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By E-Mail

Peter Dengate-Thrush, Chairman of the Board
Rod Beckstrom, President & CEO
Internet Corporation for Assigned Names and Numbers (ICANN)
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601

Dear Chairman Thrush and President Beckstrom:

I am again writing on behalf of the domain name investors and developers of the Internet Commerce Association in regard to the apparent intention of the accredited UDRP provider known as the Czech Arbitration Court (CAC) to unilaterally launch a parallel, expedited form of the UDRP on March 15, 2010 by mere amendment of its Supplemental Rules. For the reasons outlined below, we believe that ICANN should immediately advise the CAC that such action is a significant change in a fundamental policy that can only be undertaken following GNSO review and a vote of approval by the ICANN Board – and that if CAC proceeds to take this unilateral action it risks being stripped of its accreditation to adjudicate UDRP cases.

We also believe that ICANN should advise all contract parties subject to the UDRP – both registries and registrars—that they are not to be bound to comply with any decision rendered by the CAC under its pending fast track procedure because it is not consistent with the existing minimum procedural requirements of the UDRP.

Background

The ICA previously wrote to you on November 30, 2009 to express our concerns about the then-pending CAC proposal (correspondence at <http://icann.org/correspondence/corwin-to-beckstrom-dengate-thrush-30nov09-en.pdf>).

That letter stated that the CAC proposal:

- Greatly exceeded the scope of issues eligible to be unilaterally addressed by a UDRP provider in its Supplemental Rules

- Was at odds with the substantive and procedural consensus within the ICANN community and the ICANN Board in regard to the related, pending proposal for Uniform Rapid Suspension (URS) for new gTLDs
- Relates to an important policy issue that should only be addressed within the context of a formal UDRP Policy Development Process (PDP), an undertaking for which there appears to be growing consensus within the broad ICANN community

On November 11th ICANN publicly announced that the Czech Arbitration Court (CAC) was proposing its own version of fast track UDRP and that a 30 day comment period had started running, with input due by December 11th (<http://icann.org/en/announcements/announcement-2-11nov09-en.htm>). Details of the then-pending proposed alteration of CAC's Supplemental Rules were available at <http://www.icann.org/en/dndr/udrp/cac-proposed-supplemental-rules-11nov09-en.pdf> .

The comments filed with ICANN in regard to the CAC proposal – including those of the world's leading registrar, as well as of members of the STI drafting group – were unanimously opposed as regards both process and substance. ICA filed a formal comment to supplement our letter of November 30th.

Subsequent to ICANN announcement of the open comment period Mr. Zbynek Loebel, Counsel to the ADR.EU Center of the CAC and an author of the proposed Expedited Decision Case (EDC) variant of the UDRP, posted a statement at the Domain Name Wire website (<http://domainnamewire.com/2009/11/12/coming-soon-file-a-udrp-domain-name-dispute-for-250/>) stating, “We have been discussing our proposal with ICANN lawyers for several weeks before the public comments started and **we will implement the proposed procedure only after receiving an approval of ICANN.** We believe that our proposal is in compliance with UDRP.”(Emphasis added.)

Notwithstanding Mr. Loebel's prior commitment that CAC would not act in the absence of ICANN approval, CAC now stands ready to violate that commitment to respect ICANN's internal procedures and lead role in policymaking. On March 1, 2010, CAC announced that it would implement a low cost, fast track UDRP variant in just two weeks' time, on March 15, 2010: That announcement (available at http://www.adr.eu/arbitration_platform/news.php) reads in part as follows:

In the autumn of 2009 we published for public consultation (http://adr.eu/arbitration_platform/public_consultations.php) our proposal for the Expedited Decision which has been the subject of much discussion amongst the Internet Community. One of the criticisms of that proposal is that it introduces a dual-track UDRP that is not permitted under the Policy and Rules.

*We do not agree with this criticism but this is not the key aspect of the proposal. **The core of our proposal is the introduction of a substantially lower filing fee for simple cases***

where no response is filed and there is no need for Panellists to produce a detailed decision.

