

ICANN'S UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY

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From Oklahoma's land-runs to San Francisco's gold rush, new frontiers have always drawn on the spirit of risk-taking. Today, the rush for gold is in cyberspace as speculators race to register valuable domain names in the hopes that they hit the jackpot.¹

The Internet, as we know it, began in 1973 as a small research program funded by the U.S. Defense Department to investigate technologies that could interlink various kinds of network packets.² It was not until 1984 that the number of Internet addresses (websites and email addresses) first reached a figure that necessitated an organizational system.³ And it was not until 1994 that domain name disputes first appeared.⁴ Since, the growth of the Internet has been sudden and remarkable. Less than ten years after the creation of the first organizational system, the Internet swelled to include almost 5,000 networks spread across three dozen countries.⁵ By the end of 1998, an estimated 148 million people worldwide were using the Internet, and 760 new U.S. households were joining the

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1. <Business.com> recently sold for \$7.5 million, the highest price ever paid for an Internet address, to the San Jose-based "incubator" for start-ups, Ecompanies. See Andrew Pollack, *What's in a Cybername? \$7.5 Million for the Right Address*, N.Y. TIMES, Dec. 1, 1999, at C8.

2. See Vint Cerf, *A Brief History of the Internet and Related Networks* (visited Oct. 2, 1999) (<http://www.isoc.org/internet/history/cerf.html>).

3. See *Domain Name System Privatization: Is ICANN Out of Control? Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 106th Cong. (1999) [hereinafter *ICANN Hearings*] (prepared testimony of Jonathan Weinberg, Professor of Law, Wayne State University), available at (<http://com-notes.house.gov/cchear/hearings106.nsf/a317d879d32c08c2852567d300539946/a897f153ecc07feb852567b7005100ec?OpenDocument>) [hereinafter Weinberg Testimony].

4. See *Internet Domain Names and Intellectual Property Rights: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *Domain Name Hearings*] (prepared testimony of Michael Daniels, Chairman of the Board of Directors, Network Solutions, Inc.), available at (<http://www.house.gov/judiciary/dani0728.htm>) [hereinafter Daniels Testimony].

5. See Cerf, *supra* note 2.

Internet per hour.⁶ Even more telling than these statistics, the Internet's expanded uses, both informational and commercial, indicate the importance of the Internet today and for the future.⁷

The Internet is expanding more rapidly than anyone foresaw; yet, we may only be seeing the tip of the iceberg.⁸ But this exponential growth has not come without growing pains, one of the most recognized being domain name disputes. In the past, these disputes have involved everyone from corporations⁹ to famous athletes¹⁰ as the value of desired domain names grows each day.¹¹ Many of these disputes are a result of cybersquatting, defined as "the abusive registration of domain names by bad faith actors . . . in order to mislead consumers . . . or to extort payment from the right-

6. See Win Treese, *The Internet Index* (visited Jan. 20, 2000) (<http://new-website.openmarket.com/intindex/99-05-s.htm>).

7. See *Domain Name Hearings*, *supra* note 4 (testimony of Jonathan C. Cohen, President of the Intellectual Property Constituency of the Domain Name Supporting Organization), available at (<http://www.house.gov/judiciary/cohe0728.htm>) (describing Internet use to do business, meet people, be entertained, shop, study, and discuss politics) [hereinafter Cohen Testimony].

8. See Global Internet Project, *How the Internet Works* (visited Dec. 16, 1999) (<http://www.gip.org/gip7.htm>) (quoting Vint Cerf, Senior Vice President MCI, as saying that "I anticipate big surprises and monumental changes in the way in which the Network [the Internet] can serve us. . .").

9. In September 1999, the online toy retailer eToys, who uses the domain name (etoys.com), filed a trademark infringement suit against a Swiss art group using the domain name (etoy.com) after angry parents who had mistakenly landed on the (etoy.com) website began complaining to eToys. The (etoy.com) site occasionally includes graphic language and nude images on its website. In one example, an enraged consumer wrote to eToys after his grandson mistakenly visited the (etoy.com) site: "Are you completely nuts? What an irresponsible thing to show young children. We will never buy from you again." Less than two weeks later, eToys filed suit. See Claire Barliant, *E-Toy Story*, THE VILLAGE VOICE, Dec. 7, 1999, at 37. In late January 2000, eToys and the Swiss art group reached a settlement out of court. Among other terms of the agreement, the art group will keep the domain name (etoy.com), and eToys will pay the art group up to \$40,000 for legal fees. See Patricia Jacobus, *eToys Settles Net Name Dispute With etoy*, CNET NEWS.COM (Jan. 25, 2000) (<http://news.cnet.com/news/0-1007-200-1531854.html?tag=st.ne.1002>).

10. Two attorneys were recently sued by tennis stars Serena and Venus Williams over the registration of the domain names (serenawilliams.com) and (venuswilliams.com). The attorneys agreed to transfer the domain names and settled out of court. See Brenda Sandburg, *Lawyers Hit a Double Fault with Net Racket*, THE RECORDER, Oct. 28, 1999, at 5.

11. See Karen Kaplan, *Domain Name Trade Gives Rise to Whole New Breed of Brokers*, L.A. TIMES, Dec. 13, 1999, at C1.

ful trademark owner. . . .”¹² In October 1999, the Internet Corporation for Assigned Names and Numbers (“ICANN”) adopted its Uniform Domain Name Dispute Resolution Policy (“UDRP”) designed to provide a quick resolution to these types of disputes.

This Note will provide a review of the content and scope of ICANN’s UDRP and a discussion on whether the UDRP has succeeded where previous dispute resolution policies have failed. The Note begins with a brief overview of domain names and domain name registration. The historical overview then shifts to the creation of ICANN and the criticisms of Network Solutions, Inc.’s dispute resolution policy. The discussion focuses first on how domain name policy should be formulated, arguing that it is more efficient to focus on promoting consumer growth on the Internet than creating bright lines between disputing parties. The second section will address the issue of whether cybersquatters deserve to be targeted, and if so, what is their relative harm. The discussion then looks at the inherent problems intertwined with bad faith domain name disputes and policies that are most responsive. The Note concludes by exploring possible areas in which ICANN’s policy can improve with respect to the protection of non-consumer users.

I. BACKGROUND

A. The Domain Name System

1. *How the domain name system works*

Each computer connected to the Internet has a unique 32-bit Internet protocol (“IP”) address that is separated into a series of four 8-bit groups called octets (e.g., <123.45.67.89>).¹³ Like a telephone system, each address must be unique.¹⁴ Because remembering these strings of numbers is difficult and inconvenient, the IP address corresponds to a domain name or an easy-to-remember group of words or numbers such as <law.berkeley.edu> or <mccain2000.com>.¹⁵ These domain names are then

12. See *Domain Name Hearings*, *supra* note 4 (testimony of Andrew J. Pincus, General Counsel to the Department of Commerce), available at <<http://www.house.gov/judiciary/pinc0728.htm>>.

