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ADMINISTRATION OF JUSTICE IN DOMAIN NAME DISPUTES: CRITICAL ANALYSIS OF DISPUTE RESOLUTION POLICIES (DRPs).

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“In the digital world of today, one can say almost nothing is local”.

-John W. Henry

Abstract

Access to justice does not merely include access to the forum, rather it includes the aspects of fairness, equality, legal aid, legal awareness, public confidence in the justice system, etc. Despite being praised as an efficient mechanism of dispute resolution, the UDRP and other similar policies (DRPs) have several flaws, which prevent effective access to justice in domain name disputes or reduce the confidence of the aggrieved party in the policy framework. In this paper, the authors have made a critical analysis of some of the Dispute Resolution Policies (DRPs) along with some relevant suggestions.

Keywords: Dispute Resolution Policies (DRPs), IPR, cybersquatting, administration of justice.

I. Introduction to the Problem of Domain Name Disputes.

These days the terms like “e-commerce”, “digital marketing”, “business-to-business (B2B)”, “business-to-consumer (B2C)” etc are in vogue. Internet and the digital realm have opened large avenues of success in businesses across the globe. It is due to internet that a person living in a remote area of the city can get his desired article delivered at his doorstep.

It is much evident from the UNCTAD report published in 2021 (UNCTAD, 2021). The report has underlined the dramatic surge in e-commerce amid the COVID-19 restrictions globally (the share of online retail sales in total retail sales has boosted from 16% to 19% in 2020) (UNCTAD, 2021).

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However, as a dark side of the digital world, the legal issues and disputes like privacy breach, breach of contract, defamation and cyber-fraud have cropped up recently. Apart from the above disputes, the internet has also posed threat to intellectual property rights (IPRs), especially trademark rights of the individuals. A peculiar form of dispute often arises due to unauthorised registration and use of domain name of a company or a well known mark, (such as Mercedes-Benz) for attracting profits and customers. Such disputes pertain to the problem of “cyber-squatting”. The WIPO has defined it as the act “involving the pre-emptive, bad faith registration of trademarks as domain names by third parties who do not possess rights in such names” (WIPO, n.d.).

A domain name is often considered as “addresses of the Internet”, which are also used for the purpose of sending E-mail messages and also to find web pages (BitLaw, n.d.). Some famous examples of domain names are “.com”, “.org”, “.net”, “.edu”, “.gov” etc. These all are examples of the top-level domain (TLD) name.

However, the problem of domain name disputes, specially, cyber-squatting, revolve around the unauthorised use of “second level” domain names, which are the names “directly to the left of the TLD name. As an example in the “www.mercedes-benz.com”, the word “mercedes-benz” is the second level domain. It is this name that acts as an extension of trademark over the internet. Therefore, it can be appropriately said that, such unauthorised registration of domain names constitute the act of trademark violation over internet.

Given that courtroom proceedings cause undue delay in resolution of disputes pertaining to IPRs, the owners of such rights prefer to opt for the mode of ADR, which is much easier, cheaper and speedier mode for cross-border disputes (Nandini & Reddy, 2010, p. 81). Even in the US judgment of *Bensusan Rest. Corp. v. King*, (126 F.3d 25, 27 (2d Cir. 1997)), highlighting the problem regarding applicability of trademark law over the realm, the Court held that applying such law over internet was nothing less than “trying to board a moving bus”.

II. DRPs as ODR framework for domain name disputes.

As far as the ADR in domain name disputes is concerned, the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit organisation came out with the policy called the Uniform Domain Name Dispute Resolution Policy (UDRP) in 1999, which lays down the Online

Dispute Resolution mechanism for resolution of domain name disputes. On the same line, various countries have formulated such policies (DRPs), some of which include .IN Dispute Resolution Policy (INDRP) of India; .eu Alternative Dispute Resolution Rules of European Union (EU); .usTLD Dispute Resolution Policy of USA; the CNNIC ccTLD Dispute Resolution Policy (CNDRP) and Rules of china; JP Domain Name Dispute Resolution Policy and Rules (JPD-DRP) of Japan; .au Dispute Resolution Policy Rules (.auDRP) of Australia; Nominet Dispute Resolution Service (DRS) Policy of UK etc.

