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Online Dispute Resolution:
Overcoming the Problems and Shackles of Territory

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1. Introduction

As effective as the Internet has been in rendering geographical location irrelevant for purposes of social and economic community, it has been equally effective in disrupting the jurisdictional framework by which participants traditionally seek redress. For parties engaged in international business-to-consumer (B2C) electronic commerce, resulting lack of confidence and trust threatens to choke major expansion before it begins. Emerging models of online dispute resolution, though, such as that recently created for the resolution of domain name conflicts, present what many consider to be a solution to this intractable cross-border problem. In online fora, international disputants are not only able to avoid issues of jurisdiction, but also are afforded easy access to relief more timely and cost-effective than that obtainable through real world litigation. However, while the advantages are clear, wide-scale implementation in areas like B2C e-commerce is unlikely to occur soon, as other issues remain which are not as amenable to global consensus. At the crux of the matter: how wide a legal swath is cut for an online system necessarily poised to arrogate the status of its offline counterparts?

2. The Problem of Territorial Jurisdiction

Suggesting necessity in this context of course demands explanation. The first point in support derives from the origins of the Internet itself. Originally a U.S. government-funded defence project aimed at creating the ultimate decentralized computing network, the Internet is designed to exist irrespective of physical constructs, and physical constraints. As one author described the medium's reach: "it is everywhere and no where in particular." Location continues to retain significance, but only in respect of the machine addresses through or to which information is routed; where those machines geographically exist on the network bears no relation to its functioning. Hence, "there is no necessary connection between an Internet address and a physical jurisdiction."

Physical jurisdiction, however, is what traditionally anchors the laws of nation-states, by demarcating the borders within which coercive power, authority, and control may be exercised over inhabitants: "our real space legal jurisdictions are essentially defined by geography, by the physical boundaries of space." Problems therefore result from what is basically a forced overlap of habitat: an Internet user inhabiting virtual space may simultaneously interact across borders with other users, yet the respective physical spaces of all will still work to simultaneously dictate their behaviour. Such an apparent impossibility underscores the dilemma of Internet regulation: "because the Internet does not map neatly into the jurisdiction of any existing sovereign entity, territorially defined laws and rules are difficult to apply to the Internet and activities of Internet users." Although intersections of jurisdiction in the offline context have been dealt with through conceptions of adjudicative and prescriptive jurisdiction under conflict-of-laws theory, these traditional dispute resolution mechanisms are inadequate when deprived of a real-world locus of activity. For Internet behaviour, as suggested early by David Johnson and David Post and endorsed here, their reactive application in determining "where" events occur is "decidedly misguided, if not altogether futile." Succinctly appraised by Veijo Heiskanen, such deployment of existing doctrine ultimately "suspends rather than resolves the issue, thus failing to remove the uncertainty surrounding applicable law."

Two "misguided" attempts to artificially localize Internet conduct in this way may be observed in the areas of domain name registration and international business-to-consumer e-commerce, both of which represent the main examples in this paper. In respect of the former, conflicts often arise between persons who register domain names through a domain name registrar, and trademark owners who claim rights in those names by reason of a mark contained therein. Whereas national trademark laws anticipate and avoid such confrontation by territorially permitting multiple parties to legitimately utilize the same words or phrases, provided such use is in relation to clearly distinct products or services, these conflicts require reconciling competing party rights to a truly finite global resource: only one trademark or other legitimate holder in the name Acme may be given the right to use the domain name www.acme.com (or a similar address using any other top level domain). The infamous practice of "cybersquatting"

exacerbates the problem. Its most publicized form involves persons registering the distinctive marks of others as a domain name, and then retaining such domain names until they are forced into relinquishment, or able to extract payment from the trademark owner or highest bidder. Other forms include where cybersquatters register well-known marks of others, or close approximations thereof, and proceed to divert unsuspecting users to their (typically pornographic) sites; in other instances, the diversion aims at unfairly impacting the business of a competitor.

Importantly though, this activity is made possible through the use of a domain name system which operates irrespective of territorial jurisdiction: it is not uncommon for actual participants and parties (including the domain name owner, the registrar, and the trademark holder) to each reside in separate countries. Hence, court attempts to establish personal jurisdiction over defendants for purposes of a national lawsuit often fail, due to a lack of territorial connection in these circumstances to the party and corresponding virtual event. This is in fact the appropriate result, as it highlights the difficulty in using territorially-based concepts — here notions of adjudicative jurisdiction — to resolve Internet-based disputes.

