

UDRP FUNDAMENTALS:

NAVIGATING DOMAIN NAME TRADEMARK DISPUTES

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I. OVERVIEW OF THE UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION POLICY.

A. Internet Structure Basics.

Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit corporation created in 1998 in association with the United State government to provide centralized management of the Internet. One the elements of the Internet ICANN manages is the Domain Name System (DNS).

The DNS translates domain names or hostnames meaningful to human beings into the numerical identifiers used by the network to locate and address particular Internet protocol (IP) addresses throughout the world. For example, the DNS links the domain name www.lindquist.com to Internet protocol locations such as 192.152.160. The DNS is often analogized to a telephone book in that it links names with numbers associated with certain locations.

The DNS consists of a hierarchical naming system, with the top-level domain taking the place of the root zone of the name space. Common top-level domains are .com, .org, and .net, which are known as generic top-level domains. Top-level domains can also consist of country codes, such as .uk for the United Kingdom. Second-level domains take the place in the name space directly preceding the top-

level domain and commonly refer to a organization name, product name, geographic location, or other recognizable word or phrase. For example:

Domain Name: www.lindquist.com

Top-Level Domain: “.com”

Second-Level Domain: “lindquist”

Trademarks are routinely used within the second-level domain name space.

Although an accurate number is difficult to gauge because the totals are constantly in flux, as of the end of 2012 there were approximately 252 million active registered domain names.

B. The UDRP and Its Purpose.

In part due to the number of trademark disputes that have arisen as a result of the advent of the Internet, in 1999 ICANN introduced the Uniform Domain-Name Dispute-Resolution Policy to provide an efficient process to aid in remedying these ongoing trademark infringement and cybersquatting problems. The policy provides rules and procedures for trademark owners to resolve trademark disputes relating to domain names through an abbreviated arbitration procedure or through a traditional court action.

ICANN accredits organizations or commercial entities to sell to the public and manage second-level domain names within certain top-level domains. Each registrar must require all individuals or entities registering domain names to adhere to the UDRP and “represent and warrant,” among other things, that registering the name “will not infringe upon or otherwise violate the rights of any

third party.” The domain name registrant must further agree to participate in an arbitration-like proceeding should any third party assert such a claim under the policy.

C. Scope.

The UDRP applies to all .com, .biz, .info, .name, .net, and .org top-level domains, and some country code top-level domains and binds all internet registrars and all domain name “owners” within these top-level domains.

D. Remedy.

The sole remedy provided by the UDRP to complainants is the potential transfer ownership of domain name to the complainant. If the complainant cannot meet the requirements of the UDRP, the case is dismissed.

II. UDRP CLAIMS.

A. The Policy, Rules, and Supplemental Rules.

UDRP claims are governed by three provisions: 1) the Uniform Domain-Name Dispute-Resolution Policy itself, 2) the Rules for Uniform Domain Name Dispute Resolution Policy issued by ICANN, and 3) the Supplemental Rules issued by each dispute resolution provider. A copy of the Uniform Domain-Name Dispute-Resolution Policy may be obtained online at the ICANN website at <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

B. Three Key Elements.

Under the UDRP, a trademark owner may attempt to remedy what it perceives as a violation of its trademark rights by establishing three elements:

1. The domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights. UDRP ¶ 4(a)(i).
2. The registrant does not have any rights or legitimate interests in the domain name. UDRP ¶ 4(a)(ii).
3. The registrant registered the domain name and is using it in “bad faith.” UDRP ¶ 4(a)(iii).

C. Rights in a Trademark.

In order to assert a claim under the UDRP, the complainant must have provable rights in a valid trademark. Normally this element is met by proving a copy of a United States trademark registration or a trademark registration issued by any national or multi-national governing body.

A national trademark registration is not necessary, however, to maintain a claim under the UDRP. Claims may be maintained based upon common law rights by providing evidence, such as state trademark registrations, a prior domain registration coupled with substantial use, or evidence establishing long and substantial common law use. *See William M. Krings v. Hugo Hernandez*, WIPO Case No. D2006-0237 (citing numerous decisions).

