

Summary and Analysis of Public Comments for ACDR Proposal to be Recognized as an Official Dispute Resolution Provider Under the UDRP

Comment period: 28 September 2010 – 28 October 2010

Background

The Arab Center for Domain Name Dispute Resolution (ACDR) submitted a proposal to ICANN to be recognized as an official dispute resolution provider under the UDRP. The proposal was submitted pursuant to the process specified at <http://www.icann.org/en/dndr/udrp/provider-approval-process.htm>.

At its 5 August 2010 meeting, the Board approved staff's recommendation to publish the ACDR proposal for a public comment for a period of not less than 30 days.

Comments received

A total of seven comments were received.

Summary of relevant comments

George Kirikos of Leap Financial Services Inc. commented that ICANN should not approve another UDRP provider and should instead prioritize bringing existing UDRP providers under contract. <http://forum.icann.org/lists/acdr-proposal/msg00000.html>

Barbara Madonik of Unicom Communication Consultants Inc. commented that while she applauds the attempt to establish an international center, the locale of the ACDR "might not be ideal" and ICANN should seek a more neutral location to serve both Arab and non-Arab countries. <http://forum.icann.org/lists/acdr-proposal/msg00001.html>

Moe Alramahi expressed support for the ACDR's proposal, noting that it is "reasonable, comprehensive and robust." Mr. Alramahi also noted that recent developments in the domain name system, such as the introduction of IDNs and gTLDs will lead to increased disputes, and local knowledge and expertise will expedite the handling of those disputes. <http://forum.icann.org/lists/acdr-proposal/msg00002.html>

A commenter identified as Volodya submitted comments covering positive and negative aspects of the ACDR proposal. Among the positives are the location of the Center, which will provide a "more balanced process"; the provision of multilingual services, and the multinational composition of the initial panel. Among the negatives are the apparent view of the ACDR to enforce the "strong protection of Intellectual Property Rights," which raises questions of the ACDR's commitment to

neutrality. Further, the Advisory Board's selection is based upon experience in "intellectual property protection" – again demonstrating a bias. Though the panel selection procedures allow for persons to be chosen that "do[] not openly show support for Intellectual Property," the remainder of the document "suggests . . . a deliberate attempt to derail the neutral process of domain name resolution." Volodya notes that this could result in biased panels, and would not represent the "complexity of the IP debate." <http://forum.icann.org/lists/acdr-proposal/msg00003.html>

Steve DelBianco on behalf of the ICANN Business Constituency (BC) submitted the BC's comment that it cannot support the approval of ACDR's proposal nor any other proposal until "ICANN implements a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities." The BC noted that gTLD names can only be registered through accredited registrars under contract with ICANN, but non-contracted UDRP providers have the power to order the involuntary deletion or transfer of those same names. The BC raised a concern of the consistency of the UDRP process among providers, and noted that these concerns grow if additional providers are approved without first creating a uniform framework. Therefore, the BC "advocates" that ICANN should first standardize a framework for UDRP providers – allowing for regular ICANN review and ultimate loss of approval where appropriate – prior to approving any new providers. The creation of a uniform framework – including constraints on provider authority – is increasingly important with the anticipated expansion of gTLDs and jurisdictions where disputes are likely to arise. This will further the goal of consistency among decisions and will allow the UDRP to remain "an expedited and lower cost remediation" to address cybersquatting. The BC notes that the standardization of provider practices does not require a full review of the substantive elements of the UDRP. <http://forum.icann.org/lists/acdr-proposal/msg00004.html>

J. Scott Evans on behalf of the Intellectual Property Constituency (IPC) submitted conditional approval of the ACDR proposal, noting the geographic and cultural diversity the ACDR would bring to the UDRP process at a time where Arabic expertise is needed. The IPC provides substantive comment on portions of the ACDR's proposal, suggesting that a proposal adopting all of the IPC's modifications would be appropriate for approval, but if the ACDR elects not to incorporate all revisions, the proposal should be presented for further public comment. The IPC also cautioned that "any enthusiasm for the ACDR's proposal must be tempered by the desire to ensure a predictable and equitable system of domain name dispute resolution – as opposed to any profit-driven 'race to the bottom' between UDRP providers." The IPC's substantive comments on the proposal identified issues such as potential inconsistencies with the UDRP and its Rules on electronic filings, commencement dates, and definition of "writings." The IPC also recommends changes to the fee structure proposed, with an eye to minimizing fees to complainants. Additional recommendations include: inclusion of statements on the commitment to impartiality and fairness; additional information on the start-up

period and background and track record for handling ADR proceedings; and clarification of the role of a presiding panelist. <http://forum.icann.org/lists/acdr-proposal/msg00006.html>

