

Everything You've Ever Wanted to Know About UDRP - With David Weslow

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Domain name disputes are happening more and more every day. In today's show, you are going to learn everything you need to know about the Uniform Dispute Resolution Process for domain names from a domain name intellectual property expert. But first, these messages from our sponsors.

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Here's your program.

Michael Cyger: Hey everyone. My name is Michael Cyger, and I'm the Publisher of DomainSherpa.com - the website where you come to learn how to become a successful domain name entrepreneur and investor directly from the experts. Businesses and individuals are coming forth in record numbers this year charging one another with domain name copyright infringement and trademark violation. Through an action known as UDRP, or Uniform Dispute

Resolution Process, anyone can pursue possession of a domain name they believe is legally theirs. But UDRP action is not always clear-cut, and the results often confuse and disappoint. Today, we are joined by a past Sherpa. David Weslow, Partner at Wiley Rein LLP, who specializes in litigation and transactions involving trademarks, copyrights, and domain names.

Full disclosure -- David is also one of our sponsors. I invited him here not because of his sponsorship, but because of his IP expertise and his willingness to share with the Domain Sherpa audience, and help us all learn more about this topic.

And before we get started, I want to also be sure to provide a disclaimer that David is here as a guest, providing general information; not offering specific legal advice or counsel. Be sure to consult an attorney for any specific legal questions you may have. David, welcome back to the show.

David Weslow: Michael, thanks for having me back on.

Michael: It is great to have you back. When you were last here - and that interview aired July 26, 2011 -, we discussed a broad range of important legal topics for domain name investors and developers like buy-sell domain name agreements and trademarks. We talked about auto-blogging software that is popular on WordPress sites, and how that can get you into trouble. We discussed UDRP issues and lawsuits, and much more. For anybody that wants to go back and watch that interview, go on to the right hand side of the Domain Sherpa window and you can see past interviews; and scroll down and you'll see David Welsow's name listed there. Actually, twice. He discussed legal issues. You discussed legal issues, David. And then we had you on discussing the ICANN (Unclear 2:40.5) conference and how the GTLDs were coming out. So, today I would like to explore the anatomy and forensics of a UDRP action, and how domain name investors and developers can position themselves in case they are involved in one, or they need to start an action. So, here, near the end of 2012, we are entering the fourth quarter. It seems like a record year for UDRP actions. From at least my perspective, it seems like they are in the news all the time. Do you have any data around the number of UDRPs that have been filed this year?

David: Sure. And I think we are going to talk, in more detail, about the four service providers for the UDRP. Not all of them release their statistics on UDRP filings, but the largest service provider is The World Intellectual Property Organization (WIPO) in Geneva. WIPO does release its statistics; so let me look at them here. Year to date, for 2012, there have been 2,072 UDRP filing with WIPO. For the entire year of 2011, there were 2,764. So, with a number of months left in this year, I think that does support your feeling that we are probably on track for this to be a record year; and probably the highest year since the advent of the UDRP, particularly when we consider this is data from just one of the providers.

Michael: Yeah. And what do you attribute this increase in UDRPs to?

David: I think it really comes down to two things. The first, for me, is that domain names are increasingly in the media. There is more attention to domain names. They are becoming more mainstream through GoDaddy SuperBowl commercials and through other things that you see. More in the news about GTLDs is another example. More and more people are learning about domain names. So I think, on the one hand, that leads to more people beginning to invest in domain name. People that may not have been aware that you should not register a domain name that conflicts with a trademark whereas folks, such as yourself, who are experts in the industry learned that years ago. And in my opinion, there was a dip a few years ago in those types of really direct match domain name registrations where it was clearly a trademark. I think there are more people entering into the industry, so there are more of those types of registrations. And then I think the second piece of that is, as domain names become more accepted, or more and more companies learn about them, we are seeing online branding and eCommerce become more and more important for companies. So, they are looking at their online profile. They are looking at: How is their name being used? Are there any domain names that they should own? And as eCommerce becomes more and more appropriate, then we are seeing more companies file UDRP actions. And I think we can talk about this in more detail, but I have also noticed, as part of the uptick - and I think you will probably have questions about this -, it seems like there are more and more UDRP rulings in favor of the respondent, which I do not have any data to support, but I have observed that as well; and I think that comes from attorneys and parties using the UDRP

who may not be as familiar with it and who may not realize that it is designed to address a particular problem - clear cybersquatting. It is not really intended to address business disputes or other types of legal claims. And so, when that type of claim is asserted in the UDRP, the panelist is going to rule against the complainant. The only other scenario I have seen is that we have seen UDRP filings by companies that are not attorneys. I am aware of one UDRP decision that pointed out that the complainants' arguments look like they had been assembled by an automated computer process. Well, you can guess that the panelist ruled against the complainant in that case. So, those types of filings are, in my opinion, also leading more of these decisions in favor of the respondent.

Michael: Okay. So we are going to get into all of these cases where it is cut and dry where it is gray and where it is cut and dry the other way. So let's talk about UDRP Process. The main purpose - the reason why there is a process called UDRP - is to prevent what?

David: To address clear-cut cases of cybersquatting.

Michael: What does that mean? Give me an example. Like if I am Amazon.com, what would a clear-cut case be?

David: If someone registered AmazonSale.com and used it to display a website that looked like Amazon, but was not really someone that, when they registered that name, they did that for the purpose of capitalizing on the similarity between the domain name and the trademark, and then they put up content that showed that it was with bad faith. So, really, there are three requirements for the UDRP. The first is that the domain name must be identical or confusingly similar to a trademark in which the complainant has right. The second is that the registrant has no rights or legitimate interests in the domain name. And then the third is that the registrant registered and used the domain name in bad faith. So those requirements are very similar to a Federal Court cause of action for cybersquatting, but the UDRP was put in place to provide for a more efficient, streamlined process. Something outside of court litigation where you do not have the ability to request monetary damages as you would in a typical court action, but you do have the ability to request a transfer of the domain name.

Michael: Got you. So it is similar to the cybersquatting laws that are in place, but you do not have to go to court. So, it costs a lot less and probably takes a lot less time. It is like arbitration. If you get divorced, instead of going to court and fighting over possessions and stuff, you can go to arbitration; try to get it done more quickly and more painlessly, but you got to prove three things. If you are complaining - if you are the complainant - filing a UDRP, you need to show the domain name is confusingly similar to your trademark. The complainant is the person filing.