The task of the researcher will be finding the gap in these policies with respect to securing access to justice in domain name dispute cases.

III. The Rules for Uniform Domain-Name Dispute-Resolution Policy (UDRP).

The UDRP rules govern the arbitration proceedings involving the most important generic top-level domains (gTLDs), such as “.com”, “.net”, “.org,” “.biz” and “.info”. Also, some countries have adopted UDRP, rules in modified form for resolution of disputes concerning country-code top-level domain (ccTLDs) such as “.ag,” “.bz”, “.cc”, “.fj”, “.fm”, “.gd”, “.gt”, “.pa”, “.pk”, “.pn”, etc. (WIPO, n.d.).

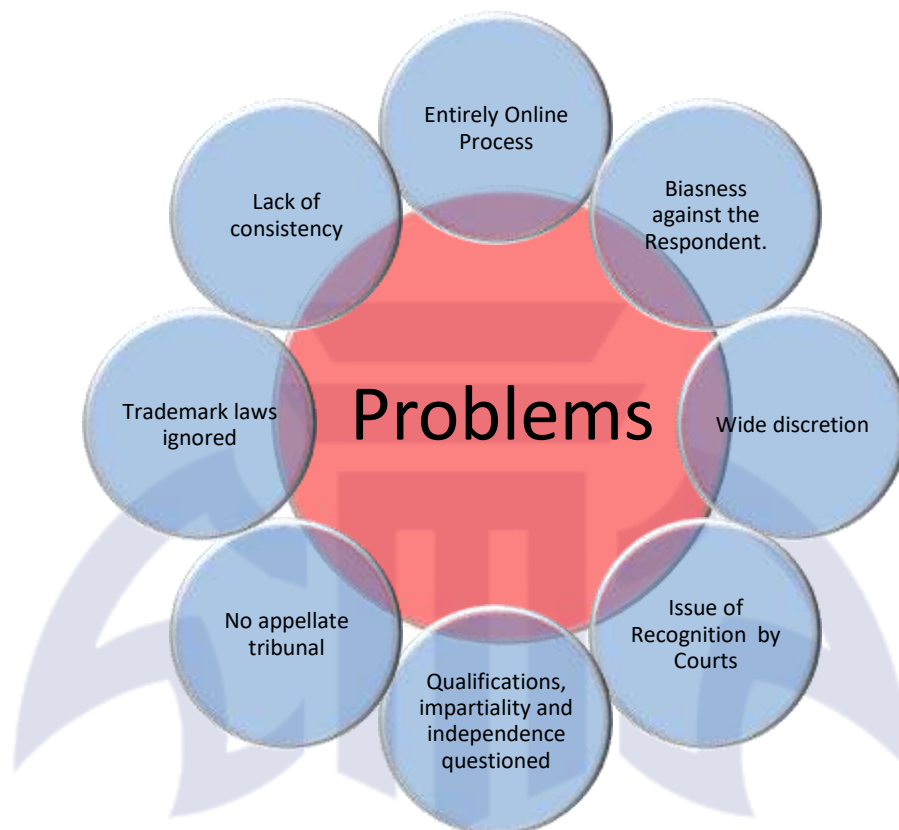
A. Significance of UDRP Rules. As compared to other forms of resolution mechanisms, the UDRP provides for speedier and inexpensive mechanism for dispute resolution. UDRP provides for an extra-judicial tribunal, which has authority to decide cyber-squatting cases, thereby setting up a mandatory/administrative arbitration mechanism (Efroni, 2007).

