ORGANISATION MONDIALE
DE LA PROPRIÉTÉ INTELLECTUELLE

Centre d'arbitrage et de médiation de l'OMPI

WORLD INTELLECTUAL
PROPERTY ORGANIZATION

WIPO Arbitration and Mediation Center

March 26, 2010

Dear Messrs. Beckstrom, Dengate-Thrush,

Re: Registration Abuse Policies Working Group (RAP WG) Initial Report

The Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO Center) submits these comments on the "Registration Abuse Policies Working Group Initial Report" which discusses *inter alia*, registrar and registry conduct that may be seen as abusive of third-party rights.

WIPO stands for balanced mechanisms that contribute to a stable, credible Domain Name System (DNS).

In 1999 WIPO submitted its Report offering a blueprint for the ICANN-adopted Uniform Domain Name Dispute Resolution Policy (UDRP), largely heralded as a remarkably effective, predictable alternative to court litigation for rights holders. In this way, the UDRP, as a mandatory best practice, also continues to limit exposure for registration authorities and ICANN. Any process outcome that destabilizes or compromises the principles and practices of this bedrock mechanism for out-of-court dispute resolution concerning online identifiers would jeopardize this effect.

The issue is not whether the UDRP itself can be improved, but rather whether a process of this nature is likely to achieve such result. Realistically, this effort may well end up also incorporating design proposals facilitating the type of practices that prompted the creation of the UDRP in the first place. Against the backdrop of the

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recent constellation of embedded ICANN processes, WIPO cautions against any outcome, however well-intentioned in some ways, that would ultimately harm the legitimate interests of trademark owners as well as ICANN stakeholders. This would also include registrants, who may do well to recall that under the UDRP system, unlike in national courts, monetary damages and legal costs are not awarded to prevailing complainants. Likewise, on their own level, we believe that registrars and registries have their own interest in UDRP stability.

The basis for including the UDRP in the RAP WG initial report, especially against the background of ICANN's New gTLD Program, is unclear.

The link between a report concerning abusive practices undertaken by certain registration authorities on the one hand, and a "Cybersquatting Recommendation" to investigate the current state of the UDRP on the other hand, on its face is surprising. Rather, it might have been expected that any such recommendation would have sought to address any registration authority conduct that may tend to frustrate core UDRP principles and ICANN compliance conditions, particularly as UDRP panelists have found occasion to publicly discuss the various, and unfortunately sometimes repetitive, facets of these issues.

That such practices seem to persist substantially informed the concept of the WIPO-proposed Post-Delegation Procedure for New gTLD Registries; the concept appears equally appropriate vis-à-vis registrar conduct.

Discussions occurring within the context of ICANN's New gTLD Program would seem to already address the "Cybersquatting Recommendation."

Calls to investigate the UDRP may also be driven by the proposal for a Uniform Rapid Suspension System (URS) occurring within the context of ICANN's New gTLD Program. At its core, the URS is intended to (interoperate with and) complement the existing UDRP by seeking to deliver faster and cheaper results in appropriate cases.

Whether the current URS proposal meets these objectives remains open. For example, further to our proposal of April 3, 2009, we note that removing the need for panel appointment in cases of respondent default in a URS proceeding – where the envisioned remedy is a temporary suspension of an infringing domain name – would exponentially decrease the cost and time attendant to such a procedure. With already adequate registrant notice and an appropriately-crafted mechanism through which a defaulting respondent or unrelated third party could later establish their *bona fides* with respect to a suspended domain name, the benefits of a default-based filtering mechanism to all ICANN stakeholders would seem obvious.

In the meantime, informed by its administration of some 17,000 UDRP-related cases, WIPO will continue to upgrade its non-profit public resources (*e.g.*, the free globally searchable WIPO Legal Index, UDRP Panel Overview, Domain Name

Workshops, Panelists Meetings, and Conferences) and UDRP case administration, in full respect of the rights of all parties, and without additional cost to parties. Previous examples of this include matters such as claim consolidation, language of proceedings, case suspensions to facilitate early settlement, treatment of privacy and proxy services, and most recently, the overwhelmingly positively received eUDRP.

Rather than seeking to amend the time-tested UDRP, independent focus on meaningful complementary mechanisms may yield more practical results.

As noted, rather than focusing efforts and processes unlikely to beget a progressive result, WIPO believes that ICANN's focus should be on development of rights protection mechanisms which truly add value for the prevention and resolution of disputes in a massively enlarged DNS. While we fully agree that all such solutions must be reasonable and workable for all stakeholders, compromise as to the scope and design elements of such new mechanisms must ultimately be guided by the need for these to be effective. Diluted mechanisms may see rights holders turning instead to court, as for example seems likely with the present post-delegation version – foregoing the present occasion to help avoid this may become seen as a missed opportunity.

The integrity of the UDRP depends in large part on the providers ICANN chooses to accredit.

Perceived UDRP-related issues tend not to be rooted in the UDRP itself, but rather in its, often profit-driven, application by certain providers and their constituents. WIPO has publicly alerted ICANN to provider practices that may violate the letter or spirit of the UDRP, and risk compromising the integrity thereof. We note the call documented for example in our letters of July 4 and November 29, 2007, for ICANN to recognize the positive as well as negative consequences of its accreditation choices.

We look forward to continuing to assist ICANN in its ongoing deliberations on the appropriate way forward.

We are posting a copy of this letter on the WIPO Center website for public information at *http://www.wipo.int/amc/en/domains/resources/icann/*.

Yours sincerely,

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