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TAURANGA OFFICE

Domain Name Commission
PO Box 11881
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For: Brent Carey, Domain Name Commissioner

SUBMISSIONS ON DOMAIN NAME
DISPUTE RESOLUTION CONSULTATION PAPER
Domain Name Commission
Dispute resolution service review 2019
Our Ref: GEN80

Dear Brent

1. Thank you for the opportunity to comment on the Domain Name Commission’s consultation paper on resolving disputes in the .nz domain name space.

2. I have read the consultation paper, as well as the Strawperson Proposal, and completed the online Survey. My contribution to the review process is as follows.

Introduction

3. By way of an introduction to me, and therefore any weight you may attach to my comments on the review, I am a Senior Associate in James & Wells’ litigation team and a Resolution Institute-accredited mediator. I have been advising and acting for clients in domain name disputes (on both sides) under, for example, the DRSP, the auDRP and the UDRP since 2010.

4. Prior to joining James & Wells in late 2009, I enjoyed a career in marketing and design for a number of UK and New Zealand-based companies, including Raleigh (bicycles), Sellotape (adhesive products), Boots Healthcare (Nurofen analgesic brand) and DNA (brand strategy, design and customer experience). I therefore have a unique blend of client, agency and legal experience to bring to the current review discussion.

Structure of these submissions

5. These submissions to the Commission are structured thus:

(a) My comments on specific aspects of the content of the consultation paper, in page order;

(b) My submissions on my preferred option (1, 2, 3 or 4).
Consultation paper – comments

Who can determine .nz domain name disputes

6. The following statement appears at the top of page 17 and introduces the subject ‘Who can determine .nz domain name disputes’:

Currently, disputes can be made to the courts, an intellectual property office in New Zealand, or the Commission; alternatively, they can be negotiated privately between the parties using WhoIs contact information.

7. I agree that domain name disputes can be made to the courts and the Commission. However, domain name disputes cannot be made to or decided by ‘an intellectual property office in New Zealand’ – by which I assume the paper means the Intellectual Property of New Zealand (there is only one) as it does not have the jurisdiction to do so.

8. The Intellectual Property Office of New Zealand has jurisdiction to (principally) examine, grant and revoke rights in trade marks, patents, plant variety rights and geographical indications. It has no jurisdiction to examine, grant and revoke domain name registrations. Its jurisdiction to examine, grant and revoke rights in trade marks, for example, is granted under sections 175-176 of the Trade Marks Act 2002. Section 175A specifically sets out the functions of the Commissioner of Trade Marks:

175A Functions of Commissioner

The functions of the Commissioner are, in accordance with this Act and the regulations, to—

(a) examine applications for the registration of trade marks, consider applications for the alteration, renewal, assignment, revocation, declaration of invalidity, and cancellation of registered trade marks and make other decisions relating to the examination and registration of trade marks; and
(b) provide preliminary advice and search advice to persons who propose to apply for the registration of trade marks; and
(c) appoint and alter the advisory committee under section 177; and
(d) provide administrative support to the advisory committee; and
(e) maintain the register of trade marks and carry out other duties and responsibilities relating to the register of trade marks; and
(f) perform or exercise other functions, duties, and powers conferred on him or her by this Act and the regulations.

9. The Commission will note the absence of any reference in section 175A to domain names.

10. I am also not aware that disputes concerning domain names can be made to or decided by the Disputes Tribunal as it is barred from hearing disputes concerning “any trade secret or other intellectual property” pursuant to section 11(5)(c)(iv) of the Disputes Tribunal Act 1988. Although the definition of “intellectual property” in section 2 of the Disputes Tribunal Act does not include domain
names, disputes involving domain names are, in the majority of cases, disputes involving either registered or unregistered trade mark rights – i.e. intellectual property rights. I would therefore be very surprised if, in practice, the Disputes Tribunal accepted and decided domain name disputes.

**The .nz model – Dispute Resolution Service Overview 2017-2018**

11. Page 25 of the paper states that four of the disputes validly lodged last year did not progress any further – presumably this means to expert determination – because of unpaid fees. The reason is unknown but the paper then asks is the process putting stakeholders off? It may be that the expert’s fee is a potential barrier to one or more of these complainants, who may have lodged complaints in the hope of settling them at mediation. Without knowing the reasons behind why the complaints were abandoned, however, I don’t believe it is right to speculate the process may be putting stakeholders off and proceed to make changes to the process based on assumption not evidence.

12. I fully endorse the Summary Decision process. This is a no brainer and should have been introduced years ago. I have previously recommended to the Commission that it introduce this option because of precisely the circumstances the paper outlines; unfortunately, the Commission decided otherwise.

13. The number of invalid attempts made at lodging a dispute is concerning. However, in order to comment on the significance (or otherwise) of these invalid attempts in this review it is important to know:

   (i) Who filed the complaints (member of the public or lawyer/consultant/adviser);

   (ii) The substance/nature of the complaint;

   (iii) The reasons for/nature of non-compliance;

   (iv) Why the complainant did not remedy the non-compliance.

14. Answers to (i), (iii) and (iv) above are of particular importance because answers to (i) may indicate the process is too complicated for members of the public (or lawyers/advisors) and that, contrary to the ideal, lawyers (or advisors familiar with the process) are needed for the process, much like they may be needed for Disputes Tribunal proceedings even though they cannot appear in Tribunal hearings.

15. Answers to (ii) may indicate a complaint was frivolous, vexatious or a spur of the moment decision that did not have sufficient intent behind it; while answers to (iii) may also, or instead, indicate too strict an approach to implementation of the process. (NB: The Hearings Office of the Intellectual Property Office of New Zealand allows a certain degree of latitude when lay persons represent their own interests in IPONZ proceedings. It is not clear to me whether the Dispute Resolution Service exercises a similar degree of latitude in domain name proceedings.)

16. As I stated above, without answers to the above questions there is no evidential basis to inform what changes may need to be made to the process to make it better.
Current process

Lodging a complaint

17. I agree with encouraging the parties to resolve their dispute between themselves both before and during the process. It should be noted, however, that (in my experience, at least) the reason the process has been engaged is because attempts at private resolution have failed.

18. The second paragraph on page 29 of the paper states:

Parties do not need a lawyer or to consult a lawyer to use the service.

19. I have no issue with parties representing themselves if they feel sufficiently comfortable and au fait with the process to do so. More often than not, however, through no fault of their own parties are not comfortable with representing themselves because they are not sufficiently au fait with the process. They therefore seek the assistance of, for example, experienced IP lawyers to prepare their complaint/response documents and participate in mediation on their behalf. In doing so, they believe they are giving themselves the best chance of success. In short, just because complainants/respondents can represent themselves in a domain name complaint proceeding doesn’t mean to say that they will or should be forced to.

20. The answer to the question, “why are parties not comfortable with representing themselves?”, I believe lies in a number of factors, at least in relation to commercially-driven domain name disputes:

(i) The process is defined by a set of rules. To that extent, it is no different than, for example, a trade mark opposition proceeding whose process is defined by the Trade Marks Regulations 2003 or a High Court proceeding whose process is defined by the High Court Rules 2016. Members of the public cannot be expected to be familiar with these rules and how they operate in practice if they do not regularly engage with them.

(ii) Experts’ decisions use previous DRSP and other extra-jurisdictional domain name decisions to influence their decisions – in the same way the courts use previous decisions (some of which may be binding) to make their decisions. Members of the public cannot be expected to be familiar with previous DRSP and other extra-jurisdictional domain name decisions which they can use to support their complaint/response. If they do not regularly review such decisions or engage in the dispute resolution process.

(iii) Members of the public are not usually, like lawyers, trained to think and write in the way the process and securing the desired outcome demands, including being familiar with the Dispute Resolution Policy and the process, the basics of trade mark law, and knowing how to construct arguments and obtain the right evidence to support those arguments. There is therefore a perceived level of risk in self-representation in a domain name proceeding in the same way there is a perceived level of risk in self-representation in the courts.
(iv) Members of the public – especially principals in small-medium size businesses – don’t usually have the time to deal with the process so they look to entrust it to someone else – like an IP lawyer – while they focus on their business.

(v) The Commission does not offer drafting assistance to complainants or respondents (except to the extent it does now in providing information (via https://www.dnc.org.nz/drs, for example) to assist participants in the process.

21. In summary, I venture that the level of knowledge required, resource commitment and risk associated with self-representation is too great for most to take on the risk of self-representation. I am happy to be corrected if this is not the case. (I also note that a self-represented person has no-one to blame if they are unsuccessful in pursuing or defending a complaint, which may be a factor in deciding whether to seek assistance from a lawyer/adviser.)

