

DOMAIN NAME DISPUTE RESOLUTION IN U.S. COURTS: SHOULD ICANN BE GIVEN DEFERENCE?

Abstract: Established in 1998, the Internet Corporation for Assigned Names and Numbers (ICANN) is a private, non-profit corporation that administers the Internet domain name system. Through its Uniform Dispute Resolution Policy (UDRP), ICANN has also become an important vehicle for resolving domain name disputes that result from "cybersquatting." The UDRP requires that parties to a domain name dispute submit to arbitration that conforms to ICANN rules. Although the parties maintain the right to seek judicial review of UDRP decisions, however, the level of deference that courts should grant those decisions remains unclear. To address this issue, this Note reviews the technological and legal history of the domain name system. This Note also examines ICANN's origins, purposes, and structure, comparing them to those of federal administrative agencies. In doing so, this Note concludes that courts reviewing UDRP decisions should grant ICANN the same deference granted to federal agencies.

INTRODUCTION

Technical development of the Internet has historically been based on the principles of decentralization, consensus, and transparency.¹ Groups of Internet engineers and developers gather to discuss technical problems; if one solution is widely agreed upon, that solution is reviewed by another group of engineers until the solution reaches enough support from enough people to achieve public acceptance.² This tradition permeates not only the engineering process, but also the fledgling international organizations established to regulate Internet technology.³

¹ See Joseph Reagle, *Why the Internet is Good: Community Governance That Works Well*, Berkman Center for Internet and Society, at <http://cyber.law.harvard.edu/people/reagle/regulation-19990326.html> (last visited Mar. 17, 2002) (quoting Internet pioneer David Clark, "We reject kings, presidents, and voting. We believe in rough consensus and running code.").

² See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 250 (2000).

³ See Letter from Esther Dyson, Interim Chairman, ICANN to Ralph Nader and James Love, Consumer Project on Technology (June 15, 1999), at <http://www.icann.org/chairman-response.htm> [hereinafter Letter] ("But ICANN's goals and its actions are in fact the

The Internet Corporation for Assigned Names and Numbers (ICANN) is one such regulatory organization.⁴ Established in 1998, ICANN administers the domain name system, a directory that allows numerical Internet addresses like "192.0.34.65" to be reached by typing "www.icann.org."⁵ As a private, non-profit corporation, ICANN reflects many of the Internet engineering principles of consensus-driven decisionmaking, transparency, and decentralization.⁶ Additionally, ICANN represents a global constituency in the regulation and administration of a worldwide domain name system.⁷

Since ICANN's inception, commentators have debated the merits of permitting a private organization to administer a public resource.⁸ On the one hand, private regulation of the Internet bears important advantages over traditional public regulation.⁹ Global private regulators can make and enforce rules across national boundaries because they are unhindered by jurisdictional requirements.¹⁰

Alternatively, the major disadvantage of private regulation is its lack of legitimacy.¹¹ Private regulators do not derive their authority from sovereign governments, as do public regulators.¹² Thus, their actions are susceptible to criticism for being unchecked, unrestrained abuses of power.¹³

result of public debate and consensus—though not of unanimity."); *ICANN Background*, at <http://www.icann.org/general/background.htm> (last modified July 16, 1999) ("Though often contentious the ICANN structure creates an open, transparent, global forum in which competing interests can work towards consensus."); see also Reagle, *supra* note 1 (discussing the policy formation techniques of two groups who regulate Internet standards, the Internet Engineering Task Force and the World Wide Web Consortium).

⁴ See Letter, *supra* note 3; *ICANN Background*, *supra* note 3.

⁵ *ICANN Background*, *supra* note 3.

⁶ See Letter, *supra* note 3; *ICANN Background*, *supra* note 3.

⁷ See Graeme B. Dinwoodie & Laurence R. Helfer, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 144 (2001); *ICANN Background*, *supra* note 3.

⁸ See, e.g., Dinwoodie & Helfer, *supra* note 7, at 144; A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 29 (2000); Henry H. Perritt, *Towards a Hybrid Regulatory Scheme for the Internet*, 2001 U. CHI. LEGAL F. 215, 215 (2001); Elizabeth Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 154 (2000); Weinberg, *supra* note 2, at 191.

⁹ See Dinwoodie & Helfer, *supra* note 7, at 144; Perritt, *supra* note 8, at 215.

¹⁰ Perritt, *supra* note 8, at 221.

¹¹ See Dinwoodie & Helfer, *supra* note 7, at 146.

¹² See *id.*; Weinberg, *supra* note 2, at 218.

¹³ See Froomkin, *supra* note 8, at 29; Weinberg, *supra* note 2, at 217. For example, some scholars have criticized ICANN's dispute resolution policy for failing to conform to U.S. constitutional due process standards. See Froomkin, *supra* note 8, at 98–100; Thornburg, *supra* note 8, at 188, 196.

United States courts have an opportunity to lend ICANN legitimacy and endorse the decentralized, consensus-based traditions of the Internet.¹⁴ This opportunity arises out of the disputes between trademark owners and cybersquatters over the registration of domain names.¹⁵ Essentially, a cybersquatter registers a domain name containing a trademark, for example "panavision.com," and then ransoms the domain name to the trademark holder.¹⁶ There are two legal solutions to such disputes: ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) and the federal Anticybersquatting Consumer Protection Act (ACPA).¹⁷

A recent case exemplifies both the issues involved in domain name disputes and the role of federal courts in bolstering ICANN's legitimacy.¹⁸ In 1998, Jay Sallen registered the domain name "corinthians.com" with Network Solutions, Inc., a domain name registrar accredited by ICANN.¹⁹ Approximately one year later Sallen contacted Corinthians Licenciamentos, a Brazilian corporation holding trademark rights in the name "Corinthiao," the Portuguese equivalent of Corinthians and also the name of a popular Brazilian soccer team.²⁰ Sallen explained to Corinthians that several people had offered to buy "corinthians.com" and suggested it was in Corinthians' interest to purchase the domain name.²¹

Corinthians initiated UDRP proceedings through ICANN to recover "corinthians.com."²² Sallen lost at the UDRP proceeding and promptly filed suit in federal court.²³ Sallen alleged that, contrary to the UDRP determination, his actions were not cybersquatting under

¹⁴ See Dinwoodie & Helfer, *supra* note 7, at 203-09 (exploring the effects of national court review of ICANN's dispute resolution policy); Donna Howard, Note and Comment, *Trademarks and Service Marks and Internet Domain Names: Giving ICANN Deference*, 33 ARIZ. ST. L.J. 637, 638 (2001) (advocating deferential treatment by U.S. courts of decisions made under ICANN's dispute resolution policy).

¹⁵ See Sallen v. Corinthians Licenciamentos, LTDA, 273 F.3d 14, 16-17 (1st Cir. 2001).

¹⁶ See, e.g., Sporty's Farm L.L.C. v. Sportsman's Mkt., Inc., 202 F.3d 489, 493 (2d Cir. 2000), *cert. denied* 530 U.S. 1262 (2000); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998).

¹⁷ See Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(1) (2000); *Uniform Domain Name Dispute Resolution Policy* (Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> [hereinafter *UDRP*].

¹⁸ See Sallen, 273 F.3d at 14.

¹⁹ *Id.* at 20.

²⁰ *Id.* at 17, 21.

²¹ *Id.* at 21.

