Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles

Monika Zalnieriute*

ABSTRACT

An international legal framework for resolving disputes between trademark owners and domain name holders, the Uniform Domain Names Disputes Resolution Policy ("UDRP"), purports to address economic interests; however, fundamental human rights are indirectly implicated in the process (for example, the rights to freedom of expression and peaceful enjoyment of one's property) or are ingrained within the procedure itself (such as the right to due process). The UDRP was created in 1998 by the Internet Corporation for Assigned Names and Numbers ("ICANN"), which has recently adopted in its organizational bylaws a "Core Value" of respecting "internationally recognized human rights." In light of these institutional changes, in this Article, I chart the international human rights implications of the procedural aspects of the UDRP. I will show how the UDRP's procedural elements raise numerous due process concerns regarding the deprivation of property rights, which are recognized in international human rights instruments, and make concrete proposals to improve procedural aspects of the policy in the upcoming UDRP review in 2020. To bring the UDRP procedure in line with "internationally recognized human rights," the upcoming review should: (1) introduce a clear choice-of law clause in the UDRP; (2) develop uniform "Supplemental Rules" at ICANN level to increase uniformity and consistency of the UDRP system; (3) introduce a requirement to disclose and publish all UDRP decisions and statistics; (4) develop uniform standards for accreditation and selection of panelists; (5) require disclosure of conflicts of interest by panelists and Dispute Resolution Providers; (6) introduce regular comprehensive UDRP reviews; (7) reform the rules around communication, and the effectiveness of notice in particular; (8) establish an appeal procedure; and (9) explicitly acknowledge access to courts.

* Fellow and Lead of "Technologies and Rule of Law" Research Stream, Allens Hub for Technology, Law and Innovation, Faculty of Law, UNSW Sydney, Australia. I am very grateful to David Lindsay, Kathy Kleiman, Zak Muscovitch, Robin Gross, Stephanie Perrin, and Leah Grolman for their insightful comments on earlier drafts. I am also grateful to Milton Mueller, Farzaneh Badiei and Konstantinos Komaitis at ICANN's Non-Commercial Users Constituency, Sophie Kwasny and Lee Hibbard at Council of Europe, and various researchers and civil society advocates working in ICANN, for the many thoughtful discussions which stimulated much of the thinking behind this Article.

TABLE OF CONTENTS

INTRODUCTION

The Internet can both significantly facilitate and impede the exercise of human rights. Since the Domain Name System ("DNS"), which matches computer addresses to human-friendly domain names, is integral to the way in which we navigate the Internet, the human rights implications of the DNS are important due to their enormous scope and global reach. While the DNS is arguably a global public good, it is governed by a private, multi-stakeholder body, the Internet Corporation for Assigned Names and Numbers ("ICANN"). Lack of clarity about the nature of human rights obligations of private actors in Internet governance, coupled with their growing power and influence over public affairs, has long been one of the most pressing human rights issues in the digital age.[1]

As ICANN is now transitioning from formal oversight by the U.S. government,[2] the organization has been engaging on a number of fronts with what it refers to as "internationally recognized human rights." In particular, ICANN has recently added respect for "internationally recognized human rights" to the "Core Values" expressed within its bylaws.[3] In 2020, ICANN will also begin the first reform process for its oldest, and one of its most controversial, policies: the Uniform Domain Name Dispute Resolution Policy ("UDRP").[4] The UDRP was created in 1998 as an international legal framework for resolving disputes between trademark owners and domain name holders. Because of profound economic, political, and human rights implications, domain name disputes have been subject to substantial litigation,[5] legislative action,[6] and scholarly and civil society debate[7] over the twenty years since

1. Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression, 35th Sess., U.N. Doc. A/HRC/35/22 (June 23, 2017); Joseph Cannataci, The Right to Privacy in the Digital Age, Presentation at the Internet Governance Forum (Nov. 10, 2015).

2. *See infra* Part I.D.2.

3. ICANN, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS § 1.2(b)(viii) (May 2016), https://perma.cc/K7MJ-A39U [hereinafter ICANN BYLAWS].

4. The UDRP review will be conducted in a second phase of the review of all Rights Protection Mechanisms ("RPMs"), following a currently ongoing review of the Universal Rapid Suspension System and Trademark Clearinghouse. *See* Rachel Reyes, *Review of All Rights Protection Mechanisms in All gTLDs PDP*, ICANN (Aug. 24, 2016), https://perma.cc/3BLW-N4JK.

5. For prominent examples of U.S. litigation, see Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998); Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001).

6. In 1999, the U.S. Congress amended the Lanham Act to include the Anti-Cybersquatting Consumer Protection Act, which created a cause of action in federal courts for bad faith registration of a domain name containing a protected trademark. *See* 15 U.S.C. § 1125 (2012).

7. The UDRP system has attracted significant scholarly attention. *See, e.g.*, Milton L. Mueller, *Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy*, 17 INFO. SOC'Y 151, 152–153 (2001); A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOKLYN L. REV. 605, 651–78 (2002); DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP (2007); Zohar Efroni, *Names as Domains, Names as Marks: Issues Concerning the Interface Between Internet Domain Names and Trademark Rights*, *in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE (Peter K. Yu ed., 2007); JACQUELINE LIPTON, INTERNET DOMAIN NAMES, TRADEMARKS AND FREE SPEECH (2010); KONSTANTINOS KOMAITIS, THE CURRENT STATE OF DOMAIN NAME REGULATION: DOMAIN NAMES AS SECOND-CLASS CITIZENS IN A MARK-DOMINATED WORLD (2010). For examples of

the UDRP was created. The UDRP reform therefore entails important implications for many areas of international law and Internet governance. In this context, important questions arise about what kind of ethical and legal obligations ICANN has to ensure that the upcoming UDRP reform is consistent with, and incorporates, the new Core Value of respect for "internationally recognized human rights."

This Article sketches out the human rights implications of the *procedural* aspects of the UDRP in order to demonstrate how it may fall short of compliance with "internationally recognized human rights." I will not focus on the human rights concerns arising from the *substantive* aspects of the UDRP, but this is not to suggest that substantive UDRP policy elements are not problematic from a human rights perspective. To the contrary, they implicate the rights to freedom of expression, nondiscrimination, and equality, and I address them in detail in a separate piece, which should be read in conjuction with the proposals in this Article.[8] A human rights analysis of the UDRP *procedure* is, however, timely and significant, given that the new UDRP Rules of Procedure,[9] which have streamlined the processing of UDRP complaints since 2015, have not yet received any academic attention or scholarly analysis.[10] In this Article, I analyze the scope and impact of the new Rules of Procedure from a human rights perspective. However, I do not think that reforming the UDRP procedure alone will be sufficient to bring it in line with "internationally recognized human rights," to which ICANN is committed under its updated bylaws.[11] To the contrary, I argue that a changing institutional structure and updated ICANN bylaws necessitate a more precise articulation and reflection of the narrow scope and *substantive* objectives of the UDRP, along with the reform of the UDRP *procedural elements*, in the upcoming 2020 UDRP review if ICANN is to uphold its human rights Core Value.[12]

In this Article, I propose concrete ways in which the UDRP procedure's human rights shortcomings should be addressed. I argue that the UDRP review should (1)

the civil society debate surrounding domain-name disputes, see the work of IP-Justice and the Noncommercial Users Constituency within ICANN. *See* IP JUSTICE, https://perma.cc/6W5B-M59Y (last visited Nov. 26, 2019); NONCOMMERCIAL USERS CONSTITUENCY, https://perma.cc/YN9J-BVN3 (last visited Nov. 26, 2019).

8. *See* Monika Zalnieriute, *Beyond the Governance Gap in International Domain Name Law: Bringing the UDRP in Line with Internationally Recognized Human Rights,* 56 STANFORD J. INT'L L. (forthcoming 2020) [hereinafter Zalnieriute, *Beyond the Governance Gap*].

9. *See Rules for Uniform Domain Name Dispute Resolution Policy,* ICANN, https://perma.cc/HV5M-RF92 (last visited Nov. 26, 2019) [hereinafter *UDRP Rules*]. New Rules that apply to all complaints brought on or after July 31, 2015 were developed during the Policy Development Process ("PDP") at ICANN during 2011–13.

10. Existing commentary on the new UDRP Rules at the time of writing of this Article does not go beyond the acknowledgment of their existence in various intellectual property and domain name blogs. *See, e.g.*, Kevin Murphy, *"Cyberflight" Rules Coming to UDRP Next July*, DOMAIN INCITE (Nov. 18, 2014), https://perma.cc/H8TB-FNHB.

11. Often, reform proposals are limited to procedural changes, while proclaiming that the substantive aspects and wording of the UDRP have served its policy goals very well. *See UDRP Policy Reform Platform 2018: Accountability, Uniformity, Predictability, Balance,* INTERNET COM. ASS'N (2018), https://perma.cc/RJ3T-A9KY.

12. *See generally* Zalnieriute, *Beyond the Governance Gap*, *supra* note 8.

introduce a clear choice-of law clause; (2) develop uniform "Supplemental Rules" at ICANN level to increase uniformity and consistency of the UDRP system; (3) introduce a requirement to disclose and publish all UDRP decisions and statistics; (4) develop uniform standards for accreditation and selection of panelists; (5) require the disclosure of conflicts of interest by panelists and Dispute Resolution Providers ("DRPs"); (6) introduce regular comprehensive UDRP reviews; (7) develop clear rules around notice; (8) establish an appeal procedure; and (9) explicitly acknowledge access to courts.

While human rights issues are not absent from earlier scholarly analyses of the UDRP or civil society debate, these discussions have almost exclusively focused on the application of U.S. constitutional law to the UDRP. The policy has received criticism for lacking procedural fairness and failing to protect individuals' rights to free speech, privacy, and reputation under U.S. law.[13] The U.S. focus is not unexpected, given that the UDRP was created by ICANN, which is a private, nonprofit corporation registered in California and founded by the U.S. Department of Commerce in 1998.[14] However, as ICANN transitions from U.S. supervision to full privatization, and has recently announced new aspirations to comply with "internationally recognized human rights," it is crucial to assess global legal norms and policies created by ICANN against international human rights law.

This Article thus supplements the earlier constitutional literature and contributes to international digital constitutionalist efforts by approaching the UDRP from an international human rights perspective.[15] Digital constitutionalism has been defined as the "constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet."[16] Traditionally, constitutionalist analyses, as well as human rights instruments, have focused on the exercise and limits of power by nation-states. More recently, constitutionally inclined scholars and activists working on technology and Internet governance have also aspired to confront the practices of private companies and informal actors.[17] In this Article I adopt the latter approach and focus on limits of

13. *See* Froomkin, *supra* note 7, at 688–95; Jacqueline Lipton, *Celebrity in Cyberspace: A Personality Rights Paradigm for a New Personal Domain Name Dispute Resolution Policy*, 65 WASH. & LEE L. REV., 1445, 1484–87 (2008).

14. *What Does ICANN Do?*, ICANN, https://perma.cc/LAL5-AWSR (last visited Dec. 4, 2019).

15. For the latest overview of digital constitutionalist efforts, see Claudia Padovani & Mauro Santaniello, *Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System,* INT'L COMMC'N GAZETTE 295–301 (2018).

16. Lex Gill, Dennis Redeker & Urs Gasser, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights* 2 (Berkman Klein Ctr. for Internet & Soc'y Research Publication No. 2015-15, 2015), https://perma.cc/XE8T-74MH.

17. *See, e.g.*, Monika Zalnieriute, *From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN*, 21 YALE J. L. & TECH. 278–335 (2019) [hereinafter Zalnieriute, *From Human Rights Aspirations*]; NICOLAS P. SUZOR, LAWLESS: THE SECRET RULES THAT GOVERN OUR DIGITAL LIVES (2019); Terrell McSweeny, *FTC 2.0: Keeping Pace with Online Platforms,* 32 BERKELEY TECH. L.J. 1027, 1043–48 (2017); PLATFORM REGULATIONS: HOW PLATFORMS ARE REGULATED, AND HOW THEY REGULATE US (Luca Belli & Nicolo Zingales eds., 2017).

power in the changing institutional context of Internet policy and governance.

An international human rights analysis of the UDRP becomes even more urgent when one realizes the quantity of UDRP decisions. Between December 1999 and December 2019, the World Intellectual Property Organization ("WIPO") alone has processed over 46,000 UDRP disputes.[18] While some commentators have insisted that domain names are no longer relevant due to an increasing use of search engines to locate content online,[19] statistics suggest that the domain name industry is still growing rapidly, and ever more individuals and businesses are buying their own domain names.[20] Similarly, the number of domain name disputes has been steadily increasing since 2003.[21] The economic and cultural importance of domain names in the Internet ecosystem can also be illustrated by recent disputes between the Brazilian and Peruvian governments and the U.S. e-commerce company Amazon, Inc., over the *.amazon* top-level domain name.[22]

Human rights analysis of the UDRP is also significant because proposals are increasingly made to use it as a model for the development of global policies governing online alternative dispute resolution ("ADR") mechanisms.[23] These ADR mechanisms are seen as essential for maintaining "equitable access to justice in cyberspace,"[24] and for solving global Internet-related disputes, because the role of national and regional courts in solving such disputes is often portrayed as contributing to Internet fragmentation.[25] One of the most efficient and popular means of overcoming the danger of fragmentation has been the deployment of critical parts of the Internet's technical infrastructure, such as DNS, to enforce public and private law globally. As I have explained elsewhere, the UDRP is a primary example of a proliferating international infrastructure-based governance regime

18. *See Domain Name Dispute Resolution Statistics*, WIPO, https://perma.cc/9VN8-V3GG (last visited Jan. 6, 2020).

