

Re: WIPO Arbitration and Mediation Center observations on ICANN Staff "Preliminary Issue Report on the Current State of the Uniform Dispute Resolution Policy"

July 15, 2011

**The ICANN Board has committed itself to UDRP stability**

The existing UDRP underpins commercial and legal stability in the DNS. It is widely acknowledged to be functioning well, and any destabilization risks regression to pre-UDRP litigation options. The ICANN Board, in approving an unprecedented expansion of the DNS, assured the GAC and trademark stakeholders of the continuing availability of the "existing, long-standing and tested [UDRP]".

Not only because of this commitment, but also because of the complexities and resource needs involved, unleashing any UDRP revision effort in the present circumstances would be institutionally reckless.

This is especially so since the additional RPMs devised for new gTLDs are wanting in many respects and remain to be proven in practice. As it is, the looming unprecedented DNS expansion represents a huge enforcement burden for trademark owners.

**Review of "registration abuse" should focus on cybersquatting, not on the UDRP**

The invoked "passage of time" is not a compelling motive for UDRP revision where contemporary expert assessment so clearly recognizes this mechanism's overall positive functioning. If age were a relevant standard, any intellectually honest effort would focus on the persistence of the much older yet less transparent practice of cybersquatting: its drivers, its beneficiaries, and the extent to which it funds the DNS.

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**If any process should take shape, it must be focused and expert driven**

The UDRP is not the problem. The problem is cybersquatting, as it exists now, and the vastly expanded scope for registration abuse occurring within new gTLDs.

In the event that – against ICANN Staff’s preliminary recommendation, echoed by a clear majority of invested stakeholders, not to initiate a PDP on the UDRP – any such process should nevertheless move forward, it would demand appropriately motivated expertise. ICANN should not accommodate desires to politicize the UDRP.

Business models and enforcement decisions worldwide rely on the overall predictability of the existing UDRP framework, as applied by panels across thousands of published decisions. This global body of jurisprudence should not be tampered with, and certainly not on the basis of outlier cases or academic differences of opinion. The system can only be looked at holistically.

The anticipated ICANN process does not inspire the requisite confidence where IP institutionally occupies a minor ICANN voting role. Recent experiences with new gTLD RPMs, including the URS on the second level, unmistakably demonstrate this.

Those familiar with the recently updated “[WIPO Overview](#)” of UDRP jurisprudence (distilling panel responses to some 50 of the most common substantive and procedural questions, over thousands of WIPO cases) can appreciate the need to make choices on the basis of a proper understanding of the UDRP in all its interconnected facets.

The only constructive approach to an ICANN-sponsored UDRP revision might be the establishment of a small working group representing only informed stakeholders whereby unanimous results would be accepted or rejected by ICANN as a package. Failing such approach, no one would win if the UDRP would end up embroiled in recycled committee processes, open-microphone lobbying and line-item horse-trading. Early-day ICANN efforts to revise the UDRP merely spawned polarized debate; its only successful amendment resulted from the targeted, non-contentious ICANN adoption of the WIPO-proposed paperless “eUDRP”.

**Policy/process distinctions are complex; listed issues are outside the scope of the UDRP; or are properly subject to panel determination**

The list of suggested changes captured in the ICANN Staff Preliminary Issue Report is voluminous, and likely to prove contentious as a basis for any revision effort.

Many issues included in this list as “process” would in fact have policy implications. Other items would fall outside the scope of the UDRP itself, or would be more appropriately addressed through the RAA, registrar best-practices, and/or ICANN advisories/compliance activities. Examples include: “Privacy/Proxy Registrations”, “Verification Process”, “Registrar Obligations”, “Lock Down of Domain”, “Meaning of Status Quo”, “WHOIS Updates”, “Billing Contact Data Not Provided”, “Identity of Respondent”, “Stays/Case Suspensions”, “Uniform Procedures for Transfers”, “Registrar Cooperation”, “Conflicts of law”, “Renewal Fees”, “Expiration/Deletions”, and “Forum Shopping”.

In fact, the policy-impacting potential of such items is recognized by proponents of UDRP revision. For example, at an [NCUC working session](#) on Tuesday June 21, 2011 at the ICANN Meeting in Singapore, it was observed (ICANN Transcript):

[Milton Mueller]: "If it were well before July 15 we would be able to say - let's suppose that we discover that all of the serious changes we're proposing actually could be spun as procedural. Then we could go along with the flow and say okay, we agree with all of these people who are afraid of substantive changes, let's make it a procedural change."

The ICANN Report listing further includes numerous items already addressed by existing panel-supported jurisprudence and/or provider practices. Listed examples additional to those mentioned above include: "Electronic Communications", "Copy of Complaint", "Language of Proceedings", "Timing of Response", "Laches", "Evidence", "Rules on Supplemental Submissions", "Reverse Domain Name Hijacking", and "Three Member Panel Fees". In terms of more substantive items listed in the ICANN Report, both the UDRP itself and panel jurisprudence amply provide for "Safe Harbors", including fair use.

Constraining legitimate panel discretion on such issues would seriously impact the essential flexibility to do justice in each case over time against the backdrop of a continually evolving DNS.

#### **The UDRP should be left to do its job**

The issue is not whether the UDRP can be improved, but whether it could effectively survive an ICANN process nominally directed to that end. Especially at a time of massive DNS expansion, the UDRP should be left to do its job.

We are posting a copy of these observations on the WIPO website for public information at [www.wipo.int/amc/en/domains/resources/icann/](http://www.wipo.int/amc/en/domains/resources/icann/).

Thank you for your consideration.

Yours sincerely,



Erik Wilbers  
Director  
WIPO Arbitration and Mediation Center