The ICANN Domain-Name Dispute Resolution System as a Model for Resolving other Intellectual Property Disputes on the Internet

Andrew CHRISTIE*

I. INTRODUCTION

This article provides an introductory consideration of the extent to which the domain-name dispute resolution system of the Internet Corporation for Assigned Names and Numbers (ICANN)—which implements and enforces the ICANN Uniform Domain-Name Dispute Resolution Policy (UDRP)—provides a useful model for the resolution of other intellectual property disputes that arise through the use of the Internet. It starts with a brief description of the development and implementation of the UDRP, and of the experience since its adoption by ICANN. The article then proceeds to explain the reasons for the effectiveness of the ICANN domain-name dispute resolution system, and describes the key actors and entities that comprise that system. The conceptual equivalent of those actors and entities in a generalized regulated technical infrastructure are then determined by extrapolation.

The reasons for the effectiveness of the ICANN system—the uniform application of the UDRP to all potential transgressors, and the automatic execution of an effective remedy against proven transgressors—are discussed as well as how this remedy can have the secondary effect of the removal of the transgressor's presence on the Internet under the domain name in issue. There is no reason why, as a matter of practical necessity, the availability of this remedy need be limited to the type of conduct currently prohibited in the UDRP—i.e. bad-faith registration and use of a domain name that is the same or confusingly similar to another person's trademark or service mark. It is conceivable that other conduct which infringes on the rights of an intellectual property owner could be treated as giving rise to such a remedy. Accordingly, the ICANN domain-name dispute resolution system does, in theory at least, have the potential to

* Visiting Professor and Fulbright Senior Scholar, Duke University School of Law, Durham, North Carolina, U.S.A.; Distinguished Visiting Professor, Centre for Innovation Law and Policy, University of Toronto Faculty of Law, Toronto, Canada; and Associate Professor, University of Melbourne Law School, Melbourne, Victoria, Australia.

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The author may be contacted at: «a.christie@unimelb.edu.au».

provide a model for the resolution of disputes concerning misuse on the Internet of other intellectual property.[1]

II. DEVELOPMENT AND IMPLEMENTATION OF THE UDRP

A. *Background to the UDRP*

The development of the UDRP can be traced to the *Statement of Policy on the Management of Internet Names and Addresses* (the White Paper) of the National Telecommunications and Information Administration—an agency of the U.S. Department of Commerce—issued on 5 June 1998.[2] The White Paper contained the following passage:

> "The U.S. Government will 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 cyber-piracy (as opposed to conflicts between trademark holders with legitimate competing rights);
>
> (2) recommend a process for protecting famous trademarks in the generic top level domains [gTLDs]; and
>
> (3) evaluate the effects, based on studies conducted by independent organizations, such as the National Research Council of the National Academy of Sciences, of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders.
>
> These findings and recommendations could be submitted to the board of the new corporation for its consideration in conjunction with its development of registry and registrar policy and the creation and introduction of new gTLDs."[3]

The World Intellectual Property Organization is a specialist agency of the United Nations, with responsibility for the development and administration of normative and procedural treaties for the protection of patents, copyrights, trademarks, designs, and other forms of intellectual property. The number of nations comprising its Member States is currently one hundred and seventy-seven.[4] As foreshadowed in the White Paper, WIPO was subsequently requested to initiate a process to develop, among other things, recommendations for resolving disputes between trademarks and domain names.

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[1] For a different perspective on the desirability of extending the scope of operation of the UDRP to other types of transnational disputes, see L.R. Helfer and G.B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Dispute Resolution Policy*, 43 William & Mary Law Review, 2001.

[2] 63 Fed. Reg. 31741 (1988). A copy of the White Paper is available at: «http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm».

[3] Ibid., 31747.

[4] See information contained at: «http://www.wipo.int/about-wipo/en/».