David: Right.

Michael: And then the respondent is the person responding to the UDRP process.

David: Right.

Michael: Okay. So the complainant - the person that is putting the complaint in - needs to show that the domain should not be somebody else's and that it should be theirs because the domain name is confusingly similar to one of their trademarks, that the respondent has no rights to use that domain name, and that they are using it in bad faith. So, for example, if I registered AmazonSale.com, and I put up a website that was similar to Amazon's in color, and I was just gathering e-mail addresses for a spam campaign or something, I could show that they are using my colors, they are using my name, they are using it without our permission - they do not have rights to do that -, and they are using it in bad faith, trying to get e-mail address because people trust Amazon. And so, would that be enough to prove, for me as Amazon, that that domain name should be mine?

David: Presumably. So you would have to do that through legal arguments and establishing all of those facts. Looking at the registration date of the domain name. Establishing when your trademark rights arose. Establishing how the domain name was used and that there was actual registration and use in bad faith. Yeah.

Michael: Okay. That makes sense. All right. So it seems pretty cut and dry, but there are UDRP cases that seems like almost every day that are not as cut and dry as that. Maybe that the domain name is confusingly similar to my trademark, but the person that is using it -- like DomainSherpaSucks.com is a new source talking about how I am doing wrong for people out there; in which case they might have a right to then use that because we have seen a number of websites out there that have trademark words within their domain name, then the word sucks, and they are using it as a news source or something like that, right?

David: Right. So, with your example, there are a few issues there. The first is: would adding whatever that term is to the domain name itself distinguish the domain from the trademark? I know there are UDRP decisions that find where the domain name itself conveys something. So, DomainSherpaSucks.com is probably not you. So there are UDRP findings that that is not identical or confusingly similar. That can cut both ways in the context of a "sucks" domain, but you get the idea that if some word is added, you have to look at is the domain name still identical or confusingly similar. Then, in the context of a criticism site such as you mentioned, you look under the second prong under the UDRP. You really have to look at: well, does the registrant have rights or legitimate interest? You look at things like: is it a real criticism site or is it just a fake criticism site to run ads? Things like that. And then, the real fight, very often, is that third factor - was the domain name registered and used in bad faith? Very often, the panelist will look for arguments by inference as to what the intention was at the time of the registration. In the UDRP, you have to establish bad faith registration and use, so you, as a complainant, need to address that fact. Well, what was the intention at the time of registration?

Michael: Yeah. So, now we can see where the gray area sort of creeps into this issue. Because somebody else may have registered DomainSherpaSucks.com, and then immediately put up a parked page that had advertisements for domain name sales as well as a big buy it now price. And they may have e-mailed me saying: "Hey, Mike, do you want to buy DomainSherpaSucks.com? I've got it available for sale." So, they have shown bad faith that they may have registered it for their profit off of my trademark, but what happens if I reject it and then a month later, David, they say: "Now

I'm going to create a true criticism site." They originally had bad faith, but now they are actually using it as a criticism site. You said that I, as the complainant, need to show that they registered it in bad faith and are currently using it in bad faith.

David: Yeah. So that is probably one of those gray cases that you were talking about. The majority rule in UDRP cases is that you must establish bad faith registration at the time of the domain name registration and then use. If there are issues, such as in that case, where you may have intent at the time of registration but not later, it is going to depend on really what has happened. One thing that is clear is, under the UDRP, if there was not bad faith intent at the time of registration, the majority rule is that is not appropriate for the UDRP; and that most typically comes up where the domain name was registered prior to a trademark coming into existence. The majority rule is that if the trademark did not exist at the time of registration, you cannot have had bad faith at the time registration. Now, it is important to keep in mind that is different than the A rule in US Court for a cybersquatting claim. Dependent on your court, there may be a rule that bad faith registration for a cybersquatting claim can come up after use. But in the UDRP, going back to your initial point, it was setup to just address a narrow type of cases - just clear cybersquatting cases. You have got to have both, bad faith at the time of registration and use.

Michael: All right. So now we are seeing a little bit more about the intricacies involved in trying to file a UDRP case and defend a UDRP case. So, Wayne Nelson, our show Producer, spoke to you before the interview and he determined that you were receiving a daily WIPO Report that outlines the latest UDRP actions. Is that an e-mail that you receive on a regular basis?

David: Yeah. So, we talked about WIPO; and the other large service provider is the National Arbitration Forum (NAF) in Minnesota. They are actually, for ICANN, accredited UDRP providers. In addition to WIPO and NAF, there is a Czech Arbitration Court; and the Asian Dispute Resolution Forum, I believe, is the name, but there are four providers. NAF and WIPO, I think, handle ninety-five percent of the cases; and both, WIPO and NAF, do send out a free daily report of their rulings.

Michael: Okay. So if people want to get an e-mail to just browse through, they can go to either the WIPO website or the National Arbitration Forum (NAF) website, and sign up to receive daily decisions.

David: That is right.

Michael: Okay. Great. And so, how do you differentiate the difference between WIPO and National Arbitration Forum (NAF)?

David: So the filing fees are a little bit different between each of the two organizations, and each has their own supplemental rules that can differ a little bit in how the procedures are conducted. And the best example is that if a case is settled by an agreement between the parties before a panel is appointed, then WIPO will refund a portion of the fees; and that says that clearly in their rules. NAF, I do not believe has a similar rule. Of course, as I mentioned, WIPO is based in Geneva. I do not have any hard data on its panelists, but they seem to be more private practice attorneys. NAF seems like it is both private practice attorneys as panels, but also retired judges. I think WIPO handles a few more cases than NAF; but again, the two of those organizations make up the bulk of the rulings.

Michael: So, let's take a couple of scenarios. If I am a business owner and I have a registered trademark with the United States Patent and Trademark Office, and there is a website that has sprung up that is using a domain name that is confusingly similar to my trademark; I believe that they have no rights and that they are using it in bad faith. Is it more advantageous for me to file with WIPO or with NAF?

