Comments on the Preliminary Issue Report on the Current State of the Uniform Domain Name Dispute Resolution Policy (UDRP)

by

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I would, first, like to take this opportunity and thank ICANN for issuing its preliminary Issues Report on the Current State of the UDRP and allowing a period for public comments. Having spent more than ten years observing the UDRP as a litigious machine, I believe that it is a system that has failed to evolve organically and to reflect the true value and potential of domain names. The UDRP is stuck to a microscopic view that sees domain names mainly as tools of trademark infringement, without making room for other uses, related to and recognized by trademark law itself.

Everyone will agree that the Uniform Domain Name Dispute Resolution Policy (UDRP) is a true phenomenon. It is a process that started more than ten years ago as part of the US Government's White Paper mandate and has developed into a process that so far has adjudicated more than 30000 domain name disputes. This is both good and bad. It is good because it demonstrates the ability of the UDRP to operate in a fair, timely and cheap manner that eliminates jurisdictional issues. It is bad, however, because it has provided UDRP panels the ability to act as international arbitrators assigning rights of international recognition; it has allowed precedent to become an integral part of its processes and its rules have acquired a normative connotation, sufficient to provide the UDRP with an unprecedented authority.

All this is quite alarming considering that the UDRP was never meant to either transform trademark law or acquire the status it currently enjoys. Because of its current authority to adjudicate the rights of trademark owners and domain name registrants, it is vital we discuss and investigate the true efficiency of the UDRP and its ability to produce decisions that can be celebrated for their fairness, reasonableness, balance and legality. Currently, these values are highly disputed in the context and content of UDRP decisions.

First, it is important we clarify a big misconception: Contrary to what the Issues Report suggests, the UDRP was never a consensus document. This has been well documented by those who participated in the UDRP process ten years ago (See, A. Michael Froomkin, *A Catalog of Critical Process Failures; Progress on Substance; More Work Needed*, *available at* http://www.law.miami.edu/~amf/-icann-udp.htm (Oct. 13, 1999). Now, however, ICANN is presented with a unique opportunity to achieve the consensus that failed to achieve some ten years ago; ICANN is provided with the right set of circumstances to involve all its stakeholders and continue to support its multistakeholder, bottom-up policy formation. The precedent established by the Special Trademark Issus Team (STI) recommendation proves that policy,

based on multistakeholder participation is feasible and it can produce valuable conclusions.
The Issues Report further calls the UDRP a fair system. This is not entirely true and a close look at the UDRP and its rules clearly demonstrates the fundamental unfairness of the mechanism. Take a look, for example, at the lack of clear fair use provisions and safe harbors; calculate the unreasonably disproportionate deadlines that exist for the complainant and the respondent; pay close attention to the bias that takes place even at the time of the center selection; and, notice how the UDRP has failed to account for registrants and users located in countries, where Internet connectivity is still at its infancy.

It has been asserted during the UDRP Webinar that the UDRP has been fluid and flexible to deal with issues, not foreseen back in 1999 (pay per click, pshising, mousetrapping). This is true. But, at the same time, the UDRP has failed dramatically to account for the major changes in user participation and behaviour through domain names. Innovators, bloggers, entrepreneurs, new businesses and their domain names are not included in the UDRP of 2011. Actors administering and using the UDRP have only focused on those acts that affect trademark owners; they have completely disregarded those acts that can be harmed by the strong protection of trademarks. You only have to imagine the scenario of some trademark owner, somewhere in the world, contesting <facebook.com> and you will understand the narrow view the UDRP takes in the protection of domain names.

The Issues Report suggests that "many [of the issues of the UDRP] relate to process issues associated with the implementation of the UDRP, rather than the language of the policy itself". This is an extremely narrow interpretation. It is very difficult (and would be naive) to divorce substance from process not just for the UDRP but for any system of adjudication. Rules that are clear and coherent allow for a more efficient procedural environment; when the substantive layer is concise, the procedural level operates smoothly – and visa versa.

Another issue that is presented as contributing to the success of the UDRP is its consistency. I personally find this consistency troubling, mainly for two reasons: first, because it is confused with the fairness or success of the UDRP. Consistency proves nothing, apart from a system that is trapped in its own discretionary interpretations. And, second, it is the wrong kind of consistency. It is consistency of decisions rather than of rules. For example, the UDRP should aim for consistency in the way its rules are interpreted or the way the supplemental rules of its accredited centers are enforced.

It is important to stop considering the UDRP as a business-making machine. The UDRP was created to provide relief and not to create an extremely profitable industry in the adjudication of domain names. Given that the Policy assigns and determines rights on the Internet, it should be clothed with solid checks and balances and depart from its current *modus operandi*, which focuses primarily on creating incentives and using the UDRP rules to satisfy certain interests than delivering justice.

Undeniably, a review of the UDRP will not be an easy task – with more than 30,000 domain name disputes, a huge volume of documented decisions, and a lot of academic writing, the body of the UDRP is colossal. However, this should not prevent the UDRP from being reviewed; on the contrary, it is should be the catalyst for its review. The UDRP will only get bigger and its case law will become more complex. ICANN is presented with a great opportunity to start discussions, deliberations and put in place mechanisms that will allow the UDRP to be properly analyzed. A good starting point would be the existing academic writings, which have produced valuable and objective considerations.

By suggesting that the UDRP should not be reviewed, the ICANN Staff is making a big mistake. We made this mistake back in 2003, when discussions for a potential review of the UDRP were cut abruptly short. We should not repeat the same mistake. We should not let the fear of what the review might do to the UDRP, take precedent over the real need to review a policy document that is very old, in many cases is out of touch with the way domain names are used nowadays and is not inclusive of emerging Internet economies.

It would be a shame, if we were to let this opportunity for a proper UDRP review pass us by. ICANN has a responsibility to make sure that the UDRP, like any of its policies, is fair and represents the needs of all the parties that participate and use it.

Thank you.

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