²² *Id.* When Sallen registered the domain name with Network Solutions he had agreed to resolve disputes concerning the name under UDRP proceedings. *Id.* at 20.

²³ Sallen, 273 F.3d at 18.

the ACPA.²⁴ The United States District Court for the District of Massachusetts dismissed Sallen's complaint on the grounds that no actual controversy existed between the parties because Corinthians never claimed that Sallen violated the ACPA.²⁵

In 2001, in *Sallen v. Corinthians Licenciamentos, LTDA*, the United States Court of Appeals for the First Circuit reversed the district court's judgment.²⁶ The ACPA, the court held, allows parties whose domain names had been suspended or cancelled under the UDRP to file a cause of action in federal court.²⁷ With this decision, the First Circuit has said that the federal courts are the final arbiters of domain name disputes.²⁸ As a result, parties engaged in the mandatory UDRP arbitration can use federal courts as "appeals" courts for unfavorable UDRP decisions.²⁹

Although *Sallen* confirms that the First Circuit will allow UDRP appeals,³⁰ the degree of deference courts should give UDRP decisions remains unclear.³¹ Whether federal courts should disregard the UDRP findings entirely, or should grant UDRP decisions the deference given to other forms of adjudication they review has not been resolved.³² Courts could analogize the UDRP to similar types of dispute resolution proceedings.³³ Indeed, analogies between the UDRP and administrative agency adjudication are particularly instructive given the parallels between ICANN and public regulatory agencies.³⁴

²⁴ *Id.* at 22.

²⁵ *Id.* at 18.

²⁶ *Id.* at 30.

²⁷ *See id.* at 18.

²⁸ *See Sallen*, 273 F.3d at 18; Seth Stern, *Federal Courts Could Override UDRP Arbitration*, BOSTON LAW TRIB., Dec. 17, 2001, at 1.

²⁹ *See Sallen*, 273 F.3d at 18, 26, 27; Stern, *supra* note 28, at 1.

³⁰ *See Sallen*, 273 F.3d at 26, 27.

³¹ *See Howard*, *supra* note 14, at 638. In 2001, in *Weber-Stephen Products Co. v. Armitage Hardware and Building Supply, Inc.*, the United States District Court for the Northern District of Illinois considered the legal effect of the ICANN administrative proceedings on ACPA claims. No. 00-C-1738, 2000 WL 562470, at *1 (N.D. Ill. May 3, 2000). The court concluded that it was not bound by the outcome of the ICANN proceedings but did not decide what degree of deference, if any, should be given to ICANN decisions. *Id.* at *2.

³² *See Weber-Stephen*, 2000 WL 562470, at *1, *2.

³³ *See Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 749 (E.D. Va. 2001). So far, courts have distinguished the UDRP from other forms of private arbitration. In 2001, in *Parisi v. Netlearning, Inc.*, the United States District Court for the Eastern District of Virginia held that the Federal Arbitration Act, which limits judicial review of private arbitration, does not apply in civil actions seeking review of arbitration conducted under the UDRP. 139 F. Supp. 2d at 749, 753.

³⁴ *See infra* notes 188–251 and accompanying text.

This Note proposes that, because of the substantive and procedural similarities between ICANN and administrative agencies, courts should use the standard of review for agency action when reviewing UDRP decisions.³⁵ Part I briefly describes domain names and the disputes surrounding them.³⁶ Part II examines private regulation of the domain name system under ICANN.³⁷ Part III reviews some key characteristics of administrative agencies.³⁸ Part IV compares ICANN's administration of the domain name system and UDRP proceedings to the regulatory and adjudicatory functions of an administrative agency.³⁹ Finally, this Note argues that the similarities between ICANN and administrative agencies should encourage courts to grant UDRP decisions the deference afforded agency adjudication and promote private regulation of Internet technology.⁴⁰

I. DOMAIN NAMES AND DOMAIN NAME DISPUTES

A. Domain Names

In 1965, the first computer network was created by connecting a computer in Massachusetts to one in California over a telephone line.⁴¹ From this first breakthrough evolved the Internet, a globally interconnected network of computers through which data can be accessed from any computer on the network.⁴²

As the Internet grew, it was necessary to develop a language that would enable computers on the network to communicate with each other.⁴³ One such language, Internet Protocol (IP), is a uniform naming system that indicates the server or network on which a particular computer is connected.⁴⁴ IP addresses have become a universal nu-

³⁵ See *infra* notes 183–269 and accompanying text.

³⁶ See *infra* notes 41–63 and accompanying text.

³⁷ See *infra* notes 64–134 and accompanying text.

³⁸ See *infra* notes 135–182 and accompanying text.

³⁹ See *infra* notes 188–251 and accompanying text.

⁴⁰ See *infra* notes 252–269 and accompanying text.

⁴¹ Barry M. Leiner et al., *A Brief History of the Internet*, Internet Society, at <http://www.isoc.org/internet/history/brief.shtml> (last updated Mar. 4, 2002).

⁴² Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998); Leiner et al., *supra* note 41.

⁴³ Leiner et al., *supra* note 41; Paul Mockapetris, *Request For Comments: 1034, Domain Names—Concepts and Facilities 1* (1987), at <http://www.ietf.org/rfc/rfc1034.txt> (last visited Nov. 29, 2001).

⁴⁴ See Leiner et al., *supra* note 41.

merical code designating the location of every computer on the Internet.⁴⁵

These long strings of numbers were hard to remember, however, so Internet engineers developed a shorthand device for IP addresses called domain names.⁴⁶ The domain name for a corresponding IP address can be any combination of characters followed by "." and then a top-level domain such as "com" or "net."⁴⁷ Logical choices for domain names are those with significance for the entity attracting Internet users, like a product or company name.⁴⁸ Conflicts arise, however, when a trademark is used as a domain name.⁴⁹

B. Domain Name Disputes

Using a trademark name as a domain name is problematic because there can be only one domain name for each website.⁵⁰ Yet, under U.S. trademark law, there can be a number of entities with rights in the same trademark.⁵¹ For example, an airline may trademark the term "United" for air travel service.⁵² Other companies may use the name "United" for their products as long as there is little likelihood of confusing the source of the registered trademark "United" Airlines with, for example, United Plumbing.⁵³ On the Internet, however, there can only be one "united.com."⁵⁴ United Airlines and United Plumbing cannot both use the domain name "united.com."⁵⁵

The singularity of domain names led to the practice of cybersquatting.⁵⁶ A cybersquatter would register a domain name, such as "united.com," before the trademark holder.⁵⁷ As the Internet grew more popular and larger companies sought to use their trademarks as domain names, many of these companies found that their trademarks

⁴⁵ *The Domain Name System: A Non-technical Explanation—Why Universal Resolvability Is Important*, InterNIC, at <http://www.internic.org/faqs/authoritative-dns.html> (last modified Mar. 25, 2002) [hereinafter *Domain Name System*].

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *See* Howard, *supra* note 14, at 637.

⁴⁹ *See id.*

⁵⁰ *See Domain Name System, supra* note 45.

⁵¹ *See* Lanham Act § 32 (1), 15 U.S.C. § 1114 (2000).

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See Domain Name System, supra* note 45.

⁵⁵ *See* Thornburg, *supra* note 8, at 159.

⁵⁶ *See id.* at 160.

