



November 29, 2007

Dear Sirs,

The World Intellectual Property Organization (WIPO) Arbitration and Mediation Center wishes to take the occasion of the posting for comment on-line on November 12, 2007 of the revised Czech Arbitration Court (CAC) proposal to become accredited as a Uniform Domain Name Dispute Resolution Policy (UDRP) Provider by the Internet Corporation for Assigned Names and Numbers (ICANN), to make the following observations additional to WIPO's previous letter of July 4, 2007 to Dr. Paul Twomey.

That letter flagged WIPO's increasing concern about the largely unchecked consequences of the generally profit-driven competition for the provision of a consistent, predictable and equitable system of law in domain name cases. In particular, WIPO expressed the view that:

“Violations of the intent, if not the letter, of the UDRP negatively affect parties and impede the functioning of the UDRP. Further consequences include the distortion of fair competition by rewarding provider practices that represent a ‘race to the bottom’, without a corresponding commitment to institutional investment in the establishment of a predictable and equitable system of law in domain name dispute resolution at large. An absence of providers’ historic understanding of the UDRP and of transparency in structures and objectives comes at the expense of due process, quality precedent and investment in the future of the process. Forum shopping is of concern, especially where it exploits such a vacuum.”

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It will be noted that WIPO's letter was not only in reference to the CAC proposal, but also listed in detail certain practices of existing Providers which violate in material ways the letter or spirit of the UDRP. Some of these practices appear based on use of Supplemental Rules as a 'back door' means of exploring legal scope for variations to the ICANN-mandated UDRP and Rules.

Merely as a recent example of this, WIPO notes the proposal by the National Arbitration Forum (NAF) to ICANN of September 21, 2007 for modifications to its Supplemental Rules, in particular to its definitional provisions regarding the deemed submission of documents, which appear *inter alia* to be inconsistent with the current communication provisions under the Rules (specifically, Rules, paragraph 2(f)).

Revised CAC Proposal

As regards the revised CAC Proposal, WIPO notes that a number of the more obvious examples of attempted variation to the UDRP and Rules appear to have been amputated. These include, among others, previously proposed "new features" such as a "quasi appeal" mechanism, which if retained would have gone to the heart of the UDRP system.

Other proposed "new features" on the other hand appear to have been retained in part, but with some 'rewrapping'. For example, the previously envisaged stand-alone challenge process to the Provider's rejection of a complaint on grounds of administrative deficiency is now described on page 10 of the revised Proposal under "Return of UDRP Fees", with the revised mechanism itself now described in the proposed Supplemental Rules (Article 4) under the heading "Notification of Complaint". The net effect of this fee-based process appears to be to allow a complainant to request the Provider to review that Provider's decision to "withdraw" a complaint due to administrative deficiency, subject to payment of an additional filing fee, for which sole purpose the Provider would appoint a panel to conduct a review of the disqualified complaint. A finding against it would presumably result in the Complainant forfeiting such additional fee, if not all or part of the original UDRP fee. Apart from the fact that such a process is not contemplated in the UDRP or Rules, its inclusion raises unaddressed questions in relation to for example implications for possible refiling.

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“Class Complaints”

The principal WIPO comment apparently not taken on board in the revised CAC Proposal and Supplemental Rules concerns CAC’s proposed acceptance of a single so-called “class complaint” on behalf of multiple rights holders against “serial cybersquatters”. As stated in WIPO’s previous letter, this element of the Proposal ignores a series of legal and practical issues under the existing UDRP in relation to complaint compliance and notification, panel appointment and registrar enforcement.

The revised CAC Proposal and Supplemental Rules do little to address this concern in substance, and indeed retain many of the essential elements and inherent uncertainties of such “class complaint”. WIPO continues to have reservations not only in terms of what the broader objectives of such a mechanism may be, but more particularly in terms of what may amount to systemic inconsistency with the existing UDRP and Rules, which simply do not contemplate nor are designed to deal with such multiple numbers of right holding parties to a complaint. The UDRP mechanism is predicated on single parties, and while some flexibility may be required from time to time for example in relation to cases involving one or two additional related right holders, the UDRP and Rules simply do not equip Providers, parties, panels or registrars to adequately assess what their own differing obligations may be in relation to a “class complaint” involving potentially multiple parties with differing marks, legally relevant locations, and interests in one or more domain names.

Among other terms, the proposed definition of “class complaint” (in paragraph 2 of the Draft Supplemental Rules) and the conditions for the filing of such contemplated complaints (described in paragraph 4(a)) lack clarity. More importantly, this mechanism is likely to raise substantive issues in its interaction with numerous existing provisions of the UDRP and Rules. For example, it is not clear how a “class complaint” based “on legal arguments applicably equally, or substantially in the same manner, to all the disputed domain names” would necessarily be consistent either with paragraph 4(a) of the UDRP or indeed with paragraph 3(b)(ix) of the Rules.

Putting aside questions of how “class” complainants in such cases would be required to establish the three substantive elements of the UDRP in relation to their multiple sources of trademark rights, or indeed what the substantive ramifications for respondents in seeking to defend themselves in such cases may be, the introduction of such a mechanism through a Provider’s Supplemental Rules would also likely have apparently unconsidered implications for the

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operation of a number of existing provisions of the UDRP and Rules. These include Rules paragraphs 1 (definition of “Complainant” and “Party”, and also the election by the complainant in combination with 3(b)(xiii) of “Mutual Jurisdiction”), 2 (Communications), 3 (The Complaint), 4(b) (administrative deficiency), 5 (The Response) and 17 (Settlement). It is also unclear how the contemplated “separate relief for each” complainant in a “class complaint” would in practice be implemented by registrars, let alone how they would interact with the existing court proceedings provisions and the ‘ten-day rule’ under paragraph 4(k) of the UDRP.

Provider Accreditation Policy

In sum, while the revised CAC Proposal and Supplemental Rules address many of the previously expressed concerns of compatibility with the existing UDRP and Rules, certain elements remain in apparent violation of those key instruments.

Moreover, whatever the likely merit of considering any number of potential options for ‘improvement’ to the well-established UDRP mechanism may be, WIPO does not believe that a Provider’s Supplemental Rules are an appropriate means by which such variations should be proposed or considered, let alone brought into play.

As WIPO noted in its previous letter to ICANN, examples abound of undesirable consequences of a proliferation of accredited institutions acting out of different motives within the domain name system. WIPO also believes it is important to stress the potential hazards of forum shopping resulting from Provider practices in violation of the UDRP.

While WIPO does not necessarily seek to have excluded any particular candidacy, we believe that the need for a considered provider policy is well illustrated by the currently continuing consideration of a prospective candidate who has already proposed a string of clear derivations from the UDRP terms previously mandated by the accrediting institution.

WIPO urges ICANN to adopt a deliberate provider policy, in full awareness of consequences for the longer term for the credibility of the UDRP, which thus far has been acknowledged to be an effective mechanism and should be allowed to remain so in comparison to court options.

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Internet Corporation for Assigned Names and Numbers, Marina del Rey –
November 29, 2007

Finally, WIPO emphasizes its openness to targeted consideration of any streamlining by ICANN of the UDRP mechanism that may be effective in the face of recent developments in the domain name system.

Yours sincerely,

WIPO Arbitration and Mediation Center