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Re: ICANN Report of Public Comments on the UDRP Preliminary Issue Report

September 23, 2011

Dear ICANN Counsel, Staff,

We hope this letter finds you well. We are writing on the occasion of ICANN's updated publication on September 12, 2011 of the Report of Public Comments on the UDRP Preliminary Issue Report (<http://gnso.icann.org/mailing-lists/archives/council/msg11963.html>).

1. UDRP Webinar

The Report of Public Comments contains virtually no observations as made by participants at the ICANN-organized Current State of the UDRP Webinar of May 10, 2011, nor, more importantly, does it contain the conclusions which ICANN Staff drew from those comments in its Preliminary Issue Report (in fact, even the Webinar itself is only mentioned in passing).

A clear majority of Webinar participants counseled against opening up a process on the UDRP, at least at this time. It would negatively impact on the credibility of any ICANN UDRP process if that expert input were not given an appropriate place in the Final Issue Report; indeed, it must have been because of the weight of their submissions that ICANN invited these experts in the first place. ICANN standing by its previous summary of the flow of these Webinar comments would assist the integrity of its current process.

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2. Policy/Process Distinction

WIPO's comments on the Preliminary Issue Report documented how certain stakeholders have publicly suggested that substantive UDRP changes be "spun" as procedural (<http://singapore41.icann.org/meetings/singapore2011/transcript-ncuc-21jun11-en.pdf>). Transparent inclusion at least in the Final Issue Report of this intent could help offset any notion that a distinction between "substance" and "procedure" would beget a good-faith result.

3. Board Representations; GAC Position

Aside from passing reference to WIPO comments on the Preliminary Issue Report, the Report of Public Comments avoids specifically mentioning the ICANN Board's express representations on the UDRP, made to the GAC and other stakeholders in its justification for proceeding with its New gTLD Program. These Board assurances are of course highly material and as such merit straightforward disclosure in the Final Issue Report.

In connection with the GAC, we note that it has provided a UDRP position statement to the GNSO subsequent to the publication of the Report of Public Comments (<http://gns0.icann.org/correspondence/dryden-to-van-gelder-udrp-14sep11-en.pdf>).

4. "Provider Education"

The Report of Public Comments includes a headline reference to "Education of Service Providers as an Alternative to a PDP". This does not appear to be supported (or even mentioned) by either of the comments cited.

As for WIPO, this UDRP Provider has a long-standing record of offering ample UDRP education, on a non-profit basis. We do so for example by hosting meetings which facilitate discussion of jurisprudence among panelists and by providing workshops to filing and defending parties and registration stakeholders. Furthermore, WIPO's website is replete with resources, notably the globally relied-upon WIPO jurisprudential Overview and the WIPO Legal Index of UDRP Panel Decisions.

Considering the Report of Public Comments' inclusion of uninformed positions on the subject, we believe the Final Issue Report should acknowledge the existence of the ready availability of such public-interest tools.

5. Weight of Submissions

The rather unfiltered approach of the Report of Public Comments implies deference to a number of plainly incorrect observations. (To name but one example, the assertion that the UDRP does not protect free speech – when it expressly provides for legitimate noncommercial and fair use, as applied in panel decisions.) By contrast, expert data and analysis representing the reasoned decisions of hundreds of panelists across tens of thousands of cases, receive only passing mention.

Such imbalance makes it more difficult for grounded positions to prevail. To be productive, even a fully open process must appropriately reflect real-world expertise.

6. WIPO Paper for INTA Conference

./ Attached is a copy of a UDRP paper which WIPO was requested to prepare for a September 21-22 INTA Conference on Trademarks and the Internet. We are not here providing this public paper by way of any formal submission, but rather offer it in case you would find it useful for cross-checking any overall UDRP statistics to be contained in the Final Staff Report.

7. Looking Ahead

The Report of Public Comments' inventory of positions, objections, and wish-lists provides an illuminating preview of what would lie ahead for the UDRP if subjected to unguided review. (Incidentally, we note that this inventory excludes WIPO's observation that a credible review would investigate the persistence of cybersquatting: its drivers, its beneficiaries, and the extent to which it funds the DNS itself.)

As raised in our July 15 letter (<http://www.wipo.int/amc/en/docs/icann150711.pdf>), if at a later point in time the UDRP were to be reviewed, we believe the constructive way forward would be the appointment of an appropriately contained working group representing only informed stakeholders whose unanimous recommendations would be accepted or rejected wholesale by ICANN's Board. Bearing in mind WIPO's management of its eUDRP proposal (practically unanimously viewed as a success for ICANN), we would be pleased to discuss this further at the right time.

I wish to assure you of WIPO's strong commitment to UDRP stability.

Yours sincerely,



Erik Wilbers
Director
WIPO Arbitration and Mediation Center