13. See *Details About Internet Addresses: Subnets and Broadcasting* (visited Dec. 17, 1999) (<gopher://gopher-chem.ucdavis.edu:70/11/Index/Internet_aw/Intro_the_Internet/intro.to.ip/07_Internet_addresses>). Each octet can range in value from 0-255. However, the numbers 0 and 255 have special meanings and are not generally used. Furthermore, the first octet is rarely 0, 127, or any number above 223. See *id.*

14. See Weinberg Testimony, *supra* note 3.

15. See *id.*

organized into a hierarchical retrieval system created by U.S.C.'s Information Sciences Institute ("ISI") in 1984.¹⁶ At the apex of the system is the "root server," which holds the root directory of all computers that hold top-level domain ("TLD") directories. TLDs include geographic identifiers (e.g., <.jp>, <.uk>) as well as generic identifiers (e.g., <.com>, <.edu>, <.net>).¹⁷ These computers, in turn, contain a directory of computers which hold the directories of second-level domains. Second-level domains ("SLDs") include identifiers within each top-level domain (e.g., <gap.com>, <yahoo.com>, <berkeley.edu>)¹⁸ which hold directories of third-level domains (e.g., <law.berkeley>, <psychology.berkeley>, <history.berkeley>) and so on. This system retrieves the domain name address by breaking down the domain name into its TLD and SLDs and retrieving those addresses from their respective databases, which are held by various computers across the Internet.¹⁹

When a user types in a domain name, the user's computer sends a request to a domain name server, which then searches for the IP address associated with that URL in a hierarchical fashion. The server then returns the corresponding IP address to the host computer.²⁰ Using <www.law.berkeley.edu> as an example, the user's local domain name server will first query the root server to find the IP address for the computer holding the directory for the <.edu> TLD. After receiving this address, it will then query the <.edu> server for the IP address of the computer holding the directory for the <.berkeley> SLD. Finally, it will query the <.berkeley> server for the IP address of the computer holding the directory for the <.law> sub-domain, which it will query for the IP address of the machine named "www."²¹ This IP address will then be returned to the user's computer.

2. *A brief history of domain name registration*

To access a domain name, the name must be registered or listed in the proper corresponding domain directory. If "berkeley" is not registered in

16. *See id.*

17. *See* Joseph P. Liu, *Legitimacy and Authority in Internet Coordination: A Domain Name Case Study*, 74 IND. L.J. 587, 590-91 (1999).

18. *See id.* at 591.

19. *See id.*

20. *See Keeping Track of Names and Information: The Domain Name System* (visited Dec. 17, 1999) <gopher://gopher-chem.ucdavis.edu:70/11/Index/Internet_aw/Intro_the_Internet/intro.to.ip/05_Names_and_Info_Domain_System>.

21. Fortunately, it is usually not necessary most of the time to go through each query. The computer's cache will store recent answers it received, so many of the queries can be eliminated. *See id.*

the (.edu) master server, querying the (.edu) server for its address would be equivalent to searching for an unlisted phone number in a telephone directory.

Unlike telephone directories, though, servers have a finite number of desirable domain names. Whereas a telephone directory can contain an infinite number of "McDonald, R." listings, each with a different phone number, the Internet can only have one (mcdonalds.com). Domain name disputes, therefore, arise when one entity (the domain name holder)²² registers and owns a domain name like (mcdonalds.com), and another entity (usually the registered trademark owner) wants to use it.²³

There are three generic top-level domains ("gTLDs")—(.com), (.net), and (.org)—in which any person can register a domain name without any prerequisites apart from uniqueness.²⁴ In 1985, the Defense Department first assigned the job of registering domain names in these top-level domains to SRI International, a non-profit Silicon Valley research institute.²⁵ Later, the National Science Foundation ("NSF") became the leading funder for the Internet infrastructure, and on December 31, 1992, it entered into a five-year cooperative agreement with Network Solutions, Inc. ("NSI"). This agreement gave NSI the responsibility and sole control over domain name registration in these gTLDs.²⁶ Initially, NSI attempted to remain neutral in domain name disputes, registering domain names on a first-come, first-served basis.²⁷

When NSI's initial agreement expired,²⁸ NSI entered into an agreement with the Department of Commerce which extended the terms of the

22. The term "domain name holder" obviously includes some parties that own both the domain name and the registered trademark just as the term "trademark owner" encompasses parties that own the domain name as well as the trademark. However, as this Note focuses primarily on domain name disputes, the term "domain name holder" will refer exclusively to domain name holders who do not also possess the trademark. Likewise, "trademark owner" will not include those parties who own both the domain name and the trademark.

23. See Angela Proffitt, Note, *Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn from United States Trademark Experience*, 19 LOY. L.A. ENT. L.J. 601, 601 (1999).

24. See Daniels Testimony, *supra* note 4.

25. See Weinberg Testimony, *supra* note 3.

26. See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,742 (1998), [hereinafter White Paper].

27. See Development, *The Domain Name System: A Case Study of the Significance of Norms to Internet Governance*, 112 HARV. L. REV. 1657, 1664 (1999) [hereinafter *Domain Name System*].

28. The initial agreement was scheduled to expire on September 30, 1998. See ICANN, *supra* note 3 (prepared statement of Esther Dyson, Interim Chairman of the

initial agreement until September 30, 2000.²⁹ In exchange for this two-year extension, NSI agreed to create a Shared Registry System to allow competing companies to register domain names in the (.com), (.org), and (.net) domains.³⁰ In addition, once a competitive registrar system was created, NSI agreed to apply for accreditation through the same process as other registrar companies, so it would no longer hold any advantage over its competitors.³¹

B. Why ICANN was Created

1. Concerns about NSI

By 1998, NSI and the domain name registry system as a whole had attracted critics. Some felt that NSI had been given an economic windfall on its control of domain name registration in the (.com), (.org), and (.net) gTLDs.³² NSI had registered over 2.7 million domain names and reaped estimated gross profits of almost \$36 million.³³ With the Internet experiencing an explosive economic boom,³⁴ allowing this windfall to continue seemed increasingly inequitable.³⁵ Others lamented that the lack of competition and the absence of alternative means to register domain names led to high registration fees,³⁶ high annual fees,³⁷ and a poor customer service record.³⁸

Board of Directors, ICANN), available at (<http://com-notes.house.gov/ccheart/ hearings106.nsf/a317d879d32c08c2852567d300539946/ 8467221f7c9d1630852567b70049d574?OpenDocument>) [hereinafter Dyson Statement].

29. *See id.*

30. *See id.*

31. *See id.*

32. *See Domain Name System, supra* note 27, at 1663.

