



International Legal & Consulting Services

Respond to:
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**Via Email: Correspondence@icann.org
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August 16, 2018

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
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Attn: Board of Directors

Re: PDP-IGO-INGO Access to Curative Rights Protection Mechanisms

Dear ICANN Board of Directors:

I have never before written to the ICANN board but feel compelled to do so now.

I have read Mr. Mathias' letter dated July 27, 2018, which was sent to you on behalf of the United Nations in connection with the Final Report. I am quite simply shocked and offended by its contents and wish to make several points.

First, those participating over the 4-year history of the working group came from a wide cross-section. There was an active and robust exchange of ideas and proposals and much heated debate. To claim that the group was captured is simply nonsense.

Second, I spent approximately four (4) years as a member of the working group, having dedicated over 154 hours of my personal time to furthering its purpose. I represented no specific

group during my participation. Others and I repeatedly requested that IGOs and NGOs participate in the Working Group. Several official requests to participate were communicated. We received few, if any, responses. To my knowledge representative of any IGO (other than indirectly WIPO and attorneys who had represented the Red Cross) participated in the Working Group. It would appear that the IGO community was content sitting by the wayside and hoping that they could utilize their political power to change whatever final report was issued. I am offended that you all should issue such a letter having voluntarily forgone your rights to meaningfully participate.

Third, the working group reviewed the number of known instances in which an IGO had issued a complaint (legitimate or otherwise) concerning a domain name. Several IGOs successfully participated in UDRPs. There were an insignificant number of instances in which IGOs participated in domain disputes – whether via the UDRP or otherwise.

Fourth, the issue of immunity is simply over-blown. There are ample means for an IGO to protect its legitimate rights in a UDRP (or other) proceeding using an agent or other authorized representative.

Fifth, the UDRP process is contractual in nature. Any form of alternative dispute resolution for the benefit of such a small group (IGO/NGO) would require an enormous task of negotiating multiple layers of contractual relationships. Even if adopted, any resulting contractually based process would remain subject to legal challenge by the domain registrant.

Finally, while I fully understand the need in some instances for IGOs and NGOs to exist outside of the normal legal framework, such must be understandably curtailed in many respects. There is a distinct conflict in asserting immunity and simultaneously claiming trademark rights. Trademark rights are inherently commercial in nature – a situation no largely recognized as incompatible with claims of immunity. The fact is that IGOs encounter legal conflicts with third parties for all manner of disputes and such disputes are not always subject to private commercial arbitration. While IGOs may include such arbitration provisions in their private contracts with their own willing service providers (such as landlords or caterers for example), one must not forget that a domain registration agreement involves only the registrant and registrar. Where IGOs become involved in non-contractual disputes (such as third party trademark, copyright, or patent infringement or even car accidents, for example) IGOs must avail themselves of the courts like everybody else. If they desire to press their claims they must, as everyone else, waive issues of jurisdiction.

Mr. Mathias relies heavily on the argument that arbitration provisions are “normal” when dealing with IGOs. Such is irrelevant. In this case the IGOs are not a party to the relevant agreement. As such they are in essence inserting themselves as a potential claimant and arguing that they should benefit from a separate dispute resolution service. Would such an argument be acceptable in – for example – a car rental agreement in which IGOs asserted a special right of arbitration in the event the driver of a rental car collided with a vehicle owned by an IGO? I think not.

IGOs do great things. Their efforts should be applauded. Such actions – however noble – do not trump the private contractual and statutory rights of third parties. And, presuming bad faith on the part of a private domain name registrant is not a justifiable basis for limiting the statutory and moral rights of property owners.

The Mathias letter makes clear that the objective of the IGOs is to discredit the many years work of the Working Group and to undermine the bottom up policy-development process that is fundamental to the legitimacy of the ICANN model. As a diligent and fair-minded member of the Working Group who actually invested the time to examine the issues in incredible detail and reach sound recommendations, I simply cannot accept his attempt to circumvent the Policy Development Process.

I encourage the Board to carefully read the thoughtful and balanced Final Report, which does in fact provide considerable care and attention to the needs of IGOs. That it does not provide a “special” right does not mean that their concerns were ignored. Rather, given the current legal structure and the purpose of the UDRP, I felt that their needs were simply not sufficient to warrant a change of the long-established and successful process that currently exists.

Yours truly,

A handwritten signature in blue ink, appearing to read 'Paul Keating', with a large, sweeping flourish extending to the right.

Paul Raynor Keating, Esq
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