⁵⁷ *See id.* at 159–60.

had already been registered by cybersquatters.⁵⁸ Furthermore, some cybersquatters demanded money from trademark owners in return for handing over domain names.⁵⁹ In response to a cyberquatter's threat, a trademark owner had to choose between paying the cyber-squatter's ransom and initiating potentially costly litigation to recover the domain name.⁶⁰

Intellectual property organizations, trademark owners, and legal experts scrambled to find a solution.⁶¹ Many attributed the increase in cybersquatting to lack of any regulatory control over domain names.⁶² Amid this controversy, ICANN was formed.⁶³

II. PRIVATE REGULATION OF THE DOMAIN NAME SYSTEM: THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

A. ICANN's Purpose

In 1998, with both Internet popularity and cybersquatting increasing, the U.S. Department of Commerce published a proposal to privatize the administration of domain names, known as the "White Paper."⁶⁴ The White Paper suggested that oversight of the domain name system be transferred to a new, non-profit corporation.⁶⁵ The administrative entity described in the Commerce Department's proposal took the form of the Internet Corporation for Assigned Names and Numbers (ICANN).⁶⁶

⁵⁸ See *Sallen v. Corinthians Licenciamentos, LTDA*, 273 F.3d 14, 19 (1st Cir. 2001).

⁵⁹ See *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1319 (9th Cir. 1998). Toeppen offered to return the domain name "panavision.com" to Panavision for \$13,000. *Id.* Some alleged cybersquatters register domain names to annoy, rather than to profit. In 1999, San Francisco mayoral candidate Clint Reilly was accused of registering his opponents' names as domain names to prevent his opponents from using their own names for their campaign websites. See Larry D. Hatfield, *Candidate "Cybersquats" on Mayoral Foes*, S.F. EXAMINER, August 11, 1999, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/examiner/archive/1999/08/11/NEWS1616.dtl>.

⁶⁰ See Froomkin, *supra* note 8, at 101; Thornburg, *supra* note 8, at 160.

⁶¹ See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,742 (June 10, 1998); *Management of Internet Names and Addresses: Intellectual Property Issues* para. 14, WIPO (Apr. 30, 1999), at <http://wipo2.wipo.int> [hereinafter WIPO Report].

⁶² See *Sporty's Farm L.L.C. v. Sportsman's Mkt., Inc.*, 202 F.3d 489, 493 (2d Cir. 2000).

⁶³ See WIPO Report, *supra* note 61, para. 14, 18, 19.

⁶⁴ Management of Internet Names and Addresses, 63 Fed. Reg. at 31,749.

⁶⁵ See *id.*; ICANN Background, *supra* note 3.

⁶⁶ ICANN Background, *supra* note 3.

ICANN was incorporated in California in October 1998.⁶⁷ Currently, the organization is governed by a nineteen-member board of directors and maintains a full-time staff of eighteen.⁶⁸ In addition, ICANN relies on a number of supporting committees in its administration of the domain name system.⁶⁹

Pursuant to the White Paper, ICANN's purpose is to regulate the domain name system, the hierarchical directory of every Internet address.⁷⁰ At the top of the hierarchy is the root file.⁷¹ This one data source links all domain names to their corresponding IP addresses.⁷² The ultimate goal articulated in the White Paper is to grant ICANN control of the root file.⁷³

The entire domain name system extends from the root file.⁷⁴ There are copies of the root file on thirteen computer servers around the world.⁷⁵ In turn, each domain name registry has a copy of the root file for the top-level domain that it administers.⁷⁶ For example, Global Name Registry, Inc. has a list of IP addresses and corresponding domain names for all domain names ending in ".name."⁷⁷ Thus, any modification of an IP address or a domain name at any level of the system must be reflected throughout the entire domain name system to ensure uniformity and reliability.⁷⁸ This system, according to ICANN and the White Paper, requires administrative oversight by a single entity.⁷⁹

⁶⁷ *Id.*

⁶⁸ See *About ICANN*, at <http://www.icann.org/general/abouticann.htm> (last modified Feb. 18, 2002).

⁶⁹ See *id.*

⁷⁰ See *Domain Name System*, *supra* note 45.

⁷¹ See *A Unique, Authoritative Root for the DNS* (July 9, 2001), at <http://www.icann.org/icp/icp-3.htm> [hereinafter *Authoritative Root*].

⁷² *Id.*

⁷³ See *Management of Internet Names and Addresses*, 63 Fed. Reg. 31,741, 31,749 (June 10, 1998).

⁷⁴ See *Authoritative Root*, *supra* note 71.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ *New TLD Program*, at <http://www.icann.org/tlds> (last accessed Jan. 30, 2002).

⁷⁸ See *Authoritative Root*, *supra* note 71.

⁷⁹ See *Management of Internet Names and Addresses*, 63 Fed. Reg. 31,741, 31,743 (June 10, 1998); *Authoritative Root*, *supra* note 71.

B. ICANN's Powers

The White Paper set forth guidelines as to how a private entity should regulate the domain name system.⁸⁰ Subsequently, the exact powers of ICANN were articulated in its agreement with the Department of Commerce and in the recommendations made by intellectual property interests.⁸¹

Soon after its incorporation, ICANN entered into a Memorandum of Understanding ("Memorandum") with the Department of Commerce.⁸² The agreement states that before turning management of the domain name system over to ICANN, the Department of Commerce requires assurances that ICANN has the capabilities and resources to assume technical management of the domain name system.⁸³

The Memorandum provides that ICANN and the Department of Commerce will jointly design, develop, and test certain management functions.⁸⁴ First, the parties are to establish a policy for the allocation of IP numbers.⁸⁵ Second, both parties agree to share oversight of the root server system, the data file linking IP addresses to domain names.⁸⁶ Third, both agree to implement and oversee a policy for the creation of new top-level domain names.⁸⁷ Finally, both ICANN and the Department of Commerce will continue to coordinate the technical method for addressing computers on the Internet using IP addresses.⁸⁸

In addition to the responsibilities described in the Memorandum, ICANN was empowered to create a dispute resolution process for domain name disputes.⁸⁹ To aid ICANN in this task, the World Intellectual Property Organization (WIPO) recommended a number of features for this process.⁹⁰ The WIPO envisioned a dispute resolution policy that would decide disputes quickly and inexpensively, would

⁸⁰ Management of Internet Names and Addresses, 63 Fed. Reg. at 31,743.

⁸¹ *Memorandum of Understanding Between the U.S. Dep't of Commerce and ICANN*, § V (Nov. 25, 1998), at <http://www.icann.org/general/icann-mou-25nov98.htm> [hereinafter *Memorandum*]; WIPO Report, *supra* note 61, para. 24; see Froonkin, *supra* note 8, at 34.

⁸² See *Memorandum*, *supra* note 81, § II(A).

⁸³ *Id.* § II(B).

⁸⁴ *Id.*

⁸⁵ *Id.* § II(B)(a).

⁸⁶ *Id.* § II(B)(b); see *Authoritative Root*, *supra* note 71.

⁸⁷ *Memorandum*, *supra* note 81, § II(B)(c).

⁸⁸ *Id.* § II(B)(d).

⁸⁹ WIPO Report, *supra* note 61, para. 24.