Nevertheless, such concepts continue to be stubbornly applied, with the best illustration in the context of domain names being the United State's recent enactment of the Anti-Cybersquatting Consumer Protection Act (ACPA), one of the first pieces of legislation directed solely at cybersquatting. In addition to giving trademark holders the right to bring an action upon establishment of *in personam* jurisdiction, the Act also allows an *in rem* action to be brought against the domain names *themselves*, when registered with a U.S. registrar, provided an alleged cybersquatter is not subject to personal jurisdiction anywhere in U.S. or cannot be found despite the exercise of due diligence. Since a single U.S. registrar registered the majority of domain names until quite recently, this provision effectively extends the reach of the new American law to all such domain name holders in any country. Indeed, this blunt tool has been wielded without hesitation by U.S. courts. In one controversial example of its application, a U.S. judge in *Heathmount A.E. Corp. v. Technodome.com* refused to transfer a domain name dispute between two Canadians to a Canadian court, citing among other things the lack of a body of law in Canada equivalent to the ACPA. The question thus arises: should an American court legitimately be able to assert jurisdiction over everyone doing business on the Internet through domain names merely because the domain names are "located" on a root domain server in that country? In keeping with academic conjecture, it appears that such a misguided approach only suspends rather than resolves the true multi-jurisdictional problem.

A second prominent area where extensive efforts have been — arguably wastefully — devoted to sorting out problems of territorial jurisdiction on the Internet is international business-to-consumer (B2C) e-commerce. Unlike business-to-business (B2B) e-commerce, where companies use the Internet to connect to their partners and suppliers, international consumers do not have the luxury of legal departments or ready legal advice to ensure their interests are protected. Rather, they are left with traditional legal mechanisms developed for their economic relief in the *offline* context, including consumer protection offices, small claims court, local registration requirements for foreign businesses, building permits, and governmental inspection agencies. These mechanisms, however, are all grounded in territorial concepts of sovereignty, premised largely on place of product/service origin and destination being physically the same, and thus do not work well when buyers and sellers are located in different jurisdictions. Where cross-border transactions are contemplated, principles of prescriptive jurisdiction typically provide for country-of-destination rules, which permit consumers to rely on core substantive protections afforded at home and to have access to courts where they live. A country-of-destination localization scheme, though, is no more rooted in geography than a rule of origin: "it simply applies a different formula for selecting which borders are relevant."

Move transactions onto the Internet, where borders are *irrelevant*, and this presents a major problem. A

heated debate now rages amongst governments, consumer and business groups over which conflict-of-law rule, country of destination or country of origin, should prevail for electronic commerce. Business groups obviously prefer that sellers be subjected to the jurisdiction of their own country, according to a country of origin rule. The alternative rule, in their view, fails to address key concerns surrounding the need for a predictable regulatory environment and reduced compliance costs, especially given the fact it is not fully possible to tell where a consumer is located when selling digital goods or services online. As emphasized in a recent paper by the international organization, Global Business Dialogue on E-Commerce, the country of destination principle would only dissuade online merchants from entering "international transactions that could subject them to a variety of differing country laws, processes and legal reach of every country in which their online customers may live." Conversely however, this same principle is championed by consumer groups as critical to their members maintaining confidence and trust in the new electronic medium. Applying the alternative country of origin rule, in their view, risks undermining this confidence in three ways. First, a "race to the bottom" might develop whereby companies seek to operate from jurisdictions with the laxest consumer protection laws. Second, lax enforcement in these or other jurisdictions might render countries powerless to protect its citizens. Third, even if full disclosure of applicable law and enforcement policy were made, a lack of understanding would preclude many buyers from making an informed jurisdictional assessment.

Despite the intractability of this impasse, however, international drives for consensus are still being undertaken. The Hague Conference on Private International Law is scheduled to resume formal talks in June 2001, regarding a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. Initially called together in 1992 by the governments of 45 countries, this treaty has by implication come to encompass — and in fact has been stalled over — the controversial questions of e-commerce jurisdiction mentioned above. Regardless the best intentions of those involved, though, the stalemate does not seem likely to be broken. Consumer groups want to preserve a draft provision favouring a rule of destination; business representatives are unwavering in their desire to block its inclusion.

