WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition
("WIPO Jurisprudential Overview 3.01")

Resulting from WIPO's care for effective remedies under a sustainable UDRP, this WIPO Jurisprudential Overview reflects, and assists the predictability of, UDRP decisions by panels appointed in WIPO cases.

The World Wide Web in 20142024 celebrated its 35th anniversary. Its ubiquity both as a commercial medium – facilitating trillions of dollars in trade annually – and as a means of disseminating information globally, is self-evident. Sometimes heralded as one of mankind's greatest innovations, for all of its positive attributes, even looking back to its early days the Internet has also provided a platform for a range of bad-faith practices across territorial borders, including Intellectual Property infringement.

To help maintain the overall integrity of the Internet's Domain Name System (DNS), at the request of the United States Government supported by all Member States, in 1999, following an extensive process of international consultations, the World Intellectual Property Organization (WIPO) created the Uniform Domain Name Dispute Resolution Policy (UDRP) to address cross-border trademark-abusive domain name registrations, a practice widely known as cybersquatting. Adopted by ICANN as a much needed standardized alternative to multi-jurisdictional court litigation, the UDRP provides an efficient remedy for brand owners and predictability for domainers, fosters consumer protection for end users, and acts as a safe harbor for DNS registration authorities – who are able to outsource trademark-related disputes. As a globally recognized best-practice, it is also the basis for a significant number of country code top-level domain (ccTLD) dispute resolution policies.

Since creating the blueprint for the UDRP – which in 2025 celebrated its own 25th anniversary – WIPO as of early 2017 has processed over 3780,000 UDRP-based cases decided by nearly 500 experts covering some 65 nationalities and over 2021 languages, and involving parties from some 190over 175 countries.

As the DNS expands, including as an engine for economic growth, and further to ICANN's approval of scores of new Top Level Domains – not to mention the possibility of alternative root and complementary naming systems, the potential for cybersquatting and resulting consumer harm persists – making WIPO's not-for-profit institutional investment in continued UDRP predictability, for all DNS stakeholders, all the more important.

In furtherance of transparency and accessibility, this WIPO investment includes a keyword-searchable Legal Index of WIPO UDRP Panel Decisions, a full-text search facility on all posted decisions, real-time WIPO case statistics, UDRP training Workshops, WIPO Panelists Meetings, and this WIPO Jurisprudential Overview. Beyond these resources, WIPO has successfully initiated paperless e-filing, case language, and settlement practices.

Understanding the relationship between UDRP operations and policy, WIPO notes that the fabric of UDRP jurisprudence, carefully woven over many years, can easily be torn apart. It is hoped that, as ICANN embarks on a review of the UDRP, resources such as this WIPO Jurisprudential Overview 3.01 will assist responsible decision-making that works for all DNS stakeholders.

Under the UDRP, decision-making authority rests exclusively with the appointed external panels, based on the facts and circumstances of each case. While the UDRP does not operate on a strict doctrine of binding precedent, it is important for the overall credibility of the UDRP system that filing parties can reasonably anticipate the result of their case. Often noting the existence of similar facts and circumstances or identifying distinguishing factors, WIPO panels strive for consistency with prior decisions. In so doing, WIPO panels seek to ensure that the UDRP operates in a fair and predictable manner for all stakeholders while also retaining sufficient flexibility to address evolving Internet and domain name practices.

With this collective aim, ~~the~~ WIPO ~~Arbitration and Mediation Center~~ has produced the present WIPO ~~Jurisprudential~~ Overview version 3.~~0~~1, to summarize consensus panel views on a range of common and important substantive and procedural issues. Following a review of thousands of WIPO panel decisions issued since WIPO Overview ~~2~~3.0, this updated edition ~~has been updated to~~ now ~~include express~~includes references to over ~~800~~1,400 representative decisions ~~(formerly 380)~~ from ~~over 250 (formerly 180)~~nearly 300 WIPO panelists. The number of cases managed by ~~the~~ WIPO ~~Center~~ has nearly doubled since ~~its~~ publication of the WIPO Overview ~~2~~3.0; ~~as a result,~~at the ~~number of~~ same time, because the consensus positions set out in the WIPO Overview 3.0 have for the most part remained very stable and have been endorsed in the intervening decisions, the updates to issues covered in this WIPO ~~Jurisprudential~~ Overview 3.~~0 has significantly increased to~~1 reflect ~~a range of~~targeted and incremental DNS and UDRP case evolutions. Simply put: the consensus views in the WIPO Overview 3.0 have stood the test of time, and the present effort reflects specific and nuanced updates.

While the overall purpose of the WIPO ~~Jurisprudential~~ Overview is to assist in predictability, it is important to point out that – as with any legal system – differences of opinion may exist on some specific issues and in certain ~~outlier~~ cases; all the more so as the UDRP operates across fact patterns and jurisdictions. Furthermore, neither this WIPO ~~Jurisprudential~~ Overview nor prior UDRP decisions are strictly binding on panelists, who will consider the particular facts and circumstances of each individual proceeding in a manner they consider fair. At the same time, panel findings tend to fall within the views summarized in this WIPO ~~Jurisprudential~~ Overview 3.~~0~~1. Finally, parties should note that the WIPO ~~Jurisprudential~~ Overview cannot serve as a substitution for each party's obligation to argue and establish their particular case under the UDRP, and it remains the responsibility of each party to make its own independent assessment of prior decisions relevant to its case.

The consensus views laid out in this WIPO ~~Jurisprudential~~ Overview 3.~~0~~1 have been discussed and welcomed by UDRP Panelists inter alia at WIPO's Panelists Meetings convened in Geneva ~~through 2016~~over the years. The contents reflect the Meetings' constructive dialogue, as well as substantial contribution and informal review from a number of the most experienced WIPO panelists. As ~~WIPO~~ UDRP jurisprudence matures, ~~the~~ WIPO ~~Center~~, in consultation with its panelists, will on appropriate occasions consider undertaking further updates ~~in whole or in part~~ to ~~this~~the WIPO ~~Jurisprudential~~ Overview 3.1 ~~3.0.~~. (The original edition, ~~and~~ WIPO Overview 2.0, and WIPO Overview 3.0 will continue to be accessible on ~~the WIPO Center's~~WIPO's website for reference.)

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1. First UDRP Element

1.1 What type of trademark rights are encompassed by the expression "trademark or service mark in which the complainant has rights" in UDRP paragraph 4(a)(i)?

1.1.1 The term "trademark or service mark" as used in UDRP paragraph 4(a)(i) encompasses both registered and unregistered (sometimes referred to as common law) marks.

1.1.2 Noting in particular the global nature of the Internet and Domain Name System, the jurisdiction(s) where the trademark is valid is not considered relevant to panel assessment under the first element~~=~~, cf. Section 1.3.

Also, the goods and/or services for which the mark is registered or used in commerce, the filing/priority date, date of registration, and date of claimed first use, are not considered relevant to the first element test. These factors may however bear on a panel's further substantive determination under the second and third elements.

1.1.3 ~~While~~ Although the UDRP makes no specific reference to the date on which the holder of the trademark or service mark acquired its rights, such rights must be in existence at the time the complaint is filed.

The fact that a domain name may have been registered before a complainant has acquired trademark rights does not by itself preclude a complainant's standing to file a UDRP case, nor a panel's finding of identity or confusing similarity under the first element.

Where a domain name has been registered before a complainant has acquired trademark rights, only in exceptional cases would a complainant be able to prove a respondent's bad faith. See generally section 3.8 below.

1.1.4 A pending trademark application would not by itself establish trademark rights within the meaning of UDRP paragraph 4(a)(i).

[See sections 3.1, 3.2.1, and 3.8 generally.]

1.2 Do registered trademarks automatically confer standing to file a UDRP case?

1.2.1 Where the complainant holds a nationally or regionally registered trademark or service mark, this prima facie satisfies the threshold requirement of having trademark rights for purposes of standing to file a UDRP case.

1.2.2 Complainants relying on trademark registrations listed solely on the USPTO Supplemental Register are expected to show secondary meaning in order to establish trademark rights under the Policy because under US law a supplemental registration does not by itself provide evidence of distinctiveness to support trademark rights. ~~Even where such standing is established, panels may scrutinize the degree of deference owed to such marks in assessing the second and third elements.~~

When considering UDRP standing, panels tend to carefully review certain types of automatic/unexamined registered trademarks such as US state registrations (as opposed to US federal registrations); these are not accorded the same deference and may not on their own satisfy the UDRP's "rights in a mark" standing test. In such cases, panels might require that complainants include allegations and evidence

sufficient to establish secondary meaning to support a finding of common law or unregistered trademark rights. Even where such standing is established, panels may scrutinize the degree of deference owed to such marks in assessing the second and third elements.

1.2.3 Subject to considerations addressed in section 1.10 below, trademark registrations with design elements or disclaimed terms typically would not affect panel assessment of standing or identity/confusing similarity under the UDRP~~,~~ but may be relevant to panel assessment of the second and third elements. However, if the similar elements of the domain name are made up exclusively of disclaimed terms, trademark rights under the Policy may not be found unless the complainant can show sufficient secondary meaning in the disclaimed terms.

[See also section 1.10.]

1.3 What does a complainant need to show to successfully assert unregistered or common law trademark rights?

To establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant's goods and/or services.

Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of the use of the mark~~,~~ (which may include social media presence and engagement), (ii) the amount of sales under the mark and during which time period, (iii) the nature and extent of advertising using the mark – including evidence of expenditures over a relevant time period, (iv) the degree of actual public (e.g., consumer, industry such as trade and professional associations, media) recognition, and (v) consumer surveys. The fact that a respondent is shown to have been targeting the complainant's mark (e.g., based on the manner in which the mark is used on the related website or impersonating documents or other instruments) may also support the complainant's assertion and evidence that its mark has achieved significance as a source identifier.

~~(Particularly~~The claimed mark must also be used as a source identifier of goods or services e.g., on a website or on products or packaging used in commerce, provided that the mark, as used, is linked to the goods or services that are being branded with ~~regard to~~ the mark; this may include use by the complainant on letterhead or invoices or email headers and signatures.

The length of time that the mark has been used is not itself determinative. Panels have noted that, nowadays, some brands ~~acquiring relatively rapid~~may rapidly acquire recognition due to a broad and significant Internet presence ~~, panels have also been considering factors such as the type and scope of market activities and the nature of the complainant's goods~~ and~~/or services.)~~ user base.

Specific evidence including for example documented evidence of figures relating to sales, marketing, and/or social media endorsements supporting assertions of acquired distinctiveness should be included in the complaint; conclusory allegations of unregistered or common law rights, even if undisputed in the particular UDRP case, would not normally suffice to show secondary meaning. ~~In cases involving unregistered or common law marks that are comprised solely of descriptive terms which are not inherently distinctive, there is a greater onus on the complainant to present evidence of acquired distinctiveness/secondary meaning.~~

In cases involving claimed unregistered or common law marks (which may include domain names) that are comprised solely of descriptive terms or acronyms that are not inherently distinctive, panels require the complainant to present relevant and sufficient examples of evidence of acquired distinctiveness/secondary meaning.

As noted in section 1.1.2, for a number of reasons, including the global nature of the Internet and Domain Name System, the fact that secondary meaning may only exist in a particular geographical area or market niche does not preclude the complainant from establishing trademark rights (and as a result, standing) under the UDRP.

Also noting the availability of trademark-like protection under certain national legal doctrines (e.g., unfair competition or passing-off) and considerations of parity, where acquired distinctiveness/secondary meaning is demonstrated in a particular UDRP case, unregistered rights have been found to support standing to proceed with a UDRP case including where the complainant is based in a civil law jurisdiction.

~~The fact that a respondent is shown to have been targeting the complainant's mark (e.g., based on the manner in which the related website is used) may support the complainant's assertion that its mark has achieved significance as a source identifier.~~

Even where a panel finds that a complainant has UDRP standing based on unregistered or common law trademark rights, the strength of the complainant's mark may be considered relevant in evaluating the second and third elements.

[See also sections 3.2 and 3.8 generally.]

1.4 Does a trademark owner's affiliate or licensee have standing to file a UDRP complaint?

1.4.1 A trademark owner's affiliate such as a subsidiary of a parent or of a holding company, or an exclusive trademark licensee, is considered to have rights in a trademark under the UDRP for purposes of standing to file a complaint. The same holds true for a parent company filing a UDRP case on the basis of rights held in the name of one of the companies or brands under its corporate umbrella.

While panels have been prepared to infer the existence of authorization to file a UDRP case based on the facts and circumstances described in the complaint, (which may be supported by information that is publicly available online such as company websites or financial statements), they may expect parties to provide an explanation of the relationship between the entities and/or relevant evidence of authorization to file a UDRP complaint, especially if the companies are not named in the complaint as co-complainants.

In this respect, absent clear authorization from the trademark owner, a non-exclusive trademark licensee would typically not have standing to file a UDRP complaint.

1.4.2 Where multiple related parties have rights in the relevant mark on which a UDRP complaint is based, a UDRP complaint may be brought by any one party, on behalf of the other interested parties; in such case, the complainant(s) may wish to specify to which of such named interested parties any transfer decision should be directed.

[See also section 4.11.1.]

1.5 Can a complainant show UDRP-relevant rights in a personal name?

1.5.1 ~~Personal names that have been registered as~~ Registered trademarks ~~would provide~~ comprised of personal names are sufficient to establish standing ~~for a complainant~~ to file a UDRP case.

1.5.2 The UDRP does not explicitly provide standing for personal names ~~which~~that are not registered or otherwise protected as trademarks. ~~In situations however where~~ Where a personal name is being used as a trademark ~~like~~ (i.e., as a source-identifier in trade or commerce~~,~~), the complainant may be able to establish unregistered or common law rights in ~~that~~the name for purposes of standing to file a UDRP case where the name ~~in question~~ is used in commerce as a distinctive identifier of the complainant's goods or services.

Merely having a famous name (such as a businessperson or cultural/political leader who has not demonstrated use of their personal name in a trademark/source-identifying sense), or authoring an article or giving a speech, or making broad unsupported assertions regarding the use of such name in trade or commerce, would not likely demonstrate unregistered or common law rights for purposes of standing to file a UDRP complaint.

Even in cases where the domain name and website content clearly target the personal name, this may not be enough to overcome a lack of specific evidence of use of the name as a distinctive source identifier (cf. section 1.15).

[See also section 1.3.]

1.6 Can a complainant's rights in a geographical term provide standing to file a UDRP complaint?

Geographical terms used only in their ordinary geographical sense, except where registered as a trademark, would not as such provide standing to file a UDRP case.

Geographical terms ~~which~~that are not used ~~solely~~ in a geographically descriptive sense (e.g., "Nantucket Nectars" for beverages) ~~and which are registered as a trademark, would~~may provide standing to file a UDRP case.

