

Anyway thanks for the opportunity. I agree 100% with John. Don't mess with the substantive law but, you know, improve on the procedural. Thank you.

Margie Milam: Thank you Ari. Would any other presenter like to address that issue?

Okay hearing none we'll turn to another question. And this is directed at the...

Man: Could I...

Margie Milam: Oh I'm sorry, go ahead.

Man: Yes if I could jump in on one thing. You know, and, you know, as far as the deadline goes, you know, again it's an area where, you know, panelists can assess the situation.

But, you know, the day in day out, the bulk of UDRP decisions, you know, quite frankly a lot of them could be decided in under five minutes.

You know, you've got a globally famous brand and it's going to something, you know, bizarre.

And, you know, I can see where well nobody needs, you know, 20 days to sit around and wait to find out that no one's going to respond and defend the indefensible.

And the UDRP was really intended to address the indefensible. And I believe that's what drives the perception of, you know, for example the - some of the IPC suggestions.

You know, but I in terms of deadlines there could be something like, you know, expressing an intent to respond and, you know, that if that's not followed through then, you know, we draw adverse inferences against the non-responding party.

But, you know, I have seen that again it goes back to the panelists, you know, are not idiots and can exercise appropriate discretion with respect to, you know, all of the rules so long as the process implemented by the provider is not getting in the way of the dispute resolution mechanism. That's all.

Margie Milam: Thank you John. Any other panelists like to reply a response to the question?

All right hearing none we'll turn one more question and then we'll wrap this up. This question is directed to the UDRP providers.

And the question came from I believe George Kirokis regarding whether UDRPs would consider formal contracts with ICANN? Is there any provider that'd like to address that issue of formal contracts?

Eric Wilbers: This is Eric Wilbers. Am I on?

Margie Milam: Ari yes?

Eric Wilbers: Eric Wilbers, WIPO.

Margie Milam: Oh Eric go right ahead yes. Go right ahead.

Eric Wilbers: We're on this thing together, great. Well again not necessarily the sort of question that I think is for this chat here.

But a position which WIPO's been taking on this subject for a long time is that in our view of course there is a contract in existence.

That may not be a written contract, you know, with 20 pages of attachments and lots of signatures on it.

But ICANN have decided -- and that's a legal decision -- ICANN has decided to credit it's providers. And I don't know what criteria it has for making those decisions but it does accredit providers.

Those providers are accredited to give effect to the UDRP. The UDRP has a policy. It's got rules and the rules refer to supplemental rules.

And so implicit in all of this is that when ICANN accredited provider it has to hold and is entitled to hold that provider to compliance to giving effect to compliance with the UDRP in all of its aspects.

And you can't of course micro-regulate that out in, you know, big detailed stories. But the UDRP is out there as the instrument itself.

They the norm for providers is the UDRP itself. This is not to say that providers can always just like parties or panelists can always comply with every detail.

But the basic idea is that ICANN has an understanding implicitly with every provider that that provider should essentially do justice to the system which is called the UDRP.

I think the question is not whether you would have some sort of contract or though I have to say I direct this prospect of everybody getting in on every line of that one.

But I think the real question is what does ICANN really do in observing how the UDRP is being conducted?

What does it really do in judging how these providers are functioning? I think precious little frankly speaking.

From where we stand we don't see much of ICANN compliance action or effort or perhaps resources not just in relation to providers but fairly generally when it comes to UDRP.

Well on some days that's not a good thing and on other days perhaps, you know, it's better to leave the system alone the way it runs.

But I think the real question is if there are situations where providers are clearly out of bounds either in relation to the specific text of the UDRP or on a higher level in terms of the bona fides of their whole effort then I think the question is what does ICANN do with that?

And I submit here that ICANN doesn't need a 50 page written contract to act on these instances.

Margie Milam: Thank you Eric. Kristine you'd like to respond?

Kristine Dorrain: I just wanted to briefly echo mostly what Eric says. We - the forum doesn't believe that the inclusion of provider contracts would substantially change how we process cases.

You know, we fully, you know, do the best we can to be in compliance with all of the rules and policies, et cetera.