Taken together then, the controversies surrounding competent jurisdiction in the domain name and B2C e-commerce contexts go far toward confirming the original postulation: territorially-based concepts of jurisdiction — and the national courts which would apply them — are unsuited to the task of regulating behaviour on the Internet. As Henry Perritt aptly comments: "because of the difficulties of localizing conduct in Internet markets, allocating jurisdiction to a formal public institution is uncertain, even as a theoretical matter." Even if a compromise on territorial jurisdiction for e-commerce is by long odds achieved at the Hague conference, it will, like the American APCA for domain names, only suspend rather than truly resolve questions of applicable law on the Internet. The solution, therefore, requires not artificial localization but a new approach to be taken: "these problems must be addressed apart from the real world legal system simply because there is no single 'real world' legal system that can be applied uniformly in Cyberspace without agreement from all countries to abide by it."

3. The Problem of Territorial Distance

Assuming a single real world legal system *was* uniformly applied to the Internet through unanimous international consensus, there still remains the problem of physical space for online users as well. Whereas information "can be transmitted from any physical location to any other location without degradation, decay, or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another", real world disputants cannot traverse borders with anything approaching the same instantaneity. Regardless the nature of jurisdictional compromise, adjudication of global Internet matters by nationally-based courts still inevitably requires one party to travel great distances to make or meet the case at hand.

The practical consequence is that territorial solutions at a distance are rarely any solution at all. Aside from assorted procedural and communication problems relating to time zone differences, varying business hours, document filing, and hearing scheduling, just the sheer expense of cross-border litigation is prohibitive for the average Internet user. That fact of profile follows above all from the medium's low cost; as Perritt describes the situation:

The Internet's low economic barriers to entry invite participation in commerce and politics by small entities and individuals who cannot afford direct participation in many traditional markets and political arenas. These low barriers to entry, and greater participation by individuals and small entities, also mean a greater incidence of small transactions.

Thus the costs to Internet users of travelling to another country for purposes of formally asserting or defending their rights will invariably outstrip by a large margin the actual value of Internet disputes.

Court adjudication of international domain name conflicts offers a clear example. Given a choice between costs of foreign litigation and out-of-court settlement, trademark holders are often confronted with the unpleasant reality that paying off persons such as cybersquatters makes more economic sense. Internet domain name registration may be undertaken for exceedingly minimal cost (currently around \$75 to \$100 to meet the initial fee), and enterprising individuals can use this imbalance to make a significant profit in basically any circumstance where a business or entity has a vested interest in obtaining a specific domain name, yet cannot sensibly incur the expense of going to a distant court over the issue.

The costs associated with domain name registrants *defending* legitimate rights over domain names are equally disproportionate. Typically the party with the shallower pockets, they have increasingly been targeted by trademark owners capable of utilizing foreign court processes to their own advantage. In the aforementioned *in rem* ACPA case of *Heathmount*, it was held that the fact of modest annual income did not demonstrate that it would "literally be financially impossible" for the Canadian defendant to litigate in that district of the United States. Although the court acknowledged inconvenience and hardship might be grounds for dismissal where an alternative forum exists, commentary subsequent to this case noted the test apparently requires the domain name owner to be on welfare before such a request is granted. Also, the mere request itself was recognized as a practical obstacle: "if it is "financially impossible" for defendants to litigate in the district, how could they afford a lawyer to present the argument in the first place?" Hence it is evident that both sides in domain name disputes can be, and usually are confronted with considerable — if not unassailable — hurdles in having to litigate across borders.

The same will assuredly be true for disputants in B2C e-commerce as well, where domestic consumer protection regimes will be hard-pressed to remain viable options for online disputes global in scope. Individual consumers and business have traditionally always done business inside a local or national market, and have relied on the accessibility of small claims courts and the like within those markets. Yet as parties increasingly set their online sights beyond national borders, so will they encounter adjudicative machinery not necessarily as familiar or as inexpensively reached. Aside from the legal complexity involved with utilizing such machinery, it is this simple fact of distance which is likely to remove them from consideration in any case; as Heiskanen observes:

Although all the legal issues surrounding international e-commerce are remarkable, they remain somewhat academic in practice. As a practical matter, given the expected relatively low average value of international consumer transactions, it is unlikely that extensive cross-border litigation involving international electronic consumer transactions will ever become a reality, even if legal grounds for such litigation existed. The cost of such litigation would simply be too high compared to any potential benefit.

