# Comments of the Noncommercial Users Constituency (NCUC) on the Preliminary GNSO Issue Report on the Current State of the Uniform Dispute Resolution Policy

# The burden of proof is on those who oppose a review

NCUC believes that a PDP reviewing the UDRP must be considered the presumptive outcome of this process. A review is the default for several reasons:

1. The policy has been in place for a long time and was put together very quickly in the earliest stages of ICANN’s existence, and has not been reviewed or modified since.
2. Many country code TLDs have instituted 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 experiences
3. A research and critical literature has grown up around the UDRP which can be assessed for problem areas and mined for proposals to improve it.
4. No stakeholder or independent commentator now claims that the UDRP is perfect. Virtually all of the panelists on the workshop held at ICANN 41 (Singapore) noted that there were specific improvements or changes they would like to see, even if they did not prefer to invest time in a PDP.

For the reasons stated above, those who oppose a review must provide very strong reasons that it should not take place.

NCUC believes that resistance to a PDP comes from two sources. One is a fear of various parties that a PDP might make it worse than it is now. In response to that, we reply that a PDP does not presume that the UDRP will be changed; it simply allows us to systematically 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 will change.

The other argument against a review is that the timing is bad. Some believe that the timing is bad because we are headed into the new TLD program which relies on the UDRP and URS and that consideration of change will “destabilize” these efforts. Others believe that other policy making activities should be prioritized. The first claim seems entirely illogical to us. The new TLD program will expand the usage of the UDRP and the URS will rely on certain elements of the UDRP. 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. Further, we simply cannot agree with anyone who sees the UDRP and trademark – domain name conflicts in general as a low-priority area for ICANN. UDRP touches on issues that are central to ICANN’s mission and fundamental to the interests of nearly all of its stakeholder groups. If ensuring that the UDRP is functioning properly is not a priority, what is?

# The Staff Issues Report

NCUC is disappointed with the quality of the Preliminary GNSO Issue Report on the UDRP. NCUC believes that GNSO policy making must be grounded in facts and experience. For this to happen, issue Reports must provide the GNSO Council with informative background materials that can prepare the Council for policy discussions and debates. We expect staff issue reports to involve the collection, compilation and analysis of relevant factual evidence, and a neutral and balanced assessment of relevant literature.

Over the past twelve years, the UDRP has generated a significant amount of independent research and critical examination. There are also statistical sources available, both in the research literature and from the DR providers. If one uses focused search techniques and devotes two or three days to examining the most important materials, one finds about a dozen useful empirical studies and analytical law review pieces on the UDRP. These reports could have and should have been summarized and referenced in the staff issues report. While it does take time to sift through this material and glean its findings, the amount of time consumed would almost certainly be less than the time consumed by organizing a “webinar” and a survey. We question the value of the techniques staff employed in developing the report. Webinars and surveys merely elicit opinions from the handful of people already involved in ICANN who happen to be available. There is an important distinction between an internal opinion poll and a fact-based issues report.

Issue reports, and GNSO policy development processes generally, should not rely exclusively on casual internal soundings. If professionals, social scientists and researchers outside of ICANN have devoted resources and expertise to the analysis of ICANN and its policies, our processes can only benefit from drawing upon these materials. We note that SSAC reports routinely involve reviews of the relevant research literature and often do a good job of compiling and summarizing such literature. The GNSO needs to do the same.

# Summary of research literature

To aid the staff, we list and provide brief summaries of the relevant research in the appendix to this comment. The sources are in chronological order. We ask that this information be incorporated into the revised issues report. The overview exposes a huge disparity between the staff issue report conclusions and the conclusions of most of the research literature on UDRP. The staff report portrays the UDRP as completely consistent, fair and universally supported. Nearly all scientific reports, on the other hand, while noting the UDRP’s success at reducing the costs of resolving domain name disputes and rectifying gross forms of cybersquatting, tend to be critical of both substantive and procedural aspects of the UDRP. In other words, independent, neutral research does not support the staff’s assertions that UDRP is fair, consistent and in no need of review.

