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Conference

**On-line Dispute Resolution: Challenges and
Opportunities for Lawyers**

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Mr. Chairman, ladies and gentlemen, thank you for inviting me to speak with you at this very interesting conference. I would like to thank David for his kind introduction. It is truly a pleasure to tell you about ICANN, my Office, and Online Dispute Resolution, and to be able to do so in my own community.

I have a confession. I am not a lawyer. I am an ODR practitioner, a sometime academic, and a well-positioned observer of developments in the use of information communications technology across the globe. My comments today come from those perspectives and not as an attorney.

I'd like to spend a couple of minutes giving you background on the Internet Corporation for Assigned Names and Numbers, and my role as Ombudsman.

ICANN defines itself as, "a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission through bottom-up, consensus-based processes. ICANN, a public benefit, non-profit entity, is the international organization responsible for the management and oversight of the coordination of the Internets domain name system and its unique identifiers."

ICANN administers the Domain Name System or DNS for the global internet. In lay terms, these are the unique identifiers that allow computers to reach each other over the internet. ICANN is responsible for the organization of the top level domains, and you can see examples of these of the slide. There are three basic types of top level domains: generic TLDs such as .net and .com, sponsored TLDs such as .travel, and country code TLDs such as .ca. Any new top level domains only come into being after technical and policy development processes which lead to a vote by our Board. ICANN is on the verge of opening a new TLD round, which will determine if new TLDs will be added to the root.

ICANN is actually a small organization. It is a not-for-profit registered in the State of California. Its revenues come chiefly from a user fee attached to the registration of top level domain names, and by voluntary contributions from country code administrators.

There are about 100 staff and a team of contractors in our head office in Marina del Rey and on 6 continents. The staff is multinational and multilingual, representing at least 20 nations, and 29 languages.

My Office came into being as the last step in a reform movement. ICANN is stakeholder-driven, and as the organization matured, the community expressed its desire to be able to resolve disputes at an informal level. Apart from my Office, ICANN also has two formal dispute resolution schemes; a Board Reconsideration Committee, and an Independent Review Policy, which allows an independent arbitrator to examine areas of dispute.

Mine is an Executive Ombudsman's Office, in that I am appointed by the Board of Directors under authority of the Bylaws. I investigate complaints about the organization from its community, and I use a number of Alternative Dispute Resolution tools such as mediation, good offices, early neutral evaluation, and shuttle diplomacy to resolve complaints. My jurisdiction relates to matters of fairness concerning actions, decisions, or inactions by the Board, the staff, or the supporting organizations. In cases where I am unable to resolve the matter, I may make a report to the Board, and may make recommendations on reasonable and equitable solutions to the dispute.

ICANN's mandate is to provide a stable, secure, and universal internet. My Office is part of that goal. I make sure community members receive fair and equitable treatment from the organization. This helps to raise service standards, and this, I believe, also raises the community expectation of administrative standards and organizational performance. My Office also helps to promote the dialogue between the community and the organization, especially when those conversations hit difficult topics.

In my role as the Ombudsman I participate in a number of fora which offer perspectives on Online Dispute Resolution. I am a Fellow at the National Centre for Technology and Dispute Resolution at the University of Massachusetts, and a member of a number of Ombudsman associations.

ODR has two key characteristics. First, ODR may be a technology based platform, where the technology itself takes an active part in the dispute resolution process. This would include an example such as SmartSettle. SmartSettle, developed in Abbotsford by Dr. Ernie Thiessen, is a platform which allows for multivariate blind bidding processes which optimize outcomes, and reduce antagonism. SmartSettle may be used in many applications, from insurance settlements, to the division of marital property.

SmartSettle, and its cousin platforms, represent the cutting edge in ODR. Their impact on dispute resolution and on the efficiency of two or multi-party disputes is likely to be large, and pervasive.

The second characteristic of ODR is that it may use ICT to augment processes which could be done in more traditional fashions. I'll use my office as an example. Although I use a very high-end case management system, a person must actually conduct the file triaging, investigations, and reporting. However, as I serve a community that is literally any person on the face of the globe connected to the internet, it is impractical for me to handle complaints in any other fashion. One of the great benefits of ODR is that it may be conducted in either a synchronous or an asynchronous manner. To make that clearer – it can be handled in real time, or via correspondence like email. I may be in live time conversation with a party to a complaint, or they may live on the other side of the world, and one of the parties is always offline. As technology improves this

asynchronous ability means more than the simple shift of documents or emails; but may also include, for example, the use of webcams and video conferencing, where the video forms part of the record of resolution process. Over 99% of the work that I do as the Ombudsman is completed online.

There are a number of factors driving the adoption of Online Dispute Resolution systems. Access to Justice is important. You will recognize that there are increasing numbers of people in disputes who either lack the resources to engage a lawyer, who do not meet the means test for legal aid, or whose issue is outside of the legal aid remit, or those who simply chose to act without representation. Recently the Supreme Court of Canada published an unrepresented litigant's guide, due to the growth in cases heard by the Court where citizens appear without counsel.