33. *See id.* at 1662.

34. In 1998, total e-commerce business totaled \$102 billion. *See Domain Names Hearings, supra* note 4 (testimony of Anne Chasser, President of the International Trademark Association), available at (<http://www.house.gov/judiciary/chas0728.htm>) [hereinafter Chasser Testimony].

35. NSI currently charges the public \$35 per year for registration fees. Richard Forman, president of Register.com claims that NSI would make \$80 million per year even if it charged only \$16 per year, which is NSI's current proposal for registration fees when its agreement with the Department of Commerce expires. Forman suggests that a fair registration fee would be between \$1.50 and \$2. Tom McDonald, founder of domainwatch.com, suggests that a fair registration fee would be less than \$1 per year. Other market analysts predict between a \$10 and \$16 annual fee. *See Spencer Ante, Network Solutions' Complicated Name Game, THESTREET.COM* (April 6, 1999) (http://fnews.yahoo.com/street/99/04/06/valley_990406.html).

36. Science Applications International Corporation ("SAIC") purchased NSI in 1995 and negotiated a deal with the U.S. Government which allowed NSI to charge \$100 for each new domain name. Many customers lamented the fact that if they wanted to be-

At the forefront of complaints was NSI's policy (or lack of policy) for resolving domain name disputes³⁹ and its highly disputed first-come, first served policy for domain name priority.⁴⁰ Before 1995, NSI asserted that the domain name holder bore the responsibility for ensuring that a domain name did not infringe upon any trademark rights, but otherwise, did not provide a formal dispute resolution policy.⁴¹ In 1995, NSI issued its first formal domain name dispute policy and allowed trademark owners to challenge the registration of a domain name by presenting NSI with evidence that the domain name violated their trademark rights.⁴² Notwithstanding a challenge by trademark owners, however, NSI still allowed domain names to be registered on a first-come, first-served basis.⁴³ In 1998, NSI issued another dispute resolution policy, which allowed trademark owners to place domain names "on hold" pending the resolution of the dispute.⁴⁴ The domain name owner, if challenged, could prevent the domain name from being placed on hold by providing proof that either (1) the domain name was registered before the complainant's trademark or (2) the domain name holder also held a trademark for the domain name.⁴⁵

come part of the Internet, they had no choice but to pay this arbitrary fee. To compound the dissatisfaction, the IANA previously provided registration service for free. See *Domain Name System*, *supra* note 27, at 1662 n.32, 1663 n.40.

37. In addition to the registration fee, SAIC negotiated with the Government to allow NSI to charge a \$50 annual fee for each existing domain name holder. See Weinberg Testimony, *supra* note 3.

38. Among other complaints, many customers found NSI's domain name owner database, "Whois," often out of date or incorrect. This created significant problems in domain name disputes because the domain name owner could not be consistently located. See *Domain Name System*, *supra* note 27, at 1663 n.39.

39. See White Paper, *supra* note 26, at 31,742 (declaring that among the pressures for changing the domain name management system are that "[c]onflicts between trademark owners and domain name holders are becoming more common," and the fact that the preexisting "[m]echanisms for resolving these conflicts are expensive and cumbersome.")

40. See Jonathan Zittrain, *ICANN: Between the Public and the Private—Comments before Congress*, 14 BERKELEY TECH. L.J. 1071, 1079 (1999).

41. See *Domain Name System*, *supra* note 27, at 1664.

42. See *id.* at 1664 n.46.

43. See *id.* at 1664.

44. When placed on hold, a domain name is unavailable for use by either party until the domain name dispute is resolved. See G. Peter Albert, Jr., *Eminent Domain Names: The Struggle to Gain Control of the Internet Domain Name System*, 16 J. MARSHALL J. COMPUTER & INFO. L. 781, 787-88 (1998).

45. See *NSI Dispute Resolution Policy* (visited Nov. 2, 1999), available at <http://www.networksolutions.com/legal/dispute-policy.html> ; see also *Domain Name Dispute Policy FAQ* (visited Nov. 2, 1999), available at <http://www.networksolutions.com/help/general/dispute.html>.

Both domain name holders and trademark owners attacked NSI's policy for its breadth because of its failure to consider the common law likelihood of confusion requirement necessary for trademark infringement in the United States.⁴⁶ For domain name holders, NSI's policy was overbroad and placed them at an unfair disadvantage because trademark owners could invoke the dispute resolution policy and place a domain name on hold even if the domain name registration was for products or services that bore no similarity to the trademark use.⁴⁷ In other words, trademark owners were allowed to place domain names on hold even though they would have had only a very weak claim under trademark law.

On the other hand, by not following the likelihood of confusion standard in US trademark law, the policy was under-inclusive for trademark owners.⁴⁸ Whereas NSI's dispute resolution process could only be invoked if the domain name was identical to the registered trademark, American trademark law allows an action against nonidentical marks that create a "likelihood of confusion."⁴⁹ For example, under NSI's dispute resolution policy, Microsoft could not invoke the process to dispute the domain name <microsoftsoftware.com>.⁵⁰

This bright line drawn between trademark owners and domain name holders created steadfast rules for the polar extremes, but did not provide an answer for the middle ground. Instead, it implemented an all-or-nothing rule. If the domain name was identical, then it was treated as infringing without regard to whether it actually infringed in real life. And on the other side, unless the domain name was identical, trademark owners were helpless to invoke NSI's policy for protection.

2. *The creation of ICANN*

In response to the growing criticisms of NSI's domain name registration system, the Commerce Department issued a Green Paper⁵¹ and then a White Paper⁵² expressing its views on the domain name system. Citing the

46. See Lisa T. Oratz, *Trademarks and the Internet*, Perkins Coie LLP (visited Sept. 12, 1999), available at <<http://www.perkinscoie.com/webrelease/trademarks.htm>>.

47. See *id.*

48. See *id.*

49. See *id.*

50. See *id.* NSI's policy also stated that the registered trademark had to be identical to the portion of the domain name *before* the TLD. That is, the registered trademark "Amazon.com" would apply to the domain name <amazoncom.com> but not to <amazon.com>. See *id.*

51. See Improvement of Technical Management of Internet Names & Addresses, 63 Fed. Reg. 8826, 8827 (1998).

52. White Paper, *supra* note 26.

evolution of the Internet into an international medium for commerce with growing demands for change, the Commerce Department called for a new, private, non-profit organization, independent of the U.S. Government, to centralize domain name system management.⁵³

Following the release of the White Paper, a coalition of the Internet's communities formed the Internet Corporation for Assigned Names and Numbers ("ICANN").⁵⁴ In 1998, the Government gave ICANN the responsibility of centralizing the management of the domain name system in accordance with the White Paper.⁵⁵ Jon Postel, who helped develop the hierarchical domain name system and who had chaired the InterNet Assigned Numbers Authority ("IANA"), agreed to serve as Chief Technical Officer for ICANN.⁵⁶

Initially, ICANN suffered from continual financial problems⁵⁷ and controversies⁵⁸ that were only compounded by Postel's unexpected death in 1998.⁵⁹ But ICANN endured,⁶⁰ and has since made significant strides in

53. *See id.* at 31,749-51.

