

Final GNSO Issue Report on The Current State of the Uniform Domain Name Dispute Resolution Policy

STATUS OF THIS DOCUMENT

This is the Final Issue Report on the current state of the Uniform Domain Name Dispute Resolution Policy requested by the GNSO Council. This report is published following the closure of the public comment forum on the Preliminary Issue Report published on 27 May 2011.

SUMMARY

This report is submitted to the GNSO Council in response to a request received from the Council pursuant to a motion proposed and carried during the Council teleconference meeting on 3 February 2011.

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1. Executive Summary

The Uniform Domain Name Dispute Resolution Policy (UDRP) has been in effect for over 10 years. It is widely recognized as one of ICANN's defining accomplishments from its formative years. While not perfect, the UDRP has successfully offered parties a far less expensive alternative to costly litigation for resolving international disputes involving domain name cybersquatting. Staff concurs with the view held by many that the Internet community has come to rely on the consistency, predictability, efficiency, and fairness generally associated with the present implementation of the UDRP.

1.1. Background

The UDRP has not been reviewed by the GNSO Council since its inception.¹ This Final Issue Report on the Current State of the UDRP is prepared at the request of the GNSO Council,² and follows the closing of the public comment forum on the Preliminary Issue Report.³ Upon review of the Final Issue Report, the GNSO Council will determine whether to commence a policy development process (PDP) on the UDRP.

In response to the GNSO Council's request, Staff conducted preliminary research on the UDRP to identify issues for inclusion in this Report. Due to the tremendous volume of cases and materials available regarding the UDRP (including, over 300,000 hits on Google alone), it became clear that there was no effective way to evaluate these materials. Instead, at the suggestion of the GNSO Council, Staff conducted a Webinar on the Current State of the UDRP (UDRP Webinar), to solicit feedback and information from UDRP experts and

¹ In 2003, Staff published an Issue Report on the UDRP at the request of the GNSO Council, but the GNSO Council did not follow up with a PDP at that time. For more information see:

<http://www.icann.org/en/gnsso/issue-reports/udrp-review-report-01aug03.htm>.

² The GNSO Council resolution requesting an Issue Report on the UDRP is included on [Annex 1](#).

³ The Public Comment Forum on the Preliminary Issue Report may be reviewed at:

<http://www.icann.org/en/public-comment/prelim-report-udrp-27may11-en.htm>.

representatives from a broad cross-section of stakeholders.⁴ The information communicated in the Public Comment Forum on the Preliminary Issue Report, as well as from the UDRP Webinar, and the UDRP Provider Questionnaires, helped shape the Staff recommendations described below.

1.2. Staff Recommendation

While periodic assessment of policies can be beneficial to guard against unexpected results or inefficient process, the GNSO Council should consider the perspective of the majority of the ICANN community, and the advice of the Government Advisory Committee (GAC), and the At-Large Advisory Committee (ALAC), with regard to whether such review is necessary or warranted. Although properly within the scope of the GNSO's mandate, Staff recommends that a PDP on the UDRP not be initiated at this time. Staff recommends that a PDP be delayed until after the New gTLD Uniform Rapid Suspension System (URS) has been in operation for at least eighteen months. Doing so would allow the policy process to be informed by data regarding the effectiveness of the URS, which was modelled on the UDRP, to address the problem of cybersquatting.

However, if the GNSO Council determines that the UDRP should be reviewed immediately, Staff suggests that the GNSO Council consider alternatives to commencing a PDP for addressing this issue. After carefully evaluating the issues and concerns expressed by the ICANN community regarding the UDRP, many of those concerns relate to *process* issues associated with the *implementation* of the UDRP, rather than the language of the policy itself. The GNSO Council should consider, in lieu of commencing a PDP, recommending that ICANN convene a small group of experts representing the different community viewpoints to produce recommendations to improve the *process or implementation* of the UDRP policy as an initial step. These "expert" process recommendations, to the extent they

⁴ More information on the UDRP Webinar is posted at:
<https://community.icann.org/display/gnsoudrpd/Webinar+on+the+Current+State+of+the+UDRP>.

target changes in the behavior of the UDRP providers, could be implemented after they are recommended by the GNSO Council, and approved by the ICANN Board. If after consideration of such expert recommendations, there continues to be a desire to conduct a more thorough review of the UDRP, or if the recommendations are intended to affect the obligations of the contracted parties, the GNSO Council could subsequently initiate a more focused PDP at that time.

2. Objective and Next Steps

The objective of this Report is to inform the GNSO Council of the current state of the UDRP in advance of the Council's vote on whether to commence a policy development process (PDP) on this important policy. Preparation of an Issue Report is a required first step under the ICANN Bylaws before a PDP can be initiated.

This Report also addresses the GNSO's specific request for information on:

- How the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies/inequalities associated with the process.
- Whether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated.

A Preliminary Issue Report⁵ on the Current State of the UDRP was published for public comment to allow for the ICANN community to provide feedback on the analysis and recommendations contained therein.⁶ A summary of the comments submitted on the Preliminary Issue Report is referenced in [Annex 4](#) to this Report. In addition, the GAC and ALAC submitted statements (attached in [Annex 5](#)) informing the GNSO Council of their advice with regard to whether a PDP on the UDRP should be commenced.

⁵ Although the Bylaws do not refer to a "Preliminary" or "Final" Issue Report, Staff adopted this new format in consultation with the GNSO Council. The GNSO Council is in the midst of completing its restructuring activities and is undergoing a wholesale revision of its policy development processes. The new PDP model to be approved shortly by the Council accommodates a more flexible time-frame and consultative approach to delivering the Issue Report, and introduces the concept of a "Preliminary" Issue Report to be published prior to the "Final" Issue Report. In the case of the UDRP, the GNSO Council suggested that Staff follow this new approach. It is hoped that by adopting the new model, this Final Issues Report is more meaningful, as it includes the Community's perspective gleaned from the comments submitted during the public comment forum.

⁶ The Public Comment Forum is posted at: <http://www.icann.org/en/public-comment/prelim-report-udrp-27may11-en.htm>.

3. Background on the UDRP

The UDRP⁷ was created in 1999. The initial idea for a uniform policy was proposed by the World Intellectual Property Organization (WIPO), in recommendations called for in the US White Paper on the Management of Internet Domain Names. The Domain Name Supporting Organization (DNSO)⁸ considered WIPO's recommendations, and the DNSO Names Council ultimately forwarded consensus position recommendations to the Board on a uniform dispute resolution policy. The Board then directed ICANN's President to convene a representative working group to draft plans for the implementation of the DNSO Council policy. The Board approved the UDRP on 24 October 1999. Since the UDRP was enacted, over 30,000 UDRP complaints have been commenced with ICANN approved dispute resolution providers.⁹

Two documents are required for universal, uniform operation of the UDRP. The first is the policy itself, at <http://www.icann.org/en/dndr/udrp/policy.htm>, setting out the scope of relief and the basis for mandatory administrative hearings that may be brought. The second document is the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), at <http://www.icann.org/en/dndr/udrp/uniform-rules.htm>, which provide the baseline procedural requirements that must be followed in a UDRP proceeding, such as required notice to a respondent, time for filing a response, and standardization of a practice for appointing of the administrative panel in every UDRP proceeding. These Rules

⁷ The UDRP is posted at <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

⁸ The precursor to today's GNSO.

⁹ A review of the WIPO and National Arbitration Forum (NAF) websites list over 30,000 cases in their historical databases of commenced UDRP proceedings. There are other UDRP providers for which historical information is not as easily accessed, and general trends show that WIPO and NAF combined oversee more than 75% of UDRP proceedings commenced in recent years.

were developed with the assistance of a select group of experts that were convened to assist with the implementation of the UDRP.¹⁰

The UDRP has not been amended since Board approval in October 1999. As the UDRP was created through the predecessor to the GNSO policy development process (PDP), substantive changes to the UDRP are appropriately achieved through a new GNSO PDP. However, changes to the UDRP rules and procedures can be accomplished without going through a new GNSO PDP. For example, on 30 October 2009, the ICANN Board approved changing the Rules to allow for electronic filing of complaints (previously required in hard copy), so long as hard copy notification that a complaint has been filed is provided to a respondent.¹¹

The UDRP is applicable to all names registered in gTLDs as imposed through the Registrar Accreditation Agreement (RAA).¹² RAA Section 3.8 states:

“3.8 Domain-Name Dispute Resolution. During the Term of this Agreement, Registrar shall have in place a policy and procedures for resolution of disputes concerning Registered Names. Until different policies and procedures are established by ICANN under Section 4, Registrar shall comply with the Uniform Domain Name Dispute Resolution Policy identified on ICANN's website (icann.org/general/consensus-policies.htm)”.

The obligations to comply with the UDRP flow through to the registered name holders under 3.7.7.11 of the RAA, which requires each registrar to include the following in the registration agreement it enters with registered name holders:

“3.7.7.11 The Registered Name Holder shall agree that its registration of the Registered Name shall be subject to suspension, cancellation, or transfer pursuant

¹⁰ For more information on the process followed by ICANN to implement the UDRP, please see:

<https://community.icann.org/display/tap/1999-10-24+-IMPLEMENTATION+OF+UNIFORM+DISPUTE+RESOLUTION+POLICY>

and <http://www.icann.org/en/udrp/udrp-schedule.htm>.

¹¹ <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>.

¹² The RAA is posted at: <http://www.icann.org/en/registrars/agreements.html>.

to any ICANN adopted specification or policy, or pursuant to any registrar or registry procedure not inconsistent with an ICANN adopted specification or policy, (1) to correct mistakes by Registrar or the Registry Operator in registering the name or (2) for the resolution of disputes concerning the Registered Name.”

4. Research Conducted on the UDRP

In response to the GNSO Council's request, Staff conducted preliminary research on the UDRP to identify issues for inclusion in this Report. Due to the tremendous volume of treatises, academic journals, cases and commentaries published on the UDRP (including, over 300,000 hits on Google alone) over the last decade, there was no evident way to look through these materials in a timely manner.

To support Staff's research activities, the GNSO Council convened a drafting team¹³ that focused on two efforts to quickly discern the current community thinking on the UDRP. These included the UDRP Webinar conducted on 10 May 2011,¹⁴ and a UDRP Questionnaire sent to each of the ICANN approved UDRP providers. The responses received from the UDRP providers are attached as [Annex 3](#) to this Report.

The Webinar speakers were selected by the UDRP Drafting team based in part on recommendations from the UDRP providers. The speakers reflected a broad cross-section of perspectives from various stakeholders with expertise in the UDRP and its administration, such as registrars, UDRP service providers, UDRP complainants and respondents, ICANN's Contractual Compliance Department, and academics. The information gleaned from the UDRP Webinar, the UDRP Questionnaires, and the contributions from the Public Comment Forum guided the preparation of this Report, and helped shape the Staff recommendations and opinions described below.

Some commentators disapproved of the limited nature of the research referenced by Staff in the Preliminary Issue Report and suggested that the Staff instead consider the vast

¹³ Information on the UDRP Drafting Team's activities are posted on the ICANN Wiki at: <https://community.icann.org/display/gnsoudrpd/Home>.

¹⁴ A recording and transcript of the UDRP Webinar is available at: <https://community.icann.org/display/gnsoudrpd/Webinar+on+the+Current+State+of+the+UDRP>.

amount of literature written on the UDRP over the last decade.¹⁵ While research has been limited, the path taken towards evaluating the community experience with the UDRP was formed with the GNSO Council's drafting team.¹⁶ Though additional research may be beneficial, Staff suggests that the GNSO Council consider whether an extensive review of all literature published on the UDRP to date is desirable now, or whether such research is more appropriately conducted should a PDP be initiated, as well as the incremental value of the results of that research in comparison to the resources such an exhaustive survey would require.

¹⁵ See comments of Milton Mueller and the comments of the NCUC, submitted in the Public Comment Forum.

¹⁶ See the mailing list archives for the UDRP Drafting Team posted at: <http://forum.icann.org/lists/gnso-udrp-dt/>.

5. Community View of the Current State of the UDRP

5.1 Effectiveness of the UDRP

The UDRP has won international respect as an expedient alternative to judicial options for resolving trademark disputes arising across multiple national jurisdictions. This view was broadly shared during the UDRP Webinar by representatives of a broad cross-section of the Internet community, and by many contributors to the Public Comment Forum.

The UDRP is widely recognized as effective because it is much faster than traditional litigation.¹⁷ As reported in the National Arbitration Forum's (NAF) Questionnaire response, since January 2010, NAF's time to decision from filing averages 46 days, and from commencement averages 38 days.

Many recognize the benefit of maintaining the current model, which has evolved over the last decade through the processes that have been adopted by UDRP providers. Today's UDRP reflects the collective wisdom developed by providers, panelists, complainants, and respondents, as reflected in the large body of published decisions, commentaries, and other educational materials maintained by providers for the benefit of the public.

According to James Carmody, a UDRP panellist since 2000, remarkable changes have occurred in the way in which the system has been administered. This is due in large part to efforts by providers such as WIPO and NAF to streamline the administration of their procedures and to dedicate educate panelists to achieve consistency in decisions. He has witnessed increased sophistication by complainants and respondents in the handling of UDRP cases. Panelist David Bernstein remarked that because all UDRP decisions are published, "it's open for the community to see, for the community to debate the way in

¹⁷ See comments of David Taylor, on behalf of Hogan Lovells, John Berryhill, and Phil Corwin, on behalf of the Internet Commerce Association, summarized in the Public Comment Forum.

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.”

As noted in NAF’s Questionnaire response, “the UDRP is fluid. Panelists have been able to apply the UDRP to situations unforeseen in 1999. Pay per click, phishing, and mousetrapping were practices created since 1999, yet UDRP panels have been able to apply the UDRP appropriately.”

It would be incorrect to leave the impression that the UDRP is above criticism or cannot be improved. Milton Mueller points to the many articles, books and treatises published over the last decade that are critical of the UDRP.¹⁸ However, as noted by Kristine Dorrain of NAF, many undoubtedly have a wish list of things that they would like to see changed to make the process flow more smoothly for them, or to increase their likelihood of success. The fact that people and organizations, have taken the opportunity to air their frustrations with the process should not be taken as an indication that immediate fixes are needed.¹⁹

As noted by several commentators²⁰, the Internet community has come to rely on the transparency, predictability, and consistency associated with the UDRP. This effectiveness has led to it’s serving as a model for several ccTLD registry dispute resolution policies such as those used in .cn and .hk., and for some ccTLD registries (such as .be) that have implemented variations of the UDRP.²¹

¹⁸ See comments of Milton Mueller, in the Public Comment Forum.

¹⁹ See comments of Kristine Dorrain, in the Public Comment Forum.

