

As a working group member I am generally not comfortable with seeking public input and then arguing against those contributions. However this has to be balanced against comments from informed organisations such as WIPO <sup>1</sup> because other important and influential, but naturally less informed organisations <sup>2</sup> rely on them to provide considered and objective advice.

Citing emotive articles from organisations like the New York Times to set the narrative is a risky approach, since inaccurate or incorrect assumptions could lead to bad policy recommendations and ultimately, have far reaching unintended consequences for innocent third parties. It is therefore something that is probably best avoided.

With this in mind we need to look more carefully at the problems raised in the cited New York Times article. <sup>3</sup>

If we look more closely at the two screenshots of emails purporting to be from the World Health Organisation and the Mexican Government we can see that both of the examples cited by the article from the New York Times do not actually use an infringing domain, so any changes to UDRP or URS would have zero impact on this problem behaviour.

The second example actually shows the email as being sent from the real Mexican Government domain “gob.mx”. Faking an email sender’s addresses is incredibly easy, it is simply a matter of entering whatever you want in many email software programs. <sup>4</sup>

There are several ways in which malware & phishing can be delivered and most do not actually need a confusingly similar domain name that would be required to take action under UDRP or URS.

1. Attachment – No infringement so action is not possible under UDRP or URS
2. Obfuscated URL – No confusingly similar infringement is likely <sup>5</sup>
3. Visible URL possible infringement could occur in a small percentage of cases.
4. IP address – No infringement so action is not possible under UDRP or URS

It is important to understand that the actors behind these scams often register hundreds or thousands of domains which in the vast majority of cases bare no similarity to the domain of the targeted organisation <sup>5</sup>. It is far easier to make part of the URL other than the domain look official to a percentage of people either through the use of a sub-domain, directory path or additional parameters and then use a batch of non-infringing domains, [non-wipo.com.asdfaa.xyz/submit-to-non-wipo.com?non-wipo.com-submission-form.aspx](https://non-wipo.com.asdfaa.xyz/submit-to-non-wipo.com?non-wipo.com-submission-form.aspx) as a significant percentage of people would not know that domain in the above example is actually the blue part of the text.

The reason many of these actors use hundreds if not thousands of domains is because most registrars are getting increasingly active at shutting down domains that lead to such bad sites and as a result these domains have a short shelf life often measured in hours before being suspended.

Indeed section 3.18 of the 2013 Registrar Accreditation Agreement (RAA) requires registrars to take action against this sort of behaviour.<sup>6</sup>

The advantage of using the 3.18 approach is it doesn't require any domain name infringement to take action which means all of the bad behaviour involving a domain cited by WIPO can easily be dealt with and without any costs beyond the time spent identifying offending sites and requesting their suspension.

If governments and/or WIPO feel there is a need to increase enforcement methods, two possible steps would be to widen the approved parties list in 3.18.2 and/or centralise the reporting requirements as is in the approach taken in the false WHOIS reporting system.

I understand fully the IGOs reluctance to have to deal in different jurisdictions around the world but any actors engaged in the kind of behaviours cited by WIPO would be extremely unlikely to ever provide a defence against a UDRP never mind seek to overturn an adverse UDRP outcome against them in their domestic courts.

I personally believe a separate, narrowly tailored dispute resolution mechanism isn't the best way forward especially given better alternative non UDRP/URS mechanisms already exist to deal with the vast majority of the cited bad behaviour.<sup>6</sup> It would be far better to improve the existing protection mechanisms which would also help other non-IGO organizations which currently experience in excess of 99.9% of these kinds of problems.

Such an approach often raises concerns as to immunity and standing to bring a UDRP.

As WIPO states in its submission<sup>7</sup> IGOs are institutions created by states. And as such it is difficult to see how IGOs should be entitled to enjoy greater immunity than their creators, especially where IGOs are seeking to use UDRP or URS as a sword to seize assets from third parties as opposed to using UDRP or URS to defend their own assets.

This is also reflected in Members' domestic legal systems, where a Member has the right to amend immunities and privileges enjoyed by international organizations.<sup>8</sup>

It is also worth noting that in The United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)<sup>9</sup> article 14 for example places considerable restrictions on foreign states seeking to invoke immunity in disputes on intellectual property.

Any tailored UDRP protections offering a pervasive right of immunity would also grant substantial additional rights to IGOs bringing a dispute against a registrant in a non Member state and especially so, for regional IGOs.