54. *See Internet Domain Names and Intellectual Property Rights: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, (July 28, 1999) (<http://www.house.gov/judiciary/robe0728.htm>) (testimony of Michael Roberts, Interim President and Chief Executive Officer of ICANN).

55. In addition to overseeing policy for creating new domain name registrars and new gTLDs, ICANN was given the responsibility of coordinating the assignment of Internet protocol parameters, allocating IP address space, and managing the Internet root server system. *See White Paper, supra* note 26, at 31,749 & 31,751.

56. *See Weinberg Testimony, supra* note 3.

57. *See Carolyn Duffy Marsan, ICANN't Make Ends Meet: Internet Names Group Cries Poverty*, NETWORK WORLD FUSION (July 15, 1999) (<http://www.nwfusion.com/news/1999/0715icannt.html>).

58. In response to its financial difficulties and lack of a stable source of income, ICANN initially proposed charging a volume-based user fee (not to exceed \$1 per registration per year) paid by registrars based on the volume of their registrations. *See Weinberg Testimony, supra* note 3. This proposal was met with much criticism, the source of which one commentator argues is not the actual fee policy but the failure to obtain community support before announcing the policy. *See id. But see Dyson Statement, supra* note 28 (arguing that the registry fee was adopted following a thorough process of public notice and comment which resulted in what appeared to be community consensus of a broad support for the fee).

59. Apart from Dr. Postel, the initial Board of Directors were selected specifically for their non-involvement in the previous "DNS wars" with the belief that they would begin operations with an open mind. It was believed that Dr. Postel's reputation in the Internet community would offset the other Directors' lack of experience in the Internet world. When Dr. Postel died, the Board of Directors came under intense scrutiny, and ICANN's legitimacy was immediately questioned because of its lack of experience in domain name disputes. *See Weinberg Testimony, supra* note 3.

addressing many of the main concerns with the past domain name system registry.⁶¹

ICANN immediately addressed the need for increased competition in domain name registrars by licensing five testbed registrars on April 26, 1999.⁶² Since then, it has licensed 110 additional registrars, including the twelve newest companies on January 25, 2000.⁶³ As of September 1999, nineteen were in various stages of creating software that will allow them to soon offer registrar services.⁶⁴ And after a lengthy struggle, ICANN reached an agreement with NSI in which NSI agreed to recognize ICANN's authority and operate its registry in accordance with ICANN's Registrar Accreditation Agreement.⁶⁵

Not surprisingly, the most significant policy which ICANN has adopted is its Uniform Domain Name Dispute Resolution Policy. After

60. See generally Mary Mosquera, *Net Governance Will Take Time to Get Right*, TECHWEB (July 23, 1999) (<http://www.techweb.com/wire/story/TWB19990723S0016>) (discussing ICANN's first-year and potential future).

61. The Global Internet Project ("GIP") endorsed ICANN for its administration of the domain name system, applauding ICANN for working hard to provide "a transparent, participatory process." GIP is an international group of senior executives from Internet-centric companies. It was founded by former Netscape Communications Corporation Chairman, Dr. James Clark, and is currently chaired by IBM Vice President for Internet Technology, John Patrick. See Global Internet Project, *Leading Internet Executives Speak Out in Support of ICANN; Address New Internet Policies* (Sept. 16, 1999) (<http://www.gip.org/pr19990916a.htm>).

62. See ICANN, Press Release, *ICANN Names Competitive Domain-Name Registrars* (April 21, 1999) (<http://www.icann.org/announcements/icann-pr21apr99.htm>). The testbed registrars were the first registrars to participate with NSI in the Shared Registry System, which implemented the new competitive system for gTLD registration services. The five registrars were America Online, CORE (Internet Council of Registrars), France Telecom/Oléane, Melbourne IT, and register.com. See *id.*

63. See ICANN, Press Communique, *ICANN Accredits Twelve New Domain Name Registrars* (Jan. 25, 2000) (<http://www.icann.org/announcements/icann-pr25jan00.htm>).

64. See Business Wire, *Network Solutions, Department of Commerce and ICANN Working Together to Reach Agreement on Domain Name Registration Services* (Sept. 10, 1999) (<http://library.northernlight.com/FC1999091030000021.html?cb=0&dx=1066&sc=0>).

65. See *Network Solutions, Department of Commerce and ICANN Reach Long-Term Agreements for Internet's Domain Name System* (Sept. 28, 1999), available at (http://www.netsol.com/news/1999/pr_19990928.html); see also *Fact Sheet on Tentative Agreements Among ICANN, the U.S. Department of Commerce, and Network Solutions, Inc.* (Sept. 28, 1999) available at (<http://www.icann.org/nsi/factsheet.htm>). ICANN and NSI had been involved in a bitter dispute over control over the domain name registry. Prior to the agreement, NSI had asserted intellectual property rights over the contents of the gTLD databases and had hindered ICANN's integration of the shared registry system. For further discussion on these battles, see Weinberg Testimony, *supra* note 3.

over a year of formulation, ICANN proposed a policy adapted from the World Intellectual Property Organization ("WIPO") proposal⁶⁶ to resolve certain domain name disputes. The proposal was accepted on October 24, 1999, and the first dispute-resolution provider was approved on November 29, 1999.⁶⁷ Complaints were first allowed to be submitted on December 1, 1999, and the first complaint under ICANN's UDRP was submitted one day later over the domain name, <worldwrestlingfederation.com>.⁶⁸ On January 14, 2000, a single panelist ruled that the domain name was being used in bad faith and required that the registration be transferred to World Wrestling Federation Entertainment, Inc. pursuant to section 4(i) of the UDRP.⁶⁹ As of February 7, 2000, three dispute resolution service providers had been approved,⁷⁰ and fifty-eight disputes were pending.⁷¹

II. ICANN'S UNIFORM DISPUTE RESOLUTION POLICY

The UDRP differs from NSI's dispute-resolution policy in three main areas. First, trademark owners are no longer able to place a hold on domain names during any dispute-resolution process.⁷² Second, unless the domain name is being held in bad faith, the trademark owner cannot invoke the UDRP proceedings. For traditional trademark infringement or

66. See WORLD INTELLECTUAL PROPERTY ORG., FINAL REPORT OF THE WIPO INTERNET DOMAIN NAME PROCESS, WIPO Pub. No. 92-805-0779-6 (1999), available at <<http://ecommerce.wipo.int/domains/process/eng/processhome.html>>.