²⁰ See comments of Phil Corwin in the Public Comment Forum, on behalf of the Internet Commerce Association, and Julian Crump, on behalf of the International Federation of Intellectual Property Attorneys.

²¹ See comments of the NCUC in the Public Comment Forum, and Alexandre Cruquenaire in the Public Comment Forum.

5.2 Perspectives on Whether the UDRP is Fair

Many in the ICANN community believe that by accommodating evolving norms and practices, the UDRP has proven to be a flexible and fair dispute resolution system.²² Only the rarest of the tens of thousands of UDRP decisions have been successfully challenged in court.²³ As noted by Panelist Tony Willoughby, this is “a huge tribute to the success of the system.” The majority of those who commented on the fairness of the UDRP in the Public Comment Forum, agreed that the UDRP is generally a fair system.

For domain registrants, the UDRP provides an environment in which to present their dispute and have it evaluated in a way that would not be possible for many if the only alternative was litigation in an inconvenient jurisdiction. Panelist Matthew Harris portrays the UDRP as a “balanced tool that takes into account competing interests” while protecting the interests of rights holders. Panelist David Bernstein describes the UDRP as a “process 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.”

Respondent Counsel Ari Goldberger sees the UDRP as “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.” Mr Goldberger described his first-hand experience in successfully defending a costly cybersquatting case involving one of his domain names prior to the adoption of the UDRP in 1996. “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.”

²² See comments of Steve Metalitz, on behalf of the Coalition for Online Accountability, and Claudio DiGangi, on behalf of the International Trademark Association, in the Public Comment Forum.

²³ The responses to the UDRP Questionnaire indicate that very few UDRP decisions are appealed to the knowledge of the providers (one case, or .1% from the Asian Domain Name Dispute Resolution Centre, “fewer than five” per year from the NAF, 0 from the Czech Arbitration Court). It is noted, however, that providers may not receive notice of all appeals or challenges in court.

The UDRP Questionnaire responses shed light on how the UDRP is fair to respondents. For example, the NAF explains that “UDRP decisions are not made on a straight-default basis. There are cases where panelists find for respondents, even when the respondents didn’t appear, just on the record before it, or the lack of record in some cases.” The UDRP Questionnaire responses also reveal that in a large percentage of cases, respondents are not represented by counsel (approximately 86% for NAF, 80% for the Asian Domain Name Dispute Resolution Centre, and 70% for the Czech Arbitration Court). These statistics suggest that the simplicity of the UDRP allows respondents to defend themselves without incurring significant expense.

A minority of commentators disagreed with the widely-held view that the UDRP is fair. For example, Konstantinos Komaitis states that a close look at the UDRP and its rules demonstrates the fundamental unfairness of the mechanism.²⁴ A number of Non Commercial User Constituency (NCUC) members believe there should be a review of the ability to protect freedom of expression guarantees and the fair use or other non-commercial rights of domain name registrants.²⁵

Some in the trademark community hold the view that the UDRP is inefficient and unfair to rights holders. According to trademark attorney Paul McGrady, the UDRP is inefficient because complainants have no means of identifying all of the domain names owned by a single respondent, which leads to the need to file additional complaints and incur additional expenses. In addition, he also notes the difficulties of identifying the proper respondent often leads to unnecessary costs to both providers and complainants.

With respect to inequalities, he notes that “UDRP proceedings cost brand owners millions of dollars a year and they cost the squatter community almost nothing.” Mr. McGrady sees unfairness in that the “conjunctive bad faith requirements allow gaming” and that the

²⁴ See comments of Konstantinos Komaitis, submitted in the Public Comment Forum.

²⁵ See comments of the NCUC, submitted in the Public Comment Forum.

respondent controls the jurisdiction of any appeals, thereby increasing costs to rights holders.

5.3 Advice from ICANN Advisory Committees and Supporting Organizations

Under the ICANN Bylaws, advisory committees such as the GAC and the ALAC may provide advice to the GNSO Council on matters within their remit.²⁶ The GNSO Council should consider any advice given by an advisory committee, but is free to exercise its independent discretion to follow or disregard such advice, as appropriate.

On 14 September, 2011 the GAC submitted a statement of advice directly to the GNSO Council, expressing the GAC's concern about the possible initiation of a PDP to review the UDRP. The ALAC submitted similar comments through the Public Comment Forum on the Preliminary Issue Report. As the GAC and ALAC play an important role in the ICANN "ecosystem" and represent key stakeholders within ICANN, Staff encourages the GNSO Council to consider the advice of the GAC and ALAC (included in [Annex 5](#)) as it deliberates on whether to commence a PDP on the UDRP.

The GNSO Council should consider the possible ramifications of the GAC's advice if a PDP is initiated. Under the Bylaws,²⁷ "the GAC may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." To the extent that the GNSO Council determines to move forward with the initiation of a PDP and produces recommendations for approval by the Board, the GAC may choose to raise its concerns as advice directly to

²⁶ Under Article XI, Section 2.4 "[t]he role of the ALAC shall be to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN's Supporting Organizations, as well as the many other issues for which community input and advice is appropriate." Similarly, under Article XI, Section 2.1(j) states that: "[t]he advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies."

²⁷ See ICANN Bylaws, Art. XI, Section 2.1(i).

the Board. The availability of GAC advice to the Council on this issue may be a factor for the GNSO Council to consider in deciding whether to initiate a PDP to review the UDRP at this time. As a result, the Council could consider meeting with the GAC to better understand its concerns with respect to the UDRP.

The GAC Statement of Advice to the GNSO Council ([Annex 5](#)), explains that initiating a PDP on the UDRP at the same time as the new gTLD launch would have public policy implications that are of concern to the GAC. Specifically, the inevitable uncertainty associated with the introduction of the new untested rights protection mechanisms (RPMS) for new gTLDs “would be compounded if simultaneously the future of the primary, pre-existing, and proven RPM - the UDRP - were also subject to uncertainty as a result of a long-running PDP.” The GAC points to statements made by the ICANN Board that referenced the continued availability of “the existing, long-standing and tested [UDRP]” as an important aspect of the New gTLD Program.

The GAC considers that any review of the UDRP should be conducted in light of community experience with the new gTLD RPMs, and should take full account of ccTLDs’ use of the UDRP. While the GAC is not opposed in principle to a review of the UDRP at an appropriate time, the GAC considers that a review at this time would not be appropriate.

Similarly, the ALAC agrees with the recommendation that a PDP on the UDRP should not be commenced at this time. The ALAC advises that modifications to the UDRP should wait until a detailed and thorough analysis of the UDRP policies and its practices have been completed. It notes that “the voices that strongly support a PDP do not represent the consensus- and do not objectively represent the policies of the last ten years.”

The ALAC considers the recommendation that a small group of experts be convened to produce proposals for improvements to the process or implementation of the UDRP to be

a cause for concern. In the view of the ALAC, the evolution of the UDRP over the last ten years has not been conducted in an appropriate manner (U.S. centric, and plagued with conflicts-of-interests), and advocates for a broader approach to addressing the issue, in order to be more multi-stakeholder and global in scope. In addition, ALAC urges ICANN to do a better job of translating the UDRP related website content in order to facilitate understanding of the UDRP among non-English speakers around the world.

5.4 Other Observations from the Public Comment Forum

A majority²⁸ of contributors (consisting of stake holder groups, supporting organizations, UDRP providers, IP-related groups and individuals) either opposed the initiation of a PDP which would substantively review the UDRP, and/or recommended that any PDP be delayed to a later date. Among those that suggested a delay, the most common suggestion was to commence a PDP either after the new gTLDs are launched or, in conjunction with or after the review of the URS, mandated to take place 12-18 months after the launch of the new gTLDs. Another primary concern of contributors which opposed a PDP was the lack of ICANN staff and community resources given the necessary preparation for and implementation of the new gTLDs. Groups and organizations supporting the initiation of a PDP at this time included the Registry Stakeholder's Group, the NCUC and Internet Commerce Association. Key reasons to support a PDP at this time include, a desire to encourage ICANN to make the UDRP as effective as possible prior to the launch of the new gTLDs, providing a means for all stakeholder groups to participate in reviewing and improving the UDRP, and expressing concerns that a PDP is the only method available to address and change key procedural and policy issues.

The ICANN community as represented by the contributors appears to be split as to the issue of whether a long-standing policy such as the UDRP, which is generally viewed as

²⁸ Approximately 16 contributors opposed a PDP or suggested a delay, versus six contributors that advocated for commencing a PDP.

being effective, should be reviewed. The two primary divergent views are that it is a basic best practice to review all long-standing policies after implementation, versus that a review should not be conducted simply for the sake of form if the policy is generally viewed as being effective and serves the community well.

6. Issues Identified by the ICANN Community

Over the years, numerous substantive and procedural issues have been raised with respect to the UDRP and its processes. [Annex 2](#) includes a brief summary of the issues recently highlighted in the UDRP Webinar and in the Public comment Forum that could be addressed as part of a review of the policy and its procedures. This summary is meant to be illustrative, rather than exhaustive, of the issues raised by the UDRP and its implementation. Included in the responses to the Questionnaires found in [Annex 3](#) is a list of resources and additional information regarding the UDRP and its administration. A few submissions in the Public Comment Forum suggested additional documents and publications written on the UDRP that could be further reviewed to identify issues.²⁹ In event the GNSO Council initiates a PDP on the UDRP, these resources should be reviewed to compile a more complete list of procedural and substantive issues to evaluate within the PDP.

6.1 Possible Focus on Process Improvements

Several experts noted areas where the process could be improved, if the UDRP is to be reviewed at all. NAF's Christine Dorrain notes that although NAF was not advocating changes to the UDRP, "there are places in the UDRP that the drafters could not have forecasted to be procedurally problematic at the time the UDRP was drafted." Panelist David Bernstein suggests that there may be some very technical points, as raised by the registrars and the providers, that can be made from time-to-time as technical developments warrant. However, in Staff's view, these may not necessarily require that an entire policy development process be started.

Respondent counsel John Berryhill explained that it is important to separate proposals into procedural and substantive changes. He believes there can be a productive discussion on

²⁹ See [Annex 4](#) to this Issue Report.

certain procedural aspects, and, in particular, with regards to review of the provider supplemental rules. Similarly, respondent counsel Goldberger is 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.”

Professor Cédric Manara suggests review of the documentary evidence rules, citing examples of where documents may have been altered or modified for use in UDRP proceedings.

6.2 Consideration of the Appropriate Time for a UDRP Review

Many in the ICANN community believe that now is not the best time to review the UDRP. WIPO’s Erik Wilbers³⁰ writes that:

Irrespective of one’s views on its functioning, the UDRP must interoperate with other RPMs being developed for New gTLDs, in particular the URS which also addresses registrant behavior. The URS is as yet unsettled and presents serious issues in terms of its workability; its procedural and jurisprudential interaction with the UDRP remains largely unaddressed. Even if such issues were satisfactorily resolved, this new RPM 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 expansion, and it would be highly unwise to risk its destabilization at this time.

Many contributors to the Public Comment Forum agree with WIPO’s observations. The contributors prefer that if a PDP is to be conducted on the UDRP, it should be timed to occur at the same time as the review of the URS, to be conducted approximately 18

³⁰ See WIPO’s written observations dated May 6, 2011, posted at [Annex 3](#) of this Report.

months after the URS has been in effect. As noted in the Statement by the Intellectual Property Constituency, “it might be appropriate to consider if there is justification for a UDRP PDP review in a few years when the URS is subject to review. At that time, the GNSO could have the benefit of knowing how the new gTLD launch has proceeded, how the UDRP and URS work together to protect the interests of stakeholders, and whether there are specific problems that require a UDRP PDP. Otherwise, a UDRP PDP is likely to become bogged down in a fruitless and uninformed debate among polarized parties with disparate views.”³¹

Similarly, 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. Instead of, in her view, possibly compromising the UDRP, Aimee Gessner states that “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.” WIPO’s Wilbers agrees, and notes that “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.”

As suggested by Adam Scoville of RE/MAX, another benefit of delaying a PDP to a time when ICANN has the benefit of a couple of years of experience in the practical operation of the URS, is that the PDP could focus on reviewing and harmonizing the two procedures, in conjunction with applying the URS to all gTLD registries.³²

A few commentators point to the fact that the UDRP has been in effect for over ten years as a reason for conducting a PDP now. The NCUC observes that “[a]fter more than a

³¹ See comments of J.Scott Evans, on behalf of the Intellectual Property Constituency, submitted in the Public Comment Forum.

³² See comments of Adam Scoville, on behalf of RE/MAX, submitted in the Public Comment Forum.

decade of practice and evidence, this policy is beyond ripe for review.³³ The Registry Stakeholder Group concurs, and notes that it is a matter of best practice to review all policies that have been in place for a substantial length of time and that “this seems even more important in the case of a consensus policy like the UDRP.”³⁴ However, WIPO disagrees, and believes that the “passage of time” is not a compelling motive for any revision to the UDRP because in this case, the UDRP’s overall positive functioning is “clearly recognized” by experts.³⁵

6.3 Effectiveness of the UDRP Following a PDP

The general sentiment from the UDRP Webinar is that although it is not perfect, the UDRP should be untouched. This sentiment was also shared by a majority of commentators in the Public Comment Forum. Many share the view that opening up the policy to a PDP may ultimately undermine it.

Neil Brown, a UDRP panelist, observed that the policy and the rules associated with the UDRP already provide the framework for a good system. In his view, improvements are more likely to be found in applying the policy and rules properly in their own terms, rather than changing them. Similarly, WIPO’s Wilbers observed that “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.” Panelist Tony Willoughby exclaimed: “[b]ut 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.”

³³ See comments of Konstantinos Komaitis, on behalf of the NCUC, submitted in the Public Comment Forum.

³⁴ David Maher, on behalf of the Registry Stakeholder Group, submitted in the Public Comment Forum.

³⁵ See comments of Brian Beckham, on behalf of WIPO, submitted in the Public Comment Forum.

Panelist Matthew Harris expressed scepticism on whether a formal redrafting of the UDRP itself would be particularly useful. He expressed concerns that amendments to the policy may undermine its efficacy as a tool for dealing with cyber-squatting.

Should the policy be improved? As stated by Panelist David Bernstein, the real difficulty will be in getting everyone on the same page, on finding some consensus on what should be changed. Aimee Gessner, Senior Trademark Counsel for BMW, is concerned that opening up the UDRP may result in lobbying and politics that might change it in ways that cause more harm than good. Respondent counsel John Berryhill agrees that “while the UDRP is not without some problems and aggravations, we do run the risk of creating more harm and more problems by ... generally throwing the procedure open.”

Respondent counsel Ari Goldberger remarked “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.”

