

Workshop on the Current State of the UDRP

*Overview & Analysis of the
Preliminary Issue Report*



22 June 2011

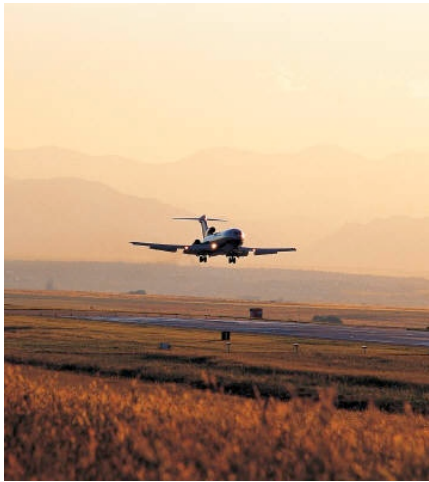
Moderators:

Mary Wong

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Background & Current Approach

- Issue Report Requested by the GNSO Council on 3 Feb 2011
- Webinar 10 May heard from experts on the current state of the UDRP
- Questionnaire to UDRP providers submitted facts for Issue Report
- Preliminary Issue Report published for public comment
- Final Issue Report to be released after Singapore
- GNSO Council to vote on whether to initiate a PDP on the UDRP



Current State of the UDRP



Widely Recognized as a Success

- Over 30,000 complaints filed over last decade
- Four service providers approved by ICANN providing choice and competition
- Viable alternative to costly litigation involving parties from differing jurisdictions
- Served as a model for ccTLDs
- Significant service provider resources in education and publishing decisions



Community Opinion of the UDRP

- The UDRP is **cost effective**, as compared to traditional litigation
- The UDRP is **flexible and fair to respondents**-rarely challenged in court
- The UDRP is **predictable and transparent**
- The UDRP is **unfair to brand holders**, who spend million\$ on cybersquatting
- Although not perfect, more harm than good can result from a PDP
- If the UDRP is to be reviewed at all, focus on process improvements
- **Consensus** - a PDP could undermine the effectiveness of the UDRP



Staff Recommendation

- Given the Community view that the UDRP should not be tampered with, *Staff recommends against initiating a PDP*
- If the GNSO Council believes that the UDRP should be reviewed:
 - Staff suggests convening a team of experts
 - Experts to focus on process recommendations only
 - PDP could be initiated later if there is a continued desire to review the policy



Issues Identified by the Community

Policy Issues

- Bad Faith Requirement
 - “Or” instead of “And”
- Missing Safe Harbors
 - Policy should reference free speech and fair use
- No Appeals
 - Policy should include an appeals process



Issues Identified by the Community

Process Issues

Early Mediation	Might consider option for early mediation in the process
Panel Appointment Timeline	Timeline to appoint panel could be more flexible; five days too short
Verification Process	No requirement to provide information to providers
	Registrars sometimes provide false information in 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

Issues Identified by the Community

Process Issues

Registrar Obligations	More guidance to Registrars on what needs to be done in UDRP proceedings would be helpful
Lock Down of Domain	No requirement to lock names in period between filing complaint and commencement of proceedings
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
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

Issues Identified by the Community

Process Issues

WHOIS Updates	WHOIS record modifications after filing but before commencement lead to unnecessary deficiencies and amendments
	WHOIS contact data often updated even after receipt of notice of proceedings
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
Privacy/Proxy Registrations	Need to address privacy and proxy registrations or require complaining party to amend complaint once infringing party identified
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



Issues Identified by the Community

Process Issues

Copy of Complaint	Registrars are not required to receive a copy of the Complaint
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
Language of Proceedings	Timing of determination is procedurally impossible to occur before the proceedings commence Difficulties identifying panelists in certain languages
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

Issues Identified by the Community

Process Issues

Dropping names from Respondents in Complaint	Rules unclear and confusing to respondents
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
Stays/Case Suspensions	No guidance on what a Registrar is to do if a claim is stayed or suspended
Timing of Response	Respondents should be given more time to respond to Complaint
Default	Should examine why defaults occur, and whether they are tied to language issues for foreign respondents

Issues Identified by the Community

Process Issues

Laches	Laches should be considered in UDRP cases
Evidence	Rules written in 1999, need to be updated to address changing content based on user location, and to reduce document manipulation and forgery
	Lack of sufficient evidence to support claims, especially jurisdictional ones; unsupported assertions should not be considered "proof"
	Rules 10/12 gives panelists ability to conduct proceedings fairly and seek more evidence; these rules should be used more
Rules on Supplemental Submissions	Additional rules needed regarding supplemental submissions to reduce delays into the process; uniformity would be useful



Issues Identified by the Community

Process Issues

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
Uniform Procedures for Transfers	No specified timeframe for implementing transfers
	Delays often experienced in implementation of decisions by Registrars
Registry Notice to Registrars	Registries do not communicate to Registrars when a decision has been implemented at the Registry level
Registry Role In Implementation	Registry involvement in implementation may be appropriate



Issues Identified by the Community

Process Issues

ICANN Compliance Activity	ICANN Contractual Compliance Department rarely intervenes when Registrars not cooperating
UDRP Cases as Precedence	No clear authority for treating prior cases as "precedence"
Review of Bad Cases	No mechanism to review bad decisions or to hold panelists accountable
Uniform application of rules by providers	Review of provider interpretation of rules may be advisable to make them more uniform
Uniform File/Decision formats	Providers use different formats--may be beneficial to make uniform



Issues Identified by the Community

Process Issues

Prevailing Party Cooperation	Need method to solicit contact data from prevailing party
	Prevailing party cooperation needed to effect transfer to new Registrar; No timeline specified for prevailing party actions
Registrar Cooperation	Registrars should be required to actively cooperate with UDRP proceedings
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
Appeals	Respondent controls jurisdiction of appeals

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Issues Identified by the Community

Process Issues

Deadlines and Timings	In a global world, more specificity needed for setting deadlines
	Timing for decisions often too short to allow for meaningful review of the evidence
Penalties for abusive filings	Should consider penalties for trademark holders that abuse the UDRP system
Sanctions for Rule Violations	No penalties for violations of the Rules
ICANN Contracts with Providers	Might be beneficial to have ICANN enter into formal contracts with Providers

Issues Identified by the Community

Process Issues

Renewal Fees	Clarification of requirement to pay renewal fees
Expiration/Deletions	Clarification of rules applicable to expiration or deletion of domain names during a UDRP Proceeding
Loser Pays Nothing	Losing respondent should pay filing fees and attorney's fees
Three Member Panel Fees	If respondent asks for 3 member panel, and complainant asked for 1, respondent should bear the extra fees

Additional Information



- The UDRP-
<http://www.icann.org/en/udrp/#udrp>
- Review archive of the Webinar on the Current State of the UDRP:
<http://icann.adobeconnect.com/p22471828/>
- Participate in the public comment forum on the Preliminary Issue Report- until 15 July 2011
<http://icann.org/en/announcements/announcement-2-27may11-en.htm>



Panel- Discussion of Preliminary Issue Report

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Questions

One World

One Internet



Thank You