Panels have exceptionally found that geographical terms ~~which~~that are not registered as trademarks may support standing to file a UDRP complaint if the complainant is able to show that it has rights in the term sufficient to demonstrate consumer recognition of the mark in relation to the complainant's goods or services (often referred to as secondary meaning).

Under the UDRP however, it has generally proven difficult for an entity affiliated with or responsible for a geographical area (which has not otherwise obtained a relevant trademark registration) to show unregistered trademark rights in that geographical term on the basis of secondary meaning.

[See also section 1.3.]

It is further noted that the Report of the Second WIPO Internet Domain Name Process ultimately declined to recommend specifically extending protection to geographical terms as such under the UDRP.

1.7 What is the test for identity or confusing similarity under the first element?

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the complainant's trademark and the disputed domain name.

This test typically involves a side-by-side comparison of the domain name and the textual components of the relevant trademark to assess whether the mark is recognizable within the disputed domain name. (This may also include recognizability by technological means such as search engine algorithms.) In some cases, such assessment may also entail a more holistic aural or phonetic comparison of the complainant's trademark and the disputed domain name to ascertain confusing similarity. This test is narrower than and thus different to the question of "likelihood of confusion" under trademark law. Therefore, questions such as the scope of the trademark rights, the date they were acquired, the geographical location of the respective parties, and other considerations that may be relevant to an assessment of infringement under trademark law are not relevant at this stage; such matters, if relevant, may be considered under the other elements of the Policy.

~~While~~Although each case is judged on its own merits, in cases where a domain name incorporates the entirety of a trademark, or where at least a dominant feature of the relevant mark is recognizable in the domain name, the domain name will normally be considered confusingly similar to that mark ~~for purposes of UDRP standing.~~ .

In ~~specific limited instances, while not a replacement as such for the typical side-by-side comparison, where~~some cases, in assessing the first element a panel ~~would benefit from affirmation as to confusingly similarity with the complainant's mark,~~may find that the broader case context (such as website content or fraudulent (phishing) emails trading off the complainant's reputation~~,~~ (in particular in the case of unregistered marks), or a pattern of multiple respondent domain names targeting the complainant's mark within the same proceeding~~, may support~~), supports a finding of confusing similarity~~. On the other hand, if such website content does not obviously trade off the complainant's reputation, panels may find this relevant to an overall assessment of the case merits, especially under the second and third elements (with such panels sometimes finding it unnecessary to make a finding under the first element).~~ with the complainant's mark.

Issues such as the strength of the complainant's mark or the respondent's intent to provide its own legitimate offering of goods or services without trading off the complainant's reputation, are decided under the second and third elements. Panels view the first element as a threshold test concerning a trademark owner's standing to file a UDRP complaint, i.e., to ascertain whether there is a sufficient nexus ~~to assess~~between the ~~principles captured in~~mark and domain name to proceed to an assessment of the second and third elements.

~~In this context, panels have also found that the overall facts and circumstances of a case (including relevant website content) may support a finding of confusing similarity, particularly where it appears that the respondent registered the domain name precisely because it believed that the domain name was confusingly similar to a mark held by the complainant.~~

[See also section 1.15.]

1.8 Is a domain name consisting of a trademark and a descriptive or geographical term confusingly similar to a complainant's trademark?

Where the relevant trademark is recognizable within the disputed domain name, the addition of other terms (whether descriptive, geographical, pejorative, meaningless, or otherwise) would not prevent a

finding of confusing similarity under the first element. The nature of such additional term(s) may however bear on assessment of the second and third elements.

[See also section 2.5.]

1.9 Is a domain name consisting of a ~~misspelling~~variation of the complainant's trademark ~~(i.e., typosquatting)~~ confusingly similar to the complainant's mark?

A domain name which consists of a variation of a trademark (typically a common, obvious, or intentional misspelling ~~of a trademark~~, referred to as typosquatting) is considered by panels to be confusingly similar to the relevant mark for purposes of the first element.

This stems from the fact that the domain name contains sufficiently recognizable aspects of the relevant mark. Under the second and third elements, panels will normally find that employing a misspelling in this way signals an intention on the part of the respondent (typically corroborated by infringing website content) to confuse users seeking or expecting the complainant.

Examples of such ~~typos~~variations include (i) adjacent keyboard letters, (ii) substitution of similar-~~-~~appearing characters (e.g., upper vs lower-~~-~~case letters or numbers used to look like letters), (iii) the use of different letters that appear similar in different fonts, (iv) the use of non-Latin internationalized or accented characters, (v) the inversion of letters and numbers, ~~or~~ (vi) the addition or interspersion of other terms or numbers~~,~~, or (vii) plays on the mark (e.g., abbreviations or combinations of select elements of the mark).

1.10 How are trademark registrations with design elements or disclaimed text treated in assessing identity or confusing similarity?

Panel assessment of identity or confusing similarity involves comparing the (alpha-numeric) domain name and the textual components of the relevant mark. To the extent that design (or figurative/stylized) elements would be incapable of representation in domain names, these elements are largely disregarded for purposes of assessing identity or confusing similarity under the first element. Such design elements may be taken into account in limited circumstances e.g., when the domain name comprises a spelled-out form of the relevant design element.

~~On this basis,~~ Although a trademark ~~registrations~~registration with design elements would ~~prima facie~~ satisfy the requirement that the complainant show "rights in a mark" ~~for further assessment as~~", panels would tend to focus on the non-design elements for purposes of assessing confusing similarity.

~~However where design elements comprise the dominant portion of the relevant mark such that they effectively overtake the textual elements in prominence, or where~~ Where the trademark registration entirely disclaims the textual elements (i.e., the scope of protection afforded to the mark is effectively limited to its stylized elements), panels may find that the complainant's trademark registration is insufficient by itself to establish confusing similarity. Similarly, in the case of claimed unregistered rights, where the design elements comprise the dominant portion of the mark such that they overtake the textual elements in prominence and where there is no evidence of such terms acting as a source identifier, panels may find that the claimed mark is insufficient to establish confusing similarity. [See in particular section 1.2.3.~~support standing under the UDRP. [See in particular section 1.2.3.]]~~

To the extent the complainant could nevertheless establish UDRP standing on the basis of a mark with design elements, the existence of such elements (or a disclaimer) ~~would~~may be relevant to the panel's assessment of the second and third elements, e.g., in considering possible legitimate trademark co-existence or scenarios where the textual elements correspond to a dictionary term.

[See also section 1.15.]

1.11 Is the Top Level Domain relevant in determining identity or confusing similarity?

1.11.1 The applicable Top Level Domain ("TLD") in a domain name (e.g., ".com", ".club", ".nyc") is viewed as a standard registration requirement and as such is disregarded under the first element confusing similarity test.

1.11.2 The practice of disregarding the TLD in determining identity or confusing similarity is applied irrespective of the particular TLD (including with regard to "new gTLDs"); the ordinary meaning ascribed to a particular TLD would not necessarily impact assessment of the first element. The meaning of such TLD may however be relevant to panel assessment of the second and third elements. [See in particular sections 2.14 and 3.2.1.]

For example, in cases where the combination of the mark and the TLD signals potential legitimate co-existence or fair use, and where the related website content supports such inference, panels ~~would tend to focus their inquiry on~~may find this relevant under the second ~~element~~and third elements. On the other hand, in cases where the TLD corresponds to the complainant's area of trade so as to signal an abusive intent to confuse Internet users, panels ~~have found~~may find this relevant ~~to assessment~~ under the second and third ~~element~~elements.

1.11.3 Where the applicable TLD and the second-level portion of the domain name in combination contain the relevant trademark, panels may consider the domain name in its entirety for purposes of assessing confusing similarity (e.g., for a hypothetical TLD ".mark" and a mark "TRADEMARK", the domain name <trade.mark> would be confusingly similar for UDRP standing purposes).

1.12 Is a domain name consisting of the complainant's mark plus a third-party trademark confusingly similar to the complainant's trademark?

Where the complainant's trademark is recognizable within the disputed domain name, the addition of other third-party marks (i.e., <mark1+mark2.tld>), is insufficient in itself to avoid a finding of confusing similarity to the complainant's mark under the first element.

The complaint may include evidence of the third-party mark holder's consent to file the case, and request that any transfer order be issued in favor of the filing complainant only. Absent such consent (and, where this was considered appropriate, having failed to reach the concerned third party by Procedural Order via the complainant), some panels have ordered transfer of the domain name without prejudice to the concerned third-party's rights. ~~In certain highly exceptional circumstances,~~(Exceptionally, some panels have ordered the cancellation of the disputed domain name~~.~~)

[See also sections 4.11.1 and 4.13.]

1.13 Is a domain name consisting of a trademark and a negative term ("sucks cases") confusingly similar to a complainant's trademark?

A domain name consisting of a trademark and a negative or pejorative term (such as <[trademark]sucks.com>, <[trademark]구려.com>, <[trademark]吸.com>, or ~~even~~ <trademark.sucks>) is considered confusingly similar to the complainant's trademark for the purpose of satisfying standing under the first element~~,~~ because the trademark is wholly incorporated in, and/or recognizable within, the domain name. The merits of such cases, in particular as to any potential fair use, are typically decided under the second and third elements.

[See also section 2.6 and sections 3.1 and 3.2.1 generally.]

Panels have thereby observed that permitting such standing avoids gaming scenarios whereby merely appending a "sucks variation" would potentially see such cases fall outside the reach of the UDRP~~,~~ even though the case context makes clear that such variation is a pretext to mask bad faith conduct.

1.14 Is a domain name that consists or is comprised of a translation or transliteration of a trademark identical or confusingly similar to a complainant's trademark?

A domain name that consists or is comprised of a translation or transliteration of a trademark will normally be found to be identical or confusingly similar to such trademark for purposes of standing under the Policy, where the trademark – or its variant – is incorporated into or otherwise recognizable, through such translation/transliteration, in the domain name.

1.15 Is the respondent's conduct or the content of the website associated with a domain name relevant in determining identity or confusing similarity?

The content of the website associated with the domain name is usually disregarded by panels when assessing confusing similarity under the first element.

In some instances, panels have however taken note of the content of the website associated with a domain name to confirm confusing similarity whereby it appears prima facie that the respondent seeks to target a trademark through the disputed domain name.

~~Such~~Similarly, even where no website content is being hosted at the disputed domain name, but the respondent has used the domain name in a manner that trades off of the complainant's rights (e.g., in an email impersonating the complainant), panels have found that such conduct affirms a finding of confusing similarity.

Such respondent conduct or website content will often also bear on assessment of the second and third elements, namely whether there may be legitimate co-existence or fair use, or an intent to create user confusion.

2. Second UDRP Element

2.1 How do panels assess whether a respondent lacks rights or legitimate interests in a domain name?

The UDRP Rules in principle provide only for a single round of pleadings, and do not contemplate discovery as such. Accordingly, a panel's assessment will normally be made on the basis of the evidence presented in the complaint and any filed response. The panel may draw inferences from the absence of a response as it considers appropriate, but will weigh all available evidence irrespective of whether a response is filed. [See also in this regard sections 4.7 and 4.8.]

~~While~~Although the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving that a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of "proving a negative", requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a prima facie case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element.

To demonstrate rights or legitimate interests in a domain name, non-exclusive respondent defenses under UDRP paragraph 4(c) include the following:

> (i) before any notice of the dispute, the respondent's 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
>
> (ii) the respondent (as an individual, business, or other organization) has been commonly known by the domain name, even if the respondent has acquired no trademark or service mark rights; or
>
> (iii) the respondent is 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.

[See respectively sections 2.2, 2.3, 2.4, and 2.5.]

Over the course of many UDRP cases, panels have acknowledged further grounds ~~which, while~~that, although not ~~codified~~specifically articulated in the UDRP ~~as such, would~~, may establish respondent rights or legitimate interests in a domain name. For example, generally speaking, panels have accepted that aggregating and holding domain names (usually for resale) consisting e.g., of acronyms, dictionary words, ~~or~~ common phrases, or unique/catchy or memorable terms (alone or in combination) can be bona fide and is not per se illegitimate under the UDRP~~,~~ where the respondent can show that the purpose of the registration was not to target a trademark. [See in particular section 2.10.]

2.2 What qualifies as prior use, or demonstrable preparations to use the domain name, in connection with a bona fide offering of goods or services?

~~As expressed in UDRP decisions, non~~Non-exhaustive examples of prior use, or demonstrable preparations to use the domain name, in connection with a bona fide offering of goods or services may include~~: (i)~~ evidence of: (i) business formation-related due diligence/legal advice/correspondence, (ii) ~~evidence of credible~~ investment in website development or promotional materials such as advertising,

letterhead, or business cards (iii) ~~proof of~~ a genuine (i.e., not pretextual) business plan utilizing the domain name, and credible signs of pursuit of the business plan, (iv) bona fide registration and use of related domain names, ~~and~~or (v) other ~~evidence~~ circumstances generally pointing to a lack of indicia of cybersquatting intent. ~~While~~Although such ~~indicia~~factors are assessed pragmatically in light of the case circumstances, the Policy clearly states that such evidence must support a claim to bona fide activity "before any notice [ ] of the dispute" and in that respect, clear contemporaneous (and ideally, dated) evidence of bona fide pre-complaint preparations is required.

Acknowledging that business plans and operations can take time to develop, panels have not necessarily required evidence of such use or intended use to be available immediately after registration of a domain name, but the passage of time may be relevant in assessing whether purported demonstrable preparations are bona fide or pretextual.

If not independently verifiable by the panel, claimed examples of use or demonstrable preparations to use the domain name in connection with a bona fide offering of goods or services cannot be merely self-serving but should be inherently credible and supported by other relevant pre-complaint evidence.

2.3 How would a respondent show that it is commonly known by the domain name or a name corresponding to the domain name?

Panels have addressed a range of cases involving claims that the domain name corresponds to the respondent's actual given name (including in combination with initials), stage name, nickname, or other observed moniker.

For a respondent to demonstrate that it (as an individual, business, or other organization) has been commonly known by the domain name or a name corresponding to the domain name, it is not necessary for the respondent to have acquired corresponding trademark or service mark rights.

The respondent must however be genuinely "commonly known" ~~(as opposed to merely incidentally being known)~~ by the relevant moniker (e.g., a personal name, nickname, or corporate identifier), apart from the domain name. Such rights, where legitimately held/obtained, would prima facie support a finding of rights or legitimate interests under the UDRP.

Insofar as a respondent's being commonly known by a domain name ~~would~~might give rise to a legitimate interest under the Policy, panels will carefully consider whether a respondent's claim to be commonly known by the domain name – independent of the domain name – is legitimate. Mere assertions that a respondent is commonly known by the domain name will not suffice; respondents are expected to produce ~~concrete~~specific credible evidence.

