

# Report of Public Comments

<b>Title:</b>	<b>Locking of a Domain Name Subject to UDRP Proceedings – Initial Report</b>		
<b>Publication Date:</b>	29 May 2013		
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<b>Comment Period:</b>		<b>Important Information Links</b>	
Comment Open Date:	15 March 2013		
Comment Close Date:	26 April 2013		
Reply Close Date:	17 May 2013		
Time (UTC):	23:59		
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<b>Section I: General Overview and Next Steps</b>			
<p>The 'locking' of a domain name registration associated with UDRP proceedings is not required by the UDRP as currently written, but is a common practice that has developed around it. Consequently, there is no uniform approach, which has resulted in confusion and misunderstandings. To address this issue, the GNSO Council decided to initiate a Policy Development Process on 15 December 2011. As part of its deliberations, the WG was required to consider the following questions:</p> <ol style="list-style-type: none"><li>1. Whether the creation of an outline of a proposed procedure, which a complainant must follow in order for a registrar to place a domain name on registrar lock, would be desirable.</li><li>2. Whether the creation of an outline of the steps of the process that a registrar can reasonably expect to take place during a UDRP dispute would be desirable.</li><li>3. Whether the time frame by which a registrar must lock a domain after a UDRP has been filed should be standardized.</li><li>4a. Whether what constitutes a "locked" domain name should be defined.</li><li>4b. Whether, once a domain name is 'locked' pursuant to a UDRP proceeding, the registrant information for that domain name may be changed or modified.</li><li>5. Whether additional safeguards should be created for the protection of registrants in cases where the domain name is locked subject to a UDRP proceeding.</li></ol> <p>The UDRP Lock WG published its <a href="#">Initial Report</a> for public comments on 15 March 2013. In its <a href="#">Initial Report</a>, the PDP Working Group presents eleven preliminary recommendations, which are expected to usefully clarify and standardize how a domain name is locked and unlocked during the course of a UDRP Proceeding for all parties involved. Amongst others, these recommendations include:</p> <ul style="list-style-type: none"><li>• A definition of 'locking' in the context of a UDRP Proceeding - the term "lock" means preventing any changes of registrar and registrant [without impairing the resolution of the domain name]<sup>1</sup> (Preliminary recommendation #1)</li><li>• Proposed modification of the UDRP rules to no longer require that the complainant sends a copy of the complaint to the respondent to avoid cyberflight<sup>2</sup> (Preliminary recommendation #2)</li></ul>			

- Requirement for the registrar to 'lock' the domain name registration within 2 business days following a request for verification from the UDRP Provider (Preliminary recommendation #3)
- Clarifying how to deal with changes to contact information and/or lifting of proxy / privacy services (Preliminary recommendation #7 and #8)
- Clarifying the process for the unlocking of a domain name registration following the conclusion of a UDRP proceeding (Preliminary recommendation #9)

In addition to these recommendations, the WG put forward two possible options in its report to clarify the process in case a settlement is reached and requested community input on both of these or possible alternatives.

Following the review of the public comments received, the Working Group will continue its deliberations and finalize its report for submission to the GNSO Council.

## Section II: Contributors

*At the time this report was prepared, a total of five (5) community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.*

### Organizations and Groups:

Name	Submitted by	Initials
International Federation of Intellectual Property Attorneys	Julian Crump	FICPI
MarkMonitor	Kiran Malancharuvil	MM
Internet Commerce Association	Philip S. Corwin	ICA
Com Laude	Nick Wood	CL

### Individuals:

Name	Affiliation (if provided)	Initials
Joseph Peterson		JP

## Section III: Summary of Comments

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

### **General Comments**

FICPI generally accepts and agrees with the conclusions and suggestions presented by the WG especially in light of them improving legal certainty for all affected parties.

MM submitted a statement providing general support for all comments submitted by FICPI.

CL welcomes and supports the Preliminary Recommendations whilst noting that some actors have exploited imprecisions in the UDRP rules by acting against the policy's spirit.

JP noted that, as somebody who manages a large domain portfolio, he opposed to reduce the time frame to respond to UDRP allegations.