⁹⁰ *Id.* at para. 150.

ensure procedural fairness for all parties, and would co-exist with existing national courts as a solution to cybersquatting.⁹¹

C. ICANN's Procedures

To accomplish the goals envisioned by the White Paper, ICANN has established procedures for implementing policy decisions, for the resolution of domain name disputes under the UDRP, and for reconsideration and review of actions that adversely affect third parties.⁹²

•1. Rulemaking Procedures

Any policy being considered by ICANN's board of directors that will substantially affect the operation of the Internet or a third party is subject to public comment and review.⁹³ Four steps are required. First, the board must provide public notice of the proposed policy on the ICANN website.⁹⁴ The notice must explain what policies are being considered by the board and why.⁹⁵ Second, there must be reasonable opportunity for comment.⁹⁶ Interested parties must be able to comment on the proposed policy, to see the comments of others, and to reply to those comments.⁹⁷ Third, ICANN must hold a public forum at which the proposed policy is discussed.⁹⁸ Fourth, after voting, the board will publish minutes of the board meeting and an explanation of any action taken.⁹⁹

2. Adjudicatory Procedures—The UDRP

Those registering domain names with ICANN are required to submit to ICANN's dispute resolution policy, the UDRP, in the event that a domain name dispute arises.¹⁰⁰ The UDRP allows trademark holders to submit a complaint against an alleged cybersquatter to an

⁹¹ See *id.*

⁹² See *infra* notes 93–134 and accompanying text.

⁹³ *Bylaws for Internet Corporation for Assigned Names and Numbers*, art. III § 3(b) (Feb. 12, 2002), at <http://www.icann.org/general/bylaws.htm> [hereinafter *ICANN Bylaws*].

⁹⁴ *Id.* art. III § 3(b)(i).

⁹⁵ *Id.*

⁹⁶ *Id.* art. III § 3(b)(ii).

⁹⁷ *Id.*

⁹⁸ *ICANN Bylaws*, *supra* note 93, art. III § 3(b)(iii).

⁹⁹ *Id.* art. III § 3(c).

¹⁰⁰ *UDRP*, *supra* note 17, §§ 2, 4.

ICANN-approved arbitration service.¹⁰¹ The responding party is notified of the complaint and may answer it within twenty days.¹⁰² The arbitration panel then makes a determination within fourteen days.¹⁰³ If the arbitration panel determines that the cybersquatter registered the domain name in bad faith, the domain name is transferred to the trademark holder.¹⁰⁴

The UDRP is fairly limited in scope.¹⁰⁵ Three criteria must be met before a domain name is transferred to a trademark holder. First, the domain name must be identical or confusingly similar to a trademark or service mark in which the complainant has rights.¹⁰⁶ Second, the domain name holder must have no rights or legitimate interests in the domain name.¹⁰⁷ Lastly, the domain name must have been registered and used in bad faith.¹⁰⁸

The UDRP provides four examples of bad faith.¹⁰⁹ The first occurs when an individual intends to sell or rent the domain name to a trademark owner for more than the cost of registering the domain name.¹¹⁰ Second, bad faith can be demonstrated by registering a domain name to prevent a trademark owner from registering it;¹¹¹ in this example, there must be evidence that the alleged cybersquatter has previously engaged in similar conduct.¹¹² Third, registering a domain name for the purpose of disrupting the business of a competitor is considered evidence of bad faith.¹¹³ Finally, bad faith may also include using a domain name intentionally to attract Internet users to a website for commercial gain.¹¹⁴

In deciding a complaint, the arbitration panel must conform to the procedural constraints set forth in the Rules for the Uniform

¹⁰¹ *Id.* § 4. A trademark holder is not a party to the contract between the domain name holder and the registrar, they are the third party beneficiaries of that contract. *See id.*

¹⁰² *Rules for the Uniform Domain Name Dispute Resolution Policy*, § 5(a) (Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-rules-24oct99.htm> [hereinafter *UDRP Rules*].

¹⁰³ *Id.* § 15(b). An arbitration panel or single arbitrator, depending on the arbitration service used and the complainant's preference, may hear the dispute. *Id.* § 6.

¹⁰⁴ *UDRP*, *supra* note 17, § 3.

¹⁰⁵ *See id.* § 4(a).

¹⁰⁶ *Id.* § 4(a)(i).

¹⁰⁷ *Id.* § 4(a)(ii).

¹⁰⁸ *Id.* § 4(a)(iii).

¹⁰⁹ *UDRP*, *supra* note 17, § 4(b).

¹¹⁰ *Id.* § 4(b)(i).

¹¹¹ *Id.* § 4(b)(ii).

¹¹² *Id.*

¹¹³ *Id.* § 4(b)(iii).

¹¹⁴ *UDRP*, *supra* note 17, § 4(b)(iv).

Domain Name Dispute Resolution Policy ("UDRP Rules").¹¹⁵ Even so, the panel retains considerable discretion.¹¹⁶ The panel determines the admissibility, relevance, materiality, and weight of the evidence.¹¹⁷ The UDRP Rules, however, prohibit in-person hearings, including hearings by teleconference, videoconference, and web-conference, unless the panel decides such a hearing is necessary.¹¹⁸ In the absence of live hearings, the panel decides the dispute on the basis of the statements and documents submitted in the complaint and answer.¹¹⁹

The UDRP contemplates domain name dispute resolution in fora other than its own.¹²⁰ The UDRP Rules provide that the panel shall decide the complaint in accordance with any rules or principles of law it deems applicable.¹²¹ Furthermore, in the event of legal proceedings initiated prior to or during the UDRP proceeding, the panel can decide to suspend, terminate, or proceed to a decision.¹²² Moreover, the UDRP does not prevent either the domain name holder or the trademark holder from submitting the dispute to a court before or after the dispute is heard by the ICANN-approved arbitration service.¹²³

3. Review Procedures

ICANN sets forth two mechanisms by which its actions are subject to review—the internal Reconsideration Policy and the Independent Review Policy.¹²⁴ Neither policy applies to decisions made by the administrative panel under the UDRP, only to actions of ICANN.¹²⁵

The Reconsideration Policy provides that the ICANN board will maintain a committee of three members to hear any requests for reconsideration of ICANN actions.¹²⁶ To be heard by the committee, the requesting party must demonstrate that they will be affected by an

¹¹⁵ *UDRP Rules*, *supra* note 102, § 10.

¹¹⁶ *See id.*

¹¹⁷ *Id.* § 10(d).

¹¹⁸ *Id.* § 13.

¹¹⁹ *Id.* § 15(a).

¹²⁰ *UDRP Rules*, *supra* note 102, §§ 15(a), 18.

¹²¹ *Id.* § 15(a).

¹²² *Id.* § 18(a).

¹²³ *UDRP*, *supra* note 17, § 4(k).

¹²⁴ *ICANN Bylaws*, *supra* note 93, art. III, § 4; *Independent Review Policy* (Mar. 10, 2000), at <http://www.icann.org/committees/indreview/policy.htm>; *Reconsideration Policy* (Mar. 4, 1999), at <http://www.icann.org/general/reconsideration.htm>.

¹²⁵ *See ICANN Bylaws*, *supra* note 93, art. III, § 4. ICANN's bylaws state that "any person affected by an action of the Corporation may request review or reconsideration." *See id.*

¹²⁶ *Reconsideration Policy*, *supra* note 124.