4. One Solution: ICANN's Uniform Domain Name Dispute Resolution Policy

In light of these practical encumbrances, and those likewise arising from questions of physical jurisdiction, it should therefore become understandable that a new approach needs to be taken in resolving Internet-based disputes. This approach requires a re-evaluation of our real world public institutions, as they depend on a geographical habitat that is truly foreign to Internet users; as Johnson and Post remark: "the line that separates online transactions from our dealings in the real world is just as distinct as the physical boundaries between our territorial governments--perhaps more so." Any solution that is found must rather accommodate and reflect the unique characteristics of the virtual environment that Internet users *do* inhabit. Since public institutions and their national courts are incapable of fully meeting this challenge, it is private international systems of on-line dispute resolution — and their lack of territorial definition — which thus emerge as an obvious possible answer.

One such private adjudicatory system is that recently established for the resolution of domain name conflicts. The system operates pursuant to a policy formulated in 1998 by the World Intellectual Property Organization (WIPO) and then adopted on October 24, 1999, by the Internet Corporation for Assigned Names and Numbers (ICANN), a private body newly created and contractually charged by the U.S. Department of Commerce with administering the Internet domain name system. This policy, called the Uniform Domain Name Dispute Resolution Policy (UDRP), is now incorporated into the registration agreements of all domain name holders under the popular "generic" top level domains (gTLDs)- .com, .net, and .org. Anyone is eligible to register a gTLD domain name with an ICANN-accredited registrar, and now any trademark holder in any country is able to initiate a Mandatory Administrative Proceeding under the UDRP in respect of such a name. Four private dispute resolution providers approved by ICANN — WIPO, National Arbitration Forum (NAF), eResolution, and the CPR Institute For Dispute Resolution — maintain lists of qualified panellists who are capable of arbitrating domain name disputes under the policy.

Positively, the policy has garnered substantial international interest from trademark owners worldwide; by its one-year anniversary in late October 2000, the UDRP had been applied in 2166 proceedings involving 3938 domain names. This process utilization dwarfs global court dockets of similar disputes; even the U.S. ACPA saw only approximately thirty cases filed during a comparable time period, although litigation initiated under that Act has since increased. The UDRP's success is now sought to be emulated by individual countries, whose 245 country code top level domain name (ccTLD) managers have the choice of either complying with the UDRP (as have the managers for .nu [Nuie] and .tv [Tuvalu]) or creating their own dispute resolution policies. With new gTLDs such as .info and .pro being introduced by ICANN for general registration, though, the UDRP in any case will continue to be the applicable dispute resolution policy for seventy percent or more of the world's domain name registrations.

The system's most innovative — and important — feature, though, is that its proceedings are based and carried out almost exclusively online, through the use of email and other means of electronic communication. Access to the UDRP does not in any way depend on the domicile of the alleged cybersquatter, thus "obviating the thorny problems associated with establishing personal jurisdiction for purposes of a federal lawsuit." Aside from an avoidance of jurisdictional problems, territorial distance issues relating to the prohibitive cost and inconvenience of court adjudication have also been largely overcome. Compared to typical trademark litigation expenses which — in the *domestic* context - start at \$15,000 to \$20,000US, a single panellist can decide a UDRP case for between \$750 to \$2,000 and three panellists for \$2,200 to \$4,500, depending on the provider chosen. The process is also fast: barring extraordinary circumstances, arbitration under the UDRP is procedurally required to take no more than 57 days. The first UDRP decision, *World Wrestling Federation Entertainment, Inc. v. Bosman*, took to much positive publicity only 36 days to reach conclusion; overall, studies have shown the average decision time to be 43 days. In contrast, a domain name dispute sent through litigation typically takes a minimum of three to four months to obtain a final judgment, and a maximum of six months to even

three years; possible complications such as foreign service of process might even add six months or more to the case. Finally, the accessibility associated with the online nature of UDRP proceedings is unprecedented. Unlike litigation, the complainant, respondent, and arbitrator are not required to make arrangements and travel to a neutral location to present their case. Accordingly, it is now possible for a dispute over a domain name registered with an U.S.-based registrar, between a complainant in France and a respondent in India, to be decided by a panelist in Australia, with no one ever having to leave customs — or even their homes.

