Report of Public Comments

Title:	Preliminary Issue Report on the Current State of the UDRP
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Section I: General Overview and Next Steps

The Preliminary Issue Report informs the GNSO Council of the current state of the Uniform Dispute Resolution Policy (UDRP) in advance of the Council's vote on whether to commence a policy development process (PDP) on the UDRP.

The Preliminary Issue Report will be updated to reflect the information submitted through this Public Comment Forum and during the Singapore ICANN Meeting in the form of a Final Issue Report to be presented to the GNSO Council.

Section II: Contributors

At the time this report was prepared, a total of 24 community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. In addition, this report also includes a summary of verbal comments provided by participants and speakers at the two UDRP-related sessions held during the Singapore Meeting on 18 June and 22 June. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
Registry Stakeholder Group	David Maher	DM
Non-Commercial Users Constituency	Konstantinos Komaitis	KK
Verizon	Sarah Deutsch	SD
Motion Picture Association of America	Fritz Attaway	FA
International Federation of Intellectual Property Attorneys (FICPI)	Julian Crump, Secretary General	JC
Kirton & McConkie	Sean Gunnarson	SG

Leap of Faith Financials Inc.	George Kirikos	GK
International Trademark Association, Internet Committee	Claudio DiGangi	CDG
Coalition Against Domain Name Abuse	Elizabeth Cummings	EC
Business Constituency	Steve Del Bianco	SDB
Microsoft Corporation	Russell Pangborn	RP
National Arbitration Forum	Christine Dorrain	CD
World Intellectual Property Organization	Brian Beckham	BB
MARQUES	Dr. Luca Barbero	LB
Hogan Lovells	David Taylor	DT
Coalition for Online Accountability	Steve Metalitz	SM
Internet Commerce Association	Phil Corwin	PC
Intellectual Property Constituency	J.Scott Evans	JSE
MarkMonitor	Fred Felman	FF

Individuals:

Name	Affiliation (if provided)	Initials
Danny Younger		DY
Dr. Konstantinos Komaitis	University of Strathclyde	KK
David Simon	Academic Fellow, Harvard Law School	DS
Alexandre Cruquenaire	Professor, University of Namur	AC
Jim Davies	Elevation Legal	JD
Speakers at Singapore Meeting Sessions		
Wendy Seltzer		WS
Chuck Gomes		CG
Jeff Neuman		JN
Milton Mueller		MM
Jonathan Cohen		JnC
Christina Rodriquez		CR
David Roache Turner	WIPO	DRT
Lynn Goodendorf		LG
Kristina Rosette		KR
Statton Hammock	Registrar Stakeholder Group	SH
Susan Kawaguchi	Facebook	SK
John Berryhill		JB
Mark Partridge	American Bar Association	MP
Petr Hostas	Czech Arbitration Court	PH
Elliot Noss	Tucows	EN
Petr Hostas	Czech Arbitration Court	PH
Jonathan Robinson		JR
Robin Gross	NCUC	RG

Zahid Jamil		ZJ
John Berard		JnB
Thomas Rickert		TR
Carlos Aguirre		CA
Avri Doria	NCUC	AD
Claudio DiGangi	IPC	CDG

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

The UDRP has been in effect for over 10 years, and, although it is widely recognized as one of ICANN's defining accomplishments from its formative years, it is not perfect. That being said, the majority of contributors acknowledged that overall, the UDRP has worked well as an effective mechanism against cyber-squatting, provides stability for and generally meets the needs of the community, and provides a cost-effective alternative to litigation. Several contributors also noted that the UDRP is currently the only RPM available for trademark owners and needs to be maintained in its current state to ensure a stable and certain RPM during the transition to and implementation of new gTLDs. There were a small number of contributors that expressed process-related concerns that the UDRP has not evolved appropriately with the development of the DNS system, and has become unfair, including by eroding the due process rights of legitimate domain name owners.

It is important to highlight the complexity of the issue, as it is one of the oldest policies ICANN adopted, and was developed when the practices of "good" and "abusive" domain name registration first came to light.

A majority of contributors consisting of stake holder groups, supporting organizations, UDRP providers, IP-related groups and individuals either opposed the initiation of a PDP which would substantively review the UDRP, and/or recommended that any PDP be delayed to a later date. Among those that suggested a delay, the most common suggestion was to commence a PDP either after the new gTLDs are launched or, in conjunction with or after the review of the URS, mandated to take place 12-18 months after the launch of the new gTLDs. Another primary concern of contributors which opposed a PDP was the lack of ICANN staff and community resources given the necessary preparation for and implementation of the new gTLDs. Groups and organizations which supported the initiation of a PDP at this time included the Registry Stakeholder's Group, the NCUC and ICA.   Key reasons to support a PDP at this time include, a desire to encourage ICANN to make the UDRP as

effective as possible prior to the launch of the new gTLDs, providing a means for all stakeholder groups to participate in reviewing and improving the UDRP, and expressing concerns that a PDP is the only method available to address and change key procedural and policy issues.

The Community as represented by the contributors appears to be split as to the issue of whether a long-standing policy such as the UDRP, which is generally viewed as being effective, should be reviewed. The two primary divergent views are that it is a basic best practice to review all long-standing policies after implementation, versus that a review should not be conducted simply for the sake of form if the policy is generally viewed as being effective and serves the community well.

With regard to the overarching issue of whether the GNSO should initiate a PDP to review the UDRP, the following key issues were also raised and commented on by contributors often representing a split along the lines of whether they opposed or supported a PDP to review the UDRP:

- Whether a PDP Would Undermine the UDRP's Effectiveness: Those who favored a PDP argued that a review itself would not necessarily lead to any changes to the UDRP and therefore, would not undermine the UDRP itself; and that any fear of a possible outcome which would result in a change should not alone be the basis to preclude a PDP review. The primary argument of those who opposed a review was that the stability provided by the UDRP is critical especially prior to and during the introduction of new gTLDs and the URS.

- Whether a Review of the UDRP Should Focus on Either Substance or Process and if on Process, Whether an Expert Group to Address Process Issues Should be Created as an Alternative to a PDP: Most contributors who commented on this issue supported at least a review of process-related issues. Comments were split on whether to establish a small group of experts to review process-related issues – the primary concern of those who opposed this alternative was that any such review should be open to the larger community.

- Relationship Between the UDRP and URS: All contributors who commented on this issue were in agreement that if a PDP is initiated to review the UDRP, it should be done in conjunction with the mandated review of the URS or, at least in consideration of the implementation of the URS with the launch of the new gTLDs.

- Alternatives to improve the Effectiveness of the UDRP: Contributors suggested various alternative measures to improve the effectiveness of the UDRP including: 1) enhancing and providing increased resources for ICANN's compliance activities; 2) amending the RAA to address concerns related to the UDRP raised in the Preliminary Issue Report; 3) ICANN adopting an accreditation process and/or standard contract for all UDRP providers.

Section IV: Analysis of Comments

> General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received.   A more thorough analysis and response to the contributions received will be included in the Final Issue Report to be published by Staff shortly.

General Observations on the UDRP

We want to highlight the complexity of the issue, as it is one of the oldest policy systems that ICANN has used throughout the world and was developed when the practices of "good" and "abusive" domain name registration came to light. *ALAC Statement on the UDRP.*

Historically speaking, the ALAC does not believe that the UDRP has been addressed in an appropriate way. During 10 years of operation, the process should have been addressed in a multi-stakeholder manner, with follow-up discussions based on experience and research. This issue is of great importance and complexity and should be treated as such. Going forward, a broader approach is needed than has been thus far used. *ALAC Statement on the UDRP.*

The UDRP has been in effect for over 10 years, and, although it is widely recognized as one of ICANN's defining accomplishments from its formative years, it is not perfect. *DM, on behalf of the Registry Stakeholder Group.*

No stakeholder or independent commentator now claims that the UDRP is perfect. Virtually all of the panelists on the workshop held at the ICANN 41 meeting in Singapore and in the earlier webinar noted specific improvements or changes they would like to see, even if they did not prefer to invest time in a PDP. *KK, on behalf of the NCUC.*

That is not to say the UDRP is perfect, certainly in any process there is room for improvements, both large and small. Everyone who participates undoubtedly has a wish list of things that they would like to see changed to make the process flow more smoothly for them, or to increase their likelihood of success. The fact that people and organizations, the Forum included, have taken this opportunity to air their frustrations with the process should not be taken as an indication that immediate fixes are needed. *KD, on behalf of the National Arbitration Forum.*

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. *JSE, on behalf of the Intellectual Property Constituency.*

The UDRP is not perfect, but it is the only protection mechanism currently available to trademark holders. *FF, on behalf of MarkMonitor*.

