

July 6, 2009

RE: National Arbitration FORUM comments on IRT Final Recommendations

Dear ICANN Board:

The National Arbitration Forum (“FORUM”) hereby submits its comments regarding the proposals of the Implementation Recommendation Team (“IRT”). The FORUM offers nearly ten years of experience as a domain name dispute resolution Provider under the Uniform Domain Name Dispute Resolution Policy (“UDRP”) and similar rule sets. We take great pride in the services we offer the IP community and want to continue to serve ICANN. Please accept our comments as a way to show our commitment to the process and objective of ICANN.

Background

Over the past ten years, the Forum has handled well over 10,000 domain name disputes cases; during that time we have experimented with processes and updated our Supplemental Rules which have allowed us to evolve our program to better serve parties. We respect and understand what the IRT is trying to accomplish in their recommendations and will always support changes that will make the program better for the user community. However, being a premier dispute resolution provider for ICANN and having years of practical experience, which allows us to really understand what it takes to manage domain name disputes, we hope that you will allow us to point out potential issues or make recommendations to areas that may need further thought. Our most significant comments are focused on the proposed Uniform Rapid Suspension System (“URSS”). While we can appreciate the concerns driving the URSS, and can understand wishes to improve currently available processes, we believe that the URSS as it is proposed is flawed and will ultimately not accomplish the desires of the IRT which will adversely affect the user community.

The FORUM’s comments with respect to elements of the URSS

It appears from IRT comments that the UDRP is inadequate or needs to be updated or fixed in the face of what could be unprecedented expansion of the TLD space. They have chosen to recommend an additional policy, rather than working with what currently exists. There has been a lot of discussion about the impossibility of re-opening the UDRP for discussion. While the FORUM agrees that the re-opening the UDRP for discussion could stir up a fair amount of controversy, there is a wide body of experience out there from many perspectives (Registrars, trademark holders, Providers, respondents, attorneys, etc). This type of experience would lend itself to a practical “this works, this doesn’t” discussion, not the theoretical discussions that can only take place when

something new is being “invented.” Although the IRT has contended that the URSS will “supplement” the UDRP, the practical effect, at least for new gTLDs, will be to replace it. We have found that the existing UDRP process works; instead of taking a system that might be improved or updated with a little adjusting, the IRT is proposing that ICANN essentially start from scratch. We strongly recommend that ICANN invite input from all stakeholders, including current Providers, regarding what is or is not currently working.

It is unlikely that the Internet community of people likely to be impacted by either the implementation of the URSS or the re-negotiation of the UDRP would find the URSS to be so appealing and a re-visiting of the UDRP so simultaneously repulsive that the implementation of one, while not addressing any issues with the other, would sail smoothly through any public comment fora available. We can see this is true with the initial comments for both the first IRT draft and the final report. Trademark holders are displeased that rights protection will not be as fast or cheap as they’d like and domainers are arguing that the URSS strips their rights and is tantamount to “shoot first, ask questions later.” A reopening of the UDRP would maintain the current integrity of the system while giving the user community what they are asking for.

What follows is our assessment of various URSS provisions We invite ICANN to consider our comments and welcome our input in determining what form the URSS should take, if any. Additionally, the FORUM has proposed some changes at the conclusion of our letter that we ask ICANN to consider as an alternative to implementing the IRT’s version of the URSS in its entirety.

The URSS in comparison to the UDRP

The UDRP also started out as a low-cost and rapid way to take down infringing domain names without resort to the cost and time of the courts (not to mention serious jurisdictional issues). FORUM cases on average are completed within 50 days from filing to decision. On a routine basis, cases are completed within 29 days. It is clear that the UDRP is inexpensive, and it is fast.

The URSS is supposed to deal with “abusive uses of trademarks where there is no genuine question as to the infringing or abusive use of a mark in a domain name.” However, this is exactly the purpose of the UDRP.^{1,2} Historical comments related to the formulation of the UDRP, and an analysis of UDRP Paragraph 4(c), in particular, make it clear that the UDRP was not designed to deal with any situation where a respondent

¹ “The White Paper also called upon ‘the World Intellectual Property Organization (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 . . . develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cybersquatting (as opposed to conflicts between trademark holders with legitimate competing rights).”

<http://www.icann.org/en/meetings/santiago/udrp-staff-report.htm> (emphasis added)

² “The WIPO final report recommends that ICANN establish an administrative procedure for the cancellation or transfer of domain names found to have been abusively registered (in essence, through cybersquatting/cybersquatting) in violation of another's rights under a trade or service mark by an SLD holder with no rights or legitimate interests in the domain name.”