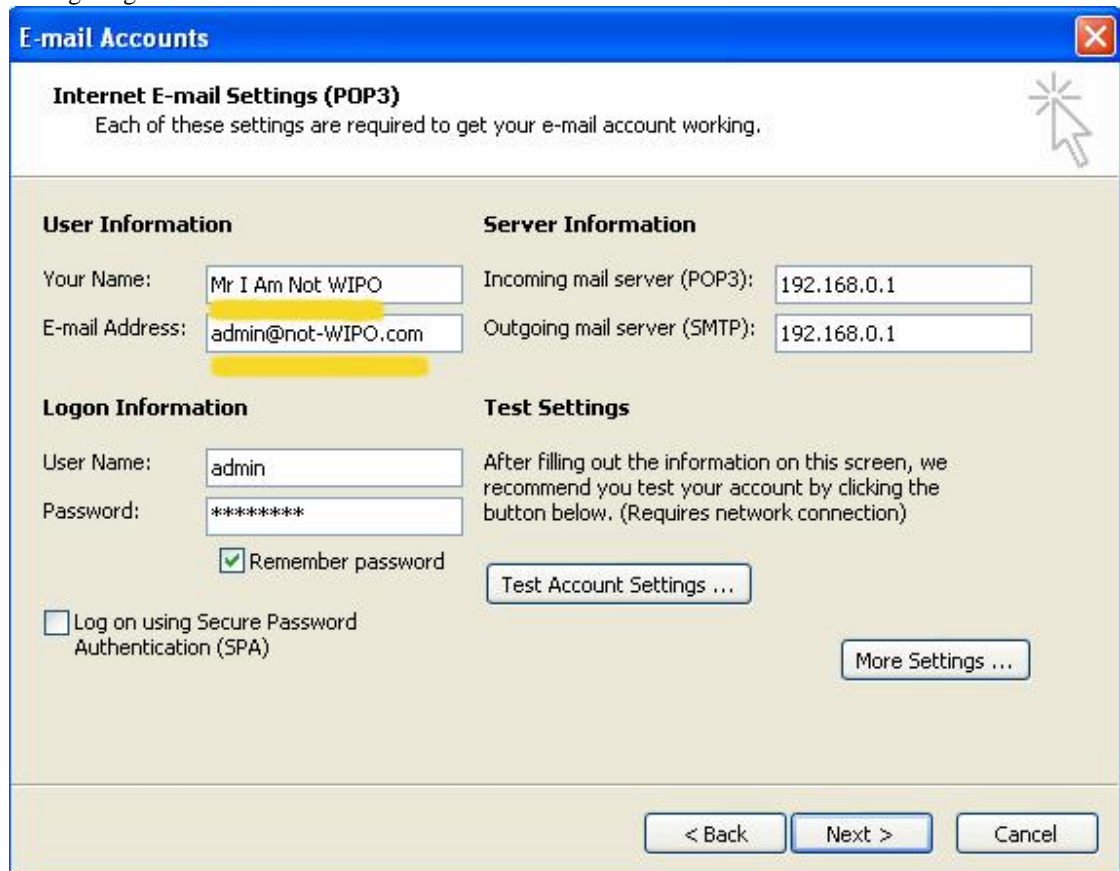
Finally, on standing it is worth pointing out UDRP is exceptionally well drafted and there are a lot of myths promulgated by interested parties. There is nowhere in the UDRP policy that requires the registration of a trademark or service mark. And 6ter simply

evidences Governmental & IGO marks in the same way the registration of trademarks simply evidences the existence of marks of the underlying goods and services. In order to have their mark infringed an IGO has to offer a service i.e. be known by that mark, this is sufficient under the existing UDRP policy.

#### **Footnotes:**

1. WIPO Comments  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00000.html>
2. Comments associating with WIPO's analysis  
  
Richard Hill – Panellist  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00001.html>  
  
ICAO – International Civil Aviation Organization  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00007.html>  
  
IDB - Inter-American Development Bank (IDB)  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00008.html>  
  
IIC - Inter-American Investment Corporation (IDB Group Member)  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00017.html>  
  
WTO – World Trade Organization  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00030.html>  
  
EPO - European Patent Office  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00035.html>  
  
WHO – World Health Organization  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00036.html>
3. WIPO cited article from the New York Times - Malicious Ebola-Themed Emails Are on the Rise  
[https://bits.blogs.nytimes.com/2014/10/24/malicious-ebola-themed-emails-are-on-the-rise/?\\_r=0](https://bits.blogs.nytimes.com/2014/10/24/malicious-ebola-themed-emails-are-on-the-rise/?_r=0)

4. Configuring email software send from addresses



**E-mail Accounts**

**Internet E-mail Settings (POP3)**  
Each of these settings are required to get your e-mail account working.

**User Information**

Your Name:

E-mail Address:

**Server Information**

Incoming mail server (POP3):

Outgoing mail server (SMTP):

**Logon Information**

User Name:

Password:

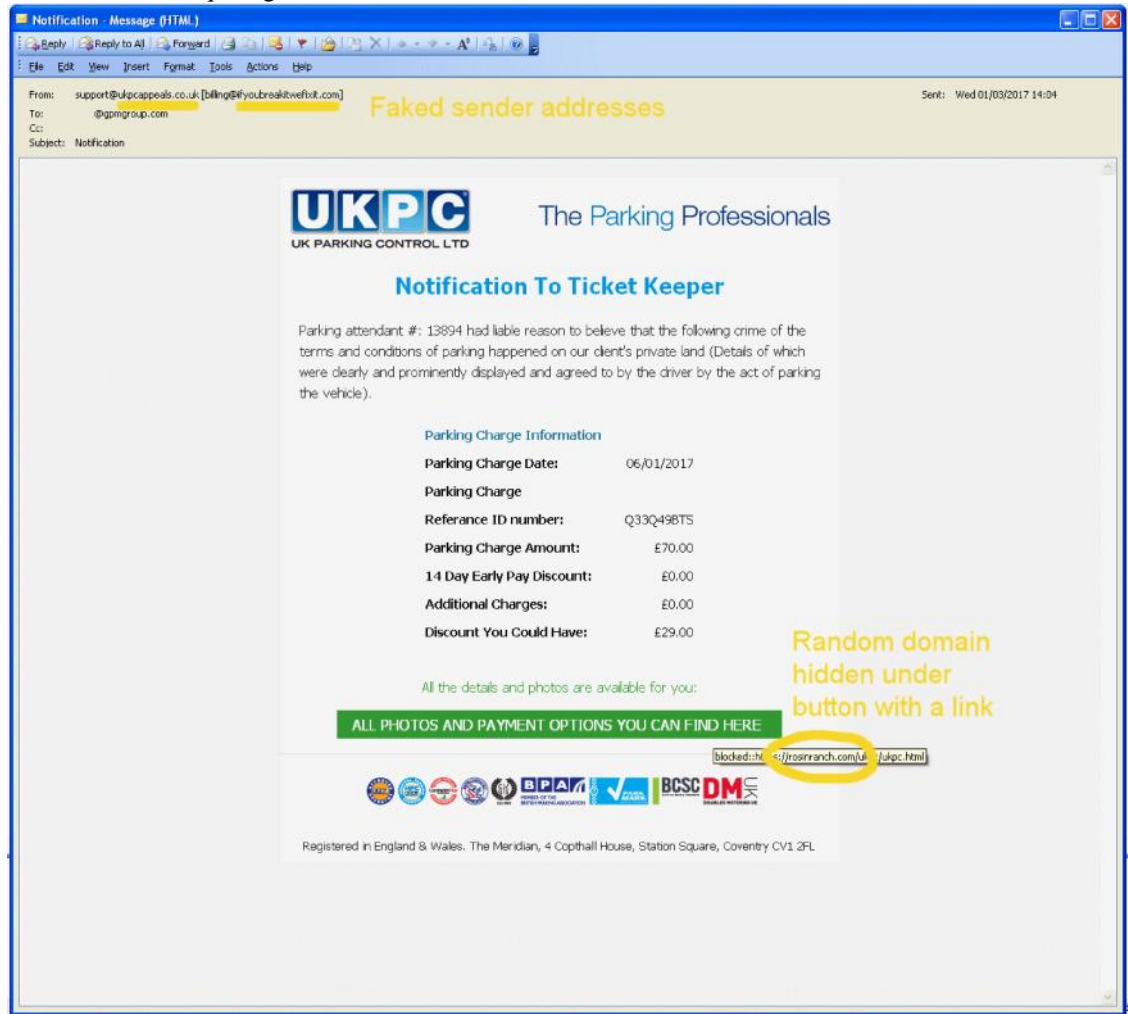
☒ Remember password

☐ Log on using Secure Password Authentication (SPA)

**Test Settings**

After filling out the information on this screen, we recommend you test your account by clicking the button below. (Requires network connection)

5. Non visible link requiring a mouse over to see the destination URL



6. 2013 Registrar Accreditation Agreement (RAA)  
<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>

3.18 Registrar's Abuse Contact and Duty to Investigate Reports of Abuse.

3.18.1 Registrar shall maintain an abuse contact to receive reports of abuse involving Registered Names sponsored by Registrar, including reports of Illegal Activity. Registrar shall publish an email address to receive such reports on the home page of Registrar's website (or in another standardized place that may be designated by ICANN from time to time). Registrar shall take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse.

3.18.2 Registrar shall establish and maintain a dedicated abuse point of contact, including a dedicated email address and telephone number that is monitored 24 hours a day, seven days a week, to receive reports of Illegal Activity by law enforcement, consumer protection, quasi-governmental or other similar authorities designated from time to time by the national or territorial government of the jurisdiction in which the Registrar is established or maintains a physical office. Well-founded reports of Illegal Activity submitted to these contacts must be reviewed within 24 hours by an individual who is empowered by Registrar to take necessary and appropriate actions in response to the report. In responding to any such reports, Registrar will not be required to take any action in contravention of applicable law.

3.18.3 Registrar shall publish on its website a description of its procedures for the receipt, handling, and tracking of abuse reports. Registrar shall document its receipt of and response to all such reports. Registrar shall maintain the records related to such reports for the shorter of two (2) years or the longest period permitted by applicable law, and during such period, shall provide such records to ICANN upon reasonable notice.

7. WIPO Comments  
<https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00000.html>

*"IGOs are unique institutions created by governments to fulfill global public missions."*

8. International Organization Immunities Act of 1945, 22 U.S.C  
<https://www.law.cornell.edu/uscode/text/22/288>
9. The United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)  
[http://legal.un.org/ilc/texts/instruments/english/conventions/4\\_1\\_2004.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf)

Article 14 - Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.