***Draft—For Discussion Only***

September --, 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]](#footnote-1). That document was issued on Friday, July 19th which we note was the day after the conclusion of the Durban meeting when most attendees were traveling home or to other destinations. We also note that there was no Public Announcement of the issuance of this document. It is unfortunate that this document was not released the prior week 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 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 comment on the application of the Arab Center for Dispute Resolution (ACDR) to become an accredited provider, in which we stated:

**[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]](#footnote-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”. Admittedly, the BC position 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.

That April 13th BC filing also stated:

Principals of the ACDR are affiliated with the BC, and engaged in a teleconference discussion with BC members on March 28th. **In that discussion ACDR made clear that they understand the need for a standard mechanism such as the BC has advocated and pledged that ACDR would adopt the standard when approved by ICANN**…The call also highlighted that the ACDR despite its best efforts cannot, in the absence of a standard mechanism adopted across all UDRP providers by ICANN, independently ensure that the UDRP is uniformly implemented across all UDRP providers. (Emphasis added)

We have checked again with principals of the ACDR and they continue to recognize the need for a standard mechanism and restated their willingness to abide by it.

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 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 would appreciate 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”. – 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. 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.” – 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), at the time of issuing its recommendation in regard to the NCSG’s request for reconsideration of adoption of “Trademark-Plus-Fifty” for the Trademark Clearinghouse, 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”. Finally, since the actual text of the URS contained in Module 5 of the Applicant Guidebook is far longer and more detailed than the text of the UDRP, why is an MOU appropriate for URS providers implementing that detailed directive but inappropriate for UDRP providers implementing a less detailed policy (although we recognize that the separate UDRP Rules provide additional implementation details)?
3. Why was a draft of the Status Report not published for public comment by the community in advance of its publication in final form, and why was the Report issued on the day after the Durban meeting ended rather than prior to it?
4. 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 standards would ICANN foresee any obstacles to implementing it? In this regard we note that 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.

Thank you in advance for your responses to our inquiries.

Sincerely,

Elisa Cooper

Chair, ICANN Business Constituency

<http://www.bizconst.org>

1. <http://www.icann.org/en/help/dndr/udrp/providers/uniformity-process-19jul13-en> [↑](#footnote-ref-1)
2. <http://forum.icann.org/lists/comments-acdr-proposal-01mar13/pdf7ZdKLP0o82.pdf> [↑](#footnote-ref-2)