

July 15, 2011

Internet Corporation for Assigned Names and Numbers
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RE: National Arbitration Forum comments on Preliminary Issue Report: The
Current State of the UDRP

In addition to the Forum's thorough response to the questionnaire prepared by ICANN staff in advance of the "The Current State of the UDRP" webinar, held on 10 May 2011, the Forum's participation in the webinar, and the Forum's participation on the follow-up panel in Singapore, the Forum submits hereby submits its official comment on the Preliminary Issue Report.

General thoughts

In May 2011, the GNSO Request for Issues Report called for an Issues Report on the Current State of the UDRP, to consider: [1] How the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies/inequalities associated with the process. [2] Whether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated. While the Forum agrees generally that it is helpful for ICANN to review all of its policies and agreements from time to time, now is not the time to spend time and energy reviewing the UDRP. With the advent of the new gTLDs, there is work for everyone to do. Registries are taking on new top-level domains and pulling together sunrise programs, registrars are learning how they can be registries and gearing up for more registrations, businesses are determining how they will react and if they will

apply, brandowners are determining their rights protect strategies, and providers are determining if they should be applying to administer any of the new rights protection mechanisms. ICANN is ramping up for application processing and bringing in new providers for various contracts, in addition to its regularly scheduled business. In order to do an adequate job of any sort of UDRP review, participants from each of these areas are needed. The people participating in the process need to be at the table in the discussions and to open up the UDRP, which by all accounts, is working, at this time of great upheaval, is, in the Forum's opinion, unwise. Furthermore, with several new rights protection mechanisms introduced in the new gTLD system, many with untested components, it would be a wise and cautious choice to allow the UDRP, which is familiar to most, to continue to be the mainstay—the solid rock that parties can rely upon for rights protections.

That is not to say the UDRP is perfect, certainly in any process there is room for improvements, both large and small. Everyone who participates undoubtedly has a wishlist of things that they would like to see changed to make the process flow more smoothly for them, or to increase their likelihood of success. The fact that people and organizations, the Forum included, have taken this opportunity to air their frustrations with the process should not be taken as an indication that immediate fixes are needed.

The Forum therefore agrees with the recommendation that there be no PDP at this time. However, the Forum has concerns with respect to Staff's recommendation on the potential process improvements on two fronts. First, the Staff report says if the Council believes the UDRP should be reviewed, it should focus on process improvements. The Forum believes that a *review* of the UDRP should not result in ANY changes. Any review should simply a look back to see what has happened and how things are working. It does not imply that changes would necessarily follow. If the Council believes a review is in order, the Forum recommends the Resolution clarify the expected outcome not be actual changes right now.

Second, if the Council is convinced that the time to change things is now, either through a PDP or a review, the Forum recommends that the Council clearly define (or create a task force to clearly define) which changes are process and which are substance. The Forum has suggested the UDRP itself is substance, while the UDRP Rules are

process. However, its easy to see how procedural changes could easily be translated into substantive changes so clear guidelines are needed. The Forum is in agreement with Staff, *if* the Council recommends process changes, that a small group of experts who have day-to-day contact with the UDRP, be convened to propose to the Council some changes that could smooth out any procedural bumps with minimum disruption.

The Effectiveness of the UDRP

In demonstrating the effectiveness of the UDRP, the Forum has released statistical data on its cases heard to date, which exceed 16,000.

The National Arbitration Forum (Forum), as a neutral dispute-resolution provider, notes the following impact and success of the UDRP. As noted below, panelists have found cybersquatting in 87% of cases filed with the Forum to date. In 13% percent of cases, panelists have found that either: 1. the complainant did not meet their burden to prove cybersquatting, 2. the case involved legal or factual circumstances that were not straightforward cybersquatting or 3. that the specific respondent was not guilty of cybersquatting (majority of the 13%). While the percentage of cases of cybersquatting overall is relatively low in comparison to the numbers of domain names registered, the UDRP has been proven as a fast and relatively straightforward means of stopping trademark infringement in the form of domain names with relatively few instances of causing an undue burden for the registrant.

The UDRP is fast. From January 2002, time to decision from filing averaged 50 days, and from commencement averaged 42 days. Since January 2010, our time to decision from filing is averaging 46 days and from commencement averages 38 days, with some cases concluding in a decision in as little as 10-15 days. The averages include cases that have been stayed for up to 45 days and cases that have been granted a response extension of up to 20 days.

The UDRP is fluid. Panelists have been able to apply the UDRP to situations unforeseen in 1999. Pay per click, phishing, and mousetrapping were practices created since 1999, yet UDRP panels have been able to apply the UDRP appropriately.

UDRP Panelists are fair. UDRP decisions are not made on a straight-default basis.

There are cases where Panelists find for Respondents, even when the Respondents didn't appear, just on the record before it, or the lack of record in some cases.

Some domain name registrants and respondents have used the UDRP decisions to guide their practices of domain names sales and registration as well, an indication that the UDRP has had a positive impact on cybersquatting over time.

The FORUM observes the following:

- a. The UDRP Policy paragraphs 4(a-c) have demonstrated remarkable fluidity and flexibility over the past nearly twelve years. Panelists have been able to apply the Policy to a wide array of situations unanticipated in 1999.
- b. If the Policy is substantively amended, care should be taken to consider the effect of the changes on existing areas of Panel consensus, and whether the changes narrow or restrict the UDRP so as to create greater loopholes for gaming or make it less flexible in application.

As of April 26, 2011 the Forum had received 16,308 cases. Approximately 81% of closed cases have a decision. Approximately 19% of cases are terminated before decision (combination of voluntary termination, and dismissal for failure to meet requirements). Of the 16,089 closed cases, 3,903 have had an official response (which may or may not have complied with the formalities in Rule 5.) We do not track cases where someone emailed with a question or to notify us of counsel, etc but did not actually provide a substantive response. The percentage is roughly a 24% response rate.

Complainants have prevailed 11,280 times (87%). Where a respondent has responded, the percentage of complainants success drops to 81%. Respondents prevail 13% of the time overall (1,673 cases). Where a respondent has submitted a response, the percentage of respondent's success rises to about 19%. In 273 cases, a respondent has prevailed even without responding (2%).

Some Forum practices that ensure fairness and efficiency:

- a. Entirely electronic case handling, including a portal (and automated notices), increases efficiency and reduces errors.

- b. Cases are assigned to coordinators based on case load and a rotating system.
- c. Forum takes deadlines very seriously and does its best to stay within them in all circumstances—deadlines are imposed upon both parties.
- d. Parties are strongly encouraged to communicate with the Forum via email so that a record may be kept of the communication for the panel and so the other party is apprised of the communication.
- e. Forum case coordinators focus on prompt, efficient case processing with a significant emphasis on customer service to parties and a particular attention to the formalities of the Rules. As a result, they do not substantively review submissions, which might permit a bias in favor of one party or another; instead they focus on the Provider's role in the UDRP: procedural efficiency and fairness.

Conclusion

The Forum recommends that there be no policy development process and no review at this time. Once the rights protections mechanisms for the new gTLDs come to some equilibrium, there will be a more optimum window for a full dialogue on the topic.

Sincerely,

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