

Dispute Resolution Process Submission

From: Electronic Commerce Committee – New Zealand Law Society

Received: 28 February 2005

Introduction

The Society's Electronic Commerce Committee (the Committee) welcomes the opportunity to comment on a report issued by a Working Group of InternetNZ concerning the establishment of a dispute resolution process for the .nz domain name space (the Report).

The Report identifies 3 options:

- (1) a variant of the Nominet UK model, administered in New Zealand by the DNC;
- (2) the UDRP model, administered by WIPO; or
- (3) the status quo.

In a recent telephone conference, the majority of members of the Committee who participated expressed views in favour of a dispute resolution process, with a preference for the Nominet rather than WIPO model. However, a general concern was expressed that the need for a dispute resolution process should be properly assessed before a dispute resolution model is selected. Any dispute resolution system adopted by InternetNZ should be quick, efficient, cost-effective and commensurate with the scale of the problem.

The Report does not provide any information that would enable the Committee to assess the scale of this issue in New Zealand, although the Report notes that 0.05% of domain name registrations are disputed in the UK. Last year about 30,000 domain names were registered in New Zealand, so if a similar proportion of registrations were disputed in New Zealand about 15 new disputes would arise annually. Anecdotal information the Committee has received plus members' own experience as lawyers suggests that a higher percentage of domain names than this number become the subject of disputes in this country.

As the DNC does not operate a formal dispute resolution process, there is no means by which a precise assessment of the level of disputes can be made. However, the Committee understands that, on average, the DNC receives about 12 inquiries each month concerning possible domain name disputes. It is also likely that individual registrars receive enquiries concerning these issues. It is not certain how many of these disputes would proceed beyond an initial enquiry if a formal domain name resolution process were available.

Analysing each of the proposed options in turn:

(1) Nominet

This option is based on UK dispute process. It first offers mediation, and, if unsuccessful, arbitration by an expert panellist. There is no cost to the claimant except for the expert panellist if mediation fails. The process would be run by InternetNZ, but without cost recovery by InternetNZ for the cost of administration and mediation.

Pros:

- Local control over the administration of the process, including over fees charged.
- Choice of panellists (this is an important benefit because local solutions can be adopted and local jurisprudence developed).
- Easier resolution of disputes than achieved through litigation.

Cons:

- Relatively expensive to run. Nominet has three full time equivalent (FTE) staff (two mediators and one administrator). Working Group report claims it could cope with one FTE, but is more likely to require two. However, costs might be reduced if staff were available on a part-time basis and depending on the workload.
- No cost recovery by InternetNZ, therefore some costs would be shared by all registrants, not merely the parties to the dispute.
- All burdens are local. Further, it may be little used depending on the true level of domain name disputes in New Zealand.

Issues:

- The Committee sees no reason why InternetNZ should not recover some of the cost from the claimants (otherwise these transaction costs will be shared between all domain registrants, not merely claimants and registrants).
- The mediation would need to be conducted separately and independently of InternetNZ to avoid any conflicts of interests.

(2) WIPO

The Uniform Domain Name Dispute Resolution Policy (UDRP) is an arbitration process, created by the Internet Corporation for Assigned Names and Numbers (ICANN), and administered by several arbitration organisations, including WIPO. This option proposes the adoption of a modified version of the UDRP, to be administered by WIPO.

Pros:

- Shifts administrative burden (and control) of process off-shore therefore no administrative costs borne by InternetNZ.
- The system is simple.
- There are enough disputes going through UDRP process to form a clear body of precedent cases.

Cons:

- Seen as expensive by some – claimants pay all costs, but there is no local control as to fees charged
- Lack of local control. It is run from Switzerland, and cases may be decided by non-NZ panellists. This is a major disadvantage, as it is appropriate that disputes relating to the .nz domain space should be resolved by independent panellists who are expert in New Zealand law, policy and business practice.

Issues:

- UDRP process was designed to handle cybersquatting only. It only applies to cases where registrant has no right, so disputes between those with competing rights are not covered.

(3) Status Quo

Registrars take a “hands off” approach. Domain names are registered on a first come, first served, basis, with any disputes over domain names having to be resolved between domain registrants and complainants.

Pros:

- Little need for involvement by InternetNZ/Registrars therefore no need for them to have dispute policy.
- New Zealand courts have already established principles to resolve domain name disputes.
- Costs of dispute are borne by the parties to the dispute.
- Frivolous claims are usually discouraged by the costs of litigation.

Cons:

- Litigation is an expensive and potentially time consuming way to resolve some domain name disputes and particularly disadvantageous to claimants who cannot fund the costs of litigation.

Conclusions

- The need for a dispute resolution process should be properly assessed before a dispute resolution model is selected

- If a decision is made to implement a dispute resolution process:
 - The process should be quick, efficient, cost-effective and commensurate with the scale of the problem.
 - The costs of the process should be fairly allocated (a user pays model may be appropriate).
 - A system that uses New Zealand based panellists with local knowledge is preferable.
 - Any mediation or adjudication should be conducted independently of InternetNZ to avoid any conflicts of interest.