Date: May 12, 2017

Re: Preliminary Report – Use of ADR in Domain Name Disputes

Summary:

There is considerable **skepticism** to whether ADR would be effective in the standard domain name dispute process but **some providers** are **open** to the possibility of offering it in those cases where it may be of some use. However, a number of **practical issues** exist as to precisely how it would be **implemented**.

Details:

I was able to **speak with representatives** of domain name dispute providers the World Intellectual Property Organization (**WIPO**), the Asian Domain Name Dispute Resolution Centre (**ADNDRC**), and **NominetUK**, and I will be meeting with a representative of the **FORUM** during the upcoming INTA Annual Meeting in Barcelona.

I asked each of the provider representatives a **series of questions** regarding the current or possible use of **ADR** – specifically **mediation** – in the resolution of trademark disputes involving internet domain names. Examples include **whether** they had **considered** incorporating either a **mandatory or discretionary** mediation period into their domain name dispute process, What potential **benefits** or **detriments**, to parties and providers, they see from ADR, and how the use of ADR would impact their **cost structure** for dispute resolution services.

It should be noted that NominetUK is the only one of the Providers that **currently offers** ADR. In fact, there is a **10-day** mediation phase built into its rules although the parties may **extend or opt-out** of this phrase by mutual agreement. The service is provided **free of charge** and no filing **fee** is required of the complainant until the ADR phase has passed **without results**. The NominetUK representative noted that its procedure offers the parties an opportunity to resolve the case **without** the **risk** of an **adverse** panel **decision** although he characterized the ADR **success rate** as "**low** overall." However, a review of statistics published by NominetUK indicates that, in **2015**, there were **160** cases successfully **mediated** out of a total **728** that were filed (i.e., about **22%**).

As for the WIPO and the ADNDRC, representatives of these organizations indicated that they had **considered** offering mediation services upon the consent of both parties but felt that it would be used only in a **very limited** number of cases. This is due to the nature of the UDRP as a **low-cost, fast-track alternative** to court-based litigation, the rather **deliberate nature of cybersquatting**, the **clear-cut evidence presented** in ***most*** UDRP cases, and the fact that domain name owners **fail to participate** in 85% to 90% of cases (i.e., they default). Further, about **20%** of filed cases are **already withdrawn** – and presumably **settled** – by complainants so there

is an assumption that parties are already using ADR, to some extent, through their own arrangements.

However, **some openness** was indicated to the inclusion of a **standardized notice** of the **availability** of ADR when a domain name owner is formally **served** with a UDRP complaint as this could serve to both **educate and encourage** respondents regarding use of this added process.

Despite the expected low uptake, **benefits** could be quite high for those **few** disputes involving uncertain cases with more **complex issues** and so the representatives stated that they would, in fact, **consider** implementing an ADR process where they felt it would be **helpful**.

The next issue that arose in my discussions was **who** would serve as **mediators** should ADR be used for certain disputes. NominetUK has **two full-time accredited** mediators who undertake the ADR function but **do not act as Panelists** in deciding contested cases. As for the WIPO and the ADNDRC, **concerns** were expressed with whether UDRP **Panelists** could or should **serve** in this capacity given the possibility that such activity could cause them to be **conflicted** out of deciding **future** cases involving one of the **parties**. It is generally known that **NominetUK**, which incorporates a mandatory 10-day ADR period for all of its cases, uses its **own staff** members to act as mediators and so it **avoids the conflict** of interest problem.

On the issue of **costs**, the WIPO and the ADNDRC representatives expressed **great concern** regarding **who would pay** for the mediators' time in undertaking ADR efforts. UDRP **Panelists** are paid a certain **fee** for each case they handle and **adding** on the **expense of a mediator** could **undercut** the attractiveness of the UDRP as a low-cost **alternative** to litigation. In the case of **NominetUK**, the organization is only **funded, in part**, by dispute **filing fees**. As a domain **registrar** for .uk names, it also receives registration income and some of this goes to support the ADR function. Finally, the organization receives some money from a **trust fund**. In this **unique environment** it can offer no-cost ADR services in those cases where the parties show interest.

Finally, some concern was expressed that **modifying the UDRP Rules** would require **formal action** at the International Corporation for Assigned Names and Numbers (**ICANN**) which would involve a **very lengthy process** and be subject to the usual **politics** inherent in ICANN's **community consensus** driven decision-making process. However, I am currently participating in a formal ICANN **working group** that is tasked with studying all of the rights protection mechanisms of domain names – including the UDRP and its Rules – and so it **may be possible** for me to **raise the issue** of ADR to the group for **consideration**.