5. Possible Application: International Business-to-Consumer E-Commerce

Hence, a success story such as ICANN's Uniform Domain Name Dispute Resolution Policy demonstrates that private international systems of online dispute resolution *can* be an answer, and so illustrates an approach by which to avoid problems of territorial jurisdiction and distance in other Internet areas. One such area where significant consideration is being given to the idea is in B2C e-commerce; as Heiskanen concludes:

It seems clear that litigation before national courts will not provide a solution and that alternative dispute resolution systems need to be developed in order to establish an international legal infrastructure that would be adequately predictable, relatively inexpensive and sufficiently effective to support the growth of international e-commerce. Without such an infrastructure, the high expectations relating to international e-commerce will be unlikely to materialize.

The international political support for use of online dispute resolution in B2C e-commerce certainly exists. In June 1999, the U.S. Federal Trade Commission (FTC) held an international workshop during which Guidelines for Consumer Protection in the Context of Electronic Commerce were formulated; 29 countries of the Organisation for Economic Co-Operation and Development (OECD) then adopted these guidelines in December 1999. Of particular importance was an agreement in principle on dispute resolution and redress, stated as follows:

Consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden . . . Businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions.

At the same June 1999 FTC workshop, it was emphasized that the above pledge should be accounted for in other international efforts as well, including talks at the Hague Conference on Private International Law on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. This has indeed happened: with participants in the Hague talks stuck in aforementioned deadlock over questions of applicable law and competent jurisdiction, both sides now recognize online dispute resolution to be a viable alternative solution for resolving B2C e-commerce disputes. The Global Business Dialogue on E-Commerce (GBDe) admits that "probably the best way out of this dilemma and an important catalyst for consumer confidence in electronic commerce is that Internet merchants offer their customers attractive extra-judicial procedures for settling disputes as an alternative to the cumbersome and expensive resort to courts." Similarly, the Trans-Atlantic Consumer Dialogue (TACD) acknowledges that "alternative dispute resolution can be very helpful to both parties in electronic transactions, especially in cross-border complaints."

In anticipation therefore of formal discussions commencing at the Hague in June 2001, energies have been partly redirected toward exploring online dispute resolution. In June 2000, the FTC and the U.S. Department of Commerce hosed an international public workshop to investigate the use of online dispute resolution for "transparent, effective, quick, and inexpensive redress for consumers engaging in

online transactions." As stated in the November summary report of that workshop, "in general, there was broad support among workshop participants for the development of ADR programs to resolve online global disputes in consumer transactions." Further roundtable discussions on the topic have also been hosted by the FTC, and in other countries, including a full convention meeting in Ottawa. Some international agencies have even gone so far as to coordinate actual ventures in the area; in one example, an experimental project called ECODIR (Electronic Consumer Dispute Resolution) has been started by a consortium of research centres under the auspices of the European Commission. After an initial information gathering phase, an implementation phase is scheduled to begin second quarter of 2001.

6. Required Decisions: Consensus Clarified

Despite this general consensus that private systems of online dispute resolution offer a solution for B2C e-commerce, though, differences of opinion remain which threaten to forestall further international implementation. Much of this discord erroneously exists over *which* processes should form a solution, and can be ascribed to the imprecision of the term "online dispute resolution" itself. A new and evolving concept, online dispute resolution identifies not only with ADR mechanisms (including negotiation, mediation, and arbitration), but also with confidence-building measures upstream from ADR (such as codes of conduct, trust mark schemes, and credit-card chargebacks). For this reason, it is not surprising that a "one-size does not fit all" approach has come to pervade the idea, according to which a variety of processes applied in different dispute resolution settings have all fought to gain recognition. Current examples of such processes include an automated negotiation process used primarily for insurance disputes, a trust-mark "reliability" program used for consumer complaints, and an online mediation program used in the online auction context. While these innovative models certainly each have a role to play in resolving Internet-based disputes, however, their diversity obscures the fact that none — or any hierarchal combination thereof — promises to truly overcome the fundamental problem of territorial jurisdiction described above. Albeit effective at conquering issues of territorial distance, they are still merely antecedent and inferior to systems of formal dispute resolution in the real world. In other words, they do not solve jurisdictional problems for disputants who *are* forced to seek final determination by a court of law. These models are simply alternatives, and thus not the total answer needed for meaningful relief.