The UDRP, despite its high costs, remains the only practical and available remedy for brand owners

today to fight cybersquatting outside the ambit of the Anti-Cybersquatting Consumer Protection Act. *SD, on behalf of Verizon.*

The UDRP has significantly enhanced trademark protection on the Internet. *AC.*

ICA generally agrees that the UDRP has successfully offered a less expensive and more rapid alternative to litigation for resolving alleged cybersquatting and that the ICANN community has come to rely upon the UDRP for efficient and relatively fair resolution of such disputes. *PC, on behalf of the Internet Commerce Association.*

Although the UDRP dates from ICANN's earliest days, it has withstood the test of time and showed itself to be a flexible, consistent, fair, and reasonably efficient mechanism for addressing clear cases of cybersquatting. This view appears to be widely shared within the ICANN community. *SM, on behalf of the Coalition for Online Accountability.*

The general conclusion and agreement among the users is that the UDRP works well and generally satisfies the needs of the Internet community. Early criticism and doubts, arising from uncertain dispute resolution results, have dissipated as a growing body of UDRP precedent, related court decisions and national laws have brought more certainty and consistency to the UDRP outcomes. *JC, on behalf of the FICPI.*

Hogan Lovells believes that the UDRP provides a very solid framework for effective resolution of domain name disputes, which in many cases is far more practical and appropriate than resorting to costly and lengthy litigation. Whilst it has not been reviewed to date, the UDRP has nevertheless evolved since its inception; one only needs to look at the WIPO Overview 2.0 of March 2011 to see first hand evidence of its evolution. It has become the highly regarded mechanism for combating cybersquatting that we know today; it is generally seen to be rapid, efficient, transparent and fair. It is recognized as one of the successes of ICANN. *DT, on behalf of Hogan/Lovells.*

MPAA strongly supports the UDRP and believes it is critically important to the stability of the domain name system. *FA, on behalf of the MPAA.*

Facebook has found the UDRP to be generally fair and effective for the purpose it was intended. *SK, on behalf of Facebook.*

The UDRP has not been quite the unqualified success that the Executive Summary of the staff report suggests. However it has been largely effective in providing a mechanism to deal with cybersquatting. *DS.*

Having spent more than ten years observing the UDRP as a litigious machine, it is a system that has failed to evolve organically and to reflect the true value and potential of domain names. The UDRP is

stuck to a microscopic view that sees domain names mainly as tools of trademark infringement, without making room for other uses, related to and recognized by trademark law itself. *KK, individually.*

Everyone will agree that the Uniform Domain Name Dispute Resolution Policy (UDRP) is a true phenomenon. It has developed into a process that so far has adjudicated more than 30,000 domain name disputes. This is both good and bad. It is good because it demonstrates the ability of the UDRP to operate in a fair, timely and cheap manner that eliminates jurisdictional issues. It is bad, however, because it has provided UDRP panels the ability to act as international arbitrators assigning rights of international recognition. It has allowed precedent to become an integral part of its processes and its rules have acquired a normative connotation, sufficient to provide the UDRP with an unprecedented authority. *KK, individually.*

The Issues Report calls the UDRP a fair system. This is not entirely true and a close look at the UDRP and its rules demonstrates the fundamental unfairness of the mechanism. *KK, individually.*

Several problems with the UDRP have eroded the due process rights of legitimate domain name registrants. *GK on behalf of Leap of Faith Financial Services Inc.*

INTA believes that the UDRP has proven to be "a time-tested method" for avoiding litigation over domain names and serves the interests of all parties including, trademark owners, registrants and registries. INTA also notes that trademark owners rely on the UDRP both in everyday practice and in planning for the implementation of new gTLDs as it is the only known mechanism for resolving disputes across all gTLDs. *CDG, on behalf of INTA.*

WIPO views the existing UDRP as the underpinning of commercial and legal stability in the DNS, and is "widely acknowledged to be functioning well." *BB, on behalf of WIPO.*

The UDRP is in "pretty good shape overall" and has been a "tremendous success" overall in protecting trademark owners and benefitting other community stakeholders including registries, registrars and registrants. *DRT representing WIPO (22 June 2011, Singapore Meeting).*

"The UDRP is not the problem. The problem is cybersquatting, as it exists now, and the vastly expanded scope for registration abuse occurring within new gTLDs." *BB, on behalf of WIPO.*

Although not perfect, the UDRP over its ten year existence has successfully provided a much less expensive alternative to costly litigation for resolving domain name disputes for brand and trademark owners. The UDRP has also evolved and served as a model reflecting the collective wisdom developed by providers, panelists, complainants and respondents through the resulting decisions and commentaries. *EC, on behalf of CADNA.*

"The UDRP is ICANN's second greatest success behind the introduction of competition in the domain

name space....if you look at the macro level down the list of decisions...I think that in the main the system is working. " *EN (22 June 2011, Singapore Meeting).*

John Berryhill believes the substantive nature of the UDRP policy is "very open-ended and very flexible," which is important in an international context because trademark law is not uniform. Berryhill also believes that any bad decisions are due to panels sometimes making errors in the interpretation or application of policy, but that this is not a policy problem. *JB (22 June 2011, Singapore Meeting).*

Robin Gross of the NCUC noted that during the 22 June 2011 morning session on the UDRP at the Singapore Meeting, there were no claims that the UDRP "is a wild success." *RG (22 June 2011, Singapore Meeting).*

In comparison to the alternative of litigation, the UDRP provides a domain registrant with a dispute resolution process that is "at virtually no cost." *JB (22 June 2011, Singapore Meeting).*

The UDRP is currently a process that creates stability for registrants, registries and registrars. *MP representing the ABA (22 June 2011, Singapore Meeting).*

Best Practice to Review Policies After Implementation

It is a matter of best practice to review all policies that have been in place for a substantial length of time (over 10 years in this case); this seems even more important in the case of a consensus policy like the UDRP. *DM, on behalf of the Registry Stakeholder Group.*

After more than a decade of practice and evidence, this policy is beyond ripe for review. *KK, on behalf of the NCUC.*

It is true that few if any ICANN policies have stood as long as the UDRP without undergoing a formal review. But to depend upon this as a reason for supporting a PDP now is to elevate form over substance. *SM, on behalf of the Coalition for Online Accountability.*

Whilst it is acknowledged that the UDRP has been in place for a significant length of time without being amended, Hogan/Lovells believes that it has evolved well with time and does not think a PDP is necessary at the present time with the impending rollout of new gTLDs*. DT, on behalf of Hogan/Lovells.*

WIPO believes that the "passage of time" is not a compelling motive for any revision to the UDRP because in this case, the UDRP's overall positive functioning is "clearly recognized" by experts. *BB, on behalf of WIPO.*

There's nothing wrong in conducting a review of a process that's been operational for ten years. A

review doesn't necessarily undermine or require revision of the policy, it serves as a prelude to discussion of whether the policy needs to be revised by providing the means to investigate the policy and document how it is or is not working. *WS (18 June 2011 Singapore Meeting).*

In taking a step back from the particular issue of reviewing the UDRP, Jonathan Robinson raised the question as to whether the community should review policies by a certain amount of elapsed time as a matter of "common and good practice." *JR, (22 June 2011 Singapore Meeting).*

All ICANN polices need to be reviewed periodically, and "one should never be afraid for procedural or other reasons to touch them if there are issues with them." *TR representing Eco (22 June 2011 Singapore Meeting).*

"Reviewing our processes is indeed part of good governance and something we should be doing." *AD speaking as a member of the NCUC (22 June 2011 Singapore Meeting).*

There are three questions to consider in determining whether the UDRP should be reviewed and opened up for possible reconsideration: 1) Is the review necessary; 2) would it be beneficial; 3) is the timing of the review right? *MP representing the ABA (22 June 2011 Singapore Meeting).*

Whether the RAP- WG's Recommendations Should Be Given Deference

Recommendations of a WG, and even more so those with unanimous WG support, should be taken up and acted upon in a manner that is substantially consistent with such recommendations OR, on occasion and with very good reason, referred back to the WG. *DM, on behalf of the Registry Stakeholder Group.*

There was also substantial dispute on the RAP-WG as to what needed to be changed and how, if at all, to change the UDRP. Given that the UDRP had not been substantially reviewed in almost 10 years it was clear that the RAP-WG members needed, as a first step, additional information to determine the current state of the UDRP. This lack of clarity was exacerbated on the RAP-WG by the fact that there were no experts (such as WIPO or respondent's counsel) that could inform the group as to how well the UDRP was performing. *FF, on behalf of MarkMonitor.*

The RAP-WG was further informed that the only mechanism for any change or investigation (irrespective of the nature and substance) would be through a UDRP Issues Report.   Members of the RAP-WG may actually have been voting for the UDRP Issues Report not necessarily the PDP. *FF, on behalf of MarkMonito*r.