D. Identical or Confusingly Similar.

Much like a traditional trademark infringement action, a successful UDRP complaint requires a finding that the domain name at issue be identical or confusingly similar to the complainant’s trademark. Since domain names are only

composed of alphanumeric characters, only word marks or composite marks that contain words may be asserted.

In general, the top-level domain portion of the domain name, such as .com or .edu, is disregarded when comparing a complainant's trademark with a respondent's domain name.

E. No Rights or Legitimate Interests.

In determining whether a respondent has legitimate rights or interests in its domain name, the UDRP states that any of the following circumstances may satisfy this second element:

1. Before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
2. You (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
3. You are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

UDRP ¶ 4(c).

F. Bad Faith.

In determining whether a respondent registered and used the relevant domain name in bad faith, the UDRP states that any one of the following factors may establish this element:

1. Circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name.
2. You have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct.
3. You have registered the domain name primarily for the purpose of disrupting the business of a competitor.
4. By using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.

UDRP ¶ 4(b).

G. Defenses and Reverse Domain Name Hijacking.

In general, a respondent's defenses to a UDRP action are limited to facts and evidence that tend to negate one of the required elements, or a component of one of the elements, of the UDRP claim.

If a respondent believes a complaint is being brought in bad faith, however, the defense of reverse domain name hijacking may be asserted. Reverse domain name hijacking is defined in the UDRP Rules as "using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain name." Generally, where a respondent can prove that a complainant brought its complaint under the policy knowing the respondent had superior rights or that the complaint was objectively unsupportable, a reverse domain name hijacking defense may be asserted. Reverse domain name hijacking findings are rare and based heavily on the factual circumstances surrounding each case. *See, e.g., Webpass, Inc. v. Paul Breitenbach*, WIPO Case No. D2010-1796 (2010). If reverse domain name hijacking is found in a UDRP arbitration proceeding, the result is a denial of the complaint. In a court proceeding, however, such a finding could form a basis for damages under another legal theory such as unfair business practices or tortious inference.

III. UDRP PROCEDURE.

A. UDRP Rules and Supplemental Rules.

In addition to the policy itself, UDRP procedure is governed by the Rules for Uniform Domain Name Dispute Resolution Policy, which may be obtained at the

ICANN website at <http://www.icann.org/en/dndr/udrp/uniform-rules.htm>, and governed by the Supplemental Rules issued by each dispute resolution provider.

B. UDRP Dispute Resolution Providers.

Presently, ICANN has approved the following four dispute resolution providers to handle UDRP proceedings:

1. World Intellectual Property Organization (WIPO).

- A collection of this forum's decisions is available at the following:
www.wipo.int/amc/en/domains/search/index.html.
- This forum's supplemental rules are available at the following:
www.wipo.int/amc/en/domains/rules.

2. National Arbitration Forum.

- A collection of this forum's decisions is available at the following:
domains.adrforum.com/decision.aspx.
- This forum's supplemental rules are available at the following:
domains.adrforum.com/users/icann/resources/UDRP%20Supplemental%20Rules%20eff%20March%201%202010.pdf.

3. Asian Domain Name Dispute Resolution Centre.

- A collection of this forum's decisions is available at the following:
www.adndrc.org/hk/case_decision.php.
- This forum's supplemental rules are available at the following:
[/www.adndrc.org/hk_supplemental_rules.html](http://www.adndrc.org/hk_supplemental_rules.html).

4. Czech Arbitration Court Arbitration Center for Internet Disputes.

- A collection of this forum's decisions is available at the following:
www.adr.eu/adr/decisions/index.php.
- This forum's supplemental rules are available at the following:
www.adr.eu/arbitration_platform/udrp_supplemental_rules.php.

Alternatively, the UDRP does not prevent a party from pursuing a claim under the UDRP through a traditional court proceeding. *See* UDRP ¶ 4(k).