22. Page 29 of the paper asks:

Would a move to provide standard form templates and sample correspondence be useful? Or would a case management system on which communication between the parties can be facilitated and saved be a better option? Or would both be useful?

23. In answer to the first question, in line with the Commission’s desire to promote self-representation I believe standard form templates for a complaint and a response would be very useful for those seeking to self-represent (and even for lawyers preparing a complaint or response for the first time). The UDRP Model Complaint Word document and the UDRP Model Response document (copies of which are attached to this submission) provide good guidance on how a DRSP complaint template and response template could be prepared. The UDRP models provide an instructional step by step approach to preparing a complaint and a response. A similar template could be developed for the complainant’s reply under the DRSP.

24. In answer to the second question, would a case management system be useful, I believe the answer is “yes” provided (a) the case management system is online (which I infer from the review paper it would be), and (b) the whole dispute resolution process from lodgement to decision is conducted online, doing away with paper copies of all documents. The Intellectual Property Office operates such a paperless case management system and has done so for a number of years. Parties and their representatives access the system using their Realm login and then a specific case number. Under the system, all documents filed in the proceeding are visible to the parties unless a specific document has been filed by a party in the separate ‘confidential’ folder. Documents in this folder cannot be accessed unless and until the intended recipient of the documents has provided suitable undertakings to the discloser, and the discloser has confirmed receipt of such undertakings to the Office. Once received, the Office enables access to the confidential documents by the recipient. If the recipient does not provide the undertakings requested within a specified period of time, the proceeding recommences but the recipient is unable to view the confidential evidence.
25. The present online/paper-based system is wholly unsatisfactory. It is logistically clumsy and results in unnecessary cost to the parties and to the Dispute Resolution Service. The whole process needs to move online. The paper-based system is logistically clumsy because many hours over a period of days, sometimes weeks, are spent crafting a complaint or response in Microsoft Word, only then to have to copy and paste the content into the online DRS form where the content loses all its formatting. Then, for a complaint to be validly filed, the submitted online version has to be printed out in hard copy four times, signed and sent to the DRS with four hard copies of the supporting evidence. If the evidence is extensive, the bundles going to the DRS in Wellington are significant in size and costly to send. As to what condition the bundles are in when they arrive in Wellington, and what condition the bundles are in when received by the recipient and (if necessary) the Expert, I can only speculate.

26. As a matter of practice, I have always also sent four signed copies of the tidy, formatted Word document with the complaint/response to make it easier for the other party and the Expert to read the complaint/response. To this day, however, I do not know whether the DRS discards those Word copies or uses/sends them to the recipient and Expert.

27. I acknowledge that the reason for filing the complaint online in the first instance may be to control word count; however, the number of words can still be checked if parties file Word documents or PDF documents via an online case management system.

28. In relation to whether a complaint has been validly made, I repeat my comments at paragraphs 13-16 of these submissions.

Chapter 2: Dispute resolution the next generation

1. Alternative dispute resolution

29. No comment.

2. Online dispute resolution

30. No comment.

3. Design

31. No comment.

4. RegTech

32. No comment.
Assessing our Service

1. Efficient

Do you think our fees and services are reasonable and fair, either in their own right or else compared to other like services?

33. Yes; both the fees and services are reasonable and fair – especially compared to court proceedings. Although the expert’s fee ($2000) is more than the hearing fee for a proceeding before the Intellectual Property Office of New Zealand ($850), the latter is arguably too cheap. Experts in the DRSP should be compensated properly to attract the appropriate calibre of experts.

34. I firmly believe, and have done for some time, that the expert’s fee should not be paid exclusively by the complainant. I believe this is unreasonable and unfair and encourages unreasonableness on the part of respondents. For example, a respondent may choose to defend a domain name complaint purely for the purpose of causing distress and financial cost to the complainant. Indeed, I know of several domain name disputes where this has occurred.

35. I propose then that if a respondent has chosen to defend a domain name complaint, and the dispute has not otherwise been resolved, then both the complainant AND the respondent should pay equal amounts of the expert’s fee: i.e. $1000 each. If the complainant fails to pay its half, the complaint is deemed abandoned and the respondent is refunded its $1000. If the respondent fails to pay its half, the complainant can choose summary determination rather than full determination. If both parties fail to pay their share of the expert’s fee, the complaint is deemed abandoned.

Do you think the fees we charge are too much, too little, or just right?

36. In my view, there should be a complaint filing fee of say, $200 and a response filing fee of the same amount. The total amount of $400 could be paid to a successful complainant/respondent by way of a contribution to costs (assuming a respondent participates).

37. The expert’s fee, as previously stated, is higher than the hearing fee for a proceeding before the Intellectual Property Office of New Zealand ($850). However, given the calibre of experts and the amount of evidence they often have to traverse the fee is more than reasonable.

38. Regarding mediation, as the parties to a dispute do not pay for the mediator’s expertise, this is a feature of the service the Commission could look to make optional. For the dispute to go to mediation, then, I propose that both parties should consent and pay a fee of say $1000, $500 each, to at least partly compensate the mediator for their time. If one party does not consent, then the dispute goes to expert determination. If neither party wants to mediate the dispute, then the mediation phase is bypassed and the dispute goes straight to expert determination.
Would you respect a decision reached by a less qualified expert?

39. What is a “less qualified expert”? Not all of the current experts are QC’s – for example, Kevin Glover and Sheana Wheeldon. That neither have been appointed as Queens Counsel does not render their decisions of any less quality than those of a QC. On the contrary, both are excellent and well-respected barristers. What is important in an expert is an understanding of the DRSP and how it is applied, as well as relevant trade mark law and fair trading law principles.

Do you think you would like an indicative decision provided to you by an app, or a form, based on the pattern established by past choices?

40. What does the Commission mean by “past choices”? Past expert decisions? Is the Commission considering an early neutral evaluation service liked the New Zealand Dispute Resolution Centre offering (https://www.nzdrc.co.nz/Early+Neutral+Evaluation.html)? If so, at what cost and at what stage in the resolution process?

41. If the Commission is considering such an option, by app or by form, then I suggest it is available to potential complainants before a complaint is filed, to see whether it is worth pursuing a complaint, and that the provision of an indicative decision is subject to the evaluator being indemnified in case ultimately the complaint is decided differently by a different expert.

42. There should also be a reasonable cost associated with pursuing an early evaluation. A legal opinion, for example, founded on the most basic of evidence, can cost from $2000. The Commission may therefore have to subsidise an option for an early evaluation as it would not be attractive to ask a potential complainant to pay the same amount as the expert’s fee; complainants would probably bypass that step and proceed straight to filing a complaint or seek oral advice from a lawyer as to the merits of pursuing a complaint.

Do you think you would be prepared to support an in-house facilitation process if this process was modelled on the method we use to resolve conflicted domains?

43. Only instead of mediation, not as well as. There is no need to add another layer of process or alternative route of resolution to the current process.

Would it be a step forward or a step back to enable parties to pay each other compensation in exchange for giving up rights to the registration?

44. It is enabled now, both privately and in the mediation phase. There is nothing new about one party paying money to another to secure a domain name registration.
To reduce further, it’s “efficient” to time cap the process? The current process strictly dictates when and how different stages must be reached. Do you think it’s better to be strict, or like other overseas organisations, do you think we should display discretion when or if required.

45. Time-capping, or dictation of timeframes for steps, is an important feature of the current process, as it is, for example, in proceedings before the Commissioner of Trade Marks under the Trade Marks Regulations 2003. I recommend not providing any discretion to vary timeframes unless a party can demonstrate genuine and exceptional circumstances. Discretion is open to abuse by parties who seek to delay a process, as is often found in the court system.

3. Accountable

Do you have confidence in the Dispute Resolution Service, and if so, is that confidence complete, or is it qualified in some way?

46. I, personally, have full confidence in the DRS as the administrator of the DRSP. My confidence might be tested however if the Commissioner sought to take on a role(s) for which it was not established, was not suitably qualified to fulfil or threatened its independent status.

4. Affordable

What should an end user, therefore, pay to have their domain name dispute resolved? Is the current funding approach where the user pays nothing except for a determination the right funding approach? Should there be any refund of any fees or charges in a dispute?

47. In answer to questions 1 and 2, please see my previous comments on fees.

48. In answer to question 3, there has long been discussion on whether a successful party should be able to recover costs (and damages). This is a particularly thorny issue given parties (especially registrants) can be based overseas, making recovery of an award of costs very difficult. In addition, no other domain name dispute resolution body that I am aware of makes an award of costs. My suggestion is that both parties pay a filing fee to participate in the proceeding, as noted in paragraph 36 of these submissions, which is refunded/paid to the successful party at the conclusion of a dispute. If only a complainant participates in a dispute, then the $250 paid by the complainant is refunded to the complainant, win or lose.

