

ICANN, You Can, We All Can . . .

But is the UDRP Fair?

Date Submitted: April 11, 2001

Class Name: Dispute Resolution

Class Number: 98-827-01

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But is the UDRP Fair?

4. Introduction

The last half of the 1990's saw an explosion in the number of Internet users. This exponential growth has created an expansive, borderless market where concurrent usage of trade-marks is impossible. In the physical world, a trade-mark may be used and owned by different entities who operate in separate markets and deal in distinctive products or services. On the Internet, however, there can only be one "acme.com". To make things even more interesting, trade-marks owners now have to deal with a new brand of entrepreneur -- the cybersquatter.

After years of trial and error by many national governments and international organizations, the "Internet Corporation for Assigned Names and Numbers" (hereinafter ICANN) has developed the "Uniform Dispute Resolution Policy" (hereinafter UDRP) to aid trade-mark owners in regaining domain names from cybersquatters. This arbitration proceeding provides an expedient and cost efficient resolution to domain name disputes. The UDRP, however, is not entirely adaptable to those cases where both disputants have lawful rights in the domain name. Although this alternative dispute resolution procedure has been highly praised by trade-mark owners, who are the vast majority of Complainants, a number of outstanding issues must be addressed to ensure that equality and fairness exist in the dispute resolution process, for both disputants.

Part II of this paper will briefly examine the mechanisms of the UDRP. Part III focuses on the advantages the dispute policy offers to trade-mark holders. Part IV explores the handicaps the UDRP places on the domain name registrant or holder, while Part V offers some suggestions for improvements to the policy. This paper will argue that, while the UDRP is an impressive alternative to traditional litigation for trade-mark holders, issues regarding fairness between the disputants remain to be addressed.

5. The UDRP

ICANN, a private sector, non-profit corporation, was formed after the United States Government called "for the privatization of technical coordination of the Domain Name System." ICANN is currently the primary entity through which Internet policy is established and its most controversial function has been the development and administration of the UDRP. The UDRP is imposed, via contract, on all accredited .com, .net, and .org registrars, who, in turn, impose the policy on domain holders as a condition of their registration agreement. Today, anyone

registering a domain name "automatically agrees to submit to [the] approved arbitration process if a controversy or conflict over [his or her] domain name, as registered, develops."

2. The Fast Track UDRP Procedures

Unlike the domain name registrant, a Complainant is not required to submit to the arbitration process created by ICANN. If a Complainant chooses to, he or she may proceed by traditional litigation based on trade-mark infringement or common law passing-off actions. The arbitration proceedings under the UDRP are governed by the Rules for the UDRP (hereinafter RULES), which impose strict time lines. Under the RULES, the process is initiated when a complaint is filed with one of four approved dispute resolution providers [hereinafter Providers].

The complaint must be filed in both electronic form and hard copy and must establish that:

the domain name is "confusingly similar" or identical to the complainant's trademark;

the registrant has no rights or legitimate interests to the domain name; and

the domain name was registered in "bad faith"

Once the Complainant has paid the required fees, the Registrant must be notified within three days and then has twenty days to "respond specifically to the statements and allegations contained in the complaint and include any and all bases for the [registrant] to retain registration and use of the disputed domain name." Once the response is received, or the twenty days has expired, the panel then has fourteen days to make its decision and the parties are notified of the result within three days. The UDRP, therefore, aims to result in the actual resolution of the dispute.

This entire process occurs via electronic communication and there is never a face to face meeting of the disputants, or panelists, with a resolution of the matter being achieved in less than forty days. Although the panel's decision is not considered to be legally binding on the parties, if no court action is filed within ten days of the decision, the panel's order will be implemented by the registrar and the domain name will either be transferred, canceled, or the status quo maintained.

3. Powers of the Panel

The RULES specifically state that "a panelist shall be impartial and independent" and provide a list of the general powers of the panel:

conduct the proceedings in such manner as it considers appropriate in accordance with the UDRP and the RULES.

ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case.

ensure the proceeding takes place with due expedition.

determine the admissibility, relevance, materiality and weight of the evidence.

The panel's decisions are to be made based on the "statements and documents submitted and in accordance with the [UDRP], [the RULES] and any rules and principles of law that [the panel] deems applicable."

The RULES, therefore, aim to place the panel member(s) in the role of a neutral adjudicator, armed with the discretion as to the weight and admissibility of evidence and what rules of law and principles to apply to the particular dispute.

4. UDRP Decision Statistics

Since the UDRP went into effect January 1, 2000, there have been more than 3400 proceedings commenced involving more than 6000 domain names. Of the decided cases, over 80% of the domain names have been transferred to the Complainant, less than 1% have been canceled, and less than 20% of the decisions have found in favour of the domain name registrant or holder. Of the resolved complaints, only 1.6% of the arbitrations have ended in a settlement between the parties. From these statistics, it is clear that the UDRP does not promote discussion or settlement between the disputants and, in the vast majority of decisions, the trade-mark owner is victorious. ICANN's arbitration process offers many advantages over traditional litigation, for the trade-mark holder.

1. UDRP -- The Trade-mark Holder's Admirable Alternative to Litigation

Trade-mark owners who are seeking a speedy and inexpensive retrieval of a domain name from a "bad faith" Registrant, are better off seeking redress via the UDRP than through traditional trade-mark infringement litigation. In addition to the benefits of time and money, the UDRP avoids the jurisdictional problems inherent in the structure of the Internet, offers arbitrators with skill and expertise, and allows Complainants a choice with respect to the Provider and panel members.

2. Cost Savings

It is not uncommon for a typical trade-mark infringement case to cost both parties tens of thousands of dollars in attorney fees, expert witnesses, evidence gathering, and market surveys and research. This is merely at the initial court proceedings – appeals will double, or even triple the disputants expenditures. With ICANN's UDRP, the Providers each set their own fees, with costs varying depending on single member or three member panels, and the number of domain names sought to be retrieved. A single domain name may be reclaimed for as little as \$950USD.

In addition, the UDRP eliminates the need for representative counsel in a distant, foreign state, as all proceedings are conducted online. This also terminates all travel and lodging expenses a Complainant may incur during litigation. Moreover, as the arbitrators are all experienced in the area of trade-mark and domain name disputes, costs are also reduced because the parties do not have to "teach" the judge or jury with expert witnesses or expensive exhibits. Therefore, not only may large corporations retrieve a domain name for around a thousand dollars, but the UDRP offers small businesses and individuals without large financial resources the opportunity to assert their trade-mark rights in domain name disputes.

3. Time Efficient

The UDRP, with its strict time lines, guarantees the resolution of a domain name dispute within forty five days from the filing of the complaint. Unlike backlogged court dockets, the Providers have a sufficient number of arbitrators to ensure that dispute resolution is not delayed. Since the disputes are handled via electronic communications the UDRP avoids time delays common in litigation. For example, a United States based company filed a complaint against a corporation based in France. The U.S. attorney noted that had "foreign service of process been required, it would have added another six months to the litigation process."

The trade-mark holder is losing the value of his or her domain name each day that the dispute is unresolved because potential customers are unable to find the correct site. Therefore, with the ease of filing a complaint, the rapid pace of proceedings, and electronic communications, the UDRP presents a speedy alternative to court litigation.

4. Jurisdictional Turmoil Avoided

The inherent nature of the Internet makes it nearly impossible to determine which jurisdiction, if any, is an appropriate forum to resolve domain name disputes. The UDRP remedies the jurisdictional uncertainties associated with international disputants by providing that all registrants of domain names are bound by ICANN's arbitration proceedings. This allows trade-mark holders to avoid litigation in the other party's home forum where the decision maker's bias' may be clouded by political issues. For example, a U.S. trade-mark holder going after an Iraqi "bad faith" Registrant will likely want to avoid proceedings in an Iraqi court. The UDRP eliminates all questions of jurisdiction by creating a standard procedure for all disputants to follow.

