Summary and Analysis of Comments for CAC Proposed Amendments to UDRP Supplemental Rules of the Czech Arbitration Court

Comment Period: 11 Nov 2009 to 11 Dec 2009

BACKGROUND

The Czech Arbitration Court (CAC), an Approved Provider for the Uniform Domain Name Dispute Resolution Policy (UDRP) submitted a proposal to amend its Supplemental Rules to provide for an alternative page limit and processing fee for certain UDRP Complaints. ICANN conducted a public comment period from 11 November 2009 to 11 December 2009. The CAC subsequently withdrew its proposal.

20 public comments were received from 16 contributors.

The public comments received can be viewed at: http://forum.icann.org/lists/cac-prop-supp-rules/

ANALYSIS

All comments received were in favor of rejecting the CAC's proposal in its current form. The CAC announced that in light of the comments received, it was withdrawing its proposal to amend its supplemental rules, and instead would implement a fee change only. No expedited process is being implemented. See http://www.adr.eu/arbitration_platform/news.php.

SUMMARY

George Kirikos submitted three comments in opposition to the CAC proposal, noting it would invite "large-scale assembly line Reverse Domain Name Hijacking" and was biased towards complainants. He stated that the CAC draft decision template did not consider the possibility of the Panel declaring that a complaint was brought in bad faith and that the proposed pricing schedule allowed for "bulk discounts for bringing multiple complaints to their forum in a calendar year." Mr. Kirikos put forward a series of suggestions: (i) that ICANN evaluate UDRP providers and seek public comment as to their neutrality including contacting past UDRP participants and registrants; (ii) that ICANN and the GNSO prepare an issues report and optionally "fund independent scholarly research"; and (iii) UDRP cases be randomized between providers. Mr. Kirikos also noted the lack of contracts between ICANN and UDRP providers, commented on the status of the UDRP proceeding search tools and offered suggestion for how such searches could be improved, as well as made suggestions on the recording of appeals from UDRP administrative decisions. See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00000.html, http://forum.icann.org/lists/cac-prop-supp-

rules/msg00011.html, and http://forum.icann.org/lists/cac-prop-supp-rules/msg00013.html.

Jim Davies commented that the CAC proposal "is a de facto change in the UDRP Policy and Rules; or alternatively a breach of what is allowed under the definition of Supplemental Rules." In a subsequent posting, Mr. Davies stressed his concern that ICANN needed to enter into contracts with UDRP providers, including a provision for review of Provider supplemental rules, and suggests that ICANN should stop providers from allowing any further changes to their supplemental rules at this time. See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00001.html and http://forum.icann.org/lists/cac-prop-supp-rules/msg00004.html

Rex Wickham commented that the CAC proposal should be subject to a "full ICANN review process" and noted his belief that the proposal was "a de facto change in the UDRP policy and Rules" requiring further investigation. Mr. Wickham suggested that a similar supplemental rules change proposed by WIPO should be halted to allow for consideration of the ramifications on ICANN stakeholders. See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00002.html

The Hon. Neil Brown, QC posed a series of questions focusing on whether the CAC's proposed changes are appropriately addressed in supplemental rules, or if the proposed changes represent a change to the UDRP itself. Mr. Brown's comment suggests that the conclusion may be reached that the CAC's proposed changes require a change to ICANN's UDRP Rules, and further raises the question of the propriety of holding domain name registrants to a form of the UDRP not in place at the time of the domain name registration. See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00003.html and http://forum.icann.org/lists/cac-prop-supp-rules/msg00005.html

Andrew Allemann of DNW.com submitted that the "Supplemental Rules were never meant to be used to completely overhaul the UDRP process and system". He suggested that ICANN should "halt the attempt by CAC (and corresponding one by WIPO, which seems to think it doesn't need ICANN approval to make the changes) and undertake a complete, bottom-up review of the proposals." See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00006.html

Scott Barclay re-posted George Kirikos' submission comments and appended his own comments, requesting enforcement of penalties for reverse highjacking of domain names. See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00007.html

Max Menius of Menius Enterprises, Inc. submitted that the CAC proposal "appears to preempt the UDRP with a quicker, cheaper lower integrity process that will invite reverse domain name hijacking." He further stated that the CAC proposal lowers the bar on challenging domain name registration rights, and can be misused. Mr. Menius reiterated others' concerns that ICANN needs to enter into contracts to

UDRP providers and maintain some control over the processes. See:
http://forum.icann.org/lists/cac-prop-supp-rules/msg00008.html

Paul Keating submitted his objection to the CAC Proposal and joined other
commenters in calling for ICANN to enter into contracts with the UDRP providers, as
the lack of contract leaves providers without any protection. Mr. Keating sets out
suggested items for inclusion in the contracts, as best practices, including
prohibitions on: providing additional information to panelists, participating in non-
random panel selections, promoting any consensus view, producing any form of
index that does not include all cases, setting minimum fees to be paid to panelists,
requiring refunds for panelist fees when complainants have been withdrawn prior
to response or panel appointment, and acting as a provider when found to have
violated legal obligations. Mr. Keating also raised a comment regarding the
inclusion of a reference to "class action complaints" and how class actions can exist
given the language of the UDRP.
See: http://forum.icann.org/lists/cac-prop-supp-rules/pdfHU1D5ucNSo.pdf

An anonymous submission under the name of 'Global Business' submitted a
comment that stating that the CAC proposal is "is a wholesale process to steal
domains from its present registrants" and will result in abuses of the UDRP by
dishonest business.
See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00009.html

