

November 17, 2015

Set out below are the WIPO Arbitration and Mediation Center's observations on ICANN's Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs (Report). These observations are also posted on the WIPO website at: www.wipo.int/amc/en/domains/resources/icann.

The UDRP is a globally-recognized policy success

Following a WIPO process consolidating the input of community stakeholders spanning 17 global consultations, ICANN in 1999 adopted the UDRP. Fifteen years later, the UDRP continues to function as intended. In its harmonized criteria and universal application, this anti-cybersquatting mechanism has come to be recognized as an international policy success.

The UDRP enables brand owners from around the world to efficiently address trademark abuse without having to go to court, let alone in foreign jurisdictions; in the process, the UDRP helps to reduce fraud and consumer confusion in the digital economy.

However, it is not only brand owners and consumers who benefit from the UDRP; this system has been positively connecting all DNS stakeholders.

Unlike in court, UDRP decisions do not impose monetary damages on registrants. Moreover, the overall predictability of the UDRP framework allows registrants to make an informed decision whether to defend a case. This UDRP predictability has also supported a high settlement rate between parties. More broadly, UDRP jurisprudence informs domain name registration practices and website use.

On their part, registrars and registries have come a long way from the pre-UDRP days of managing and defending disputes themselves. These thousands of intermediaries have come to rely on the UDRP as something of a safe harbor.

/...

WIPO Arbitration and Mediation Center observations on ICANN Staff “Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs” – November 17, 2015

ICANN’s adoption of the UDRP has not only benefited these stakeholders, but has also allowed ICANN itself to avoid compliance issues in some 50,000 UDRP cases involving many more domain names filed to date by parties from some 180 countries.

Beyond this, the UDRP is a global best-practice applied by registries in many national domains (ccTLDs).

It is no surprise, then, that the UDRP is held out as a global model for online rights enforcement.

The complexity of UDRP review should not be underestimated

With the New gTLD Program approaching, in 2011 the GNSO Council voted to postpone a review of the UDRP. That vote reflected the “perspective of the majority of the ICANN community, and the advice of the [GAC], and the [ALAC]” that with the sea-change expected from rolling out new gTLDs, it would be unwise to risk the stability of the proven UDRP.

The need for UDRP stability recognized by the GNSO in 2011 is even more important today. New gTLDs having already attracted some 10 million registrations, the UDRP has been seamlessly applied in hundreds of such cases. In contrast, a significant number of difficult files are competing for the ICANN community’s attention, for example IANA transition, and new gTLD operations and compliance.

An apt illustration of the complexity of UDRP review is provided by the ample process considerations identified in the Report, including potential contingencies such as the CCT Review, the TMCH Review, and even the option of “staggering” any reviews between mechanisms in new or existing TLDs.

Political compromise between competing wish-lists can easily undo the cohesive UDRP design

Any review of the UDRP (including its relation to the URS) must take a considered holistic approach. Politically expedient trade-offs between wish-lists simply to conclude the process (for example as a prerequisite to approval of subsequent new gTLD rounds) will be certain to cause more harm than good. Tempting as they may be, piecemeal gains are unlikely to serve UDRP stakeholders’ longer-term interests.

An inventory of early aspirations expressed by brand owners illustrates the complexity of UDRP amendment. These items include: “loser-pays” sanction, reduced timelines, lower filing fees (even via ICANN subsidy), injunctive relief, registry decision implementation, bad-faith presumption for repeat offenders, registrant portfolio disclosure, domain name blacklisting instead of transfer, Whois enhancements, addressing trademark-infringing content beyond the domain name, and revisiting the role of registration authorities.

/...

WIPO Arbitration and Mediation Center observations on ICANN Staff “Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs” – November 17, 2015

Destabilization of the proven UDRP risks unpredictable effects

The Report recognizes that any review of the UDRP, as a longstanding ICANN Consensus Policy, would be an unprecedented endeavor for the GNSO.

Destabilization of the predictable UDRP framework may have a range of unintended consequences. It would disrupt the body of precedent carefully developed by hundreds of panelists from across jurisdictions in tens of thousands of cases.

Increased (procedural or substantive) complexity may prompt brand owners already weary of disproportionate enforcement costs to knock directly on registration authorities’ doors. Imposing monetary sanctions on losing parties may impact the domain name sales market. Reducing the UDRP’s utility may see parties arguing and defending cases in courts around the world.

The many UDRP benefits are widely recognized, including at the most recent ICANN Meeting in Dublin where a range of stakeholders affirmed the overall stability of the UDRP. This is timely, because even with inevitable “imperfections”, the UDRP’s overall predictability and effectiveness as a court alternative seems to have become somewhat taken for granted.

Likewise, the risks inherent in the now-commenced ICANN exercise can easily be underestimated. Regardless of where stakeholders find themselves with ideas (each perhaps understandable in isolation) for UDRP “improvements”, all will want to tread cautiously in a review process.

It is worth noting that the existing UDRP terms already carry the flexibility which a dispute resolution framework needs to stay relevant. WIPO’s “Jurisprudential Overview”, its annual Panelists Meetings, its Legal Index, and its Advanced Workshops are live testimony to this adaptive capacity. Using reasonable discretion under the Rules, panels have successfully addressed a dynamic range of emerging DNS issues, such as consolidated complaints, reseller scenarios, party identity in relation to privacy services, and appropriate language of proceedings.

Each day, the UDRP demonstrates the flexibility to meet the demands of an evolving DNS; it does not need system-wide updates that would imprudently limit this flexibility.

If the choice is made to review the UDRP, the process should be expert-driven

As codified in its Bylaws, ICANN is tasked with the secure and stable technical coordination of the global Internet’s unique identifier system. Some may argue that questions of legal systems are outside this remit. However this may be, there is a threshold question whether an open-call ICANN Policy Development Process is best suited for any UDRP review process.

WIPO is the global forum for intellectual property policy and services. Should ICANN decide to subject the UDRP to a review process, WIPO’s Arbitration and Mediation Center would share the experience and expertise of the 33,000 UDRP cases it has managed to date.

Whatever review mechanism may take shape, it would be particularly unfortunate if a voluntarily-adopted ICANN process would end up undercutting an ICANN policy success that has remarkably served all DNS stakeholders.

/...

WIPO Arbitration and Mediation Center observations on ICANN Staff “Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs” – November 17, 2015

In its Report, ICANN Staff noted that “[w]hile a review might be beneficial, the prior ICANN work reporting on its operations did not highlight any one issue as generally being agreed as susceptible to a clear and simple remedy.”

Given the deliberate balance underpinning the UDRP’s positive track record, WIPO supports the Report’s caution about opening up the UDRP system, including in its relation to the URS.

Thank you for your consideration.

Yours sincerely,



Erik Wilbers
Director
WIPO Arbitration and Mediation Center



Brian Beckham
Head
Internet Dispute Resolution Section
WIPO Arbitration and Mediation Center

cc: Mr. Fadi Chehade, President and CEO, ICANN
Mr. Steve Crocker, Chair, ICANN Board of Directors
Mr. Thomas Schneider, Chair, ICANN Governmental Advisory Committee