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ICANN's UDRP: Maturing with the Global Internet

Good afternoon.

I'm very pleased to have been invited to deliver the luncheon address at this important conference, on this important topic.

I'd like to thank our hosts for all their efforts in organising this event, and I know we all will leave here understanding a great deal more about dispute resolution and its role in the growth of the Internet in the Asia-Pacific region.

The world Internet community passed a significant milestone two days ago — the seventh anniversary of the Uniform Domain Name Dispute Resolution Policy, or the UDRP as we all know it.

Since 1999, when the UDRP was adopted, 18,000 cases have been filed among five ICANN-approved dispute resolution providers.

Let's take a minute to consider the significance of that number. When we realise that over 100 million domain names have been registered to date, those 18,000 cases may appear to take on a certain statistical insignificance.

On the other hand, few courts of law hear — on average — 2,600 cases each year. If the U.S. Supreme Court, for example, hears 40 cases annually, it is said to have had a very busy year.

While it is difficult to give an exact figure, we estimate that these 18,000 cases have cost approximately 27 million U.S. dollars in filing fees.

This figure does not include the legal fees paid by the disputing parties, but that figure could easily rise above 250 million U.S. dollars.

When we factor in the cases filed under related domain name dispute resolution policies, since 1999 more than 33,000 administrative proceedings have been undertaken — involving a whopping 40,000 to 50,000 domain names.

These are really astounding numbers for a process that has been in place a mere seven years.

I attribute this success to the UDRP's administrative procedure, which offers a speedy, cost-effective alternative to the courts.

Its process is straightforward, it encourages settlement, it is handled almost entirely online, it is equitable, and it costs far less than traditional litigation.

Moreover, arbitrators are situated around the world and can provide decisions in at least 12 languages — Chinese, Japanese, Korean, Dutch, English, French, German, Italian, Norwegian, Portuguese, Russian and Spanish.

The UDRP is a vast improvement over the early processes for resolving disputes — which, by and large, did not work.

In the late 1990s, as the cost of domain name registration dropped from 100 U.S. dollars to as little as 8 dollars per year, and as the number of registrars grew from 1 to several dozen (today there are over 850) —

And as knowledge of the domain name registration process became more widespread, speculation in domain names led to cyber-squatting on well-known trademarks in domain names.

Sadly, since 2002 typo-squatting — cyber-squatting that involves registering domain names based on the misspelling of well-known trademarks — has spurred much of the growth in domain name disputes.

Unfortunately, trademark holders' early efforts to forestall or fend off this encroachment proved less than successful. First, they found it cost-prohibitive to try to register every conceivable variation of their mark in domain names.

Of course, what trademark owners can do is continually monitor domain name registrations and be selective about their enforcement efforts. This has spawned a thriving industry made up of businesses that sell registration monitoring services.

In addition, there is a school of thought that supports the creation of sponsored top level domains, which can impose stricter eligibility requirements, thus reducing the problems of cyber-squatting and fraud in unsponsored generic top level domains — and by extension limiting the potential for dispute.

The creation of industry exclusive spaces — and the enforcement of this exclusivity — also vastly mitigates the need for defensive registrations.

Another more traditional line of defense, litigation, has always been costly and time-consuming. In addition, in the early days of the Internet, the courts were ill-equipped to handle domain name disputes.

Both legislation and case law in this field were in their infancy. Only a few attorneys had the expertise to deal with Internet fraud. Indeed, the first U.S. federal laws prohibiting cyber-squatting were not passed until 1999.

Then, several actions by a number of concerned parties began to intersect.

In 1998, as part of its effort to privatise the technical management of the Internet's infrastructure, the U.S. government asked the World Intellectual Property Organization — the United Nations agency based in Geneva, Switzerland — to study domain name and trademark issues as they relate to the Internet.

At the same time, spurred by the International Trademark Association and similar agencies, the U.S. Congress passed the Anticybersquatting Consumer Protection Act, the first legislative attempt to resolve domain name and trademark disputes.

In April 1999, WIPO delivered its report to ICANN and included recommendations for a dispute resolution policy to be followed uniformly by all registrars of generic top level domains — at that time, dot-com, dot-net, and dot-org.

After a series of public consultations and reports from all its stakeholders, the ICANN Board of Directors approved the current UDRP on October 24, 1999.

You may recall my saying earlier that we in the Internet community just passed an important milestone. This is it.

And I think we can congratulate ourselves a little on how well those 18,000 domain name disputes have been handled in seven short years.

How was this accomplished?

Well, by the end of November 1999, that pivotal year, ICANN had approved WIPO as the first agency to provide dispute resolution services under the UDRP — and

Less than a week later, WIPO's first case — concerning the domain name <worldwrestlingfederation.com> — was under way.

