
14. WIPO and IP dispute resolution

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INTRODUCTION

For the first quarter of a century of its history, WIPO played no role in the resolution of IP disputes. For various reasons, this is not surprising. First, IP rights are sovereign rights, in the sense that they are granted by a nation state. Secondly, IP rights are private rights – that is, they are rights granted to individuals of the state (legal persons, both human and corporate, who are not themselves the state). Thirdly, IP rights are territorial, in the sense that they are generally effective only within the territory of the state that grants them. Given these characteristics, the conventional expectation is that the provision of a mechanism for the enforcement of IP rights is the responsibility of the state. Typically, that responsibility is discharged by the state providing national courts in which rights can be enforced through civil litigation or criminal prosecution.

There are, however, characteristics of IP rights that make the enforcement of them amenable to the involvement of an international agency such as WIPO. Although they are territorial in nature, IP rights may be granted in respect of the same subject matter, and to the same owner, in numerous territories at the same time. Moreover, IP rights owners often commercialize their rights through arrangements, such as licences and R&D agreements, that operate across jurisdictional boundaries. Thus, infringement of IP rights in multiple jurisdictions simultaneously is not uncommon, with the consequence that enforcement of those rights in national courts is potentially problematic. Court actions can be lengthy and costly, and it may be necessary to bring actions in multiple countries – with the potential for difficult issues of jurisdiction, choice of law and recognition and enforcement of foreign judgments to arise. These challenges make the utilization of alternative dispute resolution procedures – such as arbitration and mediation – attractive prospects to rights-holders. Recognizing this, WIPO established a section to provide such services – the Arbitration and Mediation Center (AMC) – in 1994.¹

This chapter explores and evaluates the dispute resolution services provided by WIPO through the AMC. It begins by describing the genesis for the provision of such services, and the type of services provided. It then considers in detail the most important (as judged by impact) of these – the resolution of domain name disputes under the UDRP and its derivatives. WIPO's critical role in the design and the imple-

¹ 'WIPO Arbitration and Mediation Center' (WIPO), <https://www.wipo.int/amc/en/center/background.html>

mentation of the UDRP is explained, and the UDRP's significant features and impact are discussed. A critical assessment of the UDRP in operation – and, in particular, its fairness – is undertaken, and WIPO's responsibility for that identified.

WIPO'S DISPUTE RESOLUTION SERVICES

The Arbitration and Mediation Center

The genesis for the establishment of the AMC was a recommendation of an informal working group comprising representatives of FICPI, AIPPI and LESI.² In response to this recommendation, the member states, at the 1991 General Assembly meeting, authorized WIPO to prepare, convene and service meetings of a working group of specialists to consider the setting up of 'a mechanism to provide services for the resolution of disputes between private parties over intellectual property rights'.³ Based on the deliberations of the working group so established, the General Assembly at its 1993 meeting approved the establishment of WIPO dispute resolution services.⁴

It is sensible to ask: from where does WIPO derive the legitimacy to operate the AMC? The answer appears to be: from a pragmatic reading of its objectives and functions, as they are set out in the WIPO Convention. According to Article 3 of the WIPO Convention, one of WIPO's two objectives is 'to promote the protection of intellectual property throughout the world'. If the phrase 'protection of intellectual property' can be read to include the enforcement of IP rights, then the establishment of the AMC can be seen as legitimate on the basis that it is consistent with at least two of the functions that WIPO is mandated to undertake: 'the development of measures designed to facilitate the efficient protection of intellectual property throughout the world',⁵ and the provision of 'services facilitating the international protection of intellectual property'.⁶

The concept of 'protection of intellectual property' seems capable of being given either a narrow reading or a wide reading. A narrow reading is limited to the *existence* of the rights that give rise to exclusivity over the protected subject matter. A wide reading goes beyond that, to include the *exercise* of those rights. Since the existence of rights is of little or no value unless those rights are capable of being exercised, there seems no reason to restrict the concept of 'protection of intellectual property' to the narrow reading. Thus, the concept should be given the wide reading – with the consequence that WIPO's objectives include the enforcement of IP rights, and

² WIPO, *World Intellectual Property Organization, 1992–2007* (WIPO) 93.

³ *ibid.*

⁴ WIPO General Assembly, 'Report adopted by the General Assembly' (WO/GA/XIV/4, WIPO 29 September 1993) para 31.

⁵ WIPO Convention, art 4(i).

⁶ *ibid* art 4(vii).

WIPO's functions legitimately include the provision of measures and services for the efficient resolution of international disputes about IP rights.

Voluntary Dispute Resolution Procedures

The dispute resolution services initially provided by the AMC were for the procedures of mediation and arbitration (including expedited arbitration).⁷ These procedures are 'voluntary', in the sense that they operate only where all the parties have freely consented to their use. In 2007, the AMC extended its voluntary dispute resolution services to include the procedure of expert determination.⁸

In providing these services, the role of the AMC is administrative in nature. It has created rules for the conduct of the procedures,⁹ and it provides case management of matters utilizing those rules.¹⁰ Importantly, the Center does not act as the mediator, arbitrator or expert who resolves matters under the procedures. Those roles are undertaken by individuals (neutrals) who are independent from the Center. Typically, the parties select their own neutrals by agreement. Furthermore, while the Center maintains a panel of neutrals, the parties are free to – and often do – engage neutrals who are not on the Center's panel.

The AMC also provides 'Good Offices' services – that is, procedural assistance to parties in order to facilitate direct settlement between them or the submission of their dispute to WIPO mediation or arbitration.¹¹ Those services, by definition, are also administrative in nature.

The volume of voluntary dispute resolution services provided by the AMC is increasing over time. Between 2009 and 2013, it received 195 filings (an average of 39 per year) for mediation, arbitration, expert determination and good offices requests; between 2014 and 2018, the number of such filings was 558 (an average of 112 per year).¹² The monetary value of the disputes handled by the AMC is quite

⁷ Francis Gurry, 'The Dispute Resolution Services of the World Intellectual Property Organization' (1999) 2(2) *Journal of International Economic Law* 385, 387. Mediation is a non-binding procedure in which a neutral intermediary assists the parties in reaching settlement of their dispute. In contrast, arbitration (including expedited arbitration) is a neutral procedure in which the dispute is submitted to one or more arbitrators who make a binding decision on it.

⁸ WIPO, *WIPO 1992–2007* (n 2) 94. Expert determination is a procedure in which a dispute is submitted to one or more experts who make a determination on the matter. Unless the parties have agreed otherwise, the determination is binding.