Having obtained approval to do so from its Member States in September 1998,[5] WIPO undertook the "WIPO Internet Domain-Name Process", producing both an Interim Report, published on 23 December 1998, and a Final Report, entitled *The Management of Internet Names and Addresses: Intellectual Property Issues*, published on 30 April 1999 (WIPO Report).[6] The WIPO Report made numerous recommendations in relation to four main issues:

- best practices for domain-name registration authorities;[7]
- exclusion of famous and well-known marks from domain-name registration;[8]
- new gTLDs;[9] and
- an administrative procedure concerning abusive domain-name registrations.[10]

It is the recommendations in relation to the last of these issues which led to the development and adoption of the UDRP.[11]

ICANN is a private corporation established under the laws of California.[12] By virtue of various contracts it has with the U.S. Department of Commerce, ICANN acts as the Department of Commerce's agent for the purpose of the administration of the technical aspects of the Internet.[13] Following publication of the WIPO Report, ICANN commenced a deliberative process in relation to these recommendations.[14] As a result of the work by the ICANN Domain-Name Supporting Organization and an ICANN staff drafting committee,[15] the ICANN Board approved the final version of the documents implementing a domain-name dispute resolution system on 29 October 1999. These implementing documents were the *Uniform Domain-Name Dispute*

[5] Such approval was given at the meeting of the Assemblies of Member States in Geneva, 7-15 September 1998. See WIPO document A/33/4, paras. 10–25; and WIPO document A/33/8, para. 156, both of which are available at: «http://www.wipo.int/eng/document/govbody/wo_gb_ab/index_33.htm».

[6] The WIPO Report is contained at: «http://wipo2.wipo.int/process1/report.index.html».

[7] WIPO Report, chapter 2.

[8] Ibid., chapter 4.

[9] Ibid., chapter 5.

[10] Ibid., chapter 3.

[11] More recently, WIPO has undertaken a "Second WIPO Internet Domain-Name Process". This second process commenced in July 2000, following receipt by the Director-General of WIPO of a request, from the Government of Australia and nineteen other Member States, to develop, through a consultative process, recommendations on means of dealing with "bad-faith, abusive, misleading or unfair use", within the Internet domain-name system, of: personal names; international non-proprietary names for pharmaceutical substances; names of inter-governmental organizations; geographical indications, geographical terms, or indications of source; and trade names. The Final Report of this process was published on 3 September 2001 under the title *The Recognition of Rights and the Use of Names in the Internet Domain-Name System: Report of the Second WIPO Internet Domain-Name Process* (WIPO Second Report). It is available at: «http://wipo2.wipo.int/process2/report/index.html».

[12] For a history of the administration of the technical aspects of the Internet, including the establishment of ICANN, see A.M. Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution*, 50 Duke Law Journal 17, 2000, 50–89.

[13] The various documents estbalishing ICANN's authority through the Department of Commerce are contained on the ICANN Website at: «http://www.icann.org».

[14] See *Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy*, available at: «http://www.icann.org/udrp/udrp-schedule.htm».

[15] The two reports of the ICANN staff on proposals for the UDRP are contained at: «http://www.icann.org/udrp/staff-report-29sept99.htm» and «http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm».

Resolution Policy[16] and the *Rules for Uniform Domain-Name Dispute Resolution Policy* (UDRP Rules).[17]

B. *Experience under the UDRP*

The UDRP first took effect on 1 December 1999, when it was adopted by all but three[18] of the then ICANN-accredited Registrars of open gTLDs.[19] The first dispute resolution service provider to be approved by ICANN for handling UDRP cases was the WIPO Arbitration and Mediation Center.[20] Two other dispute resolution service providers were approved by ICANN approximately one month later, and a fourth in May 2000.[21]

The first case under the UDRP was commenced with the WIPO Arbitration and Mediation Center on 9 December 1999.[22] During the first two years of operation, approximately five thousand cases were filed under the UDRP with accredited dispute resolution service providers, and approximately four thousand decisions were given by panels appointed by those providers.[23] Of those decisions, just over 80 percent were in favour of the complainant.[24] Even if judged solely by the sheer volume of cases processed in such a short period of time, it seems indisputable that the practical implementation of the UDRP constitutes a phenomenal success in alternative dispute resolution. There has been external recognition that the system is a fair, economical and effective means for resolving domain-name disputes.[25]

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[16] Contained at: «http://www.icann.org/udrp/udrp-policy-24oct99.htm».

