

Public Consultation
EXPERTS WIPO ADR

Overview

afmic

1. Introduction

"Alternative Dispute Resolution" procedures (ADR) are an out-of-court method available to rights holders who consider that a third party has infringed their rights by filing a domain name or using it in a way that is detrimental to them.

For the TLDs for which Afnic is the Registry, the Syreli Dispute Resolution System has been available since November 21, 2011.

A project has been launched such that by the end of 2013, in parallel to the SYRELI ADR, an ADR with the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO Center) will allow claimants to choose to submit their disputes to an expert appointed by the WIPO Center.

Afnic opened this project for public consultation on its website for 22 days from Monday March 11 to Tuesday, April 2, 2013 at midnight in order to gather all the opinions, comments and suggestions about the project and in particular to:

- organize interventions by experts selected in accordance with transparent, non-discriminatory and publicly disclosed conditions;
- define the rules of conduct applicable to the experts;
- specify the means and tools to ensure the impartial and adversarial intervention of the experts.

A series of questions was asked about each of the points in the consultation.

As a result, the project was well received and widely relayed on the social media.

The submissions were from highly competent stakeholders concerned by the topics in question.

The project raised no objections and further ideas were submitted including:

- The protection of personal data with the de-personalization of the decisions in the proceedings;
- The creation of a large pool of skills acquired during a career without any strict age limit to benefit from the experience of older workers.

While the idea of a *numerus clausus* was unanimously rejected, the need to address potential conflicts of interest involving experts, using specific means over and above a simple statement of principle was widely approved.

This document presents an overview of the consultation.

2. Overview

2.1. Number and type of participants

In March and April, the information about the public consultation launched by AFNIC was relayed and discussed by observers (forum, journalists, individuals, web sites) in 42 occurrences on the social media, the tone of which was 100% positive. 62% of the occurrences were on Twitter, 56% of the occurrences were in English against 40% in French and 4% in German. The occurrences relayed the opening of the consultation and the invitation to take part.

Against this backdrop, between March 14 and April 2, six (6) submissions and an unconfirmed intention to participate were received.

Apart from the participation of an ICANN Ombudsman, all of the submissions received were from France, from a University lecturer on Arbitration, Intellectual Property and Contracts and a former Vice-Chancellor, a university professor in private law, a trademark attorney, a corporate lawyer specializing in intellectual property and an individual acting in a personal capacity.

2.2. Content of submissions

2.2.1. Candidate file

Proposal: To be included in the list of experts, each candidate must send a file with a detailed CV and a letter detailing their motivations for wishing to become an expert.

Opinions & Suggestions	Number of submissions
<p><u>1 / Contractual commitment</u></p> <ul style="list-style-type: none"> - Candidates sign an agreement undertaking to accept the texts, the ADR, and rules of conduct, with a contractual sanction clause in the event of non-compliance with same; - Candidates undertake to respect the confidentiality of the contents of ADR files, including the very existence of the files; <p><u>2/ Credentials and certificates</u></p> <ul style="list-style-type: none"> - Candidates certify they are entitled to their full civil rights and provide a criminal record proving same; - With respect to the proof of adequate skills and experience, candidates should be left free to chose the credentials supporting their application; - Candidates should prove their credentials and that they maintain them each year; - In practice, compiling credentials is unwieldy and unnecessary since most of the candidates will be members of regulated professions in which it is easy to check the information in the application (lawyers, ICC, university professors). A sworn statement about their credentials and experience should therefore be sufficient; - The sworn statement should be of the same type as that requested by the WIPO Center; <p><u>3/ Insurance</u></p> <ul style="list-style-type: none"> - With respect to the professional insurance of the experts, it was suggested that a group insurance policy be taken out by the organizers of the ADR for the experts who do not have insurance coverage for this activity; - When experts rule on a dispute in an ADR, they are not covered by their usual insurance, but why require insurance when, in the Uniform Dispute Resolution Policy (UDRP), the parties expressly waive all claims against the participants in the proceedings, including the Committee? This rule does not apply in cases of misfeasance, but neither do insurance policies cover damage caused intentionally. 	4
No opinion / No direct link with the proposal	2

To summarize:

- The candidates should undertake to comply with all the provisions of the rules and regulations of the ADR, including the ethical rules;
- A simple method is needed to prove the experts' skills, experience and moral character.



2.2.2. The Committee and the selection process

Proposal concerning the Committee: A Committee composed of members of Afnic staff and members of WIPO Center staff is responsible for selecting the experts. The Committee only deliberates using electronic means on the basis of documents and files (no physical meeting of the Committee, no meetings or hearings of candidates). The decisions of the Committee (registration or refusal of registration, delisting) are sent with explanations by email and by post to each candidate and/or expert.