Not everyone agrees that the UDRP should be left alone. Professor Konstantinos Komaitis believes that the UDRP suffers from various procedural and substantive flaws. He finds it quite concerning that “the UDRP has not been reviewed until now. It’s 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, he too notes the need to be very careful in its review and suggests looking at issues that were left out at the inception or that have manifested themselves as problems over the last decade. Professor Komaitis points to the lack of due process procedures and protections for free speech as a reason to conduct a review of the UDRP.

Some question the opinion that a PDP could undermine the effectiveness of the UDRP. For example, ALAC observes that “it cannot be said that any amendment will undermine the current policy, and it is impossible to make predictions on these matters.”³⁶ However, as noted by David Taylor, “one of the main strengths of the UDRP is the consistency it provides in terms of decision making, as reflected in the large body of published decisions which, even though they are not binding, generally ensure consistency; it is feared that this consistency could be affected by attempts to revise the UDRP.”³⁷ Similarly, others note that much of the controversy surrounding the new URS process that all new gTLDs will be required to implement turned on how the URS would interface with the UDRP. In the view of the Coalition for Online Accountability, changes to the UDRP while the URS is being introduced could have unanticipated consequences on the latter.³⁸

6.4 Utilization of an Expert Panel to Address Process Issues

In the Public Comment Forum, several submissions highlighted concerns with the suggestion that a panel of experts could be convened to focus on “process” related improvements in lieu of conducting a PDP on the policy. In the view of the Registry Stakeholder Group, “(c)onvening a small group of ‘experts’ cannot be a substitute for the bottom-up policy development process that is the backbone and foundation of ICANN.” The Business Constituency and the Intellectual Property Constituency disagree, and support the call to convene a select group of experts to focus on process improvements of greatest importance.

Others caution that the selection process for the composition of the expert panels needs to ensure global representation and a reflect a diversity a broad range of views.³⁹ The ALAC

³⁶See the ALAC Statement on the UDRP, posted on [Annex 5](#) of this Report.

³⁷ See comments of David Taylor, submitted on behalf of Hogan/Lovells.

³⁸ See comments of Steve Metaliz, submitted on behalf of SM, on behalf of the Coalition for Online Accountability.

³⁹ See the ALAC Statement on the UDRP submitted in the Public Comment Forum.

considers this Staff recommendation to convene a small group of experts to be a cause for concern. ALAC notes that the UDRP was drafted by a small group of experts primarily from North America a decade ago. According to ALAC, its clear basis in American law actually has plagued its implementation. ALAC suggests that if the UDRP is to be reviewed or studied, the group doing so should be open to all five geographical regions – especially to experts from the non-Latin-language community and worldwide Internet community, who have no conflicts of interest. In other words, according to ALAC, the group should not be limited to the “existing elite club known to ICANN.”⁴⁰ Similarly, the NCUC does not support having this process carried out by what it describes as “an arbitrarily selected group of experts.” In its statement, the NCUC points out that “the community learned a valuable lesson with the failure of the single-constituency-driven Implementation Review Team (IRT), and created the subsequent Special Trademark Issues Team (STI), which reached unanimous consensus within the GNSO and drew much less criticism concerning issues of bias or misrepresentation, because it had incorporated members from across the community.”⁴¹

6.5 ICANN’s Relationship with UDRP Providers

Several contributors to the Public Comment Forum believe that ICANN should have a more formalized accreditation process of UDRP providers. For example, the Business Constituency recommends that ICANN move toward a contractual relationship with UDRP providers to allow ICANN authority for oversight and review.⁴² Staff notes that even without a formal contractual relationship, ICANN can establish regular and standardized review of the UDRP providers, and maintains flexibility in assuring provider compliance with the policy.

⁴⁰ See the ALAC Statement on the UDRP, submitted in the Public Comment Forum.

⁴¹ See comments of Konstantinos Komaitis, on behalf of the NCUC.

⁴² See comments of Steve Del Bianco, on behalf of the Business Constituency.

Commenters suggested that a formal accreditation process may be beneficial to address certain provider-related issues.⁴³ Though not recognized by some commenters, Staff observes that the existing 10-factor approval process does assure that providers demonstrate understanding of UDRP requirements and allows ICANN review of provider considerations of panelist education, training and selection. Moreover, the existing process incorporates and relies upon public comment to assist in the review and evaluation of how potential providers may meet these qualifications.

6.6 Community Bandwidth Constraints

In its comments, the ALAC highlighted the complexity of the UDRP issue, as it is one of the oldest policy systems that ICANN has used throughout the world and was developed when the practices of "good" and "abusive" domain name registration first came to light. INTA expressed its concern that there is not enough available Staff and community resources to effectively manage a PDP given the necessary preparations and implementation of the new gTLD procedures and policies. Other contributors to the Public Comment Forum recognize that the ICANN's launch of new gTLDs will consume considerable resources and should be given a high priority. Several contributors indicated that there is no pressing need to initiate a UDRP PDP at this time, and that ICANN should not divert its limited resources to such a process in the face of other, more urgent needs.

⁴³ See comments of Alexandre Cruquenaire, of the University of Namur, and Jim Davies, of Elevation Legal.
Final Issue Report: UDRP

7. Staff Recommendation

7.1 Scope

In determining whether the issue is within the scope of the ICANN policy process and the scope of the GNSO, Staff and the General Counsel's office have considered the following factors:

Whether the issue is within the scope of ICANN's mission statement

The ICANN Bylaws state that:

"The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
 - a. domain names (forming a system referred to as "DNS");
 - b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and,
 - c. protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.
3. Coordinates policy development reasonably and appropriately related to these technical functions."

Designed to address trademark infringement in the registration of domain names, the UDRP is a policy that serves to preserve and enhance the operational stability, reliability, security and interoperability of the Internet.

Whether the issue is broadly applicable to multiple situations or organizations.

As the UDRP applies uniformly to all registrants of gTLDs and to all registrars, the issue is broadly applicable to multiple situations or organizations. Any changes to the policy or the rules that may result from a PDP would also be broadly applicable to multiple situations or organizations.

Whether the issue is likely to have lasting value or applicability, albeit with the need for occasional updates.

As previously discussed, the UDRP has had lasting value, having been in operation for over ten years, and continues to have applicability in today's domain name market. Any updates to the UDRP would have to be undertaken in a way that ensures its continued viability and value for many more years, and it is not clear that the ICANN community believes that such an outcome is possible.

Whether the issue will establish a guide or framework for future decision-making.

As one of the earliest consensus-driven policies adopted by ICANN, conducting a review of the UDRP could be instructive as a guide or framework for how to conduct reviews of other policies that have been in place for many years, and that affect many ICANN stakeholders. However, issues such as the timeliness of such review, and the Community perspective on whether such a review is necessary, should be considered when determining whether to undergo an extensive evaluation of the UDRP.

Whether the issue implicates or affects an existing ICANN policy.

The UDRP, an existing ICANN policy, is implicated, and would be affected by any change.

Given the significant number of issues raised by the UDRP (as reflected on [Annex 2](#)), Staff believes that it is possible that a PDP could produce numerous changes to the policy and the processes. In such case, the new policy emerging from the PDP may adversely affect

the reliability and certainty associated with the present interpretation of the UDRP. For example, there may be confusion in the Internet community following a UDRP policy change regarding how to interpret the new policy wording or whether prior published decisions can continue to serve as “precedence.”

In addition, should a PDP produce changes to the UDRP, it could affect the implementation of the policy on the introduction of New gTLDs. As cited by several commentators in the Public Comment Forum,⁴⁴ the UDRP is one of the key RPMs for the New gTLD Program, and it is possible that some changes to the UDRP may affect the other RPMs (such as the URS), or other aspects of the New gTLD Program (such as the Registry Agreement).

Based on the foregoing, it is the opinion of the ICANN General Counsel that commencing a PDP on the UDRP would be in scope for the GNSO Council.

7.2 Resources to Support a PDP

As of this writing, the GNSO has convened approximately twenty-five policy and restructuring related groups to address a wide range of topics.⁴⁵ Many of these existing groups experience sporadic attendance and, in some cases, very low participation by some constituencies and inconsistent participation by others.

In this environment, the GNSO Council will need to consider, taking into account the current workload and resources, whether there is sufficient bandwidth to take on a review of the UDRP at this time, or whether other projects need to be halted should it decide to move forward. Staff believes that the issue of the UDRP is highly complex and will likely require significant attention from the community members likely to participate in the PDP effort. The complexity of the UDRP issue, as illustrated by the over 50 issues identified in

⁴⁴ See discussion in Section 6.

⁴⁵ For more information, please refer to the GNSO Council’s Pending Projects List posted at: <http://gns0.icann.org/meetings/pending-projects-list.pdf>.

[Annex 2](#), points to a PDP that will require significant Staff and Community resources. The GNSO Council should also consider whether the convening of a new group would draw volunteers away from other projects, considering the limited number of community volunteers available.

If the GNSO Council elects to proceed with a PDP, Staff recommends that the Council identify the specific projects to be delayed or placed in lower priority in order to accommodate the work that would be required to complete this PDP. Staff is fully prepared to support a PDP on the UDRP, in the event the GNSO Council determines that it should be prioritized over existing work.

7.3 Recommended Action

While periodic assessment of policies can be beneficial to guard against unexpected results or inefficient process, the GNSO Council should consider the general sentiment held by many in the ICANN community, and the advice of the GAC and ALAC, with regard to whether such review is necessary or warranted. Although properly within the scope of the GNSO's mandate, Staff recommends against initiating a PDP on the UDRP at this time. Staff recommends that a PDP be delayed until after the URS has been in operation for at least eighteen months. Doing so would allow the policy process to be informed by data regarding the effectiveness of the URS, which was modelled on the UDRP, to address the problem of cybersquatting. This recommendation mirrors the general sentiment of many in the ICANN community as highlighted in Section 3 of this Report, and in the Public Comment Forum, that commencing a PDP on the UDRP may ultimately undermine it, and potentially adversely affect the many Internet stakeholders who benefit from its current implementation.

However, if the GNSO Council believes that the UDRP should be reviewed at this time, Staff suggests an alternative approach for addressing this issue. After carefully evaluating the issues and concerns expressed by the ICANN community regarding the UDRP, Staff has

concluded that many relate to process issues associated with the implementation of the UDRP, rather than the language of the policy itself. The GNSO Council could consider in lieu of commencing a PDP, recommending to the Board that ICANN convene a small group of experts to produce recommendations to improve the process or implementation of the UDRP policy as an initial step. The selection criteria for these experts could be developed by the GNSO Council, to ensure global representation and a broad diversity of views. The Expert Panel could be tasked with publishing an initial report for public comment, to be followed by a final report. This expert final report could then be reviewed by the GNSO Council, and if appropriate, forwarded to the Board for adoption. To the extent that these expert recommendations result in modifications to certain of the UDRP Rules or suggested changes for provider Supplemental Rules to align with the UDRP Rules, these may be adopted by the ICANN Board without the necessity of undertaking a complete PDP. This approach is consistent with ICANN's past practice, where electronic filing rules were adopted by the ICANN Board in 2009. After consideration of such expert recommendations, if there continues to be a desire among the GNSO Council to conduct a more thorough review of the UDRP, or if the expert recommendations point to the need for substantive policy changes, or additional obligations on the contracted parties, a more focused PDP could be initiated at that time.

Annex 1 – GNSO Council Request for Issue Report

Motion Approved by the GNSO Council 3 February 2010:

Motion in response to the Registration Abuse Policies Working Group (RAP WG) final report.

Whereas the Registration Abuse Policies Working Group submitted its report to the GNSO Council on 29 May 2010 (see <http://gns0.icann.org/issues/rap/rap-wg-final-report-29may10-en.pdf>), and

Whereas the GNSO Council reviewed the report and its recommendations and decided to form an implementation drafting team to draft a proposed approach with regard to the recommendations contained in the Registration Abuse Policies Working Group Final Report, and

Whereas the Registration Abuse Policies Implementation Drafting Team submitted its proposed response to the GNSO Council on 15 November 2010 (see <http://gns0.icann.org/correspondence/rap-idt-to-gns0-council-15nov10-en.pdf>),

and

Whereas the GNSO Council considered the proposed approach at its Working Session at the ICANN meeting in Cartagena.

RESOLVED #1, the GNSO Council instructs ICANN Policy Staff to forward the two issues identified by the RAP IDT as having low resource requirements, WHOIS Access recommendation #2 and Fake Renewal Notices recommendation #1, to ICANN Compliance Staff for resolution. ICANN Compliance Staff is requested to provide the GNSO Council with its feedback on the two recommendations and proposed implementation in a timely manner.

RESOLVED #2, the GNSO Council requests an Issues Report on the current state of the UDRP. This effort should consider:

- How the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies/inequalities associated with the process.

- Whether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated. The Issue Report should include suggestions for how a possible PDP on this issue might be managed.

RESOLVED #3, the GNSO Council requests a discussion paper on the creation of non-binding best practices to help registrars and registries address the abusive registrations of domain names in accordance with the Registration Abuse Policies Working Group Final Report.

This effort should consider (but not be limited the following subjects:

- Practices for identifying stolen credentials
- Practices for identifying and investigating common forms of malicious use (such as malware and phishing)
- Creating anti-abuse terms of service for possible inclusion in Registrar-Registrant agreements by registrars who adopt them, and for use by TLD operators who adopt them.
- Identifying compromised/hacked domains versus domain registered by abusers
- Practices for suspending domain names
- Account access security management
- Security resources of use or interest to registrars and registries
- Survey registrars and registries to determine practices being used, and their adoption rates.

RESOLVED #4 (As proposed by Zahid Jamil): Resolved, the GNSO Council instructs ICANN Policy Staff to add the remaining RAP Recommendations to the GNSO Project List so that the GNSO Council can keep track of the remaining recommendations and address these as appropriate. These remaining RAP Recommendations are:

- **WHOIS Access – Recommendation #1:** The GNSO should determine what additional research and processes may be needed to ensure that WHOIS data is accessible in an appropriately reliable, enforceable, and consistent fashion.

The GNSO Council should consider how such might be related to other WHOIS efforts, such as the upcoming review of WHOIS policy and implementation required by ICANN’s new Affirmation of Commitments.
- **Uniformity of Contracts:**

View A: The RAPWG recommends the creation of an Issues Report to evaluate whether a minimum baseline of registration abuse provisions should be created for all in-scope ICANN agreements, and if created, how such language would be structured to address the most common forms of registration abuse.

View B: Opposed to the recommendation for an Issues Report as expressed in view A

- Gripe Sites; Deceptive and/or Offensive Domain Names – Recommendation #1:

Rough Consensus: Make no recommendation. The majority of RAPWG members expressed that gripe site and offensive domain names that use trademarks should be addressed in the context of cybersquatting and the UDRP for purposes of establishing consistent registration abuse policies in this area, and that creating special procedures for special classes of domains, such as offensive domain names, may present problems.

