DOMAIN TASTING IS TAKING OVER THE INTERNET AS A RESULT OF ICANN'S "ADD GRACE PERIOD"

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ABSTRACT

When a domain name is registered, the registrant is given five days to cancel for a full refund. While the purpose of this grace period is to protect those who innocently err in the registration process, speculators have taken advantage of the grace period through a process called "domain tasting." These "domain tasters" register hundreds of thousands of domain names and cancel the vast majority of them within the five-day grace period, keeping only those that may be valuable as placeholder advertising websites or to holders of trademark rights. This iBrief will outline the "domain tasting" process, analyze why it is a problem, and discuss solutions to the problem. Ultimately, it concludes that the five-day grace period is unnecessary because it serves little, if any, legitimate purpose.

INTRODUCTION

¶1   Since 2001, agreements between the Internet Corporation for Assigned Names and Numbers ("ICANN")[2] and top-level domain ("TLD")

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[2] The Internet Corporation for Assigned Names and Numbers ("ICANN") "is responsible for managing and coordinating the Domain Name System (DNS") to ensure that every address is unique and that all users of the Internet can find all valid addresses. It does this by overseeing the distribution of unique IP addresses and domain names. It also ensures that each domain name maps to the correct IP address . . . ICANN is also responsible for accrediting the domain name registrars. 'Accredit' means to identify and set minimum standards for the performance of registration functions, to recognize persons or entities meeting those standards, and to enter into an accreditation agreement that sets forth the rules and procedures applicable to the provision of Registrar Services." ICANN, FAQs, http://www.icann.org/faq/#WhatisICANN (last visited Nov. 10, 2007). *See also* ICANN, The Global Internet Community Working Together to Promote the Stability and Integrity of the Internet, http://www.icann.org/tr/english.html (last visited Nov. 10, 2007) (providing information on ICANN in general, DNS, ICANN's role, how ICANN works, ICANN's accomplishments, and ICANN's ongoing work).

registrars[3] required what is called the "Add Grace Period" or "AGP," which allows a registrant to receive a full refund for canceling a domain name within five days of the initial registration.[4] The AGP was initially intended to be a safeguard for inexperienced or careless registrants who mistyped the name of their desired domain and would otherwise be stuck with a name they did not want.[5] However, it appears that the AGP is being used primarily by individuals and organizations practicing "domain tasting" or "domain kiting."[6] Numerous commentators within the Internet-technology community expressed concern, frustration, and disappointment that little or nothing is being done to combat what they see as a harmful practice carried out by individuals and companies with questionable moral values.[7]

¶2   This iBrief begins by explaining the basics of domain tasting. It explains the use of the AGP as a tool for improper domain-name registration practices and provides evidence that such practices are taking place. Part II discusses why domain tasting is a problem, analyzing its effect on technical aspects of domain-name registration, the integrity of domain-name registration, and trademark-right infringement through cybersquatting. In Part III, solutions to the domain tasting problem are discussed and a proposal to eliminate the AGP altogether is endorsed and defended.

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[3] Top-Level Domains, or TLDs are the "right most label in a domain name." ICANN, Top-Level Domains (gTLDs), http://www.icann.org/tlds (last visited Nov. 10, 2007). There are currently fourteen "generic" TLDs: .com, .edu, .gov, .int, .mil, .net, .org, .biz, .info, .name, .pro, .aero, .coop, and .museum. *See id.*

[4] *See,* ICANN, Unsponsored TLD Agreement: Appendix C, Section I (.info), May 11, 2001, http://www.icann.org/tlds/agreements/info/registry-agmt-appc-i-11may01.htm.

[5] Posting of John Levine to CircleID, http://www.circleid.com/posts/domain_in_bad_taste (May 2, 2006, 9:14 PST).

[6] *See id; see also* Hot Points Blog, http://www.bobparsons.com/DomainKiting.html (May 10, 2006, 16:31 EST) (creating the term "domain kiting" and explaining how it works and why it is a problem).

[7] *See* Hot Points Blog, *supra* note 6; *see also* Posting of Frank Schilling to CircleID, http://www.circleid.com/posts/historical_analysis_domain_tasting (Dec. 20 2006, 8:00 PST); Levine, *supra* note 5; Terri Wells, *Domain Tasting: Hard to Swallow*, SEO, Jan 22, 2007, http://www.seochat.com/c/a/Website-Promotion-Help/Domain-Tasting-Hard-to-Swallow; Doug Isenberg, *ICANN Needs to Clamp Down on Domain Name Abuse*, CNET NEWS.COM, June 21, 2006, http://news.com.com/ICANN+needs+to+clamp+down+on+domain+name+abuse/2010-1030_3-6084970.html; Anick Jesdanun, *Entrepreneurs Profit from Free Web Names*, USA TODAY, Feb. 19, 2007, http://www.usatoday.com/tech/news/2007-02-19-web-address-sampling_x.htm.

