

May 6, 2009

RE: National Arbitration Forum comments on IRT Draft Recommendations

Dear Members of IRT:

As an ICANN-approved provider of domain name dispute resolution under the Uniform Domain Name Dispute Resolution Policy (“UDRP”) since its inception, the National Arbitration Forum (“Forum”) has been watching the process ICANN has been undergoing with respect to the new gTLDs with a great deal of interest. And although we are a neutral organization with no stated mission of protecting either intellectual property or “domaining,” we realize that the purpose of the UDRP is to provide a balanced mechanism for resolving trademark-related disputes over domain names. To that end, we are very interested in the work of the Intellectual Property Constituency generally, and the work of the IRT, specifically.

We thank ICANN and the IRT for the opportunity to express some concerns we have over two of the IRT recommendations: the proposed Uniform Rapid Suspension System (URSS) and the Post-Delegation Dispute Mechanism. The FORUM takes no position on recommendations one, four, or five.

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. If the IRT reads the comments from the drafters of the UDRP, and looks at the items listed in UDRP Paragraph 4(c), in particular, it’s clear that the UDRP was not designed to deal with any situation where a Respondent might possibly have a claim to the domain name. Complainants have pushed, and Panelists have taken the opportunity, over time, to broaden the scope of the UDRP, but it started out as a mechanism only for clear cut cases of cybersquatting.

It isn’t surprising that the URSS is appealing to many in that it purports to bring the UDRP back to its roots. The URSS has all the earmarks of what the UDRP stood for at its inception: quick, cheap dispute resolution of “easy” cases. 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 (and there are easily places the UDRP could be streamlined), perhaps 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 URDP cannot.

Regarding the Post Delegation Dispute Mechanism, the Forum believes that the first few sentences of the paragraph numbered “1” on page 1 of the Post Delegation Dispute Mechanism section of the IRT recommendations summarize our concerns exactly.

“...[T]hird parties should not be party to the dispute. Basically, the post-delegation dispute is a contract dispute between ICANN and the contracted registry.” The Forum believes this proposal has at least two problems: 1. it puts Registries in a position of policing the registration of domain names, a function they are neither designed nor equipped to do; and 2. it seems to take responsibility from ICANN for policing its contracts and place the burden on trademark holders who have the cash or knowledge to complain.

Conclusion

Overall, the Forum thanks the IRT for getting a draft out quickly so that the public can see and respond to what has been proposed. The Forum recognizes the IRT’s interests and that the proposals were designed to advance the IPC’s interests. The Forum invites the IRT and ICANN to contact its Internet Legal Counsel, Kristine Dorrain, who manages the domain name dispute department for the National Arbitration Forum, should either group wish to find out more about the Forum’s position on these or other matters, or for thoughts from our many years of experience as a dispute resolution provider under the UDRP.

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