Alternate view: The UDRP should be revisited to determine what substantive policy changes, if any, would be necessary to address any inconsistencies relating to decisions on “gripe” names and to provide for fast track substantive and procedural mechanisms in the event of the registration of deceptive domain names that mislead adults or children to objectionable sites.

- Cybersquatting – Recommendation #2:

View A: The RAPWG recommends the initiation of a Policy Development Process by requesting an Issues Report to investigate the appropriateness and effectiveness of how any Rights Protection Mechanisms that are developed elsewhere in the community (e.g. the New gTLD program) can be applied to the problem of cybersquatting in the current gTLD space.

View B: The initiation of such a process is premature; the effectiveness and consequences of the Rights Protection Mechanisms proposed for the new TLDs is unknown. Discussion of RPMs should continue via the New TLD program. Experience with them should be gained before considering their appropriate relation (if any) to the existing TLD space.

- Fake Renewal Notices – Recommendation #2 – conditional on #1: The following recommendation is conditional. The WG would like to learn the ICANN Compliance Department’s opinions regarding Recommendation #1 above, and the WG will further discuss Recommendation 2 looking forward to the WG’s Final Report.

The RAPWG recommends the initiation of a Policy Development Process by requesting an Issues Report to investigate fake renewal notices.

- Meta Issue: Collection and Dissemination of Best Practices: The RAPWG recommends that the GNSO, and the larger ICANN community in general, create and support structured, funded mechanisms for the collection and maintenance of best practices.

- Cross-TLD Registration Scam: The RAPWG recommends the GNSO monitor for Cross-TLD registration scam abuse in the gTLD space and co-ordinate research with the community to determine the nature and extent of the problem. The WG believes this issue warrants review but notes there is not enough data at this time to warrant an Issues Report or PDP.
- Meta Issue - Uniformity of Reporting: The RAPWG recommends that the GNSO, and the larger ICANN community in general, create and support uniform reporting processes.
- Gripe Sites; Deceptive and/or Offensive Domain Names – Recommendation #2:
View A: Turn down a proposed recommendation that registries develop best practices to restrict the registration of offensive strings.
View B: Registries should consider developing internal best practice policies that would restrict the registration of offensive strings in order to mitigate the potential harm to consumers and children.
- Domain Kiting / Tasting: It is unclear to what extent domain kiting happens, and the RAPWG does not recommend policy development at this time. The RAPWG suggests that the Council monitor the issue (in conjunction with ongoing reviews of domain-tasting), and consider next steps if conditions warrant.

Annex 2 – Summary of Issues Raised by the Community

Issues Identified on the UDRP Webinar and in the Public Comment Forum		
Policy Issues	Description	Commenter
Bad Faith Requirement	Should Change "AND" to "OR" in the standard: "your domain name has been registered and is being used in bad faith."	Paul McGrady, Matthew Harris, James Carmody, Aimee Gessner
Safe Harbors	Policy should include clear safe harbors, such as to protect free speech and fair use or other noncommercial rights of registrants	Konstantinos Komaitis, Milton Mueller
Appeals	No appeals of process in policy itself-- two options- appeal of decision or trial de novo	James Carmody, Konstantinos Komaitis, Robin Gross, IPC
	Establish an internal appeals process to ensure implementation of fair trial requirements	Alexandre Cruquenaire
Statute of Limitations	There should be an express time limitation for claims brought under the policy	Konstantinos Komaitis, Robin Gross
Process Issues	Description	Commenter
Early Mediation	Might consider option for early mediation in the process	John Berryhill
Panel Appointment Timeline	Timeline to appoint panel could be more flexible; five days too short	ADNDRC
Verification Process	No requirement to provide information to providers.	NAF, CAC
	Registrars sometimes provide false information in	Matthew Harris

	response to a request for information	
Electronic Communications	Although e-filing has addressed some of this, issues remain, such as where emails are too large, and as a result, respondent does not receive the communication	CAC
Meaning of Trademarks	Clarification of UDRP on panelist use of common law trademark	Alexandre Cruquenaire
Registrar/Registry Obligations	More guidance to Registrars on what needs to be done in UDRP proceedings would be helpful. Clarify Registry and registrar obligations relative to domains subject to UDRP	CAC, Mathew Harris, Business Constituency
Process Issues	Description	Commenter
Lock Down of Domain	No requirement to lock names in period between filing complaint and commencement of proceedings	NAF, ADNDRC, CAC
	Need clarification of domain locking	Business Constituency
Meaning of Status Quo	Unclear what is meant by "Status Quo". No explanation of "Legal Lock" mechanisms and when they go into effect or when they should be removed.	Registrar SG, Statton Hammock
Multiple UDRPs against single Respondent	Complainant has no way of identifying all domains registered by the respondent at the Registrar to be covered by one complaint so often multiple complaints are filed against a single respondent	Paul McGrady
WHOIS Updates	WHOIS record modifications after filing but before commencement lead to unnecessary deficiencies and amendments	Paul McGrady
	WHOIS contact data often updated even after receipt of notice of proceedings	Matthew Harris
Billing Contact Data Not Provided	2A-1 of the Rules assume that billing data of registrant is to be provided, but this is not being done	Matthew Harris

Privacy/Proxy Registrations	Need to address privacy and proxy registrations or require complaining party to amend complaint once infringing party identified	Registrar SG
	Standardized procedures for the un-masking of proxy registration to reveal ownership	Business Constituency
Identity of Respondent	When privacy/proxies are in the WHOIS, the rules are not clear who is the correct respondent and the proper jurisdiction for the case; difficulties in identifying proper respondent leads to delays and amendments to the complaint	NAF, ADNDRC, CAC, Paul McGrady
Copy of Complaint	Registrars are not required to receive a copy of the Complaint	Registrar SG
Timing of Complaint Copies	Complainant must send copy to respondent before the provider has accepted case and name has been locked, allowing for changes in the domain name.	NAF, ADNDRC
Process Issues	Description	Commenter
Language of Proceedings	Timing of determination is procedurally impossible to occur before the proceedings commence	NAF
	Difficulties identifying panelists in certain languages	Matthew Harris
Translation of UDRP	Need to translate the UDRP in multiple languages and post on ICANN website	ALAC
Forum Shopping	Rules should address forum shopping, should consider panel appointment rules, such as rotating panelists, and address bias issues; more transparency needed on appointment by providers	Konstantinos Komaitis, Robin Gross
Dropping names from Respondents in Complaint	Rules unclear and confusing to respondents	NAF
Contact Data of the Parties	Registrars are not provided with the contact information for the disputing parties and are therefore unable to lock down the domain name or send communications to the parties	Registrar SG

Stays/Case Suspensions	No guidance on what a Registrar is to do if a claim is stayed or suspended	Registrar SG, CAC
Timing of Response	Respondents should be given more time to respond to Complaint	Ari Goldberger, Konstantinos Komaitis
Default	Should examine why defaults occur, and whether they are tied to language issues for foreign respondents	Konstantinos Komaitis
Laches	Laches should be considered in UDRP cases	Ari Goldberger
Evidence	Rules written in 1999, need to be updated to address changing content based on user location, and to reduce document manipulation and forgery	Cedric Manara
	Lack of sufficient evidence to support claims, especially jurisdictional ones; unsupported assertions should not be considered "proof"	Neil Brown, Paul McGrady

Process Issues	Description	Commenter
Evidence	Rules 10/12 gives panelists ability to conduct proceedings fairly and seek more evidence; these rules should be used more	Neil Brown
Rules on Supplemental Submissions	Additional rules needed regarding supplemental submissions to reduce delays into the process; uniformity would be useful	ADNDRC, John Berryhill
Reverse Domain Name Hijacking	A finding of reverse domain name hijacking is rarely found, and panelists should be encouraged to make this finding when appropriate	Neil Brown, James Carmody, Paul McGrady, Konstantinos Komaitis
Meritless Capture of Domains	Need to address problems concerning meritless capture of domains	ALAC
Uniform Procedures for Transfers	No specified timeframe for implementing transfers	Registrar SG, John Berryhill, Statton Hammock, Business Constituency
	Delays often experienced in implementation of decisions by Registrars	Matthew Harris
Registry Notice to Registrars	Registries do not communicate to Registrars when a decision has been implemented at the Registry level	Registrar SG
Registry Role In Implementation	Registry involvement in implementation may be appropriate	John Berryhill
Prevailing Party Cooperation	Need method to solicit contact data from prevailing party	Registrar SG
	Prevailing party cooperation needed to effect transfer to new Registrar; no timeline specified for prevailing party actions	Registrar SG

Registrar Cooperation	Registrars should be required to actively cooperate with UDRP proceedings	Matthew Harris
Conflicts of law	No explanation on what a Registrar should do when a UDRP decision conflicts with an injunctive order issued by a court of local jurisdiction	Registrar SG, Statton Hammock
Choice of Law	Revise choice of law provision and assignment of arbitrators	David Simon
Process Issues	Description	Commenter
Appeals	Respondent controls jurisdiction of appeals	Paul McGrady
ICANN Compliance Activity	ICANN Contractual Compliance Department rarely intervenes when Registrars not cooperating	Matthew Harris
UDRP Cases as Precedence	No clear authority for treating prior cases as "precedence"	James Carmody, Konstantinos Komaitis
Review of Bad Cases	No mechanism to review bad decisions or to hold panelists accountable	Konstantinos Komaitis
Uniform application of rules by providers	Review of provider interpretation of rules may be advisable to make them more uniform	John Berryhill, Konstantinos Komaitis
Uniform File/Decision formats	Providers use different formats-- may be beneficial to make uniform	John Berryhill
Deadlines and Timings	In a global world, more specificity needed for setting deadlines	John Berryhill
	Timing for decisions often too short to allow for meaningful review of the evidence	Cedric Manara
Penalties for abusive filings	Should consider penalties for trademark holders that abuse the UDRP system	Konstantinos Komaitis
Sanctions for Rule Violations	No penalties for violations of the Rules	Cedric Manara

ICANN Contracts Providers	Might be beneficial to have ICANN enter into formal contracts with Providers	George Kirikos, Business Constituency, Jim Davies
Best Practices/Guidelines for Selection of Panelists	Establish best practices or guidelines to providers to ensure more uniform and transparent process of panelist choice	Alexandre Cruquenaire
Standard Accreditation Process for Providers	Develop standardized accreditation processes for all UDRP providers	Business Constituency, Jim Davies
Education of Stakeholders	ICANN should provide education about UDRP, best practices and how to participate in the process to providers, panelists, registrants	J. Scott Evans (IPC), Mark Partridge (ABA)
Renewal Fees	Clarification of requirement to pay renewal fees	Registrar SG
Expiration/Deletions	Clarification of rules applicable to expiration or deletion of domain names during a UDRP Proceeding	NAF
Address UDRP Concerns by Amending the RAA	Require registrars through amendments to the RAA to: 1) provide ICANN accurate WHOIS information when inaccurate/incomplete information is in UDRP petition; 2) establish firm and enforceable deadlines for registrars to respond to provider request for information and the transfer of domain name	Steve Metalitz
ICANN Issue Guidance on Controversial Issues	To prevent panelists creating jurisprudence, ICANN should provide guidance on controversial issues such post registration bad faith	Jim Davies
	ICANN implement required standards of procedural fairness	Jim Davies

Process Issues	Description	Commenter
Loser Pays Nothing	Losing Respondent should pay filing fees and attorney's fees	Paul McGrady
Three Member Panel Fees	If respondent asks for 3 member panel, and complainant asked for 1, respondent should bear the extra fees	CAC

Annex 3 -Provider Responses and Communications

The attached documents were submitted by UDRP providers in response to the Questionnaires issued by Staff.

WIPO EMAIL RESPONSE

5 May 2011

Dear Ms. Milam,

Thank you for your below message of April 21, 2011 introducing an extensive Questionnaire as a lead-in to a possible ICANN process for UDRP revision.

WIPO believes in the UDRP. The resounding success of this live legal mechanism is rooted in substantive and procedural expert understanding. WIPO expects to be making a number of observations on the envisaged process and on the UDRP more generally at the upcoming ICANN webinar. Those observations also imply a position with respect to the ICANN Questionnaire.

In connection with the latter, one would assume that parties leading a drive towards UDRP revision are themselves motivated and informed by independent appreciation of the UDRP experience thus far, including the full scale of materially relevant publicly available data.

In this connection, having provided in 1999 the blueprint for the UDRP, WIPO makes freely available extensive resources to help to navigate and understand the 21,000 posted cases processed by WIPO on a non-profit basis since. The latest example of this is the second edition of WIPO's jurisprudential Overview. Other globally unique WIPO tools include the WIPO UDRP Legal Index, the WIPO Selection of UDRP Court Cases, and real-time statistics on WIPO UDRP cases and decisions. In addition, the WIPO Center is on record with numerous submissions and correspondence to ICANN, for example on registrar issues. WIPO also has contributed extensive suggestions and comments to ICANN on rights protection mechanisms for an expanded DNS, which as-yet unproven mechanisms must properly interact with the UDRP. Links to a selection of these resources are provided below.

Helpful as these resources may be for ICANN's purposes, we submit that any effort to revise trademark owners' principal rights-protection mechanism available in the DNS, in particular where such revision appears to target the UDRP's very definition of cybersquatting, inevitably would have to begin by examining on a more fundamental level the persisting business of cybersquatting itself, including the stakes for DNS intermediaries and authorities.

Please feel free to share with stakeholders the present WIPO reaction.

With best wishes,

Erik Wilbers
Director, WIPO Arbitration and Mediation Center

1. First WIPO Report

The blueprint of the current UDRP is in the First WIPO Report (www.wipo.int/amc/en/docs/report-final1.pdf). This Report expresses a coherent vision culminating from extensive international consultations and careful substantive reflection (www.wipo.int/amc/en/processes/process1/consultations/index.html).

In 2001, a Second WIPO Report (<http://www.wipo.int/amc/en/processes/process2/report/html/report.html>) explored policy options for other types of identifiers in the DNS.

In 2005, WIPO further produced a report (<http://www.wipo.int/amc/en/domains/reports/newgtld-ip/index.html>) analyzing the UDRP experience in the wider context of trademark protection in an expanded DNS.

2. Article on UDRP design elements *(available at request)*

The UDRP: Design Elements of an Effective ADR Mechanism, by Nicholas Smith and Erik Wilbers.

3. WIPO Jurisprudential “Overview 2.0”

www.wipo.int/amc/en/domains/search/overview2.0/

This second edition of the WIPO Overview published in March 2011 represents a major update and extension of the original version. A long time in the making, this updated edition carefully and conservatively distills observed trends and developments from the more than 10,000 WIPO Panel decisions that have been rendered since the original edition of the WIPO Overview was first published in early 2005.

