

Vox Populi supports the following concerns, which have been raised by members of the community for over a decade and are more fully described in the UDRP Policy Status Report (2022) and its predecessor, ICANN's Final Issue Report on the Current State of the UDRP (2011):

- The UDRP Rules should address current inequities including, “forum shopping,...panel appointment rules, such as rotating panelists, and ... bias issues.”
- The UDRP should provide clarification or additional guidance regarding free speech as it relates to domain name registration and use; in particular it should address “the fundamental unfairness of the [current] mechanism including ‘the lack of clear fair use provisions and safe harbors.’”
- The UDRP should have a built-in appeals process.

Like others have said UDRP complainants seek out providers they believe will provide a more favorable result. This is forum shopping. Forum shopping has “the result of biasing outcomes ... the UDRP provides trademark holders with a significant advantage over domain name registrants as they are able to opt for the service provider that they feel will be most sympathetic to their claim. In addition, ‘because the trademark owner is generally the complainant and usually pays the fee, the inference is that providers have an economic incentive to favor trademark holders.’”

While one of ICANN's goals for the UDRP is consistency, consistency is different than precedent. ICANN gave clear instructions on this point but panelists have gone rouge. UDRP's were never intended to create precedent and panel decisions were never intended to become a body of law. Rather, each individual case was to be examined against the policy and rules given to UDRP providers by ICANN. What has occurred is the opposite. Previous, poor and erroneous decisions have become precedent for new cases to refer to, which results in complainants seeking out the provider they believe has the precedent and panelists that agree with their desired outcome. Placing the UDRP provider choice in the hands of the complainant has become akin to essentially allowing the complainant to pick the judge in a case. ICANN should examine mechanisms that allow for a centralized system of complaint run by an independent body that picks the provider, and perhaps even the panelists within a provider.

Vox Populi recommends additional review of the UDRP as it relates to forum shopping and bias against domain name registrants, in favor of trademark owners.

Vox Populi would like to draw particular attention to how forum shopping and bias obstruct free speech. Despite 4(c)(iii) of the UDRP stating “noncommercial or fair use” is legitimate use of a domain name - **numerous UDRP decisions contradict the Policy's express recognition of fair use and free speech rights in favor of trademark owners. Several recent UDRP decisions have jeopardized free speech rights for all domain name registrants because of the lack of guidance from ICANN and/or a misapplication of free speech rights and/or bias as it relates to criticism sites.** Recently in *EUTELSAT SA v. Domain Admin, Honey Salt Ltd*, Case No: D2021-3806 (WIPO Jan. 24, 2022), the domain name was awarded to the complainant trademark owner despite the fact that the domain name was registered and used as a non-commercial

criticism site. **The panelist, in an unfounded grasp, used *the ICANN-mandated transfer fee, charged by the registrar as rationale to find commercial use by the registrant and hence bad faith by the registrant.* Other UDRP panels have similarly disingenuously blamed *registrants for ICANN-mandated transfer and renewal fees imposed by registrars; panelists argue that the ICANN-mandated transfer is bad faith even though the registrant has no say or participation.* See, e.g., *M and M Direct*, Case No. D2020-2545; *Brixmor Property Grp. Inc. v. Privacy Hero, Inc. / Domain Admin, Honey Salt Ltd.*, Case No. D2021-1610 (WIPO Aug. 5, 2021). These rationales are either blatant misunderstandings of the roles, relationships and obligations of registrars vs. registrants, or, alternatively pretexts used by panelists to award legitimate domain names to trademark owners – in violation of free speech rights.**

Given UDRP decisions have, de facto, become precedent, these types of decisions mean that any UDRP panel can now decide that any registrant is acting in bad faith simply because the *registrar is following the mandated ICANN Transfer Policy.* Not only is this ludicrous; it is a threat to domain name rights holders worldwide.

Even though one provider attempted to provide free speech guidance, i.e., the WIPO Overview 3.0 Section 2.6.3, states:

“where the domain name is not identical to the complainant’s trademark, but it comprises the mark plus a derogatory term (e.g., <trademarksucks.tld>), panels tend to find that the respondent has a legitimate interest in using the trademark as part of the domain name of a criticism site if such use is prima facie noncommercial, genuinely fair, and not misleading or false. Some panels have found in such cases that a limited degree of incidental commercial activity may be permissible in certain circumstances (e.g., as “fundraising” to offset registration or hosting costs associated with the domain name and website).”