There was a consensus in the RAP-WG calling for a review of the UDRP in the context of looking into registration abuse practices and policies. We should not ignore their voices even if they did not participate in the webinar. *WS (18 June 2011 Singapore Meeting).*

Jeff Neuman stated that "we need to stick to our precedent" in acknowledging that the RAP-WG

recommended by full or unanimous consensus to conduct a PDP on the UDRP. As a result, if the staff recommendation not to conduct a PDP on the UDRP remains in the final issue report, then Neuman called for staff to provide a concrete plan on how to review the issues which have been raised concerning the UDRP. *JN (22 June 2011 Singapore Meeting).*

Kristina Rosette expressed her view that relying "wholeheartedly" on the RAP-WG recommendations is problematic because there were only six members who attended more than half the meetings. Several points of view, such as academic, respondent counsel and provider viewpoints were absent. *KR (22 June 2011 Singapore Meeting).*

Claudio DiGangi, speaking as a member of the IPC, stated his belief that the RAP-WG recommended that the GNSO Council initiate an issues report, and not an actual PDP. *CDG (22 June 2011 Singapore Meeting).*

Support to Initiate a PDP on the UDRP Now

The UDRP should be reviewed and a PDP is the appropriate ICANN process for such a review. *DM, on behalf of the Registry Stakeholder Group.*

UDRP review should be the presumptive outcome of this process. *KK, on behalf of the NCUC.*

For NCUC, the key question is not whether to conduct a review of the UDRP, but rather, how to conduct a review of the UDRP. *KK, on behalf of the NCUC.*

ICA believes that the GNSO should commence an additional process for developing concrete means for assuring better predictability and consistency in UDRP decision-making. *PC, on behalf of ICA.*

It is vital that ICANN investigate the true efficiency of the UDRP and its ability to produce decisions that can be celebrated for their fairness, reasonableness, balance and legality. Currently, these values are highly disputed in the context and content of UDRP decisions. *KK, individually.*

ICANN is now presented with a unique opportunity to achieve the consensus that failed to achieve some ten years ago. ICANN is provided with the right set of circumstances to involve all its stakeholders and continue to support its multi-stakeholder, bottom-up policy formation. The precedent established by the Special Trademark Issus Team (STI) recommendation proves that policy, based on multi-stakeholder participation is feasible and it can produce valuable conclusions. *KK, individually.*

Leap of Faith Financial Services Inc. believes that a PDP is needed now to improve the rules for the benefit of all legitimate parties, and strongly encourages the GNSO to begin the process. *GK on behalf Of Leap of Faith Financial Services Inc.*

There is an extensive list of procedural issues raised by several members of the community and not all

registrars will comply with voluntary procedures. "Unless you're hoping on voluntary adoption by everyone in the ecosystem," key procedural issues can only be addressed and a consensus policy changed through a PDP. *JN (18 June 2011 Singapore Meeting).*

Whether it's a PDP or some other alternative approach that can be taken to address the issues list, there should be a "desire" to make the UDRP process "as healthy as possible" before the new gTLDs are introduced and therefore, postponing the review would be a mistake. *LG (22 June 2011 Singapore Meeting).*

Carlos Aguirre believes that the "time is now" and appropriate to review the UDRP whether through a PDP or expert panel because the importance is the revision; and the question as to whether the UDRP can be improved or not can only be answered after a review. *CG (22 June 2011 Singapore Meeting).*

Opposition to a PDP on the UDRP

The position of the BC is that there should not be a PDP on the UDRP*. SDB, on behalf of the Business Constituency.*

The IPC opposes a PDP on the UDRP at this time.   *JSE, on behalf of the Intellectual Property Constituency.*

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.   *JSE, on behalf of the Intellectual Property Constituency.*

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. *JSE, on behalf of the Intellectual Property Constituency.*

COA supports the recommendation that a PDP not be initiated at this time. *SM, on behalf of the Coalition for Online Accountability.*

While Verizon believes the UDRP would benefit from being strengthened in several ways, it opposes the idea of ICANN initiating a PDP.   Any decision to initiate a PDP will likely lead to a process (either at the outset, or incrementally), which risks weakening the UDRP.   *SD, on behalf of Verizon.*

RE/MAX agrees that ICANN should not re-open the UDRP for debate by initiating a Policy Development Process. *AS, on behalf of RE/MAX.*

MarkMonitor agrees with ICANN Staff that the GNSO should not proceed with a PDP
to review the UDRP at this time. *FF, on behalf of MarkMonitor.*

Hogan/Lovells is not in favor of a policy development process ('PDP') on the UDRP at this time. *DT, on behalf of Hogan/Lovells.*

MARQUES believes there should be no PDP on the UDRP at this time. *LB, on behalf of MARQUES.*

The Forum agrees with the recommendation that there be no PDP at this time. *KD, on behalf of The National Arbitration Forum.*

INTA supports the recommendation that GNSO Council should refrain from approving a PDP at this time. *CDG, on behalf if INTA.*

WIPO believes that given both the ICANN Board's commitment to the GAC and trademark stakeholders in approving the expansion of the DNS that the existing UDRP would continue to be available, and the complexities and resources necessary for a review, "unleashing any UDRP revision effort in the present circumstances would be institutionally reckless." *BB, on behalf of WIPO.*

Although CADNA acknowledges that the ICANN community has raised issues with the UDRP, it believes these are largely procedural issues and do not merit a PDP. CADNA strongly supports the recommendation not to initiate a PDP on the UDRP at this time. *EC, on behalf of CADNA.*

Statton Hammock, speaking as a registrar but in his own personal capacity, stated that he does not believe that a review of the UDRP – given its "relative success," does not rise to the top of the prioritization of other PDP and processes that registrars have to implement. *SH (22 June 2011 Singapore Meeting).*

Susan Kawaguchi representing Facebook stated that although there are concerns about the process – namely maintaining the status quo of a registration, she does not advocate the initiation of a PDP but considers an alternative mechanism to provide greater clarity and standard behavior in maintaining a registration under the UDRP. *SK on behalf of Facebook (22 June 2011 Singapore Meeting).*

Petr Hostas from the Czech Arbitration Court noted that although they have some recommendations to improve the process of the UDRP, a PDP is not appropriate at this time given that the UDRP is currently the only dispute resolution system for gTLDs and several ccTLDs, and with the upcoming introduction of new gTLDs and the URS. *PH (22 June 2011 Singapore Meeting).*

WIPO supports the ICANN staff recommendation not to initiate a PDP on the UDRP because the time is not right in part, due to the uncertainty of whether the URS will work. *DRT, representing WIPO (22 June 2011 Singapore Meeting).*

On Conducting a PDP on the UDRP at a later time

Support for the Staff recommendation that a PDP on the UDRP should not be initiated at this time.

ALAC Statement on the UDRP; JC, on behalf of FICPI.

The ALAC does support the implementation of a PDP process in the near future, based on a real "need," well-defined by its stakeholders, after establishing a clear purpose and scope of reform. *ALAC Statement on the UDRP.*

Some BC members are concerned that ICANN may commence a PDP despite the UDRP being the only tried and tested rights protection mechanism in place prior to implementing the new gTLDs. *SDB, on behalf of the BC.*

The Uniform Domain Name Dispute Resolution Policy (UDRP) is surely not permanently foreclosed from review. Nevertheless, it is particularly critical that the UDRP remain a constant at the present time. *AS, on behalf of RE/MAX.*

RE/MAX anticipates the increased use of the UDRP with the launch of new gTLD registries. Moreover, there will continue to be a critical need for the UDRP in cases where transfer of the domain is desired (particularly because ICANN did not heed suggestions to make the suspension available under the URS indefinite). *AS, on behalf of RE/MAX.*

Given the momentous change on the horizon, Hogan Lovells feels that it would be unwise to embark on revising the substantive wording of the UDRP at the present time, although that is not to rule out a review several years from now, once the first round of new gTLDs have been in operation for a while and any new issues have had a chance to emerge. *DT, on behalf of Hogan/Lovells.*

It is now clear, after a review of the UDRP Issues Report, that a PDP of the UDRP is premature at best. *FF, on behalf of MarkMonitor.*

MARQUES believes that there should be no review of the UDRP until at least two years after the launch of the new gTLDs when both procedural and policy issues can be considered alongside the new measures to protect IP that will be introduced, including the URS and the IP Claims process. *LB, on behalf of MARQUES.*

Determination of the best time to proceed with a policy development process (PDP) on the UDRP must be guided by considerations of necessity, benefit and timing. FICPI concludes that a PDP should not be undertaken at the present time. *JC, on behalf of FICPI.*

While perhaps not perfect, MPAA is of the view that the UDRP is working as intended to address cybersquatting and that a policy review is not warranted, at least at the present time. This position is shared by a large number of UDRP users who expressed this view at the May 10, 2011 ICANN webinar and the recent ICANN meeting in Singapore. *FA, on behalf of the MPAA.*

Microsoft proposed that a substantive review PDP of the UDRP be deferred until either after or in conjunction with the review of the URS. Microsoft views this deferral as necessary to avoid any

possible de-stabilization of the UDRP when the new RPMs which are predicated on the current UDRP are being introduced with the launch of the new gTLDs. *RB, on behalf of Microsoft.*

