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By E-Mail

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

Re: Revised Proposal of the ACDR to Serve as a UDRP Dispute Resolution Service Provider

Dear ICANN:

I am writing on behalf of the members of the Internet Commerce Association (ICA). ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers.

These comments reflect our views on the "Revised Proposal of the ACDR to Serve as a UDRP Dispute Resolution Service Provider" that was posted for public comment on March 1, 2013 at <http://www.icann.org/en/news/public-comment/acdr-proposal-01mar13-en.htm>.

Executive Summary

The major points made in this comment letter are:

- ICA continues to oppose the accreditation of the ACDR or any other potential UDRP provider until ICANN adopts an enforceable mechanism to assure uniform disposition of UDRP cases regardless of which arbitration provider is selected for their resolution.
- In the absence of such a mechanism the potential for forum shopping at the expense of registrant rights remains a major concern for ICA members.
- ACDR's application continues to raise questions about the qualifications and preparatory training of many of its proposed panelists, as well as its overall commitment to administering UDRP cases in a fashion that is consistent with established practices.

Discussion

Prior Background

The ICA previously commented on ACDR's request to become an accredited Uniform Dispute Resolution Policy (UDRP) provider when it was first put out for public comment in September 2010. Our full statement can be found at <http://forum.icann.org/lists/acdr-proposal/msg00005.html>; we ask that it be incorporated in conjunction with this comments because most of the points raised at that time remain highly relevant.

The Executive Summary of that comment letter made the following points:

- ICA strongly opposes the accreditation of the ACDR or any other new UDRP arbitration provider until ICANN establishes a standard contract or other uniform and enforceable agreement with all providers of UDRP services.
- Such a standard agreement is the only means of assuring all business entities that have made substantial investments in acquiring and developing domains of procedural and substantive due process when a UDRP action is initiated by or against them.
- A standard agreement is also the only means by which to prevent forum shopping, by which newly accredited providers seek to influence complainants' arbitrator choice by further tilting the system against registrants. We have already witnessed the CAC attempt this through their proposal to offer an unacceptably condensed version of the UDRP through amendment of their Supplement Rules. ACDR's request that they be allowed to process up to 5,000 cases during their initial start-up period – an astronomical projection that is higher than the total combined number of annual case arbitrations administered by the two leading UDRP providers –

can only raise questions about how they intend to attract many thousands of filings.

- **Regardless of whether ICANN establishes and enters into such standard UDRP provider agreement, the ACDR's Proposal contains numerous material deficiencies that require its rejection by ICANN.**

Two and one half years later, ICANN has taken no actions to address the concerns raised in the first two bullet points. There continues to be no “standard contract or other uniform and enforceable agreement with all providers of UDRP services” or even the initiation of a process leading to one – notwithstanding the fact that the approaching advent of more than a thousand new gTLDs, including International Domain Names (IDNs) in Non-Latin scripts, as well as ICANN's own ongoing outreach to the developing world and diversification of its own operational locations, would indicate that there will inevitably be applications from new entities seeking to be UDRP providers based in regions other than Europe and the United States, where the two dominant providers (WIPO and NAF) are now located. It astounds us that ICANN, after devoting so much time and effort to protection of trademark rights at new gTLDs, has failed to undertake similar steps relating to its own UDRP notwithstanding divergent approaches to enforcement of IP and domain rights in various national jurisdictions and geographic regions.

More disturbingly, in addition to taking no steps to better ensure uniformity of UDRP administration, ICANN recently announced that NAF would be the sole provider of Uniform Rapid Suspension (URS) complaints for the foreseeable future, notwithstanding NAF's shoddy record of allocating nearly half its UDRP caseload to less than five percent of its listed panelists (<http://dnattorney.com/NAFdomainnamedisputestudy2012.shtml>); as well as ICANN's receipt of applications to provide URS arbitration from new providers with estimable credentials and innovative approaches.

Further, despite the unanimous recommendation of the STI-RT that “*ICANN should discourage forum shopping among URS service providers through its URS implementation **and contracts***”. (emphasis added - <http://gnso.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf>), for now it appears that NAF and ICANN are bound solely by a 2-page Memorandum of Understanding (MOU) that fails to explicitly address any of the questions raised by NAF's appointment, and which has no enforcement mechanism. (<http://www.icann.org/en/about/agreements/partnership-mous/naf-mou-20feb13-en.pdf>). ICANN apparently intends to extend the unjustified practice of accrediting UDRP providers absent contractual compliance mechanisms to the new field of the URS, in contradiction of the community's unanimous policy recommendation.

