Semi-Private International Rulemaking: Lessons Learned from the WIPO Domain Name Process

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Some of the events discussed in this paper are in rapid flux. Unless otherwise indicated, this draft seeks to reflect events up to Aug. 26, 1999, when the paper was delivered.

INTRODUCTION

The World Intellectual Property Organization (WIPO) domain name process was an ambitious and at least partly successful attempt to make rules about a public issue–the relationship between Internet domain names and intellectual property law–via a semi-private process. It produced a lengthy and very readable report, which advanced the debate over the regulation of domain names. [WIPO, 1999] The semi-private process leading up to that report had several novel features, and perhaps as a result was not well understood by the public or even key participants. Trail-blazing is never easy. The lessons learned from this experience might suggest that this particular trail is better treated as a dead end; if, however, the process is to be repeated, as seems all too likely, lessons learned from this first run can improve any future attempts at a semi-private process.

A semi-private process is a cooperative endeavor between a public body and private interests that is designed to create a body of rules enforced by some mechanism other than direct promulgation by the public body. Semi-private rulemaking should not be confused with either negotiated rulemaking or self-regulation. In negotiated rulemaking a government agency or other public body meets with representatives of the groups who will be affected by the regulation, and seeks to find agreement on rules that can then be promulgated and enforced by the government. [Coglianese, 1997] U.S. law, for example, defines negotiated rulemaking as rulemaking through the use of "an advisory committee established by an agency... to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule." [US Code 5 USC § 562] True self-regulation excludes the participation of a public body. Thus, much of what is loosely called “self-regulation” is not in fact self-regulation. For example, US stock exchanges engage in so-called “self-regulation” but their rules are subject to approval by the US Securities and Exchange Commission.

Semi-private rulemaking melds the two: the rules may be drafted in a process superficially similar to negotiated rulemaking, but the role of the public body is different. The public body may take a direct role in the negotiations, as did WIPO, or it may act through a private proxy. Market regulation through the establishment of a government-owned market participant, or by a standards body are examples of action through such a proxy. The Commerce Department’s relationship with Internet Corporation for assigned Names and Numbers at times appears to have this character. Private federally chartered government corporations are a somewhat related phenomenon. [Froomkin, 1995] In either case, the public body either chooses not to promulgate the rule, or lacks the jurisdiction to do so; instead, the rule is enforced by some private means. In the case of the WIPO domain name process, WIPO suggested that Internet Corporation for Assigned Names and Numbers (ICANN) require the proposed rules to be included in every private contract governing the rights of registrants of the most popular types of domain names.

Although considerable scholarly attention has been paid to traditional regulation, negotiated

rulemaking, to markets as regulatory devices, to other forms of so-called "self regulation," and even to privatization of previously governmental functions, less attention has been paid to semi-private rulemaking of the kind exemplified by the WIPO process, perhaps because until now it has been relatively rare. Semi-private rulemaking may be on the increase, however, as governments and others look for flexible and credible ways to regulate transnational phenomena such as the Internet. Whatever the long-run prospects for semi-private rulemaking, experience gained in the WIPO process provides useful lessons for the emerging semi-private rulemaking processes now taking shape under the rubric of ICANN. Indeed, ICANN seems set to re-invent the wheel several times over, as it creates a bewildering profusion of subsidiary bodies [Rutkowski, 1999], each of which will need to figure out its own rules of procedure.

This paper offers a critical insider's view of the WIPO Internet Domain Name process. It is an "insiders's" view because I was a part of the process: I was a late addition to WIPO's advisory "Experts" panel, brought in about one-third of the way into the domain name process described here. Nevertheless, in some important ways I was not an insider. My addition to the panel appears to have been in response to complaints that there were no civil liberties experts included in the original advisory group. For reasons that were never made clear to me, WIPO chose not to empanel a representative of the Domain Name Rights Coalition, the advocacy group that had the most expertise and the longest track record as a counterweight to intellectual property rights holders. Instead they sought an academic, and picked one who was not, by any standard, a trademark expert, although I had both written about civil liberties in cyberspace and practiced as an arbitration lawyer. Even so, appointing an internal institutionalized representative of civil liberties issues was a noble and courageous move on WIPO's part, and I continue to hope that they do not now regret it especially since I was very public about my views as to where both WIPO's Interim and Final Reports erred. [Froomkin 1999a, Froomkin 1999b]

The WIPO experience raises broad questions about the appropriateness of public bodies engaging in creative procedures for rulemaking. As a general matter creativity of this short should be viewed with great caution, and perhaps even alarm. In democracies, traditional public rulemaking and rule-enforcement comes hedged with valuable substantive and procedural protections for those impacted by the rules. Semi-private processes may be subject to very attenuated democratic control at best, do not need to conform to due process, and if the WIPO process is any guide will be enforced in a way that makes it impossible to challenge the substance of the rules in any meaningful fashion. [Froomkin 1999c]

All that, however, is another story: this article will focus on *procedure* and not on substance. Whether you agree with it or not, WIPO's Final Report is elegantly written, contains a great deal of useful information, and sets out a clear view of the issues. I was very critical of some matters of substance, but my assessment of the procedure is that WIPO did many things right, and that those things can and should be emulated in any future semi-private process. I also will argue, however, that it did a few important things wrong–most of which could be avoided in the future. In fairness, however, one should note that WIPO was working on a very difficult issue, in a politically charged environment, to a short timetable, and that the WIPO process was in many ways the first of its kind.

There are costs to going first, but one of the benefits is that those who come later can learn from the experience.

There are also issues about how ICANN and others should weigh the end-product, the WIPO Final Report. External perceptions of the process may have diverged from what appeared, at least from my vantage point, to be the reality. These perceptions matter enormously in a semi-private rulemaking, because the end-product's influence relies on perceptions of fair and encompassing process for its political legitimacy and potential adoption.

A. DOMAIN NAMES: THE UNDERLYING ISSUES

Domain names are the alphanumeric text strings to the right of an "@" in an email address, or immediately following the two slashes in a world wide web address. By practice and convention, domain names can be mapped to a 32-bit number consisting of four octets (sets of eight binary digits) that specifies a network address and a host ID on a TCP/IP network. These are the "Internet Protocol" (IP- not to be confused with "Intellectual Property") numbers–the numbers that play a critical role in addressing all communications over the Internet, including e-mail, World Wide Web (WWW) traffic. [Mockapetris, 1987] They have justly been called the "human-friendly form of Internet addresses". [WIPO, 1999: ¶ 4] Their potential "friendliness" is also the source of legal and commercial disputes: business have come to view their domain names as an important identifier, even a brand. And as both businesses and users increasingly have come to view domain names as having connotations that map to the world outside the Internet, rather than as arbitrary identifiers, these conflicts, often involving claims of trademark infringement or unfair competition, have become more frequent.

