Comment from John Poole, Editor of DomainMondo.com to *Preliminary Issue Report (pdf) on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs*

Background:

"The press release, entitled "Over 18,000 ' ... Domain Names Released to the Public", was issued on December 3. The second paragraph heralded "thousands of short, marketable keyword ... domain names" that were now available for anyone to register, including "trademarked names such as Nike, Hulu, Netflix, Skype, Pepsi, Audi and Deloitte"." (Leading [new] gTLD owner responds to criticism over use of trademark terms in marketing materials - Blog - World Trademark Review)

".sucks uses clever policy to keep TM names costly for brands but cheap for protest. The lawyers freak-out and run to ICANN! Popcorn anyone?" (source)

Initial comments:

1. The UDRP needs to be fixed. There should be no dispute about this. The UDRP process should be reformed to provide results that are consistently **1) fair** and **2) predictable** (for both domain name registrants and trademark holders). There are 2 major problems: (a) UDRP Panelists who "go rogue" and make up the law at personal whim, and (b) the increasing malevolent attempts by some trademark holders to steal valuable dot COM domain names by filing meritless UDRPs. Both of these practices need to be corrected or stopped by reforming the UDRP. Since ICANN created the UDRP and has known about these problems since at least 2001, ICANN bears responsibility.

See for example: Getting it Wrong: It Happens! | IP Legal Corner http://iplegalcorner.com/getting-it-wrong-it-happens/ by Gerald M. Levine, Attorney: *"Over the years the UDRP has attracted a good amount of criticism hewing to one of two poles, accusing panelists of either cognitive impairment or bias. There are panelists' (it is said) "who substitute their personal views for the agreed language of the UDRP." Other critics complain that there is a "fundamental bias in the Policy [in favor of trademark owners]." Others find that there is "a significant threat to free and robust expression on the Internet." A comment posted on* ***September 20, 2005*** *announced that* ***"The UDRP is obviously not working."*** *Two websites, fundamentally the same (criticism at trademark.tld), two opposite decisions, both within weeks of each other!" This was echoed in response to a split decision in a recent case discussed further below that "demonstrates that* ***UDRP has devolved into a casino****, when panelists can reach such divergent decisions." A banner headline in a posting on The Domains on March 17, 2015 reads "Worst UDRP Decision Of The Year? Panel Gives Away Domain Registered Before TM Was Filed."... Nevertheless,* ***panelists do not walk in lockstep on a number of views and this has created tensions that undermine consistency and predictability of UDRP***

decision-making. There are in fact several issues, including split views on the issue of protectable speech, whether domain names are protected or only the content *.... raises anew an old problem that panelists recognized early on about the UDRP, namely that appointment of the wrong Panel could in fact be a* ***roulette wheel****. See Time Inc. v. Chip Cooper, D2000-1342 (WIPO February 13, 2001) (<lifemagazine.com>) ("The majority believes that potential users of the UDRP are entitled to some degree of predictability. Counseling one who is considering filing a Complaint should consist of more than,* ***'It depends what panelist you draw.'****") .... (emphasis and links added)*

2. The UDRP should apply to all gTLDs. The URS should not apply to legacy gTLDs, particularly those in existence before ICANN was incorporated, including .COM, .NET and .ORG. As noted above, there is a problem with some trademark holders attempting to steal .COM domain names by filing meritless cases. Expanding the URS to .COM would only exacerbate this malevolent activity. There are no penalties for Reverse Domain Name Hijacking provided in the UDRP; perhaps this should be included in the needed reform of the UDRP.

3. Given that ICANN, for purposes of making money, has unleashed hundreds of unwanted, unneeded new gTLDs upon the global DNS like some modern day version of the Medieval bubonic plague, provisions of the URS should be expanded to protect trademark holders in the case of all new gTLDs, now or in the future. New gTLDs are an open invitation for ignorant and intentional trademark infringers, cybercriminals, and other bad actors. Neither ICANN, nor its new gTLD registry operators, nor registrars should be allowed to financially benefit at the expense of legitimate trademark holders. Indeed, some new gTLD registry operators have built their registry operations upon extortionate business models to "shake down" trademark holders. Neither ICANN (which receives a fee for every new gTLD domain name registered), nor new gTLD registry operators, nor registrars, should be allowed to continue to benefit from these ill-gotten gains, all at the expense of the global public interest which includes protection of intellectual property rights. URS provisions should be expanded to require all new gTLD registrars to hold in escrow all new gTLD registration fees for not less than six (6) months from date of registration, during which time trademark holders could file a URS and be awarded the total registration fee plus a permanent block of the domain name. Technology now exists whereby a trademark holder could utilize algorithmic scripts to identify infringing new gTLD domain names within days of registration. Trademark holders should be allowed to file a limitless number of URS cases by paying one filing fee annually. If the domain registrant fails to respond to the URS filing, the trademark holder should automatically be awarded a block of the domain name and the total registration fee (or *"total consideration received"* to cover *.XYZ-Network Solutions free-giveaway* scenarios) paid for the domain name. Once ICANN, its new gTLD registry operators, and new gTLD registrars, no longer financially benefit from trademark

infringement and other cyber-criminal behavior, the sooner the **global public interest** will be protected and *the ICANN stampede of greed* will end.