As compared to courts, the UDRP decisions are pronounced within two months (Bernstein, 2000). Therefore, it has become a preferred method as compared to traditional litigation in domain name disputes since its inception. Even since its implementation, as compared to the ACPA case in USA, over 7500 UDRP were filed between 1999 to 2001 (Sharrock, 2001). Even, in 2021, over 5000 domain name proceedings were filed with WIPO alone, showing a surge of 22% cases than 2020 (WIPO, n.d; Mewburn Ellis, 2022).

B. Loopholes of UDRP Rules. Some of the loopholes in the UDRP Rules shake the confidence in the UDRP Proceedings as suitable mechanism for dispute resolution. These

loopholes are:

1. **Questionable legitimacy.** In the opinion of Efroni (2007), the UDRP has a questionable legitimacy as it acts as *de facto* binding legal instrument, globally, which has been drafted by a private not-for-profit organisation of US.



2. **Complete online process.** Under Rule 3(b) “complaint” and “annexes” are to be submitted mandatorily in electronic form. This provision, thus, neglects the fact of low digital literacy in developing countries like India and the African countries. It necessitates the understanding of internet, without which the forum under UDRP remains inaccessible.
3. **Inadequate provision regarding qualification, impartiality and independence of the Penalist.** The Rules nowhere mention the minimum qualification required for being appointed as penalist. Unlike the Arbitration and Conciliation Act, 1996, the UDRP rules do not provide the mechanism for challenge of appointment of penalists. Also, it lacks provision similar to Schedule 7 of the 1996 Act, which lists the categories of relationships which debar a person from being appointed as arbitrator.

The problem is much grave in the light of the statistical data proving that arbitrators are highly biased towards large corporate trademark holders (Sherrock, 2001). In this way, the decisions of panel are questionable and justice is not effectively delivered to Respondents.

4. **Neglect of basic trademark provisions.** Though domain name has been given the status of trademark in *Satyam Infoway Ltd. v. Sifynet Solutions Pvt. Ltd. (2004 (3) AWC 2366 SC)*, the UDRP proceedings do not strictly adhere to the norms of trademark laws such as prior use of the trademark. Irrespective of the long use of a particular domain name, the UDRP panel can take action if elements mentioned under Paragraph 4(a) of the UDRP are established, viz. (a) Identical or Confusingly Similarity, (ii) Rights or Legitimate Interests and (iii) Bad Faith.
5. **Ambiguity regarding applicable law.** Though, according to the WIPO Final Report the applicable law for the panel must take into account “domiciliary of the parties and place of registration”. The Rules leave the scope of ambiguity as Rule 15 (a) put the ball in the court of the Panel to determine the choice of law (Efroni, 2007).
6. **Biasness against Respondents.** The following points highlight this issue:
 - a. Since, the majority of cases are decided in favour of the trademark owners, it has led to the practice of “Forum shopping” by the Complainants, who are generally trademark owners (Nandini & Reddy, 2010, p. 86).
 - b. Rule 4 provides that the domain name in question shall be locked till the pendency of the UDRP proceedings. This happens without giving a fair hearing opportunity to the respondent and without considering the duration of use of the domain name.
 - c. The Rules are silent as to the compensation to the Respondent for such duration, in case the complaint turns out to be frivolous.
 - d. The Rules do not provide for indemnity provision, whereas the Rule 25 of the .INDRP Rules compels the Registrants/Complainants “to indemnify against and in respect of any loss, liability or damage” under the .INDRP Proceedings.Thus, the Rules fly in the face of natural justice principle of *audi alteram partem* and pave way for questionable decisions. Also, the rules leave the scope for bias against the Respondents.