ICANN action.¹²⁷ Furthermore, the requesting party must state what steps ICANN should take and the rationale for such steps.¹²⁸

After exhausting the opportunity for review under the Reconsideration Policy, affected parties still have an opportunity for third party review of ICANN actions under the Independent Review Policy.¹²⁹ The Independent Review Policy is designed to address allegations that ICANN has overstepped the boundaries of its bylaws or articles of incorporation.¹³⁰ A request for independent review must claim that an action or failure to act has materially affected an individual or entity.¹³¹ To bring a request for independent review, a party must first exhaust ICANN's internal reconsideration process.¹³²

The Independent Review Board is composed of nine members selected by a nominating committee.¹³³ Independent Review Board members are required to be of high professional standing and accomplishment, to be current or former judges, and to hold no position in ICANN.¹³⁴

III. PUBLIC REGULATION: FEDERAL ADMINISTRATIVE AGENCIES

As the term "agency" implies, an administrative agency is an entity established by a principal to carry out that principal's purposes.¹³⁵ For federal administrative agencies, this generally means that the United States government grants an agency the authority to carry out the public's purposes.¹³⁶ An agency's authority and power originate in the agency's organic statute.¹³⁷

Organic statutes generally address five topics: the agency's purpose, powers, and procedures, its structure, and its location within the federal government.¹³⁸ The purpose of the agency can cover a wide

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Independent Review Policy*, *supra* note 124, § 2; *Reconsideration Policy*, *supra* note 124.

¹³⁰ *Independent Review Policy*, *supra* note 124, § 2.

¹³¹ *Id.* §§ 6.1, 6.2.

¹³² *Id.* § 6.3.

¹³³ See *Independent Review*, at <http://www.icann.org/committees/indreview/index.html> (last modified May 26, 2001).

¹³⁴ See *id.*

¹³⁵ See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 11-12 (4th ed. 1998).

¹³⁶ See Administrative Procedure Act, 5 U.S.C. § 551 (2000); MASHAW ET AL., *supra* note 135, at 12.

¹³⁷ See MASHAW ET AL., *supra* note 135, at 13. Agencies may be created by any legal document, including a statute, executive order, constitution, charter, etc. See *id.*

¹³⁸ See *id.*

range of activities—from regulating economic activity to promoting social welfare.¹³⁹ The powers of the agency are those granted to accomplish the agency's purpose.¹⁴⁰ Whereas the purpose section of an organic statute describes the agency's goals, the powers section defines the legal tools with which the agency is empowered to pursue those goals.¹⁴¹ Those legal tools can include the collection of information, grants or contracts for services, and investigations of illegal activity.¹⁴² The process by which an agency carries out these powers is generally also defined in the organic statute.¹⁴³ In addition, the Administrative Procedure Act (APA) provides the statutory framework for determining the procedures an agency can use in exercising its powers.¹⁴⁴

Passed in 1946, the APA was designed to make the two forms of agency action, rulemaking and adjudication, more open, fair, and consistent.¹⁴⁵ To accomplish this, the APA mandates a number of procedural requirements for agency rulemaking and adjudication, and provides for judicial review of agency action.¹⁴⁶

A. Administrative Rulemaking

Administrative rulemaking, or the determination of legal norms applicable to a class of people, must comply with the procedural requirements of the APA.¹⁴⁷ The APA divides rulemaking into two categories—formal and informal.¹⁴⁸ Informal rulemaking is more common and is governed by section 553 of the statute.¹⁴⁹

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 14–15.

¹⁴¹ See *id.* at 15.

¹⁴² See MASHAW ET AL., *supra* note 135, at 15, 16.

¹⁴³ See *id.* at 16.

¹⁴⁴ See Administrative Procedure Act, 5 U.S.C. §§ 551–706 (2000); MASHAW ET AL., *supra* note 135, at 16.

¹⁴⁵ See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37–38 (1950).

¹⁴⁶ 5 U.S.C. §§ 553, 554, 556, 557, 706.

¹⁴⁷ See MASHAW ET AL., *supra* note 135, at 453. Although the Constitution is technically the first source of procedure for agency rulemaking, the conventional view is that the APA or the agency's organic statute meet whatever procedural standards the Constitution imposes. See *Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 524 (1978).

¹⁴⁸ 5 U.S.C. §§ 553, 556, 557.

¹⁴⁹ *Id.* § 553; see MASHAW ET AL., *supra* note 135, at 453–54. Formal rulemaking resembles a judicial trial in many ways and is the least common form of rulemaking. See MASHAW ET AL., *supra* note 135, at 453–54.

Section 553 requires three steps for the adoption of agency rules.¹⁵⁰ First, an agency must issue a notice of proposed rulemaking, in which the terms of the proposed rule, the legal authority under which the rule is proposed, and the details of any public proceedings to discuss the rule are disclosed.¹⁵¹ Second, any proposed rule must be submitted for public comment and provide interested parties the opportunity to rebut or respond to the information.¹⁵² Third, agencies must then issue a final rule along with an explanation of why public comments were or were not adopted.¹⁵³

B. Administrative Adjudication

Whereas rulemaking is prospective and affects a broad class of people, adjudication has an immediate effect on a dispute between specific individuals.¹⁵⁴ In administrative agencies, a decision that applies general rules to individual cases demands an individual inquiry into specific facts and circumstances.¹⁵⁵ For example, a tax assessment on a few property owners requires an individualized hearing.¹⁵⁶ Revaluation of all taxable property in a municipality, however, does not require an individual hearing because the action affects a general class of people.¹⁵⁷

Any individual affected by an agency action is entitled to a fair hearing.¹⁵⁸ The elements of a fair hearing are a matter of constitutional law and traditional norms.¹⁵⁹ At the very least, the U.S. Constitution requires that a person be given notice of the case against him or her and an opportunity to respond.¹⁶⁰ Articulating a more expansive interpretation of due process, Judge Henry Friendly offered eleven elements essential to a fair hearing, including notice of the proposed action, an unbiased tribunal, an opportunity to present evidence, and judicial review.¹⁶¹

¹⁵⁰ 5 U.S.C. § 553.

¹⁵¹ *Id.* § 553(b)(1)-(3).

¹⁵² *Id.* § 553(c).

¹⁵³ *Id.* § 553(d).

¹⁵⁴ See *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994).

¹⁵⁵ See *MASHAW ET AL.*, *supra* note 135, at 288.

¹⁵⁶ See *Londoner v. Denver*, 210 U.S. 373, 374, 385-86 (1908).

¹⁵⁷ See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

¹⁵⁸ See *MASHAW ET AL.*, *supra* note 135, at 288.

¹⁵⁹ See *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 178 (1951) (Frankfurter, J., concurring).

¹⁶⁰ See *id.*

¹⁶¹ See Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1277-95 (1975).

Many agency organic statutes describe the requisite procedures for administrative adjudication.¹⁶² The APA's formal hearing requirements are used only if the agency's organic statute requires a decision "to be determined on the record after opportunity for an agency hearing."¹⁶³ The APA thus provides a default hearing procedure, but only in the event that the organic statute requires that the formal process be employed.¹⁶⁴ Outside the formal hearing setting, agency adjudication must still comply with constitutional due process.¹⁶⁵

The APA requires that all those entitled to an agency hearing be given notice of the time, place, and nature of the hearing.¹⁶⁶ In addition, the legal authority and jurisdiction under which the hearing is to be held must be disclosed.¹⁶⁷ Parties to the hearing must be given notice of the facts and law asserted.¹⁶⁸ The agency must also allow parties the opportunity to submit facts, arguments, offers, and proposals.¹⁶⁹ In addition, the APA specifies that an agency employee performing prosecutorial or investigative functions cannot also participate or advise in the adjudication except as a witness or counsel.¹⁷⁰

C. Judicial Review

Judicial review is available for both agency adjudication and rulemaking.¹⁷¹ The right to review an agency action or decision is generally specified in the agency's organic statute, but nevertheless is available for any agency determination that is final.¹⁷² The scope of review, or the amount of deference given to the agency's action, is described in section 706 of the APA.¹⁷³ An agency action may be overturned if the decision was arbitrary and capricious, constituted abuse of discretion, was unsupported by substantial evidence, or was unwarranted by the facts to such an extent that the facts must be tried de novo by the reviewing court.¹⁷⁴

¹⁶² See MASHAW ET AL., *supra* note 135, at 287.