ODR is a vehicle to allow the parties to a dispute to resolve the matter. It allows the private ordering of affairs, regardless of locale, jurisdiction, or legislative paradigm. This ability to seek resolution, redress, and potentially justice from the comfort of their own living room, with little or marginal expense is attractive to many. This is not to say that ODR is a replacement for bricks and mortar court rooms. In fact, ODR may be particularly well suited to a number of areas. It has its greatest potentials in e-commerce, small claims, and interpersonal disputes.

Here are some examples of systems that allow the private ordering of affairs: I had previously mentioned SmartSettle. It is a platform which allows parties to obtain optimum results for a range of disputes, from insurance claims to child custody.

There are a number of platforms which assist participants in dealing with family law issues.

MeDispute is system tested in the United Kingdom in 2006, and the reports to date have been very positive.

eCommerce is the genesis of much of the work that has taken place in the development of Online Dispute Resolution. Business to Business, and Business to Consumer systems have developed. A very good example of this is eBay. The eBay team has developed a platform which allows buyers and sellers in the electronic marketplace a method of resolving disputes. Figures provided by eBay indicate that small claims litigation is less than one in a million outcome. Commerce has drawn the attention of international organizations, such as the United Nations, and the Organization for Economic Co-operation and Development. In July of this year the OECD produced a set of consensus recommendations on Consumer Dispute Resolution and Redress. These recommendations state that processes should enable consumers to conduct the redress procedure without the need for legal representation or assistance, as far

as possible. The OCED also recommends the greater use of technology to resolve disputes.

The United Nations, through a number of its bodies including the World Intellectual Property Organization, the United Nations Commission on International Trade Law, and United Nations Social and Economic Commission for the Asia Pacific, has shown great interest in Online Dispute Resolution. In fact, in June 2008 I will have the pleasure of hosting the 7th International Forum on Online Dispute Resolution in collaboration with the United Nations Social and Economic Commission for the Asia Pacific at Royal Roads University in Victoria. This UN-related conference brings together the world's leading ODR academics, practitioners, and system developers for two days of meetings and discussions. If you are interested in ODR you may wish to attend.

Online Dispute Resolution Technology is advancing quickly. As it move ahead, more adjuncts are added to the technology. The National Mediation Board has included synchronous and asynchronous videoconferencing, second track brain storming, and an online database to increase the research capacity of the participants.

One of the first and most often accessed ODR systems is the Uniform Domain Name Resolution Policy or UDRP. The UDRP is a policy that has been instituted by ICANN to deal with disputes over the rightful ownership of domain names, or cybersquatting. My organization has developed a set of rules that describe when a domain is dispute or being cybersquatted. ICANN works with three international arbitration providers, the National Arbitration Forum from the United States, the World Intellectual Property Organization from Geneva, and the Hong Kong International Arbitration Centre. In a UDRP process a trademark owner who wished to register a domain name may be located in Vancouver, the cybersquatter in China, and the arbitrator in Europe. This process has worked for thousands of cases across the globe; privately, trans-nationally, and outside of the courts.

Online Dispute Resolution is undergoing accelerated growth. As of March 2006 there were almost 150 active ODR schemes at work, and I estimate that number is likely double that at this point. There are challenges to the capacity of ODR to grow. For example, consumers have to become more aware, and more trusting of ODR, and practitioners and providers need to grow together as a community, establish standards, certifications, and frameworks.

Of course, one of the key challenges to ODR remains the enforceability of agreements. In some cases this is less of an issue. For example, in the UDRP, the arbitrator makes an order which is transmitted to the registrar, and the domain transfer is automatic.

In a green environment, Online Dispute Resolution reduces the amount of paper used. In the future small claims discoveries may be conducted by the filing of documents online, or parties examined through chat rooms.

Governments and legal systems are beginning to adopt ODR. Since 2000 Singapore's Small Claims court system has had an ODR component for mediation and arbitration. Small Claims appears to be an ideal venue, especially in uncomplicated matters, for ODR to thrive. Australia and other states have also provided for ODR in court sanctioned arbitration.

So, the question then becomes, what challenges does Online Dispute Resolution bring to your profession? I believe the challenge is that lawyers may view ODR as something outside of their practice, as opposed to engaging the technology or the opportunity. The second challenge would occur when the technology is engaged, but the practitioners don't keep up with the changing environment. For example, using ODR systems for domain name disputes, but not recognizing its applicability in other areas such as marital property settlements. Overall, the risk is simply being left behind.

I would like to recognize my colleagues Dr. Melissa Conley Tyler and Mr. Colin Rule for the use of materials from their own researches in the preparation of this lecture.

With that Mr. Chairman, I will conclude my remarks, and I will be pleased to take any questions, should there be any. Thank you for inviting me.