67. See ICANN, *Implementation Schedule for Uniform Domain Name Dispute Resolution Policy* (visited Dec. 16, 1999) <<http://www.icann.org/udrp/udrp-schedule.htm>>.

68. See ICANN, *List of Proceedings Under Uniform Dispute Resolution Policy* (visited Feb. 7, 2000) <<http://www.icann.org/udrp/proceedings-list.htm>>.

69. See *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*, WIPO Case No. D99-0001 § 7 (1999) (Donahy, Arb.). For additional information about the specifics of the first dispute resolution, see *infra* III.A.2.

70. The three providers are WIPO, The National Arbitration Forum, and Disputes.org/eResolution Consortium. See ICANN, *Approved Providers for Uniform Domain Name Resolution Policy* (visited Feb. 7, 2000) <<http://www.icann.org/udrp/approved-providers.htm>>.

71. The domain names vary from <alcoholicsanonymous.net> to <fossilwatch.com> to <sixnet.com>. See ICANN, *supra* note 68.

72. See Network Solutions, Inc., *Domain Magistrate Frequently Asked Questions* (visited Feb. 7, 2000) <<http://www.domainmagistrate.com/faqs.html#2>>.

dilution claims, ICANN will not alter the status⁷³ of the domain name absent an independent settlement between the parties or a court decision.⁷⁴

The third and most significant change with the UDRP is a mandatory administrative dispute resolution proceeding for the disputes that do involve "bad faith" domain name holders.⁷⁵ The dispute resolution procedure will be handled primarily online,⁷⁶ and is designed to cost approximately \$1,000 and take less than forty-five days to reach resolution.⁷⁷ In order to invoke this proceeding, the registered trademark owner must make a preliminary showing of bad faith on the part of the domain name holder, and in most cases, pay the entire fees for the proceeding.⁷⁸ Although either party may dispute the ruling in court following the decision,⁷⁹ this proceeding provides a quick and relatively inexpensive opportunity for the trademark owner to challenge the abusive ownership of a domain name.

73. Change of status includes cancellation, transfer, activation, and deactivation. See ICANN, *Uniform Domain Name Dispute Resolution Policy* § 7 (visited Dec. 16, 1999) available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> [hereinafter *The Policy*].

74. See *id.* at §§ 3 (a)-(b), 5, 7.

75. See *id.* § 4.

76. The initial complaint and response will be submitted electronically. All other correspondence from the complainant or respondent to the Provider will be made via either facsimile, telecopy, electronic mail, or through a Internet-based case filing administration system. All other correspondence from the Provider to the complainant or respondent shall be made according to their preferred means of communication (postal service, facsimile/telecopy, or electronic mail) stated in their complaint or response respectively. See ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy*, §§ 2, 13. (visited Dec. 16, 1999) available at <http://www.icann.org/udrp/udrp-rules-24oct99.htm> [hereinafter *The Rules*]. See also WIPO *Supplemental Rules for Uniform Domain Dispute Resolution Policy* § 3 (visited Dec. 16, 1999), available at <http://arbiter.wipo.int/domains/rules/supplemental.html> [hereinafter *Supplemental Rules*].

77. See ICANN, *Frequently Asked Questions on Uniform Dispute Resolution Policy* (visited Dec. 16, 1999), available at <http://www.icann.org/general/faq1.htm> [hereinafter *ICANN FAQ*].

78. The complainant must pay all fees associated with the administrative proceeding except in cases when the domain name holder elects to expand the number of panelists on the Administrative Panel, in which case the fees will be split evenly. See *The Policy*, *supra* note 73, § 4(g).

79. In cases in which the Administrative Panel decides that the domain name should be transferred, ICANN will not implement the decision if the domain name holder presents within ten days official documentation that a lawsuit has been commenced. Official documentation includes a file-stamped copy of the complaint filed in court. See *id.* § 4(k).

A. The Substantive Threshold

In his initial complaint, the trademark owner must include the grounds on which the domain name holder has violated *each* of the following three elements:

- 1) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;
- 2) the domain name holder has no rights or legitimate interests in respect of the domain name;
- 3) the domain name has been registered and is being used in bad faith.⁸⁰

The “bad faith” prong of the test rests on whether the domain name holder’s actions include *any* of the following:

- 1) acquisition of the domain name primarily for the purpose of selling, renting or transferring the domain name to the trademark owner or competitor for a price in excess of the costs directly related to acquiring the domain name;
- 2) registration of the domain name for the purpose of preventing the trademark owner from using the domain name;
- 3) registration of the domain name for the purpose of disrupting the business of a competitor; or
- 4) an intentional attempt to attract Internet web users to the domain name site for commercial purposes by creating a likelihood of confusion between the trademark and the source, product, or service offered on the domain name website.⁸¹

B. The Procedural Process

The dispute resolution process can be initiated by any individual or entity through the submission of a formal complaint that includes the above allegations to an administrative dispute resolution service provider (“Provider”) of its choice.⁸² After the formal complaint is filed, the Provider will review the complaint for administrative compliance.⁸³ If in

80. *See id.* § 4(a).

81. *See id.* § 4(b).

82. *See The Policy, supra* note 73 § 4(d).

83. *See The Rules, supra* note 76, § 4(a).

compliance,⁸⁴ the Provider will forward the complaint to the domain name holder,⁸⁵ and the domain name holder will have twenty days after receipt in which to respond to the complaint.⁸⁶ Within the reply, the domain name holder may address the statements and allegations in the complaint and include all bases for which the domain name holder should retain registration and use of the disputed domain name.⁸⁷ If the domain name holder fails to respond within twenty days, the Administrative Panel will decide the dispute based on the complaint alone.⁸⁸ In exceptional cases, the Provider may extend the twenty day deadline at the request of the domain name holder.⁸⁹

After the response has been submitted, an Administrative Panel will be selected, at least in part, by the Provider. The Administrative Panel will consist of a single panelist selected by the Provider unless either the domain name holder or the trademark owner requests a three member panel.⁹⁰ If a three member panel is requested, then both parties will submit a list of candidates in order of their preference. The Provider will then choose one panelist from each list. The third panelist will then be chosen by the Provider.⁹¹ All panelists and their biographies shall be made public by the Provider.⁹²

Once the Administrative Panel has received the complaint and reply, a decision must be forwarded to the Provider within fourteen days absent exceptional circumstances.⁹³ In the case of a three member panel, a majority decision is sufficient.⁹⁴ Within three days of receiving the decision from the panel, the Provider must communicate the full text of the decision to each party. In addition, absent instructions from the Panel otherwise, the Provider must publish the full decision on a publicly accessible website.⁹⁵

84. If the complaint is administratively deficient, the complainant will have five calendar days to correct the deficiencies else the complaint will be dismissed without prejudice. If the complaint is dismissed, the trademark owner must pay a new fee if she chooses to submit another complaint. *See id.* § 4(b).

