

A PROPOSAL FOR AN APPELLATE PANEL FOR THE
UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY

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The Uniform Domain Name Dispute Resolution Policy (the "UDRP" or the "Policy") adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN") to deal with cybersquatting has been generally well received. The fact that it has been used so often since the first decision was issued in January 2000 (as of 10 November 2000, 1,486 cases had been decided) is a testament to its appeal. However, the Policy has not been without its detractors. Some critics have alleged that it favors institutional mark holders at the expense of domain name registrants.¹ Numerous articles have been written about opinions that critics have found untenable and even "laughable." The process by which cases are decided has been said to yield inconsistent and unpredictable results. Both critics and friends have suggested that the process, which employs private arbitrators to issue public opinions, would benefit from an internal appeals process that corrected clearly erroneous decisions, harmonized divergent views, and provided the bar with established principles by which they could advise their clients as to probable outcomes.

However, others have argued against an appellate tribunal. It is asserted that such a procedure would be too expensive, would create undue delay, and that such a process is inconsistent with private arbitration, of which the UDRP process is a hybrid form. It is argued that any recourse should be to the courts, who are better able to deal with such matters.

It is interesting to note that the original proposal submitted by the World Intellectual Property Organization ("WIPO"), the international organization headquartered in Geneva who was charged by the United States government for recommending procedures to deal with "cybersquatting," called for an Appeal Panel. (WIPO Panel Guidelines, Art. VII.) The procedure proposed called for resolution within 80 days of the initial determination (WIPO Administrative Challenge Panel Rules ("ACP Rules"), Arts. 59, 62(b),(c),(d), and 63), appointment of the

¹ See, e.g., Dr. Milton Mueller, "Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy," available at <http://dcc.syr.edu/roughjustice.htm>; David G. Post, "Juries and the UDRP," available at www.icannwatch.org.

appellate panelists by the parties (ACP Rules, Art. 18), and the fixing of costs of appeal. (ACP Rules, Art. 69(e).)²

This paper is intended to present one possible model of appellate procedure which is basically consistent with the original WIPO recommendations, although different in several significant respects. The proposal is designed to meet with the objections as to expense and delay. The system would be financed at minimal cost to the participants. The appellate jurisdiction would be extremely limited and exercised only sparingly. The process would result in decisions which would decide disputed issues of Policy interpretation and set consistent guidelines for prospective participants in the process. This latter is highly important, since it is highly unlikely that the various national courts who might hear appeals from UDRP decisions could ever arrive at consistent, or even similar, interpretations.

THE MAKEUP OF THE APPELLATE PANEL

There are currently four providers of panelists for the UDRP: WIPO, eResolution, the National Arbitration Forum, and the CPR Institute for Dispute Resolution. As of December 28, 2000, the four providers list more than 390 panelists.³ Given the current volume of cases and the proposed limited appellate jurisdiction, it seems appropriate that an appellate tribunal of nine appellate panelists would be adequate to handle the expected volume of appeals given the present number of cases. Normally, decisions would be made by a panel of three panelists. However, in exceptional circumstances the appellate panel might elect to convene *en banc* in order to determine an especially difficult or controversial question. The panelists would be appointed by ICANN from the list of panelists of all providers. The selection could be made from all panelists listed or from a given number of panelists nominated by each provider. The total number of appellate panelists would necessarily increase if the UDRP caseload were to increase, and the

² The WIPO ACP Rules were formerly available at www.wipo.org/eng/arbit/acprules.htm, and they are discussed at length in "Dispute Resolution in Cyberspace," by this author, Vol. 15, No. 4, *Journal of International Arbitration* 127 (December, 1998).

³ See, http://www.cpradr.org/specpan_domainname.htm; <http://eresolution.ca/services/dnd/arbitrators.htm>; <http://www.arbforum.com/domains/>; <http://arbiter.wipo.int/domains/panel/panelists.html>.

manner of their selection might vary, based on a variation of the distribution of such cases among providers and on the possible approval of additional providers.