**Preliminary Recommendation #1 - In this context, the term “lock” means preventing any changes of registrar and registrant [without impairing the resolution of the domain name]<sup>1</sup>.**

FICPI supports the proposed clarification because “locking” of a disputed domain name should mean that ‘any request for the transfer’ of such a disputed domain ought to ‘be denied’.

ICA has no objections to either establishing a ‘standard definition of ‘lock’’ or the establishment of ‘uniform procedures to be followed by registrars [...] as a consequence of a UDRP filing.’ However, ICA is of the view that the launch of a UDRP proceeding should not impair a domain’s resolution or renewability.

**Preliminary Recommendation #2 - Modify the provision from the UDRP rules that specifies that upon submission of the complaint to the UDRP provider the complainant should also ‘state that a copy of the complaint [...] has been sent or transmitted to the respondent’ (section 3, b – xii) and recommend that, as a best practice, complainants need not inform respondents that a complaint has been filed to avoid cyberflight. The UDRP Provider will be responsible for informing the respondent once the proceedings have officially commenced.**

FICPI states that the suggested modification is already working in practice in most ccTLD dispute resolution procedures and strongly supports this recommendation.

ICA and JP strongly objects to the proposed deletion of the current UDRP requirement that the complainant shall provide the respondent domain registrant with a copy of the complaint at the same time it is submitted to the UDRP Provider, because in their view this will ‘substantially diminish the ability of a domain registrant to mount an effective defense’. The ICA believes that the Report ‘lacks validated documentation’ showing that cyberflight is sufficiently widespread to justify a fundamental degradation of registrants’ rights. If verifiable documentation existed, showing cyberflight to be a widespread problem, ICA would alternatively propose that the domain registrar be required to notify the registrant of the UDRP filing at the same time it confirms to the UDRP provider that the domain has been locked – and that the registrant be provided at that time with a full copy of the filed complaint, to be provided by the UDRP provider to the registrar at the time it transmits the verification request – in conjunction with an increase in UDRP response time to 24 days from the current 20 days, ‘to offset the reduction and render a neutral result.’

**Preliminary Recommendation #3a - Following receipt of the complaint, the UDRP Provider will, after performing a preliminary deficiency check<sup>2</sup>, send a verification request to the Registrar, including the request to prevent any changes of registrar & registrant for the domain name registration. The registrar is not allowed to notify the registrant of the pending proceeding until such moment that any changes of registrar**

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<sup>1</sup> The WG is considering adding the bracketed language and would welcome community input on the proposed addition.

<sup>2</sup> This is an initial check the UDRP Provider performs to ensure it does not concern a bogus complaint. This check should not be confused with the administrative compliance check as described in the UDRP which is performed as per step 4 of this proposal.

**and registrant have been prevented, but may do so once any changes of registrar and registrant have been prevented. In the case of accredited privacy / proxy providers<sup>3</sup> or a privacy / proxy provider affiliated with the registrar, the registrar may contact the accredited / affiliated privacy / proxy provider to allow for the reveal of the proxy customer data. However, such contact may only be established after an initial lock has been applied preventing any changes of registrar and registrant.**

FICPI supports this recommendation: 'it is important that the UDRP provider promptly makes the initial formal request for registrar verification, and that the locking of a disputed domain name is done at the same time.'

If documented problems of cyberflight are provided, ICA proposes amending "may do so" to "shall do so immediately". ICA notes that this would maximize the registrant's time to secure counsel and prepare a response.

**Preliminary Recommendation #3b - Within 2 business days<sup>4</sup> at the latest following receipt of the verification request from the UDRP Provider, the Registrar will modify the status of the registration to prevent any changes of registrar and registrant. These changes must be prevented within 2 business days from the date of receipt of a request for verification through the remaining pendency of the UDRP Proceeding, except in case of the suspension of a UDRP proceeding (see recommendation #10). [.....]**

FICPI notes that the WG suggested definition of "business days" 'is also not perfectly clear – depending on what is considered as a "business day" in the jurisdiction of each case.' The FICPI notes that although the definition may be acceptable, it would also be recommendable to require relevant entities to state (in their rules pertaining to dispute resolution procedures) what their yearly business days are.