5. Technical and Specialized Knowledge of the Arbitrator

The UDRP avoids the uncertainty of inexperienced and unskilled judges and juries in the area of trade-mark and domain name disputes. The approved arbitrators at each Provider, are all individuals with not only knowledge of the legal principles involved in trade-mark disputes, but also have an understanding of the importance of trade-marks and domain names in the market place. This disposes of the need for expert testimony and evidence that only serves to confuse the lay decision maker, and improves the overall quality of decisions rendered under the UDRP.

6. Forum Selection

Since the Complainant is the party that chooses the Provider, the final advantage that the UDRP bestows on the trade-mark holder is that of "Forum Selection". The WIPO Center tends to attract trade-mark holders based in Europe because WIPO's arbitrators tend to be more familiar with European and International Trade-Mark Law. American Companies opt most often for the National Arbitration Forum because many of the arbitrators are retired U.S. judges and attorneys who have practiced in the area of U.S. Trademark Law. Eresolution arbitrators tend to be University Professors from around the world and the decisions appear to be based more on academic principles than the law of any one country. Each of the four approved Providers is required, under the RULES and UDRP, to publish their list of approved arbitrators, statistics on decided cases, and the written reasons for each decision. Thus, a short to the Providers' web sites allows the Complainant to choose the Provider that will render a decision most favourable to trade-mark holders.

Although the UDRP provides for a quick and cheap alternative to litigation for the Complainant, quick and cheap do not always mean fair and accurate. Many of the advantages that the UDRP creates for trade-mark holders have skewed the process dramatically against domain name registrants and violate basic principles of dispute resolution.

1. Room for Improvement

While presenting trade-mark holders with an advantageous method of enforcing their rights, the UDRP neglects to equalize the position of the rights of a domain name holder. The majority of the Law Reform Commission of British Columbia, in its 1982 "Report on Arbitration," stated: "Justice, in our view, should not be subordinated to considerations of speed and convenience." The UDRP creates a resolution process that opens the doors for reverse domain name hijacking, while applying uncertain laws, and denying the domain name holder any choice in the process. In addition, the UDRP creates access to justice and due process gaps for the domain name registrant.

2. Reverse Domain Name Hijacking

The structure of the UDRP creates the possibility of "reverse domain name hijacking" (hereinafter "hijacking"), or bad faith attempts by trade-mark holders to deprive a legitimate domain name registrant of his or her domain name. Apart from the initial filing fee, the UDRP fails to impose sanctions against those attempting to use the procedure as a means of "hijacking." Since the UDRP focuses on "cyberpirates" or "cybersquatters", it is not "an appropriate tool for resolving garden-variety trademark/domain name disputes involving concurrent users of existing marks." A review of decided disputes, however, indicates that senior trade-mark owners have successfully used the UDRP to obtain domain names from concurrent users that have legitimately registered the trade-marks. This indicates that the rights and interests of lawful domain name holders are at risk of being exploited by senior users. The UDRP will allow large corporations to pursue smaller businesses and individuals that legitimately hold domain name registrations.

2. Domain Name Registrant Has No Choice

David Post, Temple University Law School Professor and Cyberspace Law Institute founder, has stated that the UDRP is "skewed towards trade-mark holders because it allows them to choose the arbiter." A trade-mark holder may, therefore, "forum shop" for the Provider that will find the most beneficial result in their case. Recently, ICANN approved amendments to the National Arbitration Forum's Supplemental Rules. These amendments are procedural, however, they have been criticized as being "extremely biased towards Complainants." As the Complainant is the only party that has the choice of which Provider will hear the complaint, and the Complainant is the only party responsible for the fees, they will naturally choose a Provider that will be most favourable to their case and least favourable to the Registrant. Also, the four Providers are competing against one another for business, therefore, to remain viable, they must appeal to the Complainant alone.