Rather, the true root of friction for stakeholders in B2C e-commerce still lies in allowing a private system of online dispute resolution to take hold *in the first place*, in *complete* answer to problems of territorial jurisdiction and distance. This entails viewing online dispute resolution not as an extra-judicial alternative to real world adjudication, but as a private forum of superior jurisdiction in its own right. Once that acknowledgment is made, the plethora of choices shrinks dramatically: only a formal online system involving neutral third party decision-making, whether categorized as arbitration or not, can properly deflect troublesome issues of geography on the Internet.

For such a private system to work however, it must, at the outset, have its legal authority defined and agreed to by the very public institutions it seeks to break away from; as Perritt states:

Private regulatory regimes (self ordering mechanisms) must confront representation and consent problems not faced by state-based legal systems. Whenever a private regulatory regime is constituted, its scope must be defined. In other words, the universe of individuals and entities bound by its legislative acts (rules), adjudicatory decisions, and enforcement actions must be defined. In addition, the relationship between the private regime and state-based institutions must be determined.

Therefore, consensus is not required as to process type, but as to the power stakeholders wish the process to wield. Here is the nub. Without a sufficient grant of legal authority, online dispute resolution becomes as much an exercise in futility as a solution that is territorially-based.

7. Larger Hurdles: UDRP in Context

Considered then from this perspective, ICANN's UDRP is *not* likely a complete answer for B2C e-commerce; instead, further inspection reveals it to be essentially a private legal regime with narrow scope, an ill-defined relationship to state-based legal institutions, and thus limited cross-over potential.

Firstly, the process in actual fact is neither mandatory nor binding. Proceedings under the domain name dispute resolution policy are only *mandatory* in respect of respondent domain name holders; complainant trademark owners have the option of initiating de novo litigation at any stage. Consequently, while the process mirrors conventional adjudication by compelling the responding party — here by virtue of their registration agreement — to resolve disputes using the policy (even if by default), a claiming party is not formally obligated to favour that forum over any other. Moreover, after a UDRP decision is rendered, a respondent still retains the right to fight an adverse ruling on appeal, in their own jurisdiction or that of domain name registration, whichever is consented to beforehand by the complainant; even if they fail to make judicial application within the ten day limitation period and lose their domain name, there appears to be nothing stopping respondents from thereafter suing to get the domain name back. Ultimately then, adjudicatory decisions under the policy are also not *binding* on either party. This applies to the courts as well. In a recent case, a U.S. District Court Chief Judge in Illinois stated his court wasn't bound by the proceedings of a UDRP panel, on the reason that the ICANN policy failed to address the issue of judicial deference entirely.

Secondly, although the process directs use of its own uniform rules of decision, they are highly restricted in scope, and inconsistently referred to in application. WIPO reports in 1998 limited the substantive reach of UDRP's to activities of cybersquatting, and by default left for the courts general questions of trademark. Specifically, only the most egregious instances of cybersquatting, involving bad faith registration and use of infringing domain names, are to be dealt with through ICANN's system of rules. This forced initial restriction has resulted in present confusion, however, as UDRP decision-makers and state-based institutions struggle to ascertain their respective roles in addressing a broader range of domain name disputes. For example, while recent UDRP panellists have haphazardly extended the policy to personal names, the U.S. Department of Commerce has recommended Congress stall legislative action on personal name cybersquatting, awaiting further study of UDRP results. Furthermore, for matters which are properly handled within the policy's defined scope, WIPO and ICANN did not make any stipulations as to issues of *precedent*, resulting in often inconsistent and unpredictable decision-making. No mechanism, such as an appeals process, was put in place to correct clearly erroneous opinions and thereby harmonize divergent views on similar facts. Even though UDRP panelists have increasingly begun to defer to previous panel decisions, the standard is still far lower than that required for uniform application of policy rules.