I. DOMAIN TASTING BASICS

A. *How Domain Tasting Works*

¶3   Domain tasting and domain kiting are two similar practices involving the use of the AGP by domain-name registrants. The basic process for domain tasting is as follows. An individual or company registers a domain name, fills it with pay-per-click ads,[8] and then monitors the website for about four days.[9] If it appears that the website will produce more than $6 of advertising revenue over the course of a year,[10] then the domain name will be profitable, and the registrant will maintain the pay-per-click website.[11] If, however, it turns out that the website will not generate enough pay-per-click revenue (i.e. it will generate less than $6 per year), the registration is then cancelled within the five-day grace period.[12]

¶4   A similar activity is what Bob Parsons, CEO of GoDaddy.com,[13] calls "domain kiting."[14] Those involved in domain kiting, unlike domain tasting, essentially never pay the registration fee for any of their websites.[15] Instead, they continually cancel each registration with the five-day grace period and then renew the same name repeatedly, thus running a more or less continuous website that always falls within the AGP.[16] According to Parsons, domain kiters and tasters overlap when a domain name is "especially profitable."[17] Parsons believes that registrants who happen to

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[8] Pay-Per-Click ("PPC") "is defined as the guaranteed placement of a small 'ad' on the search results page for a specific keyword or keywords in return for a specified payment, but ONLY when a visitor clicks on that ad. The advertiser pays nothing to appear on the results page; they only pay the amount they have agreed to (or bid for) when someone actually clicks on their ad and is taken to their landing page; therefore, the term 'pay per click.'" *See* Pay Per Click Universe, What are Pay Per Click Search Engines?,
http://www.payperclickuniverse.com/what-are-pay-per-click-search-engines.php (list visited Nov. 10, 2007).

[9] *See* Wells, *supra* note 7 (describing the process generally).

[10] For purposes of this paper, I assume that the typical registration fee for a domain name is $6. *See* Levine, *supra* note 5; Hot Points Blog, *supra* note 6; Wells, *supra* note 7.

[11] *Id.*

[12] *Id.*

[13] "GoDaddy.com is the world's largest domain name registrar . . . ." About GoDaddy.com,
https://www.godaddy.com/gdshop/about.asp?app%5Fhdr=&ci=4632 (last visited Nov. 10, 2007).

[14] *See* Hot Points Blog, *supra* note 6.

[15] *Id.*

[16] *Id.*

[17] *Id.*

find themselves with websites producing profits exceeding the minimal registration cost threshold may choose to pay the registration fee rather than risk losing the website altogether in their attempt to cancel and renew under their typical kiting strategy.[18] For the purposes of this paper the distinction between the two is largely irrelevant.[19]

B. Evidence of Domain Tasting

¶5   Despite the abundance of talk about domain tasting, "there has never really been any solid evidence" that it actually occurs.[20] However, the circumstantial evidence indicating the prevalence of domain tasting is convincing enough for most. According to Bob Parsons, a company called DirectNIC registered over 8.4 million domain names in April 2006 alone and subsequently cancelled all but 51,000 of them.[21] In addition, he cites a figure that several other commentators have taken as evidence of the existence of domain tasting: In April 2006, 35 million domain names were registered, but only 2.3 million were actual, permanent registrations paid for by the registrant.[22] A look at individual registrars paints a much clearer picture. According to VeriSign's[23] March 2006 monthly report, there are at least seven domain-name registrars whose deleted registrations grossly outnumber their actual registrations.[24]

Registrar	Permanent Registrations	Deletions
Belgiumdomains, LLC	250,037	7,258,306
Capitoldomains, LLC	282,883	4,588,188
Domaindoorman, LLC	191,048	4,522,019

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[18] *Id.*

[19] This paper will use the term "domain tasting" to refer to both practices except when specifically referencing a source that uses the term "domain kiting" or when the distinction is actually relevant.

[20] *See* Dylan Kingsberry, *How Does Your Domain Taste?*, EZINE ARTICLES, Feb. 22, 2007, http://ezinearticles.com/?How-Does-Your-Domain-Taste?&id=464867.

[21] *See* Hot Points Blog, *supra* note 6.

[22] *Id; see also* Domain Name Kiting, http://www.domainnamekiting.com/ (last visited Nov. 10, 2007).

