



IPC Comments on UDRP PDP

1) Introduction

The Intellectual Property Constituency (IPC) of the Generic Names Supporting Organization (GNSO) of ICANN appreciates this opportunity to comment on the “Preliminary GNSO Issue Report on The Current State of the Uniform Dispute Resolution Policy” (“Preliminary Report”).

2) The IPC Opposes a UDRP PDP at This Time.

The IPC believes that a PDP on the UDRP should not be initiated at this time. A UDRP PDP is not only unnecessary, but would be unwise and counterproductive to the best needs of the gTLD system at a time when stakeholders face major changes and uncertainty arising from the launch of new gTLDs. We note that this position is supported by a broad range of stakeholders, including counsel for domain name registrants, dispute resolution service providers, representatives of the commercial domain name registrant community and brand owners. Indeed, the positions stated by the most frequent users of the UDRP, as expressed in at the ICANN webinar on May 10, 2011, and at the ICANN Singapore meeting, were remarkable in their agreement that policy review of the UDRP was not warranted or beneficial at this time.

3) Necessity, Benefit, and Timing of Review

The IPC believes that the decision to proceed with a PDP on the UDRP should be guided by considerations of necessity, benefit and timing. The IPC agrees with the majority of views expressed by the principal stakeholders who use the UDRP that none of these considerations support a PDP at this time.

- **A policy review is not necessary because there is general agreement that the UDRP works well and generally satisfies the needs of the Internet community.** Early criticism arising from uncertain results has dissipated as a growing body of UDRP precedent, related court decisions

and national laws has brought more certainty and consistency to UDRP results. Although many of the affected stakeholders can identify a wish list of potential changes, most seem to agree that the current balance embodied in the UDRP Policy works well and should not be changed.

- **A policy review presents more risk than benefit to the relevant stakeholders because it would replace the current stability resulting from the established UDRP with the uncertainty arising from an ongoing and lengthy debate over potential changes to the UDRP.** Further, the time, money and other resources involved in a PDP would not be well spent as most stakeholders agree that there is no pressing need for changing the UDRP. There are other more pressing concerns identified by the affected stakeholders where resources are better directed.
- **The timing of a review now would be especially unwise given the uncertainty created by launch of new gTLDs.** The UDRP is a critical component of the rights protection mechanisms designed for the new gTLD launch and is one of the few elements that can provide a time-tested, stable mechanism. This would not be a good time to disrupt that stability.

4) Justifications for a PDP Are Not Persuasive

The suggested changes proposed for the UDRP do not justify a PDP because they are unnecessary, run the risk of disrupting the stability of the UDRP process and may be accomplished by other means that do not involve a policy review. Some of the specific justifications given for a PDP are addressed below:

- **Additional free speech “safe harbors” are not needed** – sufficient protection already exists. One of the concerns voiced as justification for changing the UDRP is the false assertion that the UDRP as currently implemented does not protect free speech. In this regard, it is important to note that a UDRP decision only involves the domain name *per se*; nothing in a UDRP ruling affects the actual content of a website. Secondly, it is also important to note that the Policy itself, in Paragraph 4(c)(iii), already provides a safe harbor for “free speech” when the domain name registrant is “making legitimate noncommercial or fair use of the domain name.” This provision is generally interpreted to protect legitimate free speech concerns. See, e.g., *Jules I. Kendall v. Donald Mayer*, D2000-0868; *Tom Papania v. Fraud Expose*, D2001-0978; and *Full Sail, Inc. v. Ryan Spevack*, D2003-0502. To the extent there are misunderstandings or lack of knowledge about this provision, the solution can best be found in greater education of stakeholders involved in the UDRP rather than in changes to the Policy, which could have the undesired consequence of limiting free speech protections when some protections are enumerated and others are not.

- **The existing appeal to national courts is effective and sufficient.** It has been suggested that there should be an appeal process within the UDRP. However, at present dissatisfied parties may “appeal” an adverse UDRP decision by filing an action in court, normally in the location of the registrant or the registrar chosen by the registrant. Adding an appeal process within the UDRP would insert an unwarranted level of expense and delay to the enforcement of UDRP decisions.
- **Preventing advocates from serving as panelists in unrelated cases is unwarranted.** The UDRP policy has been criticized for allowing UDRP Panelists to also represent parties in unrelated proceedings, allegedly creating the appearance of a conflict of interest. This issue has been addressed in UDRP decisions, which recognize that the legal systems of many countries allow practicing attorneys to serve as both advocates and magistrates in civil proceedings, provided there is no conflict of interest in the particular matter. The UDRP Rules already require panelist disclosures to prevent conflicts of interest in particular cases. The IPC believes the issue of conflicts is best addressed on a case-by-case basis, as currently done, and not through a blanket prohibition on attorneys serving dual roles in unrelated matters.
- **Registrar compliance and conduct concerns do not require a PDP.** Stakeholders have indicated that there are problems with registrar compliance with UDRP decisions. This problem merits a solution. That problem may be solved, however, through vigorous enforcement of the existing Registrar Accreditation Agreement by ICANN, and would not involve any policy change. Stakeholders have also experienced problems arising from registrars who have encouraged gaming of the Policy to avoid transfers after a UDRP decision. Again, this problem can and should be addressed without a policy change to the UDRP.

5) Further Time and Study Is Needed to Understand the Data and Issues

The proposals for a UDRP PDP are marked by a significant lack of clarity. The Preliminary Report recognizes that some beneficial changes might be made to the efficient functioning of the UDRP without going through a GNSO PDP, but it is not clear what changes are needed or would be beneficial, or whether there would be a better means to implement them. Clearly there is need for better information and a better understanding regarding the current situation, as well as the situation that will exist under the new gTLD regime in which the UDRP plays a key role along with the URS and other rights protection mechanisms. Given that the UDRP has handled cases involving over 30,000 domain names since 1999, the GNSO should have the benefit of a more complete understanding of these results, rather

than the isolated anecdotal examples that have been voiced so far, before proceeding with a UDRP PDP. A more useful and well-informed approach would be to form a group of people with experience and expertise in the UDRP to collect and study existing data and data obtained during the early stages of the new gTLD launch, and to determine where there are real risks and need for change. With the benefit of that information, it might then 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.

6) Conclusion

Given the uncertainty resulting from the launch of new gTLDs, a UDRP PDP is not appropriate at this time. There is no demonstrated necessity for such review, and the potential benefits are far outweighed by the expense of resources and the risk of uncertainty resulting from a review. We recommend instead that the any UDRP PDP be deferred at least until the planned review of the URS for new gTLDs and then only after there has been a complete study of the relevant data by a group of interested stakeholders and their advisors with UDRP experience and expertise.

The IPC would be glad to assist ICANN in any specific or general questions relating to the important issue of UDRP changes, as many of our members were involved in the development of the original UDRP policy, have experience creating and working with ccTLDs dispute policies, have been users or panelists in the UDRP process, and otherwise have experience and expertise in dispute resolution processes. We can offer professional and cost-effective assistance on these issues, and recognize the critical importance of the UDRP to the stability of the domain name system.