¹⁶³ Administrative Procedure Act, 5 U.S.C. §§ 553(c), 554(a) (2000).

¹⁶⁴ See MASHAW ET AL., *supra* note 135, at 287.

¹⁶⁵ See *id.* at 288.

¹⁶⁶ 5 U.S.C. § 554(b)(1).

¹⁶⁷ *Id.* § 554(b)(2).

¹⁶⁸ *Id.* § 554(b)(3).

¹⁶⁹ *Id.* § 554(c)(1).

¹⁷⁰ *Id.* § 554(d).

¹⁷¹ 5 U.S.C. § 702.

¹⁷² *Id.* § 704.

¹⁷³ *Id.* § 706.

¹⁷⁴ *Id.* § 706 (2)(A), (E), (F).

The substantial evidence standard and de novo review apply only in certain situations.¹⁷⁵ Overturning an agency action because it was unsupported by substantial evidence is authorized only if the action is taken pursuant to the rulemaking requirements of the APA or to a public adjudicatory hearing.¹⁷⁶ Otherwise the agency action has not produced the kind of record that allows for substantial evidence review.¹⁷⁷ De novo review is authorized if the agency action is adjudicative, yet the agency fact-finding procedures are inadequate.¹⁷⁸

An agency action may also be reviewed under the arbitrary and capricious standard.¹⁷⁹ To determine that the agency's decision was not arbitrary, capricious, or an abuse of discretion, the court must inquire whether the agency's decision was based on consideration of the relevant factors and whether there has been a clear error in judgment.¹⁸⁰ Although this inquiry should be searching and careful, the reviewing court cannot substitute its decision for that of the agency.¹⁸¹ Arbitrary and capricious review also examines whether the agency acted within the scope of its authority and followed the necessary procedural requirements.¹⁸²

IV. ANALYSIS: U.S. COURTS SHOULD GRANT THE UDRP THE DEFERENCE THEY AFFORD ADMINISTRATIVE AGENCIES

Given the similarities between ICANN and an administrative agency, ICANN's dispute resolution policy should be granted the same degree of judicial deference given to administrative agencies.¹⁸³ ICANN performs rulemaking and adjudicatory functions, and does so using procedural guarantees similar to those of an agency.¹⁸⁴ ICANN has established review procedures for its actions to ensure compliance with its governing documents.¹⁸⁵ What ICANN's UDRP lacks, and what United States courts should provide, is judicial review.¹⁸⁶ Judicial review of the UDRP, using the same standard of deference given to

¹⁷⁵ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 414, 415 (1971).

¹⁷⁶ *Id.* at 414.

¹⁷⁷ *Id.* at 415.

¹⁷⁸ *Id.*

¹⁷⁹ 5 U.S.C. § 706(2)(A); *Overton Park*, 401 U.S. at 416.

¹⁸⁰ See *Overton Park*, 401 U.S. at 416.

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *infra* notes 188–251 and accompanying text.

¹⁸⁴ See *supra* notes 93–99, 100–123, 147–153, 154–170 and accompanying text.

¹⁸⁵ See *Independent Review Policy*, *supra* note 124, § 2.

¹⁸⁶ See Howard, *supra* note 14, at 659–60.

administrative agencies, would bolster the legitimacy of the UDRP as a solution to cybersquatting as well as promote ICANN's regulation of the domain name system.¹⁸⁷

A. ICANN's Similarities to Administrative Agencies

ICANN is analogous to an administrative agency in three ways.¹⁸⁸ First, both ICANN and agencies employ specific rulemaking procedures to issue their rules, which are policy decisions that affect a broad class of individuals.¹⁸⁹ Second, ICANN has developed an independent review policy analogous to judicial review of agency action.¹⁹⁰ Third, ICANN allows an individualized hearing for specific disputes under the UDRP, similar to agency adjudication.¹⁹¹

1. Rulemaking

ICANN has modeled its regulation of the domain name system on the rulemaking procedures of administrative agencies.¹⁹² ICANN submits proposed policy documents for public comment as an agency would under section 553 of the APA.¹⁹³ Section 553 outlines the steps an agency must take before issuing regulations: alerting interested parties to the proposed rule, allowing those parties to respond, and promulgating the rule along with an explanation of why the agency took the final action it did.¹⁹⁴

Similarly, ICANN's bylaws require this procedure for rulemaking.¹⁹⁵ Any policy being considered by the board of directors that will substantially effect the operation of the Internet or third parties must be posted on the ICANN website with an explanation for the pro-

¹⁸⁷ See *supra* notes 171-182 and accompanying text; *infra* notes 252-269 and accompanying text.

¹⁸⁸ See *infra* notes 193-251 and accompanying text.

¹⁸⁹ See Administrative Procedure Act, 5 U.S.C. § 553 (2000); Froomkin, *supra* note 8, at 96; Weinberg, *supra* note 2, at 225; *ICANN Bylaws*, *supra* note 93, art. III, § 3; *Memorandum*, *supra* note 81, § II.

¹⁹⁰ See 5 U.S.C. § 706; Weinberg, *supra* note 2, at 229; *Independent Review Policy*, *supra* note 124, § 2.

¹⁹¹ See 5 U.S.C. § 554; *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994).

¹⁹² See 5 U.S.C. § 553; Weinberg, *supra* note 2 at 225; *ICANN Bylaws*, *supra* note 93, art. III, §3(b).

¹⁹³ 5 U.S.C. § 553; Weinberg, *supra* note 2 at 225; *ICANN Bylaws*, *supra* note 93, art. III, §3(b).

¹⁹⁴ 5 U.S.C. § 553.

¹⁹⁵ Weinberg, *supra* note 2, at 225; *ICANN Bylaws*, *supra* note 93, art. III, § 3.

posed change.¹⁹⁶ In addition, ICANN must provide a reasonable opportunity for parties to comment on the proposed change, to see the comments of others, and to respond to those comments.¹⁹⁷ Furthermore, ICANN must hold a public forum to discuss the proposed policy.¹⁹⁸ On occasion, ICANN has referred to those comments in documents accompanying the resulting policy announcements.¹⁹⁹

Of course, circulating proposals for public comment is not unique to administrative agencies.²⁰⁰ In fact, it is common practice for consensus-driven Internet engineering groups; public comments are used often, for example, by the Internet Engineering Task Force.²⁰¹ In formulating technical standards for the Internet, engineering groups often issue requests for comments to achieve consensus on a solution.²⁰²

The nature of ICANN's actions illustrate that ICANN acts more like an agency and less like a technical group.²⁰³ Unlike Internet technical groups, ICANN makes policy decisions that affect a broad class of individuals, the equivalent of agency rules.²⁰⁴ Two examples of ICANN rulemaking are the selection of new top-level domains and the promulgation of the UDRP.²⁰⁵

ICANN engaged in rulemaking when it chose the providers for the new top-level domain registries.²⁰⁶ ICANN was empowered by its Memorandum with the Department of Commerce to formulate a policy for the creation of new top-level domains.²⁰⁷ After soliciting applications, ICANN chose seven proposals.²⁰⁸ Some proposals were no doubt rejected for not demonstrating sufficient technical ability.²⁰⁹

¹⁹⁶ *ICANN Bylaws*, *supra* note 93, art. III, § 3(b)(i).

