**Via Email: comments-udrp-provider-16nov18@icann.org;**
**and andee.hill@icann.org**

December 21, 2018

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Attn: Ms. Andee Hill, Global Domains Division

Dear Ms. Hill:

**Re: Application for New Uniform Domain Name Dispute Resolution Policy (UDRP) Dispute-Resolution Service Provider**

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Introduction

I write to you on behalf of members of the Internet Commerce Association. Founded in 2006, the Internet Commerce Association (the "ICA") is a non-profit trade organization representing the thriving industry that has developed around the independent value of generic domain names in this Internet Age, including domain name investors, domain name secondary marketplaces, domain name brokers, escrow service companies, registries, and related service providers. The ICA's mission is to assist with the development of domain name related policy. ICA members own a substantial percentage of all Internet domains and provide crucial domain name-related services to millions of Internet users.

We are pleased to provide herein, our comments on the Application for New Uniform Domain Name Dispute Resolution Policy ("UDRP") Dispute-resolution Service Provider[1], by Canada International Internet Dispute Resolution Centre ("CIIDRC").

[1] See; https://www.icann.org/public-comments/udrp-provider-2018-11-16-en.

Background

Since 1999, ICANN has been responsible for over 60,000 domain name disputes under the Uniform Domain Name Dispute Resolution Policy ("UDRP"). These UDRP disputes have been brought by trademark owners against domain name registrants and concern claims of cybersquatting.

Trademark owners all over the world rely on the UDRP to protect their valuable trademark rights, such as PEPSI[2], SAMSUNG[3], and DISNEY. Domain Name registrants are compelled to rely upon the UDRP for the fair adjudication of complaints against their valuable generic or descriptive domain names, such as Queen.com[4], Circus.com[5], and Kiwi.com[6], since their domain names are automatically subject to the UDRP pursuant to every registration agreement. Indeed, after the registrant of Kiwi.com successfully defended against an attempted hijacking of its domain name through the UDRP, the registrant went on to sell the domain name for USD $800,000.00 on the open market.[7] The UDRP is thereby not only intended to protect trademark owners, but also importantly intended to protect domain name registrants from overreaching and covetous trademark owners.

These 60,000 UDRP cases have collectively involved a tab of what is likely in the hundreds of millions of dollars in the aggregate, when all the costs are taken into account, including the value of the disputed domain names, registration and renewal fees, lawyers' time for both complainants and respondents, panelists' time, and filing fees. Accordingly, the UDRP is no small enterprise, but rather a massive one that is mandated to carefully and fairly adjudicate disputes involving trademark owner rights and the rights of registrants to fairly and lawfully register and use domain names.

Despite this massive enterprise involving thousands of lawyers, panelists, administrators, complaints, and registrants, the fact is that ICANN has effectively delegated the administration of the UDRP to third party dispute resolution providers ("DRPs"). There is no ICANN staff person or office whose mandate it to exclusively oversee and administer the UDRP. Rather, the administration of the UDRP is largely left to the DRPs, and yet remarkably, they are not even under contract with ICANN. Once these DRPs are approved by ICANN, they are effectively left to administer the UDRP without any formal or regular oversight, or compliance procedures, by ICANN.

DRPs have extraordinary power within the UDRP system. They are permitted to exclusively select panelists to serve on their roster. They are permitted to exclusively decide which panelist

[2] See; https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2016-1560
[3] See; https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2018-2034
[4] See; https://www.wipo.int/amc/en/domains/decisions/text/2017/d2017-0679.html
[5] See; https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2016-1208
[6] See; https://www.theregister.co.uk/2001/12/04/eresolution_quits_domain_arbitration/
[7] https://www.namepros.com/blog/inside-interview-behind-the-800-000-purchase-of-kiwi-com.965522/

is appointed to hear a particular single-panelist case. They are permitted to exclusively nominate all panelists for the chair position in three-panelists cases. Although the majority of UDRP cases involve clear-cut cases of cybersquatting as the Policy was intended to address, if a significant number of other cases which primarily involve "generic" or descriptive common dictionary terms, there is ample opportunity for case outcomes to dramatically change depending on who is appointed to the Panel. Some panelists have demonstrated a clear pattern of favoring certain interpretations of the Policy, while others have demonstrated an equally clear but opposite interpretation. As such, through the roster and panel selection procedures, DRPs are able to indirectly influence the outcomes of many cases by determining which panelist hears a case, and as a result, are able to indirectly influence and fashion the resulting case law. DRPs are thereby placed in a supreme position of trust by both complainants and respondents and the legitimacy and effectiveness of the UDRP is to a great degree dependent upon the performance and fidelity of DRPs in carrying out their important functions.

