



April 15, 2022

Telepathy, Inc. - Comment on Policy Status Report: Uniform Domain Name Dispute Resolution Policy (UDRP)

Telepathy, Inc. is pleased to have the opportunity to comment on the UDRP Status Report.

Summary

The UDRP is due for an update.

The UDRP as originally drafted has proven itself to be an effective tool for combatting cybersquatting. Yet the UDRP should be updated to account for the changes to the DNS that have occurred in the over 20 years since it was adopted. Further, the current version of the UDRP is a first release of a policy that has left several critical areas unaddressed for decades.

As the ICANN community prepares to thoroughly review the UDRP for the first time since it was adopted nearly a generation ago, we should acknowledge both its strengths and its weaknesses.

The UDRP has proven itself effective in combatting the problem of cybersquatting. It efficiently and accurately resolves most of the disputes brought under the Policy. It deserves to continue in force with its essentials intact.

Yet the UDRP falls short in **consistency, fairness, robustness, and quality control**. These are all areas of where the UDRP could benefit from improvements.

Background

The UDRP adopted in 1999 was Version 1. The domain name system has changed dramatically in the past 20+ years. Provisions crafted to meet the needs of 1999 are falling short in meeting the needs of 2022 and beyond. Over its 20+ years of operation, it has become clear that the UDRP suffers from various procedural shortfalls that are long overdue to be addressed.

The ICANN community of 2022 fails in our responsibilities if, tasked with reviewing the UDRP, we do not improve upon the good work of the ICANN community of 1999 and do not do our

part to improve the UDRP to be a more effective procedure for delivering just outcomes in the DNS for the next twenty years.

No stakeholder should fear a strengthening of the UDRP to better accomplish its policy objectives. Pretending that nothing has changed since 1999 and that no needed improvements have been identified, such that the UDRP should remain as it is, is not a credible position.

The UDRP is ill-suited to resolve disputes involving domain names held for investment

When the UDRP was developed in 1999, there were clear good guys, the brand owners, and clear bad guys, the cybersquatters. There was little in the way of a gray area. Lacking the need to carefully distinguish between good guys and bad guys, broadly worded provisions were adopted.

Shortly after the adoption the UDRP, a secondary market for domain names began to flourish. It has grown ever since, with over a million aftermarket transactions occurring every year.

The growth of the secondary market for domain names meant that in addition to the good guy brand owners, and bad guy cybersquatters, there is now a third category of players who are affected by the UDRP, the domain name investors who have legitimate rights in their domain names. Domain name investors are frequently caught in the crossfire and mistakenly targeted as cybersquatters. Even worse, some brand owners intentionally target domain investors in bad faith, not because the domain investor has done anything wrong but because the brand owner covets a domain name rightfully owned by the domain name investor.

Domain investors make a market in inherently appealing domain names that are not exclusively associated with any one company. Because these domain names are based on words or terms that are inherently appealing, they are often adopted as a trademark by some company, somewhere in the world, for some certain good or service.

With the rapid growth of global commerce over the past 20 years, and the increased importance of the Internet, there is an increasing shortage of desirable terms that available for use as marks and increasing trademark congestion. This means that many appealing domain names held by domain name investors will be similar to a mark used in commerce by a company somewhere. But this does not mean that the domain investor acquired the domain name to target any specific company.

The language of the UDRP encourages the targeting of domain name investors with vague and overly broad language suggesting that it could be considered bad faith to buy and sell domain names that match a trademark, even if the domain names are non-distinctive and in wide use by a variety of third-parties:

4.(b)(i) circumstances indicating that you have registered or you have acquired the domain name **primarily for the purpose** of selling, renting, or otherwise transferring

the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; (emphasis added).

The only language in this provision that a Panel can rely upon to distinguish a domain name investor from a cybersquatter is the phrase “primarily for the purpose”. A cybersquatter targets a particular company, while a domain investor does not.

When an entire industry rests on the interpretation of the phrase “primarily for the purpose” that may be differently interpreted by any one of hundreds of panelists across the globe, it makes for a very flimsy and risky foundation on which to rest one’s livelihood, much less an entire industry. As a result of inconsistent application of the Policy, Panels often fail to distinguish domain name investors from cybersquatters.

Due to the age of the UDRP, unlike in a number of newer dispute policies adopted by national authorities for various ccTLDs, there is no recognition in the UDRP of domain name investing as a legitimate business nor is engaging in the business of domain name investing mentioned as an example of having a legitimate interest in a disputed domain name.

Members of the domain name investment industry are particularly vulnerable to being targeted in UDRP complaints. We have been burdened with responding to a never-ending stream of baseless complaints and at times have lost our assets through unjustified transfers. Thanks to the UDRP, we have spent the past 20 years caught in the crossfire of the battle between brand owners and cybersquatters.

