UDRP Providers and Uniformity of Process – Status Report
July 2013

Issues relating to Uniform Domain Name Dispute Resolution Policy ("UDRP") and uniformity of providers started to arise within ICANN in 2010. Commenters raised concerns regarding how ICANN can and should enforce uniformity among the approved UDRP providers. At that time, ICANN stated that it would undertake a review of its relationship with its UDRP providers, which it did. This memo is the culmination of that effort.

Background

There are two documents that are required for universal, uniform operation of the UDRP. The first is the policy itself, at http://www.icann.org/en/dndr/udrp/policy.htm ("Policy"), setting out the scope of relief and the basis for mandatory administrative hearings that may be brought. The second document set outs the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), at http://www.icann.org/en/dndr/udrp/uniform-rules.htm, which provide the baseline procedural requirements that must be followed in a UDRP proceeding, such as required notice to a respondent, time for filing a response, and standardization of a practice for appointing the administrative panel in every proceeding brought under the UDRP.

Each approved UDRP provider is responsible for maintaining its own set of supplemental rules, defined as "the rules adopted by the Provider administering a proceeding to supplement these Rules. Supplemental Rules shall not be inconsistent with the Policy or these Rules and shall cover such topics as fees, word and page limits and guidelines, file size and format modalities, the means for communicating with the Provider and the Panel, and the form of cover sheets." (Defined in the Rules, at http://www.icann.org/dndr/udrp/uniform-rules.htm.) As part of the approval process, potential providers must provide ICANN with a copy of their proposed supplemental rules, which are reviewed to confirm that there is no

conflict with the Rules and the Policy, and also to confirm that the potential provider has an understanding of the policy.

<u>Contracting with UDRP Providers</u>

One of the most common requests that ICANN has received regarding UDRP providers is to implement a contract across providers that will require uniformity in proceedings. ICANN has carefully considered whether the introduction of contracts is feasible or useful in the scope of UDRP proceedings, and has determined that contracts would be a cumbersome tool to assert to reach the same outcome that exists today. Just as UDRP providers are approved by ICANN, ICANN can always revoke its approval if a provider is found to no longer meet the standards that supported its approval. For example, if a UDRP provider is found to be acting in violation of the UDRP, or if the provider has Supplemental Rules that are in conflict with the UDRP and the Rules, and the UDRP provider failed to remedy that conflict, there is nothing in either of those situations that precludes ICANN from revoking approval. Imposing a contractual relationship could actually make it more difficult for ICANN to take corrective action. Here, the UDRP and the Rules set forth all of the expected actions of the UDRP provider; a contract would only be repetitive in this case.

Although some have argued otherwise, the situation with the UDRP is different from the Uniform Rapid Suspension System (URS) that has been established for the New gTLD Program. Unlike the UDRP, the URS is not based on a policy. ICANN has used Memoranda of Understanding to govern the relationship with each of the selected URS providers, in which each of the URS providers agree to implement the URS services in accordance with the procedures laid out in the Applicant Guidebook, as they might be amended from time to time. The URS providers also agree to maintain supplemental rules that "may not contravene or be inconsistent with the URS Procedure or URS Rules." (See http://newgtlds.icann.org/en/applicants/urs for more information on URS providers.) These are the *same requirements* that UDRP providers are subject to, without a contractual relationship.

Forum Shopping and Provider Concerns

A frequent concerns raised regarding UDRP providers is the potential for "forum shopping," or that UDRP complainants will seek out providers that they believe will provide a better result. The provision of contracts, however, will not stop complainants from filing UDRP disputes with their preferred providers. In fact, one of the expected benefits of the diversity of UDRP providers is to provide further choice to all who may invoke the UDRP, including issues of geography and language. UDRP providers are expected to perform to the standards set forth in the UDRP. So long as those standards are used, and the provider is adhering to the UDRP, the choice is appropriate to leave to a complainant as to which UDRP provider it wishes to use.

Many of the concerns raised about the uniformity of UDRP providers are based on the premise that there are UDRP providers today that act outside of the UDRP. However, the few reports or complaints that ICANN has received regarding existing UDRP providers have not evidenced behavior that would require ICANN to consider whether there was a need to revoke its approval. Of course, there is always the future possibility that an issue of non-compliance will arise that will require corrective action. In recognition of that potential, ICANN commits that substantiated reports of UDRP provider non-compliance with the UDRP or the Rules will be investigated. If the investigations uncover issues of UDRP provider non-compliance, ICANN will work with the affected UDRP provider to determine if the issue can be remedied. If the issue cannot be remedied, and the UDRP provider cannot – or refuses – to return to acting in conformity with the UDRP, ICANN will take action, which might include revocation of its approval of the UDRP provider, taking into account issues relating to the transferring or completion of pending matters before that provider.

Provider Approval Process

The work related to the approval of UDRP providers is not solely within the control of ICANN staff and Board. At the time the UDRP was implemented, there was an indication that "The Generic Names Supporting Organization (GNSO) is currently undertaking a review of the UDRP, and will include the approval process for dispute-resolution providers as part of this review." See http://www.icann.org/en/dndr/udrp/provider-approval-process.htm. In the interim, 10 required elements for applications were set forth on that approval process page. In 2003, the GNSO conducted a survey to prioritize issues relating to the UDRP, as seen in a UDRP Issue table, and raised the issue of "[s]hould standards for accrediting providers and panelists be promulgated?". This issue was ranked fourth in level of import, and there is no further mention of the issue available on the GNSO Issues page. As a result, the Approval process listed as "provisional" in 2000 has remained in effect. This issue was re-raised within the documentation for a policy development process regarding the UDRP that was before the GNSO Council in 2011, and could be included within the continuation of that PDP when the work is reinitiated after new gTLDs are delegated into the root.

Summary

UDRP providers are central to the maintenance of one of the policies that is most central to rights protection within gTLDs, the Uniform Domain Name Dispute Resolution Policy. UDRP providers are expected to adhere to all portions of the policy – and it is important for ICANN to know if they are not doing so. However, a contractual regime is not required for ICANN to have enforcement power over the UDRP providers; the established UDRP and Rules set out the parameters of the UDRP providers' conduct, and they may not act in contravention of the Policy or Rules. While there has not been, to date, a need for ICANN to revoke its approval of any UDRP provider, the concerns raised in the community make clear that ICANN has to be prepared for this potential. As a result, ICANN is committed to thoroughly investigate complaints of non-compliance and take corrective action as appropriate.