The introduction of all the new gTLDs is in Jonathan Cohen's view, a more credible reason to postpone the review of the UDRP. While not recommending that a PDP be postponed, Cohen believes that there is no current need for a PDP and if a need arises "it will likely be down the road." *JnC (18 June 2011 Singapore Meeting).*

A review of the UDRP should also include a review of all the other RPMs which if it does take place, would likely stall the new gTLD process and completion of the final DAG. As a result, this may be not the right time to initiate a review of the UDRP. *ZJ (22 June 2011 Singapore Meeting).*

If any review takes place, it should be conducted 18 to 24 months from now, given the ICANN Board's recent statements to the GAC, acknowledging that trademark owners are expecting to rely on a "presumably unchanged" UDRP during the launch of new gTLDs. *DRT representing WIPO (22 June 2011, Singapore Meeting).*

John Berard noted that the RPMs for the new gTLDs do not have any performance record and suggested that it would be preferable to see how these RPMs perform first before conducting a review of the UDRP which is currently the only existing RPM in place. *JnB (22 June 2011 Singapore Meeting).*

The issue of whether to conduct a review of the UDRP and the timing of any review are two different issues. *JR (22 June 2011 Singapore Meeting).*

Relationship between the UDRP and the Uniform Rapid Suspension (URS).

It might 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. *JSE, on behalf of the Intellectual Property Constituency.*

Much of the controversy surrounding the new URS process that all new gTLDs will be required to implement turned on how the URS would interface with the UDRP. Changes to the UDRP while the URS is being introduced could have unanticipated consequences on the latter. The better course would be to review the UDRP and URS simultaneously, after there has been adequate experience with the new procedure to evaluate how the two relate to each other in practice. *SM, on behalf of the Coalition for Online Accountability.*

The new TLD program will expand the usage of the UDRP and the URS will rely on certain elements of

the UDRP. The URS is designed upon the same substantive and procedural ethos of the UDRP; if the UDRP is not working, we need to fix it so that its existing flaws are not transferred to and will not affect the operation of the URS. It seems that the time between now and the actual coming to market of new TLDs is the ideal time to review the UDRP and fix any flaws. *KK, on behalf of the NCUC.*

A review of the UDRP should be delayed (at a minimum) until further information is gleaned from the RPMs associated with the new gTLDs. *FF, on behalf of MarkMonitor.*

When ICANN has the benefit of a couple of years of experience in the practical operation of the URS, it may be appropriate to review and harmonize the two procedures, in conjunction with applying the URS to all gTLD registries. *AS, on behalf of Re/MAX.*

Its interrelation with, and the effectiveness of, the Uniform Rapid Suspension (URS) system and other rights protection mechanisms in new gTLD registries is not yet clear. The URS was originally intended as a more scalable complement to the UDRP, offering a more streamlined, significantly lower-cost approach, but where the remedy was limited to suspension of the domain. But because the final version of the URS added the higher burden of proof, and the labor- and analysis-intensive requirement that panelists determine whether the trademark is in use, it remains an open question whether dispute resolution providers can administer and adjudicate URS proceedings for the desired $300 filing fee. *AS, on behalf of Re/MAX.*

If the Community were to engage in such a massive endeavor it would seem plausible that it would want all relevant information as its disposal. If a PDP is initiated now, a missing element in the evaluation of a future revamped UDRP is the success or failure of the RPMs (and particularly the Uniform Rapid Suspension System (URS)) in the new gTLD program. *FF, on behalf of MarkMonitor.*

Should a compelling case be made for UDRP review, the more appropriate time for such a review would be during the planned review of the URS for new gTLDs. *FA, on behalf of the MPAA.*

Christina Rodriguez, in noting that the URS is designed to be faster and cheaper than the UDRP, believes that the community should wait to see if the URS has the desired effect before launching a PDP to review the UDRP. If it is successful, Rodriguez believes there would no longer be a need for trademark owners to utilize the UDRP. *CR (18 June 2011 Singapore Meeting).*

Although the IPC does not believe there needs to be a substantive review of the UDRP, if there is one, it should be conducted at the same time when there is a review of the URS, which is 12 to 18 months after it is initiated, given the time and resource constraints on the GNSO. *JSE on behalf of the IPC (18 June 2011 Singapore Meeting).*

Petr Hostas from the Czech Arbitration Court suggests that starting a PDP now is a waste of time given that the URS will be reviewed and that review could have an impact on the UDRP or, could possibly be used to improve the UDRP. *PH (22 June 2011 Singapore Meeting).*

Zahid Jamil believes that given the URS and other RPMs have been based on the existing UDRP, any review of the UDRP should include a review of all RPMs together as one package, "to see that they balance out." *ZJ (22 June 2011 Singapore Meeting).*

Thomas Rickert, representing Eco, believes that it would be worthwhile to look at the other RPMs to see how much of the criticisms against the UDRP are redundant, because the RPMs are interlinked with the UDRP, and have been specifically designed to address some of the identified weaknesses of the UDRP. *TR representing Eco (22 June 2011 Singapore Meeting).*

Substantive v. Procedural Review of the UDRP

The ALAC supports the Staff recommendation that the UDRP can be improved through modest improvements of its implementation, but ALAC believes it to be a highly complex system. *ALAC Statement on the UDRP.*

NCUC members agree a review of the noted procedural flaws of the UDRP should be thoroughly examined by the impacted community. A number of NCUC members further believe there should be an additional review of the underlying substantive policies contained within the UDRP, including their ability to protect freedom of expression guarantees and the fair use or other noncommercial rights of domain name registrants. NCUC contends that at the very least, a procedural review of the UDRP is necessary at this time. *KK, on behalf of the NCUC.*

Additional free speech "safe harbors" are not needed – sufficient protection already exists. 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. *JSE, on behalf of the Intellectual Property Constituency.*

Dr. Komaitis believes one of the procedural aspects that should be considered for the final issue report is the need for an internal appeals process in the UDRP. *KK (22 June 2011 Singapore Meeting).*

Changes to the Policy could have the undesired consequence of limiting free speech protections when some protections are enumerated and others are not. *JSE, on behalf of the Intellectual Property Constituency.*

The BC urges that any expert group selected to give further consideration of improvements in the UDRP consider the development of such a standard mechanism that addresses appropriate issues, as such a mechanism can be readily confined to procedural and administrative matters and would further the above stated goal of recognizing UDRP providers as Contracted Parties. *SDB, on behalf of*

the BC.

The Forum believes that a review of the UDRP should not result in ANY changes. Any review should simply a look back to see what has happened and how things are working. It does not imply that changes would necessarily follow. *KD, on behalf of the National Arbitration Forum.*

Supplementary Rules are prohibited from being inconsistent with the UDRP Policy and Rules. The UDRP also makes clear that Supplementary Rules are only meant to deal with practicalities required by the Provider. *JD.*

JD agrees with the Preliminary Issue Report's suggestion that the wording of the UDRP should not be reviewed. There are issues that can be dealt with without changing the UDRP itself. ICANN should make clear that the wording of the policy itself does not need review; and further that it will not be reviewed in the foreseeable future. *JD.*

It is very difficult to divorce substance from process not just for the UDRP but for any system of adjudication. Rules that are clear and coherent allow for a more efficient procedural environment; when the substantive layer is concise, the procedural level operates smoothly – and visa versa. *KK, individually.*

Facebook has experienced obstacles in the manner in which the UDRP has been implemented. These issues are not overwhelming obstacles, but should be addressed. Facebook believes that many of these process issues can be addressed without resorting to a PDP. *SK, on behalf of Facebook.*

WIPO believes that the "voluminous" list of suggested changes in the Preliminary Issue Report would prove contentious as the basis for any revision efforts, given that many "process" issues would have policy implications. In addition, WIPO believes several of the issues would either fall outside the scope of the UDRP or, would be better addressed through the RAA, registrar best-practices, and/or ICANN advisories/compliance activities. *BB, on behalf of WIPO.*

Microsoft "does not object" to a review now to identify and address process-related aspects of the UDRP. *RP on behalf of Microsoft.*

Milton Mueller cited to his systematic studies of the UDRP to support his belief that there's a "very clear case" to review and possibly modify the substance of the UDRP in the area of the freedom of expression safe harbor, given the inconsistencies in this particular demonstrated by his study of UDRP cases. *MM (18 June 2011 Singapore Meeting).*

Jeff Neumann stated his personal view that the PDP should be limited to procedural issues. *JN (18 June 2011 Singapore Meeting).*

Comments from the Registrars Group reflected in the Preliminary Issue Report focus on process and procedure, noting that there could be greater clarity and explanation for certain terms in the UDRP which registrars are obligated to follow including, the term "maintaining the status quo," more specificity for what a gaining registrar, prevailing party and new registrant must do and how soon after a decision is rendered, and clarity on what happens if there is a conflict between a UDRP and competent court's decisions. *SH (22 June 2011 Singapore Meeting).*