*ADR.EU has therefore decided to remodel our proposal to concentrate on this core idea. We attach a **changed Fee Schedule which will become effective as of 15 March 2010.** There will be no check-box decisions and the same decision form will apply for all the decisions – see attached. We anticipate that UDRP decisions in simple cases where no response is filed will be quite short and will just outline reasons for the decision. **Model forms of decisions in simple cases and in other than simple cases will be put prominently on our on-line platform as guidelines for our Panellists.***

*Panellists will also retain an absolute discretion even in cases where no response has been filed to notify ADR.EU that the proceedings are such that a more detailed decision is required and to require payment of the additional UDRP fee (see the attached proposed new Fee Schedule) in view of - inter alia - the complexity of the legal arguments, the length of the complaint or the amounts of exhibits to review. (**Emphasis in original**)*

This announcement makes several things clear:

- CAC intends to ignore the unanimous criticism registered by those responding to ICANN's request for comments.
- CAC does not intend to wait for ICANN to complete its review of those comments, much less approve its plan
- The revised CAC proposal to be implemented on March 15 is “the core” of what was proposed last fall, and thus should be viewed in the same light.
- Under the CAC proposal, panelists will have absolute discretion as to whether to accord a complaint expedited or full review – and complainants will be able to “game” this system by minimizing their legal arguments, length of complaint, and exhibits submitted.

Need for ICANN Intervention

The CAC, the most recently accredited UDRP provider, is clearly seeking to expand its market share of UDRP filings by setting a total (panelist and CAC administrative) filing fee of 500 Euro for a complaint that elicits no response, and where the panelist determines that no detailed decision is required -- versus 1300 Euros for disputed or full decision cases involving 1-5 domain names. If CAC is successful in attracting significant numbers of UDRP cases with this two-tier pricing system it is fairly predictable that WIPO and NAF may well follow its lead to protect their own market share of UDRP filings. Also, since it is axiomatic that a reduction in the price of a service will generally lead to higher consumption, this CAC initiative can be expected to result in an increase in the overall number of UDRP filings as complainants gamble on the possibility of being able to obtain a domain name transfer for a substantially reduced cost.

While the ICA has no objection to lower cost remedies for rights owners, changes in ICANN policy to further that goal must be achieved through a proper policy process that respects community consensus and requires ICANN Board approval – and that includes adequate balancing safeguards to protect the legitimate rights of domain name registrants. CAC’s unilateral attempt to exceed the proper scope of its Supplemental Rules, ignore the unanimous criticism aimed at its proposal, and proceed to implement the core of that proposal absent ICANN approval, is a flagrant abuse that will cause material harm to registrant rights.

The proposed CAC initiative, by granting absolute discretion to panelists as to whether a detailed decision is required, clearly violates existing requirements for the UDRP. The UDRP policy now in effect requires a decision to be rendered even in the face of a default (lack of response from registrant), as a default does not create an automatic presumption in favor of the complaint and the panelist must still determine the admissibility, relevance, materiality and weight of the evidence. CAC now proposes to render UDRP determinations absent such full review – and, as a practical matter, the fee schedule they propose (250 Euro for a single panelist) will not compensate for a review of acceptable quality consistent with current UDRP requirements.

Conclusion

CAC, by its own admission, is planning to ignore the unanimous criticism directed at its fast track UDRP proposal and to implement the core of that proposal in one week, thereby also reneging on its public commitment to hold implementation in abeyance until affirmative approval was received from ICANN. The dual price regime proposed by CAC will result in a procedure that is not in compliance with current UDRP policy and that will severely prejudice the rights of domain registrants.

ICANN should in no uncertain terms immediately advise CAC that its proposed dual price regime is outside the scope of Supplemental Rules and would result in a procedure that does not meet minimum UDRP standards -- and that its implementation will result in withdrawal of CAC’s accreditation to provide UDRP services.

ICANN should also give strong consideration to launching a UDRP PDP that can result in balanced reforms implemented in a uniform manner. Placing UDRP providers under contract to assure uniform procedures, grant greater weight to decision precedents, and provide a range of flexible ICANN enforcement tools to address provider misconduct should be a central goal of any UDRP reform effort.

Thank you in advance for your expeditious consideration of our request.

Sincerely,
Philip S. Corwin
Counsel, Internet Commerce Association

Cc: Doug Brent; Kurt Pritz