David: It depends a little bit on the specific content that is put up on the website. If it is clear-cut, then there is probably not a whole lot of difference. There are a few points of distinction on some substantive issues between the two service providers, but there is also a lot of crossover between the panelists of the two organizations. As I mentioned, the supplemental rules differ a little bit, particularly with regard to supplemental filings and the refund option if the case is settled. Every attorney, I think, that practices in this area has one that they prefer over the other. It can be just a preference for how their eFiling system works, or if the supplemental rules of one provider

address a particular issue that you think may come up such as you really want to make sure that you clearly have another bite at the apple to file another argument. Then that may suggest you want to use one provider over the other. Occasionally, I think, there can be tendencies on substantive issues where you might see a little bit of a difference, but you would have to tease that out based on the content of the site in question.

Michael: So, NAF being located in the US and WIPO being located in Geneva, if I am a US Company, do I have any preference over NAF over WIPO? If I am an International Company, WIPO over NAF?

David: Not really. Everything is electronically filed. You never have to visit WIPO in Geneva or NAF in Minnesota, so everything is eFiled these days.

Michael: Yeah. Okay. And on both of those options, if I am filing, do I have the opportunity to select the number of panelists that are reviewing my claim?

David: You do. So you can opt for a one or three-member panel. And if you are the respondent, if the complainant started with a single-member panel, you have the option to opt-in to a three-member panel.

Michael: Okay. What are the advantages and disadvantages of having a one-member panel versus a three-member panel from both the claimant and the respondent point of view?

David: The biggest advantage from the complainant's perspective in having a single-member panel is the cost, so it is going to be less expensive; you are not paying those additional panel member fees. From the respondent's side, three-member panel, based on your arguments in your response, you may think that three people looking at the issues may give you a better chance than just having one. Dependent on the supplemental rules, there is a mechanism for proposing the panelists if you opt-in to a three-member panel. So that may be part of your strategy thinking as well.

Michael: Okay. How many UDRP actions have you been involved in this year as either the filing attorney or the representing attorney, David?

David: I would say, this year - and I think of UDRPs as a piece of domain name disputes, whether it is Federal Court litigation or a threat of a UDRP, or the actual filing - probably over a dozen or two.

Michael: Yeah. And when you say threat of a UDRP, is that like a cease and desist letter, when you try and communicate them before you even file anything?

David: Yeah. A UDRP and the claims in a UDRP can give rise to a court claim. I do not like to think of the UDRP segregated from the possibility of a lawsuit. So, on either side, it is important to keep in mind that whatever happens with the UDRP may not be the end of it. There may also be a lawsuit. Very often, domain name disputes start with a cease and desist and an attempt to work it out; and then, from there, it may be UDRP. It may be, dependent on how the ruling comes out and which side you are on, it may go from there to Federal Court. So, the UDRP is a piece, or a procedure, that is available when there is a dispute.

Michael: Yeah. Cut and dry case - the black and white case - where somebody is cybersquatting that is confusingly similar to my trademark, no rights to use is, and operating in bad faith. Cut and dry. Is there one case on the flip side - one UDRP in particular - that comes to the top of your mind that reflects some of the issues that arise when using the Uniform Dispute Resolution Policy and it is a really gray area?

David: It is tough to think of a gray area. Well, I think there are some cases we talked about when the domain name itself includes an additional word. I think that is the biggest gray area right now. Panelists have come out both ways where looking at the domain name itself, whether or not the addition of a word is sufficient to distinguish the domain name, or render it not identical or confusingly similar. I think that tends to be a real gray area. In terms of an open and shut, or clear-cut case, I am familiar with a number of cases where a UDRP complaint has been filed and when you look at the actual arguments, or the underlying data, the trademark did not exist at the time of the domain name registration. So, we talked about that at the outset. That is well established under the UDRP that you have to have bad faith at the time of

registration. And if your trademark did not exist, then it is not appropriate complaint for the UDRP. That may mean you have to pursue litigation, but the bottom line is that is not something that should be subject to the UDRP.

Michael: Right. And a great public example in the domain name industry is Rick Schwartz's Save Me. There is a Brazilian, I believe, company that has a coupon-type deal website like a Groupon, but down in Brazil; and it was SaveMe.br.com, or SaveMe.com.br, or something like that. And Rick Schwartz had registered SaveMe.com years before that company, I believe, came into existence. I am not familiar with all of the details, but basically the company approached him, tried to buy it, they could not come to an agreement, so the company filed a UDRP and it was successfully defended.

David: Right. I read about that, and it struck me as an open and shut case. There was the domain name registration by that registrant predates the existence of the trademark. It is not something that should be subject to the UDRP. It seems like I see a report on at least one ruling of that type per month these days. It is something that, to me, is just not appropriate for the UDRP. I mean you have to look at what is on the website. Switching from the Rick Schwartz example to just think of another site, if the site itself includes the trademark and is confusingly similar to the complainants trademark, there may be a cause of action for trademark infringement, but that does not mean it is something that should be pursued through the UDRP.

Michael: Got you. So, just because there may be a copyright or a trademark infringement does not mean that you have legal rights to the domain name and can go through the UDRP process.

David: Right. And the reasoning behind that is the UDRP was setup to address pretty clear cases of cybersquatting. Where there are these other issues, again, if there is a business dispute or if you really need to look into the issue of are consumers going to be confused and is it, therefore, a trademark infringement, that is something that a court should look into. You are going to need discovery. You are going to need motions. You are going to need to really develop the record and look into the issue as apposed to the UDRP, which is not really a truncated process where, through a couple

filings and some arguments and evidence, the domain name is transferred. That type of abbreviated process is not appropriate for a larger dispute.

Michael: Yeah. Now, if I am actually going to file a court case, that is going to cost me a lot more money, right?

David: Yeah, absolutely. And that is the advantage there; is if you are on plaintiff's side, you have the potential to recover monetary damages, which, for cybersquatting, can be up to a hundred thousand dollars in statutory damages per domain name. And you may have some arguments that are not available in the limited context of the UDRP, but you are right, it is going to be significantly more expensive, which is why most trademark owners, when possible, use the UDRP. I should also note that the court action option is available for respondents as well. So we talked about if you are losing respondent in a UDRP case, then the domain name is not actually transferred until a period passes and you have got the option to go to court.

Michael: I am going to ask you about that. What happens after the UDRP process? So, hold that thought.

David: Sure.

