

WORLD INTELLECTUAL PROPERTY
ORGANIZATION

世界知识产权组织

ORGANIZACIÓN MUNDIAL
DE LA PROPIEDAD INTELECTUAL



ORGANISATION MONDIALE
DE LA PROPRIÉTÉ INTELLECTUELLE

المنظمة العالمية للملكية الفكرية

ВСЕМИРНАЯ ОРГАНИЗАЦИЯ
ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

July 4, 2007

Dear Dr. Twomey, *Dean Paul,*

Further to our recent meeting with you, the World Intellectual Property Organization (WIPO) wishes to take the occasion of the current consideration by the Internet Corporation for Assigned Names and Numbers (ICANN) of the Czech Arbitration Court (CAC) Proposal to Become a New UDRP Provider to record a number of observations for your consideration in relation to the role and selection of dispute-resolution service providers, in particular under the Uniform Domain Name Dispute Resolution Policy (UDRP).

WIPO is increasingly concerned about the largely unchecked consequences of the generally profit-driven competition in the provision of a consistent, predictable and equitable system of law in domain name cases. Violations of the intent, if not the letter, of the UDRP negatively affect parties and impede the functioning of the UDRP. Further consequences include the distortion of fair competition by rewarding provider practices that represent a 'race to the bottom', without a corresponding commitment to institutional investment in the establishment of a predictable and equitable system of law in domain name dispute resolution at large. An absence of providers' historic understanding of the UDRP and of transparency in structures and objectives comes at the expense of due process, quality precedent and investment in the future of the process. Forum shopping is of concern, especially where it exploits such a vacuum.

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Current developments in the domain name system, in our view, only increase the need for consistency and integrity in the dispute-resolution process. These include the growth of 'domaining', whether or not associated with the increasing number of accredited registrars, and the flighty nature of many registrations.

WIPO believes that accreditation of dispute-resolution providers must be the result of a considered policy that reflects an appreciation of longer-term implications for the credibility of the domain name system.

WIPO and the UDRP

Similar to arguments heard concerning the registration system itself, we note that the UDRP mechanism requires active stewardship. WIPO invests significant resources in ensuring that domain name dispute resolution constitutes a credible, predictable system of law. The most recent example is WIPO's online provision of an unprecedented range of dispute resolution statistics and trends. Further examples are the WIPO Legal Index, the WIPO Decision Overview, WIPO Domain Name Workshops and WIPO Panelist Meetings, which are the premier forum for substantive discussion of case precedent and practices.

Panelists have been independently selected by WIPO, not only for their Internet and intellectual property expertise but also to offer true diversity in jurisdictions and languages (WIPO makes every effort to administer cases in each requisite language). Panelists have no institutional interest in the WIPO Arbitration and Mediation Center and are remunerated independently of the scope of each case. WIPO's care for due process is reflected in its appointment policy, which incorporates conservative conflict-of-interest assessment, equitable distribution, decision citations in pleadings, prior UDRP appointment involving a case party, and considerations of language and jurisdiction.

WIPO further devotes extensive resources to the multi-lingual provision of information to interested parties by telephone and online, in print and in presentations. This includes the Center's domain name dispute resolution bibliography, a listing of UDRP-related court cases, press releases providing recent statistics and analysis, and a trademark database portal.

The WIPO Center also engages extensively with registrars on their role in the UDRP system. We observe that an increasing number of registrars display behavior that frustrates the intended functioning of the UDRP. Whether or not motivated by links to registrants, such behavior includes non-compliant registration provisions, the failure to provide complete or correct registration

information, simple uncontactability, 'cyberflight'-related or other modifications to registrant data after a complaint is filed, and failure to properly implement transfer decisions. WIPO has informed ICANN of many such instances and will shortly provide a fuller overview of these practices, which call for independent and active oversight.

Beyond UDRP activities, WIPO also provides policy support to new registry operators. In addition to over 50 country code top level domains, this encompasses assistance in the drafting and operation of sunrise and other policies for ICANN-accredited registries, including in the past .biz, .info and .mobi. To facilitate the deployment of effective policies, WIPO makes publicly available detailed reports on this experience (see *inter alia* the WIPO End Report on Case Administration under the Start-Up Trademark Opposition Policy for .biz, and the WIPO End Report on Case Administration under the Afilias Sunrise Registration Challenge Policy for .info). A broad overview which also reviews the UDRP experience is provided in the WIPO Report on New Generic Top-Level Domains: Intellectual Property Considerations.

Provider Practices

A number of examples may serve to illustrate WIPO's misgivings regarding the largely unchecked consequences of unfair competition in the provision of UDRP services.