⁹ See: 'WIPO Mediation Rules' (*WIPO*), <https://www.wipo.int/amc/en/mediation/rules/>; 'WIPO Arbitration Rules' (*WIPO*), <https://www.wipo.int/amc/en/arbitration/rules/>; 'WIPO Expedited Arbitration Rules' (*WIPO*), <https://www.wipo.int/amc/en/arbitration/expedited-rules/>; 'WIPO Expert Determination Rules' (*WIPO*), <https://www.wipo.int/amc/en/expert-determination/rules/>

¹⁰ 'Role of the Center' (*WIPO*), <https://www.wipo.int/amc/en/center/role.html>

¹¹ 'WIPO Good Offices' (*WIPO*), <https://www.wipo.int/amc/en/goodoffices/>

¹² 'Caseload Summary' (*WIPO*), <https://www.wipo.int/amc/en/center/caseload.html>

varied, ranging from USD15,000 to USD1 billion.¹³ The types of disputes it handles is also quite varied. Disputes directly related to IP rights account for 59 per cent of all disputes serviced by the AMC, of which, disputes about registered rights (patents 27 per cent, trade marks 20 per cent) are more common than those about unregistered rights (copyright 12 per cent).¹⁴ Of the 41 per cent of disputes not directly related to an IP right, they occur more often in the information and communications technology sector (23 per cent) than in the general commercial sector (18 per cent).¹⁵

The volume of filings with the AMC for the most recent year reported, 2018, was 155.¹⁶ While this is impressive, it is small compared with other ADR institutions. The ICC, for example, reported that its International Court of Arbitration administered 842 cases with an aggregate value of USD36 billion in 2018,¹⁷ while the American Arbitration Association's International Center for Dispute Resolution (AAA-ICDR) serviced 993 cases totalling USD8.2 billion in claims in that year.¹⁸ It must be noted, however, that these institutions handle disputes of any type; unlike the AMC, they are not focused on disputes related to IP. When compared with the likely number of IP-related cases handled by the major institutions – estimated to be less than 100 annually¹⁹ – the number of disputes filed with the AMC is significant.

Mandatory Dispute Resolution Procedures

While the volume of filings received by the AMC for its voluntary dispute resolution procedures is significant, it is small compared with those it receives for its mandatory dispute resolution procedures. Those procedures all concern domain names – and, in particular, the abusive registration and use of domain names containing another's trade mark. As of November 2019, the AMC had received more than 45,000 cases filed for resolution under those procedures.²⁰ The filings have grown steadily over

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ ICC, 'ICC Arbitration figures reveal new record for awards in 2018' (11 June 2019), <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/>

¹⁸ AAA-ICDR, 'Arbitration Remains Popular Alternative for Resolving International Disputes' (Media release, 24 June 2019), https://www.adr.org/sites/default/files/document_repository/190409_AAA-ICDR_International_Caseload_Data_Press_Release.pdf

¹⁹ Using 'technology' and 'pharmaceutical/biotechnology' industry sector descriptions as proxies for IP-related disputes, it is estimated that the AAA-ICDR serviced about 80 such disputes in 2018: *ibid.* According to the 2018 ICC Dispute Resolution Statistics, 'Sectors related to telecoms and specialised technologies ... and health/pharmaceuticals ... range between 5 to 8% of the new cases' – meaning that the number of IP-related disputes handled by the ICC in 2018 is likely to be no more than 70: see '2018 ICC Dispute Resolution Statistics' [2019] ICC Dispute Resolution Bulletin 13.

²⁰ 'Total Number of Cases per Year' (*WIPO*), <https://www.wipo.int/amc/en/domains/statistics/cases.jsp>

the past two decades – from an average of just under 1,400 annually in the five-year period 2000–2004, to an average of nearly 3,000 annually in the five-year period 2014–2018.²¹

Unlike the AMC's other dispute resolution procedures, the procedures for resolving domain name disputes are 'mandatory', in that the free consent to their use by all parties is not a precondition to their operation. In particular, the procedures may be utilized by a trade mark owner against a domain name registrant even where the domain name registrant has not voluntarily consented to this. This and other aspects of the procedures, and WIPO's involvement in their development and application, are discussed next.

DOMAIN NAME DISPUTE RESOLUTION

A domain name is an identification string that is registered in the Domain Name System (DNS) – a hierarchical and decentralized system for computers, services or other resources connected to the internet. A domain name serves to identify internet resources with a text-based label that is easier to memorize than the numerical addresses used in the Internet Protocol. Because a domain name is text-based, it can incorporate within it the text elements of a trade mark (whether registered or unregistered). This, in turn, gives rise to the potential for one person to register a domain name that is the same as, or is confusingly similar to, the trade mark of another person.

In the late 1990s, various national courts were called upon to determine whether, and if so when, registration or use of a domain name containing another's trade mark constituted an infringement of IP rights. While the courts showed a willingness to apply – and, indeed, to extend – existing principles of trade mark infringement and passing off to capture activities involving domain names,²² it was apparent to many stakeholders that reliance on national courts to resolve disputes about domain names was problematic. Because a domain name gives rise to a global presence, a dispute about it will often concern trade marks in multiple jurisdictions, potentially requiring a trade mark owner to bring separate court actions in multiple countries. Those actions may need to involve a third party – the domain name registrar – so as to ensure the availability of an effective remedy. Even where there is no multi-jurisdictional or

²¹ *ibid.*

²² See, for example, *Panavision International, L P v Toepfen* 141 F 3d 1316 (9th Cir, 1998), where the US Court of Appeals for the Ninth Circuit found that use as a website address of a domain name containing another's famous trade mark was a 'commercial use in commerce' that 'causes dilution of the distinctive quality' of the trade mark, even though that use did come within either of the anti-dilution provision's traditional concepts of 'blurring' or 'tarnishment'. Another example is *British Telecommunications Plc v One in a Million Ltd* [1999] FSR 1, discussed below.

third-party element, litigation is expensive and time-consuming, in both absolute and relative terms. As WIPO noted in 1999:

a considerable disjunction exists between, on the one hand, the cost of obtaining domain name registration, which is relatively cheap, and, on the other hand, the economic value of the damage that can be done as a result of such a registration and the cost to the intellectual property owner of remedying the situation through litigation, which may be slow and very expensive in some countries.²³

An illustration of this disjunction is provided by the case of *British Telecommunications Plc v One in a Million Ltd* (BT case).²⁴ The defendants registered a large number of domain names that incorporated the names of well-known British companies, including <bt.org>, <cadburys.com>, <marksandspencer.com> and <virgin.co.uk>. These domain names were not used to host webpages or for email. Rather, they were passively held and offered for sale to the relevant name owner for prices up to £25,000 (plus value-added tax), with the threat that they would be offered to third parties if purchase did not occur. The Court of Appeal found that each domain name registration was an instrument of fraud, because it was 'a representation to persons who consult the register that the registrant is connected or associated with the name registered and thus the owner of the goodwill in the name'.²⁵ Injunctive relief to prevent the use of this instrument of fraud, in the form of transfer of the domain names to the trade mark owner, was granted by the court on a *quia timet* basis.