Michael: I believe I have seen decisions come through where Google Incorporated is the claimant. And so, I believe Google, pretty actively, pursues domain names that include the Google trademark in the domain name. Are you familiar with those also? Have you seen them come through pretty regularly?

David: I have. Yes.

Michael: Okay. So there might be domain names like GoogleRebates, or GoogleSearch, or Google[ThisorThat].com in all the different domains. And I have seen actions come through with like up to twenty-five domain names in a particular case. If I am Google, how many domain names can I file as part of one WIPO case?

David: I think you can file as many as you can find that are owned by the same registrant.

Michael: Okay. So that is the issue. It is the same registrant. I am filing a UDRP case against a specific registrant; not a case of all domain names.

David: That is right.

Michael: Okay. And so, let's say that I find one person that has gone out and registered twenty-five domain names. I still need to prove those three things that we discussed earlier, David. If I buy a domain name and I do not point it anywhere, I do not offer it for sale, the domain name does not resolve, somebody cannot really prove that I have bad faith in registering them, can they?

David: I would say generally it would be an uphill battle. I think it is going to depend a little bit on what the name is though. So, trademark rights are classified on what is called a spectrum of distinctiveness. On the one hand, you have got coined trademarks that are words that have just been made up out of thin air. So those are the strongest trademarks. If you think about it, if your company makes up a word, you are the first person on the planet to come up with that word and use it in your business, then there is probably not a reason why someone else needs to own that new word as a domain name unless they have got some reason for it that would establish they have got rights or legitimate interest, or that the registration was not in bad faith registration or use. As you move down the scale of trademark distinctiveness, you have to look at that issue. Well, if there is not a site up, well, why did they register it? What was the point? Can you, as the trademark owner, establish everything you need to be successful? So, really, you have got to look at all of those pieces including how the domain name itself relates to your specific trademark.

Michael: Yeah, but if I have not been labeled a cyber squatter in the past, I have not lost any UDRP cases, and I just registered them and there is nothing there, how can somebody prove something if I have not exhibited any facts that they can cite?

David: If the domain name itself is an ordinary English word term and I was your attorney, I would suggest you need to think twice about pursuing that claim. Based on what you just said that if there is not evidence of bad faith registration or use, it is possible that the words have some other meaning other than the trademark; then that is something you need to think about. If the domain name itself is that type of coined wording, the complainant, or trademark owner, would have to argue by inference that there is no possibly legitimate use.

Michael: Okay. So arguing by inference is okay. It is almost like I watch these TV Shows of the detectives and it is circumstantial evidence, right?

David: Yeah. I think they would probably still be in trouble if there is no content and no history of cybersquatting. There are lots of ways to argue by inference, but if there is nothing - it is a clean slate -, you need some evidence to put before the UDRP panelist on each of those three factors.

Michael: And if I have no evidence and I cite some, from my layman terminology, circumstantial evidence that 'hey, it could not be anything else.' So, I am trying to get them to infer that there is bad faith there. You have seen cases where that has actually won a UDRP decision?

David: Yeah. Particularly by default, where the respondent does not show up and say: "Well, here is why. These words have this meaning to me and here is why I did it." So, the best decisions, to me, are where there has been appearance by both sides and the panelists is able to look at both side's arguments and come to a reasoned conclusion. Certainly there are decisions out there where there was that type of argument, no one appeared, and it is transferred by default.

Michael: Okay. All right. So the process seems pretty simple. As the complainant, I will file the paperwork. If I file it with WIPO or NAF, they will assign a panel. Either one-person or three-person, depending on what I paid for. They will review it. Might they ever just reject it without asking the respondent for a response?

David: If you have not complied with their formalities. So let's say you just sent them a check in your name and signed it, but did not attempt to argue under the requirements of the UDRP. Then, they will not get to the point of assigning it and moving it forward. They will reject it out of hand. Short of that, if you make an attempt at complying with the requirements, then they are going to assign it to a panelist for a decision. And then it is up to the panelist to decide if you met your burden. Have you addressed all of the substantive requirements?

Michael: So the panel, whether it is one-person or three-person, will read what you submitted as a claimant; and if it meets all of the three requirements, then they will ask the respondent for their response.

David: Typically, as soon as you file, a case administrator will look at the complaint for the formalities. If you have satisfied all of the formalities, then they will institute the proceedings. For example, you have to serve it by e-mail on the registrant. So then, they will institute the proceedings, send it again to the owner of the domain name or registrant and let them know they have got twenty days to respond. Then, dependent on the service provider, after that response period, they may wait to provide the complainant with their reply period. But then they wait for all the papers to be filed before it is then assigned to a panelist, either one or three, to then think of it as both side's arguments as a package are forwarded to the panelist to then review and render a decision.

Michael: Got you. And that is all the panel has; is the claimant's arguments and the respondent's arguments. They read them. They do not ever go back and get more clarification from either side?

David: I do not recall ever seeing them ask for clarification. The parties will occasionally file more papers. The supplemental rules at NAF, I think you are allowed to file a response as the complainant if you pay a fee. WIPO, the panelist has the discretion of whether or not to consider your supplemental filing. I have seen cases where both sides continued to file papers. So the panelist may or may not look at those, but that is it.

Michael: If I am a respondent, can I pay a little extra money and get an extra twenty days extension to the process?

David: I do not know the answer to that off hand. I think it depends on the case administrator and the service provider. I know that, in certain cases, an extension can be obtained. I do not know whether you need to pay a fee to do that or not.

Michael: Okay; because twenty days seems like a lot of time, but if you are out of the country, you had some vacation planned, you have got some big issue going on in your business, twenty days could be eaten up pretty quickly, especially when you need to work with an attorney to get your story straight, the facts right, and then put it down on paper.

David: Right. And I know that there are mechanisms for requesting an extension. And on a case-by-case basis, I think the extensions are granted.

Michael: Okay. So, do you typically work more with the claimants or the respondents, or is it pretty fair mix between the two, David?

David: In my practice, probably more complainants. My background is as an intellectual property attorney, so I am more on the complainant's side. But within the last year, I had defended Frank Schilling's Name Administration in a Federal Court litigation, so I do represent both sides.

Michael: Okay. And so, when somebody approaches you and they say: "David, I have got this problem with this other person that owns a domain name that is confusingly similar to mine", what is your role as the intellectual property attorney?

