

The Current State of Domain Name Regulation

Domain names as second-class
citizens in a mark-dominated
world

Konstantinos Komaitis

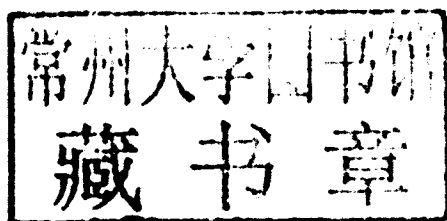


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Preface

In April 2001, I was a postgraduate student attending a conference organised by the Norwegian Centre of Computers and Law of the University of Oslo. In the morning session, Diane Cabell, then fellow at Harvard's Berkman Center for Internet and Society and UDRP panellist, went to the podium and started talking about domain names and trademarks. It was the first time I was hearing words like 'domain names', 'UDRP', 'TLD' and all the other acronyms that now constitute part of my everyday vocabulary. Diane's presentation was fascinating and really captured my attention. She was sharing with us her experience on how domain name disputes are adjudicated under the UDRP, the role of ICANN and asked us – as young scholars – to follow closely this area of law that, at the time, was in its infancy. In her presentation, she started by comparing the role and scope of trademarks with that of domain names, and exploring the analogy between the two identifiers. She warned us that this was only the beginning of a long process, fearing how the vested interests of the trademark community would expand the scope of trademark law and could potentially dominate the domain name space. She was right. Actually, she was spot-on. Everything she predicted happened and her concerns were not unjustified.

The UDRP and the interaction between domain names and trademarks would ultimately become the focus of my postgraduate dissertation. In the summer of 2001, for the first time, I started researching, thinking, understanding and rationalising domain names, their relationship with trademarks and their nature. It was a difficult task. Back then, most of the world did not understand domain names; actually, most of the world was not even on line. While the United States was experiencing the dot-com boom, in Europe online commerce had not manifested its full potential. Domain name registrations were still in an infant state, but they were expanding exponentially. From one day to another we went from standing in cinema queues to purchasing tickets on line.

After receiving my postgraduate degree, I decided to continue my intellectual pursuit on the regulation of domain names. Moving to Scotland would become a turning point for my future, as my doctorate would ultimately focus on ICANN's UDRP and the legal rationale behind domain names.

What had started as intellectual curiosity would become an ‘obsession’ and would ultimately bring me in 2009 to ICANN’s thirty-sixth meeting, in Seoul, where I would be chosen to represent the Non-commercial Stakeholder Group (NCSG) in the Special Trademark Interest (STI) group, tasked to suggest recommendations that would balance the conflicting rights of trademark owners and domain name registrants in light of the Root expansion and the addition of new gTLDs.

So this book is a story of all this experience – a story about good versus bad, strong versus weak, right versus wrong. It is about good trademark owners, bad trademark owners, legitimate domain name holders and cybersquatting. Actually, it is a book about protecting the weak, the good and the right. I don’t mean to sound hysterical, and I apologise beforehand to all readers if the book comes across that way. What I wanted to do was to provide an account of the direction we are heading. I fear that after the first big wave of domain name registrations we stopped caring. We stopped caring about the domain name registrants who unfairly lose their domain names to trademark owners and are subjected to unfair UDRP processes and biased panels. We stopped caring about small trademark owners and start-ups, which saw the Internet as the platform to promote their ideas and speech to the world. I want to believe I did not let them down – because I still care and I will continue to care until ICANN and the trademark community realise that the domain name space is everybody’s territory and not some exclusive space for trademark owners. So this book is me – caring. I wanted to write the book and bring awareness. I am not the first and certainly not the last. But in this book you will read what has been happening over the past ten years and what will continue to happen unless we do something about it. I hope there are parts that you will be able to relate to.

Before you all proceed to read the book, let me make something clear. This book is not an attack on ICANN or the trademark community and should not be perceived that way. It is a story, written as simply as possible, and aiming to give a different perspective on the regulation of domain names. I felt the need to tell this story because I realised that registrants are unrepresented and are indiscriminately seen as bad actors in an environment that fully supports and protects trademark owners. This book is about sharing experiences, thoughts, ideas and hopes.

At this stage, it is only appropriate to thank the people who inspired me, fed me intellectually, argued with me and supported me throughout this project. I would like to thank Diane Cabell for paving the intellectual way almost ten years ago. Special thanks go to Milton Mueller for allowing me to pick his brains every chance I got, sometimes even without him realising it. I would also like to thank my Ph.D. supervisor, colleague and friend Catherine Colston for discussing trademark law with me and rationalising its boundaries. Special thanks should go to Robin Gross, US attorney, friend, chair of NCUC and Executive Director of IP Justice, for explaining to me the history, role and forces within ICANN. Finally, I would like to thank Kathryn Kleiman,