4. Unfortunately for the global internet community, in regard to resolving domain name and trademark issues, ICANN officers and staff are *conflicted* by the failure of ICANN to enforce or have in place a meaningful code of ethics or conflicts of interest policy. This current ICANN administration (CEO Fadi Chehade and Global Domains Division President Akram Atallah) has the worst record in the history of ICANN in regard to conflicts of interest, and this appears to have been knowingly tolerated by a complicit, conflicted, inept, or passive ICANN Board of Directors. See, *e.g.:*

- ICANN 54 Public Forum Video, Q&A, ICANN, INTA, IANA, Lobbyists (note: Fadi Chehade still has not answered my question submitted October 21, 2015, which he promised to do—*"the questions were numerous. We will take them and address them fully to the person who sent the question."*—Fadi Chehade, October 22, 2015)
- Why Did ICANN Become a Member of Trademark Lobbyist Group INTA?
- ICANN CEO Fadi Chehadé panders to DNA at ICANN 52 (video)
- ICANN, Kurt Pritz, Conflict of Interest, new gTLD domain names program
- Is It ICANN's Job To Market New gTLD Domain Names?

Add to this miasma the "cronyism" of the Chehade-Atallah administration, and it hardly bodes well for a competent ***GNSO RPM PDP process*** or ***outcome***, with integrity, where ICANN officers or staff have any involvement. Thanks to the aforesaid "leadership" of Chehade and Atallah, and the resulting *sick organizational culture* of ICANN, one must **always** wonder whether an ICANN officer or staff member is "serving" the Domain Name Association or INTA, in a given situation or on a given issue.

Anwers to Questions asked in the Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs

☐ Whether all the RPMs have, in the aggregate, been sufficient to meet their objectives
Answer: NO, they have not been sufficient

or whether new or additional mechanisms, or changes to existing RPMs, need to be developed;

Answer: YES, new or additional mechanisms, or changes to existing RPMs, need to be developed

and

☐ Whether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs, and the transitional issues that would have to be dealt with as a consequence.

Answer: UDRP should always be a Consensus Policy applicable to all gTLDs. URS should only apply to new gTLDs.

3.2.2.3.1 Potential issues concerning the UDRP

☐ Are the UDRP's current appeal mechanisms sufficient? **NO**

☐ Should there be a limit to the time period allowed (e.g. similar to a statute of limitation) for bringing UDRP complaints? **YES**

☐ Are free speech and the rights of non-commercial registrants adequately protected in the existing policy? **NO**

☐ Should there be a formal (mandatory) mechanism of early mediation? **YES**

☐ Are the current time limits of the UDRP (for filing, response, determinations and appeals) adequate? **NO**

☐ Should there be rules for the appointment of UDRP panels, such as formalized rotations? **YES**

☐ Under what circumstances (if any) should/could UDRP proceedings be anonymized? **Possibly should be, circumstances TBD.**

☐ Should there be clearer policy guidance on a registrar's obligations if a case is stayed or suspended? **YES**

☐ Should the possibility of laches be recognized in UDRP proceedings; if so, how can this be expressly addressed? **YES—**by incorporating into the UDRP the equitable defense of laches: A claim of laches requires the following elements: 1) A delay in bringing the claim/UDRP; 2) the delay is unreasonable; 3) the delay prejudices the respondent/domain name registrant.

3.2.2.3.2 Potential issues concerning the URS

—Questions answered in my initial comments above

3.2.2.3.6 Additional Questions

☐ Do the RPMs work for registrants and trademark holders in other scripts/languages, and should any of them be further "internationalized" (such as in terms of service providers, languages served)? **Possibly**

☐ Do the RPMs adequately address issues of registrant protection (such as freedom of expression and fair use? **NO**

☐ Have there been abuses of the RPMs that can be documented and how can these be addressed? **YES—see my initial comments above**

☐ Is there a policy-based need to address the goal of the Trademark PDDRP? **Possibly.**

Respectfully submitted,

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member of the global internet community, internet user, and domain name registrant