In short, while domain registrants remain the primary source of ICANN funding, they are getting continued short shrift from ICANN when it refuses to recognize and address the need for an enforceable means to ensure uniform and effective UDRP (and now URS) administration.

Turning back to the original 2010 ACDR application, the majority of comments received on the ACDR application either opposed it or requested substantial revisions and clarifications. ICA's comment letter opposed any new accreditations of UDRP providers and also cited material deficiencies in the ACDR application (<http://forum.icann.org/lists/acdr-proposal/msg00005.html>). The Summary of the statement filed by the Business Constituency stated "The Business Constituency (BC) cannot support approval of this or any other UDRP accreditation application at this time on the grounds that no new UDRP providers should be accredited until ICANN implements a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities." (<http://forum.icann.org/lists/acdr-proposal/msg00004.html>). And the comment of the IP Constituency (IPC) noted 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", and listed numerous revisions and suggestions that it wished to see made to the ACDR proposal. (<http://forum.icann.org/lists/acdr-proposal/msg00006.html>)

The ICANN staff Summary and Analysis of the comments received stated:

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.

It also noted:

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.
(Emphasis added)

We note that while the 2010 staff Summary and Analysis refers to an ongoing review process to review ICANN's relationships with UDRP providers, we know of no information being provided to the community in regard to the status or results of such a review. If such a review has indeed been undertaken the community should be informed of its status and all relevant information pertaining to it. If such a review process has been halted or remains incomplete then we suggest it be accorded a high priority for near-term completion.

As described above, nearly two and a half years have passed since the ACDR proposal was put out for public comment. The majority of comments opposed approval or requested substantial revision and additional information. We were therefore very surprised when the revised ACDR proposal suddenly appeared on the Board's Consent Agenda for its Special Meeting of February 28, 2013 with no information presented to the ICANN community as to whether any modifications have been made to the original ACDR proposal, and whether any additional clarifying information has been submitted.

In response to that listing, ICA dispatched a letter to CEO Chehade and Board Chairman Crocker on February 26, 2013 in which we requested that the Board:

- Defer action on this matter until at least its next scheduled meeting.
- Publish the pending ACDR proposal for community review and comment.

We are aware that similar requests were received from both the BC and IPC. We appreciate the fact that the Board responded to those communications by deferring action on the ACDR application and by having staff put it out for the public comment we are now engaging in.

The Revised Application

Given the fact that ICANN has failed to even initiate a process for developing a standard enforceable mechanism for ensuring uniform UDRP administration among disparate providers, ICA must continue to oppose approval of the ACDR application – or that of any other entity seeking UDRP accreditation.

The principal concern of ICA members, due to the fact that it is complainants who determine both the timing of UDRP filings and the provider with which they file, is that the lack of such a mechanism will inevitably encourage forum shopping as

proliferating ranks of UDRP providers seek to gain market share. The means by which such forum shopping can be encouraged – price reductions and concomitant dilution of high quality legal analysis, supplemental rules that unduly favor complainants, and development of a reputation as a complainant-biased forum – would all come at the expense of registrants’ procedural and substantive rights. While the UDRP does permit appeal to courts of relevant jurisdiction that is an expensive fallback as well as one that varies in effectiveness depending on the presence and substance of statute law in different national jurisdictions.

Beyond that basic cause for opposition, the revised ACDR application also contains statements and deficiencies that argue for its rejection.

“Vision”

The ACDR’s revised application of March 1, 2013, in the application section “Our Vision”, states:

*While we put impartiality and professionalism first, **we also take into account the necessity for gradual invergance [sic] of the rules applied by UDRP providers.** Hence, we acknowledge the importance of constant interaction among the existing providers **in order to stay aware of the conflicting policies and to interactively discuss them.** (Emphasis added)*

While we commend the ACDR for recognizing the necessity of uniformity of the rules applied by UDRP providers and its commitment to “constant interaction” in pursuit of that goal, no UDRP provider has any authority to require another to apply the rules in a consistent manner; rather, it is ICANN that accredits all UDRP providers and therefore ICANN’s responsibility to establish the enforceable mechanism that can best achieve that goal.

Further, elements of this statement are deeply concerning. The UDRP is supposed to be “Uniform” in application regardless of which arbitration forum a complaint is filed in. Yet the statement’s reference to the “*necessity for gradual invergance [sic] of the rules applied by UDRP providers*” appears to presume that such divergence now exists, is evidenced by “*conflicting policies*”, and is acceptable -- with uniformity just a distant goal to be reached in gradual steps. We absolutely reject that viewpoint.