Absent genuine trademark or service mark rights, evidence showing that a respondent is commonly known by the domain name may include: a birth certificate, driver's license, or other government~~-~~-issued ID; independent and sustained examples of secondary material such as websites ~~or~~, blogs, news articles, or correspondence with independent third parties; sports or hobby club publications referring to the respondent being commonly known by the relevant name; bills/invoices; or articles of incorporation. Panels will additionally typically assess whether there is a general lack of other indicia of cybersquatting. In appropriate cases panels may refer to the respondent's domain name-related track record more generally.

2.4 How does the UDRP account for legitimate fair use of domain names?

As is evident in the Report of the First WIPO Internet Domain Name Process, fairness – both in procedural and in substantive terms – is a lynchpin of a credible dispute resolution system. A number of UDRP cases decided in a defaulting respondent's favor bear strong witness to this.

The UDRP codifies this foundational principle in many ways. For example, the UDRP stipulates that certain notification obligations should be met so that a respondent is aware of and given an opportunity to present its case. As a more substantive example, UDRP paragraph 4(c)(iii) provides that a respondent may demonstrate rights or legitimate interests in a domain name by providing evidence of "legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the [complainant's] trademark or service mark."

At the same time, in assessing allegations of bad faith, consideration factors provided under the third UDRP element address a range of unfair practices.

2.5 What are some core factors UDRP panels look at in assessing fair use?

Fundamentally, a respondent's use of a domain name will not be considered "fair" if it falsely suggests affiliation with the trademark owner; the correlation between a domain name and the complainant's mark is often the central starting point to this inquiry.

2.5.1 The nature of the domain name

Generally speaking, UDRP panels have found that domain names identical to a complainant's trademark carry a high risk of implied affiliation.

Even where a domain name consists of a trademark plus an additional term (at the second- or top-level), UDRP panels have largely held that such composition cannot constitute fair use if it effectively impersonates or suggests sponsorship or endorsement by the trademark owner.

As described in more detail below and in sections 2.6 through section 2.8, UDRP panels have articulated a broad continuum of factors that are useful in assessing possible implied sponsorship or endorsement.

At one end, certain geographic terms (e.g., <trademark-usa.com>, or <trademark.nyc>), or terms with an "inherent Internet connotation" (e.g., <e-trademark.com>, <buy-trademark.com>, or <trademark.online>) are seen as tending to suggest sponsorship or endorsement by the trademark owner.

At the other extreme, certain critical terms (e.g., <trademarksucks.com>) tend to communicate, prima facie at least, that there is no such affiliation.

In between, certain additional terms within the trademark owner's field of commerce or indicating services related to the brand, or which are not obviously critical (e.g., <okidataparts.com>, <nascartours.com>, <covancecampaign.com>, or <meissencollector.com>), may or may not by themselves trigger an inference of affiliation, and would normally require a further examination by the panel of the broader facts and circumstances of the case – particularly including the associated website content – to assess potential respondent rights or legitimate interests.

In assessing the impact of the additional term(s), where the term does not give a clear signal that creates a distinction between the respondent's domain name and the complainant's mark, panels would undertake a more robust "holistic" assessment of the factors listed below in section 2.5.2.

2.5.2 Circumstances beyond the domain name itself

Beyond looking at the domain name itself and the nature of any additional terms ~~appended to it (whether descriptive, laudatory, derogatory, etc.), panels~~(in particular where the term does not give a clear distinguishing signal), panels will assess whether the overall facts and circumstances of the case support a claimed fair use.

To facilitate this assessment, panels have found the following factors illustrative: (i) whether the domain name has been registered and is being used for legitimate purposes and not as a pretext for commercial gain or other ~~such~~ purposes ~~inhering to the respondent's~~which benefit~~,~~ the respondent; (ii) whether the ~~respondent reasonably believes its~~ domain name registration and use by the respondent is consistent with a broader pattern of bona fide activity (whether ~~referential,~~online or ~~for praise~~offline) and not to take advantage of a complainant's mark in a bad faith or ~~criticism) to be truthful and well-founded,~~abusive way; and (iii) whether it is clear to Internet users visiting the respondent's website that it is not operated by the complainant~~,~~ especially where this is readily apparent from the site look-and-feel and content (which may include the use of a reasonably clear and prominent/visible disclaimer).

Panels have additionally looked at: (iv) whether the respondent has refrained from engaging in a pattern of registering domain names corresponding to marks held by the complainant or third parties~~;~~; (v) where appropriate, whether a prominent link (including with explanatory text) is provided to the relevant trademark owner's website~~;~~; (vi) whether senders of email intended for the complainant but (because of user confusion) directed to the respondent are alerted that their message has been misdirected~~;~~; (vii) whether there is an actual connection between the complainant's trademark in the disputed domain name and the corresponding website content, and not to a competitor, or an entire industry, group, or individual~~;~~; and (viii) the genuineness and nature of the use, i.e., whether the ~~domain name registration and use by the~~ respondent ~~is consistent with a pattern of bona fide activity~~reasonably believes its use (whether ~~online~~referential, or ~~offline).~~for praise or criticism) to be truthful and well-founded.

2.5.3 Commercial activity

In the broadest terms, ~~while~~although panels will weigh a range of case-specific factors such as those listed above in section 2.5.2, judging whether a respondent's use of a domain name constitutes a legitimate fair use will often hinge on whether the corresponding website content prima facie supports the claimed purpose (e.g., for referential use, commentary, criticism, praise, or parody), is not misleading as to source or sponsorship, and is not a pretext for tarnishment or commercial gain.

Notably in this regard, commercial gain may include the respondent gaining or seeking reputational and/or bargaining advantage, even where such advantage may not be readily quantified. [See further section 3.1.4.]

Similarly, a respondent's use of a complainant's mark to redirect users (e.g., to a competing site) would not support a claim to rights or legitimate interests.

~~While~~Although specific case factors have led panels to find that fair use need not always be categorically noncommercial in nature, unambiguous evidence that the site is not primarily intended for commercial gain, e.g., the absence of commercial or pay-per-click (PPC) links or references to a respondent's business, would ~~tend to indicate a~~support a finding of lack of intent to unfairly profit from the complainant's reputation.

Panels also tend to look at whether a response is filed (and the credibility thereof), whether the respondent provides false contact information or engages in cyberflight, and whether the respondent has engaged in a pattern of trademark-abusive domain name registrations.

The above-described broad concept of fair use is explored below in the more specific contexts of (i) criticism sites, (ii) fan sites, and (iii) nominative use.

2.6 Does a criticism site support respondent rights or legitimate interests?

As noted above, UDRP jurisprudence recognizes that the use of a domain name for fair use such as noncommercial free speech, would in principle support a respondent's claim to a legitimate interest under the Policy.

2.6.1 To support fair use under UDRP paragraph 4(c)(iii), the respondent's criticism must be genuine ~~and noncommercial;~~ (i.e., not pretextual); in a number of UDRP decisions where a respondent ~~argues~~has argued that its domain name is or was being used for free speech purposes, the panel has found ~~this~~the claimed use to be primarily a pretext for cybersquatting, commercial activity, or tarnishment.

In assessing the genuineness of criticism, mindful that there may be a difference of opinion or factual dispute between the parties, panels do not look at the veracity or accuracy of the criticism as such, nor any allegations that the criticism is defamatory in nature; rather they will look at whether the motivation behind the criticism is genuine, as opposed to being a sham or pretext to hide another motive such as cybersquatting or commercial activity.

2.6.2 Panels ~~find~~have increasingly found that even a general right to legitimate criticism does not necessarily extend to registering or using a domain name identical to a trademark (i.e., <trademark.tld> (including typos)); even where such a domain name is used in relation to genuine noncommercial free speech, panels tend to find that ~~this~~ such a domain name creates an impermissible risk of user confusion through impersonation~~. In certain cases involving parties exclusively from the United States, some panels applying US First Amendment principles have found that even a domain name identical to a trademark used for a bona fide noncommercial criticism site may support a legitimate interest~~.

NB, as explained in sections 2.5 and 2.5.1, in cases where the disputed domain name is not identical to the complainant's trademark but adds a term, panels have applied a range of factors such as those articulated in section 2.5.2 in assessing whether a criticism site is genuine and not pretextual. And while some cases involving exclusively US parties have given particular consideration to national law, the weight of authority continues to move away from a national law approach in favor of a more uniform approach that applies supra-national principles in striving for consistency across the UDRP regardless of the location of the parties.

2.6.3 Where the domain name is not identical to the complainant's trademark, but it comprises the mark plus a derogatory term (e.g., <trademarksucks.tld>), panels tend to find that the respondent has a legitimate interest in using the trademark as part of the domain name of a genuine criticism site if such use is prima facie ~~noncommercial~~, genuinely fair, and not misleading or false. Some panels have found in such cases that a ~~limited~~ degree of ~~incidental~~ commercial activity may be permissible ~~in certain circumstances~~ (e.g., as "fundraising" to offset registration or hosting costs associated with the domain name and website).

[See also sections 1.8 and 1.13 with respect to the first UDRP element.]

[See also sections 2.5 and 2.7.]

2.7 Does a fan (or informational) site support respondent rights or legitimate interests in a domain name?

Many of the considerations applied in relation to criticism sites, as discussed above in section 2.6, also are considered by panels as relevant in relation to fan or informational sites.

2.7.1 As with criticism sites discussed above, for purposes of assessing fair use under UDRP paragraph 4(c)(iii), a respondent's fan or informational site must be active, ~~genuinely noncommercial~~genuine, and clearly distinct from any official complainant site. Again, similar to claimed criticism sites, there are a number of UDRP cases in which the respondent claims to have a true fan or informational site but the panel finds that it is primarily a pretext for cybersquatting ~~or commercial activity.~~ .

2.7.2 Where a domain name ~~which~~that is identical to a trademark (i.e., <trademark.tld>) is being used in relation to a genuine ~~noncommercial~~ fan site, panels have tended to find that a general right to operate a fan or informational site (even one that is supportive of the mark owner) does not ~~necessarily~~ extend to registering or using a domain name that is identical to the complainant's trademark, particularly as such an impersonation of the domain name may be misunderstood by Internet users as being somehow sponsored or endorsed by the trademark owner. (See discussion of inter alia ~~misrepresentation~~impersonation at section 2.5 above.) In such cases, where the domain name is identical to the trademark, panels have also noted that this prevents the trademark holder from exercising its rights to the mark and so managing its presence on the Internet, including through a corresponding email address. ~~However, as with criticism sites, in certain cases involving parties exclusively from the United States, some panels applying US First Amendment principles have found that even a domain name identical to a trademark used for a bona fide noncommercial fan site may support a legitimate interest.~~

NB, as explained in sections 2.5 and 2.5.1, in cases where the disputed domain name is not identical to the complainant's trademark but adds a term, panels have applied a range of factors such as those articulated in section 2.5.2 in assessing whether a fan site is genuine and not pretextual. And while some cases involving exclusively US parties have given particular consideration to national law, the weight of authority continues to move away from a national law approach in favor of a more uniform approach that applies supra-national principles in striving for consistency across the UDRP regardless of the location of the parties.

2.7.3 Where the domain name is not identical to the complainant's trademark, i.e., it comprises the mark plus an additional, typically descriptive or laudatory term (e.g., <celebrity~~-~~fan.tld> or <brand-info.tld>), noting the factors listed above at section 2.5.2, panels tend to find that the respondent has a legitimate interest in using the mark as part of the domain name for a fan or informational site if such use is considered to be fair in all of the circumstances of the case. Where such a site is noncommercial in nature, this would tend to support a finding that the use is a fair one. Some panels have found in such cases that a ~~limited~~ degree of ~~incidental~~ commercial activity may be permissible ~~in certain circumstances~~ (e.g., to offset registration or hosting costs associated with the domain name and website).

[See also generally section 1.8, and sections 2.5, and 2.6.]

2.8 How do panels assess claims of nominative (fair) use by resellers or distributors?

~~While~~Although the following section primarily concerns cases involving "bait and switch" or other related unfair trade practices, many of the principles outlined above, especially at section 2.5 with respect to fair use, underpin the following section.

2.8.1 Panels have recognized that resellers, distributors, or service providers using a domain name containing the complainant's trademark to undertake sales or repairs related to the complainant's goods or services may be making a bona fide offering of goods and services and thus have a legitimate interest in such domain name. Outlined in the "Oki Data test", the following cumulative requirements will be applied in the specific conditions of a UDRP case:

(i) the respondent must actually be offering the goods or services at issue;

(ii) the respondent must use the site to sell only the trademarked goods or services;

(iii) the site must accurately and prominently disclose the registrant's relationship with the trademark holder; and

(iv) the respondent must not try to "corner the market" in domain names that reflect the trademark.

The Oki Data test does not apply where any prior agreement, express or otherwise, between the parties expressly prohibits (or allows) the registration or use of domain names incorporating the complainant's trademark.

2.8.2 Cases applying the Oki Data test usually involve a domain name comprising a trademark plus a descriptive term (e.g., "parts", "repairs", or "location"), whether at the second-level or the top-level~~. At the same time, the risk of~~; in this way, the domain name itself (as opposed to the site content) is viewed as part of the assessment of whether the use of the mark is fair and merely referential. (At the same time, the risk of impersonation and misrepresentation has led panels to find that a respondent lacks rights or legitimate interests in cases involving a domain name identical to the complainant's trademark. [See section 2.5.1 above.])

Panels have found that PPC websites do not normally meet the Oki Data requirements as they do not themselves directly offer the goods or services at issue.

2.9 Do "parked" pages comprising pay-per-click links support respondent rights or legitimate interests?

Applying UDRP paragraph 4(c), panels have found that the use of a domain name to host a parked page comprising PPC links does not represent a bona fide offering where such links compete with or capitalize on the reputation and goodwill of the complainant's mark or otherwise mislead Internet users.

Panels have additionally noted that respondent efforts to suppress PPC advertising related to the complainant's trademark (e.g., through so-called "negative keywords") can mitigate against an inference of targeting the complainant.

Panels have recognized that the use of a domain name to host a page comprising PPC links would be permissible – and therefore consistent with respondent rights or legitimate interests under the UDRP – ~~where~~as long as such links do not trade off the ~~domain name consists of an actual dictionary word(s) phrase and is used to host~~ its competitor's) trademark. Although the PPC links ~~genuinely~~need not necessarily be related to the ~~dictionary~~ordinary meaning of the word(s) or phrase

comprising the domain name, ~~and not to trade off~~this would support a respondent's claim not to have targeted the complainant's (or its competitor's) trademark.

In cases involving a website that is not predominantly a "typical" parked or PPC site (e.g., a blog, forum, or other informational page), where other clear, non-pretextual indicia of respondent rights or legitimate interests are present, some panels have been prepared to accept the incidental limited presence of PPC links as not inconsistent with respondent rights or legitimate interests.

[See also section 3.5.]

2.10 Does a respondent have rights or legitimate interests in a domain name comprised of a dictionary word/phrase or acronym?