The Internet works the way it does because it is able to route information quickly from one machine to another. IP numbers provide the identifying information that allows an e-mail to find its destination, or a request for a web page to reach the right computer across the Internet. Unlike e-mail, web page accesses can be achieved with an IP number. Thus, for example, http://www.law.miami.edu is equivalent to http://129.171.187.10 . However, email to froomkin@129.171.187.10 will not reach me or anyone else. IP numbers are hard for people to remember, so the designers of the Internet introduced easier alphanumeric domain names as mnemonics. When a user types an alphanumeric Uniform Resource Locator (URL) into a web browser, the host computer must "resolve" the domain name -- that is, translate it into an IP number. Both domain names and IP numbers are ordinarily unique (subject to minor exceptions if resources are interchangeable). The system by which these unique domain names and IP numbers are allocated and domain names resolved to IP numbers is a critical function on the Internet.

Currently, the large majority of domain names for Internet resources intended to be used by the public have a relationship to two organized hierarchies. (Internet-based resources for private use, such as intranets can be organized differently.) The first, very visible, hierarchy, relates to naming conventions for domain names and constrains how domain names are allocated. The second, and

largely invisible, hierarchy determines the ways in which domain names are resolved into the IP numbers that actually make Internet communication possible. The two hierarchies are closely related, but not identical.

Domain naming conventions treat a domain name as having three parts: In the address www.miami.edu, for example, ".edu," the rightmost part, is the "top level domain" or TLD, while "miami"is the second-level domain (SLD) and any other parts are lumped together as third-or-higher-level domains. Domain names are just conventions, and a core part of the current dispute over them arises from the conflict over whether new TLDs should be added to the so-called "legacy root" – the most widely used, and thus most authoritative list, of which TLDs will actually map to IP numbers. It should be noted that in addition to the "legacy root" TLDs discussed in this article, there are a large number of "alternate" TLDs that are not acknowledged by the majority of domain name servers. There is no technical bar to their existence and anyone who knows how to tell his software to use an alternate domain name server can access both the "legacy root" and whatever alternate TLDs are supported by that name server. Thus, for example, pointing your DNS at 205.189.73.102 and 24.226.37.241 makes it possible to resolve http://lighting.faq, where a legacy DNS would only return an error message.

The legacy root is currently made up of two-letter country-code TLDs (ccTLDs), and seven three-letter generic TLDs (gTLDs). There are 243 ccTLDs, each having a two-letter country code, almost all of which are derived from ISO Standard 3166. Not every ccTLD is necessarily controlled by the government that has sovereignty over the territory associated with that country code, however. This is likely to be an area of increasing controversy, as (some) governments argue that the ccTLD associated with "their" two-letter ISO 3166 country code is somehow an appurtenance of sovereignty. [ICANN Governmental Advisory Communique, 1999]. The ccTLDs sometimes have rules that make registration difficult or even next to impossible; as a result the gTLDs, and especially .com, have the lion's share of the registrations. Three gTLDs are open to anyone who can afford to pay for a registration: .com, .org, and .net. Other gTLDs impose additional criteria for registration: .mil (US military), .gov (US government), .int (international organizations), .edu (institutions of higher education,..arpa (primarily used for testing purposes). Domains registered in ccTLDs and gTLDs are equally accessible from any computer on the Internet.

The Registration Hierarchy

The registration side of the current DNS architecture is arranged hierarchically to ensure that each domain name is unique. At least prior to the recent introduction of a "shared registry" system, which seems to have introduced some at least transitory uncertainty about whether the master file is authoritative, a master file of the registrations in each TLD was held by a single registry. [Network Solutions, 1999; Rony & Rony, 1999] In theory, and ignoring software glitches, having a single registry ensures that once a name is allocated to one person it cannot simultaneously be assigned to a different person. End-users seeking to obtain a unique domain name must obtain one from a registrar. A registrar can be the registry or it can be a separate entity that has an agreement with the registry for the TLD in which the domain name will appear. Before issuing a registration, the

registrar queries the registry's database to make certain the name is available. If it is, it marks it as taken, and (currently) associates various contact details provided by the registrant with the record.

While one can imagine other possible system architectures, the current domain name system requires that each domain name be "unique" in the sense that it be managed by a single registrant rather than a single IP number. The registrant may associate the domain name with varying IP numbers if that will produce a desired result. For example, a busy web site might have several servers, each with its own IP number, that take turns serving requests directed to a single domain name. In a different Internet, many computers controlled by different people might answer to http://www.law.tm. In that world, WWW users who entered that URL, or clicked on a link to it, would either be playing a roulette game with unpredictable results, or they would have to pass through some sort of gateway or query system so their requests could be routed to the right place. (One can spin more complex stories involving intelligent agents and artificial intelligences that seek to predict user preferences, but this only changes the odds in the roulette game.) Such a system would probably be time-consuming and frustrating, especially as the number of users sharing popular names grew. In any case, it would not be compatible with today's e-mail and other non-interactive communications mechanisms.

The DN Resolution Hierarchy

The resolution side of the DN system is an interdependent, distributed, hierarchical database. [Rony & Rony, 1998: §3.4.2] At the top of the hierarchy lies a single data file that contains the list of the machines that have the master lists of registrations in each TLD. This is the "root.zone" or "root" sometimes the "legacy root." Although there is no technical obstacle to anyone maintaining a TLD that is not listed in the legacy root, these "alternate" TLDs can only be resolved by users whose machines, or ISPs as the case may be, use a domain name server that includes this additional data or knows where to find it. A combination of consensus, lack of knowledge, and inertia among the people running the machines which administer domain name lookups, means that domain names in TLDs outside the legacy root, e.g. http://lighting.faq, cannot be accessed by the large majority of people who use the Internet unless they do some tinkering with obscure parts of the their browser settings. [OSCR Root Zone].

Domain names are resolved by sending queries to a set of databases linked hierarchically. The query starts at the bottom, at the name server selected by the user or her ISP. A name server is a network service that enables clients to name resources or objects and share this information with other objects in the network. [Domains FAQ: §2.3] If the data is not in the name server, the query works its way up the chain until it can be resolved. At the top of the chain is the root zone file maintained in parallel on thirteen different computers. These thirteen machines, currently identified by letters from A-M, contain a copy of the list of the TLD servers that have the full databases of registered names and their associated IP numbers. (To confuse matters, some of these machines have both a copy of the root zone file and second-level domain registration data for one or more TLDs.) Each TLD has a registry that has the authoritative master copy of the second-level domain names registered for that TLD, and the root zone file tells domain name resolving programs where to find

them.