The binding nature of the UDRP also shifts the burden of initiating a law suit to the Registrant. If the Registrant is unhappy with the decision, they must bear the burden of initial costs in court to retrieve their domain name, as there is no appellate review for the UDRP. If the Registrant cannot afford the attorney and filing fees of litigation, the domain name is gone.

3. What Law, Rules and Precedents are Being Applied is Uncertain

A dominant criticism levied by many academics is that the UDRP does not state whose trade-mark law ICANN will accept. Trade-mark laws vary from country to country and although International Conventions do exist, not every country is a signatory. Para. 15(a) of the RULES does allow the panel to use outside precedent and law at their discretion, however, a review of decided disputes indicates that U.S. Trade-mark Law seems to provide the basis for most decisions. This is a logical choice where both parties are domiciled in the U.S., but when one of the parties is not, questions of fairness are raised. Since the Complainant has the sole power to choose the Provider, they will likely choose one that tends to apply law favouring their case, and not necessarily the proper law under conflict of laws principles. This allows the Complainant to circumvent the law that would otherwise apply and achieve a desired outcome.

During the creation of the UDRP, it was said that the procedure was available "only in respect of deliberate, bad faith, abusive, domain name registrations." ICANN Arbitrators, however, have decided cases that are outside the scope of the UDRP and the RULES, based on their "discretion" to arbitrarily apply national trade-mark laws. A Registrant, therefore, may be subjected to the laws of a country that they have no ties to and no knowledge of.

4. Access to Justice and Due Process Gaps

A. Michael Fromkin, a University of Miami law professor, has criticized the UDRP as forcing Registrants to be "subject to an idiosyncratic set of arbitration rules and procedures that benefit third-party trade-mark holders at the expense of Registrants." The UDRP and its RULES "do not protect certain traditional components of due process in dispute resolution." Features such as "affordable access to justice, notice, discovery, collective action, live hearings, confrontation of witnesses, [and] a neutral decision maker" are lacking from the domain name registrant's point of view. The UDRP arbitration involves the settlement of complex, fact-intensive legal issues such as bad faith, fair use, confusingly similar and dilution of a trade-mark. Since the UDRP focus is on a fast and cheap resolution, procedures such as discovery, cross examination, and live hearings are omitted, placing into question the accuracy and fairness of the decision. The procedures and law applicable are entirely discretionary and left to the arbitrator(s), who are chosen by the Complainant, thus tainting the process with arbitrariness, uncertainty and bias against the Registrant.

Access to justice for the Registrant is affected by the fact that the UDRP shifts the burden of initiating a court action to a domain name holder who has lost at the ICANN arbitration phase. Unlike a Complainant, whose costs were dramatically reduced by the UDRP as compared to litigation, a domain name registrant has no recourse other than litigation. If the Registrant cannot afford a law suit, then the domain name is gone. The UDRP proceedings are also tainted by the fact that the arbitrators base their decisions only on the submitted complaint and response and do not provide for discovery, live hearings, or cross-examination. The parties, therefore, only have one shot at providing the panel with all the information relevant to their positions. Statistics indicate that only half of Registrants submit responses to complaints. This may be due to the fact that at the outset of any proceedings, the Complaint is likely to have the bulk of the information, while the Respondent will be lacking. The strict time lines imposed on the Respondent, in favour of the Complainant, only restricts their ability to fairly respond to the Complainant's accusations.

Due process and procedural fairness require an unbiased and neutral decision maker in dispute resolution. Arbitrators are valued, particularly in the ICANN process, for their expertise in the particular subject area of the dispute. Expertise, however, often carries with it an underlying bias. Since the trade-mark holder is the party choosing the Provider, they will be able to study patterns in decisions and determine which Provider is most favourable to their case. Additionally, the trade-mark holder is the party paying the arbitrator's fees, therefore, there is a direct financial bias present towards the Complainant. These fairness and equality issues are particularly troubling when the Registrant has a legitimate interest in the domain name and trade-mark, and is not a bad faith actor.