FICPI is of the view that 'Whois record modifications after filing but before commencement of action lead to unnecessary deficiencies and amendments in the context of the UDRP process.' FICPI notes that in cases of Proxy/privacy services being involved, 'current rules are unclear as to who is the correct respondent and what is the proper jurisdiction for such cases.' Thus, registrant information ought not to be modified once the domain name is "locked". Moreover, FICPI 'welcomes the suggested clarification that the [UDRP] provider is under no obligation to require the complainant to amend its complaint, should a further privacy/proxy customer information be released after the lock is applied'

**Preliminary Recommendation #4 - The registrar must confirm to the UDRP Provider within 2 business day following receipt of the verification<sup>5</sup> request from the UDRP Provider that any changes of registrar and registrant have been prevented and will be prevented during the pendency of the proceeding and verifies the information requested by the UDRP Provider.**

FICPI supports this recommendation, which in its view represent 'another way to speed up the initial part of the process.'

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<sup>3</sup> To apply to accredited privacy / proxy providers following finalization of the privacy / proxy accreditation program by ICANN.

<sup>4</sup> Business days are defined as business days in the jurisdiction of the entity required to undertake the action, in this case the registrar.

<sup>5</sup> The UDRP Provider will send a request to the registrar to verify amongst others that the named Respondent is the actual registrant of the domain name(s) in issue, language of the registration agreement as well as checking the Respondent's contact details.

**Preliminary Recommendation #5 - If deemed compliant, the UDRP Provider shall forward the complaint to the Registrar and Respondent and notify them of the commencement of the administrative proceeding no later than 3 business days<sup>6</sup> following receipt of the fees paid by the complainant.**

FICPI restates the importance to clarify the meaning of 'business days' in each case; see comment on #3b above.

**Preliminary Recommendation #6 - If the complaint should remain non-compliant, or fees unpaid, after the period for the administrative deficiency check per UDRP Para 4 has passed, or if the complainant should voluntarily withdraw during that period, the UDRP Provider informs the Registrar that the proceeding is withdrawn. The Registrar shall, within one business day of the transmission of the notice of withdrawal, release the "lock".**

FICPI supports this Recommendation.

**Preliminary Recommendation #7 - As part of its notification to the Registrant, the UDRP Provider informs the Registrant that any corrections to the Registrant's contact information during the remaining pendency of the proceedings are also required to be communicated to the UDRP Provider as per UDRP rule 5(ii) and (iii).**

FICPI supports this Recommendation.

**Preliminary Recommendation #8 - This notification would also include information that any changes as a result of lifting of proxy / privacy services, following the 'locking', would need to be discussed / addressed by the UDRP Panel directly. The WG recommends that this issue is further reviewed as part of the proxy / proxy accreditation program.**

FICPI points out that proxy/privacy registrations should not be seen as 'indication of bad faith registration and/or use.' FICPI supports 'further review of this issue' and proposes that 'in cases where the information needs to be kept confidential, the identity of the 'underlying Registrant' is only made known to the parties pertaining to the UDRP proceedings.

**Preliminary Recommendation #9 - Upon receipt and communication of a decision from the Provider, the Registrar must within 3 business days communicate to each Party, the Provider, and ICANN the date for the implementation of the decision in accordance with the Policy (UDRP Rule 16 and UDRP Paragraphs 4(k) and Paragraph 8(a)). If the Complainant has prevailed, the Registrar shall implement the Panel order immediately after 10 business days have elapsed (UDRP Paragraph 4(k)). The Complainant or its Authorized representative is required to provide the Registrar with the required information regarding implementation; this may include the information that should be in the Whois. If the Respondent has prevailed, the Registrar shall prohibit transfer of the domain name to another registrar or registrant for 15 business days from the date the decision is transmitted from the Provider (UDRP Paragraph 8).**

FICPI supports this Recommendation.