C. Determining Domain Name Ownership.

In order to bring a UDRP claim against a given domain, the complainant must first research who owns the domain registration. ICANN requires all Internet registrars to maintain a database, generally referred to as a WHOIS database, of all currently registered domains. Determining the owner of a domain name is often a two-step process. First, the domain name can be searched at a general WHOIS database, such as InterNIC at the U.S. Department of Commerce (www.internic.com), to determine the name of the registrar that issued the domain registration. Second, the domain can then be searched at the WHOIS database at the particular registrar's website to determine the name and contact information of the domain owner.

In many cases, registrars operate privacy services in which the name of the domain owner is withheld and only a designated e-mail address is provided. In such cases it may be necessary to initiate a UDRP proceeding with only this designated e-mail address and the registrar's name and contact information. Once the action is commenced, the dispute resolution provider will contact the registrar

and retrieve the domain owner's name and contact information so a complainant may provide notice of the action.

D. Arbitration Process.

The UDRP proceeding itself is generally an arbitration process in which a complaint is filed, a fee is paid, and the dispute resolution provider selects a panel of either one or three arbitrators to decide the case. Generally, the panelists are trademark practitioners that speak and practice law in the language of the parties. The process is handled almost entirely on the pleadings, any supplemental responsive statements, and any affidavits and documentary evidence provided. Any procedural issues may be dealt with through a designated case manager at the dispute resolution provider.

The supplemental rules issued by the dispute resolution provider determine the content of a complaint and response, how each is to be filed, and the timing of the proceedings. In some cases the complaints and responses may be filed through an online method or via e-mail. In most cases, the dispute resolution provider has template or sample complaints and responses available.

E. Importance of Responding to a Complaint.

With regard to defending a UDRP action, one of the most damaging acts a domain owner can undertake is failing to respond to a complaint. In such circumstances, the appointed arbitration panel may take all facts recited in the UDRP complaint as true. *See, e.g., Talk City, Inc. v. Michael Robertson*, WIPO Case No. D2000-0009. Other panel decisions note that adverse inferences may be

drawn from a respondent's failure to reply. *See, e.g., Charles Jourdan Holding AG v. AAIM*, WIPO Case No. D2000-0403.

F. The Panel.

Either the complainant or the respondent in the action has the option of choosing a single or a three-member panel to decide the case. Three-member panels are generally chosen in high profile cases in which multiple facts are in dispute and the value of the trademark or domain registration is high.

G. Timing and Cost.

Typically, a UDRP proceeding can be resolved within 60 days of filing. The cost of pursuing a UDRP action consists of the filing fee and the attorney time. The filing fees are generally determined by the number of domain names at issue and the number of panelists chosen. For instance the World Intellectual Property Organization (WIPO) fee for a case involving one to five domain names decided by a single panelist is \$1,500. For a three-panel decision on a case involving one to five domain names, the cost is \$4,000. The National Arbitration Forum's fee for a case involving one to two domain names having a single-member panel is \$1,300 and a three-member panel is \$2,600. Usually, the complainant is responsible for paying all fees. The only time the respondent is required to share the fees is when the respondent chooses to have the case decided by three panelists and the complainant has chosen a single panelist. Finally, if the case is settled after filing but before a panel is assigned, the dispute resolution provider will likely refund a substantial portion of the filing fee.

IV. RELATED STATUTORY PROVISIONS.

Related to the UDRP, the United States Anti-Cybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d), is also available as an alternative to remedy domain-name-related trademark disputes through a traditional court action.

The ACPA prohibits a person from registering, trafficking in, or using a domain name that is “identical or confusingly similar to” a distinctive mark, if the person has bad faith intent to profit. The ACPA provides, in part, as follows:

(d) Cyberpiracy prevention

(1) (A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that—

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; or

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; . . .

15 U.S.C. § 1125(d). The ACPA provides nine factors that are relevant to finding bad faith intent under the statute. 15 U.S.C. § 1125(d)(1)(B)(i). The ACPA also includes a safe harbor provision, which provides that bad faith intent will not be found “in any case

in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.” 15 U.S.C. § 1125(d)(1)(B)(ii).