ICANN's UDRP offers little that a domain name registrant would want, yet the Registrant is the party bound to the process. The UDRP and the arbitrator's implementing the RULES, must learn to balance the interests of both the trade-mark holder and the domain name registrant.

1. Suggested Improvements for the UDRP

While the UDRP is an impressive alternative to litigation from the trade-mark holder's point of view, the policy is severely lacking from the domain name holder's position. ICANN and its arbitrators must not overlook the rights of domain name holders, especially where the holder is a legitimate, concurrent user of the trade-mark at issue. The following are some suggested improvements for ICANN's domain name arbitration process:

2. Stay True to the Original Aims of the UDRP

Judge Muller, a dissenting panel member in the ICANN arbitration Hearst Communications, Inc. v. Spencer, stated in his reasons:

the UDRP is intended to prevent trade-mark owners from being extorted by cybersquatters, but it is *also intended to protect legitimate registrations from being threatened by overreaching trade-mark owners*. A correct application of the spirit and letter of the UDRP gives each of these concerns equal weight.

The ICANN process was designed solely to deal with cybersquatters and bad faith Registrants. The UDRP, therefore, should not be applied to situations where both the Complainant and the domain name holder have legitimate rights in the trade-mark. ICANN arbitrators must be discriminate and only grant remedies in the clearest cases of bad faith registration.

2. Complainant Should not be the Only Party Paying the Provider's Fees

If the Providers continue to be dependent solely on the Complainant for their fees, the Providers will continue to "have an interest in keeping Complainants happy [and] we are in danger of having a biased system." A system must be developed to ensure that the Complainants are not the sole source of income for the decision maker. If the losing party, whether it be the trade-mark holder or the domain name holder, is required to pay the fees, then this will discourage both cybersquatting and reverse domain name hijacking. Also, this system will place both disputants at equal levels in the eyes of the arbitrators.

3. Establish a Set of Substantive Rules and Precedents

Currently, national laws and precedents are being arbitrarily applied to cases. Guidelines must be established to aid the panel in determining what country's trade-mark law to apply, in what situation. For example, if both disputants are domiciled in the United States, then U.S. Trademark Law must apply. If one party is based in the United States and the other in Taiwan, then the panel must have some direction to ensure that the proper rules are employed. ICANN must also establish an easily useable digest of decided disputes so that future disputants can more easily predict the outcome of their case. This may, in turn, lead to settlement of disputes before a complaint is even filed.

3. Complainant Should not be Responsible for Choosing the Provider

Forum shopping by the Complainant must be discouraged. This can be accomplished by having a central agency where complaints are filed. The parties will then each choose a Provider. If they each choose the same, then that Provider will take over the case. If they each choose differently, then one should be chosen randomly from the remaining Providers.

5. Protect Domain Name Holders from Reverse Domain Name Hijacking

Currently, a trade-mark holder may use the ICANN process without fear of penalty or fine in bad faith attempts to obtain domain names. A fine system must be in place that punishes attempts at reverse domain name hijacking, as well as cybersquatting.

These suggested improvements are not meant to be exhaustive, however, they will serve to equalize the positions of the disputing parties and improve the fairness of the ICANN process.

VI. Conclusion

The original purpose of ICANN's dispute resolution policy was to create a process for trade-mark holders to quickly and cheaply enforce their rights "*only* in respect of deliberate, bad faith, abusive, domain name registrations or cybersquatting." The UDRP was developed from the point of view of the trade-mark holder and succeeds in producing an effective and impressive alternative to litigation for the Complainant. The UDRP, however, fails in balancing the interests of the domain name registrant and, instead, creates a system plagued with questions of bias and unfairness. With minor procedural amendments, cautious arbitrators and a defined set of standards for the application of national laws, the ICANN system will be a desirable alternative to litigation for both disputants.

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