[17] Contained at: «http://www.icann.org/udrp/udrp-rules-24oct99.htm».

[18] America Online, the NameIT Corp., and Network Solutions, Inc., adopted the UDRP on 1 January 2000.

[19] The three open gTLDs in operation on 1 December 1999 were the ".com", ".net" and ".org" domains.

[20] The WIPO Arbitration and Mediation Center received accreditation for UDRP cases from ICANN on 29 November 1999; see: «http://www.icann.org/udrp/udrp-schedule.htm». Details of the operation of the WIPO Center are at: «http://arbiter.wipo.int».

[21] The National Arbitration Forum was approved on 23 December 1999. The disputes.org/eResolution consortium was approved on 1 January 2000. This latter approval was subsequently transferred to eResolution on 16 October 2000. The CPR Institute for Dispute Resolution was approved on 22 May 2000; see «http://www.icann.org/udrp/udrp-schedule.htm».

[22] The case was *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*, WIPO Case D1999-0001, concerning the domain name «worldwrestlingfederation.com». A copy of the decision is available at: «http://arbiter.wipo.int/domains/decisions/html/1999/d1999-0001.html». Decisions in all cases filed with the WIPO Arbitration and Mediation Center are published online at: «http://arbiter.wipo.int/domains/decisions/html».

[23] Weekly up-dated figures on filings and decisions, for all four accredited dispute resolution service providers, are published at: «http://www.icann.org/udrp/proceedings-stat.htm». Statistics on cases filed with and decided by the WIPO Arbitration and Mediation Center are published at: «http://arbiter.wipo.int/domains/statistics/index.html». None of the other three dispute resolution service providers appear to publish statistics on the number of case filings and the outcome of decided cases.

[24] See «http://www.icann.org/udrp/proceedings-stat.htm».

[25] This is reflected in the fact that ICANN and the WIPO Arbitration and Mediation Center together were awarded the 2000 CPR Awards for Excellence in alternative dispute resolution, in the category for "Outstanding Practical Achievement". The award was given in recognition of "their Uniform Dispute Resolution Policy and Domain-Name Dispute Resolution Service: a fair, economical and effective approach to resolving domain-name disputes arising in the new medium of the Internet"; see the Press Release of 24 January 2001, available at: «http://www.cpradr.org».

III. THE ICANN DOMAIN-NAME DISPUTE RESOLUTION SYSTEM

A. *Structural Features of the System*

The ICANN domain-name dispute resolution system operates to provide an effective means of resolving one class of transborder intellectual property dispute, namely the bad-faith registration and use of a domain name that is the same or confusingly similar to another person's trademark or service mark (cybersquatting).[26] It does so without the need to instigate curial proceedings, and thus without the problems and limitations of private international law—including, in particular, the thorny issues of jurisdictional forum, applicable national law, and enforcement of judgments in other jurisdictions.

The ICANN system achieves this outcome because of two key structural features, as follows:

- the uniform application of the UDRP to all potential respondents to a cybersquatting action; and
- the automatic execution of an effective remedy for successful complainants under the UDRP.

Both of these structural features derive from the fact that ICANN currently has control over the "root zone" file on the "A root" name server. The root zone file contains the authoritative list of each of the top level domains (TLDs),[27] together with the Internet Protocol address of the computer that has the authoritative list of who has registered domain names in those TLDs. The A root name server is the computer server maintained by Network Solutions, Inc., under the control of ICANN.[28]

The root zone file is authoritative because it is the file from which twelve other servers (designated by the letters B-M) get their data.[29] The B-M root name servers (as well as the A root name server) are authoritative because most computers on the Internet make reference to them, or to a downstream server containing a cached copy of their data, for the purpose of resolving domain names to Internet Protocol addresses. As Froomkin notes:

> "This Internet monoculture is the result of the ubiquity of a single DNS program called BIND ... which comes pre-configured to get data from one of the thirteen legacy root name servers, and few users or domain-name service providers ever change the setting."[30]

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[26] This definition comes from the three elements which a complainant must prove to be entitled to a remedy: UDRP, para. 4(a).