The fact that a particular term has a dictionary meaning is sometimes confused with the notion of a "generic" term. When used in a non-dictionary distinctive sense (i.e., in a manner that bears no relation to the goods or services being sold), such dictionary terms can function as "arbitrary" trademarks. ~~(See the "orange" example below.)~~

~~2.10.1 Panels have recognized that merely registering a domain name comprised of a dictionary word or phrase does not by itself automatically confer rights or legitimate interests on the respondent; panels have held that mere arguments that a domain name corresponds to a dictionary term/phrase will not necessarily suffice. In order to find rights or legitimate interests in a domain name based on its dictionary meaning, the domain name should be genuinely used, or at least demonstrably intended for such use, in connection with the relied-upon dictionary meaning and not to trade off third-party trademark rights.~~

For example, a hypothetical respondent may ~~well~~ have a legitimate interest in the domain name <orange.com> ~~if~~as long as it ~~uses the domain name for a~~ does not trade off of the complainant's mark, even if the website ~~providing information~~ to which the domain name resolves is not about oranges, the fruit ~~or the color orange.~~. The same respondent would not, however, have a legitimate interest in the domain name if the corresponding website is aimed at goods or services that target a third-party trademark (~~in this~~for example: ORANGE, well-known inter alia for telecommunications and Internet services) which uses the same term as a trademark in a non-dictionary sense.

2.10.1 Panels have held that merely registering a domain name comprised of a dictionary word or phrase would not by itself automatically confer rights or legitimate interests on the respondent. Mere arguments that a domain name corresponds to a dictionary term/phrase or acronym, or unique/catchy or memorable term (sometimes referred to by respondents as "brandable") may not be sufficient, and panels will consider the overall facts and circumstances of the case when assessing such arguments.

Although panels have not found it strictly necessary for the disputed domain name to be used to host content that corresponds to the dictionary meaning, such use would support a respondent's attempt to rebut the claim made against it of a lack of a right or legitimate interest. As long as the disputed domain name is being used in a way that does not trade off the complainant's trademark (whether to host links, content, a landing or sales page, or hosting no content at all), and where there are no other indicia of cybersquatting, such use may support the respondent's claim to a right or legitimate interest.

As a general matter, panels have noted that, where there are indications a respondent is targeting a complainant (as is typically considered under the third element), this would undermine any claim to a right or legitimate interest, whether supported by content/links or not. (See also section 2.15 concerning the relation between the second and third elements.)

Panels have assessed cases involving common phrases (whether spelled out or numerical) corresponding in whole or in part to numbers (e.g., 24/7 or 365) in a similar manner as dictionary terms.

Panels also tend to look at factors such as the status and fame of the relevant mark and whether the respondent has registered and legitimately used other domain names containing dictionary words or phrases in connection with the respective dictionary meaning.

[See generally section 3.2.1.]

2.10.2 For a respondent to have rights or legitimate interests, in particular for a domain name comprising an acronym, the respondent's evidence supporting its explanation for its registration (and any use) of the domain name should indicate a credible ~~and legitimate~~ intent which does not capitalize on the reputation and goodwill inherent in the complainant's mark.

2.11 At what point in time of respondent conduct do panels assess claimed rights or legitimate interests?

Although the historical use of a domain name may be relevant to assessing the parties' claims, ~~Panels~~ panels tend to assess claimed respondent rights or legitimate interests ~~in the present, i.e., with a view to the circumstances prevailing~~ at the time of the filing of the complaint.

~~Without prejudice to the complainant's duty to establish that a domain name has been registered~~, but would also consider any evidence of past use, including its veracity and ~~and used in bad faith, a respondent claiming a right or legitimate interest in a domain name for example based on a prior agreement or relationship between the parties or based on past good faith use (thus demonstrating merely a past right or legitimate interest) would not necessarily have rights or legitimate interests in the domain name, at the time a decision is rendered.~~ surrounding context.

For example, merely because a respondent once had a claim to a legitimate interest in a domain name (e.g., as a former employee or agent), this would not necessarily mean that this claim still exists if there is subsequent evidence of bad faith when the complaint is filed.

Panels will ~~often also~~ consider any evidence of previous legitimate use under the third UDRP element, e.g., in deciding the question of the respondent's intent at the time of registration. [See also in this regard, sections 3.2.1 and 3.8 generally.]

2.12 Does a respondent's trademark corresponding to a domain name automatically generate rights or legitimate interests?

2.12.1 Panels have recognized that a respondent's prior registration of a trademark which corresponds to a domain name will ordinarily support a finding of rights or legitimate interests in that domain name for purposes of the second element. Although evidence of the registration of a business name may also be submitted to support the respondent's case, panels are not likely to give a mere business name registration the same weight as a trademark registration, and would expect evidence of use of the business name (beyond mere corporate registration documents) to also be provided in a way that links the business name to the source of specific goods or services. [See generally section 1.3 as to the types of evidence that may support a claim of use of a business name]

2.12.2 The existence of a ~~respondent~~respondent's trademark or (registered) business name does not however *automatically* confer rights or legitimate interests on the respondent. ~~For example, panels~~ Panels have generally declined to find ~~respondent~~ rights or legitimate interests in a respondent's domain name on the basis of a corresponding trademark or business registration where the overall circumstances demonstrate that such trademark was obtained primarily to circumvent the ~~application of the UDRP~~complainant's assertion of its rights or otherwise prevent the complainant's exercise of its rights (even if only in a particular jurisdiction). Absent evidence of such circumstances indicating pretext however, panels have been reluctant to reject a respondent trademark registration out of hand.

2.13 How do panels treat complainant claims of illegal ~~(e.g., counterfeit)~~ activity in relation to potential respondent rights or legitimate interests?

2.13.1 Panels have categorically held that the use of a domain name for illegal activity (e.g., the sale of counterfeit goods or ~~illegal~~(unlicensed) pharmaceuticals, phishing/identity theft, distributing malware, unauthorized account access/hacking, ~~impersonation/~~copycat sites, passing off, or other types of fraud) can never confer rights or legitimate interests on a respondent. ~~Particularly in the case of~~Where counterfeits ~~and~~ or (unlicensed) pharmaceuticals~~, this is true irrespective of any~~ are involved, no disclosure on the related website (or indeed the use of a disclaiming term in the domain name itself) that such infringing goods are "replicas~~" or~~", "reproductions", etc. would cure the illegal behavior. [See sections 3.1.4 and 4.2.~~" or indeed the use of such term in the domain name itself. ~~] Some panelists have held that (properly argued and evidenced) trademark infringement would render a use not legitimate under the Policy; in other cases, where the evidence is not adequate to substantiate a claim of trademark infringement, panels have held that the parties may avail themselves of national courts.

[See sections 3.1.4 and 4.2.]

2.13.2 Panels are generally not prepared however to accept merely conclusory or wholly unsupported allegations of illegal activity, including counterfeiting, even when the respondent is in default. On the other hand, panels have found that circumstantial evidence can support a complainant's otherwise credible claim of illegal respondent activity. Evidence that the goods are offered disproportionately below market value, that the goods are only sold under license or through a prescription (especially with pharmaceutical products), that the images of the goods prima facie suggest (e.g., where the relevant logo is distorted) that they are not genuine, that the respondent has misappropriated copyrighted images from the complainant's website, that the goods are extremely rare, that the goods have prompted consumer complaints, or that a respondent has improperly ~~masked~~concealed its identity (whether on the website or in the registrar's RDAP (formerly WhoIs information) to avoid being contactable, have each been found relevant in this regard. ~~Where relevant~~(Although not necessary, panels have found evidence of ~~so-called~~ "trap purchases" to be of additional assistance~~.~~.)

2.14 Is the TLD under which a domain name is registered relevant in assessing respondent rights or legitimate interests?

2.14.1 Particularly when the TLD is descriptive of or relates to goods or services (including their natural zone of expansion), a geographic region, or other term associated with the complainant, the respondent's selection of such TLD would tend to support a finding that the respondent obtained the domain name to take advantage of the complainant's mark, and as such that the respondent lacks rights or legitimate interests in the domain name.

2.14.2 If on the other hand the meaning of the TLD appears to corroborate the respondent's bona fide use or demonstrable preparations to use the domain name (e.g., the respondent has a legitimately obtained and used trademark covering goods or services connected to the meaning of the relevant TLD), the selection of the TLD may support respondent rights or legitimate interests in the domain name. The adoption of a TLD would not override the application of the Policy or create an *automatic* "safe harbor," however, and panels may look beyond the domain name and TLD to assess whether the broader case circumstances (including website content) indicate an attempt to mask bad faith or otherwise pretextual or cybersquatting activity.

[See generally section 1.11 and section 3.2.1.]

2.15 What is the relation between the 2nd and 3rd UDRP elements?

Apart from the circumstances surrounding ~~their~~the registration of a domain name, to support a claim to rights or legitimate interests under the UDRP, the use of a disputed domain name must in any event not be abusive of third-party trademark rights.

In some cases therefore, panels assess the second and third UDRP elements together, for example where clear indicia of bad faith suggest there cannot be any respondent rights or legitimate interests. In such cases, panels have found that the facts and circumstances of the case would benefit from a joint discussion of the policy elements. In other cases panels have found it useful to assess the merits of the second and third elements separately as at their core, they address different aspects of a respondent's conduct.

[See in particular in this regard, sections 3.2.1 (including "NB") and 3.8.]

3. Third UDRP Element

3.1 How does a complainant prove a respondent's bad faith?

~~Policy criteria: bad~~ Bad faith under the UDRP is broadly understood to occur where a respondent takes unfair advantage of or otherwise abuses a complainant's mark. To facilitate assessment of whether this has occurred, and bearing in mind that the burden of proof rests with the complainant, UDRP paragraph 4(b) provides that any one of the following non-exclusive scenarios constitutes evidence of a respondent's bad faith:

> (i) circumstances indicating that the respondent has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name 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 the respondent's documented out-of-pocket costs directly related to the domain name; or
>
> (ii) the respondent has 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 the respondent has engaged in a pattern of such conduct; or
>
> (iii) the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to its website 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 the respondent's website or location or of a product or service on the respondent's website or location.

General evidentiary framework: complaints alleging the types of conduct described in UDRP paragraph 4(b) should be supported by arguments and available evidence such as dated screenshots of the website to which the disputed domain name resolves or correspondence between the parties. Even in cases of respondent default, panels have held that wholly unsupported conclusory allegations may not be sufficient to support a complainant's case.

Panels have been prepared in appropriate cases to draw inferences concerning a respondent's ~~(~~intent (both in terms of bad faith~~) intent~~, but also the lack of it) from the relevant facts and circumstances.

[See section 4.2 in relation to the complainant's burden of proof.]

Given that the scenarios described in UDRP paragraph 4(b) are non-exclusive and merely illustrative, even where a complainant may not be able to demonstrate the literal or verbatim application of one of the above scenarios, evidence demonstrating that a respondent seeks to take unfair advantage of, abuse, or otherwise engage in behavior detrimental to the complainant's trademark would also satisfy the complainant's burden.

Noting that the UDRP normally provides for a single round of pleadings without opportunity for discovery, panels have expressed an expectation that a complainant should anticipate and address likely plausible respondent defenses with supporting arguments and evidence in its complaint. To the extent a response raises defenses that could not reasonably have been anticipated, a complainant may request that the panel provide an opportunity to address such unanticipated defenses in a supplemental filing, which may also include a rebuttal opportunity for the respondent.

[See also sections 4.6, 4.7, and 4.8.]

For discussion of specific application by panels of the policy criteria see the discussion below at sections 3.1.1 through 3.1.4.

3.1.1 How does a complainant prove that a respondent has registered or acquired a domain name primarily to sell the domain name to the complainant (or its competitor) for valuable consideration in excess of the respondent's costs related to the domain name?

Generally speaking, panels have found that the practice as such of registering a domain name for subsequent resale (including for a profit) would not by itself support a claim that the respondent registered the domain name in bad faith with the primary purpose of selling it to a trademark owner (or its competitor).

Circumstances indicating that a domain name was registered for the bad-faith purpose of selling it to a trademark owner can be highly fact-specific; the nature of the domain name (e.g., whether a typo of a famous mark, a domain name wholly incorporating the relevant mark plus a geographic term or one related to the complainant's area of commercial activity, or a pure dictionary term) and the distinctiveness of trademark at issue, among other factors, are relevant to this inquiry.

The use to which the domain name is put, particularly the absence of circumstances indicating that the respondent's aim in registering the disputed domain name was to profit from or exploit the complainant's trademark, can inform a panel's assessment of the respondent's intent. Such circumstances notably include credible pre-complaint website content corresponding to a dictionary meaning of the term comprising the domain name, as opposed to targeting the trademark owner or its competitor. Panels have also viewed a respondent's use of "negative keywords" or similar means to avoid links/content impermissibly capitalizing on a trademark as relevant in assessing a respondent's overall intent.

If, on the other hand, circumstances indicate that the respondent's intent in registering the disputed domain name was in fact to profit in some fashion from or otherwise exploit the complainant's trademark, panels will find bad faith on the part of the respondent. ~~While~~Although panel assessment remains fact-specific, generally speaking such circumstances, alone or together, include: (i) the respondent's likely knowledge of the complainant's rights, (ii) the distinctiveness of the complainant's mark, (iii) a pattern of abusive registrations by the respondent, (iv) website content targeting the complainant's trademark, e.g., through links to the complainant's competitors, (v) threats to point or actually pointing the domain name to trademark-abusive content, (vi) threats to "sell to the highest bidder" or otherwise transfer the domain name to a third party, (vii) failure of a respondent to present a credible evidence-backed rationale for registering the domain name, (viii) a respondent's request for goods or services in exchange for the domain name, (ix) a respondent's attempt to force the complainant into an unwanted business arrangement, (x) a respondent's past conduct or business dealings, or (xi) a respondent's registration of additional domain names corresponding to the complainant's mark subsequent to being put on notice of its potentially abusive activity.

Particularly where the domain name at issue is identical or confusingly similar to a highly distinctive or famous mark, panels have tended to view with a degree of skepticism a respondent defense that the domain name was merely registered for legitimate speculation (based for example on any claimed dictionary meaning) as opposed to targeting a specific brand owner.

Offers to sell: ~~Taking~~ taking the above scenarios into account, panels have generally found that where a registrant has an independent right to or legitimate interest in a domain name, an offer to sell that domain name would not by itself be evidence of bad faith for purposes of the UDRP, irrespective of which party solicits the prospective sale. This also includes "generalized" offers to sell, including those on a third-party platform. Panels have noted in respect of UDRP paragraph 4(b)(i) that offers to sell which exceed the respondent's documented out-of-pocket costs must target a trademark owner; assessment of such targeting will take account of all relevant facts and circumstances, and often includes matters such as the strength of the mark at issue (including whether there may be third parties also using the term as a mark for other goods/services including in other jurisdictions and whether it may also be descriptive or a dictionary term capable of non-infringing uses), the extent or reach of the complainant's online presence, and the location of the parties. Mere offers to sell for a profit, where this does not target a trademark owner would not be considered to violate paragraph 4(b)(i). Panels moreover rely on the parties to provide evidence of such costs.