Improvements to the UDRP

A system set up to adjudicate clear black and white cases has proven poorly suited to addressing more nuanced cases where there are shades of gray. A system set up almost entirely for the benefit of one party, the complainant, is lacking the necessary balance to fairly adjudicate disputes where both parties, the complainant and the respondent, can assert rights to a disputed domain name.

Areas where the UDRP could benefit from strengthening include improving the **consistency** of decisions issued the Policy, addressing structural vulnerabilities that create **fragility** in the system and lead to a culture where there is a **lack of accountability**, addressing inconsistent treatment of complainants and respondents leading to a lack of **fairness**, and an absence of mechanisms for evaluation and improvements such that the UDRP is hobbled by poor **quality control**.

Consistency of decisions

Improving the consistency of decisions issued under the UDRP is a worthwhile objective for the upcoming review. The current version of the UDRP falls short of delivering consistency in decisions, especially those involving domain names held by domain name investors.

Procedural improvements could be considered that would improve consistency of application.

Fragility and Lack of Accountability

The UDRP is only as strong as its weakest link. With the UDRP administered by six different providers who are accountable to no one, if one of those providers goes rogue, that can take down the entire system.

For instance, what procedures currently exist under the UDRP to address the following hypothetical situations:

- The administrators of a UDRP provider force panelists to rewrite decisions to their liking.
- A UDRP provider only accredit or assign cases to panelists with extreme views of the UDRP far outside the consensus.
- A UDRP provider undercuts the pricing of all the other providers and then farms out decisions to unqualified panelists who rubber stamp decisions.
- The administrators at one of the providers fail to implement the UDRP rules by mischarging parties, or by delaying the issuance of decisions, or in other ways.

The UDRP has no mechanism to deal with a poor quality UDRP provider. ICANN has no agreement nor enforceable standards of conduct with any UDRP provider.

As we look ahead to the next twenty years, we should not take for granted that we will continue to be as lucky with the quality of the administrators who happen to run the various UDRP providers as we have been so far. If recent history has taught us anything, it is that people are at times entrusted with positions of authority who do not respect norms or conventions and who are unrestrained in pursuing self-serving aims that harm the larger community.

The lack of accountability and the extreme fragility of the UDRP are glaring weaknesses in the current version of the UDRP. The ICANN community would be well served if these weaknesses were addressed in the upcoming review.

Fairness

The UDRP is a system set up for, by, and on behalf of brand owners. That was not a problem when UDRP disputes are between good guy brand owners and bad guy cybersquatters such that all that is right and good rested with one party.

Yet the UDRP is not a fair system when both the complainant and the respondent have rights that need to be balanced between them, as happens when a domain investor asserts that they have a right to a domain name that has inherent value and is not targeted at the complainant.

In these circumstances, that the UDRP is set up for, by and behalf of brand owners can lead to bias in favor of the complainant.

The upcoming UDRP review should review the UDRP's procedures to ensure that both parties to a UDRP receive a fair hearing.

Quality Control

Accreditation as a panelist was likely not intended as a lifetime appointment with no review as to the quality of the decisions. Yet that is what has occurred in practice.

There are several panelists, in my view, who should never have been accredited as panelists, who regularly misapply the Policy and issue decisions in contravention to the consensus view, and yet have issued hundreds of decisions over more than a decade and will likely continue to be appointed to decide cases for many years to come.

No other reputable system relying on neutrals operates with such a lack of standards or review. The UDRP provides little in the way of guidelines for panelist accreditation, appointment, or review. Procedures for handling panelists affect the jurisprudence, the consistency, and the fairness of the UDRP. UDRP providers have adopted disparate approaches to panelist accreditation, appointment, and review which in turn destabilize the consistency and fairness of UDRP jurisprudence.

Consistent guidelines for procedures and standards involving panelists and overall quality control are another area that is suitable for exploration in the upcoming UDRP review.

Updating the UDRP should be non-controversial

There are numerous areas where the UDRP can be improved to benefit all parties. I support exploring expedited proceedings for clear-cut instances of cybersquatting to reduce the burden on complainants. As a domain name investor and an active participant in the secondary market for domain names, I appeal to my colleagues representing brand owners, including those in the IPC and at INTA, to explore in good faith measures to reduce the harm that the UDRP imposes on legitimate domain name investors. There is no necessity that the UDRP remain unchanged when there are so many opportunities for improvement.

A review of the UDRP with the aim of improving its consistency, fairness, improving its quality and addressing its vulnerability to systemic failure should not be controversial.

Sincerely,

Nat Cohen
President
Telepathy, Inc.