Given the immense importance of the UDRP to stakeholders, and given the great degree of reliance and trust that all stakeholders must have in the fairness of DRP's, the approval of a DRP cannot be taken lightly. It is a very serious matter which is inextricably tied to the fundamental legitimacy of the UDRP as a whole.

The Absence of Contractual Arrangements with DRPs

As aforesaid, despite the massive scope of the UDRP and despite the crucial and trusted role that DRPs play, there is a surprising absence of any contractual framework between ICANN and DRPs. It is particularly surprising as contracts are consistently relied upon by ICANN to establish and document relationships and obligations in every other aspect of its mandate, as one would expect given the ubiquity of contracts in every facet of business.

The Internet Commerce Association has consistently advocated for the establishment of a contractual framework between ICANN and DRPs. Back in 2013, the ICA expressed its strong opposition to any new DRP approvals until ICANN adopts an enforceable mechanism to assure uniform disposition of UDRP cases regardless of which arbitration provider is selected for their resolution.[8] The ICA pointed out that a standard agreement is the only means of assuring that all business entities that have made substantial investments in acquiring and developing domain names, of procedural and substantive due process when a UDRP procedure is initiated by or against them. The ICA also pointed out that a standard agreement is also the only means by which to prevent forum shopping, by which newly accredited providers seek to influence complainants' arbitrator choice by further tilting the system against registrants.

Indeed, the concern about "forum shopping" has existed from the very beginning of the UDRP and even resulted in eResolution, a former Canadian DRP, quitting UDRP administration in 2001 because "the system gave complainants, who invoke intellectual property rights, the privilege to choose the provider", and that "statistics were soon released showing that

[8] See; https://forum.icann.org/lists/comments-acdr-proposal-01mar13/pdfpOXJrusDnW.pdf

complainants tended to win significantly more often with some providers…creating a perception of bias from which the system never recovered".[9]

Indeed forum shopping is a critical flaw in how the UDRP is currently implemented. Since complainants are exclusively permitted to select the DRP, and not the respondent, DRPs are susceptible to catering to complainants. This concern has been around since the beginning of the UDRP and has still not been corrected. As noted by Professor Geist in his study, "Fair.com? An Examination of the Allegations of Stemic Unfairness in the ICANN UDRP" in 2001[10], in a letter to the ICANN Board on January 26, 2000, A.M. Froomkin and D. Post, stated; "Complainant choice has the useful property of promoting price competition. Unfortunately, economic theory suggests that is also will tend to promote other types of competition, including competition among dispute resolution service providers to be perceived as being most "complainant-friendly" in order to capture all, or a disproportionate share, of the market. We consider this to be a very serious issue, as even the appearance of partiality would so taint the UDRP as to call the entire enterprise into question." Accrediting another UDRP provider, no matter how excellent its reputation, while this flaw remains unaddressed by way of a contractual framework, would regrettably exacerbate the existing critical problem and expose the UDRP to continued apprehensions of bias.

Despite the obvious reasons for establishing a contractual framework for the provision of UDRP dispute resolution services by DRP's, ICANN has to-date, failed to take any steps towards this needed improvement. Indeed, ICANN expressed a reluctance to employ formal contracts on the inexplicable basis that the absence of contracts was somehow a good thing. In 2013, ICANN stated that "entering into formal contracts with UDRP providers carries with it the formality of following all contractual obligations, including notice and cure requirements, as opposed to ICANN's ability today to take swifter corrective action".[11] Notwithstanding that at no point as ICANN ever taken any corrective action against any DRP, it strains credulity to believe that the UDRP is somehow the only area of ICANN endeavor where contracts are a hinderance rather than a best practice.

Remarkably, and despite this express reluctance to employ best practices, ICANN somehow saw fit to employ a contract of sorts when it came to the URS. On May 10, 2013, ICANN Board Chairman Steve Crocker advised that "a contract is being developed" for URS[12], and subsequently a short form agreement labeled a "Memorandum of Understanding" was implemented for all URS providers. Despite lacking many of the features usually and appropriately present in comprehensive provider contracts of this sort[13], these MOU's did at least

[9] See; "eResolution Quits Domain Arbitration" at: https://www.theregister.co.uk/2001/12/04/eresolution_quits_domain_arbitration/, December 4, 2001.
[10] http://aix1.uottawa.ca/~geist/geistudrp.pdf
[11] See; Letter from Akram Attallah President Global Domains Division, to BC, December 19, 2013; https://www.icann.org/en/system/files/correspondence/atallah-to-cooper-19dec13-en.pdf
[12] See; https://archive.icann.org/en/meetings/beijing2013/bitcache/Responses%20to%20Questions_Comments%20from%20Public%20Forum%20Session-vid=49793&disposition=attachment&op=download.pdf
[13] See for example; https://www.icann.org/en/system/files/files/naf-rrdrp-15aug13-en.pdf

establish a basic contractual framework. There is absolutely no genuine reason why this should not also be done for UDRP DRPs.