[27] TLDs are the domains at the top level of the domain naming system. They are represented by the suffix of a domain name.

[28] See *Root Nameserver Year 2000 Status*, available at: «http://www.icann.org/committees/dns-root/y2k-statement.htm». See also, *Discussion Draft: A Unique, Authoritative Root for the DNS*, available at: «http://www.icann.org/stockholm/unique-root-draft.htm».

[29] The complete list of root name servers and their operators are set out in Appendix A to *Root Nameserver Year 2000 Status*, id.

[30] Froomkin, *supra*, footnote 12, at 28.

By virtue of its control over the root zone file on the A root name server, in practice ICANN has the sole power to determine who can act as a Registrar for the various TLDs. In turn, ICANN has effective power to determine the conditions of operation of TLD Registrars, including the mandatory terms of the registration agreements between Registrars and domain-name registrants, and the circumstances in which involuntary cancellation or transfer of domain-name ownership will occur.

B. *Uniform Application of the UDRP to all Potential Respondents*

The UDRP applies uniformly to all potential respondents to a cybersquatting action in respect of the registration of a domain name in a significant number of TLDs. The set of TLDs is made up of gTLDs and country-code TLDs (ccTLDs). The ccTLDs are those TLDs that end in a country-specific, two-letter code; the gTLDs are those TLDs that are not country-specific. There are currently two hundred and forty-three ccTLDs[31] and fourteen gTLDs.[32] As of late 2001, the UDRP applied to all registrants of domain names in thirty TLDs—being the three original gTLDs (".com", ".net", ".org"), the seven "new" gTLDs approved by ICANN on 16 November 2000 (".aero", ".biz", ".coop", ".info", ".museum", ".name", ".pro"),[33] and twenty ccTLDs.[34]

In relation to the gTLDs, uniform application of the UDRP to all potential respondents to a cybersquatting action is achieved in the following manner. ICANN makes it mandatory for Registrars to provide, in their registration agreements with all registrants, the requirement that registrants will submit to the UDRP in the event of a cybersquatting complaint being made in relation to a domain name. Because all ICANN-accredited Registrars include the UDRP as a mandatory term in their registration agreements, it is not possible for a would-be registrant of a domain name in those gTLDs to shop around for a Registrar offering a registration agreement which does not contain the UDRP. By this mechanism, all registrants of domain names in these gTLDs become contractually bound to submit to the UDRP in the event of a dispute being commenced in relation to their domain name.

The position is essentially the same in relation to the ccTLDs to which the UDRP also applies. For those ccTLDs, the relevant administrative authority requires that all Registrars approved for registering domain names in the domain space make submission to the UDRP a mandatory term of the registration agreement entered into by all registrants.

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[31] The list of ccTLDs is available at: «http://www.iana.org/cctld/cctld-whois.htm».

[32] These gTLDs consist of the three original and seven new "open" gTLDs (".com", ".net", ".org", ".aero", ".biz", ".coop", ".info", ".museum", ".name", ".pro"), and the four "closed" gTLDs (".gov", ".edu", ".mil", ".int"). The latter gTLDs are "closed" in the sense that registration in them is reserved exclusively for the U.S. government, U.S. educational institutions granting four-year degrees, the U.S. military, and organizations established by international treaties between governments, respectively, see: «http://www.iana.org/gtld/gtld.htm».

[33] See information at: «http://www.icann.org/tlds/».

[34] See the WIPO Arbitration and Mediation Center Website on its domain-name dispute resolution services for ccTLDs, at: «http://arbiter.wipo.int/domains/cctld/index.html». Of the twenty-two ccTLDs listed at this site, only two (".ac", ".sh") do not apply the UDRP, but apply the WIPO Expedited Arbitration Rules instead. Of the remaining twenty, eighteen apply the UDRP as it stands and two (".mx", ".ph") apply the UDRP in slightly modified form.