[23] VeriSign, among other things, is the registrar for all ".com" domain names. *See* Ryan M. Kaatz & Julie Erin Land, *Lawsuit Naming High-Volume, Domain "Tasting" Registrar Blazes New Trail in Combating Online Trademark Infringement*, http://www.digitalbrands.info/Dotster_article6.pdf (last visited Nov. 10, 2007).

[24] VERISIGN, REGISTRY OPERATOR'S MONTHLY REPORT: MARCH 2006 (Apr. 18, 2006), *available at* http://www.icann.org/tlds/monthly-reports/com-net/verisign-200603.pdf.

Dotster, Inc.	946,953	1,920,658
Intercosmos Media Group, Inc. d/b/a directNIC.com	1,188,733	6,822,192
NameKing.com, Inc.	488,356	1,592,029
Nameview, Inc.	672,009	2,737,139

Chart 1[25]

¶6   In comparison to these registrars, GoDaddy.com had 9,466,028 permanent registrations and only 141,182 deletions.[26] In the case of what appears to be the most egregious offender, Belgiumdomains, LLC, the ratio of deletions to actual registrations is 29:1 whereas for GoDaddy.com, the ratio is 1:67. It simply cannot be by pure chance that Belgiumdomains deletes almost 97% of its registrations and GoDaddy.com deletes less than 2%.[27]   The most logical explanation for this disparity is that Belgiumdomains engaged in blatant domain tasting.[28] While some may still be skeptical that domain tasting is taking place,[29] the evidence of domain tasting is strong, and this paper assumes that domain tasting does in fact occur.

II. IS DOMAIN TASTING A PROBLEM?

¶7   Among those commentators discussing the topic of domain tasting, there seems to be a consensus that it is a growing problem that needs to be fixed.[30] Unfortunately, the practice of domain tasting itself is currently not illegal,[31] but many argue that it is nonetheless morally reprehensible and not in the proper spirit of domain-name registration.[32]

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[25] *See id.*

[26] *Id.*; *see also* Kaatz & Land, *supra* note 23.

[27] *See supra* Chart 1 accompanying note 25. The disparity between the two numbers is so great that a statistical analysis is unnecessary to conclude that it is not the result of pure chance.

[28] *See* Hot Points Blog, *supra* note 6 (commenting on the ratio of deleted names to actual registrations by DirectNIC).

[29] *See* Kingsberry, *supra* note 20.

[30] *See* Schilling, *supra* note 7; Levine, *supra* note 5; Wells, *supra* note 7; Isenberg, *supra* note 7; Jesdanun, *supra* note 7; Parsons, *supra* note 6. Of course, those who are most vocal are the ones seeking change, so it is unclear whether or not those opposed are in the majority.

[31] *See* Domain Name Kiting, *supra* note 22 ("Kiting is *not illegal as per current...provisions of ICANN rules*.").

[32] *See* Schilling, *supra* note 7; Levine, *supra* note 5; Wells, *supra* note 7; Isenberg, *supra* note 7; Jesdanun, *supra* note 7; Hot Points Blog, *supra* note 6.

A. *Arguments in Favor of Domain Tasting*

¶8   No one believes that domain tasting is actually illegal or prohibited by ICANN or anyone else.[33] Under current ICANN rules, the AGP can be used to cancel a domain-name registration for any reason, legitimate or otherwise.[34] The ICANN rule outlining the AGP is stated simply and directly and does not require that the registrant have any specific reason to cancel the registration.[35] As a result, one might argue that if domain tasting were really a problem, ICANN, domain name registrars, or the government would see fit to change the rules to prevent it.

¶9   Those who engage in domain tasting consider themselves an Internet analog to real estate developers.[36] A company called Maltuzi Holdings frankly states, "[i]n simplest terms, this is no different than acquiring an apartment building for rental income."[37] Essentially, the argument is that domain-name registration operates in a free market—there is nothing restricting any individual or organization from registering any available domain name, and all domain names are available on a first-come first-serve basis. If you are first, then you get the domain name, and if you are not first, then you do not. One could rationally argue that this is substantively similar to any other commodity in which there is a limited supply and a demand exceeding that supply.

B. *Domain Tasting Abuses the Add Grace Period*

¶10   The AGP "was introduced to provide a mechanism for registrars and registrants to correct mistakes"[38] and "reverse fraudulent registrations."[39] The idea is that sometimes an individual may inadvertently make a minor error in the registration process. If he realizes it within a short period (five days), then he can cancel the registration, receive a full refund, and proceed to register the proper name. However, the AGP has proved extremely valuable to speculators who use it to sample a website for up to five days, risk free, to determine whether or not the website will be valuable to them as a source of pay-per-click revenue.[40] As previously discussed, it appears that several registrars are tasting domain names on a

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[33] *See* Domain Name Kiting, *supra* note 22.