Should such private contractual arrangements [between Registrars and registrants] happen where there is a free mediation service for parties?

49. This appears to be more a question for the Commission than domain name registrants, in terms of the Commission’s contracts with authorised registrars. Does the Commission want to stop registrars acting as intermediaries? From a registrant point of view, if using a registrar avoids having to file a complaint (and perhaps spending money on lawyers) and achieves the same objective – i.e. securing a particular domain name – then I can see no reason why registrants wouldn’t use registrars as intermediaries.
5. **Additional Measures**

*How cost-effective is the process (given the number, size, nature, and complexity of issues, the parties, and other contextual factors)?*

50. The process is very cost-effective, especially if you exclude lawyers’ fees. Even if you include lawyers’ fees, the process is still cost effective for brand owners given the cost of the alternative dispute resolution route (court) and the potential value of the subject domain name to a business.

*Does the scheme have the resources it needs to operate effectively, and are they allocated appropriately?*

51. I believe this is an internal question for the Commission.

6. **Our self-Assessment**

52. **My comments on the self-assessment are:**

   *(a)* _Users cannot currently track their progress in the process, except through telephone call and email._

   A case management system would assist in parties being able to track their progress; if it has a simple timeline dashboard that would also be useful. That said, is this an issue the Commission has received complaints about, or is this a case of over-thinking what parties need? As it stands, the process timeframes are clearly identified under the DRSP so provided parties are organised they can track the progress of the process readily.

   *(b)* _Translators are not available, and the process is ‘English only’ consistent with its development by Nominet UK._

   Without wishing to sound exclusionary, to what extent are translators needed? Has the Commission received complaints about translators not being available, or parties not being able to file documents in Te Reo Māori? Documents in a language other than English can be filed in the Intellectual Property Office but they must be accompanied by a certified translation. This seems an appropriate practice to follow for complaint/response/reply, rather than the Commissioner making translators available. That said, I have no objection to the process being conducted in English and Te Reo since both are official languages of New Zealand.

   On the subject of official languages, what provision does the Commission currently make for sight-impaired, or dyslexic parties, who may/find reading printed impossible or difficult? If none, then the Commission should, in my view, look into provisioning for such parties.

   In terms of mediation, the availability of a translator would be helpful in those instances where English is not a first language of a party. How often does this happen? If it is required, then the Commission could offer to provide a translator, with the translator’s fees being covered by the party requiring the translator. Alternatively, the party can provide their own suitably qualified translator.
(c) **There is no referral procedure for matters that are outside the scheme’s jurisdiction.**

Matters such as? Other intellectual property issues, such as copyright, or disputes between former trading partners? Does the Commission need a referral procedure?

(d) **Disputes are not assessed and triaged. Assistance to navigate the process is limited to providing guideline materials and answering process related questions.**

My understanding from the Strawperson document is that the Commission suggests the introduction of a three-step triage process:

- Step 1: Is the dispute something that can be handled under .nz policy?
- Step 2: Have the parties made any effort to resolve the dispute? (Y – proceed to Step 3; N – Enquiry Referral > parties discuss resolution; if fails, proceed to Step 3)
- Step 3: Party still dissatisfied?

In relation to Step 2, in my experience most parties have tried to resolve the dispute before a complaint has been lodged so the answer to the Step 2 enquiry would be ‘Y’. I accept however that there may be cases where the parties haven’t tried directly to resolve the dispute before a complaint is lodged. In these cases, it seems to me to be fairer on the parties in terms of cost for evidence supporting a complaint to be filed only if the parties proceed to Step 3. In other words, in the first instance a complainant lodges ‘a notice of complaint’ which identifies the parties, the subject domain name(s), the rights on which the complainant relies (registered or unregistered trade mark, for example) and a statement of the grounds and brief particulars/facts on which the complainant seeks transfer or cancellation of the domain name(s). Such a document would be very likely a ‘notice of opposition’ which commences a trade mark opposition proceeding before the Commissioner of Trade Marks.

If the parties cannot resolve the dispute, then the parties proceed to exchange evidence, again like in a trade mark opposition proceeding.

(e) **The scheme does not have formal, documented systems in place to support staff wellbeing and protect their identity and other personal information where required.**

This appears to be an internal question for the Commission?

(f) **The scheme does not formally report against external quality standards. However, this review and this list is a starting point for moving to a new outline, application, and monitoring of our adherence to external quality standards.**

I don’t think there has been a quality issue with the Service; however, I understand if the Commission thinks it appropriate to formally report against external quality standards.
(g) *The scheme does not report or formally assess user satisfaction, of both the process and outcomes, but could do.*

I agree.

(h) *The process has the capacity for adapting and scaling based on needs, in as much as fees are higher for disputing multiple domains but it arguably doesn’t have enough flexibility to treat simple and complex disputes on their merit.*

How often has the Commission had to deal with disputes involving multiple domains? How complex have these disputes been? Is the question relevant to the majority of disputes involving .nz domain names? It is very difficult to comment on such questions in the absence of any information on which to base an answer.

(i) *The process is prescriptive and unsupported by technology. In other words, it doesn’t cater to multiple ways to connect.*

I don’t believe there is anything wrong with the process being prescriptive. Its prescriptiveness is what has made the DRSP successful; there is, in my view, no need to tinker with or redesign the process for this reason alone. The lack of technology is an issue, as I have discussed. The whole process should be online.

(j) *It also has accessibility problems, including language barriers and particular needs.*

Refer my previous comments on accessibility and language.

(k) *It doesn’t have formal or reported feedback and listening mechanisms.*

Refer my previous comment on formal reporting.

**Issues**

**Expansion**

53. This appears to be more an internal issue for the Commission than for users of the .nz dispute resolution service. If the Commission was able to offer dispute resolution for other ccTLD’s, however, then to the extent it is an additional offering that does not compromise the current service then it is to be welcomed.

**Outsourcing/reciprocal arrangements**

54. Again, this appears to be more an internal issue for the Commission than for users of the .nz dispute resolution service. Does the Commission want to, or need to, outsource resolution to, for example, WIPO or the Resolution Institute? What is the Commission’s motivation for doing so?
Ways and means: walking the talk online

55. I refer to my previous submissions concerning the process and how it should be conducted online.

Accessibility

56. The paper states that “the .nz domain space is one of the few country codes in the world to permit non-residents to register domain names”. What is the Commission’s continued justification for this? Would the number of complaints fall if potential registrants of .nz domain names had to satisfy eligibility criteria in order to register a .nz domain name, as potential registrants of .com.au domains have to (see: https://www.domainregistration.com.au/infocentre/info-center-qd1.php)? It is my submission that if potential registrants of .nz domain names had to satisfy eligibility criteria then the number of unfair registrations by non-residents would fall. In support of this submission, I cite the following statistics:

(a) In the five years from June 2014-June 2015, experts issued 61 decisions under the DRSP;

(b) Of those 61, 27 (44%) involved non-NZ based respondents, with 17 (28% of the 61 total) being non-NZ based individuals (as opposed to corporates);

(c) Of those 17, 16 (26% of the 61 total) were decided in favour of the complainants (transfer of the domain) and 1 was dismissed (because the complainant, a UK company, failed to prove rights in the domain name).

It is arguable that had those 16 respondents not been able to register the subject domain names in the first place, then 16 complainants would not have had to spend time and money on the dispute resolution process.

57. In relation to what languages may be used for the dispute resolution process, I repeat my earlier comments in these submissions and add the following. If the Commission expands what it does and changes its language policy to improve how it goes about resolving disputes downstream of registration, then if the Commission does not introduce eligibility criteria for registration, then it also needs to change its language policy upstream of disputes, at the stage of registration of domain names – i.e. mandate Registrars publish their terms and conditions in multiple languages including English and Te Reo. Freeparking, for example, only publishes its .nz Terms and Conditions in English: https://www.freeparking.co.nz/about-us/terms-and-conditions/nz-terms-and-conditions/#content.

In so doing, registrants could claim they don’t understand the Terms and Conditions of their contracts, especially clauses like clause 3.4 of Freeparking’s Terms which states that a registrant must “[s]atisfy yourself that your use of a domain name will not infringe anybody's intellectual property rights”. This has implications for the validity of the contracts that registrants enter into with .nz Registrars.