* 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

The article critically assesses the Uniform Domain Name Dispute Resolution Policy (UDRP) as a potential model for solving the legal challenges presented by transborder activity. It describes the conditions that led to the UDRP's formation and considers whether the UDRP can and should be replicated elsewhere. While authors believe that UDRP succeeded in bypassing cumbersome mechanisms of national and international law making and in fulfilling demand for effective dispute settlement, they do not believe that it should be uncritically extended to other contexts. This article contains no empirical or statistical analysis of UDRP results.

* 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

A statistical analysis of UDRP case outcomes based on the concern that ICANN allows the complainant to select the dispute resolution service provider. This statistical tests indicate that complainant selection of dispute resolution service providers does lead to forum shopping that biases the results.

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

This study finds that influence over panel composition is likely the most important controlling factor in determining case outcomes. Providers steer a majority of the cases toward complainant-friendly panelists. Fifty-three percent of all NAF single panel cases were decided by only six people, and the complainant winning percentage in those cases was 94%. Provider influence over panelists diminishes in three-member panel cases, since both complainant and respondent choose one of the panelists and exercise some influence over the choice of the third; predictably, complainant win rates go down in three-member panels. The study concludes by proposing changes to the UDRP to instill greater fairness and confidence in the process.

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

This paper describes the main features of the UDRP and ICANN’s accompanying rules of procedure and compares them to the recommendations of the WIPO proceeding and Report called for in the 1998 White Paper. The article documents four "unfair aspects of the UDRP rules:" (1) the selection and composition of the arbitral panel; (2) the failure to provide a registrant with adequate time to reply to a complaint; (3) the limited opportunity for complainants who lose a UDRP action to get their cases into court; and (4) the absence of any meaningful check on the providers’ creation of supplemental rules that effectively tilt the playing field. Notes that in practice, UDRP’s requirement that names be registered *and* used in bad faith “appears to have been completely lost on numerous arbitrators, who have read 'and' as if it meant 'or.'” Notes how the noncommercial use defense imported a tarnishment concept and that this "undermines a substantial part of the free-speech value of the non-commercial and fair use defenses" and "could be used to deny protection to legitimate criticism sites.”

* 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>

Study supported by the Markle Foundation based on a comprehensive review and classification of the first 4,000 UDRP cases. The UDRP has been an effective remedy for cybersquatting primarily because it makes it economically inefficient for abusive registrants to defend their names. Known cybersquatters default 70–100% of the time. The study’s compilation of case statistics provides many insights into the UDRP’s results. E.g., eighteen percent (18%) of UDRP claims are based upon unregistered trademarks; the UDRP has protected personal names as strongly as registered marks; of the 20 cases UDRP panelists cite as precedents most often, *all* were won by Complainants and all but 4 were Respondent defaults. Provides proof that decisions regarding gripes sites are inconsistent, and calls for clarifying standards for a finding of “confusing similarity” to a trademark such that criticism, parody and commentary are not suppressed.

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

A study that tests the hypothesis that UDRP panelists are more likely to side with complainants or respondents who are of the same nationality as they are. The study used automated techniques to process UDRP decision documents to sample 2944 disputed domains where the nationalities of the panelist and both litigants were known. Based on this data, the hypothesis of a nationality bias appears to fail. However, the overwhelming number of Americans in both the respondent and complainant sample may limit the results’ generality.

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

Book-length analysis that argues that domain names are a form of property, and the property rights held by domain name registrants need to be recognized in law – independently of, and carefully distinguished from, the limited rights associated with trademark protection. The book discusses the history, legal basis, procedural aspects and performance of ICANN’s Uniform Domain Name Dispute Resolution Policy (UDRP). Analyzes the differences between arbitration and the UDRP, which is sometimes characterized as an arbitral process; most of the differences are shown to weaken the rights of registrants, binding them to a procedure and rules while allowing the complainant more choice and options.

# Use standard ICANN processes, not a special group

We do not support having this process carried out by an arbitrarily selected group of “experts”. Use existing GNSO processes.

Substantive changes vs. Procedural changes