[34] *See*, *e.g.*, ICANN, *supra* note 4.

[35] *See id.*

[36] *See* Larry Seltzer, *Bad Taste: Another Way ICANN Blew Domain Registration*, EWEEK.COM, June 8, 2006, http://www.eweek.com/article2/0,1895,1974213,00.asp.

[37] *Id.*

[38] *Id.*

[39] Domain Name Kiting, *supra* note 22.

[40] *See* Levine, *supra* note 5.

massive scale.[41]   Some registrars, most notably Belgiumdomains, are canceling almost 97% of their registrations within the AGP.[42]   It almost goes without saying that the vast majority of these registrations are not due to simple typographical errors on the part of innocent domain-name registrants.

1. Domain Tasting is a Drain on the Domain Name Registration System

¶11   Some speculate that the percentage of domain-name registrations that end up being refunded may be as high as 99%.[43]   Assuming that this percentage is accurate or close to accurate,[44] then for every legitimate, normal registration, 99 other domain names are registered and then deleted within five days. Thus, for each legitimate registration, a domain-name registrar must perform 198 essentially useless transactions (99 registrations and 99 deletions).[45] One need not be an expert in economics to see that this is undoubtedly an inefficient process. Assuming that the cost of registering a domain name is $6, then for every $6 fee that a domain registrar receives, they performed 100 registrations (the 99 cancelled registrations and the 1 legitimate registration) and 99 cancellations. If each of these transactions (registrations and cancellations) costs the registrar more than three cents, then they are losing money as a result of the AGP abuse.[46] Notably, the Public Interest Registry ("PIR"), which maintains all ".org" domain names,[47] indicated that domain tasting has a "potential [negative] impact…on the stability and security of the Internet."[48]

2. Domain Tasting Compromises the Integrity of the Domain Name Registration Process

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[41] *See supra* Chart 1 accompanying note 25.

[42] *Id.*

[43] *See* Levine, *supra* note 5; Hot Points Blog, *supra* note 6.

[44] The actual accuracy of the 99% estimate is not largely relevant. The analysis is similar regardless of the number, so for the sake of argument, the 99% figure will be used.

[45] *See* Levine, *supra* note 5 (discussing this very concept but with numbers that are slightly inaccurate).

[46] *See id.*

[47] "[I]t is the Public Interest Registry (PIR), which manages the .ORG top-level domain name and maintains the database of all .ORG Internet addresses." Public Interest Registry, http://www.pir.org (last visited Nov. 10, 2007).

[48] *See* Letter from Edward G. Viltz, President & CEO, Public Interest Registry, to Dr. Stephen D. Crocker, Security & Stability Advisory Committee Liaison (Mar. 26, 2006), *available at* http://www.pir.org/PDFs/SSAC-ICANN_ORG_Tasting_3-26-06.pdf. Unfortunately, the PIR does not appear to have elaborated on how they believe the "stability and security" are compromised.

¶12   The PIR stated that their "primary concerns center around the consequences of a . . . new . . . domain, purchased based on traffic and subsequently utilized *in a contradictory scope of . . .* [PIR's] *mission*."[49] In their view, the public interest requires that domain names be registered primarily for their actual use and that the corresponding website be based on the actual meaning of the domain name rather than simply acting as a placeholder website taking advantage of pay-per-click advertising.[50]

¶13   Similarly, domain tasting makes it difficult or impossible for individuals and companies to register their own legitimate domain names because such a large percentage of available or desirable domain names are registered by domain tasters at any given moment.[51]   Even worse, one party's interest in a domain name, in some cases, leads another party to register it.[52] According to Larry Seltzer, author of "Larry Seltzer's Security Weblog,"[53] a company called Chesterton Holdings has access to and uses individual WHOIS[54] search data to register domain names.[55] Seltzer searched for WHOIS information through Cnet's Domain Search[56] for random (and presumably undesirable) domain names like "myfuzzycat.com" and "lickmynose.com."[57] He didn't register either of these names and several days later checked the WHOIS data for these two domain names with a different WHOIS search service.[58] At that point, he found out that both names were registered by Chesterton Holdings.[59]

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[49] *Id.* (emphasis added).