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<sup>6</sup> This change to the UDRP Rules (currently it says 'calendar' days) is recommended to ensure that this is in line with the 2 business day requirement to lock as otherwise there may be a situation whereby 2 business days are longer than 3 calendar days, not allowing the UDRP Provider to perform the administrative checks within the allocated timeframe.

**Preliminary Recommendation #10** - In the case of suspension of a proceeding (when the parties have agreed to a settlement), the UDRP Provider informs the Registrar of the Suspension, including the expected duration of the suspension. Should both parties come to a settlement, which would involve a transfer, cancellation or agreement that the registration will remain with the Respondent, the registrar must remove any lock preventing a transfer or cancellation within 2 Business days of confirmation of the settlement by both Parties.

FICPI welcomes this clarification. FICPI notes 'is important to retain the ability to "unlock" a disputed domain name during the UDRP proceedings in cases wherein parties agree to a transfer.'

**In relation to the settlement of a UDRP Proceeding, the Working Group has discussed the following two options to further clarify the steps involved. However, the Working Group has not come to a conclusion yet which of these two options, or a possible alternative, to recommend. As a result, the Working Group is requesting community input on these options, and suggestions for possible alternatives so that these can be reviewed as part of the discussions on the Final Report. The two options are:**

**Option A: - (1) parties ask for suspension, (2) parties settle, (3) parties inform provider, (4) provider issues order to registrar to change the holder details or delete the domain name (5) that change or deletion happens, (6) complainant confirms change or deletion is complete, and (7) provider dismisses case**

**Option B - (1) parties ask for suspension (suspension request includes automatic dismissal when the suspension period is up), (2) provider issues order allowing registrar to unlock for the sole purpose of (whatever the settlement is), (2) parties settle, (3) parties request the registrar to unlock (not to manage anything further, like terms, just unlock to allow transfer), and (4) provider dismisses case automatically with no further action needed (if settlement discussions break down, either party can request that the case be reinstated before automatic dismissal).**

FICIP prefers the adoption of Option B.

In its submission, Com Laude proposes an alternative option: 'at any stage of a UDRP proceeding (i) the parties jointly notify the Provider and registrar of their wish for a 30-day suspension of the proceedings, (ii) if the parties need additional time to negotiate a settlement, they may jointly request one 30-day extension, (iii) if the parties are unable to agree on a settlement, the proceedings would recommence at their pre-suspension stage, (iv) If the parties reach an agreement, they would jointly inform the Provider and the registrar of the desired Whois changes, the domain name would be unlocked, and the proceedings dismissed without prejudice'.

**Preliminary Recommendation #11** - ICANN, in collaboration with UDRP Providers, Registrars and other interested parties, will develop educational and informational materials that will assist in informing affected parties of these new requirements and recommended best practices following the adoption by the ICANN Board of these recommendations.

FICPI notes that it looks forward 'to seeing this educational and informational material, which should be useful to [their] members in their daily work of providing efficient assistance to clients in UDRP cases.'

ICA agrees that the proposed material would be beneficial and believes that 'such materials should be subject to public comment prior to [their] final adoption.'

#### **Charter Question Charter Question 5**

In relation to Charter Question 5 concerning possible additional safeguards for registrants, ICA suggests the adoption of a specific prohibition against unilateral registrar movement of a domain name to a new account

that may deprive the registrant of control over its domain name .

**Other comments**

ICA notes that it continues to be of the view that UDRP reform of at least a procedural nature should be initiated in the near future with ‘a primary focus on creating a standard, enforceable contract between ICANN and all accredited UDRP providers’. ICA furthermore points out that some ICA members have reported that a registrar ‘lock’, whether imposed in response to a UDRP or for other purposes, has impaired renewal of a domain that is approaching expiration. ICA therefore urges the WG to consider this issue as part of its recommendations.

**Section IV: Analysis of Comments**

*General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.*

Following the complete review of the public comments received, the Working Group will continue its deliberations and finalize its report for submission to the GNSO Council. The review and evaluation of the comments received will continue over the course of the next weeks. These will be available in due time on the Working Group’s workspace and incorporated in the Final Report as may be appropriate (see <https://community.icann.org/display/udrpproceedings/Home>).