Since every Internet-related communication requires an address, and people tend to use domain names rather than IP addresses, DN lookups occur millions of times per hour. Most queries, however, do not make it to the computer holding the master list because copies are distributed to thousands of other name servers, and many local ISPs keep a cache of frequently-requested or recently requested IP numbers to provide better service to their customers. If a “local” nameserver doesn’t have the information needed, it can send a query up the tree, querying caches all the way, perhaps even going as high as a root server if the query involves a TLD whose address is not present in the local cache. [Barkow]

Domain Names and Trademarks

Governments issue (or, in the case of common-law trademarks, recognize) trademarks on a geographic and industry-sectoral basis. With the exception of some treaty-based registration systems that allow multiple registration in a unified process, trademarks are issued one country at a time. Further, trademarks generally are issued for one or only a few categories of goods of services at a time. Thus, a firm can trademark the word "United" for air transport, but this will not extend to moving vans unless the firm is in that business also. Trademark registrations generally require use to remain effective; while they are in effect they give the holder important rights against others who unfairly would seek to capitalize on the goodwill of the mark by confusing consumers. Equally importantly, trademarks protect consumers against those who might seek to pass off their goods as produced by the mark holder. As a general matter, however, in the US at least, trademark infringement requires commercial use by the infringer. Absent commercial use, some type of unfair competition, or a very small number of other specialized offenses (e.g. "tarnishment" of a mark by associating it with obscenity), trademark law does not make the use of the mark an offense. Thus, for example, in the United States and many other countries parody, criticism, names of pets, and references in literature, and every other use one might make of a basic dictionary word such as "united," are all permissible uses of a word that is also trademarked for some purposes. Indeed, unless the mark falls into a very small category of "famous" marks where it is considered likely that any product which bears the mark will be associated with a single source, it generally is permissible to make commercial use of a name trademarked by another so long as it is not likely to cause customer confusion. Even some types of commercial use of famous marks are permitted, e.g. accurate comparative advertising, news reporting, and news commentary. [*Aveery Dennison v. Sumpton* (9th Cir., 1999)]

The Internet is notoriously international, and every site registered in one of the legacy root TLDs is accessible world-wide. A system that relied on geographic distance and sectoral differentiation maps badly to a borderless world in which every participant in the global network needs a unique address. For some time now, there has been a near-consensus among policy makers interested in the Internet that the management of Internet domain names is a core issue of Internet governance. In particular, owners of trademark and related intellectual property (IP) rights have asserted that issues relating to so-called “cybersquatting” needed to be resolved before any new

TLDs could be added to the legacy root. "Cybersquatting" is shorthand for the practice of registering domains that correspond to other people's trademarks in the hopes of reselling them at a (sometimes substantial) profit. [Brookfield Communications, Inc. v. West Coast Ent., (9th Cir, 1998)] While there may be grounds to question whether cybersquatting is the first issue to resolve, some believe strongly that it is, and their view has dominated policy debates relating to new TLDs for the last three years or more.

Whether registration of a domain name that is identical to a trademarked term is in and of itself a trademark violation has been one controversial issue. Generally speaking, in the US at least, one does not violate a trademark right without commercial use (and, absent a finding that the mark is famous) likelihood of confusion. Unless, therefore, registration is itself a commercial use, mere registration without use of a domain name cannot be a violation of trademark right. This is especially clear in the case of trademarks in common words and in terms trademarked by more than one party. On the other hand, courts in the US and in the UK, have found that a person who made a practice of registering others' trademarks for potential resale was making commercial use of those trademarks and thus had committed a violation. [*Panavision Int'l v. Toeppen*, (9th Cir., 1998); , British Telecommunications v. One in a Million, (Court of Appeal, 1998)]

Bitter disputes arose between trademark holders and others who registered character strings identical or similar to their trademarks. In "cybersquatting" cases, the allegation was usually that the registrant was not using the domain but rather warehousing it in hopes of reselling it at a (sometimes substantial) profit. Not every string conflict, however, necessarily involved a claim of misuse of a domain and not all warehousing is necessarily a misuse. For example, firms sometimes acquire domains with the same name as a trademark they have registered even though they have no intention of using the domain. They do so in order to prevent someone else from using it and causing customer confusion. Similarly, firms and others sometimes acquire domains for future use. A firm may register a domain name before trademarking a term as part of the often-secret process of preparing a new product or campaign. In fact, these practices have given rise to some expressed concern that without new gTLDs large amounts of the attractive part of the namespace might become unavailable to users.

Conflicts also arise between multiple owners of a trademark in the same string of characters. The owners may be (1) sectorally separate (same country, but different use or different category of goods and services), or (2) geographically separate (same business, but different countries or regions within a country), or (3).both sectorally and geographically separate. [Prince PLC v. Prince Sports Group, Inc., (Chancery Division, 1997)] Conflicts also arise between trademark holders and persons with some other legitimate interest in a mark not deriving from a trademark. Each potential conflict tends to be aggressively pursued by trademark owners, because trademark law punishes owners who fail to police uses of their rights. An owner who fails to take action against a true infringer can soon find that the infringer has established rights of his own, and that the original mark is thus reduced in value.

B. ENTER WIPO

WIPO is one of sixteen specialized agencies operating under the UN umbrella. It is charged with promoting "the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization." [Convention Establishing the World Intellectual Property Organization, art. 3] Currently 171 states are WIPO members. [WIPO, Contracting Parties of Treaties Administered by WIPO]

In a "White Paper" formally known as the "Statement of Policy on Management of Internet Names and Addresses" issued by the U.S. Department of Commerce, the United States Government called on WIPO to:

> "initiate a balanced and transparent process, which includes the participation of trademark holders and members of the Internet community who are not trademark holders, to (1) develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cyberpiracy (as opposed to conflicts between trademark holders with legitimate competing rights), (2) recommend a process for protecting famous trademarks in the generic top level domains, and (3) evaluate the effects, based on studies conducted by independent organizations, such as the National Research Council of the National Academy of Sciences, of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders. These findings and recommendations could be submitted to the board of the new corporation for its consideration in conjunction with its development of registry and registrar policy and the creation and introduction of new gTLDs."

[United States Dept. of Commerce, 1998] The Department of Commerce subsequently designated ICANN as the "New Co." referred to in the White Paper.