[50] *See id.*

[51] *See* ICANNWiki, Domain Tasting, http://www.icannwiki.com/Domain_tasting (last visited Nov. 10, 2007).

[52] Chesterton Holdings is a "[d]omain name holding company founded in California." Chesterton Holdings LLC, http://www.chestertonholdings.com (click on link to "company background") (last visited Nov. 10, 2007).

[53] Larry Seltzer's Security Weblog, http://blog.eweek.com/blogs/larry_seltzer (last visited Nov. 10, 2007).

[54] "ICANN requires accredited registrars to collect and provide free public access to the name of the registered domain name and its nameservers and registrar, the date the domain was created and when its registration expires, and the contact information for the Registered Name Holder, the technical contact, and the administrative contact." ICANN, Whois Services, http://www.icann.org/topics/whois-services (last visited Nov. 10, 2007). This data is collectively referred to as "WHOIS" data.

[55] *See* Larry Seltzer, *Whois Hijacking My Domain Research?*, EWEEK.COM, July 19, 2006, http://www.eweek.com/article2/0,1895,1991365,00.asp.

[56] The New York Times and CNet.com, Domain Search, http://cnet.nytimes.com/Domain_name_search/4002-6551_7-5116058.html (last visited Nov. 10, 20007).

[57] Seltzer, *supra* note 55.

[58] *Id.*

[59] *Id.*

Strangely, Seltzer later performed domain-name searches through individual hosting services,[60] also of essentially random and useless domain names, and none of them were subsequently registered by Chesterton Holdings.[61] It appears that even beyond the mere chance that a domain taster will have already registered a name that you desire for your own legitimate use, some domain tasters have unauthorized access to your searches, so if you don't register your desired name right away, it will be registered by a taster who assumes there must be some value in it as a result of your desire to search for it.[62]

3. Domain Tasting Harms Trademark Holders and Facilitates Cybersquatting

¶14   Cybersquatting is not a new practice and is not unique to domain tasting. As early as 1998, the federal courts held that owners of domain names could be found liable for trademark dilution by registering a domain name that was identical or confusingly similar to the trademark of another individual or company.[63] The problem with domain tasting is that it makes the cybersquatter's job easier.

a. Domain Tasting Facilitates Registration of Infringing Domain Names

¶15   Domain tasters register hundreds, thousands, or even millions of domain names over the course of a single month.[64] Companies like Chesterton Holdings claim that "[d]omain names are not specifically targeted and are not collected by any untoward methods."[65] Even if one believes that this is true, the probability that some percentage of random domain-name registrations are infringing is likely very high.[66] If domain

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[60] CNet's search is a meta-search of individual hosting services. *See id.*

[61] *Id.* In other words, Chesteron Holdings appears to have access of WHOIS queries that are run through CNet's meta-search, but not to the searches that are performed on individual hosting services.

[62] *See id.*

[63] *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998) (requiring the owner of panavision.com to transfer the domain to Panavision, the rightful owner of the trademark). This paper assumes that the reader is familiar with the concept of cybersquatting and thus does not attempt to describe the practice in general.

[64] *See supra* Chart 1 accompanying note 25. Even if we assume that the roughly seven million deletions made by Belgiumdomains were the same domain names being registered every 4 or 5 days, they would still have over one million unique domain names registered and deleted within the span of a single month.

[65] Chesterton Holdings LLC, http://www.chestertonholdings.com (last visited Nov. 10, 2007).

[66] Under ICANN rules, one must show "bad faith" to make a case for cybersquatting. ICANN, Rules for Uniform Domain Name Dispute Resolution Policy, R. 3(b)(ix)(3), Oct. 24, 1999, http://www.icann.org/dndr/udrp/uniform-

tasters are not interested in cybersquatting, it may be the case that they are willing to turn over infringing names when contacted by the rightful owner. Even if one assumes that they are, there is still a problem because an individual seeking to register a legitimate name would have to contact a third party (i.e. the domain "taster") who currently owns the domain name and then convince the third party that the individual is in fact the rightful owner of the domain name. Clearly, this would require resources beyond the few moments it would take to register a domain name through the normal process. Factor in the assumption that companies like Chesterton Holdings may be less than willing to turn over domain names to individuals or companies claiming a trademark right in one of Chesteron's domains, or further, the assumption that many domain tasters are in fact attempting to profit from cybersquatting, and it becomes evident that the AGP is making it more difficult for legitimate domain name registrants to obtain their desired domain name.

