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UDRP: do not gamble on refiling

International - [Hogan Lovells](#)

- **The Seminole Tribe of Florida sought the transfer of 'casinoseminole.com', 'seminolecasino.com' and 'seminolegaming.com' under the UDRP; the domain names had been the subject of a previous UDRP decision in 2012**
- **The panel concluded that it was more likely than not that the domain names had been under the control of a Mr Nolter in both the 2012 case and the present case**
- **Therefore, the present case was a refiling**

In a recent [decision](#) under the [Uniform Domain Name Dispute Resolution Policy](#) (UDRP) before WIPO, a three-member panel has denied the transfer of the domain names 'casinoseminole.com', 'seminolecasino.com' and 'seminolegaming.com' because the complaint was considered as a refiling.

Background

The complainant was the Seminole Tribe of Florida, a Native American tribal government recognised by the Federal government of the United States and well known for its gambling and casino facilities. The respondent was Propertyusa Inc, a private company.

The domain names 'casinoseminole.com', 'seminolecasino.com' and 'seminolegaming.com' were the subject of a previous UDRP decision in 2012 against an entity called M.M.commerce where the complainant did not succeed. The issue of refiling was raised by the respondent, although the complainant did not mention the previous case in its initial submission.

Given this, as a preliminary issue before considering the present complaint, the panel noted that it had to determine whether the complaint constituted a refiling.

The issue of refiling

The panel noted that the UDRP did not expressly deal with the issue of refiling, but previous panels had raised the issue of refiling and the possibility for complainants to harass respondents with multiple

filings. For this reason, the panel underlined that previous panels had exercised their power to reject further complaints covering the same domain name against the same respondent.

However, under certain circumstances, a refiling is accepted by panels. This element is summarized by the [WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition](#), Section 4.18, as follows:

Panels have accepted refiled complaints only in highly limited circumstances such as:

(i) when the complainant establishes that legally relevant developments 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 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 grounds it believes would justify acceptance of the refiled complaint. The WIPO Centre 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 behaviour 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.

In this case, the complainant's position was not to consider this as a refiling, but simply as a new complaint against a different respondent. It meant that the complainant did not argue that exceptional circumstances should apply for the refiling to be reviewed by the panel. On the contrary, the complainant maintained its position that the respondent was not the same as the respondent in the initial complaint in 2012. For this reason, it was necessary for the panel to examine whether or not the respondent was in fact different in the 2012 complaint.

The respondent became the registrant in 2012. The panel noted that, where there was a transfer of a domain name between commonly controlled entities, that transfer generally did not amount to a new registration for the purposes of the UDRP. Thus, if the respondent could establish that the domain names were still under common control, then the complaint would be barred as a refiling. In this regard, the respondent provided a sworn declaration from a Mr Nolter, attesting to common control and explaining that he had moved the domain names to another company controlled by him after the 2012 UDRP decision pursuant to a business venture that never materialised. However, the panel found this evidence to be deliberately vague as it did not identify the legal entities concerned with any certainty.

Given this rather unsatisfactory situation, the panel turned to consider where the burden of proof lay. In the panel's opinion, if a complainant could establish a credible case that there had been a transfer of ownership, then the evidential burden passed to the respondent to assert common control. In the case in

hand, the panel found that the complainant had established a credible case of lack of common control, and so the question was whether the respondent's evidence was enough to rebut that. The panel concluded, not without hesitation, that it did. At least some circumstantial evidence appeared to corroborate Mr Nolter's claim to always have been in control of the domain names; in particular, he was identified in the 2012 case as the former managing director of the company that was said to own the respondent in that case, and his name appeared on the Whois records in the present case. Indeed, as a practical matter, he was the person handling the response.

Taking all of the evidence as a whole, the panel concluded that it was more likely than not that the domain names had been under the control (directly or indirectly) of Mr Nolter in both the 2012 case and in the present case. Therefore, the present case was a refiling. As the complainant had not sought to argue that any exceptional circumstances applied, it was not necessary to consider the complaint further and so it was denied, although the panel made no findings as to the complainant's potential remedies in any other applicable legal forum.

Comment

This decision sheds light on the complicated matter of refiling, especially in cases of an apparent transfer of control. The decision also highlights the importance for complainants to argue exceptional circumstances when the identity of the respondent is unclear.

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