By the time the US Government issued the domain name White Paper in 1998, WIPO was no stranger to the domain name issue. Three years earlier, in 1995, Network Solutions Inc (NSI) and the U.S. National Science Foundation (NSF) negotiated new terms under which NSI would continue to be the sole allocating authority for domain names in the .com, .org, and .net TLDs. This agreement allowed NSI to charge fees for registrations, signaled a new era in the commercialization of the domain space, and catalyzed a series of political maneuvers among those with interests in commercializing the Internet, or in protecting existing rights that might be affected by it. [Simon, 1999]. One leading organization, the International Ad Hoc Committee (IAHC), proposed to create seven new TLDs. [Rony & Rony, 1998: §13.5]. In the spring of 1997 the IAHC and others issued a Generic Top Level Domains Memorandum of Understanding (gTLD-MoU). Oddly, although the document is formally a private creation, and the signatories are private corporations, the International Telecommunications Union (ITU) agreed to "act as the depository" of the gTLD-MoU, and to promote it, as if it were an international convention. The gTLD-MoU created a twelve-person policy oversight committee (POC), with WIPO picking one member. [Simon, 1999]

The gTLD-MOU made WIPO the sole arbitral institution charged with administering any dispute arising from intellectual-property related claims settlement policy set out in the document. WIPO's Arbitration and Mediation Center had been established in 1994, although commentators

have not been completely kind to the institution, and its caseload was low. [Bernstein 1998: § 10-49]. Critics of the gTLD-MoU charged that its authors and proponents were over-solicitous of trademark interests, and they claimed that WIPO, a UN body charged with the promotion and protection of intellectual property, could not be a neutral body to hear or administer disputes between trademark holders and Internet-based competitors who might not have registered trademarks. The gTLD-MoU never achieved the critical mass of agreement necessary to claim consensus, and the belief that the plan was biased in favor of established trademark interests seems to have been a significant factor in the opposition. As passions ran high, many of those who opposed the gTLD-MoU decided WIPO was in cahoots with those who sought to expand the rights of existing trademarks holders to additional world-wide rights online; even for other less dogmatic opponents, WIPO's participation in what came to be seen as a partisan proposal made it next to impossible for them to conceive of WIPO as an honest broker.

The White Paper's call to WIPO to produce a study was thus not seen by all as a reference to a neutral, disinterested, expert body. On the contrary, by the time of the White Paper, battle lines were drawn and, at least in the eyes of the faction that wished to have new TLDs added to the legacy root quickly, WIPO was strongly identified with another faction, one that opposed large numbers of new gTLDs, and was very attentive to both the legitimate rights and the more ambitious claims of intellectual property holders. [Kleiman 1998] In the eyes of others, however, including the US government, WIPO was an expert body that could be asked to tackle an almost intractable problem.

WIPO responded to the US government's request for a report with the elaborate "Internet Domain Name Process" that is the subject of this paper. The WIPO process began a month after the White Paper, when WIPO published RFC 1, its draft "terms of reference," [WIPO, 1998a] and culminated in a Final Report issued April 30, 1999. [WIPO, 1999]. ICANN ultimately adopted part of the suggestions in somewhat modified form. [ICANN 1999a, ICANN 1999b]

Being an organ of the United Nations, responsible to all its member states rather than just the US, WIPO understandably felt empowered to define its own terms of reference rather than limit itself to the relatively narrow mandate set out in the White Paper. In its "Request for Comments 1," WIPO set out a laundry list of possible issues it might address, and asked for comments. [ICANN 1998a: ¶¶ 4-5.] WIPO posted these on its web page, and invited e-mailed or written comments. WIPO received sixty-plus e-mailed comments, which were publicly archived on its web site. The large majority of which supported its approach. WIPO then met with its Panel of Experts (although NSI Chief Litigation Counsel Philip Sbarbaro and I were added later), and issued RFC 2 in mid-September, 1998. [WIPO 1998b]

In RFC2, WIPO stated that it intended to make recommendations concerning (1) dispute prevention, (2) dispute resolution, (3) process for the protection of famous and well-known marks in the gTLDs, and (4) effects on intellectual property rights of new gTLDs. [WIPO 1998b: ¶ 12]. WIPO thus gave itself a considerably broader and more ambitious charge than the fairly narrow one proposed by the US in the White Paper.

The Consultation Process

The WIPO process had a number of innovative features, most notably an extensive consultation process. The process also included an advisory, if ultimately somewhat marginal, "Experts group" that was regionally diverse (although predominantly male, and perhaps inevitably had a heavy US representation) and composed of people with varied experience, including leaders in trademark law, in Internet technology, representatives of country-code registries and, with the addition of NSI's litigation counsel, of the major gTLD registry. WIPO undertook an ambitious, hybrid, consultation exercise in which it solicited comments both via a series of internationally dispersed physical meetings and by requesting e-mailed input that was archived on its web site. In hindsight, however, both parts of the consultation offer lessons for future projects.

Live Consultations

The live consultations began after the publication of RFC 2, the final terms of reference. Between Aug, 23, and Nov. 4, 1998, WIPO held open meetings in eleven cities: Palo Alto, Brussels, Washington, D.C., Mexico City, Cape Town, Asuncion, Tokyo, Hydrebad, Budapest, Cairo, Sydney. [WIPO, Consultations-First Series] Unfortunately, the publicity for these meetings left something to be desired. Meetings were announced on the WIPO web site, with dates set with varying degrees of advance warning but frequently less than the magic 21-day purchase period for airlines. The information was also posted to a WIPO announcement mailing list composed of a few hundred people who had previously found the web site. The mailing list had just over 200 members in July 1998, about 550 at the time of the first physical consultation, and eventually grew to 1358 by the Final Report. [WIPO 1998e; WIPO, 1999: Annex III] WIPO itself may have sent official communications to the patent and trademark offices of member states, but the brunt of publicity appears to have been handled by host groups and intellectual property associations. Neither WIPO nor the host groups posted meeting announcements on the various Internet technical or legal mailing lists in which I participate. Perhaps as a result, turnout at the meetings was not on the whole very impressive. The 11 regional consultations following RFC2 averaged 77 persons, with a very uneven geographic distribution ranging from 30 in Cape Town to 160 in Asunción. The six meetings following RFC 3 averaged just under 70 people, ranging from 48 in Toronto to 117 in Dakar. [WIPO, 1999: ¶ 28]. I only attended one meeting in the first round and four of the final six meetings, but it was my strong impression that the very large majority of the speakers, and indeed the attendees, at those events were either intellectual property rights holders, their lawyers, their trade associations, or Internet Service Providers. There were a few representatives from user groups, but only a few.