¹⁹⁷ *Id.* art. III § 3(b)(ii).

¹⁹⁸ *Id.* art. III § 3(b)(iii).

¹⁹⁹ Weinberg, *supra* note 2, at 225.

²⁰⁰ *See id.* at 226.

²⁰¹ *See id.*

²⁰² *See* Reagle, *supra* note 1.

²⁰³ *See* Froomkin, *supra* note 8, at 94–95. Some at ICANN insist that the organization is technical only and has no Internet “governance” role. *See* Letter, *supra* note 3.

²⁰⁴ Administrative Procedure Act, 5 U.S.C. § 551(4) (2000); *Yesler Terrace Cmty. Council*, 37 F.3d at 448.

²⁰⁵ *See* Froomkin, *supra* note 8, at 96–97, 101.

²⁰⁶ *See id.* at 101–02.

²⁰⁷ *Memorandum*, *supra* note 81, § II(B)(c).

²⁰⁸ *See* Froomkin, *supra* note 8, at 101. Applicants for top-level domain registries paid a \$50,000 non-refundable application fee. *See id.*

²⁰⁹ *See id.* at 101–02.

Among the technically qualified registries, however, ICANN likely decided to award the top-level domains on the basis of other criteria.²¹⁰

In its evaluation of proposed top-level domain names, ICANN relied on technical and non-technical criteria.²¹¹ ICANN's review of the applicants included questions regarding potential legal claims arising from use of the new top-level domain and the number of registrations expected by the applicant.²¹² Deciding whether to add a top-level domain to the root file is certainly a technical decision, but choosing which registry to add based on non-technical requirements could be characterized as a policy decision.²¹³

Another example of ICANN's rulemaking is the promulgation of the UDRP.²¹⁴ The decision to mandate participation in dispute resolution under the UDRP affected the rights of a broad class of individuals, namely domain name registrants.²¹⁵ The WIPO report on the issue recognized that a solution to cybersquatting was necessary to any domain name system and suggested a quick, inexpensive dispute resolution proceeding.²¹⁶ ICANN thus promulgated the UDRP and made all domain name registrants submit as a prerequisite to registration.²¹⁷

In adopting the UDRP, ICANN has favored a particular set of objectives.²¹⁸ The time limits set for response to a complaint, the availability of online proceedings, and the absence of any type of discovery or document production emphasizes the UDRP's goal of efficient, inexpensive dispute resolution.²¹⁹ By making the proceedings cheap, ICANN has reduced the settlement value of a cybersquatter's threat.²²⁰ Again, this was a policy choice, not an instance of technical coordination.²²¹ Although many Internet bodies employ consensus-driven pro-

²¹⁰ See *id.* at 102.

²¹¹ See, e.g., *Questions to and Answers from Applicant for .name, .nom, and others*, at <http://www.icann.org/lds/name1/qa.html> (last modified Nov. 7, 2000).

²¹² See *id.* at ICANN Questions 1, 2. Technical questions included those regarding the applicant's "capacity (transactions per second) to which you are willing to contractually commit for your SRS service." *Id.* at ICANN Questions 10.

²¹³ See Froomkin, *supra* note 8, at 102.

²¹⁴ See *id.* at 96.

²¹⁵ See *Yesler Terrace Cmty. Council*, 37 F.3d at 448; Froomkin, *supra* note 8, at 101.

²¹⁶ WIPO Report, *supra* note 61, para. 150.

²¹⁷ See UDRP, *supra* note 17, § 4.

²¹⁸ See Froomkin, *supra* note 8, at 101.

²¹⁹ See UDRP Rules, *supra* note 102, §§ 5, 10, 13, 15; WIPO Report, *supra* note 61, para. 150.

²²⁰ See Froomkin, *supra* note 8, at 101.

²²¹ See *id.*

cedures such as notice-and-comment rulemaking,²²² ICANN acts like an agency by engaging in policymaking.²²³

2. Review Procedures

A second similarity between ICANN and administrative agencies is the availability of review proceedings.²²⁴ One of the most substantial checks on agency power is the specter of judicial review.²²⁵ Although the courts do not substitute their judgment for that of agencies, courts still perform a searching inquiry into agency action.²²⁶ Judicial review ensures that agencies do not overstep the bounds of their organic statutes or act irrationally.²²⁷

ICANN's review policies serve a similar function.²²⁸ Any party affected by an ICANN action can file a request for reconsideration within thirty days.²²⁹ After reconsideration has been exhausted, ICANN allows for independent third party review of ICANN action.²³⁰ Independent review of ICANN policy takes place upon request by anyone materially affected by ICANN's action, or by a domain name registry like Network Solutions.²³¹ A nine-member panel then decides if ICANN violated its bylaws or articles of incorporation.²³²

One criticism of ICANN's review process is that, unlike an agency, ICANN's organic documents provide no meaningful constraints.²³³ In reviewing agency action, a court must determine if the action is consistent with the agency's organic statute.²³⁴ The independent review board, on the other hand, must determine if ICANN violated its articles of incorporation or bylaws.²³⁵ These articles and bylaws, however, were not imposed by an outside legislature seeking to constrain ICANN's powers—they were drafted by ICANN's lawyers and staff.²³⁶

²²² See Weinberg, *supra* note 2, at 226.

²²³ See Froomkin, *supra* note 8, at 101.

²²⁴ See Administrative Procedure Act, 5 U.S.C. § 706 (2000); Weinberg, *supra* note 2, at 229; *Independent Review Policy*, *supra* note 124, § 2.

²²⁵ Weinberg, *supra* note 2, at 221.

²²⁶ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

²²⁷ See Weinberg, *supra* note 2, at 221, 231, 233.

²²⁸ *Independent Review Policy*, *supra* note 124, § 2; *Reconsideration Policy*, *supra* note 124.

²²⁹ *Reconsideration Policy*, *supra* note 124.

²³⁰ *Independent Review Policy*, *supra* note 124, § 2.

²³¹ *Id.* § 6.

²³² *Id.* §§ 3.1, 5.12.3; see Weinberg, *supra* note 2, at 229.

²³³ See Weinberg, *supra* note 2, at 231.