19. *See, e.g.*, Lindsay Gellman, *How Search Engines Are Killing Clever URLs: Is There Any Need for ".pizza" When Everyone Just Googles Stuff?*, THE ATLANTIC (Dec. 15, 2016), https://perma.cc/3YRS-7DX9; BEN WAGNER, GLOBAL FREE EXPRESSION—GOVERNING THE BOUNDARIES OF INTERNET CONTENT 319 (2016); Jude A. Thomas, *Fifteen Years of Fame: The Declining Relevance of Domain Names in the Enduring Conflict Between Trademark and Free Speech Rights*, 11 J. MARSHALL REV. INTELL. PROP. L. 1, 6 (2011).

20. *Global Domain Names Markets to 2024: .com Still Market Leader, but New gTLDs Fast Catching Up*, PR NEWS WIRE (Aug. 14, 2018), https://perma.cc/TSA8-F4T8.

21. *See, e.g.*, *Total Number of Cases per Year*, WIPO, https://perma.cc/Q8E5-8DKE (last visited Nov. 26, 2019).

22. *See* Kieren McCarthy, *Jeff Bezos Finally Gets .Amazon After DNS Overlord ICANN Runs out of Excuses to Delay Decision Any Further*, THE REGISTER, https://perma.cc/2NQE-U4XL (last visited Dec. 11, 2019); *see also* Patricia Vargas-Leon & Andreas Kuehn, *The Battle for Critical Internet Resources: South America vs. Amazon. com, Inc*., 7 L., ST., & TELECOMM. REV. 37 (2015).

23. Jacques de Werra, *Alternative Dispute Resolution in Cyberspace: The Need to Adopt Global ADR Mechanisms for Addressing the Challenges of Massive Online Micro-Justice*, 26 SWISS REV. INT'L & EUR. L. 289, 289–90 (2016).

24. *Id.* at 289.

25. On this issue, see the recent white paper prepared in the framework of the World Economic Forum's Future of the Internet Initiative (FII). William J. Drake, Vinton G. Cerf & Wolfgang Kleinwächter, *Internet Fragmentation: An Overview*, WORLD ECON. F. (Jan. 23, 2016), https://perma.cc/B55P-PCK7.

which involves the imposition of binding legal rules on large numbers of Internet users—exercised via control over access to DNS.[26] Thus, a closer look at the UDRP from an international human rights law perspective is crucial in securing the place for human rights norms in the future development of access to justice, Internet policy and global governance more generally.

As this Article focuses on the human rights gaps in the procedural aspects of the UDRP from an international legal perspective, I will not discuss the relationship between domain names and trademark law in great detail.[27] Because the UDRP was designed as a gap-filling measure—to account for trademark law's inability to address clear-cut cybersquatting cases—it seems logical to treat it as a set of *sui generis* legal rules, rather than a subset or a branch of trademark law.[28] Similarly, I will not question whether domain names are "virtual property," intellectual property, or not property at all.[29] The historical, political, and technical background that produced the UDRP is also outside of the scope of this Article; this background has been analyzed exceptionally well by scholars who were involved in creating the UDRP in the 1990s.[30] Moreover, I will not focus on the Uniform Rapid Suspension System ("URS"), which was adopted as an add-on policy to the UDRP when the new generic top-level domain names ("gTLDs") were introduced in 2013 and is currently under review by ICANN's "Rights Protection Mechanisms" working group.[31] While the URS permits only the suspension of a domain name rather than its transfer, it raises many concerns similar to those addressed below. However, the UDRP and URS are also substantially different, and it is not possible to meaningfully engage with these two different mechanisms in an article of this length. The country-code

26. *See* Zalnieriute, *From Human Rights Aspirations, supra* note 17; *see also* Samantha Bradshaw & Laura DeNardis, *The Politicization of the Internet's Domain Name System: Implications for Internet Security, Universality, and Freedom*, 20 NEW MEDIA & SOC'Y (Aug. 8, 2016), https://perma.cc/7B78-E6PS; Laura DeNardis, *Hidden Levers of Internet Control: An Infrastructure-Based Theory of Internet Governance*, 15.5 INFO., COMM. & SOC'Y 720 (2012).

27. Other scholars have engaged in such discussion. *See, e.g.*, Adam Dunn, Relationship Between Domain Names and Trademark Law (Mar. 31, 2014) (unpublished LL.M. thesis, Central European University), https://perma.cc/J4UA-97VX; Christine Haight Farley, *Convergence and Incongruence: Trademark Law and ICANN's Introduction of New Generic Top-Level Domains*, 25 J. MARSHALL J. COMPUT. & INFO. L. 625, 632–33 (2007); Jacqueline Lipton, *Bad Faith in Cyberspace: Grounding Domain Name Theory in Trademark, Property, and Restitution*, 23 HARV. J.L. & TECH. 447, 448–51 (2009).

28. For a detailed explanation of the differences between traditional trademark law and cybersquatting law, see LINDSAY, *supra* note 7, at 123–27.

29. A summary of this debate can be found at Milton Mueller & Farzaneh Badiei, *Governing Internet Territory: ICANN, Sovereignty Claims, Property Rights and Country Code Top Level Domains*, 18 COLUM. SCI. & TECH. L. REV. 435, 439 (2017). *See also* Eddie Hurter, *The International Domain Name Classification Debate: Are Domain Names "Virtual Property," Intellectual Property, Property, or Not Property At All?*, 42 COMP. & INT'L J. of S. AFR. 288 (2009).

30. For a historical overview of the UDRP's development, see Froomkin, *supra* note 7, at Part I.

31. The URS is regarded as even faster and less expensive than the current UDRP proceedings but is only applicable to the new gTLDs (it does not apply to the *.com*, *.net*, or *.org* gTLDs). *See* ICANN, *About Uniform Rapid Suspension System*, https://perma.cc/9UQ4-FD86 (last visited Dec. 15, 2019); *see also* ICANN, *Uniform Rapid Suspension (URS)*, https://perma.cc/5NG6-7RCM (last visited Dec. 15, 2019).

top level domains ("ccTLDs"), such as *.in* (India) or *.au* (Australia) are also outside the scope of the analysis.[32]

In the remainder of this Article, I focus on the international human rights framework and the procedural elements of the UDRP. Part I provides a background to domain names, the UDRP, and the varying views regarding its rationale and success. In Part II, I look at international law and analyze ICANN's commitment to respect "internationally recognized human rights." In Part III, I focus on the procedural aspects of the UDRP to get a domain name transferred from the original registrant. I demonstrate that the UDRP procedure falls short of compliance with the "internationally recognized human rights" to due process and freedom of enjoyment of property, as well as equality and nondiscrimination.[33] In Part IV, I then proceed to deliver concrete proposals for how the UDRP procedure could be brought in line with "internationally recognized human rights." I hope to provide useful insights for the upcoming UDRP review which starts in 2020.

I. DOMAIN NAMES AND THE UNIFORM DISPUTE RESOLUTION POLICY[34]

A. DOMAIN NAMES AND EXPRESSION

Domain names are easy-to-remember alphanumeric identification strings such as *amazon.com* or *apple.com*. Because domain names consist of text, they have direct implications for the right to freedom of expression,[35] and indirect implications for the rights to freedom of association and assembly.[36] Sometimes they might also

32. Some ccTLDs use UDRP, but it is not universally required. On ccTLD policy, see Mueller & Badiei, *supra* note 29.

33. ICANN's Human Rights Framework of Interpretation states that there are many "internationally recognized human rights" that might be relevant for an global policy-making body like ICANN under the new Core Value, including—but not limited to—those spelled out in the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), and other significant human rights treaties. *See* ICANN Cross Community Working Group on Enhancing ICANN's Accountability, ANNEX 3–HUMAN RIGHTS FRAMEWORK OF INTERPRETATION (HR-FOI) FINAL REPORT AND RECOMMENDATIONS–CCWG–ACCOUNTABILITY WS2, ICANN (2018), https://perma.cc/RKU9-CVBR.

34. This section is based on other work I have done on ICANN, UDRP, and human rights. *See* Zalnieriute, *supra* note 8.

35. On the relationship between freedom of expression and the gTLDs, see WOLFGANG BENEDEK, JOY LIDDICOAT & NICO VAN EIJK, COUNCIL OF EUR., DGI(2012)4, COMMENTS RELATING TO FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION WITH REGARD TO NEW GENERIC TOP-LEVEL DOMAINS (2012). The relationship between domain names and freedom of expression has also been recognized by the judiciary in various countries. *See*, *e.g.*, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-45 QPC, Oct. 6, 2010 (Fr.), https://perma.cc/57KW-CQWJ; Rb.'s-Gravenhage 21 juni 2005, KG 2005, 05/447 (Inholland/Kaasjager) (Neth.); Name.Space, Inc., v. Network Solutions, Inc. & National Science Foundation, 202 F.3d 573, 577 (2d Cir. 2000).

36. See EVE SALOMON & KINANYA PIJL, COUNCIL OF EUR., DGI(2016)17, APPLICATIONS TO ICANN FOR COMMUNITY-BASED NEW GENERIC TOP LEVEL DOMAINS (GTLDS): OPPORTUNITIES AND CHALLENGES FROM A HUMAN RIGHTS PERSPECTIVE (2016). On gTLDs and the LGBTI community, see Monika Zalnieriute, *Digital Rights of LGBTI Communities: A Roadmap for a Dual Human Rights*

entail proprietary elements and incorporate trademarks. Consider, for instance, the "Apple" trademark of Apple, Inc., or the "Amazon" trademark of Amazon, Inc. In this way, domain names can become the source of a clash between trademark owners and domain name registrants who might have registered a domain containing the trademarked name or parts of it (for example, *appleisfraud.com* or *amazonisaforest.org*). In other words, expressive nature of domain names may give rise to tensions between trademark rights and human rights frameworks.

B. THE RATIONALE AND CREATION OF THE UDRP

Such potential tensions are not dealt with prior to registration of domain names, which operates on a first-come, first-served basis. Domain name registrars do not investigate domain name requests to check whether text contained in the domain name is registered as a trademark. Consequently, anyone may register any domain they want, as long as it's not already taken. Domain names can thus incorporate not only generic words like *apple* or *pear*, but also geographic names, like *amazon* or *roma*, and more unique terms and names like *microsoft, madonna*, or *mcdonalds.* Allegedly, in the early days of the Internet in the 1990s, it was common to register domain names containing parts or even full names of large companies, organizations, or famous people in the hope of coercing them to pay for the transfer of the domain name.[37] Illustrative of that practice was the registration of approximately 200 domain names by Dennis Toeppen in 1995, including names such as *www.panavision.com* and *www.deltaairlines.com*.[38] In 1998, a U.S. district court in California termed this practice "cybersquatting."[39] Widely known examples of cybersquatting include the cases of *www.madonna.com* (transferred to pop star Madonna in 2000);[40] *www.peta.org* (transferred to PETA, or People for Ethical

Framework, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND DIGITAL TECHNOLOGIES 411 (2019); Laura DeNardis & Andrea M. Hackl, *Internet Control Points as LGBT Rights Mediation*, 19.6 INFO., COMM. & SOC'Y 753 (2016); Monika Zalnieriute, *The Anatomy of Neoliberal Internet Governance: A Queer Critical Political Economy Perspective*, *in* QUEERING INTERNATIONAL LAW 67 (2017).

37. *See*, *e.g.*, Juliet M. Moringiello, *Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future*, 72 U. CIN. L. REV. 95, 95 (2003). Such practice was widely condemned in the early literature on UDRP. *See, e.g.*, Luke A. Walker, *ICANN's Uniform Domain Name Dispute Resolution Policy*, 15 BERKELEY TECH. L.J. 289, 305–06 (2000) (discussing cybersquatting's effects on e-commerce); *see also* Diane Cabell, *Foreign Domain Name Disputes*, 2000 COMPUTER & INTERNET L. 15 (2000) (discussing recent judicial and legislative developments around the world aimed at cracking down on cybersquatting); Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain Name System*, 4 J. SMALL & EMERGING BUS. L. 149, 151 (2000).

38. *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998) ("Toeppen has registered domain names for various other companies including Delta Airlines, Neiman Marcus, Eddie Bauer, Lufthansa, and over 100 other marks. Toeppen has attempted to 'sell' domain names for other trademarks such as intermatic.com to Intermatic, Inc. for $10,000 and americanstandard.com to American Standard, Inc. for $15,000.").

39. Avery Dennison v. Sumpton, 189 F.3d 868, 880 (C.D. Cal. 1998).

40. *Madonna Wins Web Site from Cybersquatter,* ABC NEWS (Oct. 16, 2000), https://perma.cc/A2KJ-BFNM.