David: To take a look at the facts there and look at all of these things we are talking about. So, are there trademark rights or trade name rights? You do not necessarily have to have a Federal Trademark Registration to use the UDRP, but you must have established trademark rights. So those can be common law or unregistered, but the issue really is when did your rights arise? So, when did you establish them? When was the domain name registered and how is it being used? You really need to look at who is the registrant. If it is a proxy,

can you get behind the proxy service to figure out who it is? And look at all the facts surrounding the registration and use to figure out who has got what argument and what is the appropriate course of action.

Michael: Okay. So you work with the client to ask all those questions that then bring into the light a lot of different issues, which may support or not support your client moving forward with the UDRP case if they are claiming.

David: Yeah, that is right. And sometimes those discussions end up in the conclusion that this is not UDRP; this is not even a trademark case. This is more of a business dispute. "We were formerly partners. Well, who should own this domain name?" I see more and more businesses where the domain names become substantial assets of the company. And then, if the business partners go their separate ways, there can be an issue. Well, who owns that domain name? Is it shared? Those types of disputes really should not be pursued through the UDRP. There are other things you need to look at. So, is there a contractual issue, or those types of things?

Michael: Yeah. So, often, just as a business owner, being able to talk to somebody who understands all of the legal intricacies can help you figure out the best way to be effective. And the best way to be effective may not be anything to do with the legal system, and it may just be to work it out on your own.

David: Yeah, that is right.

Michael: It makes sense. Okay. So we talked about burden of proof. If I am filing a UDRP case, it is my responsibility to prove the three items that you initially talked about. The domain name is confusingly similar to a trademark of mine, there are no rights, and they are operating in bad faith.

David: Right.

Michael: All right. If the burden of proof is on the person filing the UDRP, is there ever a time someone should not respond to the UDRP because the claimant has not proven what they need to prove?

David: That is a good question. I would say probably not because there are certainly UDRP cases where if I look at them, I think: 'well, this is potentially something that should not have been pursued through the UDRP', but the respondent, or registrant, did not appear and raise that issue. And while the panelists typically, and increasingly these days, do not just decide by default, there is that risk that when all that is before them is one side of the argument, that is all they have to consider. On the flip side of that is, if it is that type of situation where you would consider not responding because potentially the facts are just really bad for you, it might make sense to try and work it out. Reach out to the other side and try and reach some sort of settlement agreement short of it going to a decision that is going to be associated with your name on the Internet from that point forward.

Michael: Have you ever seen a case decided where the respondent did not respond and the case was won by the respondent?

David: Yeah, and it is interesting. And this is just my opinion from reviewing the cases. Increasingly, I think, the panelists do look at the substance of allegations, even where there is not a response. And there are certain sort of red flag issues - the date of the trademark rights versus the date of the domain name registration. If you have got common law rights, have you sufficiently established that through a declaration or evidence? There are certain hot button issues. Or to your point, if there is no content on the website, if the domain name is not resolving, where is the argument that there was registration and use in bad faith? So I think there are certain pieces that particularly will grab panelist's attention and they will find, even where there has not been a response, that the complainant has not met the burden. That is not always the case, but it seems to me like, increasingly, they are looking for those issues.

Michael: Yeah. Okay. So, as we go through time and more cases are being filed, it seems like more of the panelists are gravitating towards let's make sure that these critical legal issues are addressed by the claimant before we make a decision for them. And if they are not, then that is deciding it. But again, I think the thing that frustrates domain name investors the most is that there is not cut and dry. There is no black and white. There are no rules to determine that all panelists will follow under all situations. The only rule is

that there are three criteria that must be proven by the person filing the UDRP case. But even in some cases, I am sure you can cite a number of cases where bad faith is not proven very well.

David: Right. Yeah, and the interesting thing about the UDRP is, in the US Legal System, we have the concept of stare decisis, where courts are bound to follow prior rulings. So, the judges rendering a ruling try and keep in line with the prior holdings interpreting laws and policies. That concept, strictly speaking, does not apply to the UDRP. However, the panelists do look to prior decisions. They are not bound by prior decisions, but that is sort of the best you can do; is argue by analogy to prior decisions. But you are right. The panelist may well come to a different conclusion.

Michael: Yeah. All right. Can you estimate what percentage of UDRP actions are settled between the parties, either before a panel is set or even after the panel is set before a decision is made?

David: I am not aware of any statistics. I will just say I have seen an increasing number settled. It seems like, in recent years, more and more cases, particularly open and shut, are being resolved. To me, I think that makes a lot of sense for both parties. If you can work it out, from the complainant's perspective, you get a refund on part of your fees; from the respondent or registrant's perspective, you avoid that decision. You avoid a finding that you violated the UDRP, which could come back to haunt you later. I think that that is a win-win situation for both sides if there is some possibility. And I have noticed a trend, I think, in more settlements prior to appointment of the panel. To answer you question about settlement after appointment, I do not see very many because there is not much to gain at that point.

Michael: Because they are going to decide it even if you did settle it.

David: Yeah, and you can try and stop the panel from rendering the decision. But as a practical matter, once the UDRP provider has appointed the panel and delegated a case to them, you can try and stop that from moving forward, but most likely they are going to go forward with the decision.

Michael: Yeah. What are the general costs of a UDRP, David? Let's say I am a business owner and I do not know anything about the UDRP, clearly I can go over to NAF and I can go to the WIPO website and take a look at it. And I am going to ask the readers not to cite exactly what you are saying, but if I want to file a case, what does it typically cost? What is the adder for a three-person versus a one-person panel? What would I generally look for in legal fees of an attorney, or what should I budget for in legal fees for an attorney if it is relatively cut and dry?

David: I can tell you the filing fees. I know WIPO is around fifteen hundred dollars, and slightly less than that at NAF per domain name. Each has a different schedule that the fees go up by the number of domain names you are including in your complaint. And then also by whether or not you ask for a single-person panel. The fees go up when you ask for a three-person panel, but that is really the ballpark of what you are starting at. For the individual numbers, they vary by the service provider. So, if anyone is interested, I would suggest they just go to WIPO or NAF's website for their specific fee schedule. In terms of attorney's fees, it is going to depend on the complexity of the case, as with anything. If it is open and shut, as a complainant, you are probably looking at a few thousand dollars. If it is more complicated - multiple domain names, or unregistered trademark rights, or complicated domain name registration history, or things like that -, then it is going to go up from there. As the respondent, the same thing. If the complaint is well done and the complainant has then met their burden or shifted their burden to you, then you need to rebut that. You are going to need to compile evidence and arguments, so that is going to take some time and money as well. The best response is going to include facts and sworn testimony through a declaration or affidavit in response. So, while the process is going to be significantly less expensive than Federal Court litigation, it is generally not cheap either.