58. Finally, regarding the issue of age, what evidence does the Commission have to say that its dispute resolution process are difficult for eighteen year olds? How many disputes have involved eighteen-year olds? What proportion of the total number of disputes does this represent? Has the Commission specifically canvassed eighteen-year old registrants, or registrants 18-25, for their views? I would
venture that if an eighteen-year old can understand the New Zealand road code then s/he can understand the DRSP – it is not a complicated process.

**What is a valid complaint?**

*Is it fair that the form dictates validity rather than the substance? Should our wordcount act as a guideline, rather than a strict parameter?*

59. In my view, an essential part of what makes the DRSP work is its form (electronic-hard copy issues aside). Without form, there is a risk of the process becoming confusing, inefficient and costly. This is not to drive parties into the hands of lawyers; it is that all dispute resolution processes need structure to work efficiently, and introducing too much flexibility into the processes can derail those processes.

60. All the issues identified in the paper on page 47 are easily remedied and are, it seems, as a consequence of parties not following the DRSP. If parties choose not to follow the DRSP, that is not, in my view, a valid ground to change the DRSP. The same applies to the wordcount, where parties have tried in the past to circumvent the wordcount by filing voluminous statutory declarations as ‘supporting documents’. If the wordcount is too stringent, then it could be increased to 3000 (or even 5000, as it is under the UDRP).

**Fairness, fees, and access to justice**

*How should the costs of ADR be met under the scheme?*

61. I repeat paragraphs 11 and 33-38 of these submissions. In summary, I submit:

(a) There should be a filing fee of, for example, $200 for a notice of complaint (which does not include evidence);

(b) There should be a filing fee of, for example, $200 for a notice of response (which does not include evidence);

(c) There should be a mediation fee (say, $1000) split evenly between the parties if both parties agree to attend mediation;

(d) The expert determination fee (currently $2000) should be split evenly between the complainant and the respondent. If the complainant does not pay the fee; the complaint is dismissed. If the respondent does not pay the fee, the complainant can proceed to summary determination where the fee is (perhaps) half the amount of a full determination.

**Are the current fees for an expert determination set appropriately?**

62. Yes, unless the Commission is willing to pay less for experts in which case the Commission may not attract the same profile of experts (despite those people being equally qualified and experienced).
Should there be simple Fee waivers for low-income Complainants?

63. I have seen no evidence to support the justification for fee waivers, so cannot say ‘yes’ or ‘no’. In addition to evidence, to comment I would need to know what criteria the Commission would use to assess whether a complainant is low-income, and what evidence the Commission would need to be submitted to validate a claim to be a low-income complainant.

Precedents/case law

Should the Commission move to engage its counterparts nationally and overseas, about the possibility of sharing our decisions in one place?

64. Accessing domain name decisions under the DRSP in the same place as decisions under the UDRP, auDRP and Nominet DRS, for example, would be handy (Commonwealth court decisions are available under ‘commonlii’, for example), especially for lawyers or domain name consultants familiar with the different policies.

Would it be helpful to users if we provided further details about cases? If so, what?

65. It would be helpful to users involved in disputes to have a list of the decisions (DRSP and other) most often cited and relied on by experts in DRSP determinations, together with a summary of facts and findings for those decisions. (NB: IPONZ has a list of ‘frequently cited trade mark cases’ for trade mark proceedings before the Commissioner of Trade Marks. The list is just that, though – there is no summary of facts or findings for lay litigants.)

ADR and end to end case management

66. In my view, an online dispute resolution process could adopt the same filing, correspondence and case management procedures as the IPONZ system for trade mark proceedings. Everything from the initiating document to the end of the proceeding happens online. I can think of no reason why the DRS could not follow the same model – the technology exists and works very well. Parties are notified when they file documents online by a confirmatory email; similarly, parties receive a notification email when IPONZ issues correspondence to the parties.

67. Page 49 mentions forms or templates. I propose that the DRS provides forms for a notice of complaint and a notice of response, and model documents for complaints and responses along the lines of the ones provided by WIPO for disputes under the UDRP.

68. Page 49 also mentions that there’s no formal negotiation; no facilitation; no conciliation or indicative decision; and no triage. Other than triage, I see no need for the other DR tools in the process.

Outcomes and sanctions

69. The current sanctions are transfer or cancellation of a domain name (or dismissal of a complaint or appeal). There is no award of costs as enforcement of any award of costs would be difficult in the case of overseas parties and/or for jurisdictional reasons. There is then little deterrent value in the current
sanctions – but I am not sure the Commission has the jurisdiction to go any further. This is something the Commission would have to clarify. For example, does the Commission have the jurisdiction to temporarily take-down websites operating under domains which are alleged to contain malicious content or are alleged to be diverting trade? If the Commission did have such jurisdiction then I would be supportive of the exercise of that jurisdiction subject to a complainant providing an undertaking as to damages to a respondent with evidence it can pay an award of damages to a respondent, mirroring the obligations on a plaintiff when applying to the High Court for an interim injunction. This, of course, raises a whole different question: what amount of damages would be appropriate in the event a complainant is unsuccessful? Should there be a standard amount to make an award easy? The answers to these questions would need to be considered very carefully, lest the .nz domain name dispute resolution process and confidence in it be undermined.

70. In my view, to discourage misconduct the Commission needs to look not just downstream at outcomes and sanctions but upstream to the registration process, as I previously discussed at paragraph 57 of these submissions. The Commission needs to introduce eligibility criteria when a person wants to register a domain name. Introducing eligibility criteria would filter out at least a proportion of potential unfair registrations; just how many would have to be assessed post-introduction but judging by the number of overseas respondents whose registrations were found unfair in the last five years it may be as much as 25%. As to what criteria could be used, evidence of a New Zealand business number; trade mark registration, or, in the case of individuals, a valid New Zealand passport number or drivers licence number could be considered.

**Exploring options**

*What, if any, preliminary assistance and resolution should be offered by the Commission to either party to see if the dispute can be resolved before proceeding to mediation or expert determination?*

71. I believe the Commission, as indicated in the Strawperson document, could investigate, once a notice of complaint and notice of response has been filed, if the parties have tried to resolve the dispute between themselves; and if not, give them 5 days to try and do so before the process moves into the next stage (exchange of substantive evidence supporting parties’ positions).

*Should there be a provision in policy for financial assistance to file or defend a complaint? For example, small businesses who may have lost control of their domain name ownership through the actions of a rogue employee or where there domain name has been hijacked. Should any financial assistance requests be limited by annual turnover of less than a particular dollar amount?*

72. I repeat my comments at paragraph 63 of thee submissions, and add the following comments.

73. What does the Commission propose any financial assistance for? The expert’s fee? If a possible answer is lawyers, then this would seem to contradict the Commission’s objective that lawyers not be involved and the Commission’s statement on page 29 of the paper that ‘parties do not need a lawyer or to consult a lawyer to use the service’.
Two possible options are for the Commission to provide a loan arrangement (rather than fee waiver) or a panel of consultants who can assist parties in writing their complaints or responses *pro bono* or reduced fee. Both would ensure a deserving party is not deprived of the opportunity to be heard.

*Should the Commission play a more significant role in assessing disputes to ensure they are managed correctly and to ensure the decisions are made about whether the conflict is best handled by mediation or expert determination?*

I would hope the Commission assesses disputes at present to ensure they are managed correctly – surely that is part of its present role in the whole process?

As to whether the Commissioner should make decisions about which resolution route is appropriate – mediation (or facilitation etc) vs determination – I believe the answer is no, it should not. You cannot force two parties who attend mediation to settle; you can only provide them with the opportunity to do so. If the parties don’t want to settle, then the proceeding will have to go to expert determination. If there is a choice for the parties, then it is whether they want to attend mediation or go straight to expert determination after the complainant has filed its reply.

*Should the Commission be able to offer mediation at any stage to parties in dispute over a .nz domain name including the appeals and expert decision processes?*

I see no harm in the Commissioner offering mediation at any stage except for the potential for a party to abuse the process by asking for mediation without any intention of settling, thereby delaying the resolution process and causing frustration and/or cost to the other party. If, then, the Commission is keen of offering a mediation-on-request service, I believe both parties should consent to an early (or late) mediation. Absent such consent, the process carries on. In addition, the mediation-on-request stage should be given a defined timeframe – say, 10 working days – to mitigate delay and cost consequences. My preference and recommendation, however, is to maintain the current mediation stage in the process and if the parties want to mediate outside of that stage, earlier or later, then they are free to do so.

*The Mediator*

Is there a role for informal mediation in the .nz domain name space?

