

VIA EMAIL

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To: Mr. Beckstrom, Mr. Crocker, the ICANN Board and Staff and GNSO Council:

MarkMonitor Inc. ("MarkMonitor") appreciates the opportunity to submit these comments in connection with the Preliminary GNSO issues report on The Current State of the Uniform Dispute Resolution ("UDRP Issues Report"). MarkMonitor also wishes to thank the ICANN staff for the time and effort expended on the UDRP, associated discussions and preparation of the UDRP Issues Report.

Introduction:

The Registration Abuse Policies Working Group ("RAP-WG") was formed pursuant to the original GNSO Council Resolution dated December 18, 2008.

Pursuant to the Charter, the RAP-WG was asked to identify "which aspects of the subject of registration abuse are within ICANN's mission to address and which are within the set of topics on which ICANN may establish policies that are binding on gTLD registry operators and ICANN-accredited registrars" which was to "include an illustrative categorization of known abuses."¹

On November 15, 2010, the RAP Implementation Working Group ("RAP-IWG") (convened to determine the best approach for the GNSO to handle the numerous recommendations in the RAP Final Report) submitted its formal letter to ICANN.

MarkMonitor was an active participant on both the RAP-WG and the RAP-IWG.

¹ The issue of the RAP-WG reviewing the Uniform Dispute Resolution Policy ("UDRP") was never specifically referenced in the original resolution, however, the ability of the RAP-WG to do so was likely authorized by the GNSO's request to "identify and recommend specific policy issues and processes for further consideration by the GNSO Council."

On May 27, 2011, ICANN staff submitted its UDRP Issues Report.

Discussion:

A review of the UDRP should be delayed (at a minimum) until further information is gleaned from the RPMs associated with the new gTLDs

Undertaking a wholesale review of the UDRP will entail a massive effort given the intricate and complicated nature of this mechanism. The RAP-IWG recognized this problem and concluded that such an endeavor would be large in complexity, scope and size. The group recommended that a drafting team be convened to develop “a roadmap for addressing these issues, possibly through multiple PDPs grouping together related issues in a similar way as was done for the review of the IRTP”.

This tracks the recommendation of the ICANN Staff that, if a PDP is to be initiated, a first step is to convene a small group of experts “to produce recommendations to improve the process or implementation of the UDRP Policy”. Clearly, both groups recognized the potential massive undertaking that a full-scale review of the UDRP would entail.

MarkMonitor encourages that even before such a team of experts is formed, unbiased quantitative research should be conducted to establish and verify the real issues that affect fair adjudication of UDRP cases. With the aid of over thirty thousand, well-documented cases, statistical analysis should identify where real issues exist.

In addition, the ICANN Staff has raised almost 50 different areas that would need to be looked at in any review of the UDRP. Each one of these issues could conceivably bring up additional tangential issues that would need review as well. This, in effect, would create a never-ending “domino effect” that would require a contribution of large amounts of resources to bring any one PDP to completion. Recognizing the enormity of the task, the RAP-IWG recommended the initiation of multiple PDPs; not just one. This was a similar tack taken by the IRTP working group to handle the multiple of issues that arose in that working group.

In addition, if the Internet community were to engage in such a massive endeavor it would seem plausible that it would want all relevant information as its disposal. If a PDP is initiated now, a missing element in the evaluation of a future revamped UDRP is the success or failure of the RPMs (and particularly the Uniform Rapid Suspension System (URS)) in the new gTLD program.² Further, it would not be prudent to enlist hundreds of volunteer hours to undertake this massive overhaul only to find out that there may be other changes necessary or a more efficient way of managing the process that was not fully considered. Thus, MarkMonitor recommends that a review of the UDRP is delayed until adequate information is gleaned from the performance of the URS.

² The decision by certain members of the RAP-WG to vote in favor of a PDP was inextricably tied to a request for a PDP to determine whether the RPMs should be applied to the legacy gTLDs.

MarkMonitor agrees with ICANN Staff that the GNSO should not proceed with a PDP to review the UDRP at this time

The UDRP is not perfect, but it is the only protection mechanism currently available to trademark holders. There are undoubtedly a number of areas that could be fixed, as outlined in the UDRP Issues Report itself. However, there was also substantial dispute on the RAP-WG as to what needed to be changed and how, if at all, to change the UDRP.

Given that the UDRP had not been substantially reviewed in almost 10 years it was clear that the RAP-WG members needed, as a first step, additional information to determine the current state of the UDRP. This lack of clarity (with respect to how well the UDRP was working) was further exacerbated on the RAP-WG by the fact that there were no experts (such as WIPO or respondent's counsel) that could inform the group as to how well the UDRP was performing.³ In addition, the RAP-WG was further informed that the only mechanism for any change or investigation (irrespective of the nature and substance) would be through a UDRP Issues Report. Thus, MarkMonitor would posit that members of the RAP-WG may actually have been voting for the UDRP Issues Report not necessarily the PDP.

It is now clear, after a review of the UDRP Issues Report, that a PDP of the UDRP is premature at best. ICANN Staff met with numerous experts "on both sides of the aisle" that have specifically recommended against initiating a PDP at this time. ICANN Staff specifically sought out the input, advice and the collaboration of organizations such as UDRP providers who have also endorsed this sentiment. ICANN Staff has found that the majority of problem areas needing "fixing" relate mostly to "process issues that are associated with implementation of the UDRP, rather than the language of the Policy itself. It is now apparent from the UDRP Issues Report that a PDP is not necessary to evaluate and make these types of changes.

This was exactly the information needed and sought (and the very reason that an Issues Report was voted for) by certain members. The UDRP Issues Report now provides the answer to the nagging question of whether substantive changes should be made to the UDRP. MarkMonitor agrees with the overwhelming sentiment of the group of experts, organizations and individuals that were contacted by ICANN, that a PDP should not be initiated at this time given that such an action "may ultimately undermine [the UDRP], and potentially may adversely affect the many Internet stakeholders who benefit from its current implementation."

³ The RAP-WG was to be comprised of "interested stakeholders and Constituency representatives, [who were] to collaborate broadly with knowledgeable individuals and organizations, to further define and research the issues outlined in the [original] Registration Abuse Policies Issues Report; and take the steps outlined in the [GNSO] Charter".

Summary

Given the above, MarkMonitor recommends that:

- 1) A review of the UDRP should be delayed until further information is gleaned from the RPMs associated with the new gTLDs; and,
- 2) To the extent a PDP is initiated, then any proposed changes should be based upon and suggested after an unbiased, statistical and independent analysis of the existing thirty thousand cases and recommendations is conducted and analyzed by the expert group as recommended by ICANN Staff

Sincerely yours,

Frederick Felman