

July 15, 2011

**Comments on the Preliminary GNSO Issue Report on
The Current State of the Uniform Dispute Resolution Policy**

EXECUTIVE SUMMARY

The Preliminary GNSO Issue Report on the Current State of the Uniform Dispute Resolution Policy¹ (UDRP Report) should be withdrawn and replaced. Even as a preliminary report, it violates the bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN) in important respects:

- ♦ It was delivered 98 days later than the February 18, 2011 deadline specified under the bylaws. This delay imposed an unwarranted delay on the policy-making process.
- ♦ It stacks the deck against commencing a Policy Development Process (PDP) rather than identifying support for it, as required by the bylaws.
- ♦ It fails to answer the questions posed by the GNSO Council. Nothing is said about how the current Uniform Domain Name Dispute Resolution Policy (UDRP) addresses cybersquatting or how cybersquatting is effectively defined under the existing UDRP language, or about whether that definition should be reviewed or changed. And rather than offering suggestions about how to manage a PDP, the Report offers advice about how to avoid conducting one.

Unfortunately, the report illustrates ICANN's institutional tendency to wink at its own rules. The bylaws authorize the staff to offer its recommendation in an Issue Report, not to substitute its judgment for the GNSO Council's or to misstate the level of community support for a particular policy. Given the importance of the UDRP and of ICANN's fidelity to its own bylaws, the report should be withdrawn and replaced by a new one that fully complies with the ICANN bylaws and the GNSO Council's instructions.

COMMENTS

These comments are submitted in response to the request for public comments by ICANN regarding the UDRP Report.

¹ Preliminary GNSO Issue Report on the Current State of the Uniform Dispute Resolution Policy 17-18 (May 27, 2011), *available at* <http://gns0.icann.org/node/24715>.

Summary of the UDRP Report

Issued on May 27, 2011, the UDRP Report offers a multi-part recommendation by the ICANN staff. Its principal recommendation is “that a PDP on the UDRP *not* be initiated at this time.”² As an alternative, staff recommends that “if the GNSO Council nonetheless believes that the UDRP should be reviewed ... [it should convene] a small group of experts to produce recommendations to improve the *process or implementation* of the UDRP policy as an initial step.”³ Staff adds that if the Council continues to desire “a more thorough review of the UDRP” after this group of experts has produced recommendations, it “could subsequently initiate a more focused PDP at that time.”⁴

Staff asserts, as the main reason to avoid conducting a PDP, that “[t]he overwhelming sentiment from the UDRP Webinar is that although it is not perfect, the UDRP should be untouched.”⁵ Supporting this conclusion were statements by panelists during a staff-organized Webinar that included “UDRP experts and representatives from a broad cross-section of stakeholders” and statements by “UDRP providers in response to a questionnaire issued by Staff.”⁶ Only statements by a single UDRP Webinar panelist, Professor Konstantinos Komaitis, were cited in support of a PDP. He argued that “the UDRP suffers from various procedural and substantive flaws,” as well as “the lack of due process procedures and protections for free speech” as reasons to conduct a full-fledged PDP.⁷

Despite the staff’s recommendation not to conduct a PDP, ICANN’s general counsel certified that “commencing a PDP on the UDRP would be in scope for the GNSO Council.”⁸ In reaching that conclusion, counsel determined that the issue (1) is within the scope of ICANN’s mission statement; (2) is broadly applicable to multiple situations or organizations; (3) is likely to have lasting value or applicability, with need for occasional updates; (4) will establish a guide or framework for future decision-making; and (5) implicates or affects an existing ICANN policy.⁹

Background of the UDRP Report

The UDRP Report was produced in response to a unanimous resolution by the GNSO Council:

RESOLVED #2, the GNSO Council requests an Issues Report on the current state of the UDRP. This effort should consider:

² *Id.* at 4 (emphasis added).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 14.

⁶ *Id.* at 3-4.

⁷ *Id.* at 15.

⁸ *Id.* at 17.

⁹ *See id.* at 15-17.

- How the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies/inequalities associated with the process.
- Whether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated. The Issue Report should include suggestions for how a possible PDP on this issue might be managed.¹⁰

This request for an Issue Report (IR) came at the end of a period of deliberation by the GNSO lasting three years.

In 2008 the GNSO Council requested an IR addressing domain abuse in registry-registrar agreements.¹¹ ICANN staff recommended, in part, that the GNSO Council determine where “further research may be needed” on matters including the question of whether “an initial review or analysis of the UDRP [is] required.”¹²

Following this recommendation, the GNSO Council chartered the Registration Abuse Policies Working Group (RAPWG),¹³ which submitted a 126-page final report in May 2010. Its first recommendation (supported unanimously) was “the initiation of a Policy Development Process by requesting an Issues Report to investigate the current state of the UDRP, and consider balanced revisions to address cybersquatting if appropriate.”¹⁴ In particular, the RAPWG recommended that such a report address (1) “[h]ow the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies/inequalities associated with the process” and (2) “[w]hether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated.”¹⁵ This language was repeated verbatim in the GNSO Council’s February 3, 2011 resolution requesting an IR.¹⁶

The Registration Abuse Policies Implementation Drafting Team (RAP-IDT) was then organized to “draft a proposed approach with regard to the recommendations contained in the [RAPWG] report.”¹⁷ Among the leading criteria used by the RAP-IDT to evaluate the RAPWG recommendations was the degree of consensus. “Recommendations that received unanimous consensus were given high priority, reflecting the value assigned

¹⁰ ICANN, Generic Names Supporting Council, Council Resolutions, No. 20110203, Resolution #2 (Feb. 3, 2011), available at <http://gns0.icann.org/resolutions/#201102>.

¹¹ ICANN, Generic Names Supporting Council, Council Resolutions, No. 20080925-1 (Sep. 25, 2008), available at <http://gns0.icann.org/resolutions/#200809>.

¹² ICANN, *Issues Report on Registration Abuse Policies* 6 (Oct. 29, 2008), available at <http://gns0.icann.org/issues/registration-abuse/gns0-issues-report-registration-abuse-policies-29oct08.pdf>.

¹³ See ICANN, Registration Abuse Policies Working Group Final Report 3 (May 29, 2010).

¹⁴ *Id.* at 32.

¹