- 7. Lack of Consistency.** Given that the arbitrator exercises unlimited decision-making powers under the proceedings, such exercise is source of inconsistency regarding issues of use of domain names. One such example is the inconsistency regarding decisions on “domain name speculation”, which is not covered by the Rules. This is manifest in the conflicting decisions of *General Machine Products Co. v. Prime Domains (National Arbitration Forum Domain Name Dispute Case FA0092531)* and *eResolution v eResolution.com (WIPO Case No. D2000-0110)* and conflicting Wal-Mart decisions (*Wal-Mart Stores v Walsucks (WIPO Case No. D2000-0477)* and *Wal-Mart Stores v wallmartcanada-sucks (WIPO case No. D2000-1104)*). Reasons for inconsistency are:
- a. Lack of specificity in the provisions of the UDRP and Rules;
 - b. Lesser role played by precedents in UDRP decision making process;
 - c. Wide discretion provided to arbitrators under the Rules. For example, Rule 10(a) provides very wide discretion to the Arbitrator in matters of admissibility of evidence.

Therefore, it is uncertain whether in every case the justice will be provided to the rightful party.

- 8. Wide discretion in case of pending court proceedings.** Under Rule 18(a), the Panel has been given wide discretionary power to decide the fate of an administrative proceeding, if legal proceedings has been initiated or is pending during the administrative proceeding in respect of a domain-name dispute, which is also subject of the complaint. In the absence of clear guidelines, this discretionary power may force the complainant to fall prey to cumbersome courtroom proceedings, which the UDRP seeks to evade.
- 9. No forum for appeal.** introduction of an appellate tribunal in UDRP process is the need of the hour so that:
- a. “divergent bodies of precedent” can be reconciled (Kelly, 2002);
 - b. panelists may base their decisions on appellate decisions, which serve as “the model for resolving a particular class of disputes” (Kelly, 2002);
 - c. Decisions of the appellate tribunals will serve as principles and binding precedents for lower level Panels (Wotherspoon and Cameron, 2003);
 - d. such determinations may be corrected, which involved incorrect application of rules incorrect decisions (Kelly, 2002);

- e. Instead of challenging such determination in a court, the aggrieved may have recourse to “a more accessible forum” (Kelly, 2002).

10. Issue of recognition. It has been dealt in detail in loopholes of INDRP Rules.

11. Absence of legal aid program. The UDRP Rules fail to include legal aid programs to enhance access to justice.

12. Question of transparency. Rule 13 explicitly denies the scope for virtual or physical hearing of parties, except it is deemed necessary by the panel. Therefore, the transparency of the entire UDRP proceedings is doubted.

C. Suggestions. Considering the loopholes in the UDRP Rules, the following changes are suggested:

1. The bodies such as ICANN and WIPO must initiate awareness program for providing wider access of UDRP proceeding to all the segment of masses. A wide awareness program through advertisement concerning the process of UDRP must be initiated by the ICANN and WIPO.
2. The provision regarding the minimum qualification, impartiality and independence must be strengthened on the lines of ADR laws. Due to lack of qualifications of Penalists, the courts in some countries do not recognise the awards. It is evident from the decision of Delhi High Court in *Beiersdorf A.G. v. Ajay Sukhwani and Anr.*, (MANU/DE/1631/2008) and *Citi Corp And Anr. vs Todi Investors And Anr.* (2006 (4) ARBLR 119 Delhi).
3. The constitution of an appellate tribunal is the need of the hour in order to prevent inconsistencies of decisions and to set up the mechanism of binding precedents in the UDRP mechanism.
4. Respondent must be given an opportunity of being heard before the domain name is locked by the Registrar. Further, in the event the complaint turns out to be frivolous, the Complainant must be made to pay compensation for loss suffered by the Respondent during the entire proceedings.
5. There must be certain guidelines, subject to which the Penalists may exercise discretion in the matters of admissibility of evidence and of deciding fate of administrative proceedings under Rule 18(a).

IV. .IN Dispute Resolution Policy (INDRP) Rules of Procedure

On the lines of UDRP, India has adopted. INDRP, which applies to the “.in” ccTLDs since 2006. It is enforced by the National Internet Exchange of India (NIXI), which acts as .IN Registry since 2005 (.IN Registry, n.d.). Like UDRP, .INDRP also provides for arbitration mechanism for domain name disputes in India. The proceedings are governed by .INDRP Rules of Procedure (or INDRP Rules).