The Numerous Serious Issues with DRPs

ICANN has since acknowledged that under some circumstances, it would be possible and even "advantageous" to establish such a framework for the UDRP. On December 29, 2013, Mr. Akram Attalah expressly stated that "if ICANN were to see a great expansion of UDRP providers in the future, or if there were increasing need to take corrective action against UDRP providers, the development of a formal contractual regime may indeed become more advantageous than the system that exists today".[14]

Although the addition of a fifth DRP is not a substantial expansion but an incremental one, it is nevertheless the case that by adding DRPs one by one over time, at some point the expansion will be relatively substantial and therefore prudence dictates that a contractual framework be implemented before we reach that point. Moreover, there is currently reason to be concerned that as contemplated by Mr. Attallah in 2013, there is an increasing need to take corrective action against DRP providers. In fact in July, 2013, ICANN issued a Status Report on UDRP Providers and Uniformity of Process[15], and stated therein that, "while there has not been, to date, a need for ICANN to revoke its approval of any UDRP provider, the concerns raised in the community make clear that ICANN has to be prepared for this potential". Nevertheless, ICANN has not prepared for this potential by establishing a formal contractual framework for oversight and compliance. Moreover, as advised to ICANN by letter on September 25, 2018[16], there are numerous issues with DRP's which have arisen without any established oversight framework to address them. Such issues include but are not limited to;

a) UDRP panelists who are trademark attorneys serving as counsel to complainants and contemporaneously in judgment as panelists;

b) UDRP panelists being found to have brought UDRP complaints in bad faith as counsel (RDNH) yet being permitted to continue as panelists;

c) DRP's making up their own purported "supplementary rules" including additional new fees and procedures which conflict with the UDRP and the UDRP Rules, without any approval of ICANN or of stakeholders;

d) DRP's unliterally "franchising" out their accreditation without authorization from ICANN;

e) DRP's who fail to or refuse to transparently disclose their ownership thereby bringing the UDRP into disrepute;

[14] See; Letter from Akram Attallah to BC, December 19, 2013; https://www.icann.org/en/system/files/correspondence/atallah-to-cooper-19dec13-en.pdf
[15] See; https://www.icann.org/en/system/files/files/uniformity-process-19jul13-en.pdf
[16] See; https://www.icann.org/en/system/files/correspondence/muscovitch-to-icann-board-09oct18-en.pdf

f) DRP's who appoint favored panelists over and over again, to the exclusion of all others, thereby tainting the procedure and tilting outcomes in favor of trademark owners;

g) Allowing trademark owners to shop around between DRP's for the most sympathetic and/or biased DRP's, and as a result creating a "race to the bottom" for DRP's to cater to trademark owners; and

h) DRP's failing to provide any transparent mechanism for disciplining or removing panelists who don't take their responsibilities seriously or who make errant and outrageous decisions;

i) UDRP Dispute Resolution Providers ("DRP's") failing to publish decisions;

j) DRP's selecting panelists based upon unfair and unknown criteria and only selecting panelists from trademark stakeholder groups; and

k) UDRP panelists making up their own self-serving and un-approved interpretations of the UDRP Policy which amount to unhindered new policy making.

These are all serious issues which directly affect the efficacy of the UDRP and surely must be investigated and reviewed prior to approving a new DRP provider. Otherwise, ICANN would be expanding the universe of DRPs while allowing numerous serious issues to go unaddressed and risking new DRPs continuing unacceptable practices or creating new ones. As you know, the RPM Working Group is currently engaged with reviewing the UDRP, and this necessarily involves reviewing the DRP's performance. Surely it would be prudent for ICANN to await this important Working Group's examination and recommendations regarding DRPs before approving yet an additional one amidst numerous credible concerns as to how DRPs operate in a largely uncontrolled environment without meaningful oversight or contractual frameworks.

In response to our aforementioned letter of September 25, 2018, Mr. Cyrus Namazi advised on November 29, 2018[17] inter alia, as follows:

> "To help inform these efforts, ICANN org is currently developing a report on the operational and management elements of the UDRP within the organization, including provider relationships, to gain a better understanding of how the UDRP is managed and whether changes are needed. Based on the analysis, this effort could result in changes to the way the UDRP is administered within the organization.