3.1.2 What constitutes a pattern of conduct of preventing a trademark holder from reflecting its mark in a domain name?

UDRP panels have held that establishing a pattern of bad faith conduct requires more than one, but as few as two instances of abusive domain name registration.

This may include a scenario where a respondent, on separate occasions, has registered trademark-abusive domain names, even where directed at the same brand owner~~.~~; these separate registrations may be brought in a single case.

A pattern of abuse has also been found where the respondent registers, simultaneously or otherwise, multiple trademark-abusive domain names corresponding to the distinct marks of ~~individual~~other brand owners.

~~Panels have however been reluctant to find a pattern of abuse where a single UDRP case merely contains two domain names registered simultaneously by the same respondent directed at a single complainant mark.~~

3.1.3 How have panels viewed the concept of registering a domain name primarily to disrupt the business of a competitor?

Noting that the scenarios enumerated in UDRP paragraph 4(b) are non-exhaustive, panels have applied the notion of a "competitor" beyond the concept of an ordinary commercial or business competitor to also include the concept of "a person who acts in opposition to another" for some means of commercial gain, direct or otherwise.

~~While~~Although this may include prior customers or business partners of the complainant, it would not encompass legitimate noncommercial criticism.

3.1.4 How does a complainant prove that a respondent has intentionally attempted to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the complainant's mark?

Panels have consistently found that the mere registration of a domain name that is identical or confusingly similar (particularly domain names comprising typos or incorporating the mark plus a descriptive term) to a ~~famous or widely~~well-known trademark ~~by an unaffiliated entity~~, and particularly in the case of coined or fanciful marks, can by itself create a presumption of bad faith.

Panels have moreover found the following types of evidence to support a finding that a respondent has registered a domain name to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the complainant's mark: (i) actual confusion, (ii) seeking to cause confusion (including by technical means beyond the domain name itself) for the respondent's commercial benefit, even if unsuccessful, (iii) the lack of a respondent's own rights to or legitimate interests in a domain name, (iv) redirecting the domain name to a different respondent-owned website, even where such website contains a disclaimer, (v) redirecting the domain name to or mimicking the complainant's (or a competitor's) website, and (vi) absence of any conceivable good faith use. [See also generally section 2.5.3.]

As noted in section 2.13.1, given that the use of a domain name for per se illegitimate activity such as the sale of counterfeit goods or phishing can never confer rights or legitimate interests on a respondent, such behavior is manifestly considered evidence of bad faith. ~~Similarly, panels have found that a respondent redirecting a domain name to the complainant's website can establish bad faith insofar as the respondent retains control over the redirection thus creating a real or implied ongoing threat to the complainant.~~

3.2 What circumstances further inform panel consideration of registration in bad faith?

In addition to the above-described application of the specific Policy criteria, panels have applied a range of considerations in assessing bad faith.

3.2.1 Additional bad faith consideration factors

Particular circumstances panels may take into account in assessing whether the respondent's registration of a domain name is in bad faith include: (i) the nature of the domain name (e.g., a typo of a widely-known mark, or a domain name incorporating the complainant's mark plus an additional term such as a descriptive or geographic term, or one that corresponds to the complainant's area of activity or natural zone of expansion), (ii) the chosen top-level domain (e.g., particularly where corresponding to the complainant's area of business activity or natural zone of expansion), (iii) the content of any website to which the domain name directs, including any changes in such content and the timing thereof, (iv) the timing and circumstances of the registration (particularly following a product launch, or the complainant's failure to renew its domain name registration), (v) any respondent pattern of targeting marks along a range of factors, such as a common area of commerce, intended consumers, or geographic location, (vi) a clear absence of rights or legitimate interests coupled with no credible explanation for the respondent's choice of the domain name, or (~~viii~~vii) other indicia generally suggesting that the respondent had somehow targeted the complainant.

Application of UDRP paragraph 4(b)(iv): in some cases, e.g., where it is unclear why a domain name was initially registered and the domain name is subsequently used to attract Internet users by creating a likelihood of confusion with a complainant's mark, panels have found that UDRP paragraph 4(b)(iv), read in light of paragraph 4(a)(ii), can support an inference of bad faith registration for the respondent to rebut. Such inference would be supported by a clear absence of the respondent's own rights or legitimate interests, the nature of the domain name itself (i.e., the manner in which the domain name incorporates the complainant's mark), the content of any website to which the domain name points – including any changes and the timing thereof, the registrant's prior conduct generally and in UDRP cases in particular, the reputation of the complainant's mark, the use of (false) contact details or a privacy shield to hide the registrant's identity, the failure to submit a response, the plausibility of any response, or other indicia that generally cast doubt on the registrant's bona fides.

NB, a number of cases in 2009 and 2010 (including Mummygold, Octogen, Parvi, and Jappy) explored application of registrant representations in UDRP paragraph 2 in finding so-called "retroactive" bad faith registration; ~~while~~although this particular concept has not been followed in subsequent cases, UDRP paragraph 2 may be relevant on its own terms. [See in particular section 3.8 below.]

In addition to the above-described scenarios, sections 3.2.2 and 3.2.3 explore certain legal principles applied by panels in assessing respondent knowledge.

3.2.2 "Knew or should have known"

Noting the near instantaneous and global reach of the Internet and search engines, and particularly in circumstances where the complainant's mark is widely known (including in its sector) or highly specific and a respondent cannot credibly claim to have been unaware of the mark (particularly in the case of domainers), panels have been prepared to infer that the respondent knew, or have found that the respondent should have known, that its registration would be identical or confusingly similar to a

complainant's mark. Further factors including the nature of the domain name, the chosen top-level domain, any use of the domain name, or any respondent pattern, may obviate a respondent's claim not to have been aware of the complainant's mark.

On the other hand, where the complainant's mark is not inherently distinctive and it also corresponds to a dictionary term or is otherwise inherently attractive as a domain name (e.g., it is a short combination of letters), if a respondent can credibly show that the complainant's mark has a limited reputation and is not known or accessible in the respondent's location, panels may be reluctant to infer that a respondent knew or should have known that its registration would be identical or confusingly similar to the complainant's mark. Particularly noting the Internet's borderless nature, a sweeping respondent disclaimer of knowledge based as such on its (deemed) presence in a particular location different from the location(s) in which the complainant's goods or services are accessible may be seen by panels as lacking in credibility or relevance. In this respect, it is noted that the business of cybersquatting often seeks to exploit the global reach of the Internet, and may in fact purposefully target a location other than that in which the respondent may be "present".

~~In limited circumstances – notably where the parties are both located in the United States and the complainant has obtained a federal trademark registration pre-dating the relevant domain name registration – panels have been prepared to apply the concept of constructive notice. Application of this concept may depend in part on the complainant's reputation and the strength or distinctiveness of its mark, or facts that corroborate an awareness of the complainant's mark.~~

3.2.3 Willful blindness and the duty to search for and avoid trademark-abusive registrations

Panels have held that respondents, especially domainers undertaking bulk purchases or automated registrations have an affirmative obligation to avoid the registration of trademark-abusive domain names. Panelists will look to the facts of the case to determine whether such respondent has undertaken good faith efforts to screen such registrations against readily-available online databases to avoid the registration of trademark-abusive domain names.

Noting the possibility of co-existence of trademarks across jurisdictions and classes of goods and services, and the fact that trademarks which may be inherently ~~descriptive~~distinctive in one context may be generic in another, the mere fact of certain domain names proving identical or confusingly similar to third-party trademarks pursuant to a search does not however mean that such registrations cannot as such be undertaken or would automatically be considered to be in bad faith.

Noting registrant obligations under UDRP paragraph 2, panels have however found that respondents who (deliberately) fail to search and/or screen registrations against available online databases would be responsible for any resulting abusive registrations under the concept of willful blindness; depending on the facts and circumstances of a case, this concept has been applied irrespective of whether the registrant is a professional domainer.

Panels have conversely found that, where a respondent provides evidence that it has undertaken additional measures to avoid abusive use of any registered domain names, e.g., through methods such as applying negative keywords, such undertakings will corroborate the respondent's claim to good faith.

3.3 Can the "passive holding" ~~or non-use~~ of a domain name support a finding of bad faith?

From the inception of the UDRP, panelists have found that the non-use of a domain name (including a blank or "coming soon" page) would not by itself prevent a finding of bad faith under the doctrine of passive holding. To the contrary, in looking at the totality of circumstances in each case, panelists have found that the registration and non-use of a domain name can still constitute bad faith for purposes of the Policy.

~~While panelists will look at the totality of the circumstances in each case, factors~~ Factors that have been considered relevant in applying the passive holding doctrine include: (i) the degree of distinctiveness or reputation of the complainant's mark, (ii) the failure of the respondent to submit a response or to provide any evidence of actual or contemplated good-faith use, (iii) the respondent's ~~concealing~~taking active steps to conceal its identity, or (iv) use of false or inaccurate contact details (noted to be in breach of ~~its~~ the registrant's registration agreement~~), and (iv) the implausibility of any good faith use to which the domain name may be put.~~).

Taking the above factors into consideration, panels assess the overall plausibility of any (claimed) good faith use to which the domain name may be put in light of the composition of the domain name in relation to the relevant mark, such that, the more arbitrary or distinctive a mark the less plausible a claimed non-infringing good faith use is likely to be, and vice versa.

[See also section 3.4.]

3.4 Can the use of a domain name for purposes other than hosting trademark-abusive content constitute bad faith?

Panels have held that the use of a domain name for purposes other than to host a website may constitute bad faith. Such ~~purposes include~~active ("behind the scenes") uses are considered distinct from the passive holding doctrine discussed above, and can include a range of bad faith activity or scams such as sending email, phishing, identity theft, or malware distribution. (In some such cases, the respondent may even host a copycat version of the complainant's website.) Many such cases involve the respondent's use of the domain name to send deceptive emails, e.g., to obtain sensitive or confidential personal information from prospective job applicants, or to solicit payment of fraudulent invoices by the complainant's actual or prospective customers.

[See also section 2.13.]

3.5 Can third-party generated material "automatically" appearing on the website associated with a domain name form a basis for finding bad faith?

Particularly with respect to "automatically" generated pay-per-click links~~,~~ or website content (e.g., even website builder software done through Artificial Intelligence (AI) prompting or otherwise), panels have held that a respondent cannot disclaim responsibility for content appearing on the website associated with its domain name (nor would such links ipso facto vest the respondent with rights or legitimate interests).

~~Neither the~~ The fact that such links ~~are~~or content may be generated by a third party such as a registrar or auction platform (or their affiliate), ~~nor~~or the fact that the respondent itself may not have directly profited, is a relevant consideration but would not by itself prevent a finding of bad faith. While a respondent cannot disclaim responsibility for links or content appearing on the website associated with its domain name, panels have found positive efforts by the respondent to avoid links ~~which~~that target the complainant's mark (e.g., through "negative keywords") to be a mitigating factor in assessing bad faith.

[See also section 2.9.]

3.6 How does a registrant's use of a privacy or proxy service impact a panel's assessment of bad faith?

There are recognized legitimate uses of privacy and proxy registration services~~;~~ (separate from redaction of contact details flowing from privacy regulations) and the ~~circumstances in which~~ use of such services ~~are used, including whether~~without more would not lead to a finding of bad faith.

In cases where the ~~respondent~~publicly-available registration data appears as "Redacted [for Privacy]" (or its functional equivalent), insofar as this is ~~operating a commercial and trademark-abusive website, can however~~seen as an administrative measure employed by the registrar (and also noting that the underlying registrant information is generally provided by the registrar), this would typically not impact ~~a~~the panel's assessment of bad faith.

In terms of underlying respondent identity, panels treat privacy and proxy services (and "Name Redacted" terminology employed by the registrar) as practical equivalents for purposes of the UDRP, and the fact that such services may ~~be employed to~~ prevent the complainant and panel from knowing the identity of the actual underlying registrant of a domain name does not prevent panel assessment of the UDRP elements.

Where it appears that a respondent intentionally employs a privacy or proxy service merely to hide its identity from an anticipated complainant or to avoid being notified of a UDRP proceeding filed against it, panels tend to find that this supports an inference of bad faith; a respondent filing a response may refute such inference.

Panels additionally view the provision of false contact information (or an additional "Russian doll" privacy or proxy service) underlying a privacy or proxy service as an indication of bad faith.

In some cases, particularly where the respondent does not avail itself of the opportunity to respond to claims based on the timing of the registration of the disputed domain name (such as a materially relevant change in underlying registrant), panels have been prepared to infer that the use of a privacy or proxy service may seek to mask the timing of the respondent's acquisition of the domain name.

~~Panels have also viewed a respondent's use of a privacy or proxy service which is known to block or intentionally delay disclosure of the identity of the actual underlying registrant as an indication of bad faith.~~

[See also section 4.4 and Q&A: domain name registrant data and the UDRP]

3.7 How does a disclaimer on the webpage to which a disputed domain name resolves impact a panel's assessment of bad faith?

In cases where the respondent appears to otherwise have a right or legitimate interest in a disputed domain name, a clear and sufficiently prominent disclaimer ~~would~~may lend support to circumstances suggesting its good faith. For example, where a respondent is legitimately providing goods or services related to the complainant's mark only (see sections 2.5 and 2.8~~*Oki Data* and its progeny discussed at 2.8)~~), the presence of a clear and sufficiently prominent disclaimer can support a finding that the respondent has undertaken reasonable steps to avoid unfairly passing itself off as related to the complainant, or to otherwise confuse users.

On the other hand, where the overall circumstances of a case point to the respondent's bad faith, the mere existence of a disclaimer cannot cure such bad faith. In such cases, panels may consider the respondent's use of a disclaimer as an admission by the respondent that users may be confused.

In assessing the impact of a disclaimer – in addition to the composition of the domain name itself – panels will also look at the manner of the respondent's use(s) of the complainant's mark on the relevant site, to ascertain whether such use is truly referential and does not overtake any claimed fair use, or whether the overall impression created is one of affiliation with the complainant which does not in fact exist.

[See generally section 3.2.]

3.8 Can bad faith be found where a domain name was registered before the complainant acquired trademark rights?

3.8.1 Domain names registered before a complainant accrues trademark rights

Subject to scenarios described in 3.8.2 below, where a respondent registers a domain name before the complainant's trademark rights accrue, panels will not normally find bad faith on the part of the respondent. (This is separate from, and would not however impact a panel's assessment of a complainant's standing under the first UDRP element.)

[See also section 1.1.3.]

