

## Internal Alternative Dispute Resolution at ICANN

By David B. Collier, Esq.

The Internet Corporation for Assigned Names and Numbers (ICANN) is one of the entities responsible for making the internet run. As its name indicates, it is responsible for the master data table for unique internet identifiers, the domain names and IP address numbers that everyone uses to access websites every day. It is a private-public partnership “dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission through bottom-up, consensus-based processes.” ICANN was empowered by the U.S. Department of Commerce in 1998 to take over management of the Domain Name System from the U.S. government.

Disputes over domain names arise very frequently, often between trademark holders and domain name registrants of those trademarks by others. ICANN promulgated a dispute resolution process to respond to that need. Domain names are not “property” in the same manner that other traditional intellectual property assets are. They exist by contract alone and are subject ultimately to the control of ICANN. Because of the relationship between ICANN and the service providers, it was possible to create a contractual ADR process.

Within ICANN itself is an additional dispute resolution process for those who may wish to lodge a complaint about a decision, action or inaction of the ICANN staff or board. Such disputes are referred to the office of the ombudsman. The ombudsman is an independent, impartial, and neutral officer of ICANN that functions as the Alternative Dispute Resolution (ADR) office for the ICANN community. The purpose of the office is to ensure that people have been treated fairly.

The Ombudsman does not have the power to make, change or set aside a policy, administrative or Board decision, act, or omission, but he does have the power to investigate these events, and to use ADR technique to resolve them. The Ombudsman does not have jurisdiction over complaints concerning: internal administrative matters, personnel issues, issues relating to membership on the Board; nor issues relating to vendor/supplier relationships.

Frank Fowlie is the inaugural ICANN Ombudsman, and has been the Ombudsman since November 2004. This month he generously sat down to discuss the internal ADR process at ICANN in a “virtual” interview from Asia.

**CM:** Frank, tell us a little bit about your background and what makes you so suitable for your ADR role at ICANN?

**Frank:** I think that I was selected as the Ombudsman, not so much for any particular part of my background, but rather for the wide scope of my experiences and training. I bring a

varied personal and professional past to the position. I do have a Masters of Arts in Conflict Analysis and Management, and I will finish a Doctor of Laws in Conflict Resolution this year as well. I have trained with the Program on Negotiation at Harvard. Much of my professional background has been in the field of investigations. I started my professional life as member of the Royal Canadian Mounted Police, working the Montreal Drug squad. I have also been involved in Human Rights, financial crime, consumer protection and Ombudsmanship. I spent a couple of years working overseas with the United Nations in East Timor, and I have French as a second language. In my case, I think I was found to be the most suited candidate for the job because of this rounded career, international experience, and good understanding of the Ombudsman function and process.



**Within ICANN itself  
is an additional  
dispute resolution  
process for those  
who may wish to  
lodge a complaint  
about a decision,  
action or inaction  
of the ICANN staff  
or board.**

It is important to bear in mind that my role, although it has a very strong ADR function, also investigates matters as an independent officer, and makes recommendations to the Board of Directors in those cases where ADR is not successful. One of the things that make this Office so unique is the fact that it serves a global audience. There are stakeholders, and members of the ICANN community across the globe; and I have a history on an international level; and an understanding that not all people and cultures approach conflict in the same way, nor necessarily resolution. My past experiences certainly help in this aspect. The second thing that makes this job unique is that it is a multi stakeholder - bottom up - consensus building organization. In that sort of

environment, the volunteers and stakeholders are important to the organizations sustainability, so my own background as a volunteer helps. The third point that makes this job unique is that it is a technology enhanced dispute resolution program, which is very unusual in the world of Ombudsmanship. While I not a "techie", I am very comfortable with the technology, and actually view it as being key and critical in the future of the dispute resolution field.

It is also important to remember that this is a sole practitioner office, so it has been key to be able to balance all of the files and activities of the Ombudsman.

**CM:** Tell us about the process at ICANN, what is a typical complaint and what would its lifecycle be?

**Frank:** It is very hard to say that there is such a thing as a typical complaint. There is a wide range of issues which the community brings to me for assistance each year. Like most Ombudsman operations, many of the complaints that I receive are outside of my jurisdiction, for example, people come to me with issues about problems they may be having with their domain name registrar, and are therefore outside of my mandate. We always try to be as helpful as possible, and when something is outside of my mandate, I always ensure that a referral is made to the best possible source of resolution. For those complaints that are in my mandate, again, there is nothing typical, and that's one of the joys of this job, it is incredibly varied. My mandate establishes that I am an independent reviewer of complaints concerning fairness, an obvious common theme is that complainants don't believe that they have been treated fairly. This may mean that some process or decision may have been unreasonably delayed; or that a decision maker may not have considered all of the facts; or that when a decision was transmitted that all of the reasons for the decisions weren't fully explained. It is impossible to predict timelines, as very often I'll be dealing with people in polar opposite time zones, and messages and replies are transmitted asynchronously. It also means that I am working with language barriers, and translations have to be conducted on incoming and outgoing emails.