Proposal on selection as an expert: The Committee independently studies the file for each candidate and checks that the latter meets the requirements, if necessary by contacting the professional organizations cited in the candidate's file. The Committee notifies each candidate of the reasons for its decision to accept or reject the person. In particular, the competence and experience of the experts in procedures relating to domain names are taken into consideration by the Committee as grounds for its decisions.

Opinions & Suggestions	Number of submissions
<p><u>1/ Odd number:</u></p> <ul style="list-style-type: none"> - The Committee should consist of an odd number of members; <p><u>2/ Even number:</u></p> <ul style="list-style-type: none"> - If there is an even number of members, give the casting vote to the Chair of the Committee or his/her representative; - The Committee should be set up by two organizations and therefore consist of an even number of members. If there is an equal number of votes, the candidate is rejected; - The Committee should have an even number of members and decisions should be taken not by a simple majority but by a qualified majority; if there are not enough members to do so, in case of doubt the expert (or candidate) has the benefit of the decision; - 3 members from the Afnic staff and 3 members from WIPO Center staff with decisions taken on an absolute majority basis with a casting vote being drawn before deliberation; - The electronic method used is appropriate. 	5
No opinion / No direct link with the proposal	1

To summarize:

- The Committee should consist of an even number of members with a tied vote decision system.

2.2.3. Public, transparent, objective and non-discriminatory selection criteria

Proposal: To choose an expert on the basis of their candidate file, the Committee considers the following criteria: (i) the expert must be a qualified lawyer in French law with a minimum



of ten (10) years of experience in the sector of intellectual property and domain names, and regularly attend training courses in this area; (ii) the expert must not be involved in any activity incompatible with the independence required to carry out the assignment, and (iii) the expert must not have committed acts resulting a disciplinary measure and/or legal proceedings within the last three (3) years.

Opinions & Suggestions from the 6 participants

1/ Skills and experience

- Skills and experience in ADR gained in specific professional organizations;
- Requisite expertise in trademark law, expertise in Intellectual Property law and Internet law;
- Expertise in new technology tools and practices and the Digital Economy;
- Expertise in domain names;
- Recruit experts who can demonstrate good legal reasoning;

2/ Expert profiles

- It would be better to use experts with broader expertise rather than the simply protection of intellectual property rights (protection of public order, freedom of expression, freedom of enterprise) in order to take into account:
 - The terms of article L45-2 of the French Electronic Communications and Telecommunications Act (CPCE),
 - Satisfactory understanding of the concepts of "good faith" and "the right to bring action", and
 - The freedom of communication and the freedom of enterprise of domain name holders.
- Recruit profiles with broader experience than just in intellectual property law, such as academics and more general profiles as needed by means of quotas;
- Do not exclude lawyers and trademark attorneys from the pool of experts, while being particularly vigilant about their independence and neutrality in view of their profession;
- Pool of experts: officials from the French National Institute of Industrial Property (INPI), academics, retired judges, lawyers and patent attorneys, etc.;

3/ Length of experience

- 10 years of experience are sufficient;
- Given the experience required, do not be too restrictive about an eventual age limit;

4/ Affidavit of good moral character and civil rights

- Affidavit by the candidates that they are entitled to their full civil rights;
- Membership in a regulated profession or civil service presupposes their good moral character;

5/ On the quality of the criteria

- Transparency, objectivity and publication of the criteria mean that everyone can be informed about the quality of the accepted experts, but also allow those who are not to apply a second time, after "correcting" the grounds for their refusal;
- The criteria are vague: what does "qualified" mean?, "Activity incompatible with the assignment"? Can experts be involved in several ADRs and other arbitration bodies for domain names? Are all types of penalties / sanctions / disciplinary measures to be applied?

To summarize:



- The list should comprise experts selected for their wide-ranging expertise according to the public, objective, transparent and non-discriminatory criteria already defined in the project.

2.2.4. The list of experts: registration period and number of experts

Proposal: The selected experts are registered for a renewable period of five years. There is no numerus clausus and candidate files may be submitted at any time during the year.