Philip Corwin on behalf of the Internet Commerce Association (ICA) submitted its opposition to the ACDR proposal. As with the BC comments, the ICA notes that it “strongly opposes” the approval of any new UDRP dispute resolution provider until ICANN forms a uniform, enforceable agreement with all UDRP providers, to assure due process to all parties to a UDRP actions, and to prevent forum shopping among UDRP providers. The ICA provides substantial discussion of the need for enforceable agreements with UDRP providers, echoing many comments made by the BC regarding the contractual regime in place for the registration of domain names within gTLDs and the lack of contracts with the entities that may force involuntary deletions or transfers of those names. The ICA emphasizes the need for uniformity of process that can be achieved through enforceable agreements. The ICA comments refer to prior ICA communications on this same topic, including comments relating to a proposal of another UDRP provider to allow for reduced fees for UDRP proceedings where no response is filed. The ICA provides a suggested list of topics that such an agreement should encompass. The ICA then identified deficiencies to be addressed in ACDR’s proposal. These deficiencies include: a lack of “meaningful” information on the types of arbitration handled by the ACDR’s component entities and their “track records”; more fulsome documentation of the preparation of panel training materials; no representations of monthly case handling capabilities; the “meaningless” assertion of being able to handle 5,000 proceedings in a start-up period, particularly when compared to the numbers of cases handled by existing UDRP providers; a lack of description of communications with other UDRP providers, and a commitment to researching decisions of other providers so as to assure consistency.

ICA notes its opinion that if ACDR is approved as a provider, a strict limitation on the number of cases it may handle, subject to an ICANN quality review before the limitation can be lifted. Finally, ICA comments on the confidentiality of ACDR’s internal operating procedures and that the community will not be able to review those for fairness. <http://forum.icann.org/lists/acdr-proposal/msg00005.html>

Analysis and Next Steps

The commenters were of varied opinions on the ACDR’s proposal: Three commenters (George Kirikos, the BC and the ICA) were expressly against the ACDR proposal. The IPC noted its conditional approval subject to incorporation of suggested changes, and only one commenter (Alramahi) submitted unqualified support for the ACDR proposal.

Some commenters identified the fact that the ACDR would bring greater cultural and geographic diversity to the UDRP providers, as well as expand multi-lingual abilities of UDRP providers. Though one commenter questioned whether Jordan is a neutral

enough locale for a UDRP provider, if the ACDR were to be approved as a provider, such approval would not limit the ability for others in the region to seek to become an approved provider as well.

The three commenters opposed to the approval of the ACDR proposal noted their opinion that ICANN should not approve *any* additional UDRP providers prior to establishing a uniform, enforceable arrangement with all existing UDRP providers. The ICA also recommended that ICANN undertake an expert third party review of the operation of UDRP generally.

One commenter, Volodya, raised the question of the neutrality of the panelists to be appointed by the center, based upon the statement in the ACDR's proposal that it will enforce the "strong protection of Intellectual Property Rights." No other commenters raised this neutrality argument. The IPC and the ICA each provided substantial comments on the substance of the ACDR proposal. The IPC noted that if all of its suggestions were addressed, then it may be appropriate for ICANN to approve the ACDR's application; otherwise the proposal should be posted for additional public comment. The ICA, after attempting to evaluate the proposal against the published criteria for applying to be a UDRP provider, suggested that there is no way for ICANN to proceed to approval of the ACDR's proposal.

Some areas identified by the IPC and ICA include:

- (i) Provision of more detail on track record in handling alternative dispute resolution proceedings;
- (ii) A more precise statement regarding the case load administrative capacity that the ACDR anticipates handling;
- (iii) Better documentation regarding the creation of training materials;
- (iv) Revision of specific terms in the supplemental rules to better align with the UDRP process;
- (v) Revision to the ACDR's fee structure; and
- (vi) Release of confidential internal operating procedures.

ICANN is providing the ACDR with a copy of this summary and analysis so that the ACDR may determine how to respond and whether it wishes to revise any portion of its proposal. When a revised proposal is received, the proposal will be reviewed to determine if further public comment is advisable prior to presentation to the Board for consideration. Further comment may not be necessary, for example, if the ACDR elects to not alter its fee schedule, as the UDRP allows providers to set their own fees.

Separate from the ACDR proposal, ICANN has been undertaking a process to review its relationships with UDRP providers, and that review is ongoing.

Contributors (chronological order of posting):

George Kirikos, President, Leap of Faith Financial Services Inc.

Barbara Madonik, President, Unicom Communication Consultants Inc.

Moe Alramahi, Law Lecturer/ Domain Name Panelist (ADNDRC)

Volodya

Steve DelBianco, Business Constituency

J. Scott Evans, Intellectual Property Constituency

Philip Corwin, Internet Commerce Association