Merely because a domain name is initially created by a registrant other than the respondent before a complainant's trademark rights accrue does not however mean that a UDRP respondent cannot be found to have registered the domain name in bad faith. Irrespective of the original creation date, if a respondent acquires a domain name after the complainant's trademark rights accrue, the panel will look to the circumstances at the date the UDRP respondent itself acquired the domain name.

[See also sections 3.2, 3.6, and 3.1.4.]

3.8.2 Domain names registered in anticipation of trademark rights

As an exception to the general proposition described above in 3.8.1, in certain limited circumstances where the facts of the case establish that the respondent's intent in registering the domain name was to unfairly capitalize on the complainant's nascent (typically as yet unregistered) trademark rights, panels have been prepared to find that the respondent has acted in bad faith.

Such scenarios include registration of a domain name: (i) shortly before or after announcement of a corporate merger, (ii) further to the respondent's insider knowledge (e.g., a former employee), (iii) further to significant media attention (e.g., in connection with a product launch or prominent event), or (iv) following the complainant's filing of a trademark application.

[See also section 3.9.]

3.9 Can the respondent's renewal of its domain name registration support a finding of (registration in) bad faith?

Where the respondent provides satisfactory evidence of an unbroken chain of possession, panels typically would not treat merely "formal" changes or updates to registrant contact information as a new registration.

Also, irrespective of registrant representations undertaken further to UDRP paragraph 2, panels have found that the mere renewal of a domain name registration by the same registrant is insufficient to support a finding of registration in bad faith.

On the other hand, the transfer of a domain name registration from a third party to the respondent is not a renewal and the date on which the current registrant acquired the domain name is the date a panel will consider in assessing bad faith. This holds true for single domain name acquisitions as well as for portfolio acquisitions.

In cases where the domain name registration is masked by a privacy or proxy service and the complainant credibly alleges that a relevant change in registration has occurred, it would be incumbent on the respondent to provide satisfactory evidence of an unbroken chain of registration; respondent failure to do so has led panels to infer an attempt to conceal the true underlying registrant following a change in the relevant registration. Such an attempt may in certain cases form part of a broader scenario whereby application of UDRP paragraph 4(b)(iv), read in light of paragraph 4(a)(ii), can support an inference of bad faith registration for the respondent to rebut.

[See in particular section 3.2.1.]

Facts or circumstances supporting an inference that a change in registrant has occurred may typically include a change in the content of the website to which a domain name directs to take advantage of the complainant's mark or unsolicited attempts to sell the domain name to the complainant only following such asserted change in registrant.

3.10 Will panels consider statements made in settlement discussions?

The UDRP framework, and WIPO's specific panel-fee-refund practice, encourages settlement between parties.

[See generally section 4.9.]

In the UDRP context, panels tend to view settlement discussions between the parties as "admissible", particularly insofar as such discussions may be relevant to assessing the parties' respective motivations.

If, for example, negotiations between UDRP parties confirm that the respondent's intent was merely to capitalize on the complainant's rights (as opposed to using the domain name for prima facie legitimate purposes, possibly including resale), this would be material to a panel's assessment of bad faith.

However, panels are mindful that negotiations between domain name registrants and trademark owners (whether regarding a purchase or trademark-abusive content) can serve a legitimate useful purpose, and are not necessarily indicative of bad faith.

Whether settlement discussions occur before or after the filing of a UDRP proceeding is not necessarily relevant by itself ~~to panel assessment of the case merits~~.

[See generally section 3.1.1.]

3.11 Can the use of ~~"robots.txt" or similar~~technical mechanisms to prevent website content being accessed in an online archive impact a panel's assessment of bad faith?

Panels have tended to view the use of technical mechanisms (e.g., "robots.txt" ~~(~~or other similar ~~tool~~tools) as prima facie neutral. Panels moreover have been prepared to consider the use of ~~"robots.txt"~~such tools as legitimate, for example where used consistently from the inception of the respondent's hosting website content to prevent clickfraud.

However, the use of technical mechanisms (e.g., "robots.txt" ~~(~~or other similar ~~tool~~tools) to prevent access to evidence of historical website content (e.g., on the Internet Archive at <archive.org>), particularly where employed only after notice of potential trademark abuse, may support an inference that a respondent has sought to prevent access to trademark-abusive or otherwise incriminating content. It is incumbent however on the party advancing arguments based on ~~"robots.txt"~~such technical measures to demonstrate their relevance to the case.

3.12 Can tarnishment form a basis for finding bad faith?

Noting that noncommercial fair use without intent to tarnish a complainant's mark is a defense under the second element, using a domain name to tarnish a complainant's mark ~~(e.g., by posting false or defamatory content, including for commercial purposes)~~ may constitute evidence of a respondent's bad faith.

NB, criticism does not amount to tarnishment under the Policy; rather, tarnishment refers to unseemly conduct such as posting unsavory content meant solely to disparage the complainant's mark. [See also sections 2.4, 2.5, and 2.6.]

4. Procedural Questions

4.1 What deference is owed to past UDRP decisions dealing with similar factual matters or legal issues?

While the UDRP does not operate on a strict doctrine of binding precedent, it is considered important for the overall credibility of the UDRP system that parties can reasonably anticipate the result of their case. Often noting the existence of similar facts and circumstances or identifying distinguishing factors, panels strive for consistency with prior decisions. In so doing, panels seek to ensure that the UDRP operates in a fair and predictable manner for all stakeholders while also retaining sufficient flexibility to address evolving Internet and domain name practices.

[See also section 4.14.]

4.2 What is the applicable standard of proof in UDRP cases?

The applicable standard of proof in UDRP cases is the "balance of probabilities" or "preponderance of the evidence"; some panels have also expressed this as an "on balance" standard. Under this standard, a party should demonstrate to a panel's satisfaction that it is more likely than not that a claimed fact is true.

Panels have taken the view that merely because the facts are complex or are contested as between the parties would not mean that the case is incapable of resolution under the Policy.

While conclusory statements unsupported by evidence will normally be insufficient to prove a party's case, panels have been prepared to draw certain inferences in light of the particular facts and circumstances of the case e.g., where a particular conclusion is prima facie obvious, where an explanation by the respondent is called for but is not forthcoming, or where no other plausible conclusion is apparent. A respondent's failure to submit a formally compliant response (i.e., an informal response) with the required formal certification as to completeness and accuracy, may impact the panel assessment of the merits and credibility of respondent claims.

In cases where arguments and/or evidence presented to the panel is created with the assistance of AI tools, the credibility of such arguments/evidence may be impacted by the inclusion (e.g., in an annex) by the parties of specific prompts and their results.

(Noting that a complainant must prevail on all three elements to succeed, in ~~appropriate~~ cases where a panel finds that one of the elements is clearly not met, the panel may consider it unnecessary to address the other elements. Some panels however consider it appropriate to rule on all three elements in order to provide the parties with a decision and to provide parties and panels in future cases with guidance on particular fact patterns.)

[See also sections 2.1, 3.1 and 3.2, and 4.3.]

4.3 Does a respondent's default/failure to respond to the complainant's contentions automatically result in the complaint succeeding?

Noting that the burden of proof is on the complainant, a respondent's default (i.e., failure to submit a formal response) would not by itself mean that the complainant is deemed to have prevailed; a respondent's default is not necessarily an admission that the complainant's ~~claims~~contentions are ~~true~~accurate.

In cases involving wholly unsupported and conclusory allegations advanced by the complainant, or where a good faith defense is apparent (e.g., from the content of the website to which a disputed domain name resolves), panels may find that – despite a respondent's default – a complainant has failed to prove its case.

Further to paragraph 14(b) of the UDRP Rules however, panels have been prepared to draw certain inferences in light of the particular facts and circumstances of the case e.g., where a particular conclusion is prima facie obvious, where an explanation by the respondent is called for but is not forthcoming, or where no other plausible conclusion is apparent.

Panels have typically treated a respondent's submission of a so-called "informal response" (merely making unsupported conclusory statements and/or failing to specifically address the case merits as they relate to the three UDRP elements, e.g., simply asserting that the case "has no merit" and demanding that it be dismissed) ~~in a similar manner as a respondent default~~with a degree of caution (note the reference in section 4.2 to the certification as to completeness and accuracy) and in light of the broader case facts and circumstances.

[See also sections 2.1, 3.1 and 3.2, and 4.2.]

4.4 How is respondent identity assessed in a case involving a privacy or proxy registration service?

Paragraph 1 of the UDRP Rules defines the respondent as "the holder of a domain name registration against which a complaint is initiated." In many cases however, the named respondent ~~listed in the WHois register~~ is not a known person or corporation, but a "privacy" or "proxy" registration service~~. Regarding the latter~~; sometimes this is shown as "Redacted [for Privacy]" (or its functional equivalent) by the registrar. Insofar as such "privacy" or "proxy" registrations is concerned, paragraph 4(b) of the UDRP Rules provides that:

> "Any updates to the Respondent's data, such as through the result of a request by a privacy or proxy provider to reveal the underlying customer data, must be made before the two (2) business day period concludes or before the Registrar verifies the information requested and confirms the Lock to the UDRP Provider, whichever occurs first. Any modification(s) of the Respondent's data following the two (2) business day period may be addressed by the Panel in its decision."

For more information, please visit the FAQ page: Q&A: domain name registrant data and the UDRP, and the ICANN Registration data lookup tool: ICANN lookup.

4.4.1 WIPO Center practice

As a matter of panel-endorsed practice, in cases involving a privacy or proxy registration service initially named as the respondent, or where the name/organization is redacted, on timely receipt from the registrar ~~(or privacy or proxy service)~~ of information relating to an underlying or beneficial registrant, further to its compliance review and case notification responsibilities, the WIPO Center will (a) provide any disclosed underlying registrant information to the complainant, and (b) invite the complainant to amend the complaint to reflect such information.

Noting the definition of "respondent" in the UDRP Rules, where underlying registrant information is disclosed/provided to the complainant, and the complainant chooses not to amend its complaint, ~~and instead~~but rather to retain the ~~WHois~~publicly-listed registrant as the named respondent, the WIPO Center would not normally treat this as a complaint deficiency. Complainants do however tend to amend their complaints in such scenarios to reflect any disclosed underlying registrant information, in particular to avoid raising possible decision enforcement questions by the registrar.

4.4.2 Adding or replacing the respondent

When provided with underlying registrant information which differs from the respondent named in the complaint, a complainant may either *add* the disclosed underlying registrant as a co-respondent, or *replace* the originally named privacy or proxy service, or the redacted name/organization, with the disclosed underlying registrant. In either event, complainants may also amend or supplement certain substantive aspects of the complaint (notably the second and third elements) in function of any such disclosure. [See also section 4.11.2.]

4.4.3 Mutual jurisdiction

Noting the possibility for a respondent to commence a legal proceeding in one of two complainant-elected "mutual jurisdictions" (the location of the registrar's principal office, or the registrant's address ~~shown~~as reflected in the ~~WHois database at~~registrar's verification response to the ~~time the complaint is~~

~~submitted~~WIPO Center), when amending a complaint pursuant to disclosure of an underlying registrant, complainants will sometimes amend the mutual jurisdiction section of their complaint.

4.4.4 Complaint notification

Irrespective of the entity or entities ultimately recorded by the panel as the respondent(s) in a particular case, in satisfying its notification obligations, the WIPO Center practice provides notice of the complaint to all available registrant contacts including the privacy or proxy service and any underlying registrant.

4.4.5 Panel discretion

In all cases involving a privacy or proxy service and irrespective of the disclosure of any underlying registrant, the appointed panel retains discretion to determine the respondent against which the case should proceed.

Depending on the facts and circumstances of a particular case, e.g., where a timely disclosure is made, and there is no indication of a relationship beyond the provision of privacy or proxy registration services, a panel ~~may~~will typically find it appropriate to apply its discretion to record only the underlying registrant as the named respondent. On the other hand, e.g., where there is no clear disclosure, or there is some indication that the privacy or proxy provider is somehow related to the underlying registrant or use of the particular domain name, a panel may find it appropriate to record both the privacy or proxy service and any nominally underlying registrant as the named respondent.

4.4.6 Undisclosed/uncertain underlying beneficial registrant

Particularly noting UDRP paragraph 8(a), panels have found that where a "disclosed" registrant ~~is in turn what~~ appears to be yet another privacy or proxy service (sometimes referred to as a "Russian doll" scenario) or prima facie appears to be a false identity, such multi-layered obfuscation or possible cyberflight may support an inference of a respondent's bad faith, e.g., in an attempt to shield illegitimate conduct from a UDRP proceeding.

A number of panels have also made reference to paragraph 3.7.7.3 of the ICANN Registrar Accreditation Agreement which states that a ~~Whois-listed~~ registrant (referred to as the "Registered Name Holder") accepts liability for any use of the relevant domain name unless it timely discloses the contact information of any underlying beneficial registrant. [See generally section 3.6.]

4.5 How is the (working) language of a UDRP proceeding determined?

4.5.1 Language of Proceeding

Pursuant to paragraph 11 of the UDRP Rules, unless otherwise agreed by the parties, the default language of the proceeding is the language of the registration agreement, subject to the authority of the panel to determine otherwise.

Noting the aim of conducting the proceedings with due expedition, paragraph 10 of the UDRP Rules vests a panel with authority to conduct the proceedings in a manner it considers appropriate while also ensuring both that the parties are treated with equality, and that each party is given a fair opportunity to present its case.

Against this background, panels have found that certain scenarios may warrant proceeding in a language other than that of the registration agreement. Such scenarios include (i) evidence showing that the respondent can understand the language of the complaint, (ii) the language/script of the domain name particularly where the same as that of the complainant's mark, (iii) any content on the webpage under the disputed domain name, (iv) prior cases involving the respondent in a particular language, (v) prior correspondence between the parties, (vi) potential unfairness or unwarranted delay in ordering the complainant to translate the complaint, (vii) evidence of other respondent-controlled domain names registered, used, or corresponding to a particular language, (viii) in cases involving multiple domain names, the use of a particular language agreement for some (but not all) of the disputed domain names, (ix) currencies accepted on the webpage under the disputed domain name, or (x) other indicia tending to show that it would not be unfair to proceed in a language other than that of the registration agreement.

The credibility of any submissions by the parties and in particular those of the respondent (or lack of reaction after having been given a fair chance to comment) are particularly relevant.

Where it appears the parties reasonably understand the nature of the proceedings, panels have also determined the language of the proceeding/decision taking account of the panel's ability to understand the language of both the complaint and the response such that each party may submit pleadings in a language with which it is familiar.

4.5.2 Party requests concerning the Language of Proceeding (WIPO Center practice)

Panels have recognized that a preliminary determination by the WIPO Center may be necessary where a party (typically the complainant) requests for the proceeding to be administered in a language other than that of the registration agreement.