Opinions & Suggestions	Number of submissions
<p><u>1/ Duration and renewal</u></p> <ul style="list-style-type: none"> - Experts should be registered for a fixed, short term to ensure the list is renewed, initiate discussion and new insight; - 5 years with renewal, subject to review of a file on the experience of the expert over the previous period; - Organize an annual recruitment on a fixed date; - 5-year term, renewable once by decision of the Committee on the basis of previous experience; - Renewal further to explicit request justified by professional promotion and an updated CV; - 3-year term, renewable upon request of the expert with updated information about them and a new sworn statement; - Annual recruitment; - Draw up a list of substitutes. <p><u>2/ No numerus clausus</u></p> <ul style="list-style-type: none"> - No numerus clausus and "recruitment" according to the needs of the procedure; - A numerus clausus system is rigid, strict, constitutes a brake on opening to the outside world and could discredit the new procedure: since selection is based on candidate files and not on a competition there is a risk of negative assessment of the "clientelism" "cronyism" type; - No numerus clausus but enough experts according to the needs of the procedure. 	4
No opinion / No direct link with the proposal	2

To summarize:

- Renewal should be explicit, based on scrutiny of the expert's work over the previous period;
- The system should ensure there are enough experts throughout the year to meet the needs of the procedure.

2.2.5. Rules of conduct



Proposal: The experts undertake to be impartial and independent without taking into account any economic or personal interest in the result of the resolution of the disputes, which they must resolve in accordance with the principles of confidentiality, good faith, and fairness of an adversarial system. The expert must not accept an appointment for any assignment or must resign from any assignment in which a factual or legal issue may lead to a close, related, shared or conflicting interest.

Opinions & Suggestions	Number of submissions
<p><u>1/ On the rules as such</u></p> <ul style="list-style-type: none"> - Select experts who adhere to a recognized Code of Ethics; - Establish principles clearly and concisely laid out rather than rules that are too long and too detailed; - The rules proposed are sufficient since they include the main principles ensuring the independence of the system; - The rules proposed are sufficient; - It makes sense to build on what the WIPO Center does. <p><u>2/ On conflicts of interest and the expert's commitment</u></p> <ul style="list-style-type: none"> - Any conflict of interest must be reported by the expert before undertaking a case; - The ethical commitments are made when applying and when each assignment is accepted by the expert; <p>3/ The signing of a charter summarizing the ethical rules would be a positive, strong symbolic gesture in favor of the experts' independence and impartiality.</p>	4
No opinion / No direct link with the proposal	2

To summarize:

- A commitment on the general ethical principles should be made during the selection of the candidate followed by specific commitments before each assignment.



2.2.6. Delisting & guarantee of impartial, adversarial intervention by the experts

Proposal on the ethical commitment of the expert, prior to each assignment:

Commitment by the expert via a statement of acceptance, impartiality and independence for each assignment, published for the attention of the Claimants and Holders in the space dedicated to the case on the WIPO ADR platform.

Proposal on delisting: There is no right of registration on the list. The Committee may at any time modify the list of experts and withdraw experts from the list when they are no longer available, or if, during previous litigation proceedings, they regularly failed to meet the deadlines and requirements in the WIPO ADR regulations. In particular, experts will be removed from the list by the Committee in the event of an infringement of any one of the established rules of conduct set out in the WIPO ADR regulations, and in case of sanctions against an expert by an appropriate professional association.

Opinions & Suggestions	Number of submissions
<p><u>1- With regard to commitments</u></p> <ul style="list-style-type: none"> - For each file, the experts sign a statement of impartiality and independence, and failing same, report any item that could pose a reasonable doubt about their neutrality; <p><u>2- With regard to guarantees of impartiality: incompatibility of expert / counsel</u></p> <ul style="list-style-type: none"> - Avoid the subjective impartiality of experts (i.e. ensure there is no conflict of interest or bias in a given case); - Ensure the objective impartiality of the experts through a strict, general system of incompatibility between the status of an ADR arbitrator and that of a representative of the parties in an ADR; - The purpose is to avoid <ul style="list-style-type: none"> * what happened in the past when in an ADR at least one third of the experts arbitrating disputes concerning a TLD had also represented at least one claimant in an ADR procedure for the same TLD; * "switching" in which one counsel brings a claim before an arbitrator which the counsel has previously arbitrated; * having a legal counsel for Afnic appointed as an expert to arbitrate disputes on the .fr zone, a TLD managed by Afnic, the counsel's client; - Prohibit on principle WIPO ADR experts from representing claimants or holders in any other ADR involving the corresponding TLDs; 	5