Personally, I do not see a significant difference between the .za process and how mediation under the DRSP occurs now. As it is now, the ‘shuttle’ mediation process works as well as one can expect it to, acknowledging that the mediator’s task in a shuttle mediation can be made difficult by the parties not being available in one place at one time, with the mediator and the parties having to work around each other’s diaries throughout the mediation. It would be easier for all concerned if the mediator could arrange a set time/day/days for the mediation to occur as a three-way telephone conference.
Rather than a dead-stop date of 10 days, would it be appropriate to allow settlement to continue until one or more factors are met?

79. In my experience, 10 working days has been sufficient for the mediation stage except on one occasion when several more days were required as a result of lack of availability of one party during the mediation stage window. In such a case, or where there are related issues that can/need to be resolved, I suggest the parties have the option of suspending the complaint process for a fixed period (1 month) to allow negotiations to continue. If a mediator’s services are required, then the parties should pay the mediator his/her usual costs. There should be a maximum of two suspensions (so maximum period of 2 months) to focus parties’ minds. Further, suspensions should only be granted with both parties’ consent. The suspension can be brought to an end by either of the parties or by the mediator. In the event the suspension period is ended without settlement, the dispute will proceed to expert determination.

The Expert

What role should the Commission play in drafts of the expert’s decision, if any?

80. None. The Commission is an independent administrative body. Checking should be up to the appointed expert and/or the expert’s PA or junior in chambers.

Recommendation: preferred option

81. My preferred option is option 2 – enhance the existing system. The current system (option 1) has worked satisfactorily but can be improved. I don’t see that there are sufficient complaints or defects with the current resolution process to warrant either option 3 or option 4.

82. Before I detail what, in my view, would be an improvement to the current process, the following are my answers to the specific questions posed under Option 2 on pages 52-53 of the paper:

Would you expect to:

Download an all-in-one application from the Google Play store or App store, be able to submit information in hard copy, or else upload and submit your evidence electronically, online, or some combination of these things?

83. No, I wouldn’t expect to be able to download an all-in-one application. Yes, I would expect to be able to file a complaint/response/reply online and conduct the proceeding online using a case management system like the one used by IPONZ.

Call and speak to a person about the process, rely on FAQs and the web to guide you, or have a conversation with a chatbot?

84. Yes, if I had any questions I would expect to be able to call and speak to a person about the process, as you can now. Personally, I think FAQs are insufficient on their own – they cannot possibly cater for ALL enquiries, and I would rather engage with a human being that a chatbot.
Be given tools, and written instructions to handle the dispute yourself, or else make an appointment with someone to discuss a resolution?

85. Yes, I think tools and written instructions for non-lawyers to handle disputes would be beneficial to those parties who do not wish to or cannot afford lawyers’ services. I don’t know how an appointment system might work, but I am supportive of a panel of consultants that members of the public could use for guidance or editing purposes when preparing documents for the process. Whether the panel’s services are pro bono or fixed fee would need to be considered/canvased.

Submit information and evidence and wait to be contacted, or access an overseas-based organisation, or an automated application to resolve the dispute, using artificial intelligence and machine learning, for example?

86. I would expect to submit information and evidence and wait to be contacted; although I would expect to receive an automatic email notification confirming receipt of my documents. I would rather the .nz dispute resolution process not be delegated to an overseas-based organisation as we have the expertise in NZ for the process and should use it. I am not in favour of an automated application; disputes involve people and they require people to resolve them.

Have all or only .nz disputes heard in New Zealand, or be able to raise these issues in other places, at other agencies and about other domains that are not .nz domains as well?

87. As previously stated, my preference is for .nz disputes to be heard in NZ. Further, if a dispute involves a .nz domain name and, for example, a .com domain name, it would be ideal for both to be heard by the same expert. This is possible – the UDRP and the DRSP are not so different, plus we have UDRP panelists in New Zealand: Mr Andrew Brown QC and Mr Clive Elliott QC, for example, are both currently UDRP panelists (https://www.wipo.int/amc/en/domains/panel/panelists.html#134) and DRSP experts (https://dnc.org.nz/drs/experts-mediators).

My proposal

88. I attach in chart form, with notes, my proposal for an amended resolution process under option 2. The chart details the different stages and timings that I have proposed in these submissions. I believe it is self-explanatory, but I am happy to discuss it if required.

Yours sincerely
James & Wells

Ben Cain
Senior Associate
benc@jaws.co.nz
Attached is a Complaint that has been filed against you with the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center (the Center) pursuant to the Uniform Domain Name Dispute Resolution Policy (the Policy) approved by the Internet Corporation for Assigned Names and Numbers (ICANN) on October 24, 1999, the Rules for Uniform Domain Name Dispute Resolution Policy (the Rules) approved by ICANN on September 28, 2013, and in effect as of July 31, 2015, and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the Supplemental Rules) in effect as of July 31, 2015.

The Policy is incorporated by reference into your Registration Agreement with the Registrar(s) of your domain name(s), in accordance with which you are required to submit to a mandatory administrative proceeding in the event that a third party (a Complainant) submits a complaint to a dispute resolution service provider, such as the Center, concerning a domain name that you have registered. You will find the name and contact details of the Complainant, as well as the domain name(s) that is/are the subject of the Complaint in the document that accompanies this Coversheet.

Once the Center has checked the Complaint to determine that it satisfies the formal requirements of the Policy, the Rules and the Supplemental Rules, it will forward an official copy of the Complaint, including annexes, to you by email as well as sending you hardcopy Written Notice by post and/or facsimile, as the case may be. You will then have 20 calendar days from the date of Commencement within which to submit a Response to the Complaint in accordance with the Rules and Supplemental Rules to the Center and the Complainant. You may represent yourself or seek the assistance of legal counsel to represent you in the administrative proceeding.

- The Policy can be found at [https://www.icann.org/resources/pages/policy-2012-02-25-en](https://www.icann.org/resources/pages/policy-2012-02-25-en)


- The Supplemental Rules, as well as other information concerning the resolution of domain name disputes can be found at [http://www.wipo.int/amc/en/domains/supplemental/eudrp/newrules.html](http://www.wipo.int/amc/en/domains/supplemental/eudrp/newrules.html)


Alternatively, you may contact the Center to obtain any of the above documents. The Center can be contacted in Geneva, Switzerland by telephone at +41 22 338 8247, by fax at +41 22 740 3700 or by email at domain.disputes@wipo.int.

You are kindly requested to contact the Center to provide an alternate email address to which you would like (a) the Complaint, including Annexes and (b) other communications in the administrative proceeding to be sent.

A copy of this Complaint has also been sent to the Registrar(s) with which the domain name(s) that is/are the subject of the Complaint is/are registered.
By submitting this Complaint to the Center the Complainant hereby agrees to abide and be bound by the provisions of the Policy, Rules and Supplemental Rules.
COMPLAINT
(Rules, Paragraph 3(b); Supplemental Rules, Paragraphs 4(a), 12(a), Annex E)

I. Introduction

[1.] This Complaint is hereby submitted for decision in accordance with the Uniform Domain Name Dispute Resolution Policy (the Policy), approved by the Internet Corporation for Assigned Names and Numbers (ICANN) on October 24, 1999, the Rules for Uniform Domain Name Dispute Resolution Policy (the Rules), approved by ICANN on September 28, 2013, and in effect as of July 31, 2015, and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the Supplemental Rules) in effect as of July 31, 2015.

II. The Parties

A. The Complainant
(Rules, Paragraphs 3(b)(ii) and (iii))

[2.] The Complainant in this administrative proceeding is [provide full name and, if relevant, corporate or legal status.]
[3.] The Complainant’s contact details are:

Address: [Specify mailing address]
Telephone: [Specify telephone number]
Fax: [Specify fax number]
Email: [Specify email address]

[If there is more than one Complainant, provide the above information for each and arguments and evidence to support the consolidation of multiple Complainants in a single complaint in such cases, for example, where the multiple Complainants truly have a common grievance against the Respondent. Multiple Complainants may demonstrate a common grievance against the Respondent, for example, (1) where Complainants have a common legal interest in a relevant right or rights that are allegedly affected by the Respondent’s conduct, or (2) where the multiple Complainants are the target of common conduct by the Respondent which has clearly affected their individual legal interests. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“WIPO Overview 3.0”), section 4.11.]

[4.] The Complainant’s authorized representative in this administrative proceeding is:

[If relevant, identify authorized representative and provide all contact details, including postal address, telephone number, fax number, email address; if there is more than one authorized representative, provide contact details for each.]