In delineating substance versus process, Christine Dorrain on behalf of NAF provided a basic formulation: it's a policy issue if it affects the UDRP itself; it's a procedure issue if it affects the UDRP rules. *KD on behalf of NAF (22 June 2011, Singapore Meeting).*

Creation of Expert Group to Address Process Issues

The ALAC considers the Staff recommendation that a small group of experts be convened to produce proposals to improve the process or implementation of the UDRP to be cause for concern. The UDRP was drafted by a small group of experts primarily from North America a decade ago. Its clear basis in American law (especially ACPA) actually has plagued its implementation. If the UDRP is to be reviewed or studied, the group doing so should be open to all five geographical regions – especially to experts from the non-Latin-language community and worldwide Internet community, who have no conflicts of interest. In other words, the group should not be limited to the existing elite club known to ICANN. *ALAC Statement on the UDRP.*

The BC supports the Issues Report recommendation to consider certain implementation issues might be addressed via administrative improvements or standardization of procedures, without conducting a PDP and supports the call to convene a select group of experts to focus on process improvements of greatest importance. *SDB, on behalf of the BC.*

To support the work of such a group of experts (assuming that the selection of experts is transparent), the BC proposes that any recommendations from the group of experts be posted for the larger ICANN community and any comments that are relevant to the expert group's recommendations be considered. *SDB, on behalf of the BC.*

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. *JSE, on behalf of the Intellectual Property Constituency.*

An expert group could gather and consider the effectiveness of the newly created RPMs and how they interact with the UDRP. At that point, with clear factual data to hand, either or both the URS and UDRP could be considered for review. *DT, on behalf of Hogans/Lovells.*

Convening a small group of "experts" cannot be a substitute for the bottom-up policy development process that is the backbone and foundation of ICANN. The last time a group of experts was

convened, the Implementation Review Team for the new gTLD process, it was not met with supportive enthusiasm from the bulk of the ICANN community, and the RySG does not believe that that should be repeated here. *DM, on behalf of the Registry Stakeholder Group.*

NCUC does not support having this process carried out by an arbitrarily selected group of "experts. The community learned a valuable lesson with the failure of the single-constituency-driven Implementation Review Team (IRT), and created the subsequent Special Trademark Issues Team (STI), which reached unanimous consensus within the GNSO and drew much less criticism concerning issues of bias or misrepresentation, because it had incorporated members from across the community. *KK, on behalf of the NCUC.*

If the Council recommends process changes, the NAF agrees that a small group of experts who have day-to-day contact with the UDRP, be convened to propose to the Council some changes that could smooth out any procedural bumps with minimum disruption. *KD, on behalf of the National Arbitration Forum.*

INTA believes that this alternative approach is inadvisable for the same reasons that a PDP is inadvisable at this time – namely, that until the new system for RPMs to be made available for the new gTLDs is functioning smoothly, "all constituents have an interest in maintaining the stability and integrity of the supporting system through the continued functions of current policies and procedures." In addition, INTA believes that such an alternative approach is not required to implement procedural changes to the UDRP. *CDG, on behalf of INTA.*

WIPO views the establishment of a small working group representing only informed stakeholders "whereby unanimous results would be accepted or rejected by ICANN as a package" as possibly being the "only constructive approach" to an ICANN-sponsored UDRP revision. *BB, on behalf of WIPO.*

Microsoft supports the creation of a group of UDRP experts from across the community to participate in a process review of the UDRP. *RP on behalf of Microsoft.*

Utilizing a panel of experts to review the UDRP is a synonym for saying "Let's exclude certain people from the conversation." Instead, encouraging participation from everyone and using working groups should be our policy model. *JN (22 June 2011 Singapore Meeting).*

Petr Hostas from the Czech Arbitration Court supports utilizing a panel of experts to determine a list of issues to be addressed, and if they believe they need to be resolved through the UDRP, then a PDP could be considered at that point. *PH (22 June 2011 Singapore Meeting).*

On whether a PDP is Required to Review the UDRP

As the Report contains items that would impact implementation by ICANN's contracted parties, the

only way to change them is through a PDP. *DM, on behalf of the Registry Stakeholder Group.*

Of course the implementation of the UDRP is not perfect, and there are steps that can be
taken to improve it that do not require a PDP. COA urges that these be explored*. SM, on behalf of the
Coalition for Online Accountability.*

ICANN Staff has found that the majority of problem areas needing "fixing" relate mostly to "process
issues that are associated with implementation of the UDRP, rather than the language of the
Policy itself. It is now apparent from the UDRP Issues Report that a PDP is not necessary to evaluate
and make these types of changes. *FF, on behalf of MarkMonitor.*

Facebook believes that many of these process issues can be addressed without resorting to a PDP.
SK, on behalf of Facebook.

Other possible alternatives to review the UDRP and address some of the issues and problems that
have been raised should be explored and considered. *KR (22 June 2011 Singapore Meeting).*

As an alternative to a PDP, Wendy Seltzer proposed a "NQPDP" or, "the not quite a PDP" - a process
by which evidence can be gathered on the existing "gaps and errors" in the UDRP, including a
mechanism to allow members of the community to be able to contribute their input on rules,
changes, clarity or problems with rules, which can then be used to suggest next steps. *WS (22 June
2011, Singapore Meeting).*

Robin Gross from the NCUC suggested that the debate over whether or not to initiate a PDP review of
the UDRP should be refocused instead on a more constructive approach in looking at what are the
issues, where the problems are, and what improvements to the UDRP can be made. *RG (22 June
2011, Singapore Meeting).*

Kristina Rosette believes that the discussions over whether to initiate a PDP on the UDRP have been
made more difficult by using "PDP" and "review" synonymously, and suggested such practice should
be discontinued. *KR (22 June 2011 Singapore Meeting).*

On whether a PDP can undermine the UDRP's Effectiveness

It cannot be said that any amendment will undermine the current policy, and it is impossible to make
predictions on these matters. *ALAC Statement on the UDRP*.

The Preliminary Issue Report states that "A PDP on the UDRP may undermine its effectiveness." The
Registry Stakeholder group questions how is it possible that convening a Working Group through the
processes set forth in the ICANN Bylaws itself could undermine its effectiveness? If it were true that
simply commencing a policy development process on an existing policy could undermine that very
policy, then the ICANN community would never be in a position to review any policy once that policy
was implemented. *DM, on behalf of the Registry Stakeholder Group.*

The UDRP has already been through one review cycle. The mailing list of the DNSO Names Council UDRP Review and Evaluation Task Force was opened on 03 September 2001 and continued in operation until the abrupt resignation of its Chair on 13 March 2003 – see http://www.dnso.org/clubpublic/nc-udrp/Arc00/msg00575.html Did the examination of policy issues by this particular group undermine the UDRP? Of course not. *DY.*

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*. JSE, on behalf of the Intellectual Property Constituency, and JC on behalf of the FICPI.*

Regarding the fear that a formal Policy Development Process (PDP) might make the policy "worse than it is now"- a PDP does not presume that the UDRP will be changed; it simply allows all the Stakeholder Groups within ICANN to explore and answer questions about whether it should be changed and if so, whether there is agreement on ways to change it. If there is no consensus among GNSO stakeholders about any specific change, nothing should change. *KK, on behalf of the NCUC.*

MarkMonitor agrees with the overwhelming sentiment of the group of experts, organizations and individuals that were contacted by ICANN, that a PDP should not be initiated at this time given that such an action "may ultimately undermine [the UDRP], and potentially may adversely affect the many Internet stakeholders who benefit from its current implementation." *FF, on behalf of MarkMonitor.*

One of the main strengths of the UDRP is the consistency it provides in terms of decision making, as reflected in the large body of published decisions which, even though they are not binding, generally ensure consistency; it is feared that this consistency could be affected by attempts to revise the UDRP. *DT, on behalf of Hogan/Lovells.*

To echo the comments of many, in fact almost all, of the speakers at the ICANN webinar of 10 May 2011, Hogan Lovells is concerned that revising the UDRP could be harmful rather than beneficial and result in undermining its effectiveness. *DT, on behalf of Hogan/Lovells.*

INTA believes that initiating a PDP at this time would cause instability in relation to the implementation of the RPMs for the new gTLDs, given that the RPMs were drafted and commented on based on the assumption that the current UDRP would be in place and continuing to function as it has when the launch of the new gTLDs occurs. *CDG on behalf of INTA.*

CADNA expressed its concern that a review of the UDRP at this time could do "much more harm than good," especially in light of the launch of the new gTLD program. CADNA believes the significant expansion of new gTLDs coupled with a destabilized UDRP, could have "devastating effects for brand

and trademark owners and create a host of new opportunities for cyber-squatters." *EC, on behalf of CADNA.*