<p><u>3- With regard to delisting</u></p> <ul style="list-style-type: none"> - If a conflict of interest is found, the expert must be removed from the list; - In the event of a complaint against an expert, an ad hoc committee composed partly of experts investigates the complaint and if necessary ask the expert concerned to withdraw from the list; - Annual Meeting of the Committee to deal with complaints relating to conflicts of interest and breaches of ADR rules and regulations, with exclusion of the expert in the event of a 2/3 majority vote; - Experts should be able to request their withdrawal from the list at any time; - In the event of repeated complaints from unrelated parties and the expert cannot provide a satisfactory explanation, the Committee must temporarily or permanently withdraw the expert from the list; <p><u>4- With regard to control</u></p> <ul style="list-style-type: none"> - The experts undertake to follow vocational training that can be carried out during the course of their professional activity; - Annual vocational training certificate; - Avoid burdening experts with ancillary administrative requirements: they may be seen as an indication of suspicion and discourage the better elements; - The training requirement is vague and difficult to verify. It is suggested on the contrary that experts should be obliged to attend seminars with all the experts once a year at the initiative of the WIPO Center and Afnic; - Over-cumbersome rules (frequent activity reports, certificates, etc.) will alienate intellectual property practitioners when in principle they are the category most capable of taking decisions in the context of an ADR; - Control by appeal to a court of law. 	
No opinion / No direct link with the proposal	1

To summarize:

- The objective impartiality of the experts must be ensured through a strict, general system of incompatibility between the status of an expert and that of a representative of the parties in an ADR;
- Experts should be de-listed in the case of proven misfeasance;
- The experts need vocational training.

2.2.7. Designation of an expert for each assignment

Proposal: Given the overall lead-time of two months between opening a case file and the publication of the decision, it has now been proposed that the expert be appointed by the WIPO Center. Neither the Claimant nor the Holder may refuse an expert once s/he has been designated by the WIPO Center.



Proposal (a): Based on the same constraint of lead-times, another proposal to appoint an expert for an assignment could be as follows: "The WIPO Center appoints two experts with an order of preference "Expert 1" and "Expert 2", enabling the Claimant and/or the Holder to refuse Expert 1 and have the case file reviewed by Expert 2. If no action is taken by the Claimant and/or the Holder, Expert 1 is automatically appointed."

Opinions & Suggestions	Number of submissions
<ul style="list-style-type: none"> - The parties must be entitled to report a conflict of interest; - The expert should be chosen by the parties and failing same by his/her expert peers; - These proposals are satisfactory insofar as they avoid delaying tactics in the event of disagreement about the appointed expert; - In favor of the proposal concerning the appointment of an expert by the WIPO Center of its own motion (simple, fast and parties can't usually choose the judge); - In favor of the proposal concerning the appointment of an expert by the WIPO Center of its own motion: the procedures for appointing experts by the WIPO Center have been tried and tested; - In favor of the proposal to appoint Experts 1 and 2 and also to allow Parties to report a conflict of interest. 	5
No opinion / No direct link with the proposal	1

To summarize:

- Expert #1 should be appointed by the WIPO Center of its own motion and
- If a conflict of interest is raised, expert #2 should be appointed by the WIPO Center of its own motion.

2.2.8. Free field

Proposal: After examining the project and answering the questions above, the participants were invited to add other ideas, comments or suggestions.

Ideas, comments and other suggestions	Number of submissions
<ul style="list-style-type: none"> - The Committee must ensure the quality of the roster of experts; - Comments were made about the basis of the arbitration tribunal as it is organized by the Code of Civil Procedure: when sentences refer to previous sentences, this results in a kind of "case law" which appears to be contrary to Article 1450 of the Code of Civil Procedure which confines the jurisdiction of the institution to the organization of the procedure; this means it is the expert in person and not the organizing institution that hands down decisions; - The term "arbitrator" may be preferable to that of "expert"; - A brief training session for experts by Afnic-WIPO Center would align practices better; - The use of retirees would ensure the availability of experts; - Just as the public consultation was well publicized on the Afnic website and on legal information sites, the same level of publication is expected for domain name practitioners as for the call for applications by experts; - Do not create a closed pool of domain name experts and allow access to corporate lawyers with experience in domain names; - Maintain a high level of protection of personal data: <ul style="list-style-type: none"> * Do not publish the names and/or first names of claimants and holders of domain names * De-personalize decisions. 	5
No addition	1

3. Conclusion

Afnic would like to thank all of the participants in this consultation, for enriching the project with their contributions both by confirming most of the policy options taken and by making proposals for the others.

With regard to the rest of the project, Afnic and the WIPO Center are producing draft Experts WIPO ADR regulation to be presented to the Minister for Electronic Communications for her approval and publication in the Official Journal.

Afnic and the WIPO Center will then open the call for applications in order to select the experts.