Drawing on the over 20,000 UDRP cases administered by the WIPO Center since the UDRP’s introduction, it reflects a balanced statement of some 50 substantive and procedural issues now included. The WIPO Overview 2.0 cites over 380 decisions (formerly 100) from over 180 (formerly 80) different UDRP panelists.

A globally unique tool, the freely available WIPO Overview not only helps parties and panelists around the world, but may also serve as a timely reminder of the need to apply expert care in the development of ADR mechanisms for the DNS.

4. WIPO UDRP Legal Index

Like the WIPO UDRP jurisprudential Overview, the WIPO UDRP Legal Index (www.wipo.int/amc/en/domains/search/legalindex.jsp) is a globally unique reference tool, covering over 20,000 WIPO UDRP cases.

5. WIPO Domain Name Workshops and Panelist meetings

Every year since 2000, WIPO has held domain name dispute resolution Workshops and Panelists Meetings. Furthermore, in 2009, the Center held a conference: *WIPO Conference: 10 Years UDRP – What's Next?* (www.wipo.int/amc/en/events/workshops/2009/10yrs-udrp/index.html). WIPO's Workshops are attended by large numbers of DNS counsel and stakeholders from around the world. Set out below is the announcement for the 2011 WIPO Workshop:

“The WIPO Arbitration and Mediation Center plans to hold its annual *Advanced Workshop on Domain Name Dispute Resolution* [www.wipo.int/amc/en/events/workshops/2011/domainname/] in Geneva (Switzerland) Tuesday, October 11 and Wednesday, October 12, 2011.

The Advanced Workshop will focus mainly on the trends of UDRP decisions with regard to the most important substantive and procedural issues. Thus, in addition to those wishing to gain insight into the UDRP mechanism, this Advanced Workshop is of particular interest to those who have been or who may become involved in UDRP proceedings. The 2011 Workshop will also cover evolving developments in WIPO Center practices and resources, as well as ICANN's plans for the launch of new gTLDs, topics of interest to parties to a domain dispute as well as trademark holders generally. The Advanced Workshop also represents an opportunity for registrars and ccTLD administrators to increase their knowledge of UDRP decisions.

The faculty will consist of experienced WIPO UDRP panelists, a trademark in-house counsel and senior legal staff of the Center. The Workshop will include practical break-out sessions, followed by discussion between participants and instructors.”

6. WIPO Domain Name Dispute Resolution Statistics; WIPO Center 2011 Press Release

WIPO makes available online a wide range of UDRP-related real-time case statistics, at: www.wipo.int/amc/en/domains/statistics/

On March 31, 2011, WIPO issued the following press release that includes a domain name update: www.wipo.int/pressroom/en/articles/2011/article_0010.html

7. ccTLDs using the UDRP or variations thereof

Many countries have introduced domain name policies in their ccTLDs that are identical to or rooted in the UDRP. At www.wipo.int/amc/en/domains/cctld/, WIPO provides an overview of these policies and procedures.

8. Selected other WIPO initiatives and observations

- eUDRP: www.wipo.int/amc/en/docs/icann301208.pdf
- eUDRP follow-up letter: www.wipo.int/amc/en/docs/icann170909.pdf
- UDRP provider norms:
 - <http://www.wipo.int/export/sites/www/amc/en/docs/icann040707.pdf>
 - <http://www.wipo.int/export/sites/www/amc/en/docs/icann291107.pdf>
- April 2009 WIPO proposal for a UDRP complement “Expedited Suspension Mechanism”:
www.wipo.int/amc/en/docs/icann030409.pdf
- Other WIPO proposals and observations:
 - www.wipo.int/amc/en/domains/newgtld/
 - www.wipo.int/amc/en/domains/resources/icann/

9. Overview of UDRP cases addressed in court

This (www.wipo.int/amc/en/domains/challenged/index.html) is a selection of court orders and decisions in relation to specific UDRP cases that have come to the attention of the WIPO Center.

10. Registrar conduct in the UDRP

WIPO Center letters to ICANN discussing registrar conduct:

- Nameview: www.wipo.int/amc/en/docs/icann111209.pdf
- Lead Networks: www.wipo.int/amc/en/docs/icann090409.pdf
- ‘General’ registrar letter: www.wipo.int/amc/en/docs/icann160408.pdf
- ‘General’ registrar letter: www.wipo.int/amc/en/docs/icann010708.pdf

From among numerous UDRP decisions addressing registrar conduct, set out below is a sampling of cases cited in the above WIPO letters:

- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1843.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1886.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0945.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0620.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0503.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0849.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0830.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0407.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0827.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1438.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1431.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1373.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0997.html>
- <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1886.html>

NATIONAL ARBITRATION FORUM RESPONSE

QUESTIONNAIRE ON THE STATE OF THE UDRP

We would appreciate receiving your responses to these questions by May 6, 2011.

BACKGROUND

ICANN Staff has been asked⁴⁶ to write an Issue Report on the current state of the UDRP and consider balanced revisions to address cybersquatting if appropriate. Staff is thus aiming to look at how the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies / inequalities associated with the process as well as whether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated. This Issue Report will be considered by the GNSO Council as it decides whether to commence a new policy development process (PDP) on the UDRP.

As part of this effort, Staff is conducting research to identify potential issues that might be examined as part of a PDP on the UDRP. As a provider of UDRP Services, you may be uniquely positioned in having key information on the UDRP, data and facts necessary for any such process. Staff thus requests your input to this important process in answering the questions below. Your insight and expertise will be of assistance to Staff in drafting this Issue Report.

This Questionnaire was developed in collaboration with a drafting team convened by the GNSO Council. Participation is purely voluntary, but encouraged, as a valuable resource to inform the ICANN community of the current state of the UDRP, and whether the UDRP can be improved. The responses will be made publicly available on ICANN's website, and will be referenced by Staff in the Issue Report on the UDRP.

Please note that the purpose of this preliminary inquiry is to identify issues that may be appropriate for further analysis as part of this possible PDP. These questions are not intended to solve any of these issues or to suggest any revisions to the UDRP, but merely to identify areas deserving further exploration. This is intended to be a brain-storming exercise, and is not intended to be used for statistical analysis, or to compare or evaluate UDRP providers. If the GNSO Council votes to commence a PDP on the UDRP, we expect to solicit your expertise and in-depth knowledge in the future through additional means, including, workshops, webinars, public comment periods and dialogue with the working group to be formed to conduct the PDP.

⁴⁶ The GNSO Council's resolution requesting an Issue Report on the Current State of the UDRP is posted at: <http://gnsso.icann.org/resolutions/#201102>

We anticipate that some of the data requested below may not be easily accessible to you. In such event, you may note that in your response, or in the alternative, you may indicate a date by which you could provide such information.

Thank you in advance for your help and willingness to participate in this important process.

QUESTIONS

1. Please describe how the UDRP has addressed the problem of cybersquatting to-date.

The National Arbitration Forum (Forum) as a neutral dispute-resolution provider, is not in a position to characterize the problem of cybersquatting or how it might or might not have been addressed. However, we note the following impact and success of the UDRP.

As noted below, panelists have found cybersquatting in 87% of cases filed with the Forum to date. In 13% percent of cases, panelists have found that either: 1. the complainant did not meet their burden to prove cybersquatting, 2. the case involved legal or factual circumstances that were not straightforward cybersquatting or 3. that the specific respondent was not guilty of cybersquatting (majority of the 13%). While the percentage of cases of cybersquatting overall is relatively low in comparison to the numbers of domain names registered, the UDRP has been proven as a fast and relatively straightforward means of stopping trademark infringement in the form of domain names with relatively few instances of causing an undue burden for the registrant.

The UDRP is fast. From January 2002 (our data is less detailed extending farther back), time to decision from filing averaged 50 days, and from commencement averaged 42 days. Since January 2010, our time to decision from filing is averaging 46 days and from commencement averages 38 days, with some cases concluding in a decision in as little as 10-15 days. The averages include cases that have been stayed for up to 45 days and cases that have been granted a response extension of up to 20 days.

The UDRP is fluid. Panelists have been able to apply the UDRP to situations unforeseen in 1999. Pay per click, phishing, and mousetrapping were practices created since 1999, yet UDRP panels have been able to apply the UDRP appropriately.

UDRP Panelists are fair. UDRP decisions are not made on a straight-default basis. There are cases where Panelists find for Respondents, even when the Respondents didn't appear, just on the record before it, or the lack of record in some cases.

Some domain name registrants and respondents have used the UDRP decisions to guide their practices of domain names sales and registration as well, an indication that the UDRP has had a positive impact on cybersquatting over time.

2. Please provide your organization's *opinion* on whether the definition of cybersquatting in the existing UDRP language ought to be reviewed or updated, and if so, how.

The FORUM is a neutral organization without an official position on substantive intellectual property issues and does not take any position on whether or not the definition of cybersquatting in the existing UDRP is adequate, but observes the following:

- a. The UDRP Policy paragraphs 4(a-c) have demonstrated remarkable fluidity and flexibility over the past nearly twelve years. Panelists have been able to apply the Policy to a wide array of situations unanticipated in 1999.
- b. If the Policy is substantively amended, care should be taken to consider the effect of the changes on existing precedent, and whether the changes narrow or restrict the UDRP so as to create greater loopholes for gaming or make it less flexible in application.

3. How many UDRP Proceedings have been filed with your organization?

As of April 26, 2011: 16,308.

Of these, how many (please provide total numbers and percentages for each question):

- a. Result in a decision

We have 12,953 decisions (there are 219 open cases).

Approximately 81% of closed cases have a decision.

- b. Are terminated before decision

Approximately 19% of cases are terminated before decision (combination of voluntary termination, and dismissal for failure to meet requirements)

- c. Are responded to by the respondent

Of the 16,089 closed cases, 3,903 have had an official response (which may or may not have complied with the formalities in Rule 5.) We do not track cases where someone emailed with a question or to notify us of counsel, etc but did not actually provide a substantive response. The percentage is roughly a 24% response rate.

- d. Are appealed to a Court by the respondent (as far as you are aware)

The Forum does not track this data. We hear of a handful of cases appealed by the respondent (fewer than five) per year, but we get questions more often than that about the availability of an administrative appeal.

- e. Are appealed to a Court by the complainant (as far as you are aware)

The Forum does not track this data. We have heard of only a few cases appealed by the complainant over the past six years.

- f. Result in a ruling ordering a transfer to the complainant or a cancellation of the disputed domain name

Complainants have prevailed 11,280 times (87%). Where a respondent has responded, the percentage of complainants success drops to 81%.

- g. Result in a ruling allowing the respondent to retain the disputed domain name

Respondents prevail 13% of the time overall (1,673 cases). Where a respondent has submitted a response, the percentage of respondent's success rises to about 19%. In 273 cases, a respondent has prevailed even without responding (2%).

- h. Involve privacy and/or proxy services set out on a year by year basis (as far as you are aware)

The Forum does not track this information and notes that, in a majority of cases (anecdotally) the privacy shield lifts, exposing the underlying registrant. In all of our cases, 316 records have either the word "privacy" or "proxy" in the case name, indicating either the privacy/proxy service is the named Respondent or a Respondent has used one of those words in its Whois information.

- i. Are proceedings where the respondent is not represented by counsel (as far as you are aware)

A query of our case management system finds that 13,964 cases have no Respondent counsel record in our database (approx. 86%).

- j. Are proceedings where the respondent requested a finding of reverse domain name hijacking (RDNH) and, of those cases where the respondent requested such a finding, the number and percentage of the proceedings in which a finding of RDNH was made

The Forum does not track findings of reverse domain name hijacking. A search of our online, publicly available database just looking for the terms "reverse domain name hijacking" yields 185 cases mentioning it (indicating it has either been requested by the respondent or contemplated independently by the panel). Relatively few such findings are made by the panelists.

- k. Are proceedings where the language of the proceedings has been contested or challenged.

The Forum does not track that information.

- I. Involve disputed domain names that are deleted due to expiration either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

The Forum does not track those numbers but, anecdotally, we probably receive about one case per month for both issues.

There is a “grey area” in the UDRP about deletions after the UDRP decision but before the decision is implemented. The EDDP seems to make it voluntary for the registrar to hold the domain “during” the proceeding but the EDDP is silent as to what happens if the domain is not redeemed, but just prevented from being deleted during the proceeding. We’ve seen a couple of cases this year where a domain name has been deleted immediately following the UDRP decision. However, even if the number of incidents might be low, the impact in terms of time and effort on the part of the Forum or parties to solve or address the instances when it occurs are significant.

- m. Involve disputed domain names that are transferred to another registrar either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

The Forum does not track this data. Most “transfers” occur sometime before the domain name is locked by the Registrar (which might mean around the time the case is filed, either just before or after). In some cases, the Registrar takes so long to respond with the lock that the domain is transferred away. Relatively few domain names actually transfer to new registrars. Domain names rarely transfer DURING proceedings (and can usually be promptly returned with follow up from the Forum). However, even if the number of incidents might be low, the impact in terms of time and effort on the part of the Forum or parties to solve or address the instances when it occurs are significant.

- n. Involve disputed domain names that are transferred to another registrant either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

The Forum doesn’t maintain that information, but discounting the release of privacy shields, domains are relatively rarely transferred to a new holder during proceedings (especially when there is a lock in place). As far as domains transferring after the complaint is filed, but before commencement, that happens more often, but still not with any regularity. However, even if the number of incidents might be low, the impact in terms of time and effort on the part of the Forum or parties to solve or address the instances when it occurs are significant.

- o. Involve proceedings where updates to WHOIS records either (i) after filing of the complaint and before commencement of, or (ii) prior to or during the course of the proceedings have raised concerns or problems (as far as you are aware)

We do not track this information. Anecdotally, this is our single biggest challenge. Until we have received word that a domain name is locked (usually a day or two from filing, but sometimes as long as a few weeks) the WHOIS information is subject to change. Furthermore, if you count all the privacy shields being lifted, it amounts for probably 70% of our cases. Complainants dislike this because it means they have to go back and amend their complaints, and in some cases, the domain names turn out to be registered to different entities and the cases need to be split up. WHOIS records rarely change after a case is commenced.

- p. Involve proceedings where a decision ordering cancellation or transfer of the disputed domain name is not implemented by the registrar

Again, we do not track this; anecdotally, this is a relatively minor percentage. Although assisting complainants in getting the decision implemented is not directly required by the Providers in the UDRP, the Forum does use its connections with the Registrars and ICANN to help facilitate decision implementation when the registrar is not responding. A great deal of time is spent “chasing” the registrars that do not either comply with Rule 16(b) or implement decisions on time, and then following up with ICANN.

