



Minutes: BC Members Discussion on ACDR

March 28th, 2013

9 am EST (1 pm UTC)

Attendees:

Elisa Cooper

Steve DelBianco

Chris Chaplow

Marilyn Cade

Mahmoud Lattouf

Charles Shaban

Philip Corwin

Nat Cohen

Ayesha Hassan

Celia Lerman

Mallory Hein

Benedetta Rossi, BC Secretariat

Apologies:

Jimson Olufuye

Gabriela Szlak

1. Introduction – Steve DelBianco, Vice Chair – Policy Coordination

Steve introduced the purpose of the call, pursuant to the BC Charter, to discuss a draft comment since more than 10% of BC members raised concerns about a specific comment.

Structure of the call divided into 3 questions:

- a. The BC has an existing position saying that ICANN ought to develop standards for the administration of UDRP, drafted in 2010. Does the BC continue to believe that ICANN ought to do standards for administering UDRP? And if we reaffirm that position, we might embellish it by suggesting how ICANN should develop standards.
- b. Should the BC continue to maintain the position taken in 2010 that states that ICANN shouldn't approve any new UDRP providers until it develops the standard?
- c. Does the BC want to comment on the merits of ACDR's proposal?
 - o BC Members to discuss with a chance for members from ACDR to respond to see whether the BC wants to take a position about ACDR's proposal and if so, what should it be.

2. Should the BC continue to call for both standards for administration as well as approval?

- Phil Corwin, BC Rapporteur, put the BC position into the draft. On page 4 of the draft he summarized the BC's position from 2010, being that the BC strongly advocates that ICANN must

first implement a standard mechanism with any and all UDRP providers that defines its constraints or authority and powers and establishes regular standardized review by ICANN a flexible and effective means of enforcement. The notion that ICANN ought to develop a standard was, as stated by Phil, ignored by ICANN.

- Steve proposes that in this position the BC could call for the establishment of administrative standards.
- Marilyn Cade sent a note to Phil earlier this week, asking to include in the BC's position that the BC advocates that ICANN establish a process involving all existing providers and representatives from the users of UDRP, drawing from the Constituencies and ALAC and other parties to undertake development of a uniform set of standards for the approval of UDRP providers.
- Steve DelBianco: Language from Marilyn, which said the BC also proposes that the Board direct staff to undertake a process supported by members of the community to establish uniform rules and procedures to delineate and enforce the arbitration provider responsibilities.
- To set up standards for approval and administrative standards for the UDRP the BC needs to decide whether they prefer this to be:
 - i. A cross community process to develop approval standards and the other is
 - ii. An ICANN staff process to establish uniform rules.
- Charles Shaban: Stated that ACDR supports the BC position for the need of standards for the UDRP, and they are ready to help establish them if needed. If ICANN establish them, they will sign them.

ACTION ITEM: Steve DelBianco notes that Charles Shaban supports the establishment of standards, and that he would vote to change the BC's position to state that new standards would have to be in place before we approve new vendors.

- Marilyn Cade: Stated that the BC should call for the development of standards, but that the BC should not advance that position on any present applicants. Marilyn proposed that the BC focuses on standards for the new UDRP providers and asks the new UDRP providers to work with the BC to advance the standards. If the BC could propose the new standard language and we got an agreement from the present providers or most of the present providers to adopt this, that would advance the BC's concerns.
- Elisa Cooper: Stated her support of having standards for the providers. Elisa thinks it's an important issue for business especially as the new gTLD landscape drastically changes and UDRP may become even more important.

ACTION ITEM: Rapporteur, Phil Corwin, or other members to submit an edited position incorporating both processes: the call for administrative standards and standards for approval.

3. Should the BC change their 2010 position?

Steve DelBianco:

- Our 2010 position was that the BC could not support approval of any UDRP accreditation application on the grounds that no provider should be accredited until ICANN implements a standard mechanism for uniform rules and procedures. So the BC's position was to not approve anyone until the standards are done.

- Proposes that given the need for providers that can handle other scripts and languages like Arabic, and the proliferation of new TLDs, and the global government concerns that Marilyn mentioned, the BC could amend that position suggesting that we approve new providers while in parallel developing the standards for approval as well as the uniform rules of administration, which would retroactively apply to all providers.

Steve opened the queue for BC members to comment on his proposal to change the BC's position from 2010.

Comments:

- Mahmoud Lattouf: stated ACDR's support for this suggestion moving towards a uniform standard to be implemented for all the dispute position providers. ACDR also agrees with Steve's suggestion that the BC should move forward and approve for ICANN to accredit new dispute position providers, without therefore delaying the process of accrediting more new dispute position providers.
- Phil Corwin: In the BC's comments, everything that should be present in a standard does not need to be included. Some examples should be given, for instance: WIPO guidance is an example of a database indicating precedence on questions that have arisen in UDRP.
- Nat Cohen: Votes no to the BC changing its position because he sees it as a loss of leverage and he suggests there's a lack of need.
- Elisa Cooper: Votes no to changing the BC's position, supporting Nat Cohen's concerns.
- Chris Chaplow: Votes yes.