While the result of the action in the BT case provided the remedy desired by the plaintiffs, obtaining the result was neither quick nor cheap. Despite being granted summary judgment, resolution of the dispute through litigation took two years and two court cases.²⁶ It required the plaintiffs to engage three barristers (including, on appeal, senior counsel) instructed by three law firms. The costs of that representation would have dwarfed the defendants' expenditure in registering the domain names, which at that time was USD100 per domain name for an initial two-year period.²⁷

²³ WIPO, *The Management of Internet Names and Addresses: Intellectual Property Issues – Final Report of the WIPO Internet Domain Name Process* (WIPO 30 April 1999), <http://www.wipo.int/amc/en/processes/process1/report/finalreport.html> (*Domain Names Report*).

²⁴ [1999] FSR 1.

²⁵ *ibid* 23.

²⁶ The first registrations of the disputed domain names occurred in 1996. In response to the trade mark owner's threat of legal proceedings, the defendant cancelled the registrations. However, an entity associated with that defendant registered further domain names containing the trade mark in 1997, declined the trade mark owner's demand to cancel those registrations, and sought to sell the domain names to the trade mark owner under threat of offering them to third parties. The plaintiff commenced an action seeking summary judgment in the High Court of England and Wales, which was defended. The High Court granted summary judgment in favour of the plaintiffs in November 1997, following which the defendants appealed. The decision of the Court of Appeal was given in July 1998.

²⁷ See Peter H Lewis, 'The Internet's Gatekeeper May Cash In on Its Role', *New York Times* (New York, 12 September 1996) 1, in which the fees for registration and for renewal (USD50 per year) at that time are noted.

The BT case illustrates the soundness of WIPO's assertion of the need for a fast and inexpensive dispute resolution procedure. The UDRP was the procedure designed to satisfy that need.²⁸

Creation of the UDRP

For several years during the mid-1990s, the internet technical community had been actively debating DNS management policy, including through the International Ad Hoc Committee (IAHC) organized by the Internet Assigned Numbers Authority (IANA) and the Internet Society (ISOC). The membership of IAHC comprised representatives of IANA, ISOC, the Internet Architecture Board, the National Science Foundation, the Federal Networking Council, the International Trademark Association, and two international agencies – the ITU and WIPO.²⁹

On 28 February 1997, IAHC issued a proposal for the establishment of a *Memorandum of Understanding on the Generic Top Level Domain Name Space of the Internet Domain Name System* (gTLD-MoU).³⁰ The influence of WIPO can be seen in section 8 of the gTLD-MoU, which proposed the creation of Administrative Domain Name Challenge Panels to resolve disputes between trade mark owners and domain name holders, with the procedures for creating the panels and for bringing challenges before them to be administered by WIPO. While a significant number of entities within the internet community supported the gTLD-MoU, many others, especially those in the US who feared an 'offshore takeover', were critical of it.³¹ The IAHC failed to address all of the critics' concerns, and the internet community remained divided and dissatisfied with the proposal – with the end result being that the reform process was taken over by the US government.

On 1 July 1997, US President Clinton directed the Secretary of Commerce, among other things, 'to support efforts to make the governance of the [DNS] private and competitive and to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis'.³² In accordance with this directive, the National Telecommunications and Information Administration (NTIA), an agency of the US Department of Commerce, issued for comment 'A Proposal to Improve the Technical Management of Internet

²⁸ 'Uniform Domain-Name Dispute-Resolution Policy' (*ICANN*), <http://www.icann.org/en/help/dndr/udrp>

²⁹ 'IAHC' (*ICANNWiki*), <https://icannwiki.org/IAHC>

³⁰ 'Establishment of a Memorandum of Understanding on the Generic Top Level Domain Name Space of the Internet Domain Name System (gTLD-MoU)', <https://web.archive.org/web/19971211190257/http://www.gtld-mou.org/gTLD-MoU.html>

³¹ 'gTLD-MoU' (*ICANNWiki*), <https://icannwiki.org/GTLD-MoU>

³² William J Clinton, 'Memorandum for the Heads of Executive Departments and Agencies', *The White House – Office of the Press Secretary* (Presidential Directive, 1 July 1997) directive 5, <https://clintonwhitehouse4.archives.gov/WH/New/Commerce/directive.html>

Names and Addresses' (NTIA Green Paper) on 30 January 1998,³³ followed by a 'Statement of Policy on the Management of Internet Names and Addresses' (NTIA White Paper) on 5 June 1998.³⁴ Most commentators on the NTIA Green Paper favoured the creation of an online dispute resolution mechanism to provide inexpensive and efficient alternatives for resolving trade mark/domain name disputes. Whereas the Green Paper contemplated each domain name registry establishing its own mechanisms, most commentators preferred a uniform approach.³⁵ As a consequence, the US government resolved in the NTIA White Paper that it would:

seek international support to call upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process, which includes the participation of trademark holders and members of the Internet community who are not trademark holders, to (1) develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cybersquatting (as opposed to conflicts between trademark holders with legitimate competing rights) ...³⁶

In response to this call, and having obtained approval to do so from its member states in September 1998,³⁷ WIPO undertook the 'WIPO Internet Domain Name Process', the final report of which (WIPO Domain Names Report) was published on 30 April 1999.³⁸

Among other things, the WIPO Domain Names Report recommended:

an adjudicatory procedure where the neutral decision-maker appointed for the dispute would have the power to impose a binding decision on the parties. The scope of the procedure would be limited to cases of abusive registrations (or cybersquatting) ... and would not be available for disputes between parties with competing rights acting in good faith. The procedure would allow for a neutral venue in the context of disputes that are often international in nature, and would be conducted in accordance with procedural rules laws which take account of the various legal procedural traditions around the world. The procedure would not exclude the jurisdiction of the courts. ... The decisions taken under the procedure would be made available publicly.³⁹

Two annexes to the WIPO Domain Names Report specified in detail the principles and operational rules of the proposed procedure.⁴⁰ The organization responsible for

³³ 'Improvement of Technical Management of Internet Names and Addresses' vol 63, no 34 Fed Reg 8826 (20 February 1998), <https://www.govinfo.gov/content/pkg/FR-1998-02-20/pdf/98-4200.pdf>

³⁴ NTIA, 'Statement of Policy on the Management of Internet Names and Addresses', *US Department of Commerce* (5 June 1998), <https://www.ntia.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>

³⁵ *ibid* s 8 ('The Trademark Dilemma').