¶16   In addition, cybersquatters can register hundreds or thousands of domain names similar to trademarked names in an attempt to benefit from "typosquatting."[67] A recent lawsuit filed against domain-name registrar Dotster, Inc. alleged that Dotster was involved in typosquatting against Neiman Marcus.[68] According to the complaint, Dotster registered over twenty-five domain names similar to the plaintiffs' trademarks.[69] "Most of the offending domains listed in the complaint seem to be obvious misspellings of the plaintiffs' marks."[70] The lawsuit has since been

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rules.htm. If we assume that companies like Chesterton Holdings are in fact not targeting specific domain names, their failure to safeguard against registering infringing names may be enough to constitute bad faith. *See Domain Tasting Makes WIPO Sick*, OUT-LAW.COM, Mar. 15, 2007, http://www.out-law.com/page-7878 ("With regard to bulk buyers of domain names using automated registration processes, a WIPO panel decision issued in February 2006 found that failure to conduct prior checks for third-party rights in certain circumstances would represent 'wilful blindness,' representing bad faith under the UDRP."). The UDRP is the Uniform Domain Name Dispute Resolution Policy, which "sets forth the terms and conditions in connection with a dispute between you and any party . . . over the registration and use of an Internet domain name registered by you." *See* ICANN, Uniform Domain Name Dispute Resolution Policy, Oct. 24, 1999, http://www.icann.org/udrp/udrp-policy-24oct99.htm.

[67] *See* Jesdanun, *supra* note 7 ("'A day where 100 Neiman Marcus names get registered is not an uncommon day.'" (quoting David Steele, attorney for Neiman Marcus)).

[68] *See id.*

[69] *Id.*

[70] *Id.*

settled,[71] but considering the sheer number of domains tasted,[72] it is unlikely that lawsuits would be sufficient as a preventative measure against similar acts of typosquatting, cybersquatting, or domain tasting in general.

b. Domain Tasting Makes it Difficult to Track Down Cybersquatters

¶17   ICANN requires all accredited registrars to provide contact information about domain-name registrants through WHOIS.[73] One reason that WHOIS data is so important is because it allows trademark holders to track down those who violate their trademarks by registering infringing domain names.[74] If Company X discovered that the "companyx.com" domain was registered by another party, the company could do a WHOIS search[75] to find out the relevant contact information of the current domain-name owner.[76] However, there is evidence that many domain-name registrants, especially those with questionable motives, do not take the WHOIS system seriously. One ICANN dispute resolution case involved a cybersquatter who entered his name as "Sdf fdgg" when filling out the registration for his domain name.[77] Others identified themselves as "DOMAIN FOR SALE" and as "Meow."[78] Clearly, none of this information helps a trademark owner contact the domain name owner in order to protect its legitimate trademark rights.[79] The problem is further exacerbated by the fact that domain tasters constantly cancel domain-name registrations within the five-day AGP. As a result, a domain name that violates one's trademark rights may be owned by dozens of different

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[71] *See Dotster Settles with Neiman Marcus over Typosquatting*, DOMAIN NAME WIRE, Feb, 19, 2007, http://domainnamewire.com/2007/02/19/dotster-settles-with-neiman-marcus-over-typosquatting.

[72] *See supra* Chart 1 accompanying note 25.

[73] *See* ICANN, *supra* note 54; *see also* Isenberg, *supra* note 7.

[74] *See* Isenberg, *supra* note 7.

[75] WHOIS searches can be performed through numerous services, such as http://www.betterwhois.com.

[76] The trademark holder would be able to find "the name of the registered domain name and its nameservers and registrar, the date the domain was created and when its registration expires, and the contact information for the Registered Name Holder, the technical contact, and the administrative contact." *See* ICANN, *supra* note 54.

[77] Isenberg, *supra* note 7.

[78] *Id.*

[79] In many cases, this may not be a major issue as the trademark owner could file for dispute resolution under the UDRP and would likely have the domain name transferred to him if the defendant failed to reply and take part in the dispute resolution. *See* ICANN, Rules for Uniform Domain Name Dispute Resolution Policy, Oct. 24, 1999, http://www.icann.org/dndr/udrp/uniform-rules.htm ("If a Respondent does not submit a response, in the absence of exceptional circumstances, the Panel shall decide the dispute based upon the complaint.").

registrants over the course of only a few months, thus making it increasingly difficult to identify the owner and enforce trademark rights.[80]

<p align="center">III. SOLUTIONS</p>

¶18   There are several possible solutions to the domain tasting issue. First, some argue that nothing needs to be done and current safeguards are sufficient to deal with any problems that have arisen and may arise in the future.[81] Others advocated a nominal "restocking fee" for the cancellation of a domain-name registration.[82] Finally, some commentators advocate for, and I endorse, a complete elimination of the AGP.[83]