ACTION ITEM: Steve DelBianco will put this question to vote for the full BC membership. On the call, which lacks consensus to change the position, the idea of changing the BC's position was voted.

4. Should the BC comment specifically on ACDR and if so, how do we address that?

Steve DelBianco: Asked ACDR if they want the BC to comment specifically their application.

Charles Shaban: Responds that ACDR is in favour of the BC commenting specifically on their application.

5. Question & Answer session with ACDR representatives based on questions submitted by Nat Cohen:

Q1: What training does the ACDR provide those panelists who currently have no UDRP experience?

- Charles Shaban: around 70% of the panelists already have training and they are working with the panelist with WIPO or other current panelists.

Q2: What is the ACDR doing to harmonize the views of your panelists with the consensus views of other UDRP providers?

- Charles Shaban: ACDR will have policies before they start operation. They will work on learning from all experiences and will harmonize between all the panelists, to ensure that they are all using the same procedures.

Q3: What oversight will you exercise over your panelists? What if you find that one of your panelists is deviating from the UDRP guidelines in making his/her decisions? Do you have a procedure for de-accrediting panelists?

- Charles Shaban: This is point four of the proposal which is administrative. ACDR thinks that they should follow everything from the beginning, which is mentioned in their proposal and supplement.

Q4: How will you ensure uniformity in application of the UDRP if you find that your panelists consistently interpret the UDRP differently than panelists from other UDRP providers?

- Charles Shaban: This is also part of the proposal and covered in previous question.

Q5: How do you ensure that pro-Complainant bias is not present when you accredit panelists who also serve as active TM attorneys?

- Mahmoud Lattouf: In addition to the agreement with the panelists from the beginning, ACDR asked them to sign a declaration of independence for each case. This is especially to touch on that point, in which they want to be sure that they don't have an issue with that case, or bias. So before starting on a case, if the trademark is for instance linked to one of their clients, they should inform ACDR and they will choose another candidate.

Q6: Are you making a concerted effort to recruit panelists from academia and from retired judges, who would not be as likely to have as strong a pro-complainant bias as active TM attorneys?

- ACDR: ACDR did not target TM attorneys in specific, some of the current panelists are academics.

ACTION ITEM: ACDR to submit a categorized list for their 17 applicants for the full BC membership. It would be helpful to understand the category for each panelist, and whether ACDR intends to create balance with the next panelists they select. This is not present in the proposal.

Q7: How do you handle unsolicited supplemental filings from Complainants? How do you ensure that Respondents are not put to an undue burden of responding to Supplemental Filings from Complainants if those Supplemental Filings are not considered by the Panelists? And conversely, if Supplemental Filings are considered by panelists how do you ensure that Respondents are provided adequate time to prepare and file a Supplemental Response so that the Supplemental Response will also be considered by the Panel before they issue their decision.

- Steve DelBianco: Quoted Page 9 of ACDR’s proposal: “The ACDR will decide on additional submissions in accordance with the supplemental rules.”

ACTION ITEM: Steve proposes for ACDR to follow up in writing about what they have in mind for their supplemental rules, to respond to this question.

- ACDR: ACDR expects to leave any kind of extension needed to the panelists themselves. So after they decide on the panelists, they should decide if any requests will be asked for the extension. ACDR will leave it to the panelists to decide and in those cases, as mentioned in the proposal, it will not exceed ten additional calendar days.

Q8: What are your views on Forum Shopping and how to prevent it?

- Mahmoud Lattouf: It’s not really a problem specific to ACDR. It’s for everyone and everyone should be cooperating in order to avoid forum shopping. ACDR will be implementing the same rules and procedures as other providers in order to prevent forum shopping. Once ACDR has this uniform standard, this concern will be eliminated because everyone will be having the same procedures.

Q9: What are your views on empowering Complainants and Respondents equally in selecting a UDRP provider, such as randomly assigning the UDRP provider unless both the Complainant and Respondent agree on the venue selection?

- ACDR: Yes, ACDR supports this.

Q10: Would the ACDR be willing to enter into a standardized contract with ICANN that sets out mutual roles and responsibilities and that would be intended to ensure uniform application of the UDRP across UDRP providers?

- ACDR: Yes

6. Closing Comments

- Phil Corwin: noted that there is an existing ICANN process for the approval process for resolution service providers – adopted in 1999 and implemented in 2000.

ACTION ITEM: Steve DelBianco asks Phil Corwin and Nat Cohen to review the existing standard for approval. If they find it deficient in any way, Phil and Nat should draft a few paragraphs for the BC to add in their comments.

ACTION ITEM: ACDR to submit more articulate answers in writing, in particular regarding questions: 5, 6 and 7.

ACTION ITEM: Nat Cohen was asked by Steve DelBianco to participate in the redraft of the BC's position to provide his comments about ACDR's proposal, but also to bring forward the call for the urgency that ICANN needs to develop administrative standards and rules.