Following the registrar's confirmation as to the language of the registration agreement, and in order to preserve the panel's discretion under paragraph 11 of the UDRP Rules to determine the appropriate language of proceedings, where a complaint has been submitted in a language other than that of the registration agreement, the WIPO Center will notify both parties (in all relevant languages where possible) of the discrepancy between the language of the registration agreement and the complaint.

In such cases, the complainant is invited to either translate the complaint – which may be a verified machine translated version – or, if not already included in the original complaint, to formally submit a motivated request that the proceedings be conducted in the language of the complaint. Such requests often take account of the factors listed above in section 4.5.1. The respondent is given a subsequent opportunity to comment on or to oppose (if it wishes, in the language of the Registration Agreement) the complainant's arguments.

In the interest of fairness and to preserve continuity in the case, prior to panel appointment and determination of the language of the proceedings, where possible, the WIPO Center seeks to send "dual language" case-related communications to the parties (i.e., in both the language of the registration agreement, and the language of the complaint).

On panel appointment, both parties' arguments are provided to the panel for its determination as to the language of proceeding. This may include accepting the complaint as filed, and a response in the language of the registration agreement, thereby seeking to give both parties a fair opportunity to present their case. In certain cases however, owing to due process concerns, a panel may order that the complaint be translated into the language of the registration agreement.

See also Q&A: Language of Proceedings and the UDRP.

4.6 In what circumstances would a panel accept a party's unsolicited supplemental filing?

~~NB, at least at the WIPO Center, parties' unsolicited supplemental filings are not subject to party payment of additional administrative fees. (While other providers may charge a fee for processing such filings, a panel is under no obligation to accept it as part of the case file. On this subject see inter alia *Parfums Christian Dior S.A.Jadore*, WIPO Case No. .)~~

Paragraph 10 of the UDRP Rules vests the panel with the authority to determine the admissibility, relevance, materiality and weight of the evidence, and also to conduct the proceedings with due expedition.

Paragraph 12 of the UDRP Rules expressly provides that it is for the panel to request, in its sole discretion, any further statements or documents from the parties it may deem necessary to decide the case.

Unsolicited supplemental filings are generally discouraged, unless specifically requested by the panel.

On receipt of a request to submit an unsolicited supplemental filing or the actual receipt of such filing, the WIPO Center will confirm receipt of the request or filing to the parties, and forward such request or filing to the panel for its consideration as to admissibility.

In all such cases, panels have repeatedly affirmed that the party submitting or requesting to submit an unsolicited supplemental filing should clearly show its relevance to the case and why it was unable to provide the information contained therein in its complaint or response (e.g., owing to some ~~"~~unforeseen or exceptional~~"~~ circumstance).

Depending on the content of any admitted supplemental filing, the panel may issue further instructions to the parties, including a rebuttal/reply opportunity to the non-initiating party.

(Unsolicited supplemental filings are not subject to party payment of additional administrative fees.)

[See also section 4.7.]

4.7 Under what circumstances would a UDRP panel issue a Procedural Order?

As noted above in respect of supplemental filings, paragraph 12 of the UDRP Rules makes clear that it is for the panel to request, in its sole discretion, any further statements or documents from the parties that it deems necessary.

Paragraph 10 of the UDRP Rules similarly vests the panel with the authority to determine the admissibility, relevance, materiality and weight of the evidence, and also to conduct the proceedings with due expedition.

~~While~~Although it is relatively infrequent, where a panel believes it would benefit from additional information or arguments from the parties concerning contentions made in the pleadings or otherwise, it may issue a procedural order to the parties requesting such information or arguments.

Merely by way of example, scenarios in which a panel has issued a procedural order include (i) where a party makes a prima facie credible assertion the confirmation of which would benefit from additional supporting evidence (and irrespective of whether such assertion is disputed by the other party), (ii) where a party has failed to address a relevant claim made by the opposing party, (iii) where fairness calls for an opportunity for a party to respond to certain (usually unforeseeable) allegations or submissions by the other party~~.~~ or certain information discovered by the panel pursuant to its general powers, including to undertake limited factual research.

[See also section 4.8.]

4.8 May a panel perform independent research in assessing the case merits?

Noting in particular the general powers of a panel articulated inter alia in paragraphs 10 and 12 of the UDRP Rules, it has been accepted that a panel may undertake limited factual research into matters of public record if it would consider such information useful to assessing the case merits and reaching a decision~~.~~, in particular to affirm or corroborate a party's contention.

This may include visiting the website linked to the disputed domain name in order to obtain more information about the respondent or its use of the domain name, consulting historical resources such as the Internet Archive (www.archive.org) in order to obtain an indication of how a domain name may have been used in the relevant past, reviewing dictionaries or encyclopedias (e.g., Wikipedia), or accessing trademark registration databases.

In some circumstances, a panel may also rely on personal knowledge (e.g., to take "judicial notice" of the reputation of a well-known mark, or a corporate affiliation/structure).

Where a panel intends to rely on information outside the pleadings, in certain limited scenarios, e.g., where such information may not be general public knowledge or at least readily accessible, it may consider issuing a procedural order to give the parties an opportunity to comment on such information as it relates to the proceedings.

[See generally section 4.2.]

4.9 Can UDRP proceedings be suspended for purposes of settlement?

Paragraph 17 of the UDRP Rules makes clear that a proceeding may be suspended to facilitate settlement negotiations, or to implement a settlement agreement between the parties.

Prior to panel appointment: where, before appointment of the administrative panel, the complainant (or both parties jointly) submits a suspension request to the WIPO Center, the proceedings will be suspended to allow the parties to explore settlement options.

Given the expedited nature of UDRP proceedings such suspensions are typically for 30 days, with an additional 30 days normally available on request where necessary to give effect to the parties' settlement effort. When notifying the parties of the suspension, the WIPO Center will provide the parties with a

Standard Settlement Form merely to facilitate the implementation of any agreed transfer (and not to record any settlement particulars).

If the parties agree to settle their dispute, they should return the completed Standard Settlement Form to the WIPO Center.

Upon receipt of the completed Standard Settlement Form, the WIPO Center will direct the registrar to "unlock" the disputed domain name, ordinarily to allow it to be transferred to the complainant's control (or canceled).

Once the complainant confirms implementation of the settlement agreement (ordinarily that it has control of the disputed domain name), the WIPO Center will dismiss the proceedings and refund the panel portion of the complainant's filing fee~~. NB, other UDRP providers may not issue such a refund.~~.

Following panel appointment: a request from the parties to suspend the proceedings to explore settlement options after panel appointment is subject to the discretion of the panel. In the event of a settlement, the panel would normally terminate the proceedings in accordance with paragraph 17 of the UDRP Rules. In such a post-panel-appointment scenario however, no fee refund would be available.

4.9 Relevant decisions

4.10 How do panels handle cases involving a respondent's informal or unilateral consent for the transfer of the domain name to the complainant outside the "standard settlement process" described above?

Where parties to a UDRP proceeding have not been able to settle their dispute prior to the issuance of a panel decision using the "standard settlement process" described above, but where the respondent has nevertheless given its consent on the record to the transfer (or cancellation) remedy sought by the complainant, many panels will order the requested remedy solely on the basis of such consent. In such cases, the panel gives effect to an understood party agreement as to the disposition of their case (whether by virtue of deemed admission, or on a no-fault basis).

In some cases, despite such respondent consent, a panel may in its discretion still find it appropriate to proceed to a substantive decision on the merits. Scenarios in which a panel may find it appropriate to do so include (i) where the panel finds a broader interest in recording a substantive decision on the merits – notably recalling UDRP paragraph 4(b)(ii) discussing a pattern of bad faith conduct, (ii) where while consenting to the requested remedy the respondent has expressly disclaimed any bad faith, (iii) where the complainant has not agreed to accept such consent and has expressed a preference for a recorded decision on the merits, (iv) where there is ambiguity as to the scope of the respondent's consent, or (v) where the panel wishes to be certain that the complainant has shown that it possesses relevant trademark rights.

4.11 How do panels address consolidation scenarios?

The WIPO Center may accept, on a preliminary basis, a consolidated complaint where the criteria described below are prima facie met. Any final determination on consolidation would be made by the appointed panel, which may apply its discretion in certain circumstances to order the separation of a filed complaint. In all cases, the burden falls to the party seeking consolidation to provide evidence in support of its request.

4.11.1 Multiple unrelated complainants filing against a single respondent

Paragraph 10(e) of the UDRP Rules grants a panel the power to consolidate multiple domain name disputes. At the same time, paragraph 3(c) of the UDRP Rules provides that a complaint may relate to more than one domain name, provided that the domain names are registered by the same domain-name holder.

In assessing whether a complaint filed by multiple unrelated complainants may be brought against a single respondent, panels look at whether (i) the complainants have a specific common grievance against the respondent, or the respondent has engaged in common conduct that has affected the complainants in a similar fashion, and (ii) it would be equitable and procedurally efficient to permit the consolidation.

[See also section 1.4.]

4.11.2 Complaint consolidated against multiple respondents

Where a complaint is filed against multiple respondents, panels look at whether (i) the domain names or corresponding websites are subject to common control, and (ii) the consolidation would be fair and equitable to all parties. Procedural efficiency would also underpin panel consideration of such a consolidation scenario.

Panels have considered a range of factors, typically present in some combination, as useful to determining whether such consolidation is appropriate, such as similarities in or relevant aspects of (i) the registrants' identity(ies) including pseudonyms, (ii) the registrants' contact information including email address(es), postal address(es), or phone number(s), including any pattern of irregularities, (iii) relevant IP addresses, name servers, or webhost(s), (iv) the content or layout of websites corresponding to the disputed domain names, (v) the nature of the marks at issue (e.g., where a registrant targets a specific sector), (vi) any naming patterns in the disputed domain names (e.g., <mark-country> or <mark-goods>), (vii) the relevant language/scripts of the disputed domain names particularly where they are the same as the mark(s) at issue, (viii) any changes by the respondent relating to any of the above items following communications regarding the disputed domain name(s), (ix) any evidence of respondent affiliation with respect to the ability to control the disputed domain name(s), (x) any (prior) pattern of similar respondent behavior, or (xi) other arguments made by the complainant and/or disclosures by the respondent(s).

[See also section 4.4]

4.12 Under what circumstances may additional domain names be added to a filed complaint/ongoing proceeding?

Whether a request to add domain names to a filed complaint will be accepted may depend on whether the request is received prior, or subsequent to, complaint notification.

As the WIPO Center's UDRP fees ~~apply on a staggered sliding scale~~reflect the number of domain names, the addition of domain names may necessitate the payment of additional fees.

4.12.1 Addition of domain names prior to complaint notification

As a general rule, domain names held by the same registrant(s) may be added to a complaint before notification to the respondent(s)/formal commencement of the relevant proceeding.

Particularly where at the ~~Whois-listed~~time of filing the complaint the registrant is a privacy or proxy service, or redacted, on receipt ~~of confirmation~~ of the underlying registrant identity from the registrar relayed by the WIPO Center to the complainant, a complainant may wish to add other relevant domain names held by the same registrant to its complaint.

In the event proposed additional domain names involve marks not invoked in the original complaint, the complainant would be required to show relevant trademark rights corresponding to the new domain names. At the same time, the second and third UDRP elements may be updated where appropriate or applicable.

[See also sections 4.4 and 4.11]

4.12.2 Addition of domain names following complaint notification

Requests for addition of domain names to a complaint after it has been notified to the respondent and the proceedings have formally commenced are generally not encouraged – in particular given the potential to delay the case, and would be addressed by the panel on appointment.

Except in limited cases where there is clear evidence of respondent gaming/attempts to frustrate the proceedings (e.g., by the respondent's registration of additional domain names subsequent to complaint notification), panels are generally reluctant to accept such requests because the addition of further domain names would delay the proceedings (which are expected to take place with due expedition). Moreover, a panel declining such request would not prevent the filing of a separate complaint where such additional domain names may be addressed.

In those cases where panels would grant such a request, the complainant would need to hold relevant trademark rights and the proposed additional domain names would need to be prima facie registered by the same or related respondent. Moreover, in the event a panel would grant such a request, it may also order partial or full re-notification of the proceeding (which ~~may impact~~would extend the case timelines).

4.13 How do panels address domain names involving the mark of a third party trademark owner not joined in the complaint?

As described in section 1.12 concerning the first UDRP element, the presence, in a particular disputed domain name, of the mark of a third party not joined in a particular proceeding (e.g., <**complainant**mark+**thirdparty**mark>) would not by itself prevent a finding of confusing similarity.

While the presence of a third party mark in a domain name would not prevent a panel from rendering a decision on the merits, a number of panels have found it appropriate to issue any transfer order without prejudice to the concerned third party's rights.

Where a panel may have concerns that the rights of the third party mark owner would potentially be unduly impacted by a transfer order, some panels have issued a Procedural Order to seek some reasonable assurance of the third party's non-objection. In certain highly exceptional circumstances (e.g., where even through a Procedural Order via the complainant the third party is unreachable), a panel may order cancellation of the disputed domain name as opposed to a requested transfer.

4.14 What is the relationship between the UDRP and court proceedings?

By design, the UDRP system preserves parties' court options before, during, and after a UDRP proceeding; as indicated by UDRP paragraph 4(k), the UDRP does not bar either party from seeking judicial recourse.

Paragraph 18(a) of the UDRP Rules gives the panel discretion to suspend, terminate, or continue a UDRP proceeding where the disputed domain name is also the subject of other pending legal proceedings.

4.14.1 Suspension

Appointed panels are reluctant to suspend a UDRP case due to concurrent court proceedings, most notably because of the potential for indeterminate delay; the WIPO Center would similarly be reluctant to facilitate such suspension.

4.14.2 UDRP decision

Panels generally issue a UDRP decision on the merits even in an overlapping court–UDRP proceeding scenario where, notwithstanding the fact that a UDRP decision would not be binding on the court, the relative expediency of the UDRP versus courts is seen as a benefit to the parties. Panel reluctance to terminate a UDRP case on this basis often also takes account of, and respects, the potential for a court action to address causes of action separate from that being addressed in the UDRP proceeding.

Where there are prior or pending court or administrative (e.g., trademark office) proceedings, it is within the panel's discretion to determine the relevance to ascribe to such proceeding in the UDRP context, in light of the case circumstances. [See generally section 4.21.] Some panelists have held that (properly argued and evidenced) trademark infringement would render a use not legitimate under the Policy; in other cases, where the evidence is not adequate to substantiate a claim of trademark infringement, panels have held that the parties may avail themselves of national courts.

4.14.3 Impact of termination due to court proceedings on future UDRP filings

In the somewhat exceptional event a panel would terminate a UDRP proceeding because of its overlap with a court proceeding, the panel may specifically terminate the UDRP proceeding without prejudice to the filing of a future UDRP complaint pending resolution or discontinuation of the court proceeding. [See also section 4.18.]