In addition, the Lanham Act and other statutory and common law trademark provisions also apply to trademark disputes involving domain names.

Since the cost of asserting domain name infringement claims in a traditional court action is generally higher than the cost of a UDRP arbitration action, domain-name-related claims are generally brought under the ACPA or federal and common law trademark provisions only where broader trademark claims are also being asserted.

V. ONLINE RESOURCES.

- WIPO Overview of WIPO Panel Views on Selected UDRP Questions:
www.wipo.int/amc/en/domains/search/overview2.0/index.html
- WIPO UDRP Decision Index for searching WIPO UDRP decisions based upon substantive topics: <http://www.wipo.int/amc/en/domains/search/legalindex.jsp>
- UDRPInfo, a web site maintained by Professor Michael Geist of the University of Ottawa Law School: www.udrpinfo.com

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**Domain Names & Trademarks:
 UDRP Fundamentals in the Context
 of Real-World Cases**

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Internet Structure Basics

- ICANN - Internet Corporation for Assigned Names and Numbers.
- Domain Name System (DNS)
 - Links web site addresses (www.lindquist.com) to internet protocol locations (105.22.55.209).
- Domain Names: www.lindquist.com
 - Top Level Domain: ".com"
 - Second-Level Domain: "lindquist"
- Over 252 million registered domain names.
- Over 27 million new domains registered in 2012.
- ICANN created and controls the UDRP.



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UDRP: The Uniform Domain-Name Dispute-Resolution Policy

- Established by ICANN in 1999.
- **Purpose:** Provides rules and procedures for trademark owners to resolve infringement in domain names.
- Applies to all .com, .biz, .info, .name, .net, and .org top-level domains, and some country code top-level domains.
- Binds all internet registrars and all domain name “owners” within these top-level domains.
- **Remedy:** Transfer ownership of domain name.

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Practical Applications of the UDRP

- Used to stop trademark infringement occurring within a domain name space.
 - Stop customer confusion.
 - Stop customers from being diverted to competitors.
 - Obtain a valuable web address.
 - Increase web site traffic.
 - Can result in the elimination of traditional trademark infringement on the associated website.
- Common targets of UDRP actions:
 - Competitors seeking market advantage.
 - Cybersquatters seeking to sell domain name.
 - Typosquatters obtaining advertising revenue.
 - Junior trademark owners unaware of a senior trademark owner.

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UDRP Arbitrations

- ICANN approved provides for arbitration process:
 - World Intellectual Property Organization (WIPO).
 - National Arbitration Forum (NAF).
 - The Czech Arbitration Court Arbitration Center for Internet Disputes.
 - Asian Domain Name Dispute Resolution Centre.
- Three Set of Rules:
 - The UDRP.
 - The UDRP Rules.
 - Each arbitration provider's Supplemental Rules.
- Highly developed body of UDRP opinions at WIPO and NAF.



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UDRP Arbitration Procedure

- **Proceeding on the Papers:** UDRP provides for a mandatory arbitration proceeding on written filings only, without a discovery period and without a hearing.
- **Supplemental Rules:** Each arbitration provider issues Supplemental Rules controlling the procedure for the arbitration proceeding.
- **Panel:** Panel of one or three arbitrators, at either parties' election.
- **Fees:** Filing fee from \$1500 to \$4000 for single domain, depending upon panel size. Additional fee for supplemental statements.
- **Parties:** Parties are "Complainant" and "Respondent."
- **Filings:** Complaint and Response with supporting affidavits and exhibits. Supplemental responsive statements can be provided.
- **Court Action Available:** At the election of either party, the Policy allows for submitting the dispute to a court either before an arbitration is commenced or after it has concluded.