Treatment of Animals, in 2001);[41] *www.eminemmobile.com* (transferred to rapper Eminem in 2004);[42] *www.steviewonder.com* (transferred to the pop star Stevie Wonder in 2005);[43] and *www.jenniferlopez.org* (transferred to pop star Jennifer Lopez in 2009).[44]

In response to rising concerns about cybersquatting in the late 1990s, ICANN developed a structure for resolving the most obvious cases of cybersquatting: the UDRP. The UDRP is a mandatory policy to which all domain name registrants must agree in order to register any domain. They consent to arbitrate *any* claims that the name infringes on the rights of a *trademark* or *service mark* holder.[45] Since 1999, ICANN has been actively promoting the UDRP to resolve domain name disputes for all gTLDs, such as *.com*, *.net*, and *.org* domains. It is also applied to many ccTLDs, such as *.au* (Australia), *.br* (Brazil), *.mx* (Mexico) and *.es* (Spain). As of July 4, 2016, WIPO has been providing a new domain name dispute resolution service for the *.fr*, *.pm*, *.re*, *.tf*, *.wf* and *.yt* ccTLDs.[46] Therefore, today most domain name dispute proceedings are carried out by five ICANN-approved dispute resolution service providers: the Asian Domain Name Dispute Resolution Centre, the U.S.-based National Arbitration Forum ("NAF"), the World Intellectual Property Organization ("WIPO"), the Czech Arbitration Court Arbitration Center for Internet Disputes, and the Arab Center for Domain Name Dispute Resolution.[47]

The UDRP is applied in many countries worldwide and allows trademark holders with domain names in several countries to adjudicate them at the same time in one process.[48] It was the first-ever Consensus Policy developed by ICANN to be binding on its accredited Registrars, and as a form of mandatory administrative procedure, it

41. Although the PETA example happened before the UDRP cybersquatting case, it was ultimately decided in U.S. federal court. *See* People for the Ethical Treatment of Animals v. Doughney, 263 F.3d 359 (4th Cir. 2001).

42. *Eminem Wins Cybersquatting Case*, THE GUARDIAN (Apr. 22, 2004), https://perma.cc/SDV7-T6XJ.

43. Stevland Morris v. Unofficial Fan Club, Case No. FA0453986 (Nat'l Arb. F. June 22, 2005) (Tatham, Arb.).

44. David Goldstein, *Jennifer Lopez Wins Cybersquatting Case*, DOMAINPULSE (Apr. 13, 2009), https://perma.cc/AL9W-4YEU.

45. The UDRP consists of three core documents. First, the Uniform Domain Name Dispute Resolution Policy (the "Policy") sets out the scope, relief, and basis for mandatory administrative proceedings which may be brought within its ambit. *Uniform Domain Name Dispute Resolution Policy*, ICANN, https://perma.cc/6YUM-7YAP (last visited Oct. 29, 2019) [hereinafter *UDRP Policy*]. Second, the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") set out the procedural requirements that must be followed in such a proceeding. *UDRP Rules*, *supra* note 9. Third, there are "Supplementary Rules" which individual DRPs have enacted and which provide for additional procedural requirements observed by those particular DRPs (so these Rules vary). *See, e.g.*, *WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy*, WIPO (July 31, 2015), https://perma.cc/2SCL-Y8Z8.

46. For the full list, see *Domain Name Dispute Resolution Service for Country Code Top Level Domains (ccTLDs)*, WIPO, https://perma.cc/AX7Z-RDPQ (last visited Oct. 29, 2019).

47. *See List of Approved Dispute Resolution Service Providers,* ICANN, https://perma.cc/GP2R-6A3E (last visited Oct. 29, 2019).

48. For the full list, see *Domain Name Dispute Resolution Service for Country Code Top Level Domains (ccTLDs)*, *supra* note 46.

is currently the only nonjudicial, global standard dispute resolution policy for trademark-related disputes.[49]

C. OPINIONS ON THE UDRP: CONTROVERSIAL POLICY AND CALLS FOR REFORM

1. Mixed Views on the UDRP

Since its adoption in 1998, the UDRP has drawn fans and supporters but also vocal critics.[50] Adherents of the UDRP, many of whom are intellectual property lawyers and scholars, stress that the decisions are fair and the process is simple, quick, and inexpensive.[51] If one looks at WIPO statistics, it seems that the procedure is simple and complainant-friendly: eighty-seven percent of cases have resulted in a domain name transfer to the complainant; less than two percent have resulted in cancellation of the domain name; and the complaint has been denied only about eleven percent of the time in the twenty-plus years since the adoption of the UDRP.[52] Most proponents of the UDRP do, however, accept that the UDRP should be "limited to clear-cut cases of abusive registration and use and is not well suited to complex factual disputes."[53] It is often argued that the worldwide application of the UDRP Policy and its accompanying Rules eliminates confusion and adds a degree of predictability to a field which would otherwise be an entirely fragmented international system consisting of different regimes.[54]

The UDRP critics, on the other hand, argue that the policy defines many terms loosely, leaving panels too much interpretive freedom, which, in turn results in inconsistent decisions at odds with the policy.[55] Controversial UDRP decisions delivered during the early 2000s led free speech activists to denounce the UDRP as

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

50. Froomkin, *supra* note 7, at 611 (summarizing that "[t]he UDRP was controversial even before its birth. On the one hand, trademark owners originally objected that it was too weak and narrow, and would not serve to adequately protect their rights; opponents objected that the courts already adequately protected legitimate trademark interests, and UDRP gave trademark holders de facto rights in excess of those provided by law").

51. For especially enthusiastic and positive portrayals of the UDRP, see the early literature, *e.g.*, Matt Railo, *Trademark Owners Weigh Courts vs. UDRP*, NAT'L L.J. C1 (July 24, 2000); M. Scott Donahey & Ryan S. Hilbert, World Wrestling Federation Entertainment, Inc. v. Michael Bosman*: A Legal Body Slam for Cybersquatters on the Web*, 16 COMPUTER & HIGH TECH. L.J. 421, 427 (2000); Michael V. LiRocchi, Stephen J. Kepler & Robert C. O'Brien, *Trademarks and Internet Domain Names in the Digital Millennium*, 4 UCLA J. INT'L L. & FOREIGN AFF. 377, 443 (2000); Orrie Dinstein & Elisabeth Cappuyns, *Assessing the First 100 Days of ICANN's Dispute Plan*, N.Y.L.J. 1 (June 1, 2000).

52. *See Case Outcome (Consolidated): All Years,* WIPO*,* https://perma.cc/6R45-2L84 (last visited Nov. 21, 2019).

53. *See, e.g.*, Ritchenya A. Shepherd, *Counsels' Domain-Name Pains*, NAT'L L.J. 1 (Sept. 4, 2000).

54. *UDRP Rules*, *supra* note 9; *UDRP Policy*, *supra* note 45.

55. *See* Orna Rabinovich-Einy, *The Legitimacy Crisis and the Future of Courts*, 17 CARDOZO J. CONFLICT RESOL. 23, 54 (2015) (summarizing criticisms of the UDRP).

biased in favor of trademark owners. Examples of such decisions include the transfer of the domain *Barcelona.com* not because the registrant did not have rights to it (as required by the UDRP) but because the city (complainant) had "better or legitimate rights";[56] and those concerning domains appending the terms *sucks* or *fuck* to existing trademarks (for example, *fuckphilips.com*,[57] *fuckAOL.net*,[58] *philipssucks.com*, and *cabelassucks.com*).[59] Those activists argued that the UDRP provided a convenient and biased forum for trademark owners to challenge any domain name that was remotely similar to one of their marks, thereby expanding trademark rights at the expense of free speech rights.[60] The infamous case of Microsoft Corporation threatening seventeen-year-old Mike Row over his *www.MikeRowSoft.com* domain in 2004 illustrated and supported their cause.[61]

These criticisms and controversy are not limited to academic arguments; uneasiness with the human rights and constitutional concerns raised by the application of the UDRP are felt in many countries whose constitutions contain protections similar to those in the Universal Declaration of Human Rights ("UDHR")[62] and the International Covenant on Civil and Political Rights ("ICCPR").[63] For instance, in 2011 France passed a statute reforming domain name dispute resolution, which suspended application of the UDRP to *.fr* domain names pending approval of a new policy by the Minister of Communications.[64] Since July

56. Excelentisimo Ayuntamiento de Barcelona v. Barcelona.com, Inc., Case No. D2000-0505, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Aug. 4, 2000) (Porzio, Arb.) (ordering the transfer of the domain name to the complainant). For similar controversial decisions, see also J. Crew Int'l v. Crew.com, Case No. D2000-0054, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Apr. 20, 2000) (Page, Arb.), https://perma.cc/9YL3-R94E (ordering the transfer of the domain name to the complainant); Rockport Boat Line v. Ganonoque Boat Line Ltd., Case No. FA0004000094653, Decision (Nat'l Arb. F. May 10, 2000) (Karem, Arb.), https://perma.cc/9LVA-WJAB.

57. *See* Koninklijke Phillips Elecs. v. Snelling Domains Best, Case No. D2002-1041, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Dec. 16, 2002) (Olsson, Arb.) (finding the *fuckphilips.com* domain name to be confusingly similar to complainant's PHILLIPS mark).

58. *See* Am. Online, Inc. v. Tommy Vercetti, Case No. FA0403000244091, Decision (Nat'l Arb. F. Apr. 9, 2004) (Condon, Arb.), https://perma.cc/XVJ8-N9GB.

59. *See* Cabela's Inc. v. Cupcake Patrol, Case No. FA95080, Decision (Nat'l Arb. F. Aug. 29, 2000) (Johnson, Arb.) (finding the disputed domain name *cabelassucks.com* confusingly similar to complainant's mark, "Cabela's").

60. *See* Orna Rabinovich-Einy, *supra* note 55, at 54; Nicholas Smith & Eric Wilbers, *The UDRP: Design Elements of an Effective ADR Mechanism*, 15 AM. REV. INT'L ARB. 215 (2004); Froomkin, *supra* note 7, at 96–101.

61. Gary Barker, *Teenager Takes on a Corporate Monster*, THE AGE (Jan. 21, 2004), https://perma.cc/5CWB-GLXA.

62. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), https://perma.cc/P5PY-QAUN [hereinafter UDHR].

63. International Covenant on Civil and Political Rights, Mar. 23, 1976, https://perma.cc/HMW8-N8EX [hereinafter ICCPR] (adopted and opened for signature, ratification and accession by G.A. Res. 2200 (XXI) A (Dec. 16, 1966)).

64. Loi 2011-302 du 22 mars 2011 portant diverses dispositions d'adaptation de la législation au droit de l'Union européene en matière de santé, de travail et de communications électroniques, [Law 2011-302 of March 22, 2011 making various adaptations to European Union health, right-to-work, and electronic communications law] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 22, 2011, p. 5186 [hereinafter Law 2011-302], https://perma.cc/5LDF-

6, 2016, an updated procedure managed by registry AFNIC in collaboration with the WIPO has been available to resolve *.fr* (France) and *.re* (Reunion Island) domain name disputes.[65] Similarly, countries such as Canada have developed their own, more stringent rules for their country ccTLDs.[66] These examples signal broader constitutional implications for the future viability of the UDRP as a whole, and highlight the need for reform. If the UDRP falls short of the rights protections in national constitutions and other domestic law, countries may—and should—develop and adopt their own rules for solving domain name disputes, and not just for the ccTLDs. This would preclude the uniformity that, according to the UDRP's proponents, makes it useful and convenient.

2. Calls for Reform

Various calls for the UDRP's reform have been made since its adoption.[67] In the early 2000s, there were proposals to establish an appellate mechanism to resolve inconsistencies in panelists' interpretations and resulting decisions.[68] Some advocated expanding the UDRP to cover more than trademark infringement; for example, they argued it should apply to online copyright disputes.[69] Some commentators proposed establishing an entirely new international body to remedy the legal and political tensions arising from the UDRP.[70] These proposals never materialized because the policy has not been subjected to a thorough review since its adoption more than twenty years ago.[71]

U9MC.

65. *You've Got a Friend in UDRP: WIPO's Brian Beckham Reveals How New TLDs Are Affecting the Arbitration and Mediation Center's Workload,* IP PRO THE INTERNET BLOG (Aug. 16, 2016), https://perma.cc/46LR-EBRY.

66. *See* CANADIAN UNIFORM DISPUTE RESOLUTION, https://perma.cc/TH7K-PCXZ (last visited Nov. 5, 2019). On the main differences between the UDRP and the Canadian dispute resolution policy, see Eric Macramalla, *The Key Differences Between the Uniform Dispute Resolution Policy & CIRA Domain Name Dispute Resolution Policy*, GOWLING WLG, https://perma.cc/AN42-DRB4 (last visited Nov. 26, 2019).

67. *See, e.g.*, John G. White, *ICANN's Uniform Domain Name Dispute Resolution Policy in Action*, 16 BERKELEY TECH. L.J. 229 (2001) ("Now that the Policy has been in place for over a year, ICANN should take immediate steps to evaluate the Policy's performance and implement improvements where appropriate . . . .").

68. *See, e.g.*, Scott Donahey, *A Proposal for an Appellate Panel for the Uniform Dispute Resolution Policy,* 18 J. INT.'L ARB. 131 (2001).

69. On applying the UDRP to copyright disputes, see, for example, Steven Tremblay, *The Stop Online Piracy Act: The Latest Manifestation of a Conflict Ripe for Alternative Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 819 (2014); Mark A. Lemley & Anthony R. Reese, *A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes*, 23 CARDOZO ARTS & ENT. L.J. 1 (2005); Andrew Christie, *The ICANN Domain-Name Dispute Resolution System as a Model for Resolving Other Intellectual Property Disputes on the Internet*, 5 J. WORLD INTELL. PROP. 105 (2002).

70. *See, e.g.*, Ben Norton, *Constitutional Internationalization of ICANN's UDRP*, 29 ARIZ. J. INT'L & COMP. L. 137 (2012).