Chuck Gomes agrees that a PDP would not undermine the UDRP itself: "We have done PDPs reviewing policies for quite some time now and I don't think any of the policies have been undermined…" He points to the IRTP PDPs as an example - The first PDP (Part A) did not recommend any changes, and Part B recommended some policy changes but "none of them has undermined the policy." *CG (18 June 2011 Singapore Meeting).*

The "fear of change" should not drive the decision-making process of whether to initiate a PDP to review the UDRP. *JN (18 June 2011 Singapore Meeting).*

Jeff Neuman took issue with the staff conclusion in the Preliminary Issues Report that a PDP could undermine the effectiveness of the UDRP and doesn't see how it is possible that a PDP itself would undermine the UDRP. *JN (22 June 2011 Singapore Meeting).* While acknowledging the fears over the uncertainty of how a review of the UDRP will go and in particular among his own constituency group (NCSG), Milton Mueller agrees with others that that fear alone should not bar a review, and in supporting a review stated that "if we [NCSG] support a review there's no reason for anybody else to be afraid of a review." Mueller also agrees that a review will not undermine the UDRP, nor necessarily lead to any change unless there's a consensus – i.e., at least two-thirds of the council across the houses. Mueller believes that simply reviewing the UDRP to see if there's any consensus for change does not harm the UDRP or its effectiveness. *MM (18 June 2011 Singapore Meeting).*

Mark Partridge representing the ABA expressed concern that it would be unwise to open the UDRP to review with uncertainty about what the outcome would be. *MP, representing the ABA (22 June 2011 Singapore Meeting).*

David Taylor, speaking as a panelist expressed his serious misgivings about opening up the UDRP to revision because at this time, it's the only RPM that exists for the new gTLDs. *DT, speaking individually. DT (22 June 2011 Singapore Meeting).*

ICANN should evaluate the experience of ccTLDs that have adopted differing variations of the UDRP

Many country code TLDs have instituted similar Dispute Resolution Procedures (DRPs). Although many are based in part on the ICANN model, they often introduce slight procedural or substantive modifications. ICANN needs to assess whether it can learn from those differing experiences. *KK, on behalf of the NCUC.*

Some "national" DNS authorities implemented that kind of mechanism (three experts panel;

additional costs to avoid dilatory appeal). See, for instance, dns.be policy. *AC.*

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. *JSC, on behalf of the Intellectual Property Constituency.*

Concern Regarding Launch of New gTLDS without adequate Trademark Protections

The timing of a review now would be especially unwise given the uncertainty created by launch of new gTLDs. *JSE, on behalf of the Intellectual Property Constituency*; *JC, on behalf of the FICPI, FA, on behalf of the MPAA.*

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. *JSE, on behalf of the Intellectual Property Constituency*.

Verizon, along with many other stakeholders, was deeply disappointed to learn of ICANN's decision to release hundreds of new gTLDs without adequate and effective rights protection mechanisms in place to address the frauds and abuses that are certain to arise in the new gTLD space. *SD, on behalf of Verizon.*

At a recent summit of the porn industry, responses to questions about trademark remedies from a representative of the .XXX registry only confirms the troubles that lie ahead for trademark owners both with respect to existing RPMs and the costs of using the URDP. This leads back to the importance of one ICANN remedy that has worked well despite the high costs – the UDRP.   Although the use of the UDRP certainly does not scale to address the increased volumes of infringement in the new gTLDs, for over a decade the UDRP has remained a viable remedy.   *SD, on behalf of Verizon.*

With the advent of new gTLDs we have a number of new and untested RPMs, often described as a tapestry of solutions. A PDP could serve to pull the rug out from under the UDRP, the one and only tried and tested RPM, thus to dabble with it now would be dangerous for all concerned. *DT, on*

behalf of Hogan/Lovells.

With the launch of new gTLDs just around the corner, Hogan Lovells feels that the UDRP is an island of certainty across the hundreds of jurisdictions and in the constantly evolving internet landscape that will shortly change beyond recognition. As such it is important that everyone in the domain name industry, whether rights holders, consumers and registrants, registrars or domain name registries, may continue to rely on the UDRP, at least in the short term*. DT, on behalf of Hogan/Lovells.*

When the new gTLD process was advanced in 2008, concerns were raised by MARQUES and many other interest representative organizations and corporations about the protection of intellectual property. The success of the UDRP as a proven tool for combating bad faith registration was given as a reason for the advancement of the new gTLD process. Any move to review the UDRP at this stage would therefore undermine the basis for the new gTLD program. IP owners need consistency during this period of change. *LB, on behalf of MARQUES.*

Jeff Neuman noted that in the case of the new gTLDs, one of the reasons for the IRT was because trademark owners were not satisfied with the current state of the UDRP, and that there are still discussions and processes being debated by governments and other community members to add additional protections for the new gTLDs because of concerns over the lack of protection provided by the UDRP. *JN (18 June 2011 Singapore Meeting).*

Avri Doria, speaking as a member of the NCUC stated her position that the UDRP exists independently for both existing and future TLDs and registrars. Doria expressed her opinion that "to put any sort of fear, uncertainty and doubt on the notion of new gTLDs because someone dares talks about threatening the UDRP with review is really an unfortunate thing." *AD speaking as a member of the NCUC (22 June 2011 Singapore Meeting).*

Zahid Jamil expressed his support that a review of the UDRP should take place, and reiterated his position that taking into consideration the need to review other RPMs for the new gTLDs does not in his view "threaten the new gTLD process." Jamil noted that a lot of the work on the DAG for new gTLDs as well as the work of the IRT and STI was based on the UDRP as it currently exists. Therefore, changing the status quo of the UDRP will change the foundation on which most of the RPMs have been formed. As a result, Jamil believes that if the UDRP is reviewed, it should be done so in balance with every other RPM that exists and that the timing of such review is the real issue. *ZJ (22 June 2011 Singapore Meeting).*

Enhanced Compliance Activities Related to UDRP Are Needed.

Registrar compliance and conduct concerns do not require a PDP. The registrar compliance problem can be solved 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. *JSE, on behalf of the Intellectual Property Constituency.*

ICANN's contract compliance efforts, to ensure that registrars and registries are fulfilling their crucial obligations under the UDRP, should be stepped up. *SM, on behalf of the Coalition for Online Accountability.*

Outside any PDP process, ICANN should concentrate on ensuring that registrars adhere to all UDRP-related policies and procedures. Verizon has witnessed continuing problems where registrars (1) are in fact the cyber squatters; (2) misuse proxy services to permit cybersquatting; (3) fail to adhere to ICANN procedures to comply with the UDRP decisions, including inappropriately transferring domain names instead of locking them; and (4) encourage registrants to file fraudulent and frivolous "appeals" in national courts to circumvent the UDRP and extract monetary payments from trademark owners for the transfer of cyber squatted domain names. ICANN must take steps to enforce registrar compliance in this area. *SD, on behalf of Verizon.*

There are a number of situations on which ICANN could and should have intervened. Examples are:

• ICANN should be conducting the investigation into serious allegations made against the Hong Kong office of the Asian Domain Name Dispute Resolution Centre (ADNDRC). These allegations have led to ADNDRC initiating an investigation into itself. One would also anticipate that a contract would enable ICANN to suspend the accreditation of the Provider whilst an independent investigation was carried out, so that there was no risk of registrants' interests being harmed in the interim.

• ICANN should have been able to suspend and investigate the National Arbitration Forum (NAF), following the blizzard of allegations of conflicts of interests that led to a law suit commenced by the Minnesota Attorney General in respect of the highly lucrative consumer credit arbitration run by NAF.

• Domain Name Wire has also accused NAF of improperly providing panelists with an opinion brief to assist them with their decision making process. These allegations mirror some of those leveled in respect of their conduct in consumer credit arbitrations. *JD.*

J. Scott Evans, representing the IPC stated their concern whether the Contractual Compliance Department has enough resources in terms of budget and personnel to ensure compliance, especially in light of the number of new Registrys that will come on board with the new gTLDs. Without adequate support and resources, "the bad players are still going to be getting away with it to the detriment of good players and to the detriment of trademark owners and consumers and others." *JSE*

on behalf of IPC (18 June 2011 Singapore Meeting).