I have attached a copy of my office's process model, which

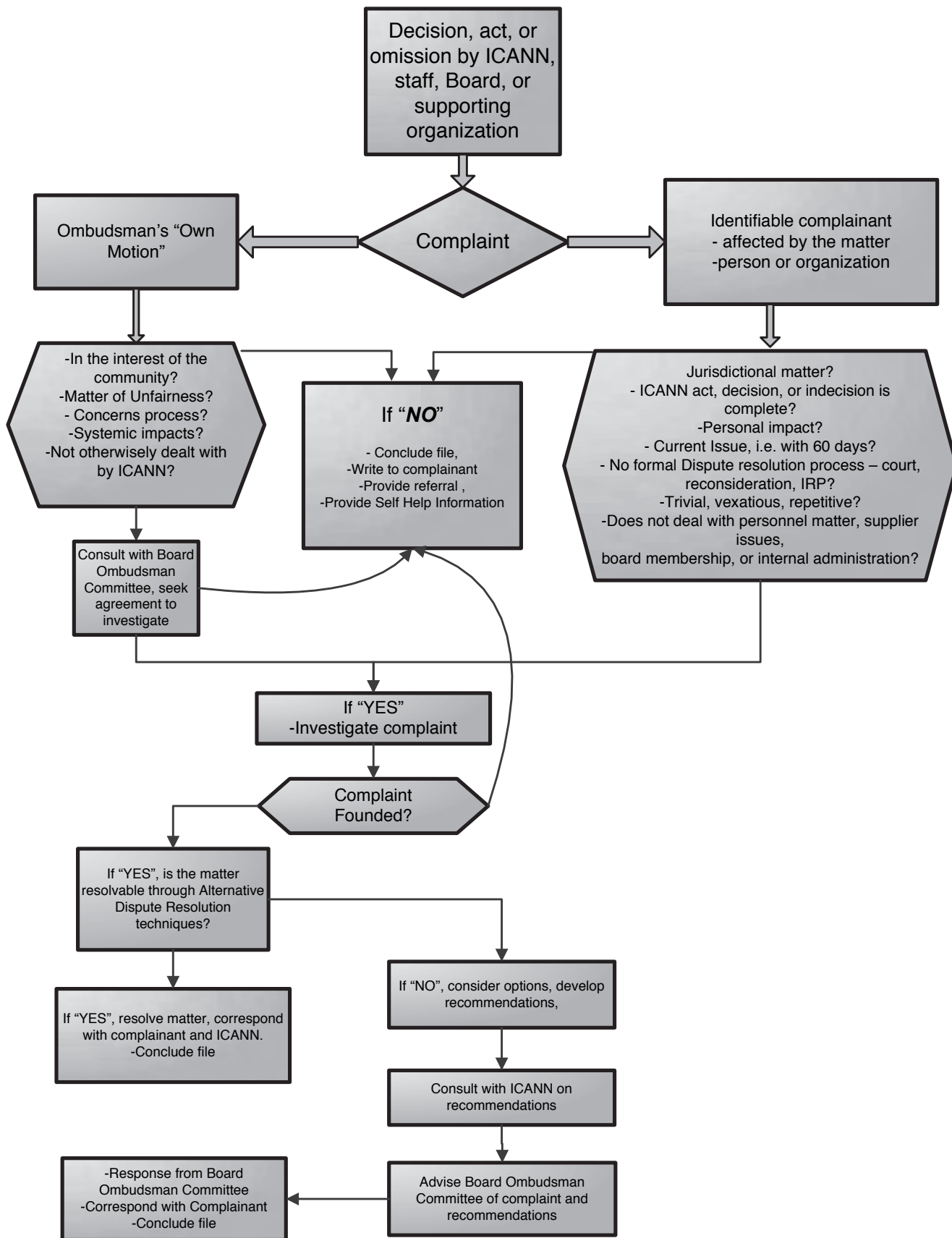
explains the cycle. It is impossible to predict how long investigations and resolution processes will take. Complaints are always reviewed and responded to in the first 24 hours, barring international travel or lack of bandwidth access on my part. Often, if the issues are clear, a file can be resolved in a matter of days. If the resolution or investigation process involves communicating back and forth with members of supporting organizations who are volunteers in the ICANN process, the timing can be a bit longer.

The Office of the Ombudsman always has two impacts in mind when looking at complaints. The first would be the individual. What is the hurt, what is the unfairness, and what is the redress? The second is on the systemic level. Is this complaint unique, or is there some systemic problem with a structural, administrative, or policy which requires change or improvement to make it fair? Systemic reviews tend have a longer life cycle than individual ones.