<http://www.icann.org/en/meetings/santiago/udrp-staff-report.htm#6>

might possibly have a claim to the domain name. Complainants have increasingly offered Panelists a broader range of “activities” that suggest a respondent’s lack of rights or legitimate interests or bad faith registration and use. Panelists have taken the opportunity, over time, to agree with those complainants and broaden the scope of the UDRP, but it started out as a mechanism only for clear cut cases of cybersquatting. It is easy to see how this happened—the UDRP is less expensive and faster than litigation, so if a complainant can get the remedy it seeks from the UDRP rather than court, even if the respondent’s activity might not be strictly abusive cybersquatting, why not try? This is actually evidence that the UDRP works—parties prefer the UDRP process to court. However, the FORUM does not see how the IRT’s repeated statement that the URSS is intended to deal ONLY with “abusive uses of trademarks where there is no genuine question as to the infringing or abusive use of a mark in a domain name” will stop this expansion from happening again under the URSS; it is only an intent and has no binding effect on the Panelists or practical means of enforcement.³

Abusive complaint sanctions

The FORUM believes that the abusive complaint sanctions are potentially a good deterrent against such “expansion,” recognizing that it’s possible not every case of abuse would be realized or identified; there is some danger to legitimate domain name registrants. We believe sound Panelist training would be a requirement. The FORUM supports cooperation between any approved Providers so as to not allow the types of complainants who would be guilty of abusive complaints to “Provider-surf” to obtain multiple opportunities for hijacking legitimately registered domains. One possible solution for helping with this is to include in the complaint a certification as to the number of abusive complaint findings a complainant has had (and the case numbers/dates for those).

Cost

One of the FORUM’s greatest concerns includes the fees proposed by the IRT. It doesn’t appear that any research was done by the IRT as to the costs associated with offering dispute resolution services. The fees charged by the FORUM for domain name dispute resolution barely cover expenses after the Panelists, who currently receive 2/3 of the filing fee, are paid.

The panelists in domain name cases are paid a significant portion of the fees collected. Our concern is two-fold; first we do not believe that any legitimate provider would be able to find professional neutrals who would decide the case for even half of the \$200.00 fee proposed. Second, if the fees were split between the provider and the neutral, the \$100.00 balance will not cover administrative costs for the provider. In fact, in some cases, it wouldn’t even cover the cost of mailing the required certified letters.

The FORUM strongly urges ICANN to allow the Providers to set their fees, market dynamics will keep the fees low. Compare for example WIPO and the FORUM’s fees.

³ The FORUM has no substantive opinion as to if the expansion of the applicability of the UDRP as a practical matter is good or bad. We merely note its occurrence, and note that if it’s the intent that this NOT occur under the URSS, we see no mechanism for stopping what appears to be inevitable.

We are both the primary providers for Domain Dispute services for ICANN. Even though WIPO is a not for profit organization the Forum's filing fees are lower which illustrates the fact that the market will ultimately set a fair price for services.

As always, our concerns are for the quality and service of the users of the system. On the outset, the cheap pricing proposed by the URSS sounds great to users, however we know, based on our experience, that there will not be a provider who can provide fair, neutral, complete decisions for this fee amount, which is ultimately what the users of the system really need.

The FORUM requests that ICANN study the actual costs of running a dispute resolution service and to also study the market to determine what an acceptable Panel payment would be for these cases. We know that it would be impossible for our expert panel to provide the services proposed by the URSS for significantly less money, which the URSS is proposing.

Verification

The URSS will require verification and a lock within 24 hours. That is currently the request the FORUM makes to all Registrars in UDRP cases. Some very large, reputable registrars do respond promptly and completely within the 24 hour time period. However, currently, no penalty exists for failing to comply. The FORUM recommends that a penalty for registries failing to reply within 24 hours be implemented or nothing will change from the way verification is currently handled. From a technical perspective, the FORUM urges ICANN to address weekends and holidays in the timeline provided by the IRT, taking into account long national holidays enjoyed by the citizens of some countries. It may be impossible for a registry to reply over a weekend or holiday due to staffing.

Deficiency check

The URSS Provider gets 24 hours to do a deficiency check. The FORUM appreciates the "form" nature of the complaint and notes that this could drastically reduce the amount of time and effort spent on deficiency checks. Again, clarification is needed to determine whether the 24 hour deadline includes weekends and holidays.

Limitation of evidence

The URSS doesn't purport to limit page counts for the URSS and many filers submit large volumes of material as Annexes to their filings. The FORUM believes that parties will continue to do the same under the proposed URSS. The problem that this poses to the proposed rules is that most panelists do believe it's their duty to read the voluminous submissions of the parties and will do so, regardless of the IRT's comment that "several panelists" believe that the URSS document review will take 15 minutes. The UDRP didn't start out with this challenge, rather, this evolved over time. Without specific restrictions, the challenge continues to grow for Providers and their neutrals. We ask ICANN to clarify if there will be provision for the Provider to incorporate Supplemental Rules that will be able to limit the volume of or specific submission types, or to include such in the URSS Rules when they are developed.