A. *The UDRP May Adequately Deal with Cybersquatters*

¶19   In 2006 there were 1,823 cybersquatting cases filed under the Uniform Domain-Name Dispute-Resolution Policy ("UDRP.")[84] In the same period, there were a total of approximately 40,400,000 domain names registered.[85] That means that only 1 out of every 22,161 domain-name registrations resulted in a cybersquatting claim under the UDRP. Even if every one of those claims were successful, it is unlikely that cybersquatting is really occurring on a sufficiently massive scale leading to significant deterioration of the Internet.[86] As a result, it may be the case that "cybersquatting is only a very minor problem that is more than adequately addressed with current policies and procedures."[87]

¶20   On the other hand, there is no reason to rely on the UDRP to handle cybersquatting cases if elimination of the AGP would reduce the number of

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[80] *See* Isenberg, *supra* note 7.

[81] *See*, *e.g.*, *WIPO: Cybersquatting on the Rise!*, DAILY DOMAINER, Mar. 13, 2007, http://www.dailydomainer.com/2007103-wipo-cybersquatting.html.

[82] *See*, *e.g.*, *id.*; Domain Name Kiting, *supra* note 22; *Domain Tasting Makes WIPO Sick*, *supra* note 66.

[83] *See*, *e.g.*, Levine, *supra* note 5.

[84] *WIPO: Cybersquatting on the Rise!*, *supra* note 81.

[85] VERISIGN, THE DOMAIN NAME INDUSTRY BRIEF, VOL. 4, ISSUE 1 (Mar. 2007), http://www.verisign.com/static/040767.pdf (indicating that in 2006 there was an average of 10.1 million new registrations per quarter).

[86] One might argue that the 1,823 UDRP cases are more significant when compared to the number of *legitimate* registrations rather than to all registrations, which includes millions of domain taster registrations. While this is a legitimate point, there remains no doubt that 1,823 is small compared to the total number of even legitimate domain-name registrations. In addition, presumably a non-negligible percentage of UDRP cases involve registrations by actual or alleged Domain Tasters, so the numbers may be skewed in both directions.

[87] *WIPO: Cybersquatting on the Rise!*, *supra* note 81.

cybersquatting cases in the first place.[88] Of course, cybersquatting will still occur even in the absence of the AGP,[89] and for these cases, the UDRP may be a sufficient remedy. Nevertheless, it is a waste of resources and inefficient to handle cybersquatting cases using the UDRP when such cases may never have come to fruition in the absence of the AGP.

B. A Fee Should Be Charged for Cancellation of a Domain Name

¶21   Various individuals and organizations, most notably the PIR,[90] endorsed imposing a small fee for cancelled registrations.[91] Basically, instead of allowing a full refund for all domain-name registration cancellations, a refund would be issued if the name is cancelled within the AGP, but there would be a nominal processing fee.[92] In theory, it would not be worth it for domain tasters to continue to register unprofitable domain names at a rate of five cents each. Consider the aforementioned Belgiumdomains.[93] If we take Belgiumdomains' 7.3 million deletions in March, 2006 and assume it would be charged five cents for each one, they would incur a total fee of approximately $363,000.[94] In addition, they have registered and kept about 250,000 domain names, which, at $6 each, totals another $1.5 million. At the very least, the additional $363,000 would make domain tasting less attractive to Belgiumdomains. A twenty-five-cent cancellation fee would more than double Belgiumdomains' registration expenses.[95]

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[88] *See* discussion *supra* Part II.B.iii.

[89] Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998). *Panavision* was decided well before the inception of the AGP.

[90] "[I]t is the Public Interest Registry (PIR), which manages the .ORG top-level domain name and maintains the database of all .ORG Internet addresses." Public Interest Registry, http://www.pir.org (last visited Nov. 10, 2007).

[91] *See*, *e.g.*, *WIPO: Cybersquatting on the Rise!*, *supra* note 81; Domain Name Kiting, *supra* note 22; *Domain Tasting Makes WIPO Sick*, *supra* note 66; *see also* ICANN Registry Request Service, Excess Deletions Fee, Sept. 22, 2006, *available at* http://www.icann.org/registries/rsep/PIR_request.pdf [hereinafter PIR request].

[92] The PIR has requested a fee of five cents. *See* PIR request, *supra* note 91. The PIR Request provides additional qualifications such that not all cancellations will result in the five-cent fee. Rather, the fee will be charged only when the registrar has cancelled more than 90% of total registrations over the course of a pre-determined length of time. *See id.*

[93] *See supra* Chart 1 accompanying note 25.