**CM:** Understanding that there is no such thing as a typical complaint, and that they involve both investigative and dispute resolution functions, can you describe for us a successfully resolved complaint from your experience that had a systemic resolution?

**Frank:** I think perhaps the best thing to do is to review an Ombudsman report. They are public reports, and are posted on my website, <http://www.icann.org/ombudsman/reports> so there is no breach of confidentiality. I think that actually seeing the report gives a much more vibrant portrait of what the work is, and how it is done. It is important to note, of course, that I don't have the power to direct any one to do anything. As an Ombudsman I can only recommend, and use the power of moral persuasion to move the organization to a conclusion. This is a very traditional Ombudsman role. Reports mark some very notable aspects of Ombudsmanship: the investigation; the ability to obtain information; the need to apply fair, logical, practical and available standards to define an unfairness; the attempts to resolve the matter at hand at the lowest level of conflict temperature; and the providing of practical solutions through recommendations. Office of the Ombudsman, Report to the Board of Directors File 06-317 is probably the most illustrative example.

**Report to the Board of Directors – File 06-317** is a 26 page report summarized as follows: Applicant sought to establish an At-Large Structure, which was rejected by the At-Large Advisory Committee (ALAC). The Ombudsman's investigation lead him to believe that that applicant was treated in an unfair manner on both an individual and systemic basis through unreasonable delay, mistake of fact, negligence and a lack of adequate and appropriate reasons for denial. The report goes through a dispassionate and clinical analysis of the circumstances relying on the ICANN By-laws, the Code of Administrative Justice (2003), and Black's Law dictionary. The report concludes with recommendations to the board of directors that were developed with ALAC to resolve the problem and prevent future occurrences. ([Http://www.icann.org/ombudsman/reports](http://www.icann.org/ombudsman/reports))



**The Internet Corporation for Assigned  
Names and Numbers (ICANN)  
4676 Admiralty Way, Suite 330  
Marina del Rey, California, USA, 90292**

**Tel: +310-823-9358 Fax: +310-823-8649**

**CM:** How would you advise an American lawyer representing someone and interacting with your office?

**Frank:** I think that one of the important things is for the community to realize is that this is an informal ADR process. There is no need for someone to be represented by counsel in order to contact an Ombudsman. I would suggest that it is very important for a lawyer to realize that the Ombudsman process is not adversarial. The Ombudsman acts as an advocate for fairness, and not for either of the parties. The Ombudsman is interested in redressing unfairness, and in helping the organizational systems to be fair. The Ombudsman doesn't assess blame, nor attribute damages or compensation. So, I believe that clarity of any Ombudsman's role for a lawyer is critical.

Personally, I tend to have very few complaints through lawyer's offices. I would say to a lawyer that it is important that they understand that the Office of the Ombudsman is the last avenue of an alternative administrative redress in an

organization or government, and that it is important to underline that the process is stand alone. Should a party decide to use a formal process such as a court system, bylaw approved reconsideration appeal or review process, my jurisdiction would cease, and I would have to close off my work. It is also important for lawyers to understand that the Ombudsman's work is done in private and in confidence, my Office does not act as a fact finding body for the purpose of providing evidence for litigation. I think that lawyers, like other third parties, can assist in the Ombudsman process by ensuring that there is a reasonable expectation of what an Ombudsman can do to resolve the issue, by being helpful when there are challenges for their clients with literacy or computer literacy (given that this is an online DR environment) and by ever bearing in mind that fairness is the key mandate for the Ombudsman.


**CM:** Thank you very much for your time sir.

**Frank:** Thank you.

For anyone that is interested, further information can be found online at <http://www.icann.org/ombudsman/>.



**David B. Collier, Esq.** is an associate at the Hartford, Connecticut office of Rome McGuigan, PC, and a member of the firm's Litigation, Intellectual Property and Technology Law Practices. Mr. Collier can be reached at [DCollier@RomeMcGuigan.com](mailto:DCollier@RomeMcGuigan.com).



**ababooks.org**...the source you trust for practical legal information

Visit the ABA Web Store at [www.ababooks.org](http://www.ababooks.org)

**Features of the Store Include:**

- E-Products
- Special Discounts, Promotions and Offers
- New Books and Future Releases
- Best Sellers
- Gift Certificates
- CLE Books & Tapes
- Magazines, Journals and Newsletters

**Over 35,000 customers have purchased products from our new ABA Web Store. This is what they have to say:**

**"The site is easily manageable."**

**"...I found just what I needed and obtained it quickly! Thanks."**

"...I appreciate being able to view parts of books (such as table of contents) prior to purchasing."

**Don't hesitate. With over 2,000 products online and more being added every day, you won't be disappointed!**