Accordingly, it appears seriously premature to be considering any new DRP applicant while ICANN is engaged in reviewing DRP relationships to get a better understanding of how the UDRP is managed and whether changes are needed. ICANN should therefore complete its report and publish it for public comment, prior to any approval of any new DRP. In fairness to applicants as well, they should not be put in the position of applying for approval and making the

[17] See; https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-29nov18-en.pdf

investments in establishing themselves as DRPs, when there is a substantial likelihood that the parameters and obligations will change as a result of both the RPM Working Group and ICANN org's own report.

The CIIDRC Application

As aforesaid, we strongly recommend that no new DRPs be approved until such time as; a) ICANN org completes its report on DRPs; b) the RPM completes its Final Report on the UDRP; and c) a satisfactory contractual framework is established for all DRPs.

Nevertheless, we have carefully reviewed the CIIDRC Application. We are familiar with the CIIDRC's work through its BCICAC arm in connection with .ca domain name disputes under the Canadian Internet Registration Authority's CDRP program and have found it to be a competent and qualified administrator for domain name disputes. The CIIDRC's application did not appear to substantially depart from the current baseline for expectations of DRPs, although as aforesaid there are numerous issues across the existing DRPs.

We did note however that several questions were raised by the CIIDRC's application, as follows:

Part 3: Training and Educational Measures. The application notes that the initial panel members will have "significant experience in domain name disputes", however the extent of this experience is unclear from the application. Although some of the proposed roster panelists appear to be well known UDRP panelists active with other DRPs, some panelists do not appear to be particularly experienced with domain name disputes and accordingly further particulars of the roster panelists would be desirable.

Given that it appears that some proposed roster panelists have no experience in UDRP disputes given that they are not apparently on the roster of any other DRP, it is unclear why the application states that "training will be required" only "as demand increases". It would be advisable to undertake training of all panelists, particularly those that appear to not have any experience in UDRP disputes. The UDRP has 20 years of crucial case law behind it which interprets the Policy and all panelists should be trained in it.

We note that the application states that there will be a "blog page" for panelists to interact with each other regarding "current issues related to the UDRP". Although this may be a useful tool, it is unclear whether these interactions will be restricted so that panelists will not be permitted or encouraged to discuss pending cases. Discussion of pending cases would not appear to be appropriate given that it could enable non-panelists to influence panelists hearing particular cases on the specific matters being adjudicated.

We note that the application also advises that the Continuing Education Society of British Columbia ("CLE") is "available to assist CIDDRC by organizing courses on domain name dispute resolution", but the application is not clear in whether there has been any actual commitment by CLE to provide such courses. It would be desirable to provide greater specificity about this aspect of the application, particularly in terms of the nature of the commitment, if any.

We note that the application commits to organizing yearly conferences dedicated to promotion of online domain name dispute resolution, and we believe that this is a good idea. WIPO also provides such conferences and they are a useful tool for educating panelists and parties.

We also believe that CIDDRC should commit to participating in a broad consultation with other DRPs and stakeholders with a view to creating a Consensus View handbook or similar that applies across all DRPs. WIPO currently provides its own Consensus View but the UDRP would greatly benefit if all DRPs and all stakeholders participated in such an effort. We note that at Part 9, the CIDDRC commits to interacting and collaborating with other DRPs, and we hope that this involves the foregoing. In our view, every DRP has an obligation to not just administer domain name disputes and take in fees, but to also actively work to improving the effectiveness of the UDRP through development of policy and case law interpretation resources.

Part 9: Statistics. The application states that CIIDRC "will provide quarterly statistics to the ICANN designated officer". It is unclear who the "ICANN designated officer is", and what the extent of these referenced statistics is. In our view, there should be a dedicated UDRP commissioner or similar, mandated to specifically oversee the UDRP. In our view the statistics should include all aspects of UDRP cases, including but not limited to instances of RDNH findings, which other DRPs unfortunately and inexplicably do not track.

Part 10: Publication. The application does commit to publishing decisions on its website, however there is no indication as to the extent or nature of any search functions. We believe that search functions should be robust so as to maximize the utility of the published decisions for all stakeholders.

Annex B (Qualifications): We note that Annex B lists the names of the proposed roster panelists, but their qualifications are not listed despite indicating that they are supposed to be. We also note that the profiles are not disclosed in the application. Panelist qualification is crucial and the extent of intellectual property and domain name experience should be fully disclosed. In our view, it is unfair to exclusively select panelists from the trademark bar to the exclusion of lawyers from the domain name defense bar. This leads to an apprehension of bias in the adjudication of disputes. Accordingly, we think it is important for the applicant to disclose what efforts it is making to include panelists from the defense bar as well.