ICANN next approved the National Arbitration Forum to begin hearing domain name disputes —

Followed shortly by eResolution. However, eResolution filed for bankruptcy in 2002 and is no longer in operation.

The last of the initial four dispute resolution providers to be appointed is the CPR Institute for Dispute Resolution.

All four agencies were appointed and began hearing cases within the span of five short months.

Then, in February 2002, ICANN approved the Asian Domain Name Dispute Resolution Centre — our host — as the first dispute resolution provider based in Asia.

Let's look at the numbers again.

Not surprisingly, since 1999 WIPO has heard the largest number of UDRP cases — more than 9,500 — involving both generic and country-code top level domain names — and if related dispute proceedings are added, WIPO has resolved 25,000 cases involving nearly 18,000 domain names and parties from 136 countries.

In 2005 alone, 1,457 cases were filed with WIPO, with 900 cases filed so far this year.

NAF has heard over 7,000 cases, and CPR has heard more than 140 —

While ADNDRC has seen its cases grow from 8 in 2002 to over 170 through September of this year.

How do we measure the success of the UDRP?

The UDRP is widely regarded as ICANN's most successful consensus-based policy. Indeed, the very boldness with which it was implemented is evidence of how badly such a mechanism was needed.

By contrast, more recent policy development efforts within the ICANN community have taken months — if not years — to develop, and rarely have the reach and impact of the UDRP.

UDRP decisions are rendered in a variety of languages by expert panellists around the world.

This capability goes hand in hand with global efforts to internationalise the Internet.

Of the 18,000 cases decided under the UDRP, complainants have won between 60 and 70 percent, leading to the transfer or cancellation of the domain name. This result is due in part to the many cases uncontested by respondents.

However, when a respondent has defended its rights and legitimate interests in a registered domain name, closer to 50 percent of contested decisions have resulted in transfer to the complainant.

There have been many studies of this data, and they offer a variety of conclusions. I won't pretend to explore all that today, other than to say that continuing scrutiny can only help us improve the effectiveness of this policy.

We also know that, to remain effective, the UDRP must mature along with the Internet.

Therefore, we welcome all suggestions for improvement and consider each suggestion seriously.

As an interesting side note, however, I'd like to report that a task force formed in 2001 to review the UDRP was dissolved after almost two years — having arrived at no consensus about change.

As a policy subject to periodic review, ICANN has included in its current operational plan a proposal to review the UDRP's effectiveness this fiscal year and report on the findings.

A number of related dispute resolution policies have developed out of the UDRP, including sunrise dispute resolution policies that share their fundamental structure with the UDRP.

For example, most registry operators offer a limited sunrise period when they launch new generic top-level domains. During this time, anyone with a registered national trademark can apply through a registrar for a top-level domain name that corresponds to the trademark.

These sunrise policies offer trademark owners additional means to pre-empt and counter abusive and bad-faith registration of their trademarks as domain names.

At this time, and for a period specified by the registry operator — which is typically 120 days — any third party can challenge a registration based on criteria usually set forth by the individual registry operator.

As with the UDRP, the challenge procedure is administered by one or more dispute resolution providers. Between 2001 and 2002, the dot-info registry used a sunrise period to resolve more than 15,000 domain name disputes.

In all such disputes, the parties can choose to try the case in a court of law, or they can submit it for resolution under the UDRP or through a dispute resolution process selected by the operator and modelled on the UDRP.

Still, when challenges arise, the UDRP has proved that a successful mechanism is in place to resolve disputes.

Under most dispute resolution policies, before entering into an administrative proceeding, complainants must decide whether to seek arbitration through a single member panel or a three-member panel. The choice may prove critical to the outcome.

Some observers believe that this option of single or three-member panels is one more aspect contributing to the UDRP's success, as it is perceived to further assure fairness in the proceedings.

Although the cost for a three-member panel is slightly higher, the complainant may pursue this option to ensure the complaint is reviewed by panellists offering an array of expertise.

Respondents may also seek review by a three-member panel. In that case, both parties share the cost and both have the option to rank potential panellists in order of preference.

When respondents have chosen a three-member panel, they have had greater success in retaining the challenged domain names.

While each dispute provider has slightly different rules for selecting panellists, it is generally assumed that the three-member process gives both parties greater input into the make-up of the panel.

I'd like to briefly explore the impact of the UDRP in the Asia-Pacific region — today and into the future.

First, domain name registrations have exploded in this region in just the past few years.

Second, China alone has — or soon will have — the greatest number of Internet users anywhere on the globe. That means we can expect a growing number of domain name registrations in China.

Of course, we cannot forget the other countries in the Asia-Pacific region — which are participating just as robustly in the expansion of the Internet throughout this huge and vibrant territory.

Third, the number of registered names will grow even faster when internationalised domain names become commonplace. And we expect that to happen sooner rather than later.

