



Mr. Fadi Chehade, President & CEO
Mr. Steve Crocker, Chairman of the Board
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

September 18, 2013

Dear Mr. Chehade and Mr. Crocker:

I am writing on behalf of ICANN's Business Constituency (BC) in regard to the document "UDRP Providers and Uniformity of Process – Status Report"¹ to raise several areas of concern to the BC's members.

First, we appreciate the publication of the Status Report, but note that the document was issued on Friday, July 19th, the day after the conclusion of the Durban meeting. Most Durban attendees were traveling home or to other destinations. It also is of concern that there was no Public Announcement of the issuance of this document. It is further unfortunate that this document was not released in the week prior to ICANN 47 so that it could have been discussed by members of the community assembled in Durban, especially given that it is characterized as culmination of a 2010 commitment to "undertake a review of its [ICANN's] relationship with its UDRP providers." The body of this BC letter raises further substantive questions which we would appreciate hearing back from ICANN on.

The Report stakes out a strong position against placing UDRP providers under contract, stating that ICANN has determined that "contracts would be a cumbersome tool to assert to reach the same outcome that exists today". That position is contrary to that of the BC, first articulated in 2010, that ICANN should implement "**a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities**". That position was most recently reiterated in our endorsement of the application of the Arab Center for Dispute Resolution (ACDR) to become an accredited provider, in which we stated:

¹ <http://www.icann.org/en/help/dndr/udrp/providers/uniformity-process-19jul13-en>

[T]he BC continues to urge the ICANN Board to instruct ICANN staff to expeditiously develop improved standards for the approval of UDRP providers, as well as uniform and enforceable standards governing the administration of UDRP cases by providers.”²

That April 13th BC filing also described seven separate non-exclusive areas that “The uniform and enforceable standards developed for all UDRP service providers should address”. The BC comments used the term “standard mechanism” rather than “contract” – but whatever the form of that mechanism, it certainly exceeds what ICANN has in place in its present relationship with UDRP providers, and made it clear that the BC supports enforceable standards.

Finally, that BC letter recognized that the creation of uniform and enforceable UDRP administrative standards was:

[A]n implementation matter related to better assuring the uniform application of the existing UDRP policy and that it therefore does not require a PDP or other policy-related process. The BC envisions the contemplated process as one that is staff-driven but that solicits and is open to broad community input.

In contrast, ICANN staff issued the UDRP Status Report absent any solicitation of input from the community. That is in stark contrast to the procedure followed prior to publication of the “Final GNSO Issue Report on The Current State of the Uniform Domain Name Dispute Resolution Policy” issued on October 3, 2011 – that report was the result of intensive interaction with the community, including questionnaires, open discussion sessions at ICANN meetings, webinars, and other initiatives. Further, so far as we are aware the July 2013 Status Report was not discussed in any meeting of the ICANN Board.

In order that the BC may better understand the positions taken by ICANN in the Status Report as well as its implications we ask for responses to the following questions:

1. The Report states that ICANN can revoke approval of a UDRP provider who failed to remedy matters after it was found to be acting in violation of the UDRP, or if it has Supplemental Rules in conflict with the UDRP and its Rules, and asserts that “a contractual relationship could actually make it more difficult to take corrective action”.

This seems counter to logic. Can you please explain why a contract or standard agreement would not provide ICANN with more certainty regarding its right to discipline or terminate a UDRP provider? Further, please explain why it would not be advantageous to have specified graduated penalties, rather than only the “death penalty” option of revocation, as is now the case in the Registrar Accreditation Agreement (RAA)? Finally, why are contracts with UDRP providers regarded as a “cumbersome tool” when ICANN has consistently striven to develop more detailed and flexible contracts with registries and registrars?

² <http://forum.icann.org/lists/comments-acdr-proposal-01mar13/pdf7ZdKLP0o82.pdf>

2. The Report, noting that providers of Uniform Rapid Suspension (URS) rights protection services at new gTLDs are subject to an abbreviated type of contract, a Memorandum of Understanding (MOU), explains this distinction with the anti-contract position for UDRP providers by stating “Unlike the UDRP, the URS is not based upon a policy.”

It is our view that URS is indeed based on Recommendation 3. Please explain the basis for implementation of the URS at new gTLDs if it is not based upon a policy. Further, please explain this statement in light of the May 16, 2013 declaration of the Board Governance Committee (BGC) that *“The staff action to allow trademark holders to include, along with a Clearinghouse record of a verified trademark, up to 50 names that had previously been found to have been abusively registered or used, is implementation of the established ICANN policy found in Recommendation 3, as are the other rights protections mechanisms within the New gTLD Program.”* (Emphasis added)

As the only other RPM adopted for new gTLDs is the URS, the BGC must have been referencing the URS as being based in “established ICANN policy”. Further, it seems logical to the BC that as written agreements are considered appropriate for URS, they would also be appropriate for UDRP providers.

3. Lack of public comment: Why was a draft of the Status Report not published for public comment by the community in advance of its publication in final form? Given the lack of advance notice and opportunity for community comment, we would strongly urge that the Report be put out for public comment now.
4. Timing of publication: By publishing right after the end of an extremely busy ICANN meeting, and without public notice, the Status Report was not apparent to many in the community. The BC and other stakeholders within ICANN have long requested that ICANN honor the commitment to post substantive reports and materials a minimum number of days prior to ICANN meetings. It is unclear to us if the publication timing was an accident, or if the staff did not understand the substantive nature of concerns, even with prior public comments via the earlier BC letter.
5. What bearing, if any, will the report have on future community consideration of alterations of the UDRP? In particular, if either an implementation process following broad community input or a formal PDP results in a recommendation that UDRP providers be made subject to uniform and enforceable agreements would ICANN foresee any obstacles to implementing it?

For example, in December 2011 the GNSO Council adopted a Resolution stating that *“a [UDRP] PDP be delayed until after the New gTLD Uniform Rapid Suspension System (URS) has been in operation for at least eighteen months. . . to allow the policy process to be informed by data regarding the effectiveness of the URS, which was modeled on the UDRP, to address the problem of cybersquatting”*, and also requested that an Issue Report on the state of RPMs at both incumbent and new gTLDs be delivered no later than eighteen months following the delegation of the first new gTLD. Under the current new gTLD program timetable, that Issue Report would be delivered and an associated PDP could commence in 2015. Even if no PDP is initiated, a community discussion

recommending implementation of standard agreements with UDRP providers could well follow the receipt and consideration of the Issue Report.

The BC looks forward to responses to the issues that are covered in this letter.

Sincerely,

A handwritten signature in blue ink that reads "Elisa Cooper". The signature is written in a cursive style with a large initial "E" and a long, sweeping underline.

Elisa Cooper
Chair, ICANN Business Constituency
<http://www.bizconst.org>