Listed Neutrals

The application’s Initial List of Neutrals also raises concerns:

*In line with the vision of ACDR, panelists will be invited from different nationalities and **with different approaches to IP** and other related fields. The selection of the panelists will be according to their experience and knowledge. (emphasis added)*

The reference to “different approaches to IP” seems at sharp odds with the overarching need for uniform approaches in UDRP jurisprudence. Also, while many of the initial panelists listed in Annex 1 have impressive credentials, fifteen of the thirty-three listed neutrals have no prior experience in UDRP administration. This raises the issue of how such panelists will be made familiar with existing UDRP practice prior to initiating their own participation in the process, and the application provides no indication of what steps or requirements will be undertaken, or training materials and instruction provided, to assure that these novice panelists receive extensive education in contemporary UDRP practice to assure consistency with prior case law.

There is also no indication of what methods will be utilized to assure that the entire list of panelists is assigned cases on a random and dispersed basis. Indeed, citing the NAF precedent, there is nothing to prevent ACDR from assigning the bulk of its cases to just a few panelists, all of them being those who lack any prior UDRP experience.

Self-Referential Perspective

Several statements in the application give rise to concerns that the ACDR will be focused primarily on its own UDRP practice absent sufficient reference to more authoritative sources such as the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition (“WIPO Overview 2.0”) (<http://www.wipo.int/amc/en/domains/search/overview2.0/index.html>). Again, this raises the prospect of divergent practices that encourage forum shopping.

For example, in the application’s section on Online Discussion, it states:

*The ACDR will establish an online discussion medium, accessible by panelists only, enabling them to communicate with each other and exchange perspectives and experience on all matters **relating to the Center’s UDRP process and legal practice** of domain dispute resolution.*

*Any significant legal perspectives or points of critical practice importance which would have **the effect of further development in the field** will be published on the Center’s website in the form of panelists’ views on UDRP practice. (Emphasis added)*

And then, in the section titled Publishing the Decision of the Panelists in the Proceedings, it further states:

*ACDR will have its own system/search tool **for researching the Center’s decisions** resolved under UDRP. The tool will assist complainants, respondents, their counsel, panelists, providers and members of the public who are concerned with the DNS, the UDRP practice, as well as IP protection in general, in researching decisions on domain names. (Emphasis added)*

These statements raise concern that, due to the focus on the “Center’s UDRP process and legal practice”, and through development of a search tool focused only on the “Center’s decisions”, there may arise an ACDR arbitration practice that over time begins to differ in significant ways from that of other UDRP providers.

Instead, ICANN needs to foster the development of tools that provide comprehensive information about UDRP practice among all accredited providers, and that fosters a uniform approach to its application and consistent outcomes in every region of the world.

Caseload projections

The ACDR’s original proposal in 2010 requested that it be allowed to process up to 5,000 cases annually during its initial startup period – a staggering number for an untested provider, about equal to the number of combined annual cases heard by both WIPO and NAF.

The revised proposal has considerably downsized its ambitions, stating: *“During the start-up period, the ACDR will be ready to start with a limitation not exceeding 50 per month.”* That would still total 600 decisions per year, or more than one-tenth of total UDRP cases at present levels. And, following the start-up period, the ACDR might even decide a greater annual percentage of cases, especially if it adopts an approach to cases and procedural and pricing differences that encourage complainants to favor it.

In sum, the ACDR will, if accredited, likely start out as a significant provider of UDRP dispute resolution and will have the capability to rapidly grow its caseload. These facts again speak to the pressing need for a mechanism to ensure a uniform approach to case administration.

Conclusion

Notwithstanding our comments, the ICA is not fundamentally opposed to the accreditation of additional UDRP providers, and we recognize that ICANN will probably receive additional applications in coming years. This makes it all the more incumbent for ICANN to initiate an approach to establish a standard enforceable mechanism to assure uniform application of the UDRP no matter which arbitration forum is involved. While elements of the ACDR application that cause us concern might well be addressed through explanation or modification, only ICANN has the power to address ICA’s fundamental concern. It is very unfortunate that, more than two and a half years after submission of its original application, we must still oppose ACDR’s revised application due to ICANN’s fundamental neglect of this matter.

We hope that ICANN finds our views useful. Thank you for considering them in this important matter affecting the basic rights of domain registrants.

Sincerely,

Philip S. Corwin

Philip S. Corwin

Counsel, Internet Commerce Association