And I don't believe having a contract in place would have any bearing on whether or not we're, you know, suddenly going to follow any rules, any strict or anything like that.

And we actually do firmly believe that ICANN can come along at any point and tell us we are not in compliance even without a contract.

That being said the forum's been very clear all along that we would not oppose having a contract if ICANN felt that that was a need and was something that the community or anyone could benefit from.

Margie Milam: Thank you Kristine.

John Berryhill: If I could...

Margie Milam: And who is this?

John Berryhill: John Berryhill. You know, I think that in some sense of what we're - what the question is driving at is, you know, having at least some avenue for, you know, oversight of the things that Eric mentioned you

clear instances where there are, you know, inconsistencies between, you know, supplemental rules and the UDRP.

And it could be very difficult to a UDRP when one gets into, you know, procedural loggerheads with a case manager to have, you know, the organization that's processing the case be the ultimate arbiter of whether or not the rules are followed.

But by the same token what you don't want to lose is the flexibility to be fair in various situations.

For example the UDRP requires that a decision be rendered in 14 days. Now I don't think I've had very many three member panel cases that have been decided in 14 days.

And, you know, if the panel needs time to confer and to consider what can sometimes be difficult issues they should have the time regardless of whether some rules says there's 14 days.

But if you try to pigeonhole this into, you know, oh well the contract says if the provider is going to suffer some penalty if they don't strictly comply with 14 days then you can't lose the justice provision function in that.

You know, so long as ICANN recognizes that it does have some oversight responsibility in, you know, perhaps more a collegial environment than a legally structured one that would be a more helpful than, you know, whether or not someone has signed a document.

Margie Milam: Thank you John. And I think Paul McGrady would like to address this topic as well?

Paul McGrady: Yes I don't - no immediate benefits come to mind in having the providers execute a contract. But I do see one downside which is that it would place yet one more thing on ICANN compliance staff's plate.

And most of us on - in the branding community believe that ICANN's compliance department's already dramatically understaffed and dramatically under functioned - not under functioned, understaffed and underfunded.

They're doing a great job with what they have but they need more. And giving them one more job without additional funding just doesn't make any sense.

Margie Milam: Thank you Paul. Now are going to turn to Tony Willoughby.

Tony Willoughby: Yes the only point I was going to make is that one of the joys of a relatively loose form of form of wording in some of these things and indeed in the procedural rules is that we are given scope for taking a sensible approach, sensible attitude.

So I was just thinking I think one of the speakers was saying that sometimes we're loaded with so much paper that we don't - well there's a risk that we won't spend time looking at the documents properly.

And I remember the longest case where I ever got involved in took me 70 - seven zero hours to complete. And of course that was an exception.

But that involved a huge amount of paper. But, you know, you're there to do a job and (unintelligible) do it.

And my - certainly my appreciation of panelists is that by and large everyone puts the work in. They're not doing it for the money. They're doing it because they want to do a proper job.

The quickest is probably about four or five hours. But it doesn't - it's really the fact that the rules enable you in exceptional circumstances or the provider in exceptional circumstances to give you the time to do what needs to be done.

And again when it comes to extensions of time and things like that they - obviously we've got attention between on the one hand of wanting to make sure that the decision comes out efficiently and swiftly as the policy was designed.

But on the other hand one doesn't want to impose those rules in such a way that you end up with giving a manifestly unfair results.

So I applaud the way that it works at the moment and that it gives one the opportunity to do the sensible thing.

Margie Milam: Thank you very much Tony. And with that we're going to close the Webinar. I'd like to thank all of the presenters who took the time to share their perspective on this important topic.

As I indicated at the beginning of the Webinar there will be multiple opportunities for comments on this issue the next being when the preliminary issue report gets published for public comment at the end of this month.

So as all of you may have interest in this topic I invite you to participate in the public comment forum because your perspective is really important as we try to determine what the next step should be with regard to the UDRP.

And the GNSO Council will have a lot of work on its plate to decide whether to commence a policy development process on this topic.

So once again thank you all to the speakers and thank you all to the participants who stayed on for such a long time. We really appreciate all of your input. Good night. Goodbye.

END