

April 19, 2022

Re: WIPO Arbitration and Mediation Center observations on *Policy Status Report (PSR): Uniform Domain Name Dispute Resolution Policy (UDRP)*

The following observations are submitted to assist ICANN and broader Domain Name System (DNS) community deliberations on the anticipated UDRP policy review.

**The UDRP is a globally-recognized policy success**

As was stated in a *Preliminary GNSO Issue Report on The Current State of the UDRP* (2011):

“In the last decade, the Internet community has come to rely on the consistency, predictability, efficiency, and fairness generally associated with the present implementation of the UDRP.”

The Conclusion of that same Report was that (emphasis added):

“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 ICANN community 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. **This recommendation mirrors the overwhelming sentiment of the ICANN community as highlighted in Section 3 of this Report that commencing a PDP on the UDRP may ultimately undermine it, and potentially may adversely affect the many Internet stakeholders who benefit from its current implementation.**”

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The UDRP is the unique result of a WIPO-led multi-year process consolidating the input of community stakeholders spanning over a dozen global consultation rounds.<sup>1</sup> With WIPO's stewardship, most evident in the WIPO Jurisprudential Overview 3.0, the UDRP remains an international success.

- Brand owners from every corner of the world rely on the UDRP day-in and day-out to address the bad faith registration and consumer-harming use of domain names (over 100,000 having been reclaimed through WIPO cases alone); indeed it is the only viable option to cost-prohibitive global court litigation.
- Registrants are able to defend their portfolios without the expenses associated with going to court.
- As is reflected in the RYSG's comments on the PSR, ICANN and Contracted Parties are able to outsource trademark-based complaints to UDRP providers without being dragged into expensive and time-consuming disputes.
- Many dozens of national domains (ccTLDs) use the UDRP model as a global best practice.

### **The complexity of a UDRP review should not be underestimated**

It has been suggested, including in the above-mentioned 2011 Report, to focus on “process or implementation” issues, leaving substantive legal issues aside. The policy-impacting potential of even so-called procedural issues has been [described](#) as follows:

“...we would be able to say - let's suppose that we discover that all of the serious changes we're proposing actually could be spun as procedural. Then we could go along with the flow and say okay, we agree with all of these people who are afraid of substantive changes, let's make it a procedural change.”

In any event, any serious UDRP review must appropriately account for over two decades of mature operation. WIPO's Jurisprudential Overview reflects a body of case law that has been carefully developed over thousands of decisions by hundreds of experts from around the world.<sup>2</sup>

To maintain its operational and jurisprudential balance, any UDRP review must avoid horse-trading from amongst competing wish-lists or policy-making by attrition, as well as artificial time constraints. It must moreover recognize that a key aspect of the UDRP's success over time is its broad and flexible framework that does not seek to legislate every last detail or provider practice, but rather accommodates relevant DNS developments (to name but one, changing privacy norms).

In contrast to ICANN's RPM Phase I effort, any UDRP review must also adequately consider whether the URS remains fit for purpose, and how to integrate a more expedited mechanism for certain types of obvious or egregious cases, into the UDRP framework.

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<sup>1</sup> Section 2 may clarify that the mentioned international consultations were undertaken by WIPO.

<sup>2</sup> It is noted that the PSR cites (at section 2.5) to an outdated version of the WIPO Overview.

**If the choice is made to review the UDRP, the process should be expert-driven and scoped**

To avoid undoing the UDRP's success, ICANN needs to give serious consideration to the weight to be accorded to the various opinions expressed. So-called "community feedback" referred to, for example, in section 4 of the PSR seems to lack specific depth and can seem more ideological or anecdotal.

In the framework of a review of this longstanding global enforcement mechanism, surely the tens of thousands of trademark owners compelled by cybersquatters to use the UDRP form a highly relevant community; not to mention the consumers who over the years have benefitted from brand owners thus having reclaimed domain names from infringers.

Ultimately, any review must be done not on the basis of conjecture, but through a rational and factual analysis.

WIPO is the global forum for intellectual property policy and services, and after 22 years of UDRP stewardship, the WIPO Arbitration and Mediation Center remains fully committed to the UDRP's effectiveness, fairness, and stability; it stands ready to share the experience and expertise of the nearly 60,000 cases it has managed to date.

**Specific PSR observations**

*Costs and fairness*

Unsurprisingly perhaps, the PSR does not attempt to deal with the underlying causes of the costs to brand owners of the monitoring and enforcement need occasioned by the practice of cybersquatting (made more complicated post-GDPR). In particular, the PSR fails to raise potential preventative tools at ICANN's disposal (e.g., known best practices deployed in the .DK and .EU name spaces).

The PSR moreover seems to gloss over the disproportionality of costs to brand owners of enforcing against an infringing domain name – which in the majority of UDRP cases, as a matter of intentional registrant choice, is not even defended.

The suggestion in section 4.3 of financial penalties for instances of RDNH raises the fundamental question whether a loser-pays model should be applied generally.

*Efficiency, scalability*

On a policy level, there may be solutions to deal with certain (obvious) cases in a more expedited and cost-efficient manner while leaving the "main UDRP" for cases involving a reasoned defense.

The WIPO Center has previously proposed a policy solution along these lines:

<https://www.wipo.int/amc/en/docs/urs2.0toronto2012.pdf>.

### *Registration contact details*

With respect to the PSR statement that a registrar verification request confirms “the accuracy of information about the domain name and the Respondent”; while the registrar does provide contact information to a UDRP provider to assist in case notification due process, the provider has no way of knowing if the information is accurate. (It is moreover a complainant, not the provider, who adds registrar-confirmed registrant information to its pleading.) An issue initially flagged in the 1999 WIPO Report that led to the UDRP and exacerbated by GDPR developments, the availability of accurate registrant contact details remains a matter requiring ICANN's renewed focus.

### *Case filing statistics*

In terms of data presentation, it is unclear why the PSR presents an average case growth rate across providers, when two (of six) providers cover nearly all UDRP cases; at global-leading WIPO (operating on a not-for-profit basis) filings increased more than 20% in 2021 alone, topping 5,000 cases in a single year (see [www.wipo.int/amc/en/domains/statistics/cases.jsp](http://www.wipo.int/amc/en/domains/statistics/cases.jsp)).

### *Forum shopping*

As to a stated “steady increase since 2013 in the total number of decisions issued by all UDRP providers in favor of Complainants”, the numbers simply do not bear this out.

### *In conclusion*

With the UDRP, ICANN has in its hands a uniquely successful mechanism that has been used by parties from over 180 countries around the world. It has become a daily fixture in the credibility of the DNS. There are many strong incentives for ICANN's review not to risk upsetting the UDRP's effectiveness. Any review should be fact-based and managed with specific expertise with this evolved global legal instrument.

Thank you for your considered reflection. These observations are posted on the WIPO website at: [www.wipo.int/amc/en/domains/resources/icann](http://www.wipo.int/amc/en/domains/resources/icann).

Yours sincerely,



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