WIPO panels often disregard this very specific guidance. WIPO panels repeatedly favor certain sections of the WIPO Overview and previous panel decisions while completely ignoring other sections and contrary authority showing that, for example, (1) the addition of the TLD “.sucks” prevents confusion (*McLane*, Case No. D2000-1455); (2) the use of a derogatory term (such as sucks) in a domain identifying a criticism site is legitimate (WIPO Overview ¶ 2.6.3); (3) providing a forum for others to exercise free speech rights is itself a legitimate interest (*Savin Corp.*, FA 0201000103892); and (4) the quality or quantity of criticism is irrelevant. See, e.g., *The United Grand Lodge of Queensland v. Redacted for Privacy et al.*, Case No. D2018-2862 (WIPO Mar. 14, 2019).

Freedom of speech and freedom of expression are well established under, for example, the First Amendment to the U.S. Constitution, Article 10 of the European Convention on Human Rights, and the U.K. Human Rights Act of 1998. The UDRP should not be used to allow complainants to suppress contrary views—the very views that freedom of speech protects—under the pretext of trademark law.

ICANN should be the source of free speech and fair use guidance, not WIPO. Whether actual or perceived, WIPO is arguably biased in favor of trademark owners since WIPO is also the organization responsible for international trademark registrations and arguably has an economic incentive to favor trademark holders. Moreover, one provider's interpretive guidance on free speech does not translate into universal or consistent application of the same amongst all UDRP providers.

The UDRP was constructed when the primary TLDs were .com, .net and .org. Original UDRP panels found that a domain name such as ICANN.org and ICANN.com were confusingly similar to the trademark "ICANN". In the past, when TLDs were not that descriptive, this may have made sense. But in today's world – after ICANN approved of and introduced over 1,000 new TLDs - many of which were designed to provide Internet users with an immediate identifier as to the function or purpose of the site, the archaic original concepts no longer apply. For example, consumers understand that ICANN.cars or ICANN.sucks are NOT confusingly similar to the trademark "ICANN" (or even the domain name "ICANN.org"). ICANN must clarify that the string itself, including the TLD extension, should be taken into consideration when comparing whether the trademark is confusingly similar.

If ICANN or the community feel a substantive review of the UDRP's impact on free speech is not warranted, or that a PDP is not the right approach to revising the UDRP, perhaps the community would be inclined to simply revise the UDRP in a manner akin to that which exists in the URS Procedure. Specifically, Section 5.8.2's of the URS states that a legal and legitimate defense against a claim of bad faith is "the domain name ... [being] ... operated solely in tribute to or in criticism of a person or business." At the very least, this clarification would be a step in the right direction towards universal application of free speech rights by all providers and panelists under the UDRP. ICANN has evolved in its dispute resolution thinking by placing this clarification of free speech rights in the newer URS policy. A similar, express clarification must be placed in the UDRP.

In light of forum shopping and bias, panelists disregard for ICANN rules and policy as it relates to precedent, and consistent misinterpretation and/or abuse of free speech rights - ICANN needs to create a mechanism for review when panels ignore ICANN rules and policies, and/or the providers own guidance. **Vox Populi joins others in the community calling for an independent, built-in appeals process.** The URS – established by the community after the UDRP with a "lessons learned" approach - understood the need for a built-in an appeals process; the UDRP should follow.

The UDRP is an efficient mechanism of domain name dispute resolution. However, efficiency can no longer prevail against the UDRP's other competing goal of fairness nor should efficiency trample over protection of free speech rights. **Free speech should continue to be a priority for the community and fiercely protected in the registration and use of domain names, even if – and precisely because – free speech principles are designed to allow unpopular views, including criticism sites.** Much has changed since the UDRP was introduced in 1999; it is time to revise the UDRP.

In summary, ICANN should revise the UDRP to address forum shopping and bias, clarify speech rights and fair use (like the URS has done) and create a built-in, independent appeals process (like the URS has done).