C. *Automatic Execution of an Effective Remedy*

There are two remedies available to a successful complainant under the UDRP—cancellation of the domain name, or transfer of the domain name to the complainant.[35] For all practical purposes, however, there is only one remedy: transfer of the domain name. As of late 2001, the remedy of cancellation had been ordered in less than 0.008 percent of cases.[36] The reason that this remedy is not sought is simple: following cancellation, the domain name becomes available once again for registration by any person, on a first-come, first-served basis. This means it is possible for the unsuccessful respondent or another person unassociated with the complainant to re-register the domain name, and so further frustrate the complainant.[37] Thus, almost all complainants (and all well-advised complainants) seek the remedy of transfer.

Transfer of the disputed domain name to the successful complainant is an effective remedy from the complainant's point of view, since it delivers the disputed property from the respondent (who, having failed in the case, by definition has no legitimate right to or interest in it) to the complainant (who, by virtue of its trademark, must be considered as having a valid claim to it). The automatic execution of this effective remedy for successful complainants under the UDRP is achieved by virtue of the fact that ICANN makes it mandatory for its accredited Registrars to implement the decisions of all Administrative Panels adjudicating under the UDRP. The transfer of ownership of a domain name is effected by changing the details (including the name) of the registrant of the domain name in the relevant TLD registry. Where this remedy is ordered by the Panel, the relevant Registrar must, upon notification of this remedy, "immediately" communicate to each party the date for implementation of the decision.[38]

The UDRP does not specify a date by which the Registrar must implement the decision. It does provide, however, that the Registrar must wait ten business days following notification before the remedy can be implemented.[39] The purpose of this delay is to allow an unsuccessful respondent who wishes to challenge the decision a period of time in which to file a lawsuit against the successful complainant.[40] The expectation is that Registrars will implement the remedy of transfer immediately upon the expiration of this ten-day period. Thus, in the absence of a lawsuit against the complainant by the unsuccessful respondent, the effective remedy desired by a

[35] UDRP, para. 4(i).

[36] See the ICANN statistics on the remedies obtained in cases decided under the UDRP, available at: «http://www.icann.org/udrp/proceedings-stat.htm».

[37] For an example of a second UDRP action being brought in relation to the same domain name as a result of its registration by another person following the remedy of cancellation under the UDRP, see eResolution case AF-0310 «blueridgeknife.com», available at: «http://www.eresolution.ca/services/dnd/decisions/0310.htm».

[38] UDRP Rules, para. 16(a).

[39] UDRP, para. 4(k).

[40] Where such a challenge is filed in a jurisdiction to which the complainant has submitted under para. 3(b)(xiii) of the UDRP Rules, the Registrar will not implement the Administrative Panel decision until it receives evidence that either the dispute between the parties has been resolved, the lawsuit has been dismissed or withdrawn, or the Court has ordered that the respondent does not have a right to continue using the domain name: UDRP, para. 4(k).

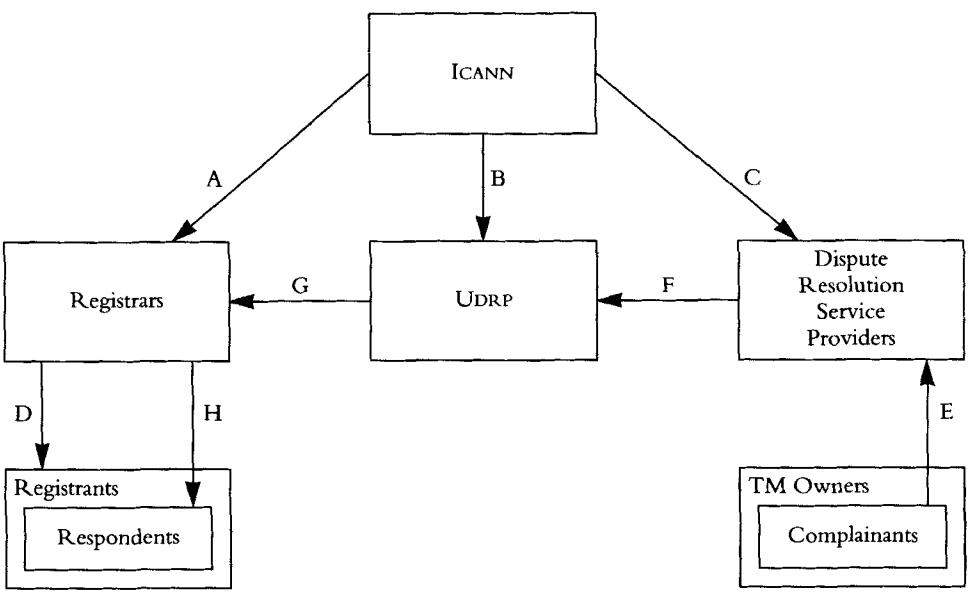
complainant (transfer of the domain name) is executed without the need to resort to a national court or other jurisdiction-specific enforcement agency.