³⁶ *ibid*.

³⁷ Assemblies of the Member States of WIPO, 'Thirty-Third Series of Meetings, Geneva, September 7 to 15, 1998: General Report' (A/33/8, WIPO 15 September 1998) para 156.

³⁸ WIPO, *Domain Names Report* (n 23).

³⁹ *ibid* para 153.

⁴⁰ *ibid* annexes IV and V, respectively.

co-ordinating the internet's naming system, ICANN, commenced a deliberative process in relation to this proposed procedure.⁴¹ Following work by the ICANN Domain Name Supporting Organization and an ICANN staff drafting committee set out in two reports,⁴² the ICANN Board approved the UDRP and the rules for its operation (UDRP Rules)⁴³ on 29 October 1999, both of which came into effect on 1 December 1999.⁴⁴ The degree of resemblance that the UDRP bears to the procedure proposed by WIPO is such that it cannot be doubted that the UDRP is essentially the creation of WIPO.

Design Features of the UDRP

The core provision of the UDRP is paragraph 4(a), which provides that a domain name registrant is required to submit to a 'mandatory administrative proceeding' in the event that a third party (the complainant) asserts that: (i) the domain name is identical or confusingly similar to a trade mark in which the complainant has rights; (ii) the registrant has no rights or legitimate interests in the domain name; and (iii) the domain name has been registered and is being used in bad faith. Although sometimes referred to as an 'arbitration', this procedure is very different from that of a typical arbitration. In a typical arbitration, the parties have voluntarily agreed to its adoption, they can select the arbitrator(s), and they choose the applicable law, language and venue of the arbitration. In addition, the existence and the outcome of the arbitration are confidential.⁴⁵ None of those features are present in the UDRP procedure. Furthermore, the UDRP has two key features not found in traditional arbitration which make it particularly powerful: mandatory application of the procedure to a dispute and automatic execution of a remedy when a complaint succeeds.⁴⁶

Like a typical arbitration, involvement in an UDRP proceeding arises as a result of a contractual commitment. Unlike a typical arbitration, however, that commitment is not made voluntarily. Rather, that commitment is a standard term in the registration agreement that all registrants of an open generic Top Level Domain (gTLD) domain

⁴¹ 'Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy' (*ICANN*), <http://www.icann.org/en/help/dndr/udrp/schedule>

⁴² 'Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy' (*ICANN*, 1 October 1999), <http://archive.icann.org/en/udrp/staff-report-29sept99.htm>; 'Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy' (*ICANN*, 25 October 1999), <http://archive.icann.org/en/udrp/udrp-second-staff-report-24oct99.htm>

⁴³ 'Rules for Uniform Domain Name Dispute Resolution Policy' (*ICANN*), <http://www.icann.org/en/help/dndr/udrp/rules>

⁴⁴ ICANN, 'Timeline' (n 41).

⁴⁵ 'What is Arbitration?' (*WIPO*), <https://www.wipo.int/amc/en/arbitration/what-is-arb.html>

⁴⁶ For an explanation of how these key features are structurally implemented in the UDRP, see Andrew F Christie, 'Online Dispute Resolution – the Phenomenon of the UDRP' in Paul Torremans (ed), *Research Handbook on Cross-Border Enforcement of Intellectual Property* (Edward Elgar 2014) 642, 650–654.

name are required to enter, both when initially registering a domain name and when subsequently renewing a registration. By virtue of being a standard term, it is not possible for a registrant to register or renew a domain name without agreeing to the commitment. Furthermore, the commitment is obligatory. As the word ‘required’ in the opening clause of paragraph 4(a) makes clear, a domain name registrant *must* submit to the administrative proceeding under the UDRP in the event that a trade mark owner commences an action with an accredited service provider. The effect of the registrant’s agreement to ‘submit’ is not to oblige it to actively participate in the proceedings; it is free to choose whether or not to file a response. Rather, the effect is to make the registrant – or, more accurately, the registrant’s domain name – subject to a remedy in the event that the complaint is found to be substantiated.

Unlike a traditional arbitration, the UDRP process provides for automatic execution of an effective remedy. There are two, mutually exclusive, remedies available to a successful complainant, at its election:⁴⁷ cancellation of the domain name and transfer of the domain name to the complainant.⁴⁸ If the complaint succeeds, execution of the requested remedy is automatic, in the sense that it does not require the co-operation of the registrant. This is because the order for the remedy is directed not to the registrant, but to the *registrar* of the domain name. Being the entity that creates and maintains the details of the domain name’s registration, the registrar is able to give effect to an order of cancellation or transfer of the domain name without the need for any action from the registrant.

Utilization of the UDRP

Between commencement of the UDRP in December 1999 and November 2019, more than 72,000 cases concerning a domain name were filed under the procedure.⁴⁹ The majority of these cases – more than 45,000 – were filed with the AMC.⁵⁰ While not every UDRP filing proceeds to a rendered decision, the vast majority – around four-fifths – do.⁵¹ Thus, it is reasonable to estimate that around 57,000 disputes between a trade mark owner and a domain name holder had been resolved under the UDRP in the first two decades of its operation.

⁴⁷ ICANN, ‘UDRP Rules’ (n 43) para 3(b)(x).

⁴⁸ ICANN, ‘UDRP’ (n 28) para 4(i).

⁴⁹ This estimate is calculated by using counts of the number of UDRP decisions extracted from the WIPO ‘Domain Name Dispute Resolution Statistics’ database (<https://www.wipo.int/amc/en/domains/statistics/cases.jsp>) and from the Forum ‘Domain Name Dispute Proceedings and Decisions’ database (<https://www.adrforum.com/domain-dispute/search-decisions>). It is an *underestimate* as it does not include cases filed with the other current UDRP service providers or the former UDRP service providers.

⁵⁰ WIPO, ‘Total Number of Cases per Year’ (n 20).