WIPO encouraged members of the Panel of Experts to attend these meetings, paid our expenses, and placed us on stage or at the front of the room. The meetings were chaired by a WIPO staff member and structured as if attendees were directing their remarks to the panel even though we were not in fact the drafters of the report. Members of the public were encouraged to present short prepared statements, followed by brief question and answer sessions. There usually was also a period of open discussion. Members of the panel of experts were encouraged to ask questions of the

attendees, but we were strongly discouraged from making statements of our own. In some cases, however, we did anyway, as did the members of the WIPO staff who efficiently chaired the meetings. The format was somewhat formal, but it was good-humored and there was a fair amount of give and take between panelists and audience, and even some comments from audience members responding to each other. The overall effect, however, was much more like a hearing before an administrative agency than, say, a faculty seminar.

WIPO made audio files and transcripts of the meetings available on its website, although in most cases these did not become available until well after the actual meeting, or even after the close of the comment period. Perhaps because of the time lag, I had little sense that large numbers of attendees at one meeting were aware of, much less responding to, what persons said in earlier meetings; in this regard the presence of repeat participants from WIPO and the Panel of Experts provided most of what continuity there was.

On-Line Consultations

WIPO's use of the Internet to further the consultative process was in some ways exemplary, in some ways poor, and in some ways timid. It was exemplary in that WIPO designed an attractive web site that was easy to navigate and which contained all the critical information about the process in very readable form. Although English was the primary working language for most meetings and commentaries, WIPO-produced materials and reports were available not only in English, but also in Spanish and French. WIPO reports that the web site received more than 700,000 "web hits"during the life of the process, although whether "web hits" are independent visits or page views is unclear. [WIPO, 1999: Annex 3, § 4]. Even taking the narrowest measure, in which the same people revisited the site repeatedly, this surely represents many thousands of independent visitors. The volume of traffic is all the more impressive as publicizing the web site does not appear to have been an especially high priority.

Furthermore WIPO made e-mail announcements to a mailing list it created and also set up an e-mail discussion group. The utility of the mailing lists was limited, however, by the "consultative" paradigm: the ultimate authors of the WIPO report, the WIPO staff, read the list but did not post to it. There was thus very little traffic on it, and the discussions that started tended to fizzle out quickly in the absence of any sign of intellectual engagement from the management. Given that WIPO is a somewhat bureaucratic body, and a part of the UN at that, it is unsurprising that staff may have been reluctant to engage in public dialog on an ad hoc basis. In contrast, there was a private list for the advisory panel, to which WIPO staff did contribute.

WIPO also received and publicly archived e-mailed comments to each of its three requests for comments. Again, the web tools were commendably easy to use and the comments easy to read, but the discussion was essentially one-way and one-time per request for comments. Comments were directed to WIPO, most came in at or near the deadline. WIPO did not undertake to reply, and there was little dialog amongst commentators.

In general, therefore, both the meatspace and cyberspace processes worked much like an informal agency hearing process: a draft document was put out for comment, the agency held public hearings and requested written input, and then retired in private to write and issue its conclusions.

Course of Discussions

After the first set of public hearings, WIPO issued its Interim Report, RFC 3. [WIPO 1998c] The report met with a mixed reception. Some members of the intellectual property rights holding community thought it did not go far enough for them; others either approved or had various technical objections. Those who had opposed the gTLD-MoU, and others also, had a large list of objections. [Froomkin 1999a] One notable objection was that although the White Paper had asked WIPO to "develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cyberpiracy" [U.S. Dept. of Commerce 1998] the report did not include a clear definition of what had come to be known as "cybersquatting". Another very controversial issue was the special protections proposed for famous and well-known marks. Famous and well-known marks are particularly recognizable trademarks that are entitled to additional legal protection beyond the ordinary protections afforded regular trademarks. [Federal Trademark Dilution Act of 1995; Paris Convention; TRIPS Agreement] Some national authorities have published lists of the marks considered famous and well-known in their jurisdictions; others leave it to their courts to decide on a case by case basis. Despite several years of work by an international panel convened by WIPO, however, there remains no agreed definition of what constitutes a *globally* famous or well-known mark, so WIPO proposed to set up a tribunal to rule on applications for this status. Marks found sufficiently famous would be entitled to additional protection against having domain names with the same or similar character strings registered in the DNS by anyone but the famous mark holder.

Process Difficulties

The Limited Role of the Experts

WIPO empaneled an impressive, experienced, and diverse group of people to advise it. I found it a privilege to be associated with them. Nevertheless, it was unclear to me what exactly WIPO had hoped the Experts would do. Whatever that something was, it certainly was not drafting.

My first introduction to the workings of the expert group was a two-day meeting in Geneva, in December 1998, to discuss the Interim Report that was due to issue shortly thereafter. Unfortunately, we were provided with only minimal text in advance of our meeting–some by email shortly before we left, more under the door of our hotel rooms the night before our first meeting. While our debates are confidential, I think it breaks no confidence to say that our meeting in Geneva was not a drafting session. Rather, we were invited to comment on the issues, and discussed the rather limited texts we had been given. WIPO then revised the texts very extensively, and e-mailed us the revised versions. We had only a very short turnaround, of a few days late in the holiday season, to comment by e-mail on what was, to my eye, a wholly new document. WIPO then made some additional changes, including the insertion of new material, and on Dec. 23, 1998 WIPO issued

RFC 3, the "Interim Report," which contained WIPO's first draft of its proposals. That report noted the Experts were not responsible for the text, [WIPO, 1998c: Annex I] but this fact often seemed to have been lost on attendees at the regional consultations I attended.

As noted above, several Experts attended each of the regional consultations. We then had another two-day meeting to discuss the comments on the Interim Report in Geneva in March, 1999. Again, this was not a drafting session. We were promised time to review the text of the final report before it would be issued. In fact, chapters 2-5 arrived by e-mail during what proved to the final week before publication, with the last one arriving perhaps two days before the report was issued. This made commenting in detail rather difficult. None of the Annexes in the Final Report, some of which contain critical procedural recommendations, were sent to the Experts prior to publication. Both the Interim and the Final Report were drafted privately by WIPO staff after the close of the public comment periods, and after meeting with the panel.