Michael Berkens, President of Worldwide Media, submitted a comment in
opposition to the CAC proposal, and noted agreement the comment submitted by
the ICA, as well as George Kirikos. Mr. Berkens notes that the CAC proposal would
be a unilateral change to the UDRP and would encourage more UDRP filings. Mr.
Berkens noted that this is a way to increase the profits and market share of the
UDRP providers. See: http://forum.icann.org/lists/cac-prop-supp-
rules/msg00012.html

The Internet Commerce Association (ICA), through its counsel, Philip Corwin,
submitted its opposition to the CAC proposal on its belief that this proposal
overreaches the individual UDRP providers' "authority to amend secondary rules
that are solely meant to address minor and incidental administrative matters" a
concern outlined in an earlier letter to ICANN (see:
http://www.icann.org/correspondence/corwin-to-beckstrom-dengate-thrush-
30nov09-en.pdf). Mr. Corwin re-iterated the ICA's earlier recommendations,
including notification that UDRP providers may not implement major UDRP policy
initiatives through unilateral amendment of their Supplemental Rules, and the
potential for a loss of approved status if unilateral amendment occurs. The ICA
further recommends that no panel decision based on a unilateral action is binding.
The ICA also recommends that the GNSO should consider convening a PDP on UDRP
reform, including the establishment of a standard contract with UDRP providers so
as to better assure uniform application of the UDRP, delineate clear boundaries for
the limits of the provider's authority, and provide ICANN with a range of

enforcement tools in addition to accreditation withdrawal." See:
http://forum.icann.org/lists/cac-prop-supp-rules/msg00014.html

Ed Muller of Namemon commented that the UDRP must be reformed to create enforceable, responsible standards, and should not be subject to simple rewrites that allow copyright holders to abuse their trademarks.. See:
http://forum.icann.org/lists/cac-prop-supp-rules/msg00015.html

Kathy Kleiman, on behalf of the NCSG STI Drafting Team, submitted a comment that the CAC proposal be rejected on procedural and substantive grounds.   The NCSG STI Drafting Team noted that: (i) this change is analogous to the Uniform Rapid Suspension (URS) system, recently created by the STI, and should be subject to the GNSO policy-making process; (ii) the CAC proposal "involves substantive change which will limit the rights of domain name registrants" and to the extent such a change is adopted, there should be additional procedures to protect domain name registrants; (iii) CAC's amendment will operate against the uniformity of the UDRP and raises competition concerns; (iv) the CAC proposal does not include safe harbors for domain name registrants; and (v) the CAC proposal presumes bad faith at default and "undercut[s] the basic fairness of the UDRP, and the fairness and balance of the newly-introduced URS."   Going forward, Ms. Kleiman suggests that ICANN must either reissue the comment period and put the public on notice that registrant rights under the UDRP are being impacted by the CAC proposal, or urge CAC to return to ICANN after a full review of the new URS. See:
http://forum.icann.org/lists/cac-prop-supp-rules/msg00016.html

Jean-Sébastien Lascary endorsed the earlier comments of George Kirikos and submitted his view that the CAC proposal is "an invitation for reverse domain name hijacking". He further highlighted three specific points of disagreement with the CAC proposal: (i) a single panel – not a three person panel – will make the decision to use the expedited decision process; (ii) the decision to use the expedited process remains with the complainant and panelist, not the respondent; and (iiI) allowing two separate fees to be charged to meet the same result will encourage forum shopping. See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00017.html

Tim Ruiz submitted a comment on behalf of GoDaddy.com. Mr. Ruiz noted GoDaddy.com's opposition to the CAC proposal, and noted that complainants may try to exploit the proposed system to acquire names that they may otherwise use, and that the lower filing fee could foster bulk filings. Mr. Ruiz noted that the proposed change impacted the UDRP, was not merely administrative in scope, and could lead to variations of a policy that is supposed to be uniform, thereby undermining the confidence in a the policy. See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00018.html

Michele Neylon submitted a comment on behalf of Blacknight Solution, submitted a comment in opposition to CAC's proposal. Mr. Neylon noted that "If each UDRP provider implements a slightly different 'flavour' of the dispute handling the entire

process will be undermined," therefore all UDRP provider reforms should be handled in a uniform manner. See: http://forum.icann.org/lists/cac-prop-supp-rules/msg00019.html

NEXT STEPS

Because the CAC withdrew its proposal, there are no further steps to be taken to address the proposal. ICANN is reviewing the feasibility of entering into contracts with the UDRP Providers. ICANN is also reviewing the processes by which the UDRP providers propose changes to supplemental rules.

COMMENTS RECEIVED FROM:
George Kirikos
Jim Davies
Rex Wickham
The Hon Neil Brown QC
Andrew Allemann of DNW.com
Scott Barclay
Max Menius of Menius Enterprises, Inc.
Paul Keating
Global Business
Michael Berkens of Worldwide Media, Inc.
Philip Corwin on behalf of the Internet Commerce Association
Ed Muller of Namemon
Kathy Kleiman on behalf of the NCSG STI Drafting Team
Jean-Sébastien Lascary
Tim Ruiz on behalf of GoDaddy.com, Inc.
Michele Neylon, Blacknight Solutions

Submitted by
Samantha Eisner
Senior Counsel, ICANN
4676 Admiralty Way
Suite 330
Marina del Rey, CA 90066
samantha.eisner@icann.org