Annex B (Code of Ethics): We note that a brief Code of Ethics has been provided and that is a good start. However, this Code does not address whether it is prohibited for a CIIDRC panelist to also act for a complainant or respondent in a proceeding brought before the CIIDRC. In our view, it is entirely improper for a panelist to appear before the same DRP that he or she is engaged by. Accordingly, we believe that the CIIDRC should be required to undertake to not permit panelists to appear as advocates. Unfortunately, this is not the case at other DRPs where panelists regularly appear in front of their fellow panelists as advocates creating a severe apprehension of bias.

Annex B (Fee Procedure): We note that the CIIDRC is proposing that a deposit be obtained from complainants with the balance only payable upon appointment of the panel. We note that the application does not however address what happens if a complainant refused to pay the balance

once a response is filed. This is an ongoing issue related to this kind of fee model that has arisen with at least one other DRP and should be addressed by the CIIDRC. It is unfair to respondents to go through the substantial expense of preparing a comprehensive response to only find out that the complainant refuses to pay its fee beyond its initial deposit. We also note that now provision is made for credit card payments for panelist fees and the absence of such facilities is burdensome for both complainants and respondents.

Annex B (Board of Directors): We note that although the Board is appropriately charged with monitoring and evaluating performance and initiating corrective or disciplinary actions, there is no formal complaints procedure established and it would be recommended.

Supplemental Rules: We note that the Supplemental Rules do not appear to depart from the UDRP Rules and that is a good thing, as at least one other DRP has unilaterally enacted its own Supplemental Rules that conflict with the UDRP Rules.

Supplemental Rules (Panelist Appointment): We note that no express provision has been made for panelist rotation. Panelist appointment is hugely important and without a firm mechanism in place for determining who is appointed to sit on a particular case, it leaves the DRP with too much power and influence over outcomes. We therefore strongly recommend that the CIIDRC explicitly provide for a fair mechanism for single panelist appointments and nominations for the chair position in three-member panel situations.

Supplemental Rules (Panelist Appointment): With other DRPs, there is often a very unfair situation where respondents are required to share their nominees with the complainant before the complainant decides on its nominees. This should not be allowed to occur with any new DRP and should be rectified for all DRPs and it unfortunately appears to be the case that it does. In the model response provided in the application, the Response includes a provision requiring the respondent to set out its nominees for three member panel, thereby enabling the complainant to see the respondent's nominees first. This is unfair and should not be permitted.

Schedule D - Written Notice of Complaint: In our view, the Written Notice contains a misleading provision. At Section 6, it states that "You may consent to the remedy requested by the Complainant and agree to [transfer/cancel' the disputed domain name(s)". But it is unclear whether a respondent electing to consent to transfer or cancellation, will nevertheless be subjected to a panelist hearing the complaint and issuing a written decision on the merits. If so, and it does appear to be the case with other DRPs, then the respondent should be expressly warned that consenting does not mean that a written decision on the merits will not be issued. This becomes an important issue where the respondent does not wish to incur the time and expense of responding even though it has a defendable rights in a disputed domain name. If the respondent consents out of expediency and is still written about in a panel decision as though he or she defaulted or has admitted guilt, the respondent will be prejudiced and will have unnecessarily and unfairly have consented based upon the misapprehension that the consent ended the matter.

General Concern: We note that according to the Arab Center for Dispute Resolution's website (http://acdr.aipmas.org/default.aspx), since being approved by ICANN to be a DRP in 2013, it

apparently has only heard four (4) cases, or at least only published four (4) cases on its website. This raises a serious concern that there is no demonstrated need for yet another UDRP provider. Given the apparent lack of demand for the last additional DPR, it raises the concern that any new provider could be compelled to attract new customers by making its forum even more attractive to complainants than the existing providers. Until forum shopping is eliminated, complainants will naturally seek out those providers with the lowest standards for ordering domain transfers.

Furthermore, there is the general concern that in the absence of a significant number of cases being administered by a DRP, a DRP will not benefit from progressive experience in administering cases and this affects the quality of administration and possibly the decisions themselves. Accordingly, the potential introduction of an additional DRP makes the importance of eliminating forum shopping increasingly important, so as to both; a) prevent unfairly catering to complainants; and b) ensuring that DRP's receive enough cases to remain viable and proficient.

Yours truly,
**INTERNET COMMERCE ASSOCIATION**

Per:
Zak Muscovitch
General Counsel, ICA