Mission Blur

The purpose of the WIPO process was to produce a useful document. But uncertainties and varying perceptions as to the objective of the exercise – to *whom* the document should be useful, and for what purpose – lurked throughout the process. On the one hand, WIPO is part of the United Nations; as such it represents the nations and peoples of the world. It is thus seen by many, especially in the less-developed countries, as more than an honest broker, rather a trustee, a protector of their interests. In addition, both the White Paper and WIPO's own terms of reference spoke of a balanced and transparent process–the kind of language that suggests a search for consensus. On the other hand, WIPO exists "to promote the protection of intellectual property throughout the world." Indeed, the many thoughtful and intelligent staff members I came into contact with appeared sincerely committed to this mission from the highest of motives. The history of the gTLD-MoU further polarized WIPO's position.

The suggestions relating to famous marks, mentioned above, were the most controversial of the recommendations in the Interim Report that survived into the Final Report. Even the trademark bar appeared divided, since there is great uncertainty as to how the WIPO tribunals would work in practice, and also some worry about the effects on a mark that applied for designation as globally famous but was rejected. However, several large trademark holders felt intensely about the issue. In their view the most famous marks had been the ones most frequently victimized by cybersquatters who counted on the expense of a court case to extort substantial ransoms before releasing domains they had registered. To these trademark holders, the introduction of new gTLDs threatened to repeat the expensive and painful experience over and over again. They were adamant that no new gTLDs open to all comers should be created until and unless someone mandated a policy that would protect famous marks. Although it certainly had a significant number of vociferous supporters, no one who observed the process could plausibly claim that WIPO's decision to keep the famous marks proposal essentially unchanged reflected a consensus on the issue, because there clearly was no consensus. Here, WIPO was clearly acting in some role more like advocate than consensus-builder, although precisely whose advocate was not explained.

Everyone involved in the process understood that the WIPO report was only advisory, and that the NewCo described in the White Paper (later, ICANN) would make the ultimate decision after some further process. In my opinion–and what follows is inevitably a subjective view–the advisory, intermediate, character of the report affected the deliberative dynamic in a number of subtle ways: it reduced participation, polarized positions, and removed pressure for a truly transparent process. The WIPO DNS process happened during a busy time for Internet governance. The main stage was occupied by the debates over larger issues raised by the White Paper, especially the nature and structure of the "NewCo." that would ultimately become ICANN. Many people without a direct financial interest in the trademark/cybersquatting issue felt, reasonably enough, that given onrushing deadlines, and limited time and resources, it was more important to focus on the fundamental structural issues being decided about NewCo, especially when it seemed clear that once NewCo was up and running they would have a chance to be heard on the intellectual property issues. This attitude was not lost on the trademark partisans within the WIPO process. It would not be surprising if the fear of being asked to make further compromises later led to a hardening of positions, since there was an evident danger that any compromise offered in the WIPO process might become an hors d'oeuvre. The result was that, even from my vantage point near the center of the WIPO process, it was not always clear to what extent various participants intended the final product to be a statement of a consensus position of all affected parties, or a consensus of the intellectual property community, or a bargaining token to be played before NewCo. Few people took the bargaining chip view, at least out loud. WIPO staff tended to suggest they were searching for a general consensus or at least an outcome fair to everyone, but at times they and other participants seemed to feel that their most effective contribution would to forge a consensus among an IP community that was itself of several minds on the key issues, and that it would be unreasonable to expect any more under the circumstances.

C. WIPO PROCESS COMPARED TO OTHER TYPES OF RULEMAKING

The WIPO domain name process can be usefully contrasted to international inter-governmental rulemaking via executive agreements or treaties, and also to a US federal agency notice and comment rulemaking. The WIPO process bore little resemblance to a traditional public international law-making or agreement procedure. For one thing, other than authorizing the WIPO secretariate to proceed [WIPO, 1998d: #P643_157650], governments appeared in the WIPO process primarily as commentators; the Final Report was drafted by the Secretariat and forwarded to ICANN without first being approved by the WIPO General Assembly. This differs from both the treaty-making and executive-agreement processes in which, whoever may do the actual drafting, states must take a formal action to ratify and effectuate the decision.

In contrast, the WIPO process bore a substantial similarity to a US agency rulemaking, although the two processes also had critical differences. The look and feel of the experience of attending a hearing was remarkably like an US agency promulgating rules under the informal rulemaking procedures of the Administrative Procedure Act (APA). Like a US agency engaged in informal rulemaking, WIPO published proposed texts, held public hearings, invited written comments, then published its final disposition.

WIPO is, obviously, not an US federal agency, and it was under no obligation to adhere to the APA's informal notice and comment requirements. The APA's rules nonetheless provide a useful touchstone against which to compare the WIPO process, as the APA is result of decades of evolution in a legal culture greatly concerned with procedural and substantive rights.

Despite the name, APA informal rulemaking is quite formal, although not as formal as the trial-like "formal" rulemaking . Among the most important requirements arising from the APA or judicial glosses on it, the agency must (1) issue a notice of proposed rulemaking and publish it in the Federal Register, (2) give adequate opportunity for comments (oral hearings are usually optional but not at all uncommon), (3) consider the comments and provide reasoned responses that address every issue raised in the comments. The APA also imposes a number of duties on agencies designed to promote fairness, such as rules regulating ex parte contacts with interested parties. Once an agency issues a rule, affected parties may challenge it in court if the agency failed to follow proper procedures, or if the rule is "arbitrary and capricious," exceeds the agency's statutory mandate, or violates a constitutional guarantee such as Due Process.

Measured by this standard, several aspects of the WIPO process are problematic, although not all of these problems were necessarily easily foreseeable. To begin with, WIPO's publication of its draft documents on its web site is both commendable and insufficient. On the one hand, there is no question that web publication is about as open and transparent as anything could be. On the other hand, there is the "purloined letter" problem–the actual as opposed to potential notice provided by publication on a web page depends entirely on whether potentially affected parties become aware that the web page is there to be read. Any ad hoc semi-private rulemaking, and especially the first one announced on any given web page, must overcome the risk that the notice provided by the open publication will fail to reach all the eyes that should see it unless accompanied by a very energetic outreach and publicity campaign. Lack of routines and formal structures also affect governments' abilities to respond as it becomes uncertain which department(s) are "in the loop". For example, it emerged that consultation was far from perfect within the very U.S. government which had called for the process to begin. At the March 10 WIPO consultative meeting in Washington DC, held only days before the final comment deadline, Eric Menge, of the Office of Advocacy, U.S. Small Business Administration stated that he had only learned of the proposals a week earlier.

More traditional, routinized, administrative and legislative procedures benefit from familiarity: interested parties know (or at least reasonably should know) how to inform themselves about potential rulemaking and legislation. It is difficult to say that affected parties reasonably should have known how to find the WIPO pages. Many obviously did, but the pool of potentially affected parties was large, distributed, and diverse. The lesson here is that outreach will be necessary until the number of affected parties who are aware of the project reaches some hard-to-define critical mass.

