Success by Default

Policy Recommendations in Brief:

1. Require Complainants to post a $1,000 bond in addition to the costs of filing a complaint. The refundable bond would discourage merit-less claims and help legitimate Respondents to participate in the proceeding rather than defaulting. If the Complainant wins the case the money is refunded; if the complaint fails, the money is given to the Respondent to defray the costs of a defense. If the Respondent defaults, the bond is refunded and the procedure should be truncated so that Complainants' arbitration costs can be further reduced.

2. To promote and preserve freedom of expression on the Internet, clarify standards for a finding of "confusing similarity" to a trademark. Domain names that signal criticism, parody or commentary upon products and companies (e.g., <icannwatch.org>) should not be classified as "confusing" unless they are used in ways that actively promote fraud, deception or confusion. Precedents that stretch notions of confusing similarity to include *any* incorporation of a trademark in a domain name should be repudiated and the policy modified to prevent such findings.

3. Expand the list of bad faith factors to formally include such things as the "passive holding" doctrine and identity concealment, but make the list exhaustive and limited to the specified factors. The current approach, which allows any panelist to invent a bad faith finding "without limitation," gives panelists too much discretion and makes decisions inconsistent.

Factual Findings in Brief:

1. Domain name speculation and the large number of abusive registrations were the product of a temporary boom in <.com> registrations that peaked in the first quarter of 2000. The number of disputes – and the significance of holding any particular domain name – will decline as this boom recedes in time, new TLDs are added, and the guessability of names declines. But as long as DNS and the Web survive there will always been a need for domain name dispute resolution.

2. The UDRP has been an effective remedy for cybersquatting primarily because it makes it economically inefficient for abusive registrants to defend their names. Known cybersquatters default (i.e., fail to defend the name) 70 – 100% of the time. Unfortunately, many seemingly good faith registrants default, too. The degree to which Respondents are able to defend themselves is the single most significant factor in determining the outcome of UDRP cases.

3. Eighteen percent (18%) of UDRP claims are based upon unregistered trademarks. The UDRP has protected personal names as strongly as registered marks.

4. Domain name disputes usually involved unaffiliated parties. But 11 percent of the cases involve Competitors, 4% involve Licensees or Resellers, 4% involve Employees or Business Associates, and 3% involve Critics/Commentators. There are significant and interesting variations in the default and win rate for each of these categories.

5. Of the top 20 cases UDRP panelists cite most often, *all* were won by Complainants and 16 were Respondent defaults.