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Re: WIPO Arbitration and Mediation Center observations on ICANN's "April 2011
Discussion Draft of the New gTLD Applicant Guidebook"

May 13, 2011

General perspective:

The WIPO Arbitration and Mediation Center operates on a non-profit basis to help design and administer balanced IP-based systems in a global context. For example, the WIPO Center is the principal resource center under the Uniform Domain Name Dispute Resolution Policy (UDRP).

In a process characterized by politicized attrition, appropriately reflecting existing trademark norms in an expanding DNS appears to have posed significant challenges to ICANN stakeholders.

In the attempts to balance divergent positions, there has been no shortage of ideas, many of which have found their way into the current formats of ICANN's Rights Protection Mechanisms (RPMs).

However, at the end of the day, and irrespective of provenance, such ideas must come together through a cohesive vision; the RPMs must work – for everyone.

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If the current RPMs are now presented as complete, their actual "design" unfortunately can seem almost random, with lobbied positions tacked on as expedient. This not only harms the stated purpose of the RPMs, but risks a disservice to the DNS itself, missing a contractual opportunity for a forward-looking approach to the functional integration of norms.

The WIPO Center's New gTLD-related positions are extensively on public record with ICANN, in particular since early 2009 (see, e.g. www.wipo.int/amc/en/domains/resources/icann/). Set out below are more limited observations on ICANN's "April 2011 Discussion Draft of the New gTLD Applicant Guidebook".

1. Trademark Clearinghouse:

- The recent creeping expansion in scope of the fee-based Clearinghouse must be viewed with caution. In determining appropriate types of identifiers, ICANN should bear in mind international and national IP norms.
- Clarification remains outstanding on such matters as the relation to trademark office determinations; fee apportionment measures; any envisaged process for Clearinghouse removal of marks; and treatment of non-Latin script and word+design marks.
- The planned limitation to exact matches and the proposed 60-day Trademark Claims construct invite gaming.

2. Uniform Rapid Suspension (URS):

- Serious considerations underlie the concept itself of a URS mechanism to complement the UDRP (see, e.g., the WIPO Center's proposal of April 3, 2009, at www.wipo.int/amc/en/docs/icann030409.pdf). More than two years later, the URS format is wanting in many respects. While some timelines and other modalities have recently been tweaked, far more serious problems remain unaddressed (for one list of those, see the WIPO Center's letter of December 2, 2010, at www.wipo.int/amc/en/docs/icann021210.pdf).
- These issues are not mere details, but go to the very functioning of the URS, both on its own terms, and in relation to the UDRP. Sensible policy choices must be made to safeguard URS stability and enforceability.

3. Post Delegation Dispute Resolution (PDDRP):

- Beyond the positions already on record, little can be said about ICANN stakeholders' reluctance to engage in constructive discussion of substantive criteria and safe harbor consideration factors. Yet, it would seem illusory to expect rights holders to continue to turn exclusively to lower-level enforcement options in a vastly expanded DNS.
- The WIPO Center is pleased that ICANN has taken up its suggestion for establishing a PDDRP in the first place. However, intermediary financial gain from registration activities that infringe third-party rights comes with appropriate responsibility. This should be a time for positive collaboration in a longer-term view.

WIPO remains committed to workable IP dispute prevention and resolution solutions, and is available to share its experience and expertise with ICANN.

We are posting a copy of these observations on the WIPO website for public information at www.wipo.int/amc/en/domains/resources/icann/.

Yours sincerely,



Erik Wilbers
Director
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