Late responses in default cases

The FORUM is concerned about the provision allowing a respondent to come back at any point in time to file a response in a URSS case. This will be challenging for two reasons:

1. The Panel has been dismissed as to this case and has been paid. It is unrealistic to expect the panel to do this additional work free of charge. 2. It is unrealistic to expect that the same panel will be available to review the re-opened case. This suggestion by the IRT is entirely unfeasible, from a practical, Provider prospective.

The FORUM recommends that any default case worth defending, that was not defended initially, should be subject to a fee to cover administrative and Panel costs, payable by the respondent.

The Provider as “funds escrow” entity

The FORUM is very concerned about proposals throughout the entire IRT report that suggest that Providers should accept fee payments, hold on to them in escrow, and release them appropriately. The URSS Provider is being asked to perform much the same functions as a UDRP Provider (including hosting a website for decisions, even faster turn-around times, and expert, quality Panel lists) for a fraction of the current cost. The IRT is now proposing that the Provider handle the escrowing and disbursing funds at various points, even suggesting that parties keep “accounts” with the Provider for easy transfer of funds. We have concerns that this would subject the Provider to increased fees, potential regulations related to escrowing of funds, and increase Provider liability for mistakes, to say nothing of the administrative tasks in a proposed system that places little value on administrative tasks as evident by the proposed fees.

The FORUM urges ICANN to either do away with this requirement or if this service is required allow the provider to charge accordingly so that this complex service can be provided accurately and timely to the users of the system.

Service

The IRT proposes that service should be achieved by the Provider via two emails and one letter. The FORUM supports this proposal. The FORUM notes several comments from people in the domaining industry who object to service via email. We have three responses: 1. To assert that people who are in the business of buying and selling domain names do not check their email is hard to believe—their industry IS the internet; 2. we propose that the registries/registrars collect data for a “legal” contact that may not be available publicly; when the Provider requests verification for the domain name, that can be provided—assuming that email address is not used by anyone other than Providers, that email folder should remain relatively spam-free; and 3. as WIPO pointed out in its eUDRP proposal of months ago, we too note that the vast majority of “actual notice” we achieve is via email. More mail and faxes are “bounced” or returned than email.

FORUM suggestions to ICANN as it considers whether or not to implement the URSS, and if so, in what capacity:

If the URSS is to be accepted at all, we propose that ICANN consider fully integrating the URSS and the UDRP. Some suggestions for this could include:

1. Creation of a two-tiered system where the first tier is an abbreviated review on the merits (a la URSS) by either (a) an in-house expert hired by the Provider, (b) one or more independent contractor experts retained by the Provider, or (c) a qualified expert mediator (who may even attempt to help the parties to a resolution in a Response situation). The second tier could be a full-fledged UDRP process, where the parties receive credit toward their filing fees at tier 2 for having participated in tier 1. Either party could move/pay to have the dispute moved to the second level at any point. The parties might be allowed to provide additional submissions at that point to supplement the more abbreviated submissions of the URSS. In either tier ICANN will need to consider realistic fees so that the needed services are provided. Without this ICANN will ultimately be criticized for not insuring that the providers are providing quality services that meet the user's expectations.
2. Rather than allowing late Responses to a URSS (or the UDRP) in perpetuity, create a UDRP Appeals process where either party could pay to appeal to a new Panel (ICANN could require the use of a different Provider for the Appeal). Of course, court is always an option as well.
3. Allow the UDRP to provide an electronic solution that the users desire by matching the requirements of the URSS and establish electronic-only communication for both dispute resolution systems (with the possible exception of a certified letter upon commencement, though the FORUM does not believe the use of mail is necessary in the domain name world).
4. Require Registries (for the URSS) and Registrars (for the UDRP) to have valid email addresses for requesting verification and require both to respond to Provider requests within a realistic timeframe (the FORUM advocates that one business day is sufficient), as articulated in our "Verification" point, above.
5. Address issues with respect to the language of the proceedings. The URSS seems to assume that all proceedings will be in English, regardless of the language used for the Registration Agreement or the language the domain name is in. The FORUM cautions ICANN against adopting UDRP Rule 11 as part of the URSS, due to practical problems (e.g. the Panel is not yet appointed when the case language must be determined). However, the FORUM encourages ICANN to address the issue of "language of the proceedings" in the URSS.

Conclusion

The URSS has all the earmarks of what the UDRP was created to accomplish. If the UDRP has strayed so far from its roots that the IRT is proposing it be scrapped in favor of a more streamlined model, then it's time to take another look at the UDRP, rather than providing a new process that has not been vetted and discussed by the Internet community as a whole. The URSS, from the standpoint of an experienced Provider, is unlikely to meet the needs of the Internet community as a whole in any way that the UDRP cannot. The Forum welcomes the opportunity to discuss further if ICANN so desires. Thank you for the opportunity to provide comment to such a critical phase in ICANN's history.

Kristine Fordahl Dorrain, Esq
Internet Legal Counsel
National Arbitration Forum
kdorrain@adrforum.com