71. ICANN has announced the review of the UDRP several times in the past, but each time it was inexplicably delayed. Originally, the UDRP review was announced in 2000. *See Special Meeting of the Board Minutes*, ICANN (Jun. 6, 2000), https://perma.cc/PN8E-LA9M (referring to review "later this

D. WHAT'S NEW? WHY NOW?

1. Upcoming UDRP Review

The first comprehensive policy review of the UDRP is scheduled to get under way in 2020 and will be conducted in the second phase of the Review of the Rights Protection Mechanisms ("RPMs"), following a review of the URS and Trademark Clearinghouse.[72] In its Charter, the Working Group on the RPMs listed many questions, such as "Should the term 'free speech and the rights of non-commercial registrants' be expanded to include 'free speech, freedom of expression and the rights of non-commercial registrants' to include rights under US law and the United Nations' Universal Declaration of Human Rights?"[73] and "Are recent and strong ICANN work seeking to understand and incorporate Human Rights into the policy considerations of ICANN relevant to the UDRP or any of the RPMs?"[74] Given that such questions are raised in the Working Group Charter, an analysis of the UDRP's procedure against the international human rights framework is useful in practice.

2. Changing Institutional Context of ICANN

The international human rights analysis of the UDRP is also crucial in light of ICANN's changing institutional context: It will be reviewing the UDRP simultaneously with the implementation of the so-called "IANA transition" (IANA stands for Internet Assigned Numbers Authority, and refers to the allocation of globally unique names and numbers in Internet protocols).[75] It is beyond the scope of this article to discuss the IANA transition. It suffices to highlight that ICANN's activities (including IANA) have been supervised in the past by the U.S. government, specifically the National Telecommunications and Information Administration

year"). ICANN has issued Preliminary Issue Reports on the UDRP, which have not led to policy development or a review process. *See, e.g.*, MARGIE MILAM, PRELIMINARY GNSO ISSUE REPORT ON THE CURRENT STATE OF THE UDRP (2011), https://perma.cc/27VW-XU5M.

72. *See New gLTD Program Reviews*, ICANN, https://perma.cc/35K3-BQV4 (last updated Sept. 28, 2018); WORKING GROUP CHARTER, ICANN (Mar. 16, 2016), https://perma.cc/H8FW-87UQ; Generic Names Supporting Org. ("GNSO"), *PDP Review of All Rights Protection Mechanisms in All gTLDs*, ICANN, https://perma.cc/5GDS-LA28 (last updated Feb. 5, 2019); e-mail from Rafik Dammak, Chair of GNSO Council, to author (Nov. 11, 2019) (on file with author and public mailing list cc-humanrights@icann.org) ("RPM is still on [its] phase 1 and final report [is] scheduled for April 2020 based on current timeline provided by the [working group]. Phase 2 which includes the UDRP review should start after but possibly there would be some changes before.").

73. WORKING GROUP CHARTER, *supra* note 72.

74. *See id.* at "Additional Questions and Issues" section.

75. For an overview of the IANA transition, see Kal Raustiala, *An Internet Whole and Free: Why Washington Was Right to Give up Control*, 96 FOREIGN AFF. 140 (2017); Kal Raustiala, *Governing the Internet*, 110.3 AM. J. INT'L. L. 491–503 (2016); Joel Snyder, Konstantinos Komaitis & Andrei Robachevsky, *The History of IANA: An Extended Timeline with Citations and Commentary,* INTERNET SOC'Y (2017), https://perma.cc/3N5V-BGKS. For a critique of the IANA transition, see Richard Hill, *Internet Governance, Multi-Stakeholder Models, and the IANA Transition: Shining Example or Dark Side?*, 1.2 J. CYBER POL'Y 176–97 (2016).

("NTIA"). That supervision occurred under a contract with the U.S. Department of Commerce.[76] On June 9, 2016, the NTIA accepted the IANA Stewardship Transition Proposal, developed by the ICANN community, as meeting the criteria for transition of the IANA functions to a "global multi-stakeholder community."[77] ICANN's contract with the NTIA consequently expired on September 30, 2016. It was as part of the IANA Stewardship Transition Proposal's "accountability package" that ICANN adopted a bylaw stipulating a new "Core Value":

> In performing its Mission, the following "Core Values" should also guide the decisions and actions of ICANN: . . . (viii) Subject to the limitations set forth in Section 27.2,[78] within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.[79]

Human rights advocates lobbying ICANN consider the adoption of a human rights bylaw to be "an important milestone in including human rights on the formal agenda of internet governance bodies."[80] However, given the IANA transition, important questions arise as to how ICANN—a private body now accountable to a vaguely defined, mysterious "global multi-stakeholder community"—will be accountable for its adherence to this new bylaw. What is the "applicable law"? And which "internationally recognized human rights" does the "applicable law" require to be respected?[81] More fundamentally, what is the nature of the relationship among the UDRP, ICANN, and international human rights law in light of the new bylaw?

II. INTERNATIONAL HUMAN RIGHTS LAW AND ICANN

The UDRP was created by ICANN, which is a private, nonprofit corporation. ICANN's unique quasi-governmental nature, its public mission, and global policy-making could raise eyebrows as to why it operates in accordance with corporate law

76. *See* Award/Contract No. SA1301-12-CN-0035, U.S. DEP'T OF COMMERCE (Oct. 1, 2012), https://perma.cc/6NEA-BR7M.

77. *See NTIA Finds IANA Stewardship Transition Proposal Meets Criteria to Complete Privatization,* NTIA (Nov. 11, 2019), https://perma.cc/UJD3-AS5E.

78. Section 27.2 states that the human rights Core Value "shall have no force or effect" until a "framework of interpretation for human rights" is approved by the Board. *Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN (June 18, 2018), https://perma.cc/4U7D-EJ6U.

79. ICANN BYLAWS, *supra* note 3; *see also* CCWG-ACCOUNTABILITY, SUPPLEMENTAL FINAL PROPOSAL ON WORK STREAM 1 RECOMMENDATIONS (2016), https://perma.cc/S97U-DQP4.

80. Teemu Henriksson, *ICANN Approves Its Bylaws, Including Commitment to Respect Human Rights*, WORLD ASS'N OF NEWS PUBLISHERS (June 28, 2016), https://perma.cc/FU6G-DYUK. See, for example, a short comment by the facilitator of the Cross-Community Working Party on ICANN and Human Rights. Niels ten Oever, *Human Rights Catch up with ICANN*, OBSERVER RES. FOUND. (Feb. 16, 2016), https://perma.cc/47EK-EGQR.

81. I address these questions in extensive detail in Zalnieriute, *From Human Rights Aspirations*, *supra* note 17.

rather than in a public legal setting.[82] Because of these dual public and private qualities, some argue it is a "hybrid intergovernmental-private administration."[83] But even as a corporation, ICANN has so far successfully avoided liability under antitrust law, known as competition law in the European Union.[84] Most importantly, however, its status as a private actor registered in the United States makes it uncertain whether ICANN is covered by international human rights law or the law of any other jurisdiction beyond California (where it is based) or U.S. federal law.[85]

A. ICANN'S CORE VALUE ON HUMAN RIGHTS AND "APPLICABLE LAW"

The new ICANN Core Value stipulates that ICANN will respect "internationally recognized human rights as required by applicable law."[86] An important question in any analysis of ICANN's human rights obligations here is: What is the "applicable law"? A "framework of interpretation" for the human rights Core Value, developed by the "Accountability" working group and adopted by the ICANN board in November 2019, explains:

> "Applicable law" refers to the body of law that binds ICANN at any given time, in any given circumstance, and in any relevant jurisdiction. It consists of statutes, rules, regulations, etcetera, as well as judicial opinions, where appropriate. It is a dynamic concept inasmuch as laws, regulations, etcetera, change over time.[87]

This seemingly broad definition is a bit more tricky than it first appears. As I

82. On ICANN's quasi-governmental status, see Gianpaolo Maria Ruotolo, *Fragments of Fragments. The Domain Name System Regulation: Global Law or Informalization of the International Legal Order?*, 33.2 COMPUTER L. & SEC. REV. 159–170 (2017). On ICANN's relationship with U.S. public and constitutional law, see A. Michael Froomkin, *Wrong Turn in Cyberspace*: *Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000).

83. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 22 (2005) (describing ICANN as an institution which was "established as a non-governmental body, but which has come to include government representatives who have gained considerable powers, often via service on ICANN's Governmental Advisory Committee, since the 2002 reforms").

84. Justin T. Lepp, Note, *ICANN's Escape from Antitrust Liability*, 89(4) WASH. UNIV. L. REV. 931 (2012); A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust,* U. ILL. L. REV. 1 (2003).

85. International or European human rights law would seem not to apply to ICANN. *See* MONIKA ZALNIERIUTE & THOMAS SCHNEIDER, COUNCIL OF EUR., DGI(2014)12, ICANN'S PROCEDURES AND POLICIES IN THE LIGHT OF HUMAN RIGHTS, FUNDAMENTAL FREEDOMS AND DEMOCRATIC VALUES (2014). However, EU data protection law may apply to the WHOIS database operated by ICANN, particularly the parts of the database compiled and managed by the European Regional Internet Registry RIPE NCC, which is headquartered in Amsterdam. *See also* Data Protection Working Party, *Opinion 2/ 2003 on the Application of the Data Protection Principles to the WHOIS Directories,* 10972/03/EN final (June 13, 2003).

86. *See* ICANN BYLAWS, *supra* note 3, § 1.2.b(vii).

87. ICANN CROSS-COMMUNITY WORKING GROUP ON ACCOUNTABILITY("CCWG-ACCOUNTABILITY"), PROPOSED FRAMEWORK OF INTERPRETATION AND CONSIDERATION CONCERNING ICANN'S HUMAN RIGHTS BYLAW (2017), https://perma.cc/L29U-P3ZP; for adoption of the framework (as part of CCWG-Accountability's Work Stream 2 Final Report) by the ICANN Board, see *Approved Board Resolutions*, ICANN (Nov. 7, 2019), https://perma.cc/GQ7L-TZ3H.

explain in detail in my work on the relationship between international human rights law and private actors,[88] international law is generally understood by an international community as created *by* and *for* nation states.[89] In the same vein, international human rights law—at least as it currently stands[90]—also applies directly only to states, not private actors.[91] Given that ICANN is a private actor, the "applicable law" arguably does not refer to international law.

If no international human rights law is directly applicable to ICANN, then the phrase "applicable law" refers only to national or supranational law. A subsequent question, then, is whether national law requires private bodies to respect "internationally recognized human rights." The answer depends on jurisdiction and whether the country in question has ratified at least some international human rights instruments. However, even if these instruments have been ratified and implemented through domestic human rights legislation, such legislation is generally not enforceable horizontally—that is, against private actors. Therefore, this closer examination of the applicability of international and human rights law to private actors suggests that, apart from certain areas of antidiscrimination laws, data privacy laws, labor standards, or prohibitions on gross human rights abuses,[92] the "applicable law" referenced in the Core Value generally does not require ICANN to "respect internationally recognized human rights." This prompts a question of whether the human rights bylaw is, in practice, merely an empty public relations campaign, leaving ICANN to act as it pleases.

B. "IN CONFORMITY WITH RELEVANT PRINCIPLES OF INTERNATIONAL LAW"?

Importantly, the new human rights Core Value is not the only quasi-constitutional

88. Zalnieriute, *From Human Rights Aspirations*, *supra* note 17.

89. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57–58 (5th ed. 1998).

90. Recent negotiation efforts and the so-called "zero draft" of the UN Treaty on Business and Human Rights might change this status quo at some point in the future. For more information see BUS. & HUMAN RIGHTS RES. CTR., https://perma.cc/R657-RQ8C (last visited Dec. 11, 2019).

91. *See, e.g.*, ICCPR, *supra* note 63, art. 2 ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."). *See also* International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3, https://perma.cc/CLQ3-LBJW [hereinafter ICESCR] ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."). However, "international legal institutions typically only have advisory powers and are unable to 'make' states take particular action." Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 FORDHAM INT'L L.J. 781, 782 (2009). For discussions of these issues in depth, see BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (Surya Deva & David Bilchitz eds., 2017).

92. For more on horizontal application for human rights law, see John H. Knox, *Horizontal Human Rights Law,* 102 AM. J. INT'L L. 1 (2008); Dorota Leczykiewicz, *Horizontal Application of the Charter of Fundamental Rights,* 38 EUR. L. REV. 479 (2013).

limit that ICANN has voluntarily adopted. In particular, its founding document—the Articles of Incorporation—provides that ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with *relevant principles of international law* and *applicable international conventions* and local law."[93]

Such a statement reads strong. However, with the exception of principles of international criminal law—which applies "the most serious crimes of concern to the international community as a whole," specifically "genocide," "crimes against humanity," "war crimes," and "the crime of aggression,"[94]—generally, no international conventions or principles of international law directly apply to private actors such as ICANN.[95] The state-centeredness of the international conventions, which apply only to the parties that joined them, is a well-developed principle of international law, codified in the seminal Vienna Convention on the Law of Treaties in 1969.