[94] Belgiumdomains' 7,258,306 deletions at five cents apiece results in a total fee of $362,915.30.

[95] Belgiumdomains' 7,258,306 deletions at twenty-five cents apiece results in a total fee of $1,814,576.50.

C. The Add Grace Period Should Be Eliminated Altogether

¶22   Theoretically, the AGP exists to protect individuals who register a domain name and later realize they made a typo or other similar error and want to cancel their registration. However, it is unclear whether or not this is really a major problem. At least one commentator doesn't seem to think it is,[96] and logic agrees with him. Consider Company Y which is attempting to register a domain name for its business. The company inadvertently registers the domain name "www.CompanyZ.com" and does not realize it until the next day. To their delight, because of the AGP, they can cancel the registration and receive a full refund of the $6 they paid for the domain name. Now suppose there is no AGP. Company Y will either maintain the CompanyZ.com domain name and redirect traffic to a new website (assuming that CompanyZ.com is not an infringing name) or they will simply cancel the domain registration, properly register www.CompanyY.com, and suffer a $6 loss for the erroneous registration. If this $6 loss results in the financial ruin of Company Y, perhaps the world is a better place without it. The point is that even if everyone in the world were so incompetent as to be unable to properly register domain names, the worst that can happen is they lose an insignificant amount of money and learn a lesson in paying attention to details. It would be a stretch to argue that the AGP is justified on this basis alone, yet I have not encountered, nor can I conceive of another justification for it, other than one that openly supports and endorses domain tasting.

¶23   Similarly, while I agree that the imposition of a small fee for domain name cancellations may deter domain tasters to some extent, it is unclear that this goes far enough. For example, in the case of Belgiumdomains, we saw that their total registration fees were approximately $1.5 million.[97] The addition of a $0.05 fee for cancellations would increase their total domain-name registration expenses by about 24%.[98]   While this is a considerable increase, it is possible that Belgiumdomains is turning a profit of over 24%. Further, since Belgiumdomains appears to be one of most egregious domain tasters, the increase in registration expenses through a fee would be lower than 24% for most other registrars, thus increasing the odds that such a fee would not sufficiently deter them from domain tasting.[99]

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[96] *See* Levine, *supra* note 5.

[97] *See* discussion *supra* Part III.B.

[98] *See id.*

[99] The PIR and ICANN have recently implemented a five-cent fee for "excess deletions," which became effective on February 13, 2007. *See* Amendment No. 1 to .ORG Registry Agreement, Feb. 22, 2007, *available at* http://www.icann.org/tlds/agreements/org/pir-amendment-22feb07.pdf. It is too early to tell what effect, if any, this fee will have on domain name registrants.

¶24   As a solution for the domain tasting problem, the elimination of the AGP makes the most sense. The evidence overwhelmingly suggests that the only ones benefiting from the AGP on any substantial level are those who are taking advantage of it for the purposes of domain tasting.[100] The fact that a very small number of people utilize the AGP for legitimate reasons (whether it be for typos or just an individual who registers a domain name in good faith and realizes a few days later he simply does not want it) hardly justifies maintaining a policy inviting such abuse. I applaud those individuals taking advantage of the AGP. They made it abundantly clear to the Internet community that the AGP was never a good idea and continues to be a pointless safeguard. Removing the AGP would effectively eliminate the ability of domain registrants to endlessly "taste" domain names or to continually register and cancel them without ever having to pay. It should reduce the total number of domain name-registrations, thus freeing up domain names for legitimate registrants, and simultaneously reduce the number of trademark infringing domain names.

CONCLUSION

¶25   Domain tasting is a growing problem. Tasters took advantage of the AGP in order to register domain names for free, either indefinitely or for short periods of time in order to profit from pay-per-click advertising. In reality, the AGP serves almost no purpose other than to facilitate domain tasting, which has detrimental effects on both the everyday attempted domain-name registrant who is unable to obtain his desired domain, and more importantly, on holders of trademarks finding themselves facing both a greater number of infringing websites and the difficulty of tracking down cybersquatters. While the UDRP may help resolve individual cases of cybersquatting, it does little in terms of deterrence. And while a nominal fee for domain-name registration cancellations may deter some domain tasters, it is unclear that it is sufficient to eliminate the problem. Elimination of the AGP is a simple, effective, and efficient solution to many of the problems related to domain tasting, and ICANN should recognize this as the appropriate and most effective course of action.

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[100] *See supra* Chart 1 accompanying note 25.