

OK if any one disagrees with my reading please shout out...

Mary please do not worry about staff & member separation it doesn't matter who is right, what is important is to get this right. Looking at what Professor Swaine said:

"The scope of IGO immunity would most clearly be at issue if the Mutual Jurisdiction provision were irrelevant and the IGO had not itself initiated judicial proceedings, since that would risk waiving any immunity to which it may be entitled, including to counterclaims."

I think we can all agree that; initiating proceedings waives immunity including counterclaims.

"This might be the case, for example, if a domain-name registrant sought a declaratory judgment against an IGO in relation to some actual or potential infringement."

I think we can all agree that; if a TM owner starts proceedings to acquire a domain which an IGO has registered then an IGO would be entitled to use jurisdictional immunity to prevent a hearing taking place.

"That scenario, though not otherwise of concern here, does usefully isolate the question as to whether an IGO has a legitimate expectation that it would be entitled to immunity absent the UDRP"

I think we can all agree that; the working group has not and will not consider the case where a TM owner starts proceedings against an IGO.

Here's the problem

What Professor Swaine has done is say well he's isolated a situation where an IGO would be entitled to claim an immunity defence absent UDRP so now he's good to go for the rest of his report on immunity.

Wrong.

Just because Professor Swaine has identified a situation where an IGO is entitled to claim an immunity defence doesn't mean he can then apply it to other situations.

Proof

Absent UDRP there are two possible ways the immunity question could come before a court:

- (a) A TM owner seeks to acquire a domain which an IGO has registered
- (b) An IGO seeks to acquire a domain which a domain registrant has registered

In (a) the IGO would be entitled to raise an immunity defence
In (b) the IGO would be required to waive immunity for the court to consider the matter.

As the UDRP is an administrative procedure to help take less complex cases out of the judicial system if UDRP is to afford the same protections as any other forum then UDRP needs to take into account both scenarios.

- (a) A TM owner seeks to acquire a domain which an IGO has registered by bringing a UDRP
- (b) An IGO seeks to acquire a domain which a domain registrant has registered by bringing a

UDRP

Let's confirm what is happening with colours:

Blue = An immunity defence is good to go

Red = An immunity defence is a no-no

Applying the logic Professor Swaine has used we have

- (a) A TM owner seeks to acquire a domain which an IGO has registered by bringing a UDRP
- (b) An IGO seeks to acquire a domain which a domain registrant has registered by bringing a UDRP

What Professor Swaine is asking the reader to accept is the right to an immunity defence can be applied to both (a) and (b) scenarios and this can not be right because

Absent UDRP we have

- (a) A TM owner seeks to acquire a domain which an IGO has registered
- (b) An IGO seeks to acquire a domain which a domain registrant has registered

So the correct position at UDRP is

- (a) A TM owner seeks to acquire a domain which an IGO has registered by bringing a UDRP
- (b) An IGO seeks to acquire a domain which a domain registrant has registered by bringing a UDRP

Quite simply the IGOs are never entitled to jurisdictional immunity after initiating proceedings.