

BACKGROUND:

Telepathy, Inc. since 1999 has been investing in descriptive, generic and acronym domain names. Telepathy and its related entities have been the respondent in over 20 UDRP disputes. Telepathy has chosen to invoke its rights to judicial review of UDRP disputes in several instances. A subsidiary of Telepathy successfully challenged in Federal Court a UDRP panel's decision ordering the transfer of the lomonaco.com domain name and still retains the domain name. Telepathy filed in Federal Court seeking damages in connection with UDRP disputes filed on the domain names airzone.com and sdt.com and reached settlements involving payments of substantial sums to Telepathy by the complainants in those UDRPs. UDRP panels have determined that some of the complaints filed against Telepathy are an abuse of the Policy and as a result have found the complainants guilty of Reverse Domain Name Hijacking.

While the principal of Telepathy, Inc. is a director of the Internet Commerce Association (ICA), this comment reflects the position of Telepathy, Inc., not that of the ICA.

REPUTABLE COMPANIES AND ORGANIZATIONS HAVE MISUSED THE UDRP

High-profile and reputable companies and organizations have been found guilty of Reverse Domain Name Hijacking – including Range Rover (<https://domainnamewire.com/2013/08/19/land-rover-found-guilty-of-rdnh-is-scathing-cybersquatting-decision/>), Procter and Gamble (<https://domainnamewire.com/2013/03/11/procter-gamble-guilty-of-reverse-domain-name-hijacking/>), Puma Sportswear company (<https://domainnamewire.com/2021/08/10/sportswear-company-puma-tries-reverse-domain-name-hijacking/>), even her Majesty the Queen, in right of her Government of New Zealand, was found guilty of attempting to reverse hijack the domain name newzealand.com (<https://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0754.html>).

JUDICIAL REVIEW IS NECESSARY AS A REMEDY FOR ABUSE OF THE UDRP AND FOR FLAWED UDRP DECISIONS

The history of the UDRP, as briefly alluded to above, is that reputable organization misuse the UDRP and that UDRP panels at times issue unjust transfer decisions that require judicial review to correct.

The claim by IGOs that no harm will result if ICANN accedes to their demand that they be allowed to use the UDRP as a remedy while depriving respondents of the right to judicial review of those UDRP decisions is belied by even a cursory review of the history of the UDRP.

THE IGOS' DEMAND THAT ICANN BESTOW EXTRA-JUDICIAL RIGHTS ON IGOS VIOLATES ICANN'S MANDATE

The UDRP is supposed to be a distillation of the rights that the complainant could assert in a court of law. As was recognized by the drafters, the UDRP is a stripped-down, expedited proceeding lacking most of the evidentiary procedures available in a court of law. The adoption of the UDRP was justified on the grounds no decision would be final until a losing respondent

had the opportunity to challenge in a court of law whether the UDRP decision was consistent with the law.

The root problem with the IGOs' demands and with the recommendations of the IGO EPDP is that it deprives the registrant of judicial review. The procedural issues that the IGOs use to justify depriving registrants of their rights to judicial review can be remedied without taking this drastic action. Possible solutions include the use of a surrogate for the IGO or that any court challenge would be limited to the disposition of the disputed domain name. In addition, the Notice of Objection procedure detailed in the Leap of Faith Financial Services comment ("LEAP comment") (<https://www.icann.org/en/public-comment/proceeding/initial-report-epdp-specific-curative-rights-protections-igoss-14-09-2021/submissions/kirikos-george-24-10-2021>), is an alternative worth further consideration.

In the absence of the UDRP, how would the IGOs assert their rights? The answer is that they would have to go to court. It is entirely at the IGOs' discretion whether they choose to file a UDRP rather than go to court. No one is forcing them to file a UDRP complaint.

The IGOs' wish to voluntarily avail themselves of the UDRP is not a reason for ICANN to create extra-judicial rights for IGOs and to deprive the respondents of the right to judicial review.

It is ironic that the IGOs, who exist to serve the public good, and though motivated by good intentions to remedy the harm caused by bad actors, is advocating for a policy that deprives hundreds of millions of registrants around the globe of their judicial rights.

The political clout of the IGOs far exceeds that of a diverse, unorganized group of global registrants, yet this unbalanced political clout at ICANN is translating into unbalanced policy recommendations. A policy development process where one interest has an outsized voice leads to bad policies. The GNSO Council should see through the self-serving yet unjustified rationale offered by the IGOs in support of their radical demand to eliminate judicial rights from the global base of domain name registrants.

Telepathy recommends that the GNSO Council rejects all of the recommendations of the IGO EPDP as they are all contrary to the guidance provided to the working group by the GNSO. The recommendations are all failed attempts to solve a non-existing problem as they are based on a flawed and unsupported assertion that the IGOs are unable to seek relief under the UDRP as currently constituted.

Of the recommendations made, Telepathy supports the ICA's comment for the reasons given therein that Option 2 of Recommendation 4 is the least objectionable.

Respectfully Submitted,

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President
Telepathy, Inc.