Figure 1 shows in more detail how the ICANN domain-name dispute resolution system operates in practice.

D. *Secondary Effect of the Remedy*

At least part of the effectiveness of the ICANN domain-name dispute resolution system is attributable to the fact that the remedy of transfer of the domain name to the successful complainant has both a primary and a secondary effect. The primary effect of the remedy is that the successful complainant receives the property in dispute—i.e. the domain name. The secondary effect is that the unsuccessful respondent has taken away from it the means to continue operating on the Internet, at least under the domain name in issue. This is

Figure 1



Note: The arrows show the relationships between the various entities, as follows:
A: Accreditation of Registrars by ICANN.
B: Adoption of UDRP by ICANN.
C: Accreditation of dispute resolution service providers by ICANN.
D: Imposition of UDRP on registrants by Registrars.
E: Selection of dispute resolution service provider by complainants.
F: Application of UDRP by Panelists appointed by dispute resolution service providers.
G: Imposition of Panelists' decisions on Registrars.
H: Execution of remedies against respondents by Registrars.

Source: Compiled by the author.

because, without a domain name, the respondent has no presence on the Internet. It is this second effect of the ICANN system which provides the potential, in theory at least, for application of the generalized model to other intellectual property disputes.

IV. THE ICANN DOMAIN-NAME DISPUTE RESOLUTION SYSTEM AS A MODEL

A. *The System as a Model*

The ICANN domain-name dispute resolution system is characterized by the following actors or entities:

- ICANN;
- Registrars;
- the UDRP;
- dispute resolution service providers;
- registrants (a sub-set of which is respondents); and
- trademark owners (a sub-set of which is complainants).

This system is, in fact, a specific instance of a transborder dispute resolution mechanism that has been incorporated into a regulated technical infrastructure (being, in this case, the Internet). The key actors and elements of this system can be conceptualized in more general terms, as shown in Table 1. In this model, the regulator has the sole power to:

- accredit administrators to act on its behalf;
- adopt the Code that is the basis for resolving disputes; and
- accredit arbitrators to apply the Code to particular disputes.

Under this model, administrators have the power, and are obliged, to:

- impose the Code upon utilizers of the regulated infrastructure; and
- implement remedies against utilizers as described by arbitrators.

TABLE 1: CONCEPTUAL EQUIVALENTS OF INTERNET ENTITIES

Special Entity	Generalized Conceptual Equivalent
Internet Corporation for Assigned Names and Numbers (ICANN)	Regulator
Registrars	Administrators
Uniform Domain-Name Dispute Resolution Policy (UDRP)	Code
Dispute resolution service providers	Arbitrators
Registrants	Utilizers
Respondents	Respondents
Trademark owners	Intellectual property rights owners
Complainants	Complainants

Source: Compiled by the author.

The model provides to arbitrators the responsibility for:

- applying the Code to particular disputes; and
- deciding the remedies to be implemented by administrators.

The Code, which is the basis for resolving disputes in the regulated infrastructure, specifies:

- the conduct of utilizers which is prohibited;
- the persons entitled to seek a remedy;
- the remedies available against an infringing utilizer.

Utilizers of the regulated infrastructure are required to submit to the Code by virtue of the contractual relationship between them and the administrators of the infrastructure. The utilizers' obligation to submit is part of the *quid pro quo* for the administrators granting utilizers access to the infrastructure.

Intellectual property rights owners have the entitlement, but not the obligation, to institute complaints under the Code against allegedly infringing utilizers. Should they wish to do this, the intellectual property rights owner has the power to select a particular arbitrator from those arbitrators accredited by the regulator.