Thirdly, due to the very nature of domain name disputes, the process completely avoids dealing with important issues of enforcement. ICANN retains centralized and monopolistic control over the domain name system, which means that for an ICANN-accredited registrar to sell or rent a domain name to a registrant, both parties must first submit to the ultimate authority of ICANN in respect of that domain name registration. This in turn requires mutual recognition of any proceeding brought under the UDRP by a trademark holder, and of any adverse decisions returned against the registrant as result of that proceeding. Since ICANN in the end controls the very object in dispute, registrars and thus respondent domain name owners are powerless to do anything but observe an accompanying order. Whether that order demands transfer or cancellation of a domain name, there is absolutely no chance of a failure to comply. Hence, the practicality of asserting coercive control over domain name registrars and registrants, or the willingness of real world sovereigns to formally recognize and enforce panel decisions, do not arise as major issues; enforcement mechanisms are built-in. To rely on coercive governmental apparatus for enforcement in the domain name context would be superfluous.

Furthermore, remedies are *strictly* limited to cancellation or transfer of a dispute domain name, barring relief by way of damages or injunction. With no damages possible, issues of system funding, directly applicable to the satisfaction of non-paid judgments, are then also removed as a necessary consideration.

8. Conclusion: Sovereign Will and Private Systems of Online Dispute Resolution

Consequently, even in respect of the most successful example of online dispute resolution to date, it appears that the hard choices surrounding the legal authority of such systems have yet to be made. ICANN and WIPO were able to get the UDRP off the ground precisely because they did not *have* to — nor did they largely choose to — tackle fundamental questions surrounding the binding/mandatory nature of proceedings, applicable law, and enforcement. The solutions that were forged for domain name disputes, such as the uniform policy rules themselves, were only partial, cautious attempts. For B2C e-commerce disputes, however, the greater magnitude and scope of the potential problem *demand*s that these questions be addressed and answered. Unless an online system can be agreed to incorporate a mandatory mechanism for binding adjudication, according to a separate, uniformly applied body of law, supported by effective enforcement, consumers will persist in being denied meaningful formal redress. They may otherwise have the option of online dispute resolution, but will not altogether escape problems of territorial jurisdiction and distance.

Agreement on these critical issues presently eludes academics, consumer groups, industry, and governments on the international stage. In preparation for the upcoming Hague talks, international participants at both a June 2000 FTC workshop and a February 2001 roundtable discussion were unable to reach consensus on (1) whether online dispute resolution programs should be binding, mandatory, or voluntary; (2) what rules of decision should apply; and (3) the appropriate role of territorial governments.

Harmony in this area, though, cannot be realistically established within small forums of discussion. Because core concepts of sovereignty are inextricably intertwined, a much broader public debate is required, involving the highest levels of participation and consensus amongst *all* the world's territorial regimes. Obviously, as Ethan Katsh understatedly opines: "this is not likely to be a short term project." As the number of Internet consumers grows, in countries as diverse as Canada, China and Iran, governments and governmental agencies will invariably wish to have a say in the legal authority which is to be asserted over their online citizenry. And despite the need for such authority, an online legal regime separate from their own is not likely to be readily accepted. The distinct virtual "space" associated with the Internet must be recognized, yet this is predicated on actual recognition by territorial sovereignties of their own jurisdictional limitations — a historically dubious prospect.

Hence, though arguments supporting the use of private systems of online dispute resolution, as an answer to problems of territorial jurisdiction and distance, may be compelling, their persuasiveness does not ensure sovereign accommodation in the real world — at least in the short term. This potentially impacts not only consumer protection in B2C e-commerce, but also other areas of law on the Internet to which attention will turn in the future, including protection of intellectual property rights outside the domain name context. A solution does exist for online users, but it must be veritably acted upon; as Perritt best assesses the situation:

What once seemed like intractable legal theoretical problems now seem not so intractable . . . it is a reasonable to assert that the basic outlines of useful regulatory approaches to enhance trust, reduce transaction costs, and allow e-commerce to flourish on the Internet are available. Now it is the turn of real world actors to put their muscle where their mouth is.

The great uncertainty, of course, lies in whether that real world muscle will be sufficiently up to the task.

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