4. Please highlight the means in place to seek to balance fairness and efficiency in administration of the UDRP.

Some Forum practices that ensure fairness and efficiency:

- a. Entirely electronic case handling, including a portal (and automated notices), increases efficiency and reduces errors.
- b. Cases are assigned to coordinators based on case load and a rotating system.
- c. Forum takes deadlines very seriously and does its best to stay within them in all circumstances—deadlines are imposed upon both parties.
- d. Parties are strongly encouraged to communicate with the Forum via email so that a record may be kept of the communication for the panel and so the other party is apprised of the communication.
- e. Forum case coordinators focus on prompt, efficient case processing with a significant emphasis on customer service to parties and a particular attention to the formalities of the Rules. As a result, they do not substantively review

submissions, which might permit a bias in favor of one party or another; instead they focus on the Provider's role in the UDRP: procedural efficiency and fairness.

5. Please highlight any insufficiencies/inequalities you see with the UDRP and its implementation.

As noted in our response to questions 1 and 2, above, the UDRP has withstood the test of time, substantively. The portions more "dated" or "illogical" are procedural in nature.

a. One of the biggest points for "gaming" by both parties is in the pre-commencement phase.

- Complainants file without paying, hoping Respondents will give the domain name up and hoping for a lock on the name before payment.
- Registrars drop WHOIS privacy shields, frustrating complainants who have written their complaints with one entity as the respondent.
- Registrars ignore requests to lock and provide information on the domain names/registrants.
- Registrants transfer and delete domain names prior to commencement.
- Registrants are notified of complaints before we have payment and before the complaint is even amended to have no deficiencies.

The Forum thinks that, while the proposed URS has many deficiencies, we believe the URS has provided a good solution for at least some of the previously listed problems: a. providing Respondents with no notice of the dispute until payment is received, the complaint is accepted as not deficient, and the domain name is locked; and b. requiring a lock.

b. The WHOIS privacy issue presents multiple places for inequalities. The Forum has been told by ICANN staff that the "registrant" is the entity named in the Whois. However, when the registrant identity is requested for service purposes, most Registrars lift the privacy shield. There are problems, however, either way:

- If the Privacy shield **is not** lifted, the case can proceed against any number of domain names technically "owned" by any number of registrants. If there are multiple responses, this presents an administrative nightmare for the Provider and Panel, not to mention a possible violation of UDRP Para 4(f) and Rule 1, indicating cases are to proceed against only one respondent.

- When the Privacy shield is lifted, complainants have to take the time to amend their complaints; and if there are multiple underlying registrants, strategic determinations need to be made quickly by complainant's counsel. Some complainants characterize this change in the Whois as an impermissible transfer as well.
6. Please provide any other information or documents that you would like Staff to consider as it prepares the Issue Report on the UDRP.

Our official letter of comment is attached.

Asian Domain Name Dispute Resolution Centre Response

QUESTIONNAIRE ON THE STATE OF THE UDRP

We would appreciate receiving your responses to these questions by May 6, 2011.

BACKGROUND

ICANN Staff has been asked⁴⁷ to write an Issue Report on the current state of the UDRP and consider balanced revisions to address cybersquatting if appropriate. Staff is thus aiming to look at how the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies / inequalities associated with the process as well as whether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated. This Issue Report will be considered by the GNSO Council as it decides whether to commence a new policy development process (PDP) on the UDRP.

As part of this effort, Staff is conducting research to identify potential issues that might be examined as part of a PDP on the UDRP. As a provider of UDRP Services, you may be uniquely positioned in having key information on the UDRP, data and facts necessary for any such process. Staff thus requests your input to this important process in answering the questions below. Your insight and expertise will be of assistance to Staff in drafting this Issue Report.

This Questionnaire was developed in collaboration with a drafting team convened by the GNSO Council. Participation is purely voluntary, but encouraged, as a valuable resource to inform the ICANN community of the current state of the UDRP, and whether the UDRP can be improved. The responses will be made publicly available on ICANN's website, and will be referenced by Staff in the Issue Report on the UDRP.

Please note that the purpose of this preliminary inquiry is to identify issues that may be appropriate for further analysis as part of this possible PDP. These questions are not intended to solve any of these issues or to suggest any revisions to the UDRP, but merely to identify areas deserving further exploration. This is intended to be a brain-storming exercise, and is not intended to be used for statistical analysis, or to compare or evaluate UDRP providers. If the GNSO Council votes to commence a PDP on the UDRP, we expect to solicit your expertise and in-depth knowledge in the future through additional means, including, workshops, webinars, public comment periods and dialogue with the working group to be formed to conduct the PDP.

⁴⁷ The GNSO Council's resolution requesting an Issue Report on the Current State of the UDRP is posted at: <http://gns0.icann.org/resolutions/#201102>

We anticipate that some of the data requested below may not be easily accessible to you. In such event, you may note that in your response, or in the alternative, you may indicate a date by which you could provide such information.

Thank you in advance for your help and willingness to participate in this important process.

QUESTIONS

1. Please describe how the UDRP has addressed the problem of cybersquatting to-date.

As a dispute resolution service provider, the ADNDRC is impartial and is not positioned to comment on this question. Nonetheless, we are of the view that the UDRP is fair, speedy and effective for resolving applicable domain name disputes.

2. Please provide your organization's *opinion* on whether the definition of cybersquatting in the existing UDRP language ought to be reviewed or updated, and if so, how.

We maintain our position as stated in the first question. In general, we consider that the current UDRP works well and it is not necessary to be amended substantially.

3. How many UDRP Proceedings have been filed with your organization?

738

Of these, how many (please provide total numbers and percentages for each question):

- a. Result in a decision

612 (82.9%)

- b. Are terminated before decision

56 (7.6%)

- c. Are responded to by the respondent

The information is not readily available.

- d. Are appealed to a Court by the respondent (as far as you are aware)

1 (0.1%)

- e. Are appealed to a Court by the complainant (as far as you are aware)

0

- f. Result in a ruling ordering a transfer to the complainant or a cancellation of the disputed domain name

567 (92.6%)

- g. Result in a ruling allowing the respondent to retain the disputed domain name

45 (7.4%)

- h. Involve privacy and/or proxy services set out on a year by year basis (as far as you are aware)

N/A. (It is estimated there are approximately 5 cases per year which accounts for about 4%.)

- i. Are proceedings where the respondent is not represented by counsel (as far as you are aware)

N / A (It is estimated that there were around 80% of the cases where respondent is not represented by counsel)

- j. Are proceedings where the respondent requested a finding of reverse domain name hijacking (RDNH) and, of those cases where the respondent requested such a finding, the number and percentage of the proceedings in which a finding of RDNH was made

N / A

- k. Are proceedings where the language of the proceedings has been contested or challenged.

N / A

- l. Involve disputed domain names that are deleted due to expiration either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

4 (0.5%)

- m. Involve disputed domain names that are transferred to another registrar either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

5 (0.7%)

- n. Involve disputed domain names that are transferred to another registrant either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

5 (0.7%)
 - o. Involve proceedings where updates to WHOIS records either (i) after filing of the complaint and before commencement of, or (ii) prior to or during the course of the proceedings have raised concerns or problems (as far as you are aware)

8 (1.0%)
 - p. Involve proceedings where a decision ordering cancellation or transfer of the disputed domain name is not implemented by the registrar

N/A
4. Please highlight the means in place to seek to balance fairness and efficiency in administration of the UDRP.
- (i) The use of electronic communication for UDRP proceedings after the amendments to the Rules for UDRP in 2010;
 - (ii) The communication methods provided in Paragraph 2 of the Rules;
 - (iii) The listing mechanism for appointment of the presiding panelist in a three-member panel;
 - (iv) Specified time limits for rectification of deficiencies of the complaint, submission of the response, appointment of the panel, and submission of decision by the panel;
 - (v) Extendable deadlines for submission of response by the respondent and for submission of decision by the panel in exceptional circumstances.
5. Please highlight any insufficiencies/inequalities you see with the UDRP and its implementation.
- (i) There is no time limit set out in the UDRP for the concerned registrar to respond to the email notification and request from the provider and to take appropriate actions towards to disputed domain name, i.e to 'lock up' the domain name.
 - (ii) Under the UDRP, the complainant is required to notify the respondent of the complaint when submitting the complaint to a provider. It will often result in the disputed domain name being transferred to a third party or changes to Whois information, which will frustrate the complainant.

(iii) The time limit of 5 calendar days for appointment of the panel under Paragraph 6 (b) of the Rules is often insufficient.

(iv) There is no provision in the UDRP if the parties are allowed to submit supplemental submissions in addition to the complaint and the response.

6. Please provide any other information or documents that you would like Staff to consider as it prepares the Issue Report on the UDRP.

None.

RESPONSE FROM THE CZECH ARBITRATION COURT

QUESTIONNAIRE ON THE STATE OF THE UDRP

We would appreciate receiving your responses to these questions by May 6, 2011.

BACKGROUND

ICANN Staff has been asked¹ to write an Issue Report on the current state of the UDRP and consider balanced revisions to address cybersquatting if appropriate. Staff is thus aiming to look at how the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies / inequalities associated with the process as well as whether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated. This Issue Report will be considered by the GNSO Council as it decides whether to commence a new policy development process (PDP) on the UDRP.

As part of this effort, Staff is conducting research to identify potential issues that might be examined as part of a PDP on the UDRP. As a provider of UDRP Services, you may be uniquely positioned in having key information on the UDRP, data and facts necessary for any such process. Staff thus requests your input to this important process in answering the questions below. Your insight and expertise will be of assistance to Staff in drafting this Issue Report.

This Questionnaire was developed in collaboration with a drafting team convened by the GNSO Council. Participation is purely voluntary, but encouraged, as a valuable resource to inform the ICANN community of the current state of the UDRP, and whether the UDRP can be improved. The responses will be made publicly available on ICANN's website, and will be referenced by Staff in the Issue Report on the UDRP.

Please note that the purpose of this preliminary inquiry is to identify issues that may be appropriate for further analysis as part of this possible PDP. These questions are not intended to solve any of these issues or to suggest any revisions to the UDRP, but merely to identify areas deserving further exploration. This is intended to be a brain-storming exercise, and is not intended to be used for statistical analysis, or to compare or evaluate UDRP providers. If the GNSO Council votes to commence a PDP on the UDRP, we expect to solicit your expertise and in-depth knowledge in the future through additional means, including, workshops, webinars, public comment periods and dialogue with the working group to be formed to conduct the PDP.

We anticipate that some of the data requested below may not be easily accessible to you. In such event, you may note that in your response, or in the alternative, you may indicate a date by which you could provide such information.

¹ The GNSO Council's resolution requesting an Issue Report on the Current State of the UDRP is posted at: <http://gnso.icann.org/resolutions/#201102>

Thank you in advance for your help and willingness to participate in this important process.

QUESTIONS

1. Please describe how the UDRP has addressed the problem of cybersquatting to-date.

The CAC would like to stress out that the question could probably be better addressed by the parties to the disputes for the reasons explained in our answer to question 2. Nevertheless we are of the opinion that the UDRP has worked in a satisfactory manner for more than 10 years and became a model proceeding for many other domain name procedures. In spite of the undisputable success of the UDRP it should be noted that the domain name world evolves quickly and UDRP will sooner or later face the necessity to move on as well. In the below text we pointed out several problematic issues about the current status of the UDRP and we believe others will be mentioned by other interested parties.

2. Please provide your organization's *opinion* on whether the definition of cybersquatting in the existing UDRP language ought to be reviewed or updated, and if so, how.

We would like to stress out that as a UDRP Provider the CAC should maintain its impartial and independent position, therefore it should follow the exact wording of the UDRP at the first place. Determining if the current language should be changed, as far as the very definition of cybersquatting is concerned, should be, in the opinion of the CAC, a matter of discussion of all the interested parties, though the UDRP Provider is not, due to its nature of an impartial body, one of those parties.

However, keeping our independent position in mind, we would like to point out that based on our practice in both UDRP and .eu ADR procedures the current UDRP definition of cybersquatting does not cover some instances of clearly malicious conduct on the part of domain name registrants.

In concrete, the current definition of bad faith element says:

... your domain name has been registered **and** is being used in bad faith

It is questionable if the cumulative construction of this provision is appropriate. For example, if the domain name is acquired in good faith by a licensee of a trade mark owner and subsequently the license is terminated, it seems logical to enable the trade mark owner to have the domain name transferred to it, provided that the licensee uses it in bad faith.

A similar question can be raised regarding the cumulative requirement of the lack of legitimate interest and bad faith.

The Czech Arbitration Court, being also a .eu ADR Provider, may provide an interesting observation acquired in ADR proceedings in which both the cumulative requirements mentioned above were changed into alternative. The "success rate" in ADR Proceedings is basically the same as in UDRP Proceedings, not significantly higher, even though the burden of proof on the part of the Complainant is lower due to applying alternative requirements. Therefore applying alternative requirements does not appear to result in increasing the percentage of successful Complaints but rather to enable Panels to deal with border-line cases in a fair manner.

3. How many UDRP Proceedings have been filed with your organization?

47

Of these, how many (please provide total numbers and percentages for each question):

a. Result in a decision

37 = 79%

b. Are terminated before decision

7 = 15%

c. Are responded to by the respondent

13 = 28%

d. Are appealed to a Court by the respondent (as far as you are aware)

0

e. Are appealed to a Court by the complainant (as far as you are aware)

0

f. Result in a ruling ordering a transfer to the complainant or a cancellation of the disputed domain name

29 = 62%

g. Result in a ruling allowing the respondent to retain the disputed domain name

8 = 17%

h. Involve privacy and/or proxy services set out on a year by year basis (as far as you are aware)

2009: 3 of 21

2010: 2 of 18

2011: 5 of 8

- i. Are proceedings where the respondent is not represented by counsel (as far as you are aware)

12 out of 17 in which the Respondent made any appearance (i.e. submitted the Response or negotiated a settlement)
- j. Are proceedings where the respondent requested a finding of reverse domain name hijacking (RDNH) and, of those cases where the respondent requested such a finding, the number and percentage of the proceedings in which a finding of RDNH was made

2 in which Respondent requested finding of domain name hijacking, out of which in 1 case the reverse domain name hijacking was found by the Panel
- k. Are proceedings where the language of the proceedings has been contested or challenged.

3 = 6%
- l. Involve disputed domain names that are deleted due to expiration either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

In 1 case the domain name expired before filing a Complaint but was not deleted yet; the deletion was not made during the dispute due to a registrar lock.
- m. Involve disputed domain names that are transferred to another registrar either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

0
- n. Involve disputed domain names that are transferred to another registrant either (i) after filing of the complaint and before commencement of, or (ii) during the course of the proceedings

0
- o. Involve proceedings where updates to WHOIS records either (i) after filing of the complaint and before commencement of, or (ii) prior to or during the course of the proceedings have raised concerns or problems (as far as you are aware)

0
- p. Involve proceedings where a decision ordering cancellation or transfer of the disputed domain name is not implemented by the registrar

1 = 2%

4. Please highlight the means in place to seek to balance fairness and efficiency in administration of the UDRP.

I. The CAC would like to highlight electronic form of communication as the crucial means of making the administration of UDRP utmost efficient. Surely, the major steps have been already taken during the last amendment of the Rules for UDRP in 2010. The CAC appreciates the amendment very much as it was the first UDRP Provider to provide electronic-only proceeding. However, there is still a place for improvements.