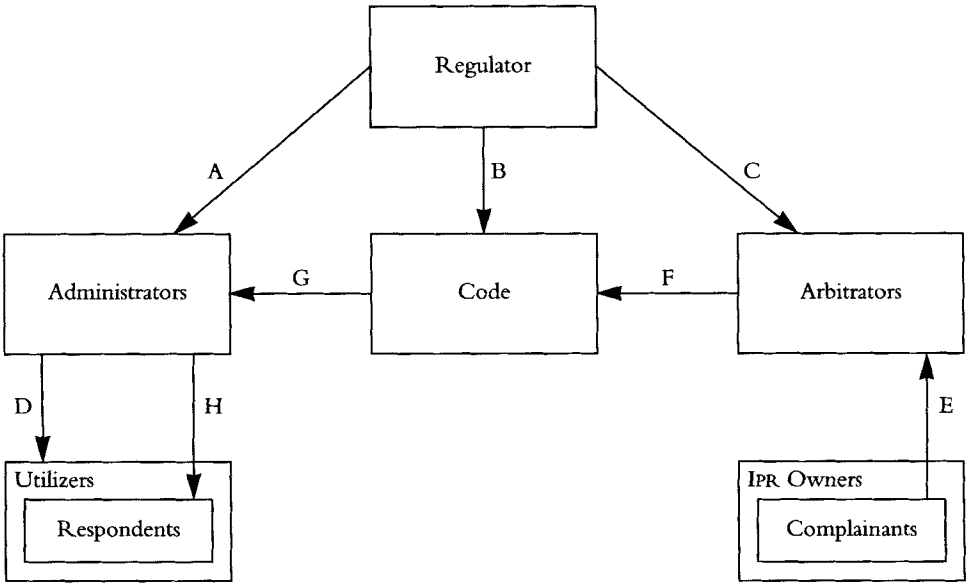
Figure 2 shows the operation of this generalized system for resolving disputes within a regulated technical infrastructure. It is a simple mapping of the specific ICANN domain-name dispute resolution system onto the generalized actors and entities described above.

B. *Possible Content of the Generalized Code*

As stated above, the key elements of the Code are its specification of the prohibited conduct, the persons entitled to seek a remedy, and the remedies available. In the UDRP, the prohibited conduct is bad-faith registration and use of a domain name,[41] in respect of which the domain-name owner has no rights or legitimate interest,[42] and which is identical or confusingly similar to the trademark or service mark of another person.[43] The UDRP specifies non-exclusive circumstances which are determinative of a right or legitimate interest in the domain name,[44] and of bad-faith registration and use of the domain name.[45] The persons entitled to seek a remedy under the UDRP are those people who have rights in a registered or unregistered trademark or service mark.[46] The remedies which such persons may seek are cancellation or transfer of the domain name.[47]

[41] UDRP, para. 4 (a)(iii).
[42] Ibid., para. 4 (a)(ii).
[43] Ibid., para. 4(a)(i).
[44] Ibid., para. 4(c).
[45] Ibid., para. 4(b).
[46] Ibid., para. 4(a)(i).
[47] Ibid., para. 4(i).

Figure 2



Note: The arrows show the relationships between the various entities, as follows:
A: Accreditation of administrators by regulator.
B: Adoption of Code by regulator.
C: Accreditation of arbitrators by regulator.
D: Imposition of Code on utilizers by administrators.
E: Selection of arbitrators by complainants.
F: Application of Code to complaints by arbitrators.
G: Imposition of arbitrators' decisions on administrators.
H: Execution of remedies against respondents by administrators.
Source: Compiled by the author.

In theory at least, these elements can be generalized to disputes about misuses of other types of intellectual property on the Internet. A generalized Code could prohibit conduct that amounted to an unauthorized and unjustified use on the Internet of any intellectual property (including, in particular, any copyright, patent or trademark) of another person. The Code could provide a right to bring an action seeking a remedy under the Code to any person who owned rights in the intellectual property so used. The remedies available under the Code to a successful complainant could be permanent cancellation,[48] or transfer to the complainant of all domain names associated with this misuse of the intellectual property. This generalization of the UDRP to all types of intellectual property disputes on the Internet is illustrated in tabular form in Table 2.