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UDRP Arbitration Timeline

- **Timing:** WIPO and NAF proceedings usually completed within 60 days of filing.
 - **Day 1:** Case filing.
 - **Day 3:** Within three days, Arbitration provider sends copy of Complaint to registrar and respondent commencing action.
 - **Day 23:** Respondent must file Answer.
 - **Day 28:** Provider has five days from receipt of response or the deadline to respond to appoint a panel.
 - **Day 42:** Panel must provide decision within 14 days of appointment.
 - **Day 45:** Panel has three days to notify parties of decision.
- **10 Business Days Later:** The registrar will implement the decision of the panel canceling or transferring the domain name, unless the adversely affected domain registration owner has filed suit in a court of mutual jurisdiction by this date.

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Identifying Domain Owner

- **Identify Owner:** Before filing a complaint, contact information for the owner of subject domain must first be identified.
- **WHOIS Searches:** Searchable databases of domain registration owners.
 - Search domain name in a general WHOIS database .
 - e.g., Google.com, Internic.com, Who.is.
 - Identify the relevant domain registrar and its website.
 - Search domain name in the registrar's WHOIS database to find the domain registrant's contact information.
- **Privacy Services:** Many registrar's provide domain privacy services that hide the contact information of domain registration owners for a fee.
 - Registrar's must provide the name and contact information to the arbitration provider when a UDRP complaint is filed.

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Elements of a UDRP Claim

1. Domain name is identical or confusingly similar to a trademark in which the complainant had rights.
 2. Domain owner has no rights or legitimate interests in the domain name.
 3. Domain name has been registered and is being used in bad faith.
- All three elements must be established to prevail.

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Element 1: Confusing Similarity

- **Requires complainant to have trademark rights.**
- Federal trademark registration not mandatory, but helpful.
 - Trademark registration or use should pre-date domain name registration.
- **Panel compares trademark to domain name.**
- Generic components (.com or generic terms) generally not considered.
 - Design elements generally not considered.

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Element 2: No Rights or Legitimate Interests

Can be established by showing . . .

- Domain is not used with bona fide offering of goods and services.
- Domain owner is not commonly known by domain name.
- If use is noncommercial, it is intended to misleadingly divert consumers or tarnish a complainant's trademark.

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Element 3: Bad Faith Registration *and* Use

Can be established by showing . . .

- Domain was registered to be later sold or rented to trademark owner.
- Pattern of registering domains to prevent trademark owners from registering.
- Domain was registered for the purpose of disrupting business of competitor.
- Domain was registered to confuse and divert internet traffic from trademark owner's web site for commercial gain.

Both bad faith registration and bad faith use must be established.

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Practice Considerations

- **Always First Determine the Registration Dates.**
 - Determine the date of the trademark registration and the date of the domain registration.
- **Avoid a Barebones Complaint or Answer.**
 - The pleading may be the only chance you have to explain facts and cite to relevant prior decisions.
- **Failing to File Answer is Dangerous.**
 - All assertions in a complaint are generally taken as true where a respondent does not answer.
- **Provide Relevant and Ample Documentary Evidence.**
 - Providing an affidavit with supporting facts and documents is generally advisable.

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Example: Sportsmanswarehouse.com



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Sportsmanswarehouse.com Website

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Why Was Complaint Successful?

- ✓ Trademark ownership predated domain name ownership.
- ✓ Domain parking is generally non-legitimate use.
- ✓ Typosquatting generally indicates bad faith.
- Result: Domain name transferred.

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Example: grouphealth.com

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Grouphealth.com Website

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Why Was Defense Successful?

- ✓ Domain name registration predated trademark registrations by 10 years.
- ✓ “Group Health” is generic term in insurance industry.
 - Domain parking is generally legitimate where domain name is generic term.
- ✓ No evidence of bad faith registration.
- Result: Complaint denied.

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Key Elements for a Winning UDRP Case

- Rights in a strong trademark.
- Trademark nearly identical to target domain name.
- Trademark rights predate domain name registration.
- Lack of legitimate domain name use.
- Evidence of bad faith use and registration.

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UDRP Statistics

- Over 20,000 UDRP complaints filed since 1999.
- Top five business sectors in which complaints were filed in 2007: biotechnology and pharmaceuticals, banking and finance, information technology, retail, and entertainment.
- Large percentage of defaults.
- On average, less than 15% of decisions favor domain owners.

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