The above said, in the international arbitration case concerning the *.xxx* gTLD, ICANN itself argued that the term "relevant principles of international law" under Article 4 of its Articles of Incorporation refers to those principles that are "specifically directed to concerns relating to the Internet, such as freedom of expression or trademark law."[96] That interpretation reveals that ICANN envisages the right to freedom of expression—and potentially other human rights relevant to the Internet, such as rights to due process, property, equality and nondiscrimination, or data privacy—as relevant principles of international law with which it has committed itself to conforming. As Jack Goldsmith, an independent expert in the *.xxx* proceedings, has pointed out, there is nothing in the legal system of California (where ICANN is registered), U.S. federal law, or international law to prevent ICANN from imposing obligations upon itself.[97] Instead, private actors often adopt numerous procedural principles to increase their legitimacy. For example, Adamantia Rachovitsa has detailed how ICANN has explicitly subjected some of its global policies to international law standards: In the procedure concerning the limited public interest objection to the new gTLD applications, ICANN has decided to assess the compatibility of the particular gTLD string against the *fundamental* principles of international law, and the principles relating to public order and morality under international human rights law in particular.[98]

93. *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, art. 4, ICANN (Sept. 30, 2016), https://perma.cc/4SHY-Y9K6 (emphasis added).

94. *See* Rome Statute of the International Criminal Court art. 5–8, July 1, 2002, 2187 U.N.T.S. 90. Generally, on international criminal law and private actors, see Shane Darcy, *The Potential Role of Criminal Law in a Business and Human Rights Treaty*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS, *supra* note 91, at 439.

95. *See* Vienna Convention on the Law of Treaties, May 23, 1969 (entered into force January 27, 1980), 1155 U.N.T.S. 331, https://perma.cc/62SV-QCQE.

96. *See* ICM Registry v. ICANN, No. 50 117 T 00224 08, at ¶ 106 (Int'l Ctr. Disp. Resol. Feb. 19, 2010) (Schwebel, Arb.).

97. *See id.* at ¶ 58.

98. *See* Adamantia Rachovitsa, *International Law and the Global Public Interest: ICANN's*

C. RELEVANT INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The substantive elements of the UDRP concern the transfer or cancellation of domain names and directly affect the right to freedom of expression, which I discuss in a separate article.[99] In this section, I focus on the procedural aspects of the UDRP, which raise numerous due process concerns regarding the deprivation of property rights, which are recognized in international human rights instruments, such as the UDHR, ICCPR, and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[100] as well as regional treaties, such as the European Convention on Human Rights ("ECHR")[101] and American Convention on Human Rights ("ACHR").[102]

1. Property Rights in Domain Names

Since the UDRP involves the *challenge* to, or *transfer* of, a domain name from one party to another, the legal basis of domain names becomes particularly important. Despite the fact that ICANN's new gTLD agreement explicitly provides that it shall not be construed as establishing or granting any property ownership rights or interests in the gTLD string,[103] domain names have been classified, controversially, as property rights in many jurisdictions around the world, such as the United States and Canada.[104]

For example, the U.S. Court of Appeals for the Ninth Circuit held in the *Kremen* case that a domain name is intangible property because it satisfies the three-part test for the existence of a property right—namely, that a domain name is an interest capable of a precise definition, capable of exclusive possession or control, and capable of giving rise to a legitimate claim for exclusivity.[105] While the *Kremen* decision is controversial,[106] the question of property rights in domain names needs to be assessed within the conceptual framework used by the respective applicable law, which may lead to different results. For instance, the German Constitutional Court held that while there is no property in the domain address per se, the "use

Independent Objector as a Mechanism of Responsive Global Governance, *in* NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT (James Summers & Alex Goughs eds., 2018). *See also* EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 58 (Hague Acad. of Int'l L. ed., 2014).

99. *See* Zalnieriute, *Beyond the Governance Gap*, *supra* note 8.

100. ICESCR, *supra* note 91.

101. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

102. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

103. *New gTLD Registry Agreement* 7.12, ICANN (2013), https://perma.cc/8F2A-LL2U.

104. *See* Kremen v. Cohen, 337 F.3d 1024 (9th Cir. 2003); Tucows.com Co. v. Lojas Renner SA, 2011 ONCA 548 (Can.).

105. *See Kremen*, 337 F.3d at 1024.

106. Noah Schottenstein, *Of Process and Product:* Kremen v. Cohen *and the Consequences of Recognizing Property Rights in Domain Names*, 14 VA. J.L. & TECH. 1 (2009); Daniel Hancock, *You Can Have It, but Can You Hold It: Treating Domain Names as Tangible Property*, 99 KY. L. J. 185 (2010).

right" based on the contract between the registrant and registrar is protected by the constitutional property guarantee, as is the second-level domain.[107]

A detailed analysis of the legal and semantic differences between the different concepts of "property rights" across the world is beyond the scope of this article.[108] Suffice it to say that domain names can be, and often are, classified as property rights in many jurisdictions. Importantly, international human rights tribunals, such as the European Court of Human Rights ("ECtHR"), have also ruled that domain registrations can constitute property or "possessions."[109] As noted by intellectual property attorney Robin Gross, irrespective of whether domain names themselves are classified as "property," they undoubtedly have a "property interest in them" which should be enough to meet the bar for due process rights in the event that they are appropriated.[110]

While similar definitional and semantic disagreements have prevented the inclusion of the right to own property in the ICCPR and ICESCR, it is nonetheless stipulated in many national constitutions; regional human rights instruments such as the ECHR, ACHR, and African Charter on Human and Peoples' Rights ("ACHPR"); and the UDHR. For example, Article 17 of the UDHR states:

> (1) Everyone has the right to own property alone as well as in association with others.
>
> (2) No one shall be arbitrarily deprived of his property.[111]

Similarly, Article 14 of the ACHPR proclaims:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.[112]

A bit more extensively, Article 21 of the ACHR sets out:

> (1) Everyone has the right to the use and enjoyment of his property. The law may

107. Second-level domains in the DNS hierarchy are the names considered to be immediately below the top-level domains. For example, in *www.ICANN.com*, "ICANN" is a second-level domain, and ".com" is a top-level domain. For the German decision, see BVerfG, 1 BvR 1306/02, Nov. 24, 2004, https://perma.cc/SDV3-D2DM.

108. For the latest summary of the debates on domain names and property, see Mueller & Badiei, *supra* note 29. *See also* Hurter, *supra* note 29, at 288–90. On property and the Internet, see generally Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1995); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 218 (1996); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 132 (1998); Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715 (2003).

109. Paeffgen GmbH v. Germany, App. No. 25379/04, HUDOC (Eur. Ct. H.R. 2007), https://perma.cc/H3DH-LVWN.

110. E-mail from Robin Gross, Cofounder, Noncommercial Users Constituency, to author (2016) (on file with the author).

111. UDHR, *supra* note 62, art. 17.

112. Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter) art. 14, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), https://perma.cc/AWH3-TUAJ.

> subordinate such use and enjoyment to the interest of society.
>
> (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> (3) Usury and any other form of exploitation of man by man shall be prohibited by law.[113]

Article 1 of the first Protocol to the ECHR also reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[114]

The right to peaceful enjoyment of one's property and possessions, however, is not an absolute right under human rights doctrine. It may be subjected to restrictions as long as these meet certain standards, collectively known in human rights jurisprudence as the three step-test.[115] For example, to be legitimate under the UDHR, such restrictions must be "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society."[116]

While the exercise of property rights can be limited, any interference with the right to peaceful enjoyment of one's possessions must be lawful, in the public interest, in accordance with the general principles of international law, and reasonably proportionate.[117] Regulation of, and limits on, the exercise of property rights may have a legitimate objective of securing social justice in the public interest.[118] Where a law (or, in this case, a private UDRP policy) interferes with

113. ACHR, *supra* note 102, art. 21.

114. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, *opened for signature* Mar. 20, 1952, E.T.S. No. 009 [hereinafter Protocol to the ECHR].

115. *See generally* HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS (3d ed. 2008). In the context of intellectual property, see MARTIN R. F. SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW (2004).

116. UDHR, *supra* note 62, art. 29(2).

117. See, for example, a "fair balance" test doctrine developed by the European Court of Human Rights under the Protocol to the ECHR, *supra* note 114, as articulated in, for example, Pye v. United Kingdom, 2007-III Eur. Ct. H.R. 365 (demonstrating how a proportionality analysis can be used in relation to laws that may be said to interfere with property rights).

118. STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 12–13 (2000).

property rights and is aimed at a legitimate objective of "protecting the rights of others," a further question may be asked as to the *appropriate balance* between competing interests, which could include both public and private interests. Human rights bodies generally require that a "fair balance" is struck between competing interests. This includes demonstrating that the individual in question does not have to bear an excessive burden, or that the person has procedural avenues to challenge the deprivation of property rights.[119] Therefore, the procedure for adjudicating the legitimacy of interference with peaceful enjoyment of property must ensure that such right is enjoyed by everyone equally, without discrimination. For example, Article 2 of the UDHR states:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[120]

The right to equality and freedom from discrimination is further protected by various provisions of the ICCPR. First, under Article 2(1) of the ICCPR each State party:

> undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[121]

Contrary to Article 2(1), which is linked to the rights recognized in the ICCPR, Article 26 of the ICCPR further provides "an autonomous right" of equality and "prohibits discrimination in law or in fact in any field regulated and protected by public authorities."[122] Article 26 reads:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[123]

These provisions suggest that international human rights law requires all individuals to be treated equally with respect to their exercise of their rights.

2. Due Process, Fair Trial, and Equality Before the Law

Moreover, as owners of property rights, registrants of domain names are subject

119. *See, e.g.*, *Pye*, 2007-III Eur. Ct. H.R. 365.
120. UDHR, *supra* note 62, art. 2.
121. ICCPR, *supra* note 63, art. 2(1).
122. Human Rights Committee, General Comment No. 18, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.5.
123. ICCPR, *supra* note 63, art. 26.

to procedural due process rights (also known as a "right to fair trial," which includes the opportunity to be heard and freedom from biased decision-making). These rights are well recognized in the core international human rights treaties, such as the UDHR and the ICCPR, as well as regional human rights treaties and instruments.

For example, Article 10 of the UDHR proclaims:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him [or her].[124]

While the UDHR mentions the right to a fair trial only in the context of criminal proceedings, the ICCPR has explicitly articulated the right for civil proceedings in Article 14(1):

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[125]

The right to a fair trial is also enshrined in Articles 3, 7, and 26 of the ACHPR; Articles 5, 6, and 7 of the ECHR; Articles 2 to 4 of Protocol No. 7 to the ECHR; and Articles 3, 8, 9, and 10 of the ACHR. The prominence of due process rights in all main human rights treaties suggests that these rights are considered to be of fundamental importance. Many see them as key to maintaining the rule of law.[126] Courts have interpreted fair trial provisions in treaties broadly, on the grounds that this is of fundamental importance to the operation of democratic societies. For example, in one of its classical cases from the 1970s, the ECtHR stated, "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision."[127] Unlike the right to property or nondiscrimination, the right to due process is absolute and cannot be limited.

Due process rights in civil matters require access to courts for individuals bringing claims against one another and against the state, and ensuring that the resulting proceedings are fair. According to a developed jurisprudence by international human rights courts and tribunals, the proceedings taken as a whole should be fair and, to ensure this fairness, a number of specific safeguards should be in place.[128] The

124. UDHR, *supra* note 62, art. 10.

125. ICCPR, *supra* note 63, art. 14(1). Paragraphs 14(2)–(7) of the ICCPR deal with criminal charges and are not relevant for the purposes of the UDRP proceedings, so I will not include those provisions here.

126. *See, e.g.*, Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, XLIX.4 UN CHRONICLE (Dec. 2012), https://perma.cc/R276-PYVV.

127. Delcourt v. Belgium, App. No. 2689/65, HUDOC (Eur. Ct. H.R. 1970), https://perma.cc/PHU4-ANFE.

128. *See* Nuala Mole & Catharina Harby, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights,* COUNCIL OF EUROPE HUMAN RIGHTS

safeguards to ensure overall fairness involve, inter alia:

- the existence of accessible, foreseeable, proportional legislation (or in the case of ICANN and UDRP, an accessible policy that is applied in a predictable and consistent manner);
- an open exchange of evidence;
- an impartial, independent and competent court (or panel); and
- the observation of the principle of "equality of arms."[129]

The principle of "equality of arms" requires a fair balance to be struck between the parties, who must have a reasonable opportunity to present their case to the court under conditions which do not place them at a substantial disadvantage vis-à-vis their opponent.[130] "Equality of arms" and other specific safeguards are further strengthened by a general legal principle of equality under the law, which is provided by most of the world's national constitutions and recognized in many regional and international human rights treaties.[131] The principle of legal equality stipulates that a fair trial must be given to all individuals without discrimination—all human beings must be treated equally by the law—and that all individuals must be subject to the same laws of justice.[132] When due process rights are compromised, or restrictions on the exercise of the right to enjoy one's property fail the three-step test in human rights jurisprudence,[133] individuals enjoy the right to an effective remedy, which is also recognized under the ICCPR and numerous regional human rights treaties. For example, Article 8 of the UDHR states:

> Everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him (or her) by the constitution or by the law.[134]

HANDBOOKS No. 3 (2006), https://perma.cc/RD36-SLES.

129. For more about the principle of equality of arms, see *id.* at 46.

130. *See*, *e.g.*, Stran Greek Refineries & Stratis Andreadis v. Greece, App. No. 13427/87, HUDOC (Eur. Ct. H.R. 1994), https://perma.cc/3AYS-9LVM; De Haas & Gijsels v. Belgium, App. No. 19983/92, HUDOC (Eur. Ct. H.R. 1997), https://perma.cc/E25Z-4K2M.