[5.] The Complainant’s preferred method of communications directed to the Complainant in this administrative proceeding is:

Electronic-only material
Method: email
Address: [Specify one email address]
Contact: [Identify name of one contact person]

Material including hardcopy (where applicable)
Method: [Specify one: fax, post/courier]
Address: [Specify one address, if applicable]
Fax: [Specify one fax number]
Contact: [Identify name of one contact person]

B. The Respondent
(Rules, Paragraph 3(b)(v))

[6.] According to [indicate why the person/entity identified in the Complaint has been identified as the Respondent, e.g., the concerned registrar’s WhoIs database. (Information about the concerned registrar can be found on the Internic database at http://www.internic.net/whois.html)], the Respondent in this administrative proceeding is [identify Respondent (the domain name holder), (including full name, and if relevant, corporate or legal status, place of incorporation and principal place of business, or residence) see WIPO Overview 3.0, section 4.4]. Copies of the printout of the database search(es) conducted on [date] are provided as Annex [Annex number].

[7.] All information known to the Complainant regarding how to contact the Respondent is as follows:

[Provide all contact details (postal address, telephone number, fax number, email addresses) for the Respondent, including those that may have been used successfully in the course of pre-complaint dealings and those available from any WhoIs look-up service.]

[If there is more than one Respondent, provide the contact details for each Respondent and describe the relationship between them, which justifies them being named in a common complaint. See WIPO Overview 3.0, section 4.11.]

III. The Domain Name(s) and Registrar(s)
(Rules, Paragraphs 3(b)(vi), (vii))

[8.] This dispute concerns the domain name(s) identified below:

[Identify precisely the disputed domain name(s). You are also invited to indicate the date(s) of domain name registration.]

[9.] The registrar(s) with which the domain name(s) is/are registered is/are:
IV. Language of Proceedings  
(Rules, Paragraph 11)

Paragraph 11(a) of the Rules provides that, subject to the authority of the Panel, the language of the proceedings shall be the same as the language of the Registration Agreement unless the Parties have otherwise agreed to proceeding in a different language. In the absence of such agreement, a complainant may submit a complaint in a language different to the Registration Agreement where a complainant requests that the language of proceedings be the same as that of the complaint and provides brief supporting evidence, including such documentation as pre-complaint correspondence between the parties, the identity of the parties, the nationality and place of residence of the parties, and any other evidence of a respondent’s familiarity with the requested language. See WIPO Overview 3.0, section 4.5.

[10.] To the best of the Complainant’s knowledge, the language of the Registration Agreement is [specify language of Registration Agreement], a copy of which is provided as Annex [Annex number] to this Complaint. The Complaint has been submitted in [specify language of Complaint] / [pursuant to an agreement between the parties stipulating that [specify language] should be the language of the administrative proceeding, a copy of which is provided as Annex [Annex number] to this Complaint.] / [The Complainant requests that the language of proceedings be [specify language] and provides the following supporting arguments and evidence.] [Where appropriate, provide supporting arguments and evidence supporting the request that the language of the complaint be the language of proceedings, including any relevant pre-complaint correspondence between the parties, the identity of the parties, the nationality and place of residence of the parties, and any other evidence of a respondent’s familiarity with the requested language.]

V. Jurisdictional Basis for the Administrative Proceeding  
(Rules, Paragraphs 3(a), 3(b)(xiv))

[11.] This dispute is properly within the scope of the Policy and the Administrative Panel has jurisdiction to decide the dispute. The registration agreement, pursuant to which the domain name(s) that is/are the subject of this Complaint is/are registered,
incorporates the Policy. If relevant, indicate when the domain name(s) was/were registered and specify the provision of the registration agreement that makes the Policy applicable to the domain names(s). A true and correct copy of the domain name dispute policy that applies to the domain name(s) in question is provided as Annex [Annex number] to this Complaint and can be found at [insert URL].

VI. Factual and Legal Grounds
(Policy, Paragraphs 4(a), (b), (c); Rules, Paragraph 3)

[In completing this Section VI., do not exceed the 5000 word limit: Supplemental Rules, Paragraph 11(a). Relevant documentation in support of the Complaint should be submitted as Annexes, with a schedule indexing such Annexes. Such Annexes should be submitted in conformity with the Supplemental Rules, Paragraph 12(a), Annex E. Case precedents or commentaries, such as the WIPO Overview 3.0, that are referred to for support should be referred to with complete citations (where appropriate, reference may be made by inserting the relevant URL).]

[12.] This Complaint is based on the following grounds:

A. The domain name(s) is(are) identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
(Policy, Paragraph 4(a)(i); Rules, Paragraphs 3(b)(viii), (b)(ix)(1))

• [In accordance with Rules, Paragraph 3(b)(viii), specify the trademark(s) or service mark(s) on which the Complaint is based and, for each mark, describe the goods or services, if any, in connection with which the mark is used. A separate description may also be given of the goods or services with which the Complainant intends, at the time the Complaint is submitted, to use the mark in the future. If applicable, attach copies of the registration certificates for the relevant marks.]

• [In accordance with Rules, Paragraph 3(b)(ix)(1), describe the manner in which the domain name(s) is/are identical or confusingly similar to a trademark or service mark in which the Complainant has rights.]
B. **The Respondent has no rights or legitimate interests in respect of the domain name(s):**
(Policy, Paragraph 4(a)(ii); Rules, Paragraph 3(b)(ix)(2))

- [In accordance with Rules, Paragraph 3(b)(ix)(2), describe why the Respondent should be considered as having no rights or legitimate interests in respect of the domain name(s) that is/are the subject of the Complaint. Attention should be paid to any relevant aspects of the Policy, Paragraph 4(c), including:

  - Whether before any notice to the Respondent of the dispute, there is any evidence of the Respondent’s use of, or demonstrable preparations to use, the domain name(s) or a name corresponding to the domain name(s) in connection with a bona fide offering of goods or services;
  
  - Whether the Respondent (as an individual, business, or other organization) has been commonly known by the domain name, even if the Respondent has acquired no trademark or service mark rights;
  
  - Whether the Respondent is making a legitimate non-commercial or fair use of the domain name(s), without intent for commercial gain misleadingly to divert consumers or to tarnish the trademark or service mark at issue.]

C. **The domain name(s) was/were registered and is/are being used in bad faith.**
(Policy, paragraphs 4(a)(iii), 4(b); Rules, paragraph 3(b)(ix)(3))

- [In accordance with Rules, Paragraph 3(b)(ix)(3), describe why the domain name(s) should be considered as having been registered and used in bad faith by the Respondent. Attention should be paid to any relevant aspects of the Policy, Paragraph 4(b), including:

  - Circumstances indicating that the domain name(s) was/were registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name registration(s) to the owner of the trademark or service mark (normally the Complainant) or to a competitor of that Complainant, for valuable consideration in excess of the Respondent's out-of-pocket costs directly related to the domain name(s); or
  
  - Whether the domain name(s) was/were registered in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the Respondent has engaged in a pattern of such conduct; or
  
  - Whether the domain name(s) was/were registered primarily for the purpose of disrupting the business of a competitor; or]
- Whether by using the domain name(s), the Respondent intentionally attempted to attract for commercial gain, Internet users to the Respondent’s web site or other on-line location, by creating a likelihood of confusion with the Complainant’s mark as to the source, sponsorship, affiliation, or endorsement of the Respondent’s web site or location or of a product or service on the Respondent’s web site or location.

VII. Remedies Requested
(Rules, Paragraph 3(b)(x))

[13.] In accordance with Paragraph 4(i) of the Policy, for the reasons described in Section VI. above, the Complainant requests the Administrative Panel appointed in this administrative proceeding that [“<the disputed domain name(s)> be transferred to the Complainant” / “<the disputed domain name(s)> be cancelled”].

VIII. Administrative Panel
(Rules, Paragraph 3(b)(iv); Supplemental Rules, Paragraph 8(a))

[14.] The Complainant elects to have the dispute decided by a [choose one: “single-member Administrative Panel” / or “three-member Administrative Panel”].

[ ] [If a three-member Administrative Panel is designated, the names of three persons must be provided, one of whom the Center shall attempt to appoint to the Administrative Panel in accordance with Paragraph 6 of the Rules and Paragraph 8 of the Supplemental Rules. The names of the nominees may be taken from the Center’s published list of panelists at http://arbiter.wipo.int/domains/panel/panelists.html.]

IX. Mutual Jurisdiction
(Rules, Paragraph 3(b)(xiii))

[15.] In accordance with Paragraph 3(b)(xiii) of the Rules, the Complainant will submit, with respect to any challenges that may be made by the Respondent to a decision by the Administrative Panel to transfer or cancel the domain name(s) that is/are the subject of this Complaint, to the jurisdiction of the courts at [choose one of the following:]

(a) “the location of the principal office of the concerned registrar.” or
(b) “the location of the domain name holder’s address, as shown for the registration of the domain name(s) in the concerned registrar’s WhoIs database at the time of the submission of the Complaint to the Center.” or

(c) “the location of the principal office of the concerned registrar AND the domain name holder’s address, as shown for the registration of the domain name(s) in the concerned registrar’s WhoIs database at the time of the submission of the Complaint to the Center.”