[48] The reference to *permanent* cancellation means cancellation of the registrant's registration of the domain name *and removal of the domain name from the pool of registrable domain names*. In this way, the registrant or a third party could not subsequently re-register the domain name.

TABLE 2: GENERALIZATION OF THE UDRP TO INTERNET DISPUTES

	Uniform Domain-Name Dispute Resolution Policy (UDRP)	Generalized Code
Prohibited conduct	Bad-faith registration and use of a domain name identical or confusingly similar to a trademark or service mark of another.	Unauthorized and unjustified use on the Internet of intellectual property of another.
Entitlement to sue	Ownership rights in the trademark or service mark.	Ownership of rights in the intellectual property.
Remedies available	Transfer (or cancellation) of the domain name.	Transfer (or permanent cancellation) of domain names associated with misuse of the intellectual property.

Source: Compiled by the author.

Adopting the general approach of the UDRP (which defines the prohibited act to be registration and use of a domain name identical or confusingly similar to a trademark), the generalized Code could define the prohibited act of "use" in such a way as to embrace all conduct that would constitute the exercise of any of the basic exclusive rights of the intellectual property right owner. Thus, a generalized Code would prohibit acts such as the posting on a Website of copyrighted material (e.g. text, pictures) of another, and the utilization on a Website of a patented process (e.g. an Internet-based business method) of another, because in both instances there would be a "use" of intellectual property in the manner defined.

A use could be defined to be "unauthorized" where it was not expressly or impliedly authorized by a person who owned rights in the intellectual property used. Further, a use could be defined to be "unjustified" where it was not a use of the type specified in the Code. The uses which the Code could specify as justified would be the equivalent of the uses generally permitted under intellectual property statutes (i.e. uses representing the "lowest common denominator" of permitted uses found in national legislation), such as use for the purpose of research or use otherwise in the public interest.

V. CONCLUSION

This article has proposed a generalized system and Code for resolving intellectual property disputes arising through the use of the Internet, based on the ICANN domain-name dispute resolution system and the UDRP which it implements. Although of undoubted theoretical interest, it does not thereby follow that it is of practical value. For the proposed generalization to be of practical value, it must provide for automatic execution of an effective remedy in favour of a successful complainant. The important question that arises, therefore, is whether the remedy under the generalized Code would be effective. For the reasons given below, it is concluded that the remedy would be effective, at least in respect of a certain type of infringer.

As noted above, the remedy of transfer of the domain name has both a primary and a secondary effect. In relation to the disputes under the UDRP, the primary effect is delivery of the domain name to the complainant, and the secondary effect is removal of the respondent's presence on the Internet under that domain name. Under a generalized Code, the secondary effect of the UDRP remedy becomes the primary effect of the generalized Code's remedy. That is to say, the primary effect of the remedy under the generalized Code is removal of the respondent's presence from the Internet, at least under any of the domain names used as universal resource locators (URLs, i.e. Website addresses) for the Website at which the infringing uses of the intellectual property occurred.

It is understood, of course, that an unsuccessful respondent is perfectly capable of re-establishing a presence on the Internet using another domain name. Thus, if a respondent was so minded, it could continue to infringe the intellectual property rights of the complainant merely by setting up the same Website, with the same offending material, under a different domain name. It follows that a generalization of the UDRP along the lines suggested above would not be much of a deterrence to those intellectual property rights infringers who are determined to infringe, come what may.

It does not follow, however, that generalization of the UDRP along these lines would be without any benefit. It needs to be borne in mind that not all of the set of Internet infringers of intellectual property rights are determined to infringe, come what may. Some Internet infringers are likely to be deterred from repeat infringement, and some potential Internet infringers are likely to be deterred from infringement in the first place, by the threat of the sanction of transfer (or permanent cancellation) of their domain names. This is especially likely to be true in relation to those infringers and potential infringers to whom the particular domain name under which they operate their Websites is important—i.e. to those who have valuable domain names.