131. Search Results for "Equality," CONSTITUTE: THE WORLD'S CONSTITUTIONS TO READ, SEARCH AND COMPARE, https://perma.cc/DRU6-DPJS (last visited Nov. 2, 2019). Specific implementations of this guarantee vary. For example, while 138 constitutions of the world guarantee equality regardless of race, only thirty-three states provide a right to equality regardless of nation. *See* Search Results for "Equality Regardless of Race," CONSTITUTE: THE WORLD'S CONSTITUTIONS TO READ, SEARCH AND COMPARE, https://perma.cc/2LYV-CTCL (last visited Nov. 2, 2019).

132. For example, UDHR Article 7 provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." For a classical liberal work on legal equality, see Adelbert Lathrop Hudson, *Equality Before the Law*, ATLANTIC MONTHLY 679 (Nov. 1913).

133. *See generally* STEINER, ALSTON & GOODMAN, *supra* note 115. In the context of intellectual property, see SENFTLEBEN, *supra* note 115.

134. UDHR, *supra* note 62, art. 8.

Article 2(3) of the ICCPR reads:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[135]

The main goal of the effective remedy provisions is to increase the judicial protection offered to individuals who wish to complain about an alleged violation of their human rights. Therefore, an effective remedy is an essential precondition for an effective human rights policy.

Given the widespread recognition of these human rights by the international community, it would be hard to disagree that the rights to due process, enjoyment of property, nondiscrimination, and equality are indeed "internationally recognized human rights," which ICANN has committed to respect in its bylaws. Moreover, ICANN has itself spelled out that it regards trademark rights—which are a form of property rights—to be one of the "relevant principles of international law" with which it has committed to act in conformity under its articles of incorporation. The following Part of this Article discusses whether the UDRP procedure lives up to these commitments.

III. HUMAN RIGHTS ANALYSIS OF THE PROCEDURAL ASPECTS OF THE UDRP: IMPLICATIONS FOR DUE PROCESS AND PROPERTY RIGHTS

Procedurally, the UDRP provides a streamlined administrative method that is intended to be much faster and cheaper than traditional litigation. However, fundamental human rights—for example, freedom of expression—are implicated in this streamlined method, or are even ingrained in the procedure itself, such as where due process rights accompany peaceful enjoyment of property.

From a human rights perspective, the UDRP defines the instances of interferences with the exercise of the right to peaceful enjoyment of property in a domain name that pursue a legitimate aim of "protecting the rights of others"—that is, the rights of trademark holders. As outlined above, such interference is only justified under international human rights law if a "fair balance" between competing interests has

135. ICCPR, *supra* note 63, art. 2(3). Other human rights instruments similarly require that effective remedies be available. *See* Convention on the Elimination of All Forms of Discrimination Against Women art. 2, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195.

been struck. In the following sections of this Article, I scrutinize the UDRP procedure, arguing that it does not necessarily live up to these standards.

A. LACK OF CHOICE-OF-LAW RULES

The first procedural issue that is problematic from a human rights perspective is that the UDRP does not specify choice-of-law rules for the adjudication process. It gives panelists discretion to apply "any rules and principles of law that [they] deem applicable."[136] This is surprising because the aim of the UDRP is to create a single procedural mechanism for resolving disputes between parties in different jurisdictions. Moreover, a choice-of-law clause is particularly important in the context of Internet governance, which challenges traditional concepts of territorial jurisdiction.[137] All transactions occurring in the digital sphere thus require specific rules, or an agreement, which govern the choice of law in the event of a dispute. Normally, such rules are stipulated in the contracts or user agreements and policies that govern e-commerce, social networking, and other sites online.[138] Contrary to this established practice, which is also codified under the *Hague Principles on Choice of Law in International Commercial Contracts*,[139] the UDRP lacks choice-of-law rules. Instead of directing panelists to apply particular laws in particular circumstances or rely on *sui generis* UDRP provisions only, the UDRP provides full discretion to apply "any rules and principles of law . . . deem[ed] applicable."[140] This is problematic for the right to due process, for several reasons discussed below.

1. Potential for Forum-Selling

The lack of a choice-of-law provision may lead to a selection of laws by the panelists that is infected with bias; for example, the selection could be made on the basis that it is more favorable to trademark holders who are paying the panelists' fee. This discretion and potential bias may fall short of the due process requirements in international human rights law. It is particularly problematic given that DRPs are able to develop their own "Supplementary Rules" to govern UDRP proceedings. Indeed, a large amount of empirical evidence suggests that UDRP providers are

136. *UDRP Rules*, *supra* note 9, § 15(a).

137. On Internet jurisdiction issues, see DAN JERKER B. SVANTESSON, SOLVING THE INTERNET JURISDICTION PUZZLE (2017). *See also* Dan Jerker B. Svantesson, *A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft*, 109 AJIL UNBOUND 69 (2015); Dan Jerker B. Svantesson, *Internet Jurisdiction Today and in the Future*, PRECEDENT, Jan.–Feb. 2016, at 4.

138. For more on choice-of-law rules in consumer contracts, see LORNA E. GILLIES, ELECTRONIC COMMERCE AND INTERNATIONAL PRIVATE LAW: A STUDY OF ELECTRONIC CONSUMER CONTRACTS (Geraint Howells ed., 2016) (ebook); Jonathan Levin, Note, *The Hague Principles on Choice of Law in International Commercial Contracts: Enhancing Party Autonomy in a Globalized Market*, 13 N.Y.U.J.L. & BUS. 271 (2016).

139. HAGUE CONFERENCE ON PRIVATE INT'L LAW, HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS (approved Mar. 19, 2015). Hague Principles are "soft law"; they are not legally binding.

140. *UDRP Rules*, *supra* note 9, § 15(a).

engaging in "forum-selling," trying to attract customers and complaints by establishing for themselves a track record of finding in favor of complainants.[141] Given the influence of trademark holders and the fact that they generally pay the panelists' fees, the current rules governing choice of law within the UDRP thus might favor trademark holders over domain name registrants and, in turn, may lead to unjustified interferences with, or erroneous transfer of, domains that are considered property in many jurisdictions around the world.

2. Potential for Importing National Laws and Discrimination Based on Nationality

Similarly, the absence of a choice of law provision, allowing the panelists to apply whatever law they "deem applicable," has resulted in the application of different legal standards based on the nationality of the respondents or members of the panels. It is problematic from a human rights perspective that the nationality or residency of the parties to the dispute, or of the panelists themselves, might lead to different outcomes.

An empirical study from 2012 demonstrated that the discretionary nature of the choice-of-law provision saw U.S. panels "import" U.S. law—generally considered to be more sympathetic to freedom-of-expression concerns than other legal frameworks[142]—into the UDRP proceedings more frequently than foreign panels.[143] Scholars have also demonstrated how panelists apply the UDRP "fair use" defense more favorably to U.S. respondents than to other respondents. The U.S. legal system also has the doctrine of "constructive notice" of trademarks,[144] whereas other jurisdictions do not have a similar principle. More generally, the UDRP allows panelists to incorporate common law principles, which do not exist in civil law jurisdictions. These differences, along with the "fair use" defense and freedom of expression, may lead or contribute to outcomes more favorable to certain parties. Because U.S. panels decide nearly fifty percent of all fair use cases, U.S. panelists have more chances to import U.S. laws than their foreign counterparts (which, some scholars argue, they do).[145] Overall, the application of different legal standards is at odds with the internationally recognized human rights to due process,

141. Daniel Klerman, *Forum Selling and Domain-Name Disputes*, 48 LOY. U. CHI. L.J. 561 (2016).

142. *See* IAN CRAM, CONTESTED WORDS: LEGAL RESTRICTIONS ON FREEDOM OF SPEECH IN LIBERAL DEMOCRACIES (2016) (ebook); Cass Sunstein, *Democracy and the Problem of Free Speech*, PUB. RES. Q. 58 (1995).

143. *See* David A. Simon, *An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute-Resolution Policy*, 53 B.C. L. REV. 65, 67–69 (2012) (positing that, among other reasons, U.S. panels may import U.S. law more than their foreign counterparts because "many countries do not have cybersquatting laws, or trademark laws with as many speech protections as U.S. laws," and lacking these laws, foreign panels "rely on the language of the UDRP . . . as a self-contained document, rather than import local legal rules or principles.").

144. I am grateful to Zak Muscovitch for this insight. E-mail from Zak Muscovitch to author (Feb. 12, 2018) (on file with author).

145. *See* Simon, *supra* note 143, at 68.

nondiscrimination, and equality before the law.

3. Potential for Inconsistencies and Unpredictability

On the one hand, studies of UDRP decisions have shown that despite the lack of a choice-of-law clause, some panelists view the UDRP as a precedential system with *sui generis* rules and strive for consistency.[146] As Daniel Doft notes, "the UDRP allows for transparency, fairness in decisions, and consistency, as the elements of the prima facie case and burden of proof are uniform across all 'jurisdictions,' and all decisions are published."[147] In some instances, panelists "even adopt a solution contrary to their own opinion for the sake of consistency."[148] For example, based on quantitative research of the UDRP decisions, Gabrielle Kaufmann-Kohler argues that the panelists systematically cite prior cases to support their decisions and follow earlier cases as binding precedent largely out of the desire to create consistent rules.[149] More critical practitioners opine, however, that it may be that the NAF and WIPO themselves perpetuate and create the precedent.[150] For instance, the NAF uses clerks to prepare case memos for panelists, thereby promoting and reinforcing its own precedent. Insights into procedural rules in relation to nominating panelists and writing consensus documents also reveal problematic aspects. For example,

146. *See* Howard Jarvis Taxpayers Ass'n v. McCauley, Case No. D2004-0014, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Apr. 22, 2004) (Bernstein, Arb.), https://perma.cc/LC7Q-RR94 ("Parties in UDRP proceedings are entitled to know that, where the facts of two cases are materially indistinguishable, the complaints and responses will be evaluated in a consistent manner regardless of the identity of the panelist . . . when policy disagreements do arise, panelists should pause and consider whether a consensus has emerged that might inform which way they should rule on these types of issues. If such a consensus has emerged, panelists should endeavor to follow that consensus and thus promote consistent application of the UDRP."); *see also* Fresh Intell. Props., Inc. v. 800Network.com, Inc., Case No. D2005-0061, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Mar. 21, 2005) (Bernstein, Arb.), https://perma.cc/6VD4-GASK. *Cf.* Nikon, Inc. v. Technilab, Inc., Case No. D2000-1774, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Feb. 26, 2001) (Bernstein, Arb.), https://perma.cc/2245-M8UG ("Although Panels are not bound to follow the decisions of prior Panels, it nevertheless is appropriate to determine whether a majority view has developed among other Panels that have considered the same issue. Not only do such decisions frequently have persuasive weight and authority, but also, they reflect a consensus that is worthy of some deference. Divining and following such a consensus helps to ensure consistency among UDRP decisions, a critical component of any system of justice. Otherwise, and given the lack of an appellate remedy, the expected result in any given case would be random based on the identify [sic] of the Panelists, which would undermine the credibility of the entire UDRP process."). *See also* Koninklijke Philips Electronics N.V. v. Relson Limited, Case No. DWS2002-0001, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. June 14, 2002) (Bernstein, Arb.), https://perma.cc/T8PJ-HK7Y.

147. *See* Daniel Doft, *Facebook, Twitter, and the Wild West of IP Enforcement on Social Media: Weighing the Merits of a Uniform Dispute Resolution Policy,* 49 J. MARSHALL L. REV. 959, 1004 (2016) ("The UDRP itself states "[a]ll decisions under this Policy will be published in full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision." (quoting *UDRP Policy*, *supra* note 45)).

148. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 367 (2007).

149. *See id.* at 368.

150. *See, e.g.*, e-mail from Zak Muscovitch, *supra* note 144.

David Bernstein, who was a proponent of a controversial "retroactive bad faith" approach to the UDRP, co-edits the WIPO consensus view, which has provided a certain degree of legitimacy to this retroactive bad faith theory in the *WIPO Overview 2.0* (now superseded by the *Overview 3.0*).[151] Therefore, it is arguable that each DRP forms and reinforces the precedential value of panelists' decisions through its procedural rules.

On the other hand, the lack of choice-of-law rules leads to divergences in approach and to situations where two opposing decisions could be "correct" at the same time, undermining the fairness, consistency, and predictability of the UDRP system as a whole.[152] Some scholars and practitioners have noted that UDRP panelists often adopt different approaches, which has often led to unpredictable and inconsistent outcomes.[153] For example, personal name disputes in the context of domain names have led to confused and often contradictory results.[154] As Zorik Pesochinsky notes:

> [A] panel granted Julia Roberts rights to the website juliaroberts.com, while another panel denied Bruce Springsteen rights to the website brucespringsteen.com [albeit with a dissenting opinion]. Similarly, it was decided that Hillary Clinton has rights to hillaryclinton.com, while Kathleen Kennedy Townsend did not have rights to kathleenkennedytownsend.com.[155]

151. *WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition ("WIPO Overview 2.0")*, WIPO, https://perma.cc/946R-2BPE (last visited Jan. 8, 2020). "Retroactive bad faith theory" refers to an approach of a number of panels in 2009 and 2010, which found "retroactive" bad faith registrations if the domain names in question were registered before trademark rights accrued (either by registration or common law). *See, e.g.*, City Views Limited v. Moniker Privacy Services / Xander, Jeduyu, ALGEBRALIVE, Case No. D2009-0643, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. July 3, 2009) (Donahey, Arb.), https://perma.cc/7CRF-3835; Octogen Pharmacal Company, Inc. v. Domains By Proxy, Inc. / Rich Sanders and Octogen e-Solutions, Case No. D2009-0786, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Aug. 19, 2009) (Donahey, Arb.), https://perma.cc/42ZC-HQA9; Jappy GmbH v. Satoshi Shimoshita, Case No. D2010-1001, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Sept. 28, 2010) (Perkins, Arb.), https://perma.cc/V2KG-W4ZN; Ville de Paris v. Walter, Case No. D2009-1278, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Nov. 19, 2009) (Christie, Arb.), https://perma.cc/3D4D-JDWG. For more on retroactive bad faith theory, see Zalnieriute, *Beyond the Governance Gap*, *supra* note 8.