4.14.4 National court competence

It is widely recognized that national courts are not bound by UDRP panel decisions. Where a domain name which has been the subject of a UDRP panel decision becomes subject to a national court proceeding (whether by a respondent pursuant to UDRP paragraph 4(k), or otherwise), such court case is generally acknowledged to represent a de novo hearing of the case under national law.

4.14.5 Court orders

Noting panel discretion concerning court proceedings, in some cases involving a court order for certain injunctive relief as to the disputed domain name(s), e.g., as in receivership cases, panels would generally render a UDRP decision rather than terminate or suspend the proceedings; implementation of such UDRP decision may be deferred pending the ultimate disposition of such receivership action.

4.14.6 Scope of UDRP as grounds for termination

Depending on the facts and circumstances of a particular case, and irrespective of whether the parties may also be engaged in court litigation, in some instances (e.g., complex business or contractual disputes) panels have tended to deny the case not on the UDRP merits but on the narrow grounds that the dispute between the parties exceeds the relatively limited "cybersquatting" scope of the UDRP, and would be more appropriately addressed by a court of competent jurisdiction.

In some cases, the complainant alleges that the respondent's actions constitute trademark infringement under national law. Although the UDRP is not the forum to conclusively assess whether a respondent's actions constitute trademark infringement (as those are matters for a court or trademark office tribunal to decide), such cases can also be decided under the Policy, and allegations and evidence that the respondent's behavior constitutes trademark infringement may be relevant to the assessment of whether the respondent's use of the domain name is bona fide for purposes of assessing the second and third elements. [See also sections 2.13.2 and 2.15.]

[See also WIPO Select UDRP-related Court Cases.]

4.15 To what extent is national law relevant to panel assessment of the second and third UDRP elements (rights or legitimate interests, and bad faith)?

UDRP paragraph 15(a) provides that a panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the UDRP, the UDRP Rules, and any rules and principles of law that it deems applicable.

Panels have broadly noted that insofar as the UDRP system is designed to operate in a global context, while rooted in general trademark law principles, in its own terms UDRP jurisprudence generally would not require resort to particular national laws. That said, panels may apply national law on questions such as whether a complainant has rights in a mark or the scope of rights granted.

In some limited cases such as where the parties share a common nationality and ~~the import of~~ a specific national law concept is particularly germane to an issue in dispute, panels have applied national law principles in assessing the UDRP elements. In such cases, panels have often noted in the applicable UDRP decision the fact that the laws of a particular jurisdiction (possibly that elected by the complainant under UDRP paragraph 4(k)) may well govern any subsequent court case.

Particularly where national trademark office proceedings between the parties have occurred or are pending, panels will normally consider the relevance of such proceedings to assessment of the case merits (e.g., where co-existence principles or limitations to the scope of rights may be present).

[See also sections 1.1.2 and 4.14]

4.16 In what circumstances will panels issue a finding of Reverse Domain Name Hijacking (RDNH)?

Paragraph 15(e) of the UDRP Rules provides that, if "after considering the submissions the panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding~~".~~."

RDNH is furthermore defined under the UDRP Rules as "using the UDRP in bad faith to attempt to deprive a registered domain-name holder of a domain name." Panels have also referred to paragraphs 3(b)(xiii) and (xiv) of the UDRP Rules in addressing possible RDNH scenarios.

Panels have consistently found that the mere lack of success of a complaint is not itself sufficient for a finding of RDNH~~.~~ (in particular where the respondent may have acted inequitably). At the same time, the mere fact of a respondent default would not by itself preclude an RDNH finding as this ultimately turns on the complainant's conduct. In either event, following some early cases to the contrary, panels have more recently clarified that, for an RDNH finding to be made, it is not necessary for a respondent to seek an RDNH finding or prove the presence of conduct constituting RDNH.

Reasons articulated by panels for finding RDNH include: (i) facts which demonstrate that the complainant knew it could not succeed as to any of the required three elements – such as the complainant's lack of relevant trademark rights, clear knowledge of respondent rights or legitimate interests, or clear knowledge of a lack of respondent bad faith (see generally section 3.8) such as registration of the disputed domain name well before the complainant acquired trademark rights, (ii) facts which demonstrate that the complainant clearly ought to have known it could not succeed under any fair interpretation of facts reasonably available prior to the filing of the complaint, including relevant facts on the website at the disputed domain name or readily available public sources such as the WhoIs [RDAP] database, (iii) unreasonably ignoring established Policy precedent notably as captured in this WIPO Overview – except in limited circumstances which prima facie justify advancing an alternative legal argument, (iv) the provision of false evidence, or otherwise attempting to mislead the panel, (v) the provision of intentionally incomplete material evidence – often clarified by the respondent, (vi) the complainant's failure to disclose that a case is a UDRP refiling, (vii) filing the complaint after an unsuccessful attempt to acquire the disputed domain name from the respondent without a plausible legal basis, (viii) basing a complaint on only the barest of allegations without any supporting evidence.

Given the undertakings in paragraphs 3(b)(xiii) and (xiv) of the UDRP Rules, some panels have held that a represented complainant should be held to a higher standard. [See also discussion of the use of AI tools in section 4.2.]

NB, parties may be aware that unlike in the UDRP system, certain national courts may (where invoked) impose monetary penalties (including punitive damages) where the equivalent of RDNH is found.

4.17 Does "delay" in bringing a complaint bar a complainant from filing a case under the UDRP?

Panels have widely recognized that mere delay between the registration of a domain name and the filing of a complaint neither bars a complainant from filing such case, nor from potentially prevailing on the merits.

Panels have noted that the UDRP remedy is injunctive rather than compensatory, and that a principal concern is to halt ongoing or avoid future abuse/damage, not to provide equitable relief. Panels have furthermore noted that trademark owners cannot reasonably be expected to permanently monitor for every instance of potential trademark abuse, nor to instantaneously enforce each such instance they may become aware of, particularly when cybersquatters face almost no (financial or practical) barriers to undertaking (multiple) domain name registrations.

Panels have therefore declined to specifically adopt concepts such as laches or its equivalent in UDRP cases.

Panels have, however, noted that in specific cases, certain delays in filing a UDRP complaint may make it more difficult for a complainant to establish its case on the merits, particularly where the respondent can show detrimental reliance on the delay.

4.18 Under what circumstances would a refiled case be accepted?

A refiled case is one in which a newly-filed UDRP case concerns identical domain name(s) and parties to a previously-decided UDRP case in which the prior panel denied the complaint on the merits. (The previous case may or may not be from another UDRP provider.) As the UDRP itself contains no appeal mechanism, there is no express right to refile a complaint; refiled complaints are exceptional.

Panels have accepted refiled complaints only in highly limited circumstances such as (i) when the complainant establishes that legally relevant developments, that would directly and materially impact the basis for the prior denial, have occurred since the original UDRP decision; (ii) a breach of natural justice or of due process has objectively occurred; (iii) where serious misconduct in the original case (such as perjured evidence) that influenced the outcome is subsequently identified; (iv) where new material evidence related to the basis for the prior denial that was reasonably unavailable to the complainant during the original case is presented; or (v) where the case has previously been decided (including termination orders) expressly on a "without prejudice" basis.

In the refiling itself, a complainant must clearly indicate the new material grounds it believes would justify acceptance of the refiled complaint, as noted above. The WIPO Center would initially assess whether grounds have been pleaded which prima facie justify accepting the refiled complaint. It remains however for any appointed panel to ultimately determine whether such preliminarily-accepted refiled complaint should proceed to a decision on the merits.

In certain highly limited circumstances (such as where a panel found the evidence in a case to be finely balanced, and opined that it may be possible for future respondent behavior to cast a different light on a panel's assessment of bad faith), a panel may record in its decision that in the event certain conditions would be met, acceptance of a refiled complaint may be justified. The extent to which any such conditions have been met would bear on determining whether a refiled complaint should be accepted prima facie by the provider, and subsequently by the panel.

[See also section 4.16]

4.19 Can a registry or registrar be liable under the UDRP?

When acting solely in its capacity as a registry or registrar, and not also as a registrant, a registry or registrar is not subject to jurisdiction under the UDRP as a respondent.

A registry or registrar would be subject to jurisdiction under the UDRP where it has registered a domain name for itself, and not demonstrably on behalf of a specific third-party registrant customer. Typically in such cases a registry- or registrar-affiliated entity, as opposed to the registry or registrar itself, is at least listed in the relevant ~~Whois~~database as the registrant.

[See also section 4.4]

4.20 How does the expiration or deletion of a domain name subject to a UDRP proceeding affect the proceeding?

Where a domain name which is subject to an active UDRP proceeding is scheduled to expire or is deleted during the course of the proceeding, to facilitate continuity and resolution of the dispute, ICANN has incorporated the Expired Domain Deletion Policy (or EDDP) into its Registrar Accreditation Agreement (RAA), applicable to all ICANN-accredited Registrars and all gTLD registrations. The EDDP (RAA paragraph 3.7.5.7) reads as follows:

"In the event that a domain which is the subject of a UDRP dispute is deleted or expires during the course of the dispute, the complainant in the UDRP dispute will have the option to renew or restore the name under the same commercial terms as the registrant. If the complainant renews or restores the name, the name will be placed in Registrar HOLD and Registrar LOCK status, the WHOIS [RDAP] contact information for the registrant will be removed, and the WHOIS [RDAP] entry will indicate that the name is subject to dispute. If the complaint is terminated, or the UDRP dispute finds against the complainant, the name will be deleted within 45 days. The registrant retains the right under the existing redemption grace period provisions to recover the name at any time during the Redemption Grace Period, and retains the right to renew the name before it is deleted."

Further to the EDDP, where the expiration or deletion of a domain name subject to a UDRP proceeding comes to the WIPO Center's attention, as a courtesy to all parties the WIPO Center will contact the parties and registrar drawing their attention to the domain name's status (i.e., that it has expired/been deleted). The registrar is expected to confirm whether any action is required by the parties to renew/restore the disputed domain name so that it may remain under "lock" and the UDRP proceeding may continue. Any renewal/registration fee required for the registrar to maintain the domain name registration status is the responsibility of the parties. If the domain name is not renewed/restored, the case may be deemed withdrawn.

While the WIPO Center will forward any registrar reply to the parties, it is solely the parties' duty to ensure that any actions required to maintain the domain name's active/locked status, including any registrar/registration fee payment, are fulfilled.

Once the relevant domain name registration passes into "pendingDelete" status at the registry level, it may no longer be possible for the parties to renew/restore the domain name registration~~.~~ in which case the filed UDRP case cannot continue (as there is no registrant to proceed against).

Expiration or deletion prior to complaint filing: ~~The~~ the WIPO Center is typically unable to register a complaint if the disputed domain name is *already* expired or deleted before receipt of the UDRP complaint. In some cases however, the domain name status is only known after the complaint is filed and the registrar asked to confirm certain information. This may occur e.g., due to the automatic "renewal" of a domain name by a registrar being presumptively reflected in the WhoIs [RDAP] (e.g., as a matter of administrative courtesy), or due to a delete request received by the registrar prior to the filing of a UDRP complaint but not yet reflected in the registrar's WhoIs [RDAP] records.

For information, see the page: Q&A: domain name expiration and the UDRP.

4.21 What is the WIPO Center's role, if any, in decision implementation?

The WIPO Center is a neutral dispute resolution provider for UDRP cases. As such, the WIPO Center's role concerns the administration of the procedure and normally ends upon notification of a panel decision to the parties and registrar (or as the case may be, upon termination/settlement).

Absent evidence that the losing respondent has commenced a lawsuit in a complainant-elected "mutual jurisdiction" further to the ICANN Registrar Accreditation Agreement (which incorporates the UDRP as an ICANN consensus Policy), a registrar is expected to implement a UDRP panel's decision.

UDRP paragraph 4(k) provides in relevant part ("you" refers to the respondent, "we"/"our" refers to the registrar):

> The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either [party] from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If [the UDRP] Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the [UDRP] Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the [UDRP] Rules. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our WhoIs [RDAP] database. See Paragraphs 1 and 3(b)(xiii) of the [UDRP] Rules for details.) If we receive such documentation within the ten (10) business day period, we will not implement the [UDRP] Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.

In relevant cases, in order to assist the registrar and parties, the WIPO Center would be able to clarify the mutual jurisdiction which was elected by the complainant in its filed complaint.

NB, in the event a complainant may be experiencing difficulty in the implementation of a panel decision, the matter may be referred to ICANN (e.g., at compliance@icann.org), or by using the ICANN compliance complaint form available at https://forms.icann.org/en/resources/compliance/complaints/dndr/udrp-form.

To assist the proper functioning of the UDRP more generally, parties may also raise such implementation matters to the WIPO Center's attention.

[See section 4.14.]

4.22 What is the relation of the UDRP to the URS?

The URS is the ICANN-created Uniform Rapid Suspension system for new gTLDs. (At present the WIPO Center is not a provider for URS cases.)

Under the relevant ICANN provisions, a URS complaint may not be filed if there is a pending URS or UDRP proceeding involving the same domain name(s). There is no explicit prohibition however, against the filing of a UDRP proceeding during a URS case. (Paragraphs 16 and 17 of the URS rules address concurrent legal proceedings.) In such event, the filing party may wish to consider whether to withdraw any such URS case after the filing of the UDRP proceeding, to maintain the registrar "lock" on the domain name while avoiding potential questions regarding implementation of overlapping decisions.

There have also been UDRP proceedings filed where the same domain name was previously subject to a URS case. In such event, the UDRP complaint should make this clear.

UDRP panels have noted that a URS case shall not cause prejudice in a UDRP proceeding. This stems in part from the fact that, aside from not being specifically linked together by ICANN in procedural terms, the URS and UDRP are distinct dispute resolution mechanisms. While the UDRP operates on an "on balance" standard, the burden of proof on the more limited pleadings provided for under the URS requires that the complainant demonstrate by "clear and convincing evidence" that the particular case facts merit a determination in its favor. The URS only provides for a proportionally appropriate remedy, namely the temporary domain name suspension (instead of the transfer provided for under the UDRP). Importantly, URS determinations rarely provide insight into the particular legal reasoning applied. Thus, while a UDRP panel should be made aware of a URS determination, it is not bound by that determination.

NB, despite its more limited pleadings and remedy, the URS foresees a range of various appeals layers over an extended time period.

[See generally section 4.2.]

WIPO UDRP Toolkit

- UDRP
- UDRP Rules
- WIPO Supplemental Rules
- WIPO ~~Jurisprudential~~ Overview 3.1~~0~~
- Legal Index of WIPO UDRP Panel Decisions
- Search WIPO Cases and WIPO Panel Decisions
- ~~WIPO Model Complaint~~
- ~~WIPO Model Response~~
- ~~Schedule of Fees~~
- Q&A: registrant data and the UDRP
- ICANN Registration data lookup tool
- Q&A: Language of Proceedings and the UDRP
- Q&A: domain name expiration and the UDRP