85. *See id.* § 4(a).

86. *See id.* § 5(a).

87. *See id.* § 5(b).

88. *See id.* § 5(e).

89. *See id.* § 5(d).

90. *See id.* § 6(b).

91. *See id.* § 6(c)-(e).

92. *See id.* § 6(a).

93. *See id.* § 15(b).

94. *See id.* § 15(c).

95. *See id.* § 16(a)-(b).

III. DISCUSSION

Whether ICANN's policy is the right solution depends, in part, upon the basic goals for any Internet policy. With the Internet's continued growth and rapid expansion within the international community, one obvious goal is to maximize the Internet's benefit to the greatest number of people. The White Paper articulated one method of achieving this objective by calling for a broad representation of interests, both geographically and with respect to differing interests involved, when formulating policy.⁹⁶ In the domain name context, this means considering the interests of both the domain name holder and the trademark owner as well as those the individual users of the Internet and the international community. The same characteristics that make this representation so important, however (the Internet's amazing growth and the skyrocketing value of domain names), have made the challenge of broad representation be void of easy solutions.

Possibly the best solution is to attempt to formulate domain name policy based on consensus⁹⁷ within the Internet community. In fact, ICANN's president, Esther Dyson, has testified before Congress that ICANN's purpose and objective are to implement policies based on this "[Internet] community-wide consensus."⁹⁸ Yet as some observers have noted, consensus is elusive if not impossible in a Pareto-optimal game.⁹⁹ For domain name disputes, a Pareto-optimal result may be inevitable. The continued surge in domain name registrations¹⁰⁰ coupled with a limited number of desirable domain names usually ensures that one party must lose.¹⁰¹ In this win-lose environment, a consensus-based policy may well be unworkable. Instead, the focus should shift from attempting to represent the interests of

96. See Zittrain, *supra* note 40, at 1084.

97. In the Internet context, "[c]onsensus is defined . . . in such terms as 'there does not appear to be any one complaining all that much' or 'most people seem to agree, except for a few outliers.'" *Id.*

98. See Dyson Statement, *supra* note 28.

99. See Zittrain, *supra* note 40, at 1085 (arguing that the first goal should be openness in the decision making process since consensus will be impossible in some situations). An outcome is Pareto-optimal if no party may be made better off without making another party worse off.

100. By the year 2000, it is estimated that 100 million domain names will be registered. See Proffitt, *supra* note 23, at 202; see also Eileen Smith, *Master of Your Domain Name*, PC WORLD, Jan. 21, 2000 (<http://www1.pcworld.com/pcwtoday/article/0,1510,14899,00.html>) (stating that more than 15,000 domain names are created every day).

101. Even cybersquatters lose in domain name disputes. Although they may not lose a valuable source for e-commerce, they lose the "investment" they made in registering valuable domain names. Depending on who is evaluating the investment, this loss can range from anywhere between the actual cost of registration, \$70, or millions of dollars.

the domain name holder against the often conflicting interests of the trademark owner to a focus on representing the interests of the Internet *users*, both corporate and individual.

A. The UDRP Helps Focus on Consumer Growth

One way to represent the interests of the users of the Internet is to create policies that aim to promote continued growth in Internet use by consumers. For as consumer use on the Internet expands, retailers receive greater commercial value for their websites both online and offline. Already, in addition to the over \$102 billion in e-commerce in 1998,¹⁰² the Internet has become an integral source of research for offline purchases and transactions.¹⁰³ As consumer use¹⁰⁴ increases, the retailer's advertising dollars return even greater value. In turn, users benefit because as the commercial value of websites rise, more and more companies will provide services and goods online. As long as consumer growth continues, this loop perpetuates. Thus, by shifting the focus to promoting continued growth in consumer use, Internet and domain name policies are no longer muddled in creating distinctions between domain name holders and trademark owners or between big businesses and small businesses or individuals.

Revisiting NSI's dispute resolution policy, one can see where that policy failed. Instead of providing a policy that focuses on a positive goal, promoting consumer growth, it attempted to draw a line between trademark owners and domain name holders. In the end, domain name holders felt that this categorization unfairly treated them all as cybersquatters. At the same time, trademark owners felt that the process was too narrow and failed to include some domain name holders who were infringing trademarks.

Whether intentionally or not, ICANN's policy does not draw the same bright lines between domain name owners and trademark owners. By specifically limiting the application of its policy to disputes involving "bad faith" domain name holders,¹⁰⁵ ICANN's policy resets the situation to one

102. See Chasser Testimony, *supra* note 34; see also *Domain Name System*, *supra* note 32, at 1663 (predicting that by the beginning of the 21st century, e-commerce could reach as high as \$300 billion).

103. See Chasser Testimony, *supra* note 34.

104. "Consumer use" includes use of the Internet for online purchases as well as for seeking information about a company or product

105. See *The Policy*, *supra* note 73, § 4(a); see also generally Courtney Macavinta *Domain Restrictions Target Cybersquatters*, CNET NEWS.COM (May 3, 1999) (<http://news.cnet.com/news/0-1005-200-341968.html>) (describing "cybersquatter" problem and reporting that WIPO Report was passed onto ICANN).

that recognizes that not all identical names should invoke special dispute resolution processes, but conversely, an identical name is not always required to infringe. Without having to evaluate whether the line was properly drawn between domain name holders and trademark owners, one can focus instead on whether the policy has effectively addressed potential roadblocks along the way towards increased consumer use.

1. Targeting cybersquatters

Although there may be many reasons behind recent growth in consumer use of the Internet, one undeniable reason is convenience.¹⁰⁶ Cybersquatters can detract from the convenience of the Internet consumer in either of two ways. They can either misdirect the consumer to a website she did not wish to access or keep an easily recognizable and memorable domain name out of Internet use altogether. Certainly, both of these methods may potentially hinder continued consumer growth on the Internet, and ICANN's policy rightfully includes both in its definition of a "bad faith" user.

On the other hand, although directing consumers to undesired websites can be both frustrating and time consuming, it is not permanent. Users who are led to undesired websites can easily revert to a search engine or even just return to the previously viewed webpage with little more than a click of the mouse.¹⁰⁷ The time lost is measured only in seconds. In addition, with the increased use of search engines like AOL's Keywords search, users can often reach desired websites regardless of domain names by typing in easy abbreviations or words.¹⁰⁸ Likewise, trademark owners are not often deterred from creating a website merely because their desired domain name is unavailable. Users may not be able to access the desired site with the ease of an already-established trademark name, but nevertheless, the website will still be available. Most importantly, the court system is always available for registered trademark owners who encounter cybersquatters.¹⁰⁹

106. See, e.g., Michelle Slatalla, *How to Spend an Allowance Without Leaving Home*, N.Y. TIMES ON THE WEB, Aug. 12, 1999 (<http://search.nytimes.com/search/daily/homepage/bin/fastweb?getdoc+cyber-lib+cyber-lib+5678+10+wAAA+Internet%7Eand%7Econvenience>).