152. Jens Schovsbo, *The Private Legal Governance of Domain Names* (Univ. Copenhagen Legal Studies Research Paper Series, Paper No. 2015-2, 2015), https://perma.cc/J3LN-934M.

153. *See*, *e.g.*, David Wotherspoon & Alex Cameron, *Reducing Inconsistency in UDRP Cases*, 2 CANADIAN J.L. & TECH. 71 (2003).

154. LINDSAY, *supra* note 7, at 213 (noting how some UDRP panelists have applied a "straightforward, orthodox approach to determining whether common law rights arise in a personal name" while others have been "perfunctory in the application of US trade mark law in finding rights in personal names" and thus applied a "relatively loose" standard to finding trademark rights in personal names).

155. Zorik Pesochinsky, *Almost Famous: Preventing Username-Squatting on Social Networking Websites,* 28 CARDOZO ARTS & ENT. L.J. 223, 235 (2010) (footnotes omitted) (citing Roberts v. Boyd, Case No. D2000-0210, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. May 29, 2000) (Page, Arb.), https://perma.cc/M9AH-P43V; Springsteen v. Burgar & Bruce Springsteen Club, Case No. D2000-1532, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Jan. 25, 2001) (Harris, Arb.), https://perma.cc/575D-M68E; Clinton v. Dinoia, Case No. FA0502000414641, Decision (Nat'l Arb. F. Mar. 18, 2005) (Atkinson, Arb.), https://perma.cc/22XT-BWN8; Townsend v. Birt, Case No. D2002-

Lack of consistency and predictability of the UDRP outcomes is problematic from the human rights perspective because the right to due process articulates the minimum degree of procedural fairness in any judicial or quasi-judicial system. Procedural fairness is especially important in securing the rights to enjoyment of one's possessions and property.

Overall, the lack of clear choice-of-law rules in the UDRP has resulted in the so-called "U.S./non-U.S. panels dichotomy,"[156] with two competing sets of rules: one set adhering to U.S. laws, and a second set comprised of *sui generis* UDRP rules developed by (largely) WIPO panels. This dichotomy may lead to different outcomes in the same circumstances, depending on the nationality of the parties to the dispute or the panelists deciding the dispute, which undermines the overall fairness, consistency, and predictability of the UDRP system.

B. LACK OF TRANSPARENCY AND PROCEDURAL RULES ON PANELISTS' ACCREDITATION AND APPOINTMENT

The due process concerns arising from the lack of choice-of-law rules are further exacerbated by the lack of transparency and clear UDRP rules in relation to accreditation and appointment of the UDRP panelists. First, the DRPs accredit the panelists to their rosters in a secret manner without any clear standards or transparency about the selection criteria for accrediting panelists, leaving (potential) applicants without any information about the standards for selection, nor the reasons for their inclusion in (or omission from) the rosters of the DRPs.[157]

Moreover, parties to UDRP proceedings in single-panelist cases are not informed of the basis on which the panelist is appointed to hear a particular dispute. This lack of transparency provides opportunities for arbitrariness on the part of the DRP, undermining the fairness of the UDRP system. In three-panelist cases, each party nominates one of the members of the panel, but the third member of the panel, who also acts as chair of the panel, is selected internally among the candidates appointed by the DRP. Panelist selection has in the past led to disagreements among the parties and even the panelists themselves, as demonstrated by cases such as *ParkRoyal.com*, where the complainant raised issues over the composition of the panel, leading to the resignation of one of the panelists.[158]

Problems with panelists' accreditation and appointment are further demonstrated by an empirical study from 2012, which shows that of all the cases decided by the

0030, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Apr. 11, 2002) (Donahey, Arb.), https://perma.cc/G5A3-TGGS).

156. Simon, supra note 143, at 68.

157. Some anonymous commentators suggested to the author by private e-mail (on file with the author) "that WIPO and NAF seem to be 'full' whenever registrant attorneys apply to be UDRP panelists, yet seem to acquire new trademark attorneys on their rosters."

158. Grupo Costamex, S.A. de C.V. (COSTAMEX), Operación y Supervisión de Hoteles, S.A. de C.V. (OPYSSA) v. Vertical Axis Inc., Case No. D2013-1829, Administrative Panel Decision (WIPO Arb. & Mediation Ctr. Feb. 10, 2014) (Harris, Arb.); *see also* Andrew Allemann, *ParkRoyal.com: UDRP and Panelist Selection*, DOMAIN WIRE NAME (Feb. 25, 2014), https://perma.cc/HU9L-8WQR.

NAF—which, along with WIPO, is one of the two organizations that decide nearly all UDRP cases—seven panelists account for fifty percent of all decisions.[159] The appointment of particular panelists to preside over particular disputes may substantially impact the outcome of the UDRP proceedings and the development of UDRP jurisprudence.

Lack of transparency over accreditation and appointment procedures has also led to increasing concerns about what could described as a "revolving door" of UDRP panelists. Practitioners in the field and active members of the ICANN community note how trademark lawyers often serve as lawyers for their clients one day and as UDRP panelists the next day.[160] While panelists cannot preside over cases from their own firm, practitioners note that, increasingly, the panelists can preside over the very types of issues they have in the past litigated themselves (including controversial issues) and make decisions favoring the types of changes they would like to see for their clients and firms in the development of UDRP jurisprudence.[161]

Overall, a lack of clear rules and transparency over the accreditation and appointment processes for panelists may be unfairly prejudicing UDRP outcomes and development of UDRP jurisprudence, which may significantly undermine the overall fairness of the UDRP policy and procedure.

C. LACK OF DUE PROCESS SAFEGUARDS

In addition to the human rights concerns arising from the lack of choice-of-law clause and accreditation and selection of panelists, the UDRP Rules of Procedure raise numerous other due process concerns. These concerns were also present in the previous version of the UDRP Rules, but the revised version (applicable to all complaints lodged on or after July 31, 2015) is arguably even more problematic from a human rights perspective, for the reasons given below.

1. Locking a Domain Name for the Prevention of "Cyberflight"

The revised Rules stipulate that all ICANN-accredited registrars are contractually obliged to "lock" any domain name that is subject to a UDRP proceeding until the panel issues a ruling. Under the revised Rules, a "lock" is defined as "a set of measures that a registrar applies to a domain name, which prevents at a minimum any modification to the registrant and registrar information by the Respondent, but does not affect the resolution of the domain name or the renewal of the domain name."[162]

159. Michael Berkens, *New Study: Nearly 50% Of All UDRP Cases Decided by NAF Are Decided By 7 Panelists,* THE DOMAINS (Aug. 28, 2012), https://perma.cc/E9GV-UP9T.

160. I am grateful to Kathy Kleiman for this insight. E-mail from Kathy Kleiman to author (Feb. 12, 2018) (on file with author). The revolving door issue has also been identified by the GNSO RPM working group. *See GNSO Transcript, Special Trademark Issues: URS*, ICANN (Dec. 4, 2009), https://perma.cc/6P6D-9M6Y.

161. E-mail from Kathy Kleiman and Zak Muscovitch to author (Feb. 12, 2018) (on file with author).

162. *UDRP Rules*, *supra* note 9.

Registrars have two working days to put the lock in place once they receive notification of a UDRP proceeding. Before the lock is activated, the registrants themselves are not aware about the complaint against them, and the registrars are prohibited from informing them. The rationale for the new procedure is argued to be the prevention of "cyberflight"—a tactic of switching registrars or registration details once informed of the UDRP proceedings in order to avoid losing the domain name.[163] Some commentators argue that the new rules address the vulnerability of the old rules and prevent the potential stalling of UDRP proceedings,[164] while others claim that "cyberflight" is a relatively rare tactic.[165]

In February 2016, ICANN for the first time accused a registrar of failing to abide by the UDRP Policy and place a lock on the disputed domain address within two days of the request.[166] However, the registrant in that specific case did not in fact change the registrar or registration details and did not "cyberfly."[167] The new rules might serve the goal of preventing "cyberflight," but from a due process perspective, the "lock" under the UDRP could be compared to "asset freezing" before any case, let alone a court order, has been made against the defendant.[168] Simply lodging a complaint, whether or not it is substantiated, is enough under the UDRP to "lock" a domain name.

2. Effectiveness of Notice

Contrary to the well-established legal practice of serving "notice" of the proceedings on defendants in civil matters,[169] notice about UDRP proceedings is considered effective from the time the complaint was *sent* to the respondent by e-mail, rather than the date the respondent actually received notice (that is, opened the e-mail).[170] Under the new Rules, this notice is served by the UDRP service provider (and is immediately effective) only after all the necessary checks have been

163. Steven S. Fang, *Fighting Cyberflight of Domain Names: ICANN Seeks Enforcement of New UDRP Rules*, TRADEMARKS, COPYRIGHT, & ADVERTISING BLOG (Mar. 2, 2016), https://perma.cc/K8EF-73MX.

164. *Id*.

165. Kevin Murphy, *"Cyberflight" Rules Coming to UDRP Next July*, DOMAIN INCITE (Nov. 18, 2014), https://perma.cc/N9JP-BCYN.

166. *See* Kevin Murphy, *First Registrar "Breached" UDRP Lock Rule*, DOMAIN INCITE (Feb. 15, 2016), https://perma.cc/6RHP-CNEA.

167. *Id.*

168. For more on asset freezing, see Jean-Philippe Bonardi & Santiago Urbiztondo, *Asset Freezing, Corporate Political Resources and the Tullock Paradox*, 15 BUS. & POL. 275, 275–293 (2013).

169. This practice is codified under international law as well. *See, e.g.*, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Hague Conference on Private International Law, Nov. 15, 1965 (entered into force Feb. 10, 1969), https://perma.cc/RLV5-HC43. Widely known as the "Hague Service Convention," it is a multilateral treaty, adopted by member states of the Hague Conference on Private International Law, that aims to provide litigants in civil and commercial matters a reliable and efficient means of serving the documents on parties living, operating, or based in another jurisdiction.

170. *UDRP Rules*, *supra* note 9, § 2(a)(ii). This issue is also discussed in detail by Froomkin, *supra* note 7, at 674–77.

completed and the domain name is "locked" by the registrar.[171] Such a standard for the "effectiveness" of notice raises many problematic issues, such as whether a registrant was ever *de facto* informed of and understood the content of the "notice." Actual receipt of e-mail could be prevented by, for example, incorrect WHOIS data, spam filtering, or the language of the notice. These considerations are, however, not taken into account in establishing whether the notice was *effectively* served, for which simply *sending* an e-mail is sufficient under the UDRP Rules.

3. Response Window and "Default Cases"

Respondents have twenty days to respond from the date the service provider sends the notice,[172] or they may request an additional four calendar days to file their responses and the request will be automatically granted by the UDRP provider.[173] If a registrant fails to respond during this window, the panel decides the case based solely on the complaint ("default" cases) even if the respondent has not actually received or is not aware of the complaint at that time.[174]

Scholars have noted large numbers of "default" decisions which have already been made since the UDRP was adopted. For example, Michael Geist found a twenty-four percent response failure rate in three-member panel cases in 2002.[175] The large number of "default" cases is problematic from an international human rights law perspective, and is further aggravated by the fact that the UDRP does not contain any mechanism for appealing panel decisions.

4. No Appeal Mechanism

The only way to challenge a panel's decision to transfer a domain name to the claimant is an external judicial review, for which a registrant must file a lawsuit in a court of competent jurisdiction against the trademark owner.[176] Although such parallel legal proceedings are sometimes described as "appeals" of UDRP decisions,[177] a UDRP decision in fact lacks formal legal status, unlike a court judgment or an arbitral award.[178]

For example, in the United States, UDRP panel decisions are not considered legally binding under the Federal Arbitration Act: "The UDRP process has been

171. *UDRP Rules*, *supra* note 9, § 4(a)–(b).

172. *Id.* § 5(a).

173. *Id.* § 5(b).

174. *Id.* § 5(f).

175. Michael A. Geist, *Fair.Com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, BROOK. J. INT'L L. 903, 923 (2002) (finding response failure characterized seventy out of 292 panel cases).

176. *UDRP Rules*, *supra* note 9, § 4(k).

177. *See* Patrick L. Jones, *UDRP Decisions Challenged in Court*, UNIF. DOMAIN NAME DISPUTE RESOL. POL'Y LEGAL INFO. (Nov. 30, 2001), http://perma.cc/4XJL-3V2J.