Amend the Registrar Accreditation Agreement to Address UDRP Concerns

ICANN should explore amending the RAA to address some of the UDRP concerns as suggested by the RAA Drafting Team. The Final Report stated that, "where WHOIS data is inaccurate or incomplete such that an 'amendment' of UDRP petitions is required, the registrar [be required under the RAA to] supply ICANN with a copy of the accurate WHOIS information along with an explanation why the published information was inaccurate or incomplete at the time a petitioner submits a UDRP petition." The Final Report included an RAA revision establishing "firm and enforceable deadlines for registrars (a) to respond to dispute resolution provider's requests for information in connection with registrar verification processes at the inception of a UDRP proceeding; and (b) to provide for transfer of the domain name to the petitioner pursuant to standard and (preferably) simplified processes." *SM, on behalf of the Coalition for Online Accountability.*

Community Bandwidth Constraints

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. *JSE, on behalf of the Intellectual Property Constituency.*

The recent report of the PDP work team documented that the average life span of the typical PDP is 350-550 days. The tens of thousands of hours that ICANN participants would need to devote to a PDP on the UDRP is not a wise use of finite human resources. The impending launch of the new gTLD process will make further demands on the time and energy of many ICANN participants. The timing of any review would be especially unpropitious now. *SM, on behalf of Coalition for Online Accountability.*

With all of the intense preparations surrounding the launch of new gTLDs, it may also be that the ICANN community lacks the 'bandwidth' at the present time to consider a UDRP review adequately. *AS, on behalf of RE/MAX, SK, on behalf of Facebook*

It would not be prudent to enlist hundreds of volunteer hours to undertake this massive overhaul only to find out that there may be other changes necessary or a more efficient way of managing the process that was not fully considered. *FF, on behalf of MarkMonitor.*

ICANN Staff has raised almost 50 different areas that would need to be looked at in any review of the UDRP. Each one could conceivably bring up additional tangential issues that would need review as well. This, in effect, would create a never-ending "domino effect" that would require a contribution

of large amounts of resources to bring any one PDP to completion. *FF, on behalf of MarkMonitor.*

At the San Francisco ICANN meeting last March, the registries and registrars blocked any action on the drafting team's recommendations, which were broadly supported by all non-contracted parties. Overcoming this roadblock would be a far more judicious use of ICANN staff and volunteer resources than convening an unnecessary and ill-timed PDP review of the UDRP. *SM, on behalf of the Coalition for Online Accountability.*

How one can get such consensus will be a difficult and tortuous route, perhaps a search akin to that of the Holy Grail. One only needs to take a look back at the 2003 Issues report on the UDRP Review and its conclusions, namely that the revision of the UDRP is likely to be contentious, that there are not many areas amenable to achieving consensus, that whilst there are some areas where improvements may be possible there was no urgent need for revision and the GNSO Council had other issues on its plate. It would seem to us that not a lot has changed since then and there is no clear argument and reason for a PDP today. *DT, on behalf of Hogan/Lovells.*

Now is not the time to spend time and energy reviewing the UDRP. With the advent of the new gTLDs, there is work for everyone to do. Registries are taking on new top-level domains and pulling together sunrise programs, registrars are learning how they can be registries and gearing up for more registrations, businesses are determining how they will react and if they will apply, brandowners are determining their rights protect strategies, and providers are determining if they should be applying to administer any of the new rights protection mechanism. In order to do an adequate job of any sort of UDRP review, participants from each of these areas are needed. The people participating in the process need to be at the table in the discussions to open up the UDRP. *KD, on behalf of the National Arbitration Forum.*

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 fundamental nature of the UDRP. *JC, on behalf of the FICPI.*

ICANN's launch of new gTLDs will consume considerable resources and should be given a high priority. There is no pressing need to initiate a UDRP PDP at this time and ICANN should not divert its limited resources to such a process in the face of other, more urgent needs. *FA, on behalf of the MPAA.*

INTA expressed its concern that there is not enough available staff and community resources to effectively manage a PDP given the necessary preparations and implementation of the new gTLD procedures and policies. *CDG, on behalf of INTA.*

Chuck Gomes accepts the lack of resources argument to justify postponing the PDP in also acknowledging that community's activities need to be prioritized in order to realistically do the work.

CG (18 June 2011 Singapore Meeting).

Education of Service Providers as an Alternative to a PDP

To the extent there are misunderstandings or lack of knowledge about the provisions in the UDRP that protect free speech, the solution can best be found in greater education of stakeholders involved in the UDRP. *JSE, on behalf of the Intellectual Property Constituency.*

Rather than changing the policy, what may be needed is more education. Mark Partridge representing the ABA suggests that ICANN could provide an education on best practices for panelists and registrants, as well as opportunities for education on how to participate in the process. *MP representing the ABA (22 June 2011, Singapore Meeting.)*

One PDP or Multiple PDPs

Undertaking a wholesale review of the UDRP will entail a massive effort given the intricate and complicated nature of this mechanism. The RAP-WG recognized this problem recommended that a drafting team be convened to develop "a roadmap for addressing these issues, possibly through multiple PDPs grouping together related issues in a similar way as was done for the review of the IRTP". *FF, on behalf of MarkMonitor.*

ICANN Should Adopt an Accreditation Process and/or Standard Contracts for all UDRP Providers

ICANN should develop standardized accreditation processes and agreements for all UDRP providers, eventually recognizing them as Contracted Parties. In this regard, the BC notes that in October 2010 it took a position regarding the accreditation of new UDRP providers that read in part:

> The BC strongly advocates that ICANN must first implement a standard mechanism with any and all UDRP arbitration providers that defines and constrains their authority and powers, and establishes regular and standardized review by ICANN with flexible and effective means of enforcement. The ultimate sanction of cancelling accreditation is an extreme sanction that ICANN has demonstrated a reluctance to initiate in other contexts…

> In the future, business interests may well be investing substantial amounts In…new gTLDs, for both defensive, new branding, and other purposes. In this type of environment it is even more important that all UDRP providers be subject to uniform and enforceable responsibilities, as that is the only means of furthering the goal that UDRP decisions are consistent within and among UDRP providers, and that the UDRP remains an expedited and lower cost remediation for addressing cybersquatting.

The BC notes that the issue of whether UDRP providers should be under a standard mechanism with ICANN is almost entirely separable from the question of whether the UDRP evaluation standards for determining the existence of cybersquatting should be reformed. There is no need to debate the substantive elements of the UDRP in order to address the fundamental issue of whether UDRP providers should be under a standard mechanism.

SDB, on behalf of the Business Constituency.

At least best practices or guidelines to providers should be issued by ICANN to ensure a more uniform and transparent process of panelist choice. *AC.*

ICANN needs to take ownership of the UDRP. ICANN should implement a contract with the UDRP providers. That contract should impose standards on the providers and, in turn, on their panelists. *JD*

ICANN has no real control over the approved UDRP Providers, since astonishingly there is no contract in place between ICANN and those Providers. It seems unbelievable that ICANN does not have in place a contract with the companies that implement the UDRP on its behalf. *JD.*

The lack of contractual regulation leaves ICANN powerless to intervene in a proper and proportionate way. *JD.*

WIPO was the first to use the term "race to the bottom" with reference to approval of a new UDRP provider in July 2007. The detailed critique expressed concern about forum shopping, profit driven competition between providers, the loss of consistent and predictable decisions, the application of reduced panel fees in default cases and that the applicant's plans were a violation of the UDRP Policy and Rules. Competing businesses, which these Approved Providers are, must have proper regulation when they are carrying out such a sensitive and wide reaching service. Otherwise, the lowest common denominator will prevail. *JD.*

The UDRP should aim for consistency in the way its rules are interpreted or the way the supplemental rules of its accredited centers are enforced. *KK, individually.*

Preliminary Issue Report Should be Withdrawn and Replaced

R Shawn Gunnarson of Kirton & McConkie called for the Preliminary Issue Report to be withdrawn and replaced because in his view, the report violated ICANN's bylaws by: 1) being delivered 98 days later than the deadline mandated by the bylaws; and 2) being substantively inconsistent with the bylaws by "stacking the deck against commencing a PDP rather than identifying support for it;" and by

"fail[ing] to answer the questions posed by the GNSO Council. Gunnerson recommends that the GNSO Council should vote to withdraw the Preliminary Issue Report and direct staff to provided a revised Issue Report "that fully complies with the bylaws within 15 calendar days;" with a minimum 30 day public comment period after. *SG on behalf of Kirton & McKonkie.*

Significant Amount of Academic Research Exists and Should be Assessed

A significant amount of academic research and critical literature has developed around the UDRP which can be assessed for problem areas and mined for proposals to improve it. *KK, on behalf of the NCUC.*

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. *JSE, on behalf of the Intellectual Property Constituency.*

MarkMonitor encourages that even before such a team of experts is formed, unbiased quantitative research should be conducted to establish and verify the real issues that affect fair adjudication of UDRP cases. With the aid of over thirty thousand, well-documented cases, statistical analysis should identify where real issues exist. *FF, on behalf of MarkMonitor.*

Additional Issues to Include in List of Issues Raised by the UDRP

If the GNSO adopts the Staff recommendation to convene a small group of experts to produce proposals that would improve the process or implementation of the UDRP, the ALAC recommends that these improvements address the problems identified by Professor Komaitis concerning meritless capture of domains. *ALAC Statement on the UDRP.*

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. *JSE, on behalf of the Intellectual Property Constituency.*

The BC believes that process improvements surrounding the following issues warrant further investigation and development:

- Registry and registrar obligations relative to domains subject to UDRP

- Clarification of domain locking, renewal and transfer procedures for domains subject to UDRP

- Standardized procedures for the un-masking of proxy registration to reveal ownership

SDB, on behalf of the Business Constituency.