Michael: Yeah. So, I would never think about suing somebody and filing a court case by myself without an attorney's help to navigate the process. Do you see people filing their own UDRP actions on behalf of themselves in layman's terms and using a layman application or filing document as apposed to using an attorney?

David: I do. I think I have seen an increase in those types of filings. And we talked about the reports that come out from WIPO and NAF on case filing; and to be honest with you, I most recently read the cases where there is a denial because those are the most interesting. 85% of cases that are won are less interesting for me. And I have observed, in some of those cases where there is a denial, that more and more recently I have seen businesses filing them on their own. Not necessarily through an in-house attorney, but just through a businessperson. And that is certainly possible and permissible, but there is no lowering of the regulations or the requirements. You still got to meet those three requirements and you have got to establish them through facts and legal argument.

Michael: Yeah. Okay. That makes sense. So, somebody goes through the UDRP process. Let's say the respondent puts in their response and the panel determines that the claimant should win the case. And again, I am using layman's terms because I do not know what all the legal terms are, David. So excuse me for that, but the claimant wins the case. What now happens for the respondent? What recourse do they have to try and keep the name and to argue it again? And I understand that when I register a domain name through, say, GoDaddy, I agree to their terms and conditions, which I have not read in detail, but I am sure say that I will be bound by the UDRP process if somebody files a UDRP action against me for the domain name that I am registering with them. So I have already agreed to that. What recourse do I have after I may have lost a UDRP case?

David: So, you are right. Your domain name registration agreement will incorporate the UDRP by contract. So, all ICANN authorized registrars are required to incorporate the UDRP in their domain name registration contracts. And then, what that means is the UDRP really is a contractual-based arbitration system. You agree to be bound by any ruling from the UDRP. So, if the panelist orders the domain name transferred, you are subject to that, but there is a hold period. So, the registrar in question does not transfer the domain name until after that hold period has passed, which I want to say is fifteen days, but it may be slightly different, but in that range. During that time period, you have the ability to file a court action. And then, if you provide evidence to the registrar that you filed a court action, then they will not proceed with the transfer order pursuant to the UDRP decision. Now,

under US Law, the Anti-Cybersquatting Consumer Protection Act (ACPA), which is a piece of a broader Federal Trademark Act, includes a provision that allows you to go to a US Federal Court and ask for a declaration that you did not engage in cybersquatting. So, if you are the losing party in a UDRP decision, you have that piece of Federal Law that you would invoke. You would go to the court and ask the judge to give you a ruling that what you did was not cybersquatting. Then you would pursue that claim and potentially others in litigation.

Michael: Got it. Okay. So I have fifteen days, or somewhere around there. And I need to go to the courts and I need to file either a counter claim against the domain name or I need to file that I am not a cyber squatter. Is there a difference between the two?

David: There is. It depends on the situation. In that situation, clearly you would have the right to ask for a declaration that you did not engage in cybersquatting. So, think of that as asking for the court of overturn the UDRP panel.

Michael: Okay; because if I do not do that and I just say: "No, they are wrong, and I am going to file a case to try and win the domain name back", the UDRP still stands and it is a matter of public record saying that I lost this case.

David: Right. Once the decision is rendered, it is always going to be out there. But if you file the Federal Court action, the actual transfer process would not kick in. So, the Federal Court is not bound by the UDRP decision or bound to give any difference to it. So, in essence, it is a new clean slate, and you would make your argument there, if you are the registrant, as to whether or not you engaged in cybersquatting. That declaration clearly you could pursue. You could potentially pursue a claim for a reverse domain name hijacking, which is different under US Federal Law than under the UDRP. So, under the UDRP, you occasionally see a panel conclude that the complainant engaged in reverse domain name hijacking, or attempted reverse domain name hijacking. That is really nothing more than a sentence in the opinion. It does not result in anything. However, under US Federal Law, there is a cause of action for reverse domain name hijacking if your use of the

domain name has been impaired somehow. So, let's say, as part of the UDRP process, the domain name was actually suspended, so it would not resolve and you lost money, or it was actually transferred prior to the UDRP decision, somehow your rights in the domain name were impaired and there is a Federal cause of action for reverse domain name hijacking.

Michael: Okay. And let's say the UDRP case was filed. I am the respondent. It goes to panel. The panel sides in favor of the claimant. The panel orders the registrar to transfer the domain. I go to court and I file that I am not a cyber squatter, and I file documents to say that it was reverse domain name hijacking. At what point does the registrar have the right to cause the domain name not to resolve to my website, let's say? Or is it not to find?

David: It is hard to say. They should not change anything until there is a determination, either by UDRP or by the court. It is possible that they will have; and in the Federal Court context, that is really what leads to reverse domain name hijacking claim. If the registrar, in response to representations by the claimant, which are unfounded, takes action and prevents it from resolving.

Michael: So the registrar should not take action until a decision has been made by UDRP, at least.

David: I would think that that is the best protocol. Obviously there are exceptions. So, if a domain name is being used as part of a phishing scam or some sort of fraud and it is clearly not a dispute, then I might counsel a registrar to go ahead and pull the plug, or even the registry to shut the domain name so it does not resolve because it is that type of situation. But where you are dealing with a claim of cybersquatting and it is a different situation, then my opinion is the registrar should wait for the UDRP decision or a court ruling, or the parties can always reach an agreement as well.

Michael: Yeah. Okay. So the UDRP process seems pretty cut and dry if the person in the US, let's say. What happens when the respondent lives in a country other than the United States? Does that affect the process at all, or it does not because the registrars are bound to ICANN's policies and the UDRP by association?

