

## Further Read: Comprehensive overview of the Final Report and implementation of recommendations from ECTA Position Paper

For those who are interested in further reading, you can find here below the **comprehensive overview that demonstrates how points from the ECTA Position Paper on the WIPO-ICA Initial Report are addressed in the Final Report**. You can also find short comments clarifying the evolution of recommendations based on feedback from ECTA and other stakeholders that contributed to public debate on the Initial Report. The comments provided in below overview reflect the view of the authors of this news item and do not necessary reflect the views of ECTA.

ECTA Position paper	WIPO-ICA Final Report	Comments
<p><b>Loser Pays, Costs, Damages</b></p> <p>ECTA acknowledges the complexity that introduction of the “Loser Pays” system would create, and aligns with the consensus of the Project Team not to move forward with this suggestion. However, ECTA strongly encourages further discussion on ICANN level regarding the domain name registration process (which is outside of the scope of Phase 2 Review) that would lead to creation of necessary preconditions of this system. Such changes in the domain name registration process would require, at minimum, processes for identifying and verifying true identity of the registrant and securing the funds from registrant’s account.</p>	<p><u>Summary of comments received on the Initial Report</u>: while the practical obstacles in implementing a cost recovery mechanism were readily acknowledged, further work was recommended by some commentators to examine how a cost recovery mechanism could be created, noting that, with careful consideration, it may be possible to devise a system that balances the interests of all parties including those tasked with managing such a system. NB, some may argue that this could have been considered a Category 2 topic, but the practical complexities of a finding and agreeing on a solution warranted listing it under Category 3.</p> <p><i><b>Recommendation:</b> while there was support for the principle of addressing the imbalance in enforcement costs and providing a deterrent against bad actors, given the complexities in administering such a system, <u>we would recommend against the adoption of a loser pays system.</u></i></p>	<p>It seems that ECTA’s comment was duly taken into account (amongst others) but, unfortunately, the report does not include any language encouraging further discussion at the domain name registration level.</p> <p>In summary, the recommendation does not change: practical complexities are (still) considered to prevent the implementation of a loser pays system.</p>
<p><b>Mediation</b></p> <p>ECTA is strongly in favour of introduction of mediation in the UDRP procedure provided that the following conditions are met: 1) such mediation is voluntary; 2) such mediation is designed at dispute resolution service provider level; and 3) dispute resolution service providers</p>	<p><u>Summary of comments received on the Initial Report</u>: there was support for voluntary mediation.</p> <p><i><b>Recommendation:</b> we believe that mandatory mediation should not be adopted. At the same time, we believe that, although instances may be relatively infrequent where both</i></p>	<p>The initial recommendation does not change in the final report. ECTA aligned with this recommendation.</p>

<p>are left to decide whether to include mediation option in their supplemental rules.</p> <p>ECTA suggests that positive experience from some TLDs (such as .ch) should be taken into account when designing the relevant recommendations.</p>	<p><i>parties are interested in availing themselves of a voluntary mediation procedure offered by a provider, it may nonetheless be offered for those that want it without interfering or compelling those that do not.</i></p> <p><i>In that light, we recommend that individual providers should be free to offer voluntary mediation to parties, provided that they both agree to participate under the provider's mediation framework, rules, and fees.</i></p>	
<p><b>Scope of UDRP</b></p> <p>ECTA agrees that scope of the UDRP should not be widened beyond the trade marks or other IP rights, as such expansion, although tempting, could create a lot of uncertainty. It should be also noted that the UDRP practice has already showed some flexibility where some other distinctive identifiers (such as personal names and company names) have been recognised to a certain extent as unregistered or common law trade marks thereby effectively expanding the scope of the UDRP.</p>	<p><u>Summary of comments received on the Initial Report:</u> there was both support for the recommendation in the Initial Report of focusing on the current trademark-based scope of the UDRP as adopted by ICANN, but also support (in particular from GI holders) for the idea of including geographical indications in the UDRP. It was noted in some comments that a number of national legal systems account for the registration of geographical indications; at the same time, it is recognized that such a registration in one jurisdiction may be considered to be a common name in another. As applied to the UDRP, this raises considerations of potential registrant rights.</p> <p><b>Recommendation:</b> <i>the focus of the present Report is on the trademark-based UDRP framework as adopted by ICANN. At the same time, it is recognized that there was interest in expanding the scope of the UDRP to include other identifiers. We therefore consider this topic in terms of the Phase 2 charter to be a matter for ICANN's GNSO Council.</i></p>	<p>We notice a slight opening in the final report as compared to the initial report. After recommending against the inclusion of this topic in the Phase 2 charter, the report now leaves it to ICANN's GNSO Council to decide.</p>
<p><b>Appeals Layer</b></p> <p>ECTA strongly supports introduction of the appeals layer within the UDRP. As correctly noted by the Project Team, introduction of this additional layer can significantly contribute to overall stability</p>	<p><u>Summary of comments received on the Initial Report:</u> there was support for the recommendation.</p> <p><b>Recommendation:</b> <i>we believe that an appeals procedure can provide enhanced stability to the</i></p>	<p>The recommendation slightly changes in the final report. The latter:</p> <ul style="list-style-type: none"> <li>- refers to a “dedicated” work track instead of a “secondary” one; and</li> <li>- emphasizes the need for convening a group with practical experience to</li> </ul>