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See *id.*

How effectively the ICANN independent review process works as a check on ICANN power remains to be seen.²³⁷ As of March 2002, the Independent Review Nominating Committee has been unable to select members for the Independent Review Board.²³⁸ A determination of whether ICANN's bylaws and articles of incorporation provide sufficient constraints on ICANN's actions will have to wait until the Independent Review Board is formed and operational.²³⁹

3. Adjudication

- The third similarity between ICANN and administrative agencies is the availability of adjudication for individual disputes.²⁴⁰ The UDRP provides for an individualized inquiry into specific facts and circumstances similar to agency adjudication.²⁴¹ ICANN has set the procedural and substantive rules for adjudicating UDRP proceedings and assigned the hearing process to four accredited arbitration services.²⁴²

Furthermore, the UDRP proceedings conform with basic due process requirements and a substantial portion of the APA's adjudicatory procedure.²⁴³ First, like the APA, the UDRP provides for notice of the proceeding to the domain name holder.²⁴⁴ Second, similar to the APA, the domain name holder is given notice of the applicable law and facts in a UDRP dispute, both when the domain name holder registers the domain name and when a complaint is brought.²⁴⁵ Third, the domain name holder has an opportunity to submit facts and arguments, also a feature of the APA.²⁴⁶ Moreover, these three elements are consistent with the basic due process requirements of notice and opportunity to respond.²⁴⁷

Some commentators, however, argue that the UDRP does not guarantee sufficient due process protection.²⁴⁸ These concerns arise

²³⁷ See *Independent Review*, *supra* note 131.

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See Administrative Procedure Act, 5 U.S.C. § 554 (2000); *UDRP*, *supra* note 17, §§ 1-4; *UDRP Rules*, *supra* note 102, §§ 3, 4, 5, 15.

²⁴¹ See *Yesler Terrace Cmty. Council*, 37 F.3d at 448; *UDRP*, *supra* note 17, §§ 1-4.

²⁴² See *UDRP*, *supra* note 17, §§ 1-4; *UDRP Rules*, *supra* note 102, §§ 3, 4, 5, 15.

²⁴³ See 5 U.S.C. § 554(b)-(c); *Joint Anti-Fascist Refugee Comm'n v. McGrath* 341 U.S. 123, 178 (1951) (Frankfurter, J., concurring); *UDRP*, *supra* note 17, §§ 1-4; *UDRP Rules*, *supra* note 102, §§ 3, 4, 5, 15.

²⁴⁴ See 5 U.S.C. § 554(b); *UDRP Rules*, *supra* note 102, § 4(a).

²⁴⁵ See 5 U.S.C. § 554(b); *UDRP Rules*, *supra* note 102, § 3(b) (ix).

²⁴⁶ See 5 U.S.C. § 554(c); *UDRP Rules*, *supra* note 102, § 5.

²⁴⁷ See *McGrath*, 341 U.S. at 178 (Frankfurter, J., concurring).

²⁴⁸ See Froomkin, *supra* note 8, at 98-100; Thornburg, *supra* note 2, at 188, 196.

because the UDRP operates through completely private means.²⁴⁹ The dispute resolution providers are private arbitrators, the rules of procedure are decided by the parties, and the arbitration panel decides the sufficiency of the complaint, the admissibility of evidence, and the manner of the proceedings.²⁵⁰ Some claim the danger of private adjudication is that private processes can be engineered to eliminate those procedures that may be deemed too expensive or disadvantageous.²⁵¹

B. ICANN Should Be Granted Deference

In the end, though similar, ICANN is not an administrative agency.²⁵² ICANN is not an authority of the U.S. government; its power to regulate the domain name system does not come from any organic statute passed by Congress.²⁵³ Yet treating ICANN like an agency by granting UDRP decisions deference addresses the due process concerns and larger legitimacy concerns faced by ICANN and its UDRP.²⁵⁴

For instance, concerns about the UDRP's lack of adequate due process guarantees could be tempered by judicial review of UDRP decisions.²⁵⁵ The involvement of public institutions provides some leverage to ensure accountability by private regulators and adjudicators.²⁵⁶ UDRP panelists may be less inclined to overstep their procedural bounds if U.S. courts were able to review UDRP decisions for procedural regularity as courts do for administrative agencies.²⁵⁷

Furthermore, deferential review of the UDRP's procedural and substantive standards may be more useful than the current *de novo* review by U.S. courts.²⁵⁸ A court reaching a different conclusion on the merits says nothing about the adequacy of UDRP procedure or substantive findings.²⁵⁹ If there are indeed failings in the UDRP, judi-

²⁴⁹ See Thornburg, *supra* note 2, at 189.

²⁵⁰ See *id.*; UDRP, *supra* note 17, §§ 1-4; UDRP Rules, *supra* note 102, § 15(a).

²⁵¹ See Thornburg, *supra* note 2, at 188, 196.

²⁵² See Administrative Procedure Act, 5 U.S.C. § 551 (2000).

²⁵³ See *id.*

²⁵⁴ See *infra* notes 255-269 and accompanying text.

²⁵⁵ See 5 U.S.C. § 706; Dinwoodie & Helfer, *supra* note 7, at 207; Perritt, *supra* note 8, at 258-59.

²⁵⁶ See Perritt, *supra* note 8, at 258-59.

²⁵⁷ See 5 U.S.C. § 706; Perritt, *supra* note 8, at 258-59.

²⁵⁸ See Dinwoodie & Helfer, *supra* note 7, at 207.

²⁵⁹ See *id.*

cial review would highlight them and promote the internalization of appropriate standards.²⁶⁰

Judicial review and deference would also address due process concerns as well as shore up ICANN's legitimacy.²⁶¹ In fact, judicial review is a common tool for legitimizing agency action.²⁶² Administrative law has traditionally been concerned with reconciling broad agency policymaking discretion with an agency's insulation from democratic controls.²⁶³ Procedural safeguards are one way to accomplish this goal—for example the notice-and-comment rulemaking in which both agencies and ICANN engage.²⁶⁴ Judicial review of agency action is another.²⁶⁵ Although ICANN has a form of independent review for its actions, there is no such review for the UDRP.²⁶⁶

Finally, court involvement in a private adjudication could significantly legitimize UDRP decisions and ICANN's regulation of the domain name system.²⁶⁷ Court review could serve as a check on the fears that ICANN is wielding unrestrained power in domain name disputes.²⁶⁸ In addition, the effectiveness of UDRP decisions will increase once those decisions are granted deference.²⁶⁹

CONCLUSION

ICANN resembles an administrative agency both in procedure and in substance. For courts seeking to determine how to treat UDRP decisions, this resemblance should be instructive. Given the similarities between ICANN's dispute resolution policy and agency adjudication, courts should grant UDRP decisions the same deference granted to administrative agencies.

The domain name system in many ways defies the traditional mode of Internet development. Whereas much of the technology of the Internet was developed in a decentralized, consensus-driven environment, the domain name system is hierarchical and dominated by ICANN and the Department of Commerce. The aspects of ICANN

²⁶⁰ See *id.*

²⁶¹ See Weinberg, *supra* note 2, at 219–20, 225.

²⁶² See *id.* at 221.

²⁶³ See *id.* at 219.

²⁶⁴ See *id.* at 221–22.

²⁶⁵ See *id.* at 221.

²⁶⁶ See *Independent Review Policy*, *supra* note 124, § 2; *Reconsideration Policy*, *supra* note 124.

²⁶⁷ See Dinwoodie & Helfer, *supra* note 7, at 254–55.

²⁶⁸ See *id.* at 258.

²⁶⁹ See Perritt, *supra* note 8, at 262.

that most reflect its Internet roots of decentralization and consensus, however, are also the aspects that resemble agency decisionmaking. Notice-and-comment rulemaking, decentralized dispute resolution, and review of decisions by the public and the judiciary until public acceptance has been established are reminiscent of the Internet pioneers' approach to technical engineering problems. Perhaps judicial deference to the more agency-like aspects of ICANN could bring the domain name system closer to the tradition of Internet development.

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