THE JURISDICTION OF THE APPELLATE PANEL

The panel's acceptance of any particular case would be a matter of the exercise of the panel's discretion, similar to the exercise of *certiorari* jurisdiction by the Supreme Court of the United States. To insure that the panel did not unnecessarily intervene in the process, but only acted when an important point of law on which a divergence existed was at issue, the total number of cases a panel might consider in a given period of time (i.e., five per month) might be established, and/or that a minimum number of cases had diverged on the issue being appealed (i.e., that at least three cases had held one way, and three another way on the same issue) or that the panel considered that a decision was "clearly contrary to the dictates of the Policy." These or similar criteria would serve to insure that the appellate jurisdiction was not overused, or that it was not used for inconsequential purposes.

THE TIMING OF THE APPELLATE PROCEDURE

Any appeal made to the appellate body would have to be made within ten days of the panel decision. The panel would then have ten days in which to accept or reject the application for appeal. If accepted, the panel would be required to issue its decision within 20 days of the acceptance of the appeal, absent an agreement of the parties. The panel would be permitted to request that the parties agree to an extension of the time for a decision, but the discretion to agree to such an extension would rest entirely with the parties.

THE FINANCING OF THE APPELLATE PROCEDURE

The expense of the appellate procedure could be financed either by 1) a fee assessed each time a domain name is registered, and/or 2) a fee assessed against every complainant who files an action under the UDRP, and/or 3) a fee assessed on appeal. If a fee were assessed against every domain name registered, an amount in the order of US\$.10 - .25 would be more than sufficient to finance the process. If a fee were assessed against every complainant who files an action under

the UDRP, the amount of the fee would be in the nature of US\$ 100-200 to independently cover the costs of the appeal. If the cost of the appeal were independently borne by the appellant, the cost would need to be in the US\$ 5,000 to 10,000 range. Obviously the former, or some combination of the financing methods would reduce the barriers to the appellate process as opposed to a process funded only under the third alternative. Under the second alternative, it is true that, for the most part, but not always, the mark holder is a business enterprise with sufficient economic wherewithal to finance the proceedings. If one used the third alternative exclusively, it could prove a significant barrier to the appellate process to the individual or small business entity. A provision which permits the appellate panel to award the costs on appeal to the prevailing party could serve to alleviate this burden. Clearly, a model financed by either the first, second, or a combination of the first and second alternatives, would permit the greatest access to the appeals process.

THE EFFECT OF THE APPELLATE DECISION

It is suggested that the appellate decision be binding upon all future panel decisions and be considered the rule of law on which all future disputants can rely. Should this be the last word on the subject? I submit that it should not be. A decision on the matter by any national court of competent jurisdiction should both overrule the effect of the decision and also eliminate the precedential value of that decision. The decision of any national court, while having the effect of eliminating the particular case as precedent and of determining the issues between the parties to the dispute, *inter se*, should not act as precedent in succeeding panel decisions. In fact, future panels and future appellate panels should, while being cognizant of the decision and its reasoning and giving the opinion due deference, should be free to once again establish the principle which a prior national court decision had overruled. Should such a determination ultimately prove enduring, it would re-establish the principle as a rule of law for purposes of the UDRP.

The UDRP is a *quasi* public/private dispute resolution procedure, in that the process is a product of the agreement of the parties. It is private, in that the agreement of the parties confers jurisdiction on the private panelists to determine their dispute. It is public, in that the full text of

the decisions of the panels are available to the public. This is similar to the Iran/U.S. Claims Tribunal, in which all decisions of the arbitral panels were required to be made public, and in which the decisions of the panel as a whole served as precedent for future panel decisions.

CONCLUSION

An appellate process that is limited in scope, fast in result, and relatively inexpensive can provide needed predictability and added credibility to the UDRP process. The process can be financed by a small amount from each domain name registration, an increased amount for each complaint filed, or some combination thereof. It can be completed in no more than 30 days. And the number of cases subject to appeal can be limited in absolute number, and to only those cases where serious disagreement has arisen. In short, there seems to be no real barrier to the adoption of such a process.