107. See Shannon N. King, Note, *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 15 BERKELEY TECH. L.J. 313, 325 (2000).

108. For example, the keyword "BofA" would directly link the user to Bank of America's homepage even if their domain name were not (BofA.com).

109. Trademark owners now have an even greater protection in court now with the newly enacted Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, § 1000(a)(9), 113 Stat. 1501, 36 (Consolidated Appropriations Act, 2000, enacting S. 1948).

Although cybersquatters do not completely block consumer growth, they still hinder it. Furthermore, the e-commerce value of a domain name used by Internet consumers far outweighs the price value an individual cybersquatter can extract from the trademark owner. Therefore, ICANN was not mistaken in targeting cybersquatters. The possibly more difficult issue lies in determining how should domain name policies deal with cybersquatters considering they pose a threat to continued consumer-use growth, yet at the same time, engage in activities that are normally only minor hindrances.

2. *The UDRP is time- and cost-efficient*

For consumers, a time- and cost-efficient dispute resolution policy is justified by the low relative importance of resolving the domain name disputes to the consumer. In terms of damaging Internet e-commerce, cybersquatting is unlikely to result in repercussions to the consumer more severe than a minor headache. Accordingly, the dispute resolution policy must be equally simple in regards to both time and economic costs. It is inefficient to have a complex dispute resolution policy with high economic and time costs when the end result may not make a noticeable difference to the everyday consumer.

On the other hand, business users of the Internet need a time- and cost-efficient method to resolve domain name disputes because of the growing value of easily recognizable domain names¹¹⁰ associated with their trade-

106th Cong., § 3002 (1999)) (to be codified at 15 U.S.C. § 1125(d)) (1999). In response to the sometimes difficult task for courts in applying old trademark law to new Internet domain name disputes, this Act amends the Trademark Act in regards to domain name disputes involving "bad faith" domain name holders. *See id.* In particular, the amendments provide for a cause of action for famous personal names as well as registered trademarks, and provide for statutory damages up to \$100,000 per domain name in lieu of actual damages. *See id.*

110. Tom Millitzer, owner of New Commerce Communications, the international Internet merger and acquisition firm that brokered the sale of <wallstreet.com> for the then largest sum ever of \$1.03 million, argues that "Good domains are valuable real estate, and ownership of the right name can translate into visitors, traffic, and unlimited business opportunity." *See Business Wire, HitDomains.com Announces Internet Auction of "autos.com" to Shift Online Auto Market Into High Gear; Record Sales Price is Predicted for Valuable Single Word Domain Name* (Nov. 22, 1999). For additional information about the online domain name brokerage industry, see generally DNRealtors.com, Inc., *DNRealtors.com Home Page* (visited Feb. 13, 2000) (<<http://www.dnrealtors.com>>). DNRealtors.com is one of the largest Internet domain name brokerage firms, having represented domain names such as <injurylawyers.com>, <slim.com>, and <iFinancial.com>. *Id.* It provides media advertisements, e-mail/telephone/fax campaigns, auction setup, and press releases. *Id.* Currently, it represents over 80,000 domain name listings. *Id.*

marks.¹¹¹ This high value to the business owner, however, creates two main advantages for the cybersquatter. First, the value of a domain name to the trademark owner may justify cumbersome and expensive litigation.¹¹² This gives cybersquatters leverage to sell the domain name to the trademark owner at its nuisance value—a price below litigation costs, but well above the actual costs of obtaining the name. A cost-efficient dispute resolution policy will help balance out this leverage that cybersquatters have over trademark owners.

Second, the trademark owner is potentially losing the value of the domain name every day the dispute resolution process goes unresolved by losing potential customers who are not finding the correct site. Considering that, on average, over 30 million people use the Internet per day,¹¹³ this result magnifies with each passing day. As the process wears on, the trademark owner faces more and more pressure to settle with the cybersquatter with a price in excess of the original costs of obtaining the domain name. Obviously, a dispute resolution policy that is time-efficient will help eliminate this inherent advantage of cybersquatters in lengthy dispute resolution processes.

Once again, it is evident where NSI's policy was lacking. By attempting to protect itself from wrong results, NSI's policy was neither time- nor cost-efficient. The "holding" period did not lessen the harm to the trademark owner. Although the NSI policy allowed the trademark owner to place the domain name on hold, it did not speed the process of resolving the domain name dispute, nor did it allow the trademark owner to use the domain name. As a result, trademark owners were still susceptible to the fear of losing potential customers during drawn-out court proceedings. In addition, by relying on the court system to ultimately resolve disputes, NSI's policy failed to resolve the cost issue as well. The potentially high litigation costs were the driving force behind the high nuisance value of domain names for cybersquatters.

ICANN's policy, on the other hand, is both time- and cost-efficient. It is designed to take approximately forty-five days and cost only \$1,000.¹¹⁴ Not only does this policy provide a quick resolution, it provides the resolution at a price that is affordable to even small business owners and individual domain name owners. On January 14, 2000, the WIPO Arbitration

111. See Zittrain, *supra* note 40, at 1076.

112. Estimates for litigation costs in even simple cases in federal civil court are between \$10,000 and \$15,000. See Jeri Clausung, *International Panel Resolves First Domain Dispute*, N.Y. TIMES, Jan. 14, 2000, at B10.

113. See Cohen Testimony, *supra* note 7.

114. See ICANN FAQ, *supra* note 77.

and Mediation Center resolved the first domain name dispute under ICANN's UDRP.¹¹⁵ In terms of time and cost efficiency, the results were generally a success.

The dispute was resolved in less than forty days, and the total cost for the World Wrestling Federation ("WWF") was limited to between \$2,000 and \$3,000.¹¹⁶ The timeliness of the dispute resolution was especially beneficial to the WWF as the group is currently working hard to build its profile and brand name.¹¹⁷ The attorney fees, included in the overall cost estimate, were a relative bargain compared to the \$10,000 to \$15,000 estimate for resolving even simple cases in federal civil court. Likewise, Michael Bosman, the individual who was forced to relinquish the <worldwrestlingfederation.com> domain name, expressed his satisfaction that the entire dispute did "not cost [him] a dime"¹¹⁸ even though he was disappointed in the arbitrator's decision. Overall, Mr. Bosman called the proceedings "fair and unbiased."¹¹⁹

B. Protecting the Nonconsumer User: Unresolved Problems

The continued growth of the Internet most likely depends primarily on e-commerce; however, it would be a mistake to develop Internet policy that overlooks those who use the Internet for entertainment and informational purposes only. In fact, even consumer use of the Internet is becoming more interlinked with informational or entertainment value. A Forrester study showed that thirty-six percent of e-commerce sites have discovered that having editorial content on their websites is the best way to sell