[A Mutual Jurisdiction election must be made for each domain name that is the subject of the Complaint.]

X. **Other Legal Proceedings**
(Rules, Paragraph 3(b)(xi))

[16.] *If any, identify other legal proceedings that have been commenced or terminated in connection with or relating to the domain name(s) that is/are the subject of the Complaint and summarize the issues that are the subject of that/those proceeding(s).*

XI. **Communications**
(Rules Paragraph 3(b), Supplemental Rules, Paragraphs 3, 4, 12)

[17.] This Complaint has been submitted to the Center in electronic form, including annexes, in the appropriate format.

[18.] A copy of this Complaint has been transmitted to the concerned registrar(s) on *date* in electronic form in accordance with paragraph 4(c) of the Supplemental Rules.

XII. **Payment**
(Rules, Paragraph 19; Supplemental Rules Paragraph 10, Annex D)

[19.] As required by the Rules and Supplemental Rules, payment in the amount of USD *amount* has been made by *method*. (Payment by credit card should be made using the Center’s [secure online payment facility](#). For any payment-related queries or difficulties, please contact the Center Secretariat on (+41 22) 338 8247, or email the Center at [arbiter.mail@wipo.int](mailto:arbiter.mail@wipo.int).
XIII. Certification
(Rules, Paragraph 3(b)(xiii); Supplemental Rules, Paragraph 15)

[20.] The Complainant agrees that its claims and remedies concerning the registration of the domain name(s), the dispute, or the dispute’s resolution shall be solely against the domain name holder and waives all such claims and remedies against (a) the WIPO Arbitration and Mediation Center and Panelists, except in the case of deliberate wrongdoing, (b) the concerned registrar(s), (c) the registry administrator, (d) the Internet Corporation for Assigned Names and Numbers, as well as their directors, officers, employees, and agents.

[21.] The Complainant certifies that the information contained in this Complaint is to the best of the Complainant’s knowledge complete and accurate, that this Complaint is not being presented for any improper purpose, such as to harass, and that the assertions in this Complaint are warranted under the Rules and under applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument.

Respectfully submitted,

___________________
[Name/Signature]

Date: ______________
XIV. **List of Annexes**
(Rules, Paragraph 3(b)(xiv); Supplemental Rules, Paragraphs 4(a), 12(a), Annex E)

[22.] The Rules provide that a Complaint or Response, including any annexes, shall be submitted electronically. Under the Supplemental Rules, there is a file size limit of 10MB (ten megabytes) for any one attachment, with an overall limit for all submitted materials of no more than 50MB (fifty megabytes).

[23] In particular, paragraph 12 and Annex E of the Supplemental Rules provides that, other than by prior arrangement with the Center, the size of any individual file (such as a document in Word, PDF or Excel format) transmitted to the Center in connection with any UDRP proceeding shall itself be no larger than 10MB. When larger amounts of data need to be transmitted, larger files can be “split” into a number of separate files or documents each no larger than 10MB. The total size of a Complaint or response (including any annexes) filed in relation to a UDRP dispute shall not exceed 50MB, other than in exceptional circumstances (including in the case of pleadings concerning a large number of disputed domain names) where previously arranged with the Center.

Annex 1:
Annex 2:
Annex 3:
Annex 4:
Annex 5:

[Additionally, to avoid any uncertainty, it is requested that any Annexes (and their corresponding filenames) be clearly labeled and sequentially numbered (i.e. Annex 1, 2, 3 etc), and a complete list of Annexes supplied].
Before the:

WORLD INTELLECTUAL PROPERTY ORGANIZATION
ARBITRATION AND MEDIATION CENTER

[NAME AND ADDRESS OF
COMPLAINANT AS STATED IN
COMPLAINT]

(Complainant)

-v-

Case No: [Indicate assigned case number]

[NAME AND ADDRESS OF
RESPONDENT]

(Respondent)

Disputed Domain Name[s]:

[<the disputed domain name(s)>]

RESPONSE
(Rules, Paragraph 5)

I. Introduction

[1.] On [indicate date on which the Notification of Complaint and Commencement of Administrative Proceeding was received], the Respondent received a Notification of Complaint and Commencement of Administrative Proceeding from the WIPO Arbitration and Mediation Center (the Center) by email [and/or the Written Notice by courier/facsimile on (date)] informing the Respondent that an administrative proceeding had been commenced by the Complainant in accordance with the Uniform Domain Name Dispute Resolution Policy (the Policy), approved by the Internet Corporation for Assigned Names and Numbers (ICANN) on October 24, 1999, the Rules for Uniform Domain Name Dispute Resolution Policy (the Rules) approved by ICANN on September 28, 2013, and in effect as of July 31, 2015, and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the Supplemental Rules). The Center set [insert date] as the last day for the submission of a Response by the Respondent.
II. **Respondent’s Contact Details**  
(Rules, Paragraphs 5(c)(ii) and (iii))

[2.] The Respondent’s contact details are:

- **Name:** [Specify full name]
- **Address:** [Specify mailing address]
- **Telephone:** [Specify telephone number]
- **Fax:** [Specify fax number]
- **Email:** [Specify email address]

[If there is more than one Respondent, provide the above information for each.]

[3.] The Respondent’s authorized representative in this administrative proceeding is:

[If relevant, identify authorized representative and provide all contact details, including postal address, telephone number, fax number, email address; if there is more than one authorized representative, provide contact details for each.]

[4.] The Respondent’s preferred method of communications directed to the Respondent in this administrative proceeding is:

**Electronic-only material**
- **Method:** email
- **Address:** [Specify one email address]
- **Contact:** [Identify name of one contact person]

**Material including hardcopy (where applicable)**
- **Method:** [Specify one: fax, post/courier]
- **Address:** [Specify one address, if applicable]
- **Fax:** [Specify one fax number]
- **Contact:** [Identify name of one contact person]
III. **Response to Statements and Allegations Made in Complaint**
(Policy, Paragraphs 4(a), (b), (c); Rules, Paragraph 5(c)(i))

[In completing this Section III., do not exceed the 5000 word limit: Supplemental Rules, Paragraph 11(b). Relevant documentation in support of the Response should be submitted as Annexes, with a schedule indexing such documents. Copies of case precedents or commentaries, such as WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“WIPO Overview 3.0”), that are referred to for support should be referred to with complete citations (where appropriate, reference may be made by inserting the relevant URL)]

[5.] The Respondent hereby responds to the statements and allegations in the Complaint and respectfully requests the Administrative Panel to deny the remedies requested by the Complainant.

[The Rules, Paragraph 5(c)(i) instruct the Respondent in its Response to “Respond specifically to the statements and allegations contained in the complaint and include any and all bases for the Respondent (domain name holder) to retain registration and use of the disputed domain name...”. For a complainant to succeed, it must establish that each of the three conditions under the Policy, Paragraph 4(a)(i), (ii), (iii) are satisfied. With reference to that Paragraph 4(a), in this section the Respondent may wish to discuss some or all of the following, to the extent relevant and supported by evidence:]

A. **Whether the domain name[s] is/are identical or confusingly similar to a trademark or service mark in which the Complainant has rights:**
(Policy, Paragraph 4(a)(i))

[In this connection, consideration may, for example, be given to the following:]

- [Any challenges to the trade or service mark rights asserted by the Complainant.]

- [A refutation of the arguments made by the Complainant concerning the manner in which the domain name(s) (is/are) allegedly identical or
confusingly similar to a trademark or service mark in which the Complainant claims it has rights.]

B. Whether the Respondent has rights or legitimate interests in respect of the domain name/s;

(Policy, Paragraph 4(a)(ii))

[In this connection, consideration may, for example, be given to the following:]

- [A refutation of the arguments made by the Complainant as to why the Respondent should be considered as having no rights or legitimate interests in respect of the domain name(s) that (is/are) the subject of the Complaint. Evidence should be submitted in support of any claims made by the Respondent concerning its alleged rights or legitimate interests in the domain name(s).]