How will the UDRP become integral to that process? Let's look to the ADNDRC for a model.

Preparations are being finalized for the new, sponsored dot-asia TLD — the first registry to be sited in Asia — in fact, here in Hong Kong. As you may be aware, the ICANN Board of Directors approved dot-asia's application last week.

Dot-asia intends to use the UDRP for its dispute resolution along with some form of sunrise challenge procedure.

We learned long ago that the launch of every new TLD is accompanied by a rush to register generic or common words —

Then speculators rush in. Domain name disputes are never far behind. In fact, recent reports from WIPO and the NAF tell us that disputes are up 25 percent since the beginning of 2005. ADNDRC reports higher numbers this year, as well.

So the volume of cases ADNDRC will hear will only increase — driven by the eagerness to register domain names in the dot-asia TLD and other new TLDs.

I was thrilled to be present at the opening of ADNDRC's third office in Seoul last month. Mr. Oh, Young Hwan is here today from that office.

This expansion augments ADNDRC's capabilities here in Hong Kong and in Beijing — in anticipation of this growing need.

I believe negotiations will soon be under way to add the Kuala Lumpur Regional Centre for Arbitration to that list of regional offices.

In fact, ADNDRC is becoming an increasingly strong option for trademark owners to consider when seeking a dispute resolution provider.

In addition, all three ADNDRC offices now offer arbitration services in country code disputes for Internet communities across the Asia-Pacific region. This cultural and linguistic diversity truly augments the global Internet community and its ability to deal with disputes as they arise.

What does the future hold for dispute resolution in general and the UDRP in particular?

Domain name disputes are on the rise despite the expansion of generic top-level domain addresses — since cyber-squatters continue to find increasingly sophisticated means to identify and register domain names.

This surge is fuelled, of course, by the ease with which typo-squatters and other bad actors can use automated approaches to identify potentially lucrative domain names.

To contain this traffic, more and more we are seeing the UDRP's simple, straightforward, and equitable processes adopted or adapted throughout the top-level domains. We are, in fact, seeing this process being applied across the Internet.

Remember, the UDRP was originally intended to provide solely for the resolution of trademark and service mark disputes in domain-name registrations in the generic TLDs.

However, it has proved so successful that more than 20 country-code top-level domains have adopted the UDRP — or a form of it — to resolve domain name disputes.

Again, we are already seeing a trend. Of the 9,500 cases heard by WIPO, 418 involved domain names registered in country-code top level domains. That agency alone provides services for disputes in 47 country code top level domains —

among them Australia, Switzerland, Colombia, France, Mexico, Spain, and, of course, Tuvalu.

We are starting to witness a push by some attorneys and their clients for even more streamlined — and less public — dispute resolution and settlement options. Some have even proposed registrar-based settlement options that bypass dispute resolution providers altogether.

It will be interesting to see how those proposals play out.

We also look for more non-traditional dispute resolution processes to evolve as Internet users become increasingly creative in the ways they do business over the Internet, on the Internet, or involving the Internet.

We have yet to fully comprehend the challenges that may arise with the deployment of internationalised domain names.

Certainly, we expect a huge increase in domain name registrations and therefore disputes over new gTLDs and IDN TLDs.

Anticipating that eventuality, UDRP dispute resolution services are now available for registrations in non-Roman, or non-ASCII, scripts such as Chinese, Korean, Arabic, and Cyrillic.

So far, 60 complaints have been filed in relation to such names, and the number is only expected to increase.

Again, spoofing is going to be an issue, but we are trying to address it as IDNs undergo testing before they are deployed.

Another area that must be closely monitored is plug-ins. As you may know, they are not universally favoured, they do not represent true IDNs, nor can they substitute for true IDNs.

Indeed, ICANN's Security and Stability Advisory Committee has sided against alternative naming conventions and plug-ins.

If anything, all this means is that the need for rapid, straightforward, transparent dispute resolution will continue to increase. It has never been otherwise.

And while some resolution processes may only be based on the UDRP, we feel certain that they will honour the foundational principles of the UDRP —

cost-effectiveness, speed, convenience, equity, universality, impartiality, expertise — everything, in fact, that makes disputing parties seek UDRP proceedings first.

While some dispute resolution providers measure success by the number of cases handled — they all work toward a goal of resolving disputes.

ADNDRC is particularly blessed by the leadership of Mr. Christopher To, whose personal values emphasize resolution — and settlement — over maximizing numbers of filings.

If history has taught us anything, it is that the Internet is ever-evolving and the entrepreneurs who work as registrars and large-scale registrants are constantly innovating — pushing boundaries and finding new ways to do business on the Internet.

What that says to me is that the need for new and evolutionary dispute resolution mechanisms cannot be far behind.