115. The dispute occurred when Michael Bosman registered the domain name <worldwrestlingfederation.com> after ICANN began allowing domain names up to sixty-three characters, up from the previous limit of twenty-two. Mr. Bosman said that he originally intended to host a wrestling fan site, but due to lack of expertise and funds, decided to attempt to sell the domain name to the World Wrestling Federation ("WWF"). On October 10, 1999, three days after registering the domain name, Mr. Bosman sent an e-mail to the WWF informing them of his intent to sell or rent the domain name. See Clausung, *supra* note 112. However, on December 3, 1999, Mr. Bosman contacted the WWF via email and stated that cybersquatting cases "typically accomplish very little and end up costing the companies thousands of dollars in legal fees, wasted time and energy." In order for the WWF to avoid this trouble, he offered to sell the domain name for \$1,000. See *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*, WIPO Case No. D99-0001 § 4 (1999) (Donahy, Arb.).

116. See Clausung, *supra* note 112, at B10.

117. See *id.*

118. See *id.*

119. See *id.*

their products.¹²⁰ Large corporations and sole proprietorships alike now pay thousands of dollars per month to online news syndicates¹²¹ for the right to have news, sports, and entertainment content hyperlinked to their websites.¹²² In sum, the growth of the Internet will always remain dependent, at least in part, on the "goodwill" of the Internet.

For domain name policy, this goodwill for nonconsumer users is found in the ability to create their own websites or view websites created by a family member, a friend, or a favorite public figure. Domain name policies can address these issues, and to be successful, they must.

1. Cyber-wildcatters

Contrary to the concern that ICANN's resolution policy expands the meaning of cybersquatting too far,¹²³ ICANN's real failure lies in not extending the protection far enough. Cyber-wildcatters are a good example. Cyber-wildcatters differ from cybersquatters in that the domain names they hoard are not protected trademarks. However, like cybersquatters, they register domain names for the sole purpose of resale or "renting" the domain name for a profit. Their hundreds of thousands of registered domain names range from family names¹²⁴ to <Athens-2004.com>¹²⁵ to <Republicans.org>.¹²⁶

In order to make the dispute resolution policy fair, it must benefit every party who wishes to have a desired domain name address regardless of whether they own a registered trademark. There would be very little change needed if any at all in ICANN's current dispute-resolution policy if ICANN were to give nonregistered trademark owners the right to initiate proceedings.

120. See Benny Evangelista, *Online News Syndicates Provide Missing Links*, S.F. CHRON., Dec. 13, 1999, at B1.

121. Businesses who obtain licenses from multiple news providers and then license the license pool to websites for a monthly fee. See *id.*

122. See *id.*

123. See *Paper: Concerns about ICANN Uniform Dispute Resolution Policy* (visited Oct. 7, 1999), available at (<http://www.icann.org/comments-mail/comment-udrp/current/msg0012.html>).

124. The successful defendant in *Avery Dennison Corp. v. Sumpton*, 51 U.S.P.Q.2d (BNA) 1801 (9th Cir. 1999), registered 10,000 domain names based on family surnames. According to his website, these names accounted for 70 percent of the population in the United States and Canada and over 200 million people. See Lawrence J. Siskind, *Striking it Rich*, THE RECORDER, Oct. 6, 1999, at 4.

125. Offered for \$50,000 at (<http://www.netezy.com>).

126. Offered for \$100,000. See Siskind, *supra* note 124, at 4.

Already, ICANN's policy does not attempt to address matters that do not involve a bad-faith domain name holder. For disputes in which the domain name holder is actually using, as opposed to selling, the domain name, ICANN's policy would not apply and could not be invoked. Hence, the first-come, first-served policy for registering domain names would remain unaffected for the domain names that, for example, include family or personal names as long as that domain name is actually being used rather than hoarded for sale.

On the other hand, bad-faith domain name holders could no longer evade ICANN's policy merely because they chose to hoard family or personal names rather than trademarked names. Individuals and small businesses would be afforded the same opportunity as trademark owners to attempt to obtain desired domain names without the high costs of traditional legal proceedings, high costs that they are the least likely to be able to afford in the first place.

2. *Reverse domain name hijacking*

Finally, ICANN must not overlook the domain name holder. One of the most publicized domain name dispute cases to date was a reverse domain name hijacking attempt by a large company to take a domain name away from a twelve-year-old boy.¹²⁷ ICANN must implement a policy to protect domain name holders from reverse domain name hijacking or bad-faith attempts to deprive a domain name holder of her domain name.¹²⁸ Currently, a trademark owner can use ICANN's dispute resolution policy to attempt to reverse domain name hijack without any penalty or fine above the \$1,000 cost of arbitration.¹²⁹ In response, many commentators favor a balanced penalty system which punishes reverse domain name hijacking attempts as well as cybersquatting.¹³⁰ To make its dispute resolu-

127. The domain name (pokey.org) generated possibly the most attention of any domain name dispute in history when the trademark owner of the toys characters Gumby and Pokey initiated NSI's dispute resolution policy against a twelve-year-old domain name holder, who posted boredom-fighting tips and pictures of his puppy on his website. For further discussion of the facts of the story, see Jeri Clausing, *Boy's Web Site Becomes a Domain Name Cause*, N.Y. TIMES, March 25, 1998, at B10.

128. See *The Rules*, *supra* note 76, §1 (reverse domain name hijacking definition).

129. ICANN only states that attempts at reverse domain name hijacking will be considered an abuse of the administrative proceeding, yet provides no additional penalty other than dismissal of the complaint. See *The Rules*, *supra* note 76, § 15.

130. See Non-Commercial Domain Name Holders Constituency, *Non-Commercial Constituency Petitions for Review of WIPO Ch. 3*, (visited Oct. 7, 1999) (<http://www.icann.org.comments-mail/comment-udrp/current/msg0000.html>).

tion policy complete, ICANN must include a measure that will combat reverse hijacking just as forcefully as it attempts to combat cybersquatting.

IV. CONCLUSION

At the Internet's inception, few could have predicted its rapid growth, and only the imaginative could have foreseen its impact on society. Likewise, few would have thought that the next race for gold would be in valuable domain names. ICANN's dispute resolution policy succeeds in addressing the main problems created by domain name disputes. It promotes the quick and efficient elimination of cybersquatting while at the same time, creating a policy that is flexible. Yet two serious issues remain: protecting nontrademark owners from cybersquatters and protecting domain name holders from reverse domain name hijacking.

ICANN has taken several steps forward by implementing a domain name policy that encourages consumer use of the Internet while remaining flexible. It must address, however, nonconsumer and reverse domain name hijacking issues to avoid taking a significant step back.

