

ICANN IRP Implementation Oversight Team

Stress Test Scenarios

The following scenarios are intended to provide definition and focus to help stress test the issues in the debate over the structure of the timing rule in Rule 4 of the Supplementary Rules of Procedure for the IRP.

The scenarios are intended to be structurally similar to reasonably foreseeable disputes, but fictionalise the specifics. **NB: they are fictitious!**

Please note that the purpose of constructing these scenarios is not to debate the merits of the case the prospective claimant seeks to bring, but whether they have a right to bring a challenge at all.

Scenario 1: An ICANN programme is alleged to be ultra vires

Summary

A longstanding ICANN programme runs into conflict with a commercial competitor outside the DNS industry. The competitor sees it as unfair competition, and seeks to use the IRP to have the programme closed down on the grounds that the programme is outside the scope of ICANN's mission. ICANN argues that it is immune to challenge on the existence of programme at this late date.

Narrative

Following the overwhelming success of the third round TLD expansion in 2024, ICANN was left with a large surplus of funds. ICANN leaders and community members saw compelling reasons not to treat these proceeds as general funding, not least the destabilising effect on ICANN's future finances that would result from coming to rely on a steadily diminishing capital accumulation.

Instead, it was decided to use it to endow a quasi-charitable public benefit programme. After community consultation, it was decided to provide educational programmes in IT in countries with under-developed economies and IT infrastructure. The "5-by-5-by-5" would provide training for 500,000 people per year for five years, free of charge, in five selected countries, chosen anew each year.

The "5-by-5-by-5" programme was very popular, both with its users, the ICANN community and external (and particularly governmental) stakeholders, who welcomed it as a sign of ICANN acting responsibly for the public good. ICANN made much positive PR and political capital from it. As the final year approached, ICANN began consulting the community on making the programme permanent, and changes to ICANN's funding that would be required to support that.

However, in the fifth and – per the original plan – final year of the project, the 5-by-5-by-5 expanded into Ruritania, and immediately ran into conflict with EduTania Inc., a local for-profit training and skills provider. EduTania argued that providing free IT training bankrolled by gTLD proceeds unfairly competed with their services, making their IT training economically non-viable.

After initial discussion with EduTania, ICANN was unmoved. As a nation with a severely undertrained population Ruritania has extensive needs, and if EduTania is any good they should be able to coexist

with 5-by-5-by-5. Perhaps more importantly, EduTania is a relatively small company that only trains a couple of thousand people per year: the 5-by-5-by-5 programme would train up to 100,000 trainees, a huge benefit to Ruritania. The 5-by-5-by-5 launch in Ruritania will go ahead as planned.

EduTania seeks to bring an IRP case challenging the existence of the 5-by-5-by-5 programme on the bounds it is ultra vires, outside the scope of ICANN's limited mission.

The ICANN Legal office advises that EduTania may bring an IRP case against ICANN for how it has chosen to implement the 5-by-5-by-5 programme in Ruritania, and whether it has complied with the original Board decision and established procedures. This may even extend to challenging the decision to select Ruritania as a target country in year 5. However, a challenge to the 5-by-5-by-5 programme itself is, ICANN Legal asserts, out of time: that needed to be brought within 120 days of the Board originally establishing the programme.

EduTania replies that they sought to bring their challenge within 120 days of becoming affected themselves by the 5-by-5-by-5 programme, which was therefore also within 120 days of their knowledge of being harmed by it. They seek a declaration from the IRP that the 5-by-5-by-5 programme is beyond the scope of ICANN's limited mission, and so inconsistent with the Bylaws.

Scenario 2: An ICANN policy regulating domain use is alleged to be ultra vires

Summary

A policy defining abusive use of the DNS is developed within the community, which asserts that its is abuse of the DNS to use it to promote certain specified socially harmful activities. The policy extends the use of the UDRP to administer challenges to registrants who fail to comply with this policy. After the Board approves the policy, there is a significant delay while ICANN works out how to add adjudicators with relevant expertise to the pool of UDRP adjudicators, who previously were heavily specialised in trademark law.

Eventually, a domain registrant loses their domain in a new "UDRP-Max" dispute. They seek to challenge the existence (or, in the alternative, the scope) of the abusive use policy on the grounds that it conflicts with (1) the mission limitation clause in the ICANN bylaws per Article 1 Section 1.1(b); and (2) more specifically, that it is explicitly prohibited by Article 1 Section 1.1(c).

Narrative:

A new ICANN policy on abusive use of the DNS is developed by the community. This contains a clause that asserts that it is abuse of the DNS to use it to promote medical information that is both false and dangerous, or to encourage or promote any behaviour that poses a serious risk to the life or health of any person. The scope of the UDRP, now called "UDRP-Max" is updated to administer complaints alleging non-compliance with this policy by any domain registrant.

This policy was approved by the Board, but it was more than three years before the UDRP was ready to hear complaints, in part because of a perceived need to supplement existing UDRP adjudicators, who specialise heavily in trademark law, with adjudicator with a broader expertise. Further delays are thought to have been occasioned by negotiations between ICANN and some major registry operators, although these were held in private and not publicly acknowledged.

At first the policy was most commonly applied to target web site containing "disinformation" concerning vaccine safety and sites offering bogus medical treatments "quack remedies". However,

following an upsurge in public concern in some countries, notably in the EU, about the harmful effects of poor diet and the obesity crisis, many governments have urged that the policy be applied to address web sites that fail to comply with public disclosure regulations applied to producers and retailers of food and confectionary.

GetBaked Inc. promotes its products worldwide through its website and direct sales arm, getbaked.com. Here you can buy for home delivery favourite high-calorie treats like the Deep Fried Sachertorte and Squigglypuffs™, a confection promoted primarily to children that appears to consist solely of buttercream wrapped in spun sugar.

A complaint was brought in the UDRP by a French public health agency, alleging that the site was directly harmful to public health both in promoting such items, and in failing to comply with French regulations for the minimum proportion of advertising space that must be used to warn of the dangers of obesity. The UDRP awarded control of the domain to the complainant.

Rather than appeal the UDRP case, GetBaked Inc., seeks to bring an IRP case alleging that merely having a policy of this nature is specifically prohibited by Article 1 Section 1.1(c), as well as generally by the mission limitation in Article 1 Section 1.1(b).

GetBaked Inc seeks a declaration from the IRP that the “abusive use of DNS” policy is fundamentally inconsistent with the Bylaws, and the only way to cure this is for ICANN to revoke the policy in its entirety.

ICANN Legal advise that GetBaked Inc can appeal the UDRP case under the terms set out in UDRP-Max. Alternatively, it is open to GetBaked to bring an IRP case about challenging more generally whether using it to require adherence to national health regulation is consistent with the policy as set out.

However, ICANN Legal contends that the existence of the “abusive use of DNS policy” and the UDRP-Max enforcement mechanism are both immune to challenge, as both were adopted more than 120 days previously – in fact, by the time of the case, more than 5 years previously. Instead, challenges can only be brought on an “as-applied” basis.

GetBaked replies that it first became materially affected when a complaint was made against GetBaked.com under the policy, and it acted in a timely fashion, filing challenge to the policy within 120 days of that date.