Practices of concern, many of which are in fact known to ICANN, include: the charging of complainants (and in the past even respondents) for supplemental submissions, and its relationship to panel independence, especially where the latter would share in proceeds; the application of reduced panel fees in respondent default cases; institutional linkages between providers and appointed panelists; lack of structured legal access to decisions; minimal exchange of panel views across decisions, and decisions of variable consistency; requiring respondents to pay a fee for requesting an extension to the response filing period; lack of or incomplete registrar verification procedures (indispensable for a provider to comply with its obligations concerning language of procedure, correct registrant identity, billing contact for notification, proper choice of mutual jurisdiction, and deletion and expiry issues); the 'poaching' of WIPO panelists; the reproduction in whole or substantial part of extensive WIPO case documents; and the duplication of detailed WIPO workshop program outlines (the last three being particularly shameful behavior in the context of a policy designed to protect intellectual property).

CAC Proposal

The CAC Proposal is the latest manifestation of the type of concerns expressed above. It contains numerous instances of proposed violation of the terms of the UDRP in its present form. Underscoring WIPO's position on the privatization of domain name justice, the Proposal appears to present these very violations as its principal selling points. Before itemizing the most blatant of these, we make two general observations.

First, the Proposal attempts to validate its so-called "new features" by their inclusion in Supplemental Rules. However, as a matter of intent as well as drafting, it is obvious that any practical latitude afforded by Supplemental Rules should not contravene the UDRP itself.

Second, to the extent that any of these features would be regarded as a platform for changes to the UDRP, we believe that these should not arrive through a 'back door' of provider accreditation. Over 11,000 UDRP cases and another 15,000 different domain name proceedings have afforded WIPO substantial insight into the possible evolution of the UDRP system (indeed, an early WIPO proposal to ICANN dates back to the year 2000). The purpose of any such changes should be to render the UDRP more efficient and to better equip it for the wide-reaching developments taking place in the domain name system. In light of past experience, it appears doubtful whether the sole submission of the UDRP to community consultations could achieve this goal. However this may be, WIPO as initiator of the UDRP would follow with great interest any action that might imply changes thereto.

WIPO's above-mentioned facilities and the procedures which it has drafted and used for new domains reflect a clear preference for electronic communication. We note, however, that the Proposal's option of an "electronic-only UDRP procedure" is in plain conflict with paragraph 2 of the UDRP Rules.

The Proposal's acceptance of a single so-called "class complaint" on behalf of multiple right holders against "serial cybersquatters" ignores a series of legal and practical issues under the UDRP in relation to complaint compliance and notification, panel appointment (essential issues of due process) and registrar enforcement.

The Proposal envisages a complainant challenge process to the provider's rejection of a complaint on grounds of administrative deficiency. Not only is this not provided for under the UDRP, but would have multiple implications for the current structure of the UDRP. These concern a provider's independent responsibility, paragraph 4(b) of the UDRP Rules in relation to the deemed

withdrawal of complaints, the introduction of panels not contemplated under the Rules, and UDRP timelines.

Likewise, CAC's stated intention not to accept complaints from parties found guilty three times of reverse domain name hijacking has no basis in the UDRP. By way of illustration, a respondent which has had one or more findings made against it of bad faith registration and use of a domain name today remains entitled to a fair hearing on any future case filed against it.

CAC's inclusion in its proposed Supplemental Rules of a "quasi appeal mechanism" goes to the heart of the UDRP system. Leaving aside important (and mostly unaddressed) questions of consistency with, and implications for, existing elements of the UDRP, the UDRP deliberately makes no provision for such mechanism. The matter was extensively canvassed when the UDRP was developed, with paragraph 221 of the Final Report of the WIPO Internet Domain Name Process, which concluded as follows:

"While a number of commentators were in favor of incorporating appeal procedures in the administrative mechanism, the majority were not. As the administrative procedure in any event would allow the parties to resort to the national courts after the issuance of a determination, an appeal process would be redundant and unnecessarily complicated for a procedure that is meant to be as streamlined and efficient as possible."

The Proposal contains yet another unforeseen additional mechanism: a separate, fee-based pre-commencement determination by a panel of the language of proceedings. In addition to adding needless complexity (WIPO's 2000 proposal includes a simple solution), this plan raises questions of jurisdiction of such a preliminary panel and of any panel subsequently appointed in accordance with the UDRP to determine the applicable language on the full record before it.

Provider Policy

Examples abound of undesirable consequences of a proliferation of accredited institutions acting out of different motives within the domain name system. WIPO strongly believes that the provision of a dependable system of law in the domain name system should not become hostage to motivations and practices that violate the principles underlying the UDRP system. If further accreditation were in general considered advantageous, it should be based on the

Dr. Paul Twomey, Marina del Rey - July 4, 2007

most serious appraisal of plans and credentials. Where accreditation does follow, it creates an ongoing responsibility for provider oversight and UDRP support exercised in a truly independent manner.

WIPO urges ICANN to adopt a deliberate and considered provider policy, in full awareness of consequences for the longer term for the credibility of the UDRP, which thus far has been acknowledged to be an effective mechanism and should be allowed to remain so in comparison to court options.

With best wishes,

Yours sincerely,



Francis Gurry
Deputy-Director General