David: Yeah, that is right. Well, the UDRP is incorporated into all generic top-level domain contracts and certain country code contracts. Other country codes have their own UDRP-like policy, which are, very often, similar. But regardless of where the registrant is, if the domain name is of an extension to which the UDRP applies, then it does not matter where you are as a registrant. As part of the UDRP, the complainant must agree to some mutual jurisdiction. So that could be either the location of the registrant or the registrar. And the reason for that is if, let's say, you have got a registrant and a registrar that are based in Europe - let's say the United Kingdom - and they want to challenge that UDRP transfer order. The complainant has consented to the jurisdiction of one of the courts where the registrant can actually go to obtain an order preventing the transfer.

Michael: Got it. So, in some cases, it is actually advantageous to use the UDRP versus going to file a court case. So, for example, if somebody has registered a domain name through a Bahamas registrar and the claimant is in the United States, they can go file a court case; but if the domain name registrant is outside the US, they really are not bound by US Laws.

David: Yeah, that is a great example. So, I have handled a few cases this year that involved phishing and phishing websites where, clearly, the name was direct on hit from one of my client's names and the website was then taking people's financial information. But the registrant was based, in some cases, Malaysia or Russia, or China, where it is going to be difficult and expensive to pursue a court action, and the UDRP fits there because the domain name is a dead-on match. The site is a phishing site. It clearly fits and that is a good case for the UDRP, and much, much preferable than me trying to go to court in Malaysia and explain cybersquatting and phishing.

Michael: Exactly. So if I was the business owner, I would have to go to Malaysia and try and explain the whole thing in court, or here is a great example of using the UDRP for that instance.

David: Yeah.

Michael: Okay. That makes perfect sense. What is the general timeline for a UDRP process versus a court case? Let's say the day of filing to a day of decision.

David: So, usually, for a UDRP, it is about sixty days from filing to decision; give or take a few days. For a court case, it depends. Most cybersquatting cases are filed in the Eastern District of Virginia, here outside of DC because the Anti-Cybersquatting Consumer Protection Act provides for jurisdiction in the location of the registrar or the registry. So, VeriSign is based in Northern Virginia as is PIR that runs .ORG. And traditionally Network Solutions was based here, so, many cases are filed in that court. That particular Federal Court is a lot faster than other courts around the country. And you may be in trial in ten months in that court versus, if you are in another part of the country, it may be two years before you even see the judge. So the process could be a lot longer. Now, if you are dealing with - to go back to the phishing website example - some real problem with the site or some emergency, you can always go to court and ask for a temporary restraining order, which is an emergency motion or preliminary injunction if there is some emergency and some ability to argue to the judge that you need to be heard right away.

Michael: So that is the quickest way to take a domain name down.

David: That is right.

Michael: Okay. So you get the judge to agree. He issues some sort of judgement, I guess. And then you take that to the registrar or the registry, and they temporarily disable the domain name.

David: Yeah, that is right. You would have to establish to the judge that there is some emergency - some need for that type of order - and you would probably ask for an order from the court directing the registry to make an entry in the zone files so that the domain name cannot resolve anymore for the pendency of the case. That would not be it. You would always have to move forward with the case, but you have that option for asking for that in an emergency.

Michael: That makes perfect sense. All right, David. Let's discuss a couple of really interesting UDRP decision that have happened. One recent UDRP decision - I think it was just a couple of weeks ago. A popular registrar has a WhoIS Privacy Service. So, for anybody that does not understand what WhoIS Privacy is, you go register a domain name for likely an additional charge. That registrar - like a GoDaddy, or Moniker, or eNom - will actually go out and say: "We won't show your personal information on the domain name when somebody does a lookup to see who the owner is. We will show our privacy. And for people to contact you, they have to go through us." So, it protects your name, and your address, and phone number, and e-mail address. So, in this particular UDRP decision, eNom's WhoIS Privacy Service, or actually the whole registrar - I need a little bit more information from you - was labeled as a cyber squatter and they lost the UDRP action. Are you familiar with this case?

David: I did. I read the reported decision, so yeah. I think what is important to recognize though is that language - the notorious cybersquatter was from the complainant's submission. So, very often, what UDRP panelists do is they set out, at the top of the opinion, each side's arguments. So I think that that is where we saw that language. I do not think the panelists actually repeated it, but you are right. I mean ultimately they found against them and ruled that the domain name should be transferred. It is an interesting case because - UDRP - the majority rule is that if the named respondent has been found to have violated the UDRP previously, then that supports a finding in that particular case. So, there is that implication here.

Michael: And the respondent is whoever is listed as the domain name registrant, which could be a WhoIS Privacy Service.

David: Yeah, that is right. And it has been my experience that most privacy or proxy services, in their privacy or proxy agreement, set forth that they are allowed to lift the privacy or proxy in the event of a legal claim. And very often, an attorney for a complainant will see a privacy service initially named. Then they will lift the privacy, either when they receive your cease and desist letter, or when they receive the lawsuit or the UDRP filing. But then that allows you to then substitute and name the actual registrant as the respondent, or defendant. I do not know why that particular privacy service

would not have lifted privacy so that their customer would be named. We see the result is that, if you do not lift privacy, then you, as a company, end up standing in the shoes of your customer. And there is that issue in terms of prior UDRP decision and the implication for future cases.

Michael: Yeah. Now, what is that implication, David? If you lose multiple UDRP actions, you can be labeled a cyber squatter? Is that the case?

David: Your use of whatever domain name is in question in the subsequent case is taken as evidence that you indeed registered and used in bad faith.

Michael: Okay. So that could be a contributing factor to the third requirement in proving your UDRP case when you submit your paperwork.

David: Yeah, that is right. And it may potentially, even the second factor of rights or legitimate interest. You could argue both. That it establishes a pattern and there is a majority rule of UDRP cases that prior findings have some relevance there.

Michael: Yeah. Okay. Do you think this will have any effect on registrar's privacy services going forward?

David: That is a good question. I think the best policy is to make sure that you have got the ability to lift privacy or proxy when appropriate. I do not know why that particular company would not have done that; and they may have their own business justifications for that being their policy. My opinion is I think we will see more and more claims against registrars and potentially even registries with GTLDs going online in this type of situation. And a registrar or a registry is entitled to immunity for claims of intellectual property infringement if they are engaging in just their core registrar/registry function. But when the company is doing other things - ancillary services. This is a good example: privacy or proxy -, but extending to other thing like parking or other types of monetization, auctions, or even domain name brokerage or recovery. When a company that may be an accredited registrar engages in those other types of services, then they move outside of that traditional registrar or registry immunity. So, I think we are going to see more

and more claims against companies operating in the space for those types of ancillary services.