- [The Policy, Paragraph 4(c) sets out examples of circumstances demonstrating the Respondent’s rights to or legitimate interests in the domain name(s) for the purposes of the Policy, Paragraph 4(a)(ii). With reference to that Paragraph 4(c), to the extent argued by the Complainant, the Respondent should discuss and show that:

  - before the Respondent received any notice of the dispute, there is evidence of the Respondent’s use of, or demonstrable preparations to use, the domain name(s) or a name corresponding to the domain name(s) in connection with a bona fide offering of goods or services;

  - the Respondent (as an individual, business, or other organization) has been or is commonly known by the domain name(s) in issue, even if the Respondent has acquired no trademark or service mark rights;

  - the Respondent is making a legitimate non-commercial or fair use of the domain name(s), without intent for commercial gain misleadingly to divert consumers or to tarnish the trademark(s) or service mark(s) at issue.]

C. Whether the domain name/s has/have been registered and is/are being used in bad faith.

(Policy, Paragraph 4(a)(iii))

[In this connection, consideration may, for example, be given to the following:]
• [A refutation of the arguments made by the Complainant as to why the domain name(s) should be considered as registered and used in bad faith.]

• [The Policy, Paragraph 4(b) identifies several examples of circumstances that an Administrative Panel could consider as constituting bad faith. With reference to that Paragraph 4(b), to the extent argued by the Complainant, the Respondent should discuss and show that:

- the domain name(s) (was/were) not registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name registration(s) to the Complainant, as the alleged owner of the trademark or service mark, or to a competitor of the Complainant, for valuable consideration in excess of the Respondent’s out-of-pocket costs directly related to the domain name(s);

- the domain name(s) (was/were) not registered in order to prevent the Complainant from reflecting the mark in a corresponding domain name and, in connection therewith, the Respondent has not engaged in a pattern of such conduct;

- the Complainant and the Respondent are not competitors and/or the domain name(s) (was/were) not registered by the Respondent primarily to disrupt the Complainant’s business;

- the domain name(s) (was/were) not registered by the Respondent in an intentional attempt to attract for commercial gain, Internet users to the Respondent’s web site or other on-line location, by creating a likelihood of confusion with the Complainant’s mark as to the source, sponsorship, affiliation, or endorsement of the Respondent’s web site or location or of a product or service on the Respondent’s web site or location.]

If appropriate and the allegation can be substantiated with evidence, the Rules provide that a Respondent may ask the Panel to make a finding of reverse domain name hijacking. (Rules, Paragraph 15(e))]

IV. Consent to Remedy (Optional)

[The Respondent may – in connection with an agreement between the Parties, or in its own discretion – include the below paragraph (no. 6). If included, this informs the Complainant, the WIPO Center, the Registrar(s), and the Administrative Panel (if subsequently appointed) that the Respondent consents to the remedy requested by the Complainant. Please note that any agreement between the Parties to transfer or cancel the disputed domain name prior to appointment of an Administrative Panel would require the Parties to complete and submit a Standard Settlement Form (this Form can be found on the WIPO Center’s website at [link].]
[6.] [The Respondent consents to the remedy requested by the Complainant and agrees to [transfer the disputed domain name(s) to the Complainant] / [cancel the disputed domain name(s)].]

V. Administrative Panel
(Rules, Paragraphs 5(c)(iv) and (c)(v) and Paragraph 6; Supplemental Rules, Paragraph 7)

[7.] The Respondent elects to have the dispute decided by a [state “single-member Administrative Panel” if the Complainant has asked for a single-member Administrative Panel and the Respondent agrees with that election. If the Respondent does not agree and wants a three-member Administrative Panel instead, state “three-member Administrative Panel”. Note that in the latter case the Respondent must pay half of the Center’s fee for a three-member Administrative Panel, as set out in Supplemental Rules, Annex D. If the Complainant has indicated it wants a three-member Administrative Panel, then the Respondent does not have the option of choosing a single-member Administrative Panel].

[If the Respondent designates a three-member Administrative Panel, or if the Complainant has designated a three-member Panel, the Respondent must provide the names of three persons, one of whom the Center will endeavor to appoint to the Administrative Panel in accordance with Paragraph 6 of the Rules and Paragraph 8 of the Supplemental Rules. The names of these three nominees may be taken from the Center’s published list of panelists at http://arbiter.wipo.int/domains/panel/panelists.html, or that of any other ICANN-accredited dispute resolution service provider.]

VI. Other Legal Proceedings
(Rules, Paragraph 5(c)(vi))

[8.] [If any, identify other legal proceedings that have been commenced or terminated in connection with or relating to the domain name(s) that (is/are) the subject of the Complaint and summarize the issues that are the subject of (that/those) proceeding(s).]
VII. Communications
(Rules, paras. 2(b), 5(c)(vii); Supplemental Rules, Paragraphs 3, 7, 12)

[9.] A copy of this Response has been transmitted to the Complainant on [date] in electronic form.

[10.] This Response is submitted to the Center in electronic form, including any annexes, in the appropriate format.

VIII. Payment
(Rules, Paragraph 5(d); Supplemental Rules, Annex D)

[11.] [If relevant, state: “In view of the Complainant’s designation of a single-member Panel and the Respondent’s designation of a three-member Panel, the Respondent hereby submits payment in the amount of USD (amount) by (method)”] (Payment by credit card should be made using the Center’s secure online payment facility. For any payment-related queries or difficulties, please contact the Center Secretariat on (+41 22) 338 8247, or email the Center at arbiter.mail@wipo.int.)

IX. Certification
(Rules, Paragraph 5(c)(viii), Supplemental Rules, Paragraph 15)

[12.] The Respondent agrees that, except in respect of deliberate wrongdoing, an Administrative Panel, the World Intellectual Property Organization and the Center shall not be liable to a party, a concerned registrar or ICANN for any act or omission in connection with the administrative proceeding.

[13.] The Respondent certifies that the information contained in this Response is to the best of the Respondent’s knowledge complete and accurate, that this Response is not being presented for any improper purpose, such as to harass, and that the assertions in this Response are warranted under the Rules and under applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument.

Respectfully submitted,
X. **List of Annexes**

[(Rules, Paragraph 5(c), Supplemental Rules, Paragraph 12, Annex E)]

[14.] The Rules provide that a Complaint or Response, including any annexes, shall be submitted electronically. Under the Supplemental Rules, there is a file size limit of 10MB (ten megabytes) for any one attachment, with an overall limit for all submitted materials of no more than 50MB (fifty megabytes).

[15.] In particular, Paragraph 12 and Annex E of the Supplemental Rules provides that, other than by prior arrangement with the Center, the size of any individual file (such as a document in Word, PDF or Excel format) transmitted to the Center in connection with any UDRP proceeding shall itself be no larger than 10MB. When larger amounts of data need to be transmitted, larger files can be “split” into a number of separate files or documents each no larger than 10MB. The total size of a Complaint or Response (including any annexes) filed in relation to a UDRP dispute shall not exceed 50MB, other than in exceptional circumstances (including in the case of pleadings concerning a large number of disputed domain names) where previously arranged with the Center.

Annex 1:

Annex 2:

Annex 3:

Annex 4:

Annex 5:

[Additionally, to avoid any uncertainty, it is requested that any Annexes (and their corresponding filenames) be clearly labeled and sequentially numbered (i.e. Annex 1, 2, 3 etc), and a complete list of Annexes supplied].
Amended Domain Name Dispute Resolution Process Proposal
Prepared by B. Cain, September 2019

**Notice of Complaint**

- **Notice of Response (10 working days)**
  - Have the parties made any effort to resolve the dispute?
    - **Yes** - but unsuccessful - proceed to evidence exchange
    - **No** - parties have 5 working days to negotiate resolution and report to DRS

**Evidence exchange**

- Complainant’s evidence (15 working days)
- Respondent’s evidence (15 working days)
- Complainant’s reply (5 working days)

- Respondent’s reply (in exceptional circumstances only and with leave of an expert)
  - apply: 5 working days
  - decision: 5 working days
  - submit 5 working days

**Mediation (if requested by consent) (10 working days)**
- (extendable by up to 2 months on request and by consent of parties)

- FULL expert determination (20 working days from date of appointment)

- **SUMMARY expert determination (10 working days from date of appointment)**

**Notes:**

1. The whole process is conducted online using a case management system.
2. The complainant and respondent can use brief ‘tick box’ template documents for the Notice of Complaint and Notice of Response (similar to those used by IP Australia for lodging trade mark proceedings before the Delegate; for example, Notice of Intention to Oppose a trade mark application).
3. Reason for Notice of Complaint and Notice of Defence documents is to avoid significant upfront cost in preparing evidence if there is a chance the dispute can settle early.
4. The complainant and respondent will have ‘model’ complaint and response documents available to them, based on the ‘model’ complaint and response documents issued by WIPO for complaints under the UDRP.
5. Timings for evidential stages and DRS notification/appointment procedures unchanged from current DRSP.
6. Timings for Expert’s decision has been stipulated.