178. *See* Parisi v. NetLearning, Inc., 139 F. Supp. 2d 745, 752 (E.D. Va. 2001) (noting that unlike arbitration awards, UDRP decisions are not subject to court confirmation and enforcement under the Federal Arbitration Act).

described as "adjudication lite" because the proceedings are handled entirely upon written submissions and the arbitration panel has total discretion to determine the application of precedent and rules of evidence. The UDRP decisions are not binding on the courts."[179]

If the original registrants initiate external review with the courts, it is a de novo review.[180] As David Sorkin explains:

> A legal action that challenges a UDRP decision therefore does so only incidentally to the legal claims that the action involves, claims potentially involving trademark and unfair competition law, contract law, fraud, conversion, privacy and personality rights, free speech, due process, public policy, and other matters related to the parties' overarching dispute.[181]

It is not always possible to file the parallel *de novo* proceedings and indirectly challenge the UDRP decision. For instance, in the United Kingdom, challenges to UDRP decisions have not been accepted by the U.K. courts, as demonstrated by *YoYo.email*.[182] In this case, the U.K. High Court heard a dispute involving the Royal Bank of Scotland Group and a business, YoYo.email, which had registered approximately 4,000 domain names with the *.email* domain. The High Court held that the UDRP itself does not constitute an independent cause of action under U.K. law, and that the UDRP did not "afford any jurisdiction" to the High Court to "act as an appeal or review body" from the UDRP panel's decision.[183] *YoYo.email* is significant because it illustrates the considerable difficulty unsuccessful registrants face in identifying a cause of action under national laws by which a UDRP panel's decision may be challenged.

However, panel decisions under the UDRP are contractually "binding" on the parties. And this seems to be the greatest paradox of the UDRP: One can lose the

179. Gen. Media Commc'ns, Inc. v. Crazy Troll, LLC, No. 06 Civ. 40581, 2007 WL 102988, at *4 (S.D.N.Y. Jan. 16, 2007).

180. *See, e.g.*, Barcelona.com, Inc. v. Excelentisimo Ayuntamiento De Barcelona, 330 F.3d 617, 624–25 (4th Cir. 2003) ("Because the administrative process prescribed by the UDRP is 'adjudication lite' as a result of its streamlined nature and loose rules regarding applicable law, the UDRP itself contemplates judicial intervention, which can occur before, during, or after the UDRP's dispute-resolution process is invoked."); *see also* Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745, 751 (E.D. Va. 2001); Taikwow Yung v. Trump, 927 F. Supp. 2d 32, 37 n.2 (E.D.N.Y. 2013). *See also* David E. Sorkin, *Judicial Review of ICANN Domain Name Dispute Decisions*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 35, 35, 44, 49, 53 (2001).

181. Sorkin, *supra* note 180, at 46 (stating that the UDRP calls for parallel litigation to resolve overarching claims); *see also* Famology.com, Inc. v. Perot Sys. Corp., 158 F. Supp. 2d 589, 590–93 (E.D. Pa. 2001). *But see* Virtuality L.L.C. v. Bata Ltd., 138 F. Supp. 2d 677, 680–83 (D. Md. 2001) (finding that where court's exercise of personal jurisdiction over trademark owner in parallel litigation is based upon consent to "mutual jurisdiction" required by the UDRP, court possesses jurisdiction only for purposes of trademark claims).

182. YoYo.email Ltd. v. Royal Bank of Scot. Grp. PLC [2015] EWHC (Ch) 3509, [31.1] (holding that "a proper construction of the UDRP clause [providing for independent court resolution of a controversy that is the subject of a UDRP proceeding] does not give rise to a separate cause of action in favor of the [registrant that is the losing party in that proceeding]").

183. *Id.* [31.2].

right to own or enjoy property under the UDRP by virtue of a decision which one cannot appeal internally via the UDRP process, but which at the same time has no formal legal binding value and cannot be appealed externally either. Such a decision has to be challenged *de novo*. This is particularly complicated from the human rights perspective because under international human rights law, property cannot be deprived or seized without a procedural avenue to challenge such deprivation, and without an appeal mechanism, the UDRP does not seem to satisfy this basic "fair balancing" test. Every individual whose right to property has been violated must have a right to appeal that decision.

Therefore, a clear imbalance emerges between the rights of trademark holders and domain name registrants. While an unsuccessful trademark holder in a UDRP dispute might bring an action under national laws for trademark infringement (or the tort of passing off),[184] unsuccessful domain name registrants who cannot establish trademark rights must look to very unusual causes of action, such as the tort of intentional interference with contractual relations. Therefore, a mere theoretical possibility of *de novo* parallel proceedings that is very difficult to realize in practice may be hardly sufficient for ICANN to comply with its Core Value to respect internationally recognized human rights.

D. SUMMARY OF PROBLEMATIC PROCEDURAL ISSUES

In sum, the overall fairness of the UDRP proceedings appears to be seriously compromised by several procedural factors, such as:

- lack of choice-of-law rules;
- lack of clear procedures for accreditation and selection of panelists;
- construing the notice of proceedings as "effective" once sent rather than accepted and read by the registrant;
- very short response window given to the respondent (especially given that the notice of proceedings is construed as "effective" once sent); and
- lack of an opportunity under the UDRP procedure to appeal panels' decisions.

Applying the human rights lens to the UDRP suggests that it may fall short in ensuring that ICANN respects "internationally recognized human rights" to property, due process, equality before the law, and nondiscrimination, as well as a right to an effective remedy. The next Part considers what might be done in the upcoming review process to bring the UDRP into line with "internationally recognized human rights."

184. "Passing off" is a common law tort which can be used to enforce unregistered trademark rights in common law jurisdictions such as the United Kingdom, Australia, and New Zealand. *See* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1842 n.3, 1861 n.95 (2006).

IV. IMPROVING THE UDRP PROCEDURE: WHAT SHOULD BE DONE FROM A HUMAN RIGHTS PERSPECTIVE?

Numerous aspects of the UDRP are problematic from a human rights perspective, and it is beyond the scope of this Article to propose fixes to all of them. However, in making sure that respect for internationally recognized human rights is reflected in the UDRP, the upcoming comprehensive UDRP reform process should address at least the interlinked issues of predictability, consistency, accountability, and transparency arising from the problematic procedural aspects of the UDRP outlined in Part III above. A number of the considerations raised in this Article in relation to procedural issues are closely interlinked with substantive aspects of the policy which arise from the text of the UDRP being insufficiently precise about its own objectives. Therefore, the procedural reforms in the upcoming review process should go hand in hand with a clarification of the UDRP's objectives.[185] This Part proposes some of the ways that the reviewers of the UDRP might achieve this.

A. IN "ACCORDANCE WITH THE LAW": INCREASING ACCESSIBILITY, UNIFORMITY, AND TRANSPARENCY

It is a basic principle of human rights law that interferences with the exercise of human rights, such as the right to property, can be legitimate only if they are in accordance with law. This first criterion of the famous three-part test is satisfied only if the law is clear, accessible, predictable, and uniformly applied.

Introduction of a Clear Choice-of-Law Clause. While the precise wording of the clause is beyond the scope of this Article and is a task for the ICANN community in the upcoming UDRP reform, it is paramount that the upcoming review process resolve the lack of a choice-of-law clause in the UDRP. The lack of such a clause has led to numerous interrelated issues, including application of different law and different outcomes based on the nationalities of the parties or panelists, forum-selling, inconsistent application, and unpredictability of the outcome based on facts. To increase the predictability and uniformity of UDRP decisions, a clear choice-of-law clause must be developed.

Uniform Supplemental Rules. Moreover, currently each DRP unilaterally adopts its own "Supplemental Rules" that result in inconsistency, lack of predictability, and so-called forum-selling. The development of uniform Supplemental Rules to be adopted by each DRP would substantially increase the uniformity and consistency of the UDRP system.

B. STRENGTHENING ACCOUNTABILITY AND TRANSPARENCY

To be accessible and uniformly applied, the UDRP as well as resulting decisions must be accessible to the public, which requires increased transparency and

185. On the importance of reforming the substantive elements of the UDRP, see Zalnieriute, *Beyond the Governance Gap*, *supra* note 8.

accountability.

Publication and Access to all UDRP Decisions and Statistics. From a human rights perspective, it is important that all UDRP decisions be published, as officially required by the policy.[186] However, currently not all UDRP decisions are published, or even searchable; for example, the Asian Domain Name Dispute Resolution Centre has many cases which are not published or searchable,[187] undermining the transparency and overall fairness of the system. In addition, disclosure of statistics on UDRP decisions, selection and composition of panels, and all other related data from all of the DRPs would significantly improve transparency of the UDRP system.

Uniform Standards for Accreditation and Appointment of Panelists. Similarly, accountability and transparency about the accreditation and appointment methodologies of the panelists by the DRPs should be increased by establishing uniform standard rules at ICANN level for panelist accreditations, de-accreditations, and appointment to specific panels. In addition, development of clear rules around conflicts of interest for panelists who also represent UDRP complainants (or, less often, respondents) would also substantially improve the accountability and impartiality of the system.

Disclosure of Conflicts of Interest by the DRPs. Accountability, transparency, and impartiality of the UDRP system as a whole would also be significantly increased by mandating that all the DRPs disclose their conflicts of interest.

Regular Comprehensive UDRP Reviews. The updated UDRP Policy should contain an explicit clause about future regular UDRP reviews to ensure ICANN's accountability to the multi-stakeholder community and to avoid arbitrariness in the policy development process.

C. OVERALL FAIRNESS AND DUE PROCESS

To increase the overall fairness of the UDRP system and bring it in line with respect for freedom of expression and the enjoyment of one's property, as well as to comply with due process and the right to an effective remedy, the upcoming reform process should consider the following measures.

Requiring Actual "Notice" to the Respondent. The stipulation of specific details for rules around communication and serving of notice is beyond the scope of this Article. However, at the core, the upcoming UDRP reform should change the rules around communication to require an actual—rather than attempted—notice to the respondent in order to bring the UDRP in line with due process requirements and legal consensus codified under international legal instruments, such as the Hague Service Convention,[188] which might provide useful guidance for the detailed

186. The UDRP itself states "[a]ll decisions under this Policy will be published in full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision." *UDRP Rules*, *supra* note 9, § 4(j). *See also* Doft, *supra* note 147, at 1020.

187. *See UDRP Rules*, *supra* note 9.

188. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Hague Conference on Private International Law, Nov. 15, 1965, https://perma.cc/

elaboration of the rules around notice.

Appeal Procedure. Establishing an appeals process within the UDRP system is particularly important in light of the U.S./non-U.S. dichotomy of UDRP interpretation under the flexible choice-of-law provision, which leads to an inconsistent and unpredictable patchwork of results.[189] Establishing an internal appeal process is fundamental for increasing procedural fairness and ensuring greater consistency and predictability of the UDRP system, as well as the uniformity of outcomes under that system.

Explicit Acknowledgment of the Access to Courts. Because examples exist demonstrating that respondents have not always been able to challenge UDRP decisions—which are *de facto* "binding" on the parties—in the national courts of their jurisdiction, the upcoming reform process should clarify this point explicitly in the Policy. Parties should retain the right to bring the dispute before the national courts before or after UDRP decisions are delivered, and under the same conditions for both complainants and respondents.

V. CONCLUSION

While the UDRP was created for making decisions on trademarks and domain names, it also indirectly established a platform for decisions affecting fundamental human rights. The UDRP claims to largely affect economic interests, but human rights are nonetheless either implicated in the process (as is the case with the right to freedom of expression, discussed in a separate article,[190] or peaceful enjoyment of one's property), or are ingrained within the procedure itself (such as the right to due process).

In this Article, I relied on an international human rights framework to evaluate the effectiveness of the procedural aspects of the UDRP. While human rights analysis does not provide concrete, simple answers, it serves as an additional framework within which ICANN's policies can be evaluated, expanding the focus and range of responses in the upcoming UDRP reform process. Applying a human rights lens to the UDPR procedure suggests that it may fall short of compliance with "internationally recognized human rights" to property, due process, equality, and nondiscrimination, or effective remedy. These shortcomings indicate that the UDRP system lacks basic fairness. More emphasis on "internationally recognized human rights" in the upcoming UDRP reform is particularly desirable in order for ICANN to fulfill its global public interest role. Special recognition of the importance of human rights in ICANN's bylaws requires it to ensure that the human rights baseline is taken into account in the upcoming review process and everyday application of the UDRP.

In this Article, I have argued that bringing the UDRP in line with internationally

RLV5-HC43.

189. *See, e.g.*, Alpana Roy & Althaf Marsoof, "*Bad Faith" and "Rights or Legitimate Interests" Under Domain Name Law: Emerging Themes from the UDRP and auDRP*, 20 MEDIA & ARTS L. REV. 282, 285–286, 303, 305 (2015).

190. Zalnieriute, *Beyond the Governance Gap*, *supra* note 8.

recognized human rights requires many procedural reforms. While the reforms suggested in this piece could help to ensure that that ICANN is fulfilling its new Core Value of respecting "internationally recognized human rights," procedural reforms alone will not be enough to transform the UDRP. I argue elsewhere that it is crucial that they are accompanied by an explicit reaffirmation of the narrow substantive scope of the UDRP and a more precise articulation and reflection of the UDRP's objectives within its substantive elements.[191] Such comprehensive reform, covering both the procedural and substantive policy aspects, is crucial to ensure not only that UDRP proceedings respect "internationally recognized human rights," but also that the design of other infrastructure-based global policies, ADR mechanisms, and future development of access to justice—which are often modeled around the UDRP—do not undermine the protection of fundamental human rights in the digital age.

191. *Id.*