The notice issue also ties into the question of time limits. While WIPO's time limits for comments were tight, they were not unreasonable given that WIPO ran a single-track process, with centralized and clearly displayed information as to what was going on. Other processes, such as the

current ICANN process, may need considerably more time to allow people to comment when large numbers of issues are being considered in parallel, and information about what is going on is more dispersed and fragmented.

The citizen's right to comment under the APA [5 U.S.C. § 553] has received particularly important judicial glosses: the right to comment must be meaningful, not just a formality. One cannot, for example, have a meaningful opportunity to comment if one is denied access to relevant data, or if the agency adopts a final rule that could not have been reasonably foreseen from the notice of proposed rulemaking. [Kannan 1996] WIPO's willingness to make substantial changes to its interim report demonstrates both the value of taking public comment and the organization's willingness to listen. Nevertheless, at some imperfectly defined point, the introduction of new material after the close of the final comment period raises questions about the status of the final document. As the D.C. Circuit famously put it, a final rule should not be a "bolt from the blue". [Shell Oil v. EPA (D.C. Cir. 1991)] If a final rule diverges too much from a proposed rule, an agency must engage in another round of notice and comment.

The WIPO Final Report contained a wealth of material not found in the interim draft. All the procedural sections, for example, were completely new and in my opinion fit into the "bolt" category. Similarly, although the White Paper asked WIPO to define cyberpiracy, WIPO's Interim Report contained at most a very dubious definition of cybersquatting. [WIPO, 1998c: ¶ 244; Froomkin, 1998b: ¶ 164]. In contrast, the Final Report produced a substantially different and considerably superior definition. [WIPO, 1999: ¶¶ 171-172] Whether the second definition was a "logical outgrowth" of the first is, I think, debatable. My point is not that WIPO erred in changing its definition, quite the contrary, but rather than the decision to do significant new work after the close of the comment period sometimes makes another round of comments necessary. As the WIPO report was only an advisory report to ICANN, and ICANN itself would need to engage in its own comment procedure, this need was perhaps less great than usual–so long as everyone was clear on what had happened. Alas, this does not appear to have been the case. Many participants in the ICANN process have cited the WIPO report not only for the force of its arguments, but as the product of a consensus-seeking process in which its ideas were subjected to searching international examination. Cries of estoppel are not, I believe, reasonable on these facts, but the ad hoc nature of semi-private rulemaking makes unproductive debate over the import of what was agreed all too likely. Professor David Post's suggestion that would-be Internet rulemakers take responsibility for documenting outreach and consensus [Post, 1999] is well-taken, but the WIPO experience demonstrates that documentation by the institution may not suffice. WIPO in fact did an excellent job of documenting the very elaborate series of consultations it undertook. [WIPO, 1999: ¶ 30(i)] On its face this appears to be excellent outreach. What the numbers do not tell you, however, is how much or little WIPO publicized the meetings and website, or to whom, and how lopsided (from my admittedly partisan perspective, of course) the participation in those meetings was–especially before a very small number of observers concerned about the process mounted a campaign to broaden awareness.

The APA imposes a number of duties on agencies, including restrictions on *ex parte* contacts.

Agencies engaged in informal rulemaking are not forbidden from meeting interested parties ex parte, but they must docket the contacts, and provide a brief summary of the topics discussed. [*Home Box Office v. FCC* (D.C. cir. 1977)] No such formalities apply to the bodies managing a semi-private rulemaking, with pernicious psychological effects. Even if the process is utterly fair and aboveboard, it becomes impossible to convince the skeptic of this. People predisposed to believe the worst of WIPO or any other body performing a similar role will be convinced that the body is consulting secretly with the wrong partisans; without some kind of transparency requirement, such rumors are impossible to squash.

The ex parte contacts issue is actually part of a more fundamental problem. The APA imposes no requirement that agencies draft in public. By drafting in private, therefore, WIPO acted no differently from a US agency. But agencies are formally accountable to the courts, and the President, and Congress, and through them the people, although opinions about the extent to which formal accountability translates into actually accountability differ. WIPO's staff is formally accountable to the delegates from its member states, and only through them to the peoples of the world. There is no direct judicial review of its work, although implementation in contracts creates opportunities for court action if appropriate. Private standard-setting bodies ameliorate these problems by having relatively open drafting sessions; in some, like the IETF, anyone can participate. In others, such as the American Bar Association, one has to join the organization, and in still others, such as the American Law Institute, membership is restricted, but drafting is done by committees that tend to welcome interested non-voting observer/participants. While more open drafting sessions are much slower, and would probably have produced a less elegantly written product, the gains in legitimacy attained by such openness would, I believe, be substantial.

Legitimacy comes in many forms. The easiest is consensus, but while that is easy to claim it is hard to attain, and perhaps impossible given the polarized nature of the domain name wars. Legitimacy in rulemaking comes most commonly from democratic processes, but semi-private rulemaking by its nature is largely divorced from the democratic process. A form of legitimacy comes from a right to challenge and review, but the extent to which challenges are available or appropriate in a semi-private rulemaking will vary enormously with the circumstances. In the WIPO proceedings, the issue of judicial challenge did not arise, since the final product was only advisory. Nor was there an opportunity to query the report in the WIPO General Assembly, since the report went to ICANN before being considered by that body. (Quite apart from the merits of semi-private rulemaking, there may be reasons to be concerned about the precedent set by a procedure in which the staff of a UN body can make policy so independently of member states.)

The WIPO DNS plan will probably never be subject to judicial review. ICANN is a private non-profit corporation, with (at present) no members and hence no one to challenge its decisions. The WIPO report calls for ICANN to require registrars who sell registrations in domains that form part of the legacy root to include mandatory domain name dispute resolution plan in all the contracts contractually on all registrants in global top-level domains. This mandatory contracts approach contrasts with the enforcement mechanisms that apply to the results of other types of rulemaking. Agency rules, whether promulgated or negotiated, have force of law and are reviewable. Self-

regulatory processes, e.g. technical standards processes, rely on their intrinsic merit or market forces (including, at times, very coercive network effects) to attract adherence. Contracts fall between the two. They have force of law, but absent unconscionablity are not usually reviewable. Of course, contracts differ from (some) agency rules in that in theory one always has the option not to enter into the contract–at the cost, here, of forgoing a name in the gTLD space–while one may or may have the option to avoid the regulated conduct.