Specifically, the Rules for UDRP require the Provider to send the Complaint, including any annexes, in electronic form by e-mail to the Respondent. There are two issues regarding this provision:

1) The volume of annexes can be very large therefore the Respondent's mailbox might not be able to accept such an e-mail. As a result, the Respondent might not be properly electronically informed about the proceeding.

2) The Provider (and subsequently the Panel) has only limited means to verify delivery of the notification e-mail as the servers usually do not provide notification of delivery.

Both problems could be tackled by sending only an e-mail notice to the Respondent describing how to access the complaint on another electronic storage which would maintain records on whether the Respondent did access it. In such case the Panel would have precise information on the delivery of the complaint to the Respondent.

As a result, sending the written notice by post could be omitted in cases where the Respondent confirmed the delivery of the e-mail notice by picking up the complaint on the electronic storage which would mean another step towards bigger efficiency.

II. There are constant issues concerning the domain name holder's identity. This is unfortunately a problem not falling exclusively into UDRP field as the WHOIS accuracy and the usage of privacy/proxy registration services are concerned.

The Complainant is often in a difficult position when considering filing a complaint. The WHOIS record may be insufficient and inaccurate or the domain holder's identity is concealed behind a privacy/proxy registration service provider. Building a strong case is therefore complicated if one is not sure against whom the complaint should be actually filed.

As a result, the Complainant only learns about the domain holder's identity after the provision of the verification by registrar after filing a Complaint.

We understand that this question could be effectively dealt with mainly by other means than UDRP amendment, however UDRP could specify a point in time which would be decisive in order to determine who should be the Respondent in UDRP Proceedings.

Of course, the issue is covered by existing case law, nevertheless establishing it directly in the applicable rules would be more appropriate.

III. The third observation is closely related to the second one as not only the domain holder's identity is difficult to find out before starting UDRP. The language of the Registration agreement is also a piece of information almost impossible to reveal before filing a complaint.

Surely, an obligatory publication of the information in WHOIS would be the most helpful in this regard.

5. Please highlight any insufficiencies/inequalities you see with the UDRP and its implementation.

I. UDRP could incorporate clear instructions and obligations for the registrars. At the moment the cooperation between the Provider and the registrar is not in fact complicated, however the registrars have very limited clear responsibilities according to the UDRP.

If we follow the course of the proceeding, the first of the responsibilities should be the registrar obligation to block the domain name against possible transfer as soon as it is notified of filing the complaint by the Provider (at the moment, Paragraph 8(a) of the UDRP prohibits the domain holder to transfer the domain name during a dispute and gives the registrar **right** to cancel any such transfer).

Secondly, the obligation to provide the Provider with verification regarding the identity of the domain holder, language of the registration agreement, etc. should be specified, including the term in which the registrar should provide it and possibly the information it should contain (or even a prescribed form).

Thirdly, an obligation could be constituted to transfer a domain name to the Complainant during a suspended dispute based on the settlement reached by the parties. At the moment, the UDRP and the Rules for UDRP do not even contain any provision on possible suspension. The CAC included this issue into its Supplemental Rules and other Providers also enable suspensions, however clear rules would be welcome.

All the above mentioned forms of cooperation are in practice provided by the registrars, however should the UDRP be reviewed, constituting clear guidelines would be appropriate. As mentioned during workshop on registrar best practices regarding UDRP in Sydney, the registrars are sometimes unfamiliar with the UDRP rules and practice and their obligations within it. Setting up rules for their behavior within UDRP would help them protect their customers (domain holders) who are otherwise in danger that they will not learn about pending procedure.

II. Distribution of the fee in three-member Panel cases. According to the applicable rules, in case the Complainant preferred single-member Panel but the Respondent asks for three-member Panel, the Respondent is required to pay one half of the fee for three-member Panel. The other half therefore must be borne by the Complainant. The problem is that the half of the total fee for three-member Panel can be higher than the fee originally paid by the Complainant in the beginning of the dispute; therefore the Complainant must be asked to pay additional fee. Notwithstanding the fact that such an additional payment could be considered unfair under circumstances where it is the Respondent, not the Complainant, who asks for the three-member Panel, the Rules for UDRP do not give any guidance as to the case where the Complainant refuses to pay additional fee. The Provider is thus not entitled to terminate the dispute.

A possible solution is to require the Respondent to pay the difference between the fee for single-member Panel and the fee for three-member Panel in case it elects three-member Panel. This model has been adopted in .eu ADR and is very efficient and less complicated.

6. Please provide any other information or documents that you would like Staff to consider as it prepares the Issue Report on the UDRP.

None.

ADDITIONAL OBSERVATIONS FROM WIPO

Other relevant communications received from WIPO, in addition to the submissions during the Public Comment Forum include:

- [The WIPO response to the ICANN Report of Public Comments on the UDRP Preliminary Issuer Report](#)
- [The UDRP AND WIPO- INTA CONFERENCE REPORT](#)

ARBITRATION
AND
MEDIATION CENTER



Re: WIPO Arbitration and Mediation Center observations to ICANN for Policy Staff/GNSO Council "Current State of the UDRP Webinar"

May 6, 2011

The UDRP has been offering an effective solution for trademark owners, domain name registrants, and registration authorities

The UDRP was born out of the need for an administrative dispute resolution mechanism specifically designed to resolve certain trademark-based online conflicts 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.

It is important to recognize that, in different ways, the UDRP has worked to the benefit of all DNS actors.

For owners of trademark rights (whether SMEs, global corporations, or individuals), the UDRP provides a widely relied-upon means for addressing a clear category of online abuse of their rights, thereby reducing consumer deception and facilitating the growth of legitimate e-commerce. Household brands from a diverse range of services and industries from around the world have found a measure of protection in the steady standards of this efficient enforcement tool.

For domain name registrants (whether represented by counsel or acting *pro se*), the UDRP has provided an accessible framework for established legal norms. Their application benefits from non-exhaustive registrant safe harbors at a substantive level (rights and legitimate interests), and appropriate process safeguards (e.g. mutual jurisdiction, language of proceedings, response extensions). Respondents are not required to pay filing fees under the UDRP, and unlike in court, do not risk imposition of monetary damages or other remedies beyond transfer or cancellation.

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2.

WIPO Arbitration and Mediation Center observations to ICANN for Policy Staff/GNSO Council
"Current State of the UDRP Webinar" – May 6, 2011

Registration authorities in their own way rely on the UDRP for predictable guidance in implementing external decisions concerning disputed domain names. Such registration authorities are afforded a measure of insulation not only from the dispute resolution process itself, but also from possible court litigation. Of course, ICANN stakeholders themselves also extensively rely on trademarks of their own.

Any destabilization of the UDRP will impact all of these parties.

By accommodating evolving norms and practices, the UDRP has proven to be a flexible and fair dispute resolution system

The overall UDRP framework does not seek to micro-legislate for moments in time. Its non-exhaustive concepts of respondent rights or legitimate interests and 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 in effect represents the collective wisdom and public stewardship of hundreds of UDRP panelists across jurisdictions exercised over the course of tens of thousands of reasoned decisions.

Examples of practical issues addressed include privacy and proxy registration services, multiple parties and consolidation principles, language requests, consideration of supplemental filings, and suspension procedures to facilitate party-agreed settlement. The list is long, with these and many other issues continuing to be streamlined by UDRP panelists in live cases every day.

In this way, the UDRP has incrementally developed as a public system of jurisprudence over more than a decade. This is illustrated by the recently published second edition of the *WIPO Overview of WIPO Panel Views on Selected UDRP Questions*, which distills broadly-held panel positions on nearly 50 of the most important procedural and substantive issues in over 20,000 WIPO UDRP cases (see www.wipo.int/amc/en/domains/search/overview2.0/). This vast body of published jurisprudence both results from and naturally furthers UDRP stability through time.

With exponential DNS growth around the corner and untested new RPMs in development, this is in any event the wrong time to revise the UDRP

Irrespective of one's views on its functioning, the UDRP must interoperate with other RPMs being developed for New gTLDs, in particular the URS which also addresses registrant behavior. The URS is as yet unsettled and presents serious issues in terms of its workability; its procedural and jurisprudential interaction with the UDRP remains largely unaddressed. Even if such issues were satisfactorily resolved, this new RPM 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 expansion, and it would be highly unwise to risk its destabilization at this time.

/...

3.

WIPO Arbitration and Mediation Center observations to ICANN for Policy Staff/GNSO Council
"Current State of the UDRP Webinar" – May 6, 2011

Institutionally stacked, an ICANN revision process would likely end up overburdening and diluting the UDRP

Following a series of nearly twenty international consultations involving experts from around the globe, WIPO's recommendations in the Final Report of this First WIPO Internet Domain Name Process provided the blueprint for the UDRP. ICANN, which at that time had only just been formed, adopted this UDRP model in late 1999. Since then, significant numbers of ccTLD registries have also adopted dispute resolution policies based on that same model.

Between 2000 and 2003, several ICANN efforts have looked into the possibility of amending the UDRP, without producing any agreed basis for constructive movement. The only positive change occurred in 2009, when ICANN adopted WIPO-designed amendments to the UDRP Rules to facilitate paperless pleadings.

Some ten years after the UDRP's inception, trademark owners are now being asked to buy into an unprecedented registration-driven DNS expansion. At the same time, certain of those registration interests, joined by other ICANN stakeholders, are advocating that the UDRP be investigated.

If interests under the ICANN umbrella do not share the wide recognition of the UDRP as an overall success and rather believe it warrants revision, it would seem incumbent upon those interests to advance a transparent rationale for their views and articulate a coherent alternative model.

Of course, from an IP rights holders' perspective, there are numerous ways in which the UDRP might be amended. It could operate on condensed timelines and default decisions. Its scope could extend beyond trademark rights, and more recent bad-faith scenarios recorded. Calls have been made for damages options and 'loser pays' models. The UDRP could also be expanded to address certain forms of intermediary behavior. Other interests are on record with wish-lists that apparently include the UDRP definition of cybersquatting itself.

On its part, based on unparalleled experience, WIPO has deep insight into practical options for UDRP modification. However, the process and timing must be right. Any responsible effort to reconstruct the UDRP framework cannot be rushed, but ought rather to be the balanced result of serious, appropriately resourced, expert deliberations, grounded in a constructive vision for the 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 the UDRP's effectiveness as a rights protection vehicle. The present state of the URS illustrates the risks of subjecting an RPM to recycled committee processes, open-microphone lobbying and line-item horse-trading.

/...

4.

WIPO Arbitration and Mediation Center observations to ICANN for Policy Staff/GNSO Council
"Current State of the UDRP Webinar" – May 6, 2011

Any invoked "inevitability" of UDRP revision is man-made. Stakeholders should not be naïve about the genesis of the envisaged revision process, nor optimistic about its likely outcome for the UDRP if moved forward: a mechanism tweaked in certain micro ways, but overburdened and diluted as a whole.

Fundamental questions about the business and DNS beneficiaries of cybersquatting must be addressed before targeting the very mechanism intended to address this practice

The spotlight today should not be on the UDRP, but on the persistent practice of cybersquatting. If only for its intended inclusion of the definition of cybersquatting, any revision of the UDRP must be preceded by a transparent examination of this illegitimate business itself.

Instead of allowing the UDRP to be placed in the dock, ICANN should first fairly address the following issues:

- the relationship between cybersquatting and the activities, revenues and budgets of DNS actors;
- the incidence of UDRP cybersquatting findings in relation to wider trademark abuse in the DNS overall, with filed UDRP cases merely representing the tip of the iceberg; and
- the degree of proportionality between trademark rights enforcement and domain name registration opportunities in the DNS.

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 to date, 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 effects 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, not an inevitability. For a number of reasons, we counsel: don't go there.

We are posting a copy of these observations on the WIPO website for public information at www.wipo.int/amc/en/domains/resources/icann/.

Thank you for your consideration.

Yours sincerely,



Erik Wilbers
Director
WIPO Arbitration and Mediation Center

ADDITIONAL OBSERVATIONS FROM THE NATIONAL ARBITRATION FORUM



A FORUM Dispute Management Organization

February 11, 2011

Intellectual Property Constituency
UDRP Issue Report Working Group

RE: National Arbitration Forum comments on Uniform Domain Name Dispute Resolution Policy (UDRP)

Dear UDRP Issue Report Working Group:

Thank you for reaching out to the National Arbitration Forum (“Forum”) for comments on the effectiveness of the UDRP to date and suggestions for improvements going forward.

First, the Forum takes no official position on the substantive portion of the UDRP (paragraph 4(a)-(c)). While other Providers might find it within their mandate to advocate for intellectual property considerations, the Forum considers itself neutral and takes no position on that portion of the UDRP.

Second, some of the questions or clarification points mentioned are routinely brought up by parties; the Forum does not necessarily advocate for a specific resolution on those comments and will so note as appropriate.

Third, the Forum urges the Working Group to review its comments submitted December 10, 2010 for the URS (also submitted again with this letter). We believe it’s possible that some of the ideas incorporated into the URS might be considered for inclusion into proposed UDRP changes and we strongly urge the Working Group to consider the pitfalls flagged in that document and address those issues.

Finally, we know there is strong IP Community interest in a “loser pays” model for the UDRP. The Forum takes no position on that topic, but is strongly opposed to any system that requires the Provider to try to collect money from losing Respondents; we are an arbitration provider, not a collection agency.

The Forum hereby submits its specific comments for consideration. The Forum is available for consultation and comment on the likely effect of any proposed recommendations, particularly ideas heretofore unproposed. Indeed, the FORUM strongly encourages the IPC and the Working Group to reach out to the Forum for consultation on matters with which the Forum has significant experience: the procedural implementation of domain name dispute systems.

We submit our comments in order of importance.



A FORUM Dispute Management Organization

1. Include a requirement that the Provider request verification and a lock from the Registrar for each domain name and that the Registrar respond within 48 hours. Currently, there is no provision for this, but Rule 2 requires the Provider to serve the billing address, which we can obtain no other way than through the Registrar, and Policy para. 8 forbids transfer, but we don't have any indication that the Registrar intends to comply. If the Registrar never replies, we are in a position of proceeding without a lock and there is a higher incidence of cyberflight on these cases. Because there is no formal requirement for this, it appears that ICANN's hands are tied—no action can be taken against the Registrars that don't comply. The information we need from the Registrar for each domain name:
 - a. Confirmation that the domain name(s) is/are registered with that Registrar.
 - b. The name and billing address for the registrant(s) (Rule 2)
 - c. Confirmation that the domain name(s) is/are locked. (Policy Para 8)
 - d. The language of the Registration Agreement (Rule 11)
 - e. The expiration date (the Whois often projects it out a year)
 - f. Confirmation that the domain name will not be allowed to expire or be deleted during the pending UDRP proceeding, as provided under the Expired Domain Deletion Policy (EDDP).