<p>of the UDRP system and it is likely that it would further diminish the already rare cases of court review of the UDRP decisions. ECTA holds that appeals procedure should not be a default remedy available for all cases (unlike court proceedings which in any event should remain available in all cases due to access to court issues), but more of an exceptional remedy that can be used under predefined circumstances (e.g. decision issued by a single-member panel, default decisions, etc.). Understanding the complexity of these issues and a need to properly design the appeals layer, ECTA agrees with the project team that this subject should be left for secondary track of the Phase 2 Review.</p>	<p><i>UDRP and on the whole appears to be a workable concept, but that a range of interrelated procedural issues would need to be worked out. As a result, we would recommend that the concept of an appeals layer be considered in a dedicated work track in Phase 2 with special focus on convening a group with practical experience to consider the related parts.</i></p>	<p>consider the matter, instead of simply refer it to the global ICANN Community.</p> <p>ECTA aligned with the initial recommendation. The final recommendation seems slightly more supportive to introduction of appeals layer.</p>
<p><b>Changing “and” to “or”</b></p> <p>ECTA holds that this is one of the most delicate questions raised in the UDRP review process and that introduction of such change without proper review could disbalance the UDRP and create potential problems in the future. Being aware that many ccTLD policies recognise that it is sufficient to prove either registration or use of the disputed domain name in bad faith, ECTA would suggest thorough review of decisions rendered under such policies and potential impact that adoption of such system would have on the UDRP. In that sense, ECTA believes that, at the moment, there is no sufficient information for achieving consensus on this subject and agrees with the Project Team that this subject should be put on a secondary track of the Phase 2 Review.</p>	<p><u>Summary of comments received on the Initial Report:</u> this continues to be an important topic with feedback on both sides of the issue. A small number believe that the current approach adequately deals with the vast majority of cases. It was also noted that, if “and” is not changed to “and/or”, some cases will simply not be addressed under the current UDRP, leaving an undesirable enforcement gap and continuing to put pressure on the UDRP system. It was, moreover, noted that many ccTLDs have effectively adopted “or”, while also noting that decisions under such ccTLD policies should be reviewed to understand how such a change might work in practice. Having taken into account the public feedback, the Project Team maintains its recommendation, acknowledging that, for many stakeholders, this continues to be of interest and believing that a focus on discrete case types or circumstances is more likely to gain consensus.</p> <p><b>Recommendation:</b> <i>as a result of the extensive deliberations and feedback received, we believe that a change from “and” to “and/or” may be possible to implement in order to address specific</i></p>	<p>The recommendation is slightly changed in the final report. The latter refers to a “dedicated” work track instead of a “secondary” one, and seems a bit more optimistic as to the introduction of “and/or” under limited circumstances.</p>

	<p><i>instances of bad faith use following good faith (or unclear) registration which would not otherwise impact domain names registered in good faith.</i></p> <p><i>As a result, we would recommend that an examination of the possible introduction of “and/or” in limited circumstances, and the inclusion of express safeguards, be discussed in a dedicated work track in Phase 2 wherein the ICANN Community can engage in what are likely to be more complex deliberations to seek consensus on this issue.</i></p>	
<p><b>Expedited or Summary Procedures</b></p> <p>ECTA is in favour of introduction of the expedited or summary procedures within the UDRP that would enable an even quicker resolution of the clear-cut cases and/or default cases. It is understandable that selection of appropriate mechanism might be a difficult task and that such mechanism should not interfere with the existing mechanisms (such as the Uniform Rapid Suspension - URS). ECTA suggests using the positive experience from other TLDs, such as the experience with summary proceedings for .uk ccTLD.</p>	<p><u>Summary of comments received on the Initial Report:</u> there was support for the recommendation, and interest in exploring the various options it could include.</p> <p><b>Recommendation:</b> <i>the Project Team felt that, although agreeing on the form of any expedited procedure would require further discussion, it is nevertheless highly worthwhile to further investigate and deliberate upon the details of such a procedure with a view to finding a solution that deals with certain kinds of cybersquatting abuse on an expedited basis, while ensuring that rights of legitimate registrants are protected.</i></p> <p><i>We would therefore recommend that such consideration be subject to a dedicated work track as consensus appears achievable.</i></p>	<p>The final report refers to a “dedicated” work track instead of a “secondary” one.</p>
<p><b>Remedy: True Cancellation</b></p> <p>ECTA is strongly in favour of the introduction of true cancellation as a new remedy in the UDRP provided that a clear guidance on lifting the cancellation is issued and adopted by ICANN.</p>	<p><u>Summary of comments received on the Initial Report:</u> There was support for the recommendation. It was noted, however, that such a remedy would necessarily involve registries and not just registrars, in order to “block” domain names across the registry. We revised our Final Recommendation based upon this feedback.</p>	<p>The final report does not fundamentally change the recommendation but emphasizes the need for input from registries and registrars.</p>

	<p><b>Recommendation:</b> the Project Team felt that “true cancellation” should be considered as a remedy under the UDRP, and that a suitable mechanism for lifting the cancellation so that third parties are not prevented from legitimate registrations be included.</p> <p>Figuring out a satisfactory method may require some nuance but appears not only to be within reach, but worth a dedicated effort. This will necessarily require input from registrars and registries. We therefore recommend that this issue be prioritized possibly in a dedicated work track.</p>	
<p><b>Codification of Case Law</b></p> <p>ECTA welcomes the idea of pan-provider codification of case law and generally supports collaboration among the providers and harmonising their practices as much as possible.</p>	<p><u>Summary of comments received on the Initial Report:</u> there was support for this recommendation with different views expressed as to whether it should be binding (ref. the discussion of appeals herein) or guidance.</p> <p><b>Recommendation:</b> we recommend that the concept of a pan-provider summary of case jurisprudence, building on the consensus views captured in the WIPO Overview, be further explored in a similar manner as this WIPO-ICA-led Review Project (i.e., outside of ICANN's policy development processes but with the inputs of stakeholders with experience with the UDRP).</p>	<p>The final report does not fundamentally change the recommendation.</p>