Michael: Yeah. Okay. That makes sense. Okay. So another recent case that I thought was interesting was the UDRP action that was brought against a real estate agent who owned the name LivingSocal, which LivingSocial.com claimed was a domain name that they should own. That it was confusingly similar to their domain name, their rights, their trademark, and things like that. And what they cited, I believe, was that www.LivingSocal.com went to the real estate agent's website, but the non-www version - so, somebody that just types in LivingSocal.com - went to a pay-per-click site. Tell us about this case.

David: Yeah. Really interesting ruling, and it sounded like the registrant did not realize that was happening. And I think I could appreciate that he did not realize that, dependent on his configuration settings in his domain name management panel, he was not getting all of the traffic to his actual legitimate website - his real estate business. I guess that was a default setting that allowed for pay-per-click content on the one hand. To me, what that case turned on was he had rights or legitimate interests in that domain name and he was running a legitimate business. He did not register, and I think the panelists went so far as to move on to the third factor and also say there was no bad faith registration or use. And this fact that pay-per-click content was displayed in the one hand was not dispositive, and the panelists believed him that he did not realize that technically that was even happening because it was a configuration setting.

Michael: Yeah. I think I have done that on my website in the past as well, and it took a customer to say, "Hey, Mike, do you know that your website here is not resolving when you do not type in the www?" Sometimes it is rocket science because the domain registrar's website is just so confusing to figure out. They do not make these A records and C names very easy to understand. So, it seemed like it was clear. Why didn't the panel say that LivingSocial - the company that filed the UDRP case - was trying to reverse domain name hijack this LivingSocal website?

David: My impression is UDRP panelists are typically willing to do that when there is something clearly inappropriate. So, the trademark did not exist at the time of registration. It was a business dispute, or there is a license, or there is something. But where it is really, on the face of it, whoever wrote the complaint should have known that they did not have. The complainant should not have pursued it here. I think it is more of a gray area. I think it makes sense - the ruling from the panel -, but there was this pay-per-click content. So, that is the situation where there is some arguments on both sides. So, unlikely to be a finding of reverse domain name hijacking in that case.

Michael: Yeah. All right, David. This has been a great interview. Really shed a lot of light for me on the whole process and how decisions are made, and what factors come into decisions. Here is the final question. The new GTLDs that everybody has been talking about, that thousands of applications have been filed for, that millions of new domain names will be coming online in the next few years. The GTLDs are going to be arriving. As an attorney, how do you see this affecting the intellectual property rights in the domain name industry with regards to copyright and trademark protections? What do you see coming down the pike? What do you advise business owners and how do you advise investors to prepare?

David: Yeah, you are right. There is a lot out there. I think there is a lot of attention being paid to GTLDs, in my opinion, as a lot of misinformation and a lot of apprehension as well. And it seems to me like every other day there is a new consultant that is moving into the space to offer some life-changing services. So there is a lot going on out there. I think the bottom line is you are right. So, there are going to upwards of fourteen hundred new GTLDs going live over the next few years. I think there are really two takeaways for businesses. The first is, if you did not apply, now is the time to take a look at that list. There is a limited time period to take action if there is a pending GTLD application that is a concern to you. That window is closing and will not come back, so I think everyone should take a look at the list and see what is out there. If they do not raise concerns, then that helps you see what is coming down the road. The second step, I think, is to start planning. Well, what is your approach going to be once new GTLDs go live? From the investors side, where you are you going to invest, where you are going to make registrations? From the business perspective, where does it make sense

to protect your name? Where should you register defensively? Where should you plan on taking action through UDRP or otherwise? So, there are just so many. Fourteen hundred is a lot. In the past, we have had a few GTLDs go online at a time, and you could sort of take the approach - well, am I going to register; am I not? I do not think you are going to be able to have that luxury with upwards of fourteen hundred going online, and we will have to see how many ICANN can actually delegate in a given year. There is going to be a lot, so I think it makes sense to make your protocol. Start developing your strategy. So, for you, something like DomainSherpa.university may make sense. Something like DomainSherpa.shoes probably does not make sense for you to spend the money on registration fees. And when you multiply that out by fourteen hundred extensions--

Michael: It would put me out of business if I tried to register that many domain names.

David: That is exactly right. And I think that is going to extend to your thinking on protecting your brand online. So, when all the GTLDs go online and someone else starts registering, if someone registers DomainSherpa.fruit - I do not know if that is an application, but let's say it was.

Michael: It would not surprise me if it was.

David: You probably do not care. But if someone registers something like DomainSherpa.adult, maybe you do care. I guess it would depend on the content, but that is the type of thing and I think it makes a lot of sense to develop that thinking or that strategy ahead of time.

Michael: Because it is cheaper for me to register a domain name in the sunrise period because I am the trademark owner of DomainSherpa than it will be for me to potentially pass it up and then go through the UDRP for fifteen hundred dollars filing plus attorney's fees to get it back later.

David: Yeah, that is right. So, the conventional wisdom as a trademark owner, which is just about any company that has a name that faces consumers - you are a trademark owner. The conventional wisdom is it is more efficient to defensively register during sunrise because that is going to cost a lot less,

either through a resolving registration or, very popular during .XXX launch, blocking registration. So, that was traditionally how companies protected their brands, but you make an excellent point. It is not going to be possible to defensively register through sunrise or otherwise across all registries. You are going to have to make a judgment call. Which ones do you care about and which ones do you let go and wait and see if an actual problem comes up through someone else registering?

Michael: All right. A lot to think about for business owners and for trademark owners. If you have a follow-up question for David, please post it in the comments below and we will ask him to come back and answer as many generic questions as he can. Clearly, he cannot address your specific questions. In that case, you should contact a domain name attorney or contact David Weslow directly. David Weslow can be followed on Twitter at @WileyRein.

David Weslow, Partner at Wiley Rein LLP. Thank you for coming on the show again, providing understandable and actionable UDRP information, and thank you for being a repeat Domain Sherpa.

David: Michael, thank you again for having me.

Michael: Thank you all for watching. We'll see you next time.

Watch the full video at:

<http://www.domainsherpa.com/david-weslow-udrp-interview/>