Thinking about semi-private rulemaking creates an almost irresistible compulsion to quote Winston Churchill's dictum that democracy is the worst form of government except for all the others. So far, semi-private international rulemaking looks mostly like one of those "others". There are very good reasons why societies entrust major aspects of social policy making to elected officials, and the difficulties of the semi-private process remind one strongly of those reasons. On the other hand, there are also valid reasons to decide things without recourse to democratic institutions. True 'bottom-up' methods exemplified by the better technical standards bodies is surely legitimate even if it too has its imperfections.

The legitimacy of the outcome of any given semi-private rulemaking procedure always will be difficult to gauge. The problem is compounded for international semi-private rulemaking by the relative thinness of the international public interest sector. In most democratic countries, civil society contains groups of various degree of formality that monitor the legislative and regulatory process. Whether one can speak of an international public interest sector, or international civil society is debatable; what is clear is that at best the equivalent institutions at the international level are few, and despite (or, sometimes, because of) the Internet, monitoring is difficult when meetings are far away in expensive places, or real-time-chat is at 4.am in the morning local time. Institutions are frequently less transparent, and their linguistic and cultural diversity, not to mention their geographic spread and sometime peripatetic nature, only adds to the difficulties. One certainly cannot have confidence that no decisions will fly in `below the radar'. Nor can one necessarily trust in self-proclaimed whistle-blowers: the good ones may not be heard, not everyone noisy is necessarily worth hearing, and it can be hard to sort them.

A semi-private rulemaking process poses a particularly stark choice for those who believe it to be captured by an interested faction. The process is dangerous to ignore because that increases the risk of future claims of consensus due to the absence of dissenting views. On the other hand, participating has risks also, as it increases the legitimacy of the final outcome: Proponents will say, accurately, that all sides were in fact represented. After all, semi-private rulemakers have no more duty to agree with any particular viewpoint than does an agency. Neither the right nor the opportunity to be heard is a right to a veto.

A semi-private process led by a public body risks combining some of the worst features of both traditional regulation and private ordering: Opaque decision-making is easy. In some cases the process may be managed by a body acting outside its jurisdiction. The public-private blend may also insulate the process from judicial review since it falls outside the categories that courts would tend to think of as within their purview. The great challenge for semi-private rulemaking therefore, is to

keep the advantages of the form, which I take to be rapid start of a process, relative rapidity of decision, and regulatory creativity, while adding in as many of the bureaucratic and Internet virtues as possible. The bureaucratic virtues include predictability, regularity, and review. The self-regulatory virtues, sometimes called Internet virtues, include openness, explanation, and sometimes excessive debate in the search for consensus.

A semi-private process may appear to offer the hope of working to a fast timetable, but this speed comes at a cost. It is no accident that the legitimacy of standards process is based on (over)full debate, and that even agency processes require a fresh round of notice and comment if the final rule begins to diverge too much from the one in the notice of proposed rulemaking.

D. SUMMARY AND CONCLUSION

Regarding one critical matter, the WIPO process was a significant success: WIPO ultimately produced a clear definition of cybersquatting (abusive registrations) that, despite its flaws, was considerably superior to those before it. That definition subsequently underwent additional refinement both before the US Congress [Anticybersquatting Consumer Protection Act] and before ICANN [ICANN 1999a], but the WIPO process undoubtedly played a pivotal role in framing the issues, and in moving the discussion forward. Other parts of the report, notably the recommendations relating to famous marks, were in my opinion less welcome and undoubtedly much more controversial.

Ultimately, however, the WIPO experience may be more important as a trail-blazing process than for any conclusions it reached. Lessons learned from this first run can be used to improve any future attempts at a semi-private process:

Beware Mission Blur. Everyone, not least the parties managing the process, needs to have a clear sense of goal, and of the managing institutions role in achieving it.

Outreach and Real Notice are Essential. Putting up a wonderful web page is important, but it is not enough. A very significant outreach program is needed to tell potentially affected parties about a semi-private process; in most cases there will be no reason to expect them to hear about it otherwise. In addition, long lead times are needed to allow information to propagate. If there are physical meetings, they (and, to the maximum extent feasible, their agendas) need to be announced well before the 21-day deadline for cheaper airfares. Last-minute changes need to be kept to a minimum, and if group decisions will be taken at physical or virtual meetings, procedural rules may need to be worked out with some detail in advance.

Involvement Can Affect Outcomes. At the risk of immodesty, it is probably fair to claim I was the most vocal, or at least verbose, critic of WIPO's interim report. [Froomkin, 1999a; Froomkin, 1999b] By no means all of my criticisms were adopted, or even addressed, in the Final Report. Nevertheless, many were, and I came away impressed with the degree to which participants were listening to opinions with which they tended to disagree.

Visible Intellectual Engagement by the Deciders Promotes Participation. The absence of judicial review in semi-private rulemaking might be turned into a benefit if the persons charged with writing the final rule are emboldened to engage in discussions with the public rather than have communications be essentially one-way. If there is no court breathing down your neck, the risks of saying something in public are less. Internet norms envision the deciders taking part in the give and take with commentators on mailing lists or similar interactive mechanisms. Without this interaction, potential commentators will be less likely to take part. Furthermore, although costly in staff time, there is more to be learned from a very interactive conversation than a small series of set piece meetings.

Explain and Document Procedures. The ad hoc nature of the process creates a greater need to explain the reasons for a decision. The explanation needs to both document the outreach, the consensus if any, and the reasons. This imposes substantial costs in staff time and in reader time as well, but a detailed report like the WIPO document is nonetheless greatly preferable to something conclusory.

Be Prepared for "Swerves". A good consultative process creates the risk of learning new things. Sometimes, often perhaps, these will require very substantial changes in existing proposals, or even wholly new ones. When that happens, another round of comments is essential, especially if the new ideas were not reasonably foreseeable from the process that preceded them. This has negative implications for the timetable. One way to blunt this danger, therefore, is to have the decision-makers engaged in a public dialog (e.g. an archived mailing list) with interested parties. If the thinking of the deciders begins to shift towards something new, detailed discussion of the proposal in a public forum reduces the "bolt from the blue" factor.

Caveat Lector. I have argued elsewhere that the greatest challenge posed by ad hoc rulemaking is figuring out when a processes was sufficiently legitimate to be worthy of respect. [Froomkin, 1999c: 631] In this paper I have tried to suggest that although the task of running a semi-private process that is not only legitimate but demonstrably so is not trivial, there are a number of things the convening body can do to at least run a better process. Whether even those suffice to overcome the fundamentally undemocratic nature of semi-private rulemaking remains debatable.

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