A. Significance of .INDRP Rules. Similar to the UDRP Rules, the .INDRP Rules also seek to provide speedier and cost-effective remedy to the parties. It is known for a transparent mechanism and mandatory execution of awards of the Panel. During 15 years of its enforcement, the NIXI was able to settle over 1150 domain name disputes (Rana & Srivastav, 2020). The success stories of the Rules include the transfer of domain names such as ‘www.pizzhut.in’, ‘www.gmail.co.in’, ‘www.nescafe.co.in’ and ‘www.starbucks.co.in’ after referral under .INDRP was made, thereby ensuring protection of rights of legitimate trademark owners (S.S Rana & Co., 2011).

Since, the Rules adhere to the provisions of the Arbitration & Conciliation Act, 1996, there are enough safeguards against the biasness of the arbitrator. Also, the appointment of arbitrator can be challenged as per the provisions of the Act.

B. Loopholes in .INDRP Rules. Despite being an effective mechanism of domain name dispute resolution in India, the .INDRP Rules suffer from some drawbacks, which are similar to that of UDRP Rules. Apart from that following drawbacks shake the confidence of the parties in the INDRP system:

- 1. Language problem.** Under the Rules, the language of the arbitration proceedings is English (Rule 14). This provision discriminates against the people, who are not comfortable in English as medium of communication.

2. **Absence of provisions ensuring minimum qualification, impartiality and independence of arbitrator.** The provision regarding impartiality and independence of arbitrator are absent in the Rules. This further mars the confidence of people in the proceedings.
3. **No forum for appeal.** Similar to the UDRP Rules, the .INDRP Rules do not provide for an appellate tribunal. An appellate tribunal is needed to evade cumbersome courtroom litigation and to lay down binding precedents on the arbitrators in case of confusion or ambiguity.
4. **Lack of freedom to appoint arbitrator.** Unlike the UDRP Rules, Rule 5 of the .INDRP Rules restricts the freedom of appointment of arbitrator by the parties. Under Rule 6(b) of the UDRP Rules, the Provider has power to appoint panelist only in the event of failure of appointing a panel by either of parties. But in the .INDRP, only the .IN Registry has power to appoint arbitrator under the .INDRP Rules, without consent of the parties. This curtails the transparency of proceedings. Even the right to appoint arbitrator is respected by the Arbitration and Conciliation Act, 1996.
5. **Burden of fee on the Complainant.** Under the UDRP Rules, if a three-member Panel was appointed on the application of the Respondent, the applicable fees shall be shared by both Complainant and Respondent. However, under the .INDRP Proceedings, except in the event of personal hearing, the fee is entirely payable by the Complainant (Rule 22). This may be a factor in preventing the complainant from taking recourse to UDRP proceedings.
6. **Lack of clarity in the event of pending court proceedings.** Under Rule 18(a), of the UDRP Rules, the Panel has been given discretion to decide the fate of an administrative proceeding, if legal proceedings has been initiated or is pending during the administrative proceeding in respect of a domain-name dispute, which is also subject of the complaint. But provision to deal with such event is absent in the .INDRP Rules. Thus, the confidence in the entire UDRP system is reduced due to such issues.
7. **Complete online process.** Similar the UDRP Rules, under Rule 3 “complaint” and “supporting documents” are required to be submitted mandatorily in electronic form. This provision, thus, neglects the fact of low digital literacy in India. Thus, the justice is restricted to only a segment of people haveing ditital connectivity.