The existing appeal to national courts is effective and sufficient. Adding an appeal process within the UDRP would insert an unwarranted level of expense and delay to the enforcement of UDRP decisions. *JSE, on behalf of the Intellectual Property Constituency*.

Preventing advocates from serving as panelists in unrelated cases is unwarranted. 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. *JSE, on behalf of the Intellectual Property Constituency*.

ICANN should consider revising its Choice of law provision and its assignment of arbitrators, at least in cases of fair use cases involving 4(c) iii of the UDRP. *DS.*

The scope of administrative procedure should be restricted to trademark Infringements. Those in favor of this form of limitation pointed out in 1999 that the violation of trademarks (and service marks) was the most common form of abuse and that the law with respect to trade names, geographical indications and personality rights is less evenly harmonized throughout the world, although international norms do exist requiring the protection of trade names. *AC*.

Most of panelists use the (unregistered) "common law trademark" concept to extend the scope of UDRP to other signs. A clarification of the Policy is needed to validate this (contra legem) extensive case law, since it seems now difficult to come back to a more restrictive approach of UDRP Policy scope. Perhaps official ICANN guidelines for interpretation would be sufficient thereto, since major actors of UDRP refuse to open a discussion on its review. *AC*

The creation of an internal appeal process should be discussed in order to ensure a better implementation of fair trial requirements within UDRP procedure. *AC*

From fair trial requirements point of view, another sensitive issue was the one of the choice of the expert for a single panel decision. Providers rule the issue in their internal "Rules" for UDRP. *AC*

ICANN should take a lead where panelists (or providers) seek to rewrite and extend the UDRP. ICANN (not providers) should issue guidance on questions that are causing controversy. An example would be the minority of panelists who believe that claims of post registration "bad faith" should suffice, notwithstanding the clear requirement for "bad faith" registration and "bad faith" use. In so doing, ICANN should stand firm on the reason behind the UDRP - that is to provide a solution to "cybersquatting"; rather than a forum for panelist created jurisprudence that "adapts" to commercial activity not contemplated at the implementation of the UDRP. *JD.*

ICANN should implement certain required standards of procedural fairness on the providers. For example, a cab rank system of appointing panelists would avoid the sort of distorted picture of

appointments highlighted in the Muscovitch study of such appointments at NAF. *JD.*

Examples of the unfairness of the UDRP include: the lack of clear fair use provisions and safe harbors; the unreasonably disproportionate deadlines that exist for the complainant and the respondent; the bias that takes place even at the time of the center selection; and, the UDRP has failed to account for registrants and users located in countries, where Internet connectivity is still at its infancy. *KK, individually.*

Additional Information to Include in the Issue Report

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. *JSE, on behalf of the Intellectual Property Constituency*.

NCUC is not satisfied with the quality of the published GNSO Issue Report. We expect Issue Reports to involve the collection, compilation and analysis of relevant factual evidence, and a neutral and balanced assessment of relevant literature. The Report should be enhanced to take account of the factual evidence and analysis generated in the 12 years since the UDRP has been in effect, to provide the GNSO Council with informative background materials that can prepare it for policy discussions and debates. *KK, on behalf of the NCU*C.

Contrary to what the Issues Report suggests, the UDRP was never a consensus document. This has been well documented by those who participated in the UDRP process ten years ago. *KK, individually.*

On whether the UDRP is a policy that preserves the operational stability, & security of the Internet

The means by which two or more parties resolve a dispute concerning the status of the registrant of record of a registered domain name is a policy, but it is not a policy that can preserve and enhance the operational stability, reliability, security and interoperability of the Internet. The determination of the registrant of record of a registered domain name has no relationship to the operational stability, reliability, security and interoperability of the Internet. While the policy has obvious benefits, this simply is not one of them. *ALAC Statement on the UDRP*.

One of the few constants between the current world of 21 gTLDs and the soon-to-be world of 321, 521, or 1,021 gTLDs is the UDRP, which will apply to every single one of them. It is hard to see how re-opening the UDRP through a PDP at this time would add anything to the security, stability or reliability of the domain name system; indeed, just the opposite could be the result. *SM, on behalf of the Coalition for Online Accountability*.

The UDRP Needs to be Translated into Other Languages

While this policy is one of ICANN's oldest, ICANN has not translated the document on its Web site from English into other languages (see http://www.icann.org/en/udrp/udrp-policy-24oct99.htm). Only its rules are summarized (see http://www.icann.org/es/dndr/udrp/uniform-rules-es.htm), which are not mandatory for providers (bearing in mind that the English version shall prevail in the case of a contradiction). This would need to be fixed as a matter of priority. *ALAC Statement on the UDRP*.

The Effectiveness of the UDRP

In demonstrating the effectiveness of the UDRP, the Forum has released statistical data on its cases heard to date, which exceed 16,000. The Forum notes the following impact and success of the UDRP. Panelists have found cybersquatting in 87% of cases filed with the Forum to date. In 13% percent of cases, panelists have found that either: 1. the complainant did not meet their burden to prove cybersquatting, 2. the case involved legal or factual circumstances that were not straightforward cybersquatting or 3. that the specific respondent was not guilty of cybersquatting (majority of the 13%).   While the percentage of cases of cybersquatting overall is relatively low in comparison to the numbers of domain names registered, the UDRP has been proven as a fast and relatively straightforward means of stopping trademark infringement in the form of domain names with relatively few instances of causing an undue burden for the registrant.   *KD, on behalf of the National Arbitration Forum.*

The UDRP is fast. From January 2002, time to decision from filing averaged 50 days, and from commencement averaged 42 days. Since January 2010, our time to decision from filing is averaging 46 days and from commencement averages 38 days, with some cases concluding in a decision in as little as 10-15 days. *KD, on behalf of the National Arbitration Forum.*

The UDRP is fluid. Panelists have been able to apply the UDRP to situations unforeseen in 1999. Pay per click, phishing, and mouse trapping were practices created since 1999, yet UDRP panels have been able to apply the UDRP appropriately. *KD, on behalf of the National Arbitration Forum.*

ICANN Should Focus on the Practice of Cybersquatting

Instead of a PDP on the UDRP, ICANN should focus on the practice of cybersquatting, including looking into:

(a)   the conduct and compliance of certain registrars with dubious behavior,

(b)   the process drivers and beneficiaries of cybersquatting,

(c)   registry involvement in implementation of decisions as a means to process domain name

transfers post UDRP decision, and

(d)   the systematic abuse by bad faith registrants of proxy services.

DT, on behalf of Lovells/Hogan.

Comments on the Research Included in the Preliminary Report

The ALAC commends Staff for preparing the UDRP Questionnaire and the summary of issues raised by respondents in the community. We also commend the Provider respondents to the UDRP Questionnaire – the World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF), the Asian Domain Name Dispute Resolution Centre (ADNDRC), and the Czech Arbitration Court (CAC). These work products of Staff and Respondents, along with their presence in the record of the Preliminary Issue Report, constitute effective and informed notice and comment. *ALAC Statement on the UDRP.*

The NCUC's overview of existing literature exposes a disparity between the Preliminary Issue Report conclusions and the conclusions of most of the research literature on UDRP.   The NCUC points out that independent, neutral research does not support the preliminary report's assertions that UDRP is fair, consistent and in no need of review.   To aid the preparation of the Final Report, the NCUC submitted the following summary of research literature:

• Helfer, Laurence R. and Dinwoodie, Graeme B., Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy. William & Mary Law Review, Vol. 43, p. 141, 2001; Stanford/Yale Jr. Faculty Forum Paper No. 01-05. Available at SSRN: http://ssrn.com/abstract=275468

• Mueller, M. (2001). Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy. The Information Society Volume 17, Issue 3, 2001, 151 - 163

• Geist, Michael (2001), Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP http://aix1.uottawa.ca/~geist/geistudrp.pdf

• Froomkin, A. Michael (2002), Uniform Dispute Resolution Policy—Causes and (Partial) Cures. 67 Brooklyn Law Review 605.

• Mueller, M. (2002). Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP. http://dcc.syr.edu/PDF/markle-report-final.pdf

• Selby, John (2004). Competitive Justice?: The Role of Dispute Resolution Providers under ICANN's UDRP, 1 Macquarie Journal of Business Law 23

• T. Lee, D. Hunter and D. Orr, "Cohesion and Coherence in the UDRP," (2008)

• Komaitis, Konstantinos. The Current State of Domain Name Regulation: Domain Names as Second-Class Citizens. Routledge, 2010.

Additional research on the UDRP should include a review of David Simon's paper entitled "An Empirical Study of Fair Use Decisions under the UDRP found at the following link: http://ssrn.com/abstract=1887888. *DS.*