2. Revise Rule 11(a). Currently the Rule says "Unless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding."
 - a. The Rule is impossible to administer as written. The language of the proceedings is determined well before commencement, at the time the domain name is verified by the Registrar, causing Complainant to have to translate the complaint during the deficiency period (see item 3 below). At that point, the case is not commenced and no panel is appointed. Therefore, it's impossible to ask a Panel to determine if the Complaint need not be translated. If we were to "pre-appoint" the Panel, it would remove Respondent's ability to select a three member panel since a Panel would already be appointed.
 - b. We understand that at least one Provider allows the Complainant to send an English language complaint and then only sends the written notice in the language of the registration agreement, allowing the Panel to determine later if everyone was served to the Panel's satisfaction. The problem as we see it is:
 - i. This appears to violate the Rule that the default language is "the language of the administrative proceeding"...that is not the exception.
 - ii. The Respondent was notified of a dispute in its language, but may not have been able to read the pleadings and therefore may not fully comprehend the nature of the Complaint. Respondent also may be more likely to ignore the Complaint as irrelevant or spam/junk mail.

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A FORUM Dispute Management Organization

- c. We recommend Rule 11 be amended to either codify the practice outlined in (b) above, or outline a new practice for the Providers, consistent with the UDRP timeline. While this Rule appears sound on its face, it's not until you get into the practical implementation of it that the problems surface.
3. Currently, when a complainant has to translate a complaint, more time is needed than the five (5) day deficiency period. As a result, the Forum has a rule allowing a complainant to withdraw and then refile for a nominal administrative fee. The challenge with this, is that the withdrawal releases any lock that had previously been on the domain name. It would be helpful to write in an allowable extension of the deficiency period, only for use when complainant has to translate. While the UDRP is supposed to be fast, it's clear the UDRP drafters didn't consider the translation issue.
4. Communication and transmission of documents via a portal (Rule 2 except Rule 2(a)). The Forum has developed a portal that its parties may use to upload and access file documents. The system notifies the parties when a new file has been uploaded via email. The only difference is, the parties are not sent an attachment of the document, but are provided with a link to the portal. We would like to:
 - a. See this explicitly addressed and approved.
 - b. Verify and have it explicitly addressed in the UDRP, that a party's burden for copying everyone else is met by a party uploading a file to the portal and the Forum's system notifying everyone of its presence.
 - c. The Forum does not seek to overturn the commencement process as outlined in Rule 2(a).
5. Policy paragraph 8(a). Clarify if the clause beginning "unless the party to whom the domain name registration is transferred agrees..." refers only to preceding romanette (ii) or to both (i) and (ii). We read this paragraph to mean that a domain name may not be transferred during a pending administrative hearing. We interpret the paragraph to mean the rest of the sentence does not apply to UDRP cases but we know that others have a different interpretation. It might also help to clarify if the lifting of a privacy shield constitutes a transfer.
6. Complaints and comments made by parties. The Forum does not necessarily endorse these comments, but passes them along for consideration.
 - a. Is there any recourse for a party when a decision was published per UDRP para 4(j) and Rule 16(b) and the decision was either overturned in court, or the parties agree they don't want the decision out there? [Forum comment: if anything is done to address this, the onus should be on the parties to notify the Provider of the court's decision/party agreement with evidence to the Forum's satisfaction.]
 - b. Paragraph 4(k) outlines how the Registrar needs to be notified. There is no requirement that the Complainant actually be served and in many cases, the Complainant is not served till much later, and only after vocal complaints. There

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is also no real requirement as to what constitutes service or even a complaint. We've seen a wide variety of documents passing for a "complaint"—some have turned out to be fraudulent. Also, it would help if the Provider was also provided with a copy of the complaint, as complainants often turn to us to help enforce decisions.

- c. Appeals. Parties have asked for an appeal process.

Finally, with respect to how the UDRP has functioned to date, we make the following observations:

1. The process is fast (on average 42 days, but frequently as few as 28 days when the parties haven't requested Stays).
2. The process is usually hassle-free. Few parties report to us that they have serious problems with having decisions implemented, and in a large number of those cases, it's the complainant who didn't understand how the process worked, or didn't follow up in a timely manner. However, I note that ICANN rarely follows up on Rule 16(a) violations. No matter how many times we bring to ICANN's attention that a Registrar is not notifying the Parties and Provider of the date on which the decision will be implemented, nothing is done about it. Many of the largest registrars are complying, notably, GoDaddy, eNom, and Tucows. Of the ones that don't comply, there are few problems with transfer so it seems the non-compliance has little negative effect. However, for a handful of Asian-based registrars with whom obtaining transfer proves to be most difficult, ICANN isn't enforcing Rule 16(a), which should be the first step in enforcing the decision. The only entity that has leverage over Registrars that don't comply with UDRP Panel Orders is ICANN. So if ICANN is not enforcing 16(a) or a registrar's refusal to contact/work with a prevailing complainant, the UDRP becomes worthless.
3. The UDRP has by-and-large stood the test of time. The Internet has changed drastically since the UDRP was approved and few changes have arisen to really confound the process. We caution ICANN and the Working Group to consider the thousands of UDRP decisions serving as precedent when suggesting substantive changes to the UDRP.

We urge the Working Group and ICANN to include the Forum in discussions regarding potential changes to the UDRP and remain willing to help in any way we can. Again, we thank you for soliciting our comments.

Sincerely,

Kristine Fordahl Dorrain
Internet Legal Counsel
National Arbitration Forum
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Annex 4 – Report of Public Comments on the Preliminary Issue Report

<http://www.icann.org/en/public-comment/report-comments-prelim-report-udrp-31aug11-en.pdf>

Annex 5 – Advice From the GAC and ALAC



Governmental Advisory Committee

14 September

2011.
Stéphane Van Gelder
Chairman of the GNSO Council

RE: GAC Statement of advice on a possible UDRP PDP.

Dear Mr. Van Gelder,

Due to the potential GNSO Council's approval for the initiation of a Policy Development Process to review the Uniform Domain Name Dispute Resolution Policy, the GAC wishes to express its concern that the time is not right for a review.

Hereby, I submit the enclosed GAC Statement of advice for the GNSO Council's consideration and look forward to receiving your response.

Thank you for your consideration.

Yours sincerely,

A handwritten signature in black ink, appearing to be the name of Margie Milam.

Heather Dryden
Chair, Governmental Advisory Committee
Senior Advisor to the Government of Canada

Attachment: GAC Statement on a possible UDRP PDP.

GAC Statement on a possible Policy Development Process for reviewing the Uniform Domain Name Dispute Resolution Policy.

The GAC is aware that the GNSO is considering initiating a Policy Development Process (PDP) for the purpose of reviewing the Uniform Domain Name Dispute Resolution Policy (UDRP). The GAC wishes to convey to the GNSO its view that a decision in favour of such a PDP at the time of launching the new gTLD program would have public policy implications of great concern to the GAC.

The new gTLD program will see the introduction of several new rights protection mechanisms (RPMs). The inevitable uncertainty associated with the introduction of these untested RPMs would be compounded if simultaneously the future of the primary, pre-existing, and proven RPM - the UDRP - were also subject to uncertainty as a result of a long-running PDP.

The GAC recalls that the ICANN Board, in responding to specific proposals in the GAC Scorecard with regard to RPMs, cited the continuing availability of “the existing, long-standing and tested [UDRP]” (see the ICANN Board Rationales for the Approval of the Launch of the New gTLD Program at 107, accessible from <http://www.icann.org/en/minutes/resolutions-20jun11-en.htm>). The ICANN Board further referenced the continued application of the UDRP to all new gTLDs as a key step taken by ICANN to “protect the rights of others in new gTLDs.” (Id. at 119). The GAC considers that the possibility of changes to the UDRP as a result of a PDP at this critical time for the DNS runs counter to these reassurances by the Board.

Further, the GAC notes that almost 50% of the country code top level domain (ccTLD) operators have either adopted the UDRP itself or a variant of it, such that any potential changes to the UDRP that could result from a PDP would potentially have broad implications beyond the remit of the GNSO.

For the reasons outlined above, the GAC considers that any review of the UDRP should be conducted in light of community experience with the new gTLD RPMs, and should take full account of ccTLDs’ use of the UDRP. While the GAC is not opposed in principle to a review of the UDRP at an appropriate time, the GAC considers that a review at this time would not be appropriate.

**EN**

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DATE: 21 July 2011
STATUS: FINAL

AT-LARGE ADVISORY COMMITTEE

Statement of the ALAC on the Preliminary Issue Report on the Current State of the UDRP

Introduction

By the Staff of ICANN

José Arce, a member of the Latin American and Caribbean Islands Regional At-Large Organization (LACRALO), composed an initial draft of this statement in Spanish, after discussion of the topic within LACRALO. This draft, along with an English translation, was posted on a [wiki workspace](#) on 12 July 2011. Eric Brunner-Williams, an individual member of the North American Regional At-Large Organization (NARALO), composed an alternative, independent draft in English, after discussion of the topic among members of the ALAC and all five Regional At-Large Organizations (RALOs) in Singapore. This alternative draft was posted on the same [wiki workspace](#) on 14 July 2011.

On 15 July, At-Large Staff sent a four-day call for comments on both drafts to all At-Large members (using the ALAC-Announce mailing list).

On 16 July, the ALAC requested a 14-day extension of the [public comment period](#) on this subject and was granted an extension through 22 July 2011.

On 20 July, ALAC Chair Olivier Crépin-Leblond created the final version of this Statement by combining the two original drafts and the comments received by At-Large members. On 21 July, the ALAC Chair requested that Staff open a five-day ALAC ratification vote on this statement, and the statement was submitted to Margie Milam (Staff person responsible for the public comment period).

[End of Introduction]

The original version of this document is the English text available at www.atlarge.icann.org/correspondence. Where a difference of interpretation exists or is perceived to exist between a non-English edition of this document and the original text, the original shall prevail.

**Statement of the ALAC on the
Preliminary Issue Report on the Current State of the UDRP**

The Preliminary Issue Report has been prepared by Staff at the request of the GNSO Council. Procedurally, production of the Preliminary Issues Report, a public comment period, and a Final Issue Report are predicates to a determination by the GNSO Council of whether or not to commence a policy development process (PDP) on the UDRP.

As a prelude to this ALAC Statement, we want to highlight the complexity of the issue, as it is one of the oldest policy systems that ICANN has used throughout the world and was developed when the practices of "good" and "abusive" domain name registration came to light. This led to the discussion of many topics, such as (a) Whois, (b) Post-Expiration Domain Name Recovery and (c) Abusive Registrations, as well as other similar policies.

The ALAC supports the Staff recommendation that the UDRP can be improved through modest improvements of its implementation, but we believe it to be a highly complex system.

The ALAC also supports the Staff recommendation that a PDP on the UDRP should not be initiated at this time.

However, we consider the Staff recommendation that a *small* group of experts be convened to produce proposals to improve the process or implementation of the UDRP to be cause for concern. The UDRP was drafted by a small group of experts primarily from North America a decade ago. Its clear basis in American law (especially ACPA) actually has plagued its implementation. If the UDRP is to be reviewed or studied, the group doing so should be open to all five geographical regions – especially to experts from the non-Latin-language community and worldwide Internet community, who have no conflicts of interest. In other words, the group should not be limited to the existing elite club known to ICANN.

That said, if the GNSO were, in fact, to adopt the Staff recommendation to convene a small group of experts to produce proposals that would improve the process or implementation of the UDRP, the ALAC recommends that these improvements address the problems identified by Professor Komaitis concerning meritless capture of domains.

Historically speaking, the ALAC does not believe that the UDRP has been addressed in an appropriate way. During 10 years of operation, the process should have been addressed in a multi-stakeholder manner, with follow-up discussions based on experience and research. This issue is of great importance and complexity and should be treated as such. Going forward, a broader approach is needed than has been thus far used.

Therefore, a modification to the UDRP can and should wait until a detailed and thorough analysis of its various policies and practices has been completed. The voices that strongly support an

immediate PDP do not represent the consensus – and do not objectively represent the policies of the past 10 years.

The ALAC has the following comments regarding the Staff recommendations stated in the Preliminary Issue Report:

First, the means by which two or more parties resolve a dispute concerning the status of the registrant of record of a registered domain name is a policy, but it is not a policy that can preserve and enhance the operational stability, reliability, security and interoperability of the Internet.

The determination of the registrant of record of a registered domain name has no relationship to the operational stability, reliability, security and interoperability of the Internet. While the policy has obvious benefits, this simply is not one of them.

Second, while the UDRP "applies uniformly to all registrants of gTLDs and to all registrars" in theory, in practice the utilization of the UDRP concerning domain names registered in .aero, .coop, .museum, .cat and perhaps others is negligible. It is useful to have a uniform policy of uniform applicability, where this policy does not create disproportionate harm and accomplishes the desired ends.

Discussion of the UDRP should be informed as to where it is useful and, in fact, necessary and as to where it is not, since this awareness relates to the market forces that create the problem for which the UDRP is a solution.

Third, while "a review of the UDRP could be instructive as a guide or framework for how to conduct reviews of other policies," other reviews, past and prospective, possess the same potential.

Fourth, it can not be said that any amendment will undermine the current policy, and it is impossible to make predictions on these matters.

Given the current state of discussion, considering that the stakeholders involved hold different views and some of these are in a state of confusion, we conclude that it is not the appropriate time to carry out a PDP process.

But the ALAC does support the implementation of a PDP process in the near future, based on a real "need," well-defined by its stakeholders, after establishing a clear purpose and scope of reform.

Fifth, the ALAC commends Staff for preparing the UDRP Questionnaire and the summary of issues raised by respondents in the community. We also commend the Provider respondents to the UDRP Questionnaire – the World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF), the Asian Domain Name Dispute Resolution Centre (ADNDRC), and the Czech Arbitration Court (CAC). These work products of Staff and Respondents, along with their presence in the record of the Preliminary Issue Report, constitute effective and informed notice and comment.

Finally, we note that while this policy is one of ICANN's oldest, ICANN has not translated the document on its Web site from English into other languages (see <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>). Only its rules are summarized (see <http://www.icann.org/es/dndr/udrp/uniform-rules-es.htm>), which are not mandatory for providers (bearing in mind that the English version shall prevail in the case of a contradiction). This would need to be fixed as a matter of priority.