8. **Restricted applicability.** The Rules apply only to the “.in” ccTLD. Thus, it excludes the remedy for other TLDs.
9. **Rigidity regarding seat of arbitration.** Under Rule 27, the courts at Delhi have been provided exclusive jurisdiction. It shakes the confidence of the parties, who are from other parts of India.
10. **Lack of recognition by Indian courts.** The Delhi High Court in (*Beiersdorf A.G. v. Ajay Sukhwani and Anr.*, (MANU/DE/1631/2008) and *Citi Corp And Anr. v. Todi Investors And Anr.* (2006 (4) ARBLR 119 Delhi) has refused to consider the decisions of arbitrator under .INDRP Rules (and UDRP) to be binding and to operate as *Res Judicata*. It has made following observations:
 - a. **Nature of award:** The decision of arbitrator is not an award of the arbitrator under the Arbitration and Conciliation Act, 1996.
 - b. **Jurisdiction of court:** The award does not oust the jurisdiction of civil court under section 9 of Code of Civil Procedure.
 - c. **Nature of Policy:** The .INDRP was not framed by legislature rather than by NIXI, a not for profit company.
 - d. **Qualification of Arbitrator:** The arbitrator under .INDRP cannot be treated as a judge or judicial officer as the qualification required under .INDRP is merely “expertise in computers or law”.
 - e. **Scope of Remedy:** The remedies provided in the .INDRP are not adequate and are restricted to “cancellation of domain name” or the “transfer of the same to the Complainant”.
11. **Absence of legal aid program.** The INDRP Rules fail to include legal aid programs to enhance access to justice.
12. **Question of transparency.** Rule 13 explicitly denies the scope for virtual or physical hearing of parties, except it is deemed necessary by the panel. Therefore, the transparency of the entire UDRP proceedings is doubted.

C. Suggestions. Both UDRP Rules and .INDRP Rules have same loopholes, for which the suggestions mentioned in UDRP Rules apply. However, in addition to that, following

changes can be suggested in .INDRP rules:

1. NIXI must initiate awareness program for providing wider access of .INDRP proceeding to all the segment of masses. It must be given wide publicity through advertisements.
2. The provision regarding impartiality and independence of arbitrator must be highlighted in clear terms in the manner of Arbitration and Conciliation Act, 1996.
3. The ambiguity regarding minimum qualification of arbitrators must be resolved. Due to lack of qualifications of Penalists, the courts do not recognise the awards. (Delhi High Court in *Beiersdorf A.G. v. Ajay Sukhwani and Anr.*, (MANU/DE/1631/2008) and *Citi Corp And Anr. v. Todi Investors And Anr.* (2006 (4) ARBLR 119 Delhi)).
4. In the event the complaint turns out to be frivolous, the Complainant must be made to pay compensation for loss suffered by the Respondent during the proceedings.
5. Scope of remedy under the Rules must be enlarged to providing monetary compensation to the Complainant.
6. There must be clarity regarding the fate of an administrative proceeding, in case, legal proceedings has been initiated or is pending during such administrative proceeding in respect of a domain-name dispute, which is also subject of the complaint.
7. On the lines of UDRP Rules, the parties in the .INDRP Rules must be given choice of arbitrator from panels.
8. Apart from English, the other Indian languages must be included as the language of arbitration proceedings.
9. Instead of making the courts at Delhi as the exclusive seat of arbitration, the parties must be given flexibility to determine the choice of arbitration according to the Arbitration and Conciliation Act, 1996.
10. Lastly, the legislature must pass an enactment to recognise the proceedings of both UDRP and .INDRP and to provide the status of arbitral award to the decision of arbitrator. It has been done by the European Parliament to provide legal backing to .eu Alternative Dispute Resolution Rules (the ADR Rules).

V. Conclusion.

The issues concerning language, transparency in the process, biases of panellists and arbitrators, lack of recognition by courts, absence of appellate body to review the decision, forum shopping by complainant are some of the areas, where the domain name dispute policies across the globe

need massive reforms. Else, the ODR platform provided by DRPs will fail in its objective of providing effective access to justice to all.

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