⁵¹ According to the statistics on case outcomes published by WIPO, ‘Case Outcome by Year(s) (Breakdown)’ (*WIPO*), <http://www.wipo.int/amc/en/domains/statistics/outcome.jsp>, as of November 2019, 9,458 out of 45,135 filed cases were ‘terminated’ – meaning that 79 per cent of filed cases proceeded to a determination by the panel.

These cases have involved parties from 179 countries,⁵² and have been dealt with in time frames that are very short, and at costs that are very low, when compared with the time frames and costs that would apply if the cases had been pursued as litigation in national courts. The typical time for resolution of a dispute under the UDRP, from filing of the complaint to the rendering of the panel's decision, is two months.⁵³ This compares very favourably with the typical time for resolving a trade mark dispute in a national court – which is likely to be around one to two years for a bench trial.⁵⁴ The typical fee to file a UDRP case is in the vicinity of USD1,500,⁵⁵ with the fees of a lawyer/attorney (where used) typically some additional thousands of dollars. Again, this compares very favourably with the cost litigating a trade mark dispute in a national court. According to a survey by the American Intellectual Property Law Association (AIPLA), the inclusive costs of litigating a trade mark infringement suit in the US range from more than USD300,000 to more than USD1.5 million.⁵⁶

Extension and Influence of the UDRP

When the UDRP commenced, there were only three open gTLDs to which it applied: <.com>, <.net>, and <.org>. Since then, the application of the UDRP has steadily expanded, along with the expansion of gTLDs. Between December 1999 and October 2013, 13 further gTLDs were created, to which the UDRP applies.⁵⁷ Since October 2013, more than 1,200 new gTLDs have been delegated (that is, introduced into the internet) under the major expansion effected by the 'New gTLD Program',⁵⁸ and the UDRP applies to them. In the event that further new gTLDs are delegated under a second round of the New gTLD Program, the UDRP will apply to them as well.

In addition to the gTLDs, the internet addressing space includes country-code Top Level Domains (ccTLDs), such as <.au>, <.uk> and <.us>. Observing the early success of the UDRP, many ccTLD administrators adopted the UDRP, or a variant of

⁵² 'Geographical Distribution of Parties (Alphabetical)' (*WIPO*), http://www.wipo.int/amc/en/domains/statistics/countries_a-z.jsp

⁵³ 'FAQs on the Uniform Domain Name Dispute Resolution Policy (UDRP)' (*InterNIC*, 2 September 2016), <http://www.internic.net/faqs/udrp.html>

⁵⁴ See, for example, William Landes, 'An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results' (2004) 41 *Houston Law Review* 749, 773; and Jason Bosland, Kimberlee Weatherall and Paul Jensen, 'Trade Mark and Counterfeit Litigation in Australia' (2006) 4 *Intellectual Property Quarterly* 347, Table 2.

⁵⁵ This is for a dispute concerning up to five domain names, resolved by a single panellist. Where a three-member panel is chosen, the equivalent filing fee is USD4,000. See 'Schedule of Fees under the UDRP (valid as of December 1, 2002)' (*WIPO*), www.wipo.int/amc/en/domains/fees/index.html

⁵⁶ 'IP – AIPLA Survey' (*Firestone Insurance*, 22 October 2010), http://www.riskplans.com/intellectual_property/aipla-survey/

⁵⁷ 'Top-Level Domains (gTLDs)' (*ICANN*), <https://archive.icann.org/en/tlds/>

⁵⁸ 'New Generic Top-Level Domains – Program Statistics' (*ICANN*), <https://newgtlds.icann.org/en/program-status/statistics>

it. As of November 2019, at least 40 ccTLDs were using the UDRP, and at least 38 other ccTLDs were using a variant of it.⁵⁹

The influence of the UDRP on domain name dispute resolution extends beyond its application to registrations in ccTLDs and the growing number of gTLDs. A streamlined version of the UDRP, the Uniform Rapid Suspension (URS) procedure, was created in 2013 to offer ‘a lower-cost, faster path to relief for rights holders experiencing the most clear-cut cases of infringement’.⁶⁰ In addition, the UDRP’s model of privatized, ‘administrative’ (that is, non-curial), dispute resolution has inspired the creation of seven new dispute resolution mechanisms for the New gTLD Program – four for ‘pre-delegation’ disputes (that is, disputes about entitlement to apply for the new gTLD),⁶¹ and three for ‘post-delegation’ disputes (that is, disputes about utilization of the new gTLD by the Registry operator).⁶² One of the pre-delegation dispute mechanisms – the Legal Rights Objection – was devised by ICANN in collaboration with WIPO, and WIPO was appointed the exclusive provider of services in relation to it.⁶³

ASSESSMENT OF THE UDRP AND WIPO’S ROLE

Judged by the volume of disputes resolved in short time frames and at relatively low cost, it is clear that the UDRP is a highly efficient form of cross-border enforcement of IP rights. Nevertheless, the procedure has been the subject of various criticisms, the substance of which is that the proceeding is inherently unfair. The majority of these assertions relate to *structural* features of the UDRP⁶⁴ – in particular, the potential for decision makers to be biased in favour of complainants and for decision making to be inconsistent.

⁵⁹ See ‘Domain Name Dispute Resolution Service for Country Code Top Level Domains (ccTLDs)’ (WIPO), <https://www.wipo.int/amc/en/domains/ccTld/>

⁶⁰ ‘Uniform Rapid Suspension’ (ICANN), <http://newgtlds.icann.org/en/applicants/urs>

⁶¹ ‘Object and Dispute Resolution’ (ICANN), <http://newgtlds.icann.org/en/program-status/odr>

⁶² ‘Post-delegation Dispute Resolution Procedures’ (ICANN), <http://newgtlds.icann.org/en/program-status/pddrp>

⁶³ ‘Legal Rights Objections under ICANN’s New gTLD Program’ (WIPO), <https://www.wipo.int/amc/en/domains/lro/>

⁶⁴ A smaller number of criticisms concern the *interpretation* of certain aspects of the UDRP – in particular, interpretation of when use constitutes a ‘legitimate non-commercial or fair use’ under paragraph 4(c)(iii) and of when ‘bad faith’ use without ‘bad faith’ registration satisfies the requirements of paragraph 4(a)(iii). For a discussion of these concerns, see Christie (n 46) 675–679.

Decision-Maker Bias

The primary source of the potential for bias in favour of the complainant, it is claimed, is the mandatory nature of the UDRP proceeding, together with the fact that the complainant gets to choose the service provider with which to file the complaint. According to Geist:

The right of complainants to pick which arbitration provider handles their dispute has been the target of particularly vociferous criticism. Although ICANN initially accredited three arbitration providers in order to foster a competitive environment, many commentators anticipated that complainants would engage in forum shopping by rationally selecting arbitration providers who tended to rule in their favour. Those fears were immediately realized.⁶⁵

Both Geist and Mueller assert that service providers have a financial incentive to attract filings of complaints, and that they seek to do so by appointing panellists who tend to rule in favour of complainants.⁶⁶ Subsequent commentators have pointed out various flaws with Geist's and Mueller's methodology and reasoning,⁶⁷ with Kesan and Gallo concluding that 'the emphasis of the different empirical studies of this bias problem was also "biased" or at least incomplete'.⁶⁸

Nevertheless, the fact remains that a system under which the service provider chooses the panellist and the complainant chooses the service provider does have built into it the *potential* for bias to arise. Thus, it is appropriate to consider whether this potential has been realized. For three reasons, it seems clear that it has not.

⁶⁵ Michael Geist, 'Fair.com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP' (2002) 27(3) *Brooklyn Journal of International Law* 903, 905 (internal citations omitted).

⁶⁶ *ibid* 911–912; Milton Mueller, 'Rough Justice – An Analysis of ICANN's Uniform Dispute Resolution Policy' (2001) *The Information Society* 151, 161.

⁶⁷ See, for example, INTA Internet Committee, 'The UDRP by All Accounts Works Effectively – Rebuttal to Analysis and Conclusions of Professor Michael Geist in "Fair.com?" and "Fundamentally Fair.com?"' (International Trademark Association, 6 May 2002), <http://www.inta.org/Advocacy/Documents/INTAUDRPSuccesscontraGeist.pdf>; Matthew Hall, Paul Heymann and Trey Williams, 'UDRP: Criticisms and Solutions' (10 December 2002), http://www.cs.duke.edu/courses/fall03/cps182s/oldproj/mth6_1/finalpaper.pdf; Ned Branthover, 'UDRP – A Success Story: A Rebuttal to the Analysis and Conclusions of Professor Milton Mueller in "Rough Justice"' (International Trademark Association, 6 May 2002), <https://www.inta.org/Advocacy/Documents/INTAUDRPSuccesscontraMueller.pdf>; Juan Pablo Cortés Diéguez, 'An Analysis of the UDRP Experience: Is it Time for Reform?' (2008) 24(4) *Computer Law and Security Report* 349.

⁶⁸ Jay P Kesan and Andres A Gallo, 'The Market for Private Dispute Resolution Services – An Empirical Re-Assessment of ICANN-UDRP Performance' (2005) 11 *Michigan Telecommunications & Technology Law Review* 285, 370.

The first reason is that all but one of the ICANN-accredited UDRP service providers are not-for-profit entities.⁶⁹ For these institutions, it is not certain that the provision of UDRP services is financially positive. According to WIPO's published financial statements, the AMC's expenses are more than three times its revenue.⁷⁰ While it is true that domain name dispute resolution is only one of the services offered by the AMC,⁷¹ it is the largest by far in terms of filings.⁷² Thus, it seems reasonable to suppose that, for WIPO at least, domain name dispute resolution services are not profit-making.

The fact that provision of UDRP services may not be financially positive would seem to reduce significantly, even if not remove entirely, the incentive for a service provider to 'curry favour' with complainants by appointing panellists inclined to uphold complaints too readily. As a matter of principle, developing and maintaining a reputation for a quality service – judged by factors such as speed, integrity, and cost – is much more likely to be the dominant factor motivating a not-for-profit service provider's performance. This reasoning seems consistent with the findings of Kesan and Gallo:

The alleged bias of the providers towards the complainants is not the main variable complainants are looking at in order to decide the most suitable provider. Instead, complainants seem to regard provider performance as the main concern in choosing a provider.⁷³

The second reason to doubt that the potential for decision-maker bias is realized in practice is that it is not the service providers who decide the outcome of UDRP cases; it is the panellists. The panellists are independent of the service provider, in that they are neither employed by, nor otherwise under the control of, the service provider.⁷⁴ Typically, they are highly experienced, legally qualified, professionals whose main

⁶⁹ The exception is Forum (previously known as National Arbitration Forum). It is a privately owned, for-profit company: Robert Berner, 'Banks vs. Consumers (Guess Who Wins)', *Bloomberg BusinessWeek* (online, 5 June 2008), <http://www.businessweek.com/stories/2008-06-04/banks-vs-dot-consumers-guess-who-wins>

⁷⁰ See WIPO, *Annual Financial Report and Financial Statements: Year to December 31, 2017*, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_finstatements_2017.pdf. The tables on pages 29 and 30 show, respectively, revenue of CHF1.689 million and expenditure of CHF5.292 million for the AMC in the year ended 31 December 2017. A similar ratio of expenses to revenue applied in the biennium ended 31 December 2017 (tables on pages 31 and 32).

⁷¹ See the section 'WIPO's Dispute Resolution Services', above, for a description of the other dispute resolution services offered by the AMC.

⁷² See text above associated with nn 20 and 21.

⁷³ Kesan and Gallo (n 68) 370.

⁷⁴ The panellists are, of course, also independent of the parties to the dispute. Paragraph 7 of the UDRP Rules requires that: 'A Panelist shall be impartial and independent and shall have, before accepting appointment, disclosed to the Provider any circumstances giving rise to justifiable doubt as to the Panelist's impartiality or independence. If, at any stage during the administrative proceeding, new circumstances arise that could give rise to justifiable doubt as to the impartiality or independence of the Panelist, that Panelist shall promptly disclose such

sources of income are unrelated to the activities of the service provider. The fee paid to a panellist to decide a UDRP case is sufficiently modest (typically USD1,000⁷⁵) to make it highly unlikely that the panellist would be motivated in his or her decision making by financial considerations. Rather, as a matter of principle, the dominant factor motivating the decision-making performance of a panellist will be the desire to develop and maintain a reputation for quality and integrity.

The third reason is that the empirical evidence does not support the view that the procedure is biased in practice. Geist claimed to see evidence of bias in the fact that the rate at which a complaint succeeds (complaint success rate) was much higher for a single-member panel case (83 per cent) than for a three-member panel case (60 per cent) in the first two years of the UDRP's operation.⁷⁶ The apparent relevance of this observed difference is that the service provider selects the panellist in single-member panel cases,⁷⁷ whereas the parties select the panellists in three-member panel cases.⁷⁸ On the basis of an observed difference in complaint success rates, Geist concluded that 'influence over panel composition is likely the most important controlling factor in determining case outcomes'⁷⁹ and that 'the system may indeed be biased in favour of trademark holders'.⁸⁰

What Geist's conclusion fails to take into account is that three-member panel cases are almost certainly different in character from single-member panel cases. A three-member panel is appointed only if one of the parties requests it.⁸¹ Choosing to have a case determined by a three-member panel incurs a greater filing fee – typ-

circumstances to the Provider. In such event, the Provider shall have the discretion to appoint a substitute Panelist': see ICANN, 'UDRP Rules' (n 43) para 7.

⁷⁵ See, for example, WIPO, 'Schedule of Fees under the UDRP' (n 55).

⁷⁶ Geist (n 65) 911–912. A later analysis by WIPO found that the complaint succeeded nearly twice as often in single-member panel cases than in three-member panel cases (89 per cent compared with 57 per cent): WIPO, 'The Uniform Domain Name Dispute Resolution Policy and WIPO' (WIPO August 2011), Table 9, <http://www.wipo.int/export/sites/www/amc/en/docs/wipointaudrp.pdf>

⁷⁷ While the Rules are silent on how single-member panels are to be appointed, WIPO explains its process as 'a conservative policy ... that takes into account not only the panellist's professional skills, linguistic ability, nationality, and geographic location, but also case citations in pleadings and prior case involvement with parties': WIPO Arbitration and Mediation Center, *Guide to WIPO Domain Name Dispute Resolution* (892(E), WIPO 2003) 11. Furthermore, it is understood that where both parties are from the same jurisdiction, the appointed panellist will be from that jurisdiction; and that where the parties are from different jurisdictions, the appointed panellist will be from a third jurisdiction.

⁷⁸ Paragraph 6(e) of the UDRP Rules provides that each party will give the service provider a list of preferred panellists, and the service provider will endeavour to appoint one panellist from each list. The service provider will supply the parties with a list of five other panellists for potential appointment as the presiding panellist. Each party ranks the five panellists in their preferred order, and the service provider endeavours to appoint the panellist who ranks highest when both parties' preferences are combined: ICANN, 'UDRP Rules' (n 43) para 6(e),

⁷⁹ Geist (n 65) 911.

⁸⁰ *ibid* 935.

⁸¹ ICANN, 'UDRP Rules' (n 43) para 6(b).

ically USD4,000, compared with USD1,500 for a single-member panel⁸² – with the party making the request incurring a greater expense.⁸³ Logically, a party will only incur this greater expense if it believes a three-member panel is more likely to find for it. This, in turn, suggests that a complainant will elect for a three-member panel only when it considers the outcome may be a close call, while a respondent will elect to have a three-member panel only when it believes it has a viable defence. Thus, the typical three-member panel case is different in character from the typical single-member panel case – meaning Geist’s analysis of complainant success rates for the two types of cases is not comparing apples with apples.

The characteristic difference between single-member and three-member panel cases that explains the difference in success rates is the fact that the respondent defaults (that is, fails to file a response in defence to the complaint) much less often in three-member panel cases than in single-member panel cases.⁸⁴ In cases where the respondent defaults, the complaint success rate is 94 per cent – significantly higher than the 66 per cent success rate for cases in which the respondent files a response.⁸⁵ The reason for this difference is easily explained. The consensus view of panels is that where the respondent fails to file a response, a panel may ‘draw certain inferences in light of the particular facts and circumstances of the case e.g., where a particular conclusion is *prima facie* obvious, where an explanation by the respondent is called for but is not forthcoming, or where no other plausible conclusion is apparent’.⁸⁶ Thus, in practice it is much easier for a complainant to prove the elements required to make out its case in the situation where the respondent has defaulted.

It follows that the observed difference in complaint success rates between single-member and three-member panel cases does not reflect that the system is structurally biased towards the appointment of decision makers inclined to find against respondents. Rather, it reflects the fact that single-member and three-member panel cases have different characteristics.

⁸² See, for example, WIPO, ‘Schedule of Fees under the UDRP’ (n 55).

⁸³ If the complainant makes the request for a three-member panel, the complainant bears the entirety of the filing fee; if the respondent makes the request the filing fee is borne equally between the complainant and the respondent: ICANN, ‘UDRP Rules’ (n 43) para 6(c). In the case of a single-member panel, by contrast, the complainant bears the entire filing fee: at para 6(b).

⁸⁴ An empirical analysis of decisions under the UDRP-equivalent for the <.au> ccTLD shows that the respondent default rate is 19 per cent in three-member panel cases, compared with 40 per cent in single-member panel cases: Andrew F Christie, James Gloster and Sarah Goddard, ‘An empirical analysis of 15 years of Australian domain name disputes’ (2019) 30(1) *Australian Intellectual Property Journal* 4, section III.A.6. There is no reason to think that a similar difference in respondent default rates does not apply in UDRP cases.

⁸⁵ Christie (n 46) 659.

⁸⁶ WIPO AMC, *WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition* (‘*WIPO Overview 3.0*’) (WIPO 2017) para 4.3.

Decision-Making Inconsistency

The other structural concern that has dominated commentary critical of the UDRP is ‘inconsistency’ in decision-making⁸⁷ – that is, that like cases are not decided alike. This concern has been attributed to two structural flaws of the UDRP system: the absence of an appellate tribunal, and the lack of a requirement for panellists to follow precedent.⁸⁸ These two alleged flaws are, of course, interrelated – the existence of an appellate tribunal to rectify incorrect decision-making is of limited use if subsequent decision makers are not required to follow the appellate tribunal’s precedent. The following discussion will, therefore, focus on the concern that the UDRP is not a ‘precedential system’; reference may be made elsewhere for consideration of the issue of an absence of an appellate tribunal.⁸⁹

While it is true that there is no formal obligation on panellists to follow the reasoning of other panellists, a *de facto* doctrine of precedent has developed in the UDRP – at least as far as decisions of panels in WIPO-filed cases are concerned. According to two empirical studies, about four-fifths of WIPO panel decisions cite the reasoning of panels in other cases (on average, over six cases) when reaching and explaining their decisions, despite the absence of a requirement to do so.⁹⁰ This seems to be because the justifications for the doctrine of precedent – fairness, efficiency and integrity – are compelling to UDRP panellists.⁹¹

Importantly, there are two procedural requirements of the UDRP, and two resources of WIPO, that have been critical in permitting panellists to develop a *de facto* precedential system. The procedural requirements are, first, that a panel’s decision ‘shall be in writing [and] provide the reasons on which it is based’;⁹² and, secondly, that the service provider ‘shall publish the full decision ... on a publicly accessible web site’.⁹³ These two requirements, together, satisfy the essential feature

⁸⁷ See, for example, Patrick D Kelley, ‘Emerging Patterns in Arbitration under the Uniform Domain-Name Dispute-Resolution Policy’ (2002) 17 *Berkeley Technology Law Journal* 181; David Wotherspoon and Alex Cameron, ‘Reducing Inconsistency in UDRP Cases’ (2003) 2 *Canadian Journal of Law and Technology* 71; Cortés Diéguez (n 67); Hall, Heymann and Williams (n 67).

⁸⁸ Cortés Diéguez (n 67) 357.

⁸⁹ See Christie (n 46) 670–672, and the references cited therein. The sufficiency of the UDRP’s current appeal mechanisms has been identified by ICANN as an issue for potential review: ICANN Generic Names Supporting Organization (GNSO), ‘Final Issue Report on a Policy Development Process to Review All Rights Protection Mechanisms in All Generic Top-Level Domains’ (11 January 2016) annex B, https://gnso.icann.org/sites/default/files/filefield_48411/rpm-final-issue-11jan16-en.pdf

⁹⁰ Christie (n 46) 661; Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23(3) *Arbitration International* 357, 367.

⁹¹ Andrew Christie and Fiona Rotstein, ‘The Evolution of Precedent in Mandatory Arbitration – Lessons from a Decade of Domain Name Dispute Resolution’ (2011) 30(1) *The Arbitrator and Mediator* 65, 66.

⁹² ICANN, ‘UDRP Rules’ (n 43) para 15(d).

⁹³ *ibid* para 16(b).

necessary for the development of a precedential system: published past decisions containing reasons.

It is, however, unlikely that this feature alone was sufficient for the UDRP to develop as a de facto precedential system. Although the past decisions are accessible, the huge volume of them – around 57,000 in just on two decades – gives rise to the problem of information overload. With so many decisions, it is not possible for a complainant or respondent, let alone a panellist, to read and understand them all. A precedential system can evolve only if there is a mechanism whereby the contents of the decisions – or, at least, the important ones – are digested.⁹⁴

It is here that the two resources of WIPO have been critical. The ‘Legal Index of WIPO UDRP Panel Decisions’⁹⁵ indexes decisions against more than 200 criteria, and permits interested persons to search the decisions database to find cases dealing with very specific issues. The ‘WIPO Overview of WIPO Panel Views on Selected UDRP Questions’ (WIPO Overview), when first released in 2005, was described (rather modestly) as an ‘informal overview of panel positions on key procedural and substantial issues’.⁹⁶ Now in its third edition (WIPO Overview 3.0),⁹⁷ it is in fact a monumental codification of the developed jurisprudence of the UDRP. It identifies the ‘consensus view’ reached by panels on the most significant issues under the UDRP, summarizes these consensus views in simple terms, and lists the leading decisions that provide persuasive analysis and reasoning on those issues.

On the question of ‘What deference should be owed to past UDRP decisions dealing with similar factual matters and legal issues?’, the WIPO Overview 3.0 identifies the consensus view as follows:

While the UDRP does not operate on a strict doctrine of binding precedent, it is considered important for the overall credibility of the UDRP system that parties can reasonably anticipate the result of their case. Often noting the existence of similar facts and circumstances or identifying distinguishing factors, panels strive for consistency with prior decisions. In so doing, panels seek to ensure that the UDRP operates in a fair and predictable manner for all stakeholders while also retaining sufficient flexibility to address evolving Internet and domain name practices.⁹⁸

It can be seen from this consensus view of UDRP panellists that the fear of rampant inconsistency of panellist reasoning in UDRP cases is not well founded.

⁹⁴ See Christie and Rotstein (n 91) 73.

⁹⁵ ‘Legal Index of WIPO UDRP Panel Decisions’ (WIPO), <http://www.wipo.int/amc/en/domains/search/legalindex.jsp>

⁹⁶ WIPO, ‘WIPO Overview of WIPO Panel Views on Selected UDRP Questions’, <http://achristie.com/wp-content/uploads/2019/07/WIPO-UDRP-Overview-1.0.pdf>. This version of the WIPO Overview was superseded by a second edition in 2011, which in turn has been superseded by the current (third) edition in 2017.

⁹⁷ WIPO AMC, *WIPO Overview 3.0* (n 86).

⁹⁸ *ibid* para 4.1.

CONCLUSION

When, in the early 1990s, WIPO moved to establish a section offering services for resolving IP disputes, the decision did not appear particularly profound. It did, however, prove to be particularly prescient. Within a few years of the establishment of the AMC, WIPO had persuaded both the international internet community and the US government that trade mark owners needed a uniform, non-curial, supra-national, automatic remedy-executing mechanism for resolving disputes with domain name registrants – and that WIPO could design and implement such a system. Most impressively, WIPO delivered on that promise.

The resulting mechanism – the UDRP – has been an outstanding success in terms of utilization. In just on two decades, it has provided resolution of around 57,000 disputes – the majority of which were serviced by WIPO. Those disputes have been resolved in time frames and at costs that are a fraction of those which would have applied had they been resolved by the traditional means of litigation in national courts.

Despite, or perhaps because of, this success, the UDRP has been the subject of various criticisms. It has been alleged to be inherently unfair – biased against domain name holders and inconsistent in application. However, theoretical and empirical assessments indicate that the allegations don't stand up. A primary reason for this is the way in which WIPO has implemented its service offering.

When last closely reviewed, the Generic Names Supporting Organization (GNSO) Council of ICANN concluded:

While not perfect, the UDRP has successfully offered parties a far less expensive alternative to costly litigation for resolving international disputes involving domain name cybersquatting. Staff concurs with the view held by many that the Internet community has come to rely on the consistency, predictability, efficiency, and fairness generally associated with the present implementation of the UDRP.⁹⁹

There can no doubt that the UDRP is one of the great achievements of WIPO in its first half century of operation.

⁹⁹ Margie Milam, 'Final GNSO Issue Report on the Current State of the Uniform Domain Name Dispute Resolution Policy' (ICANN 3 October 2011), https://gns0.icann.org/sites/default/files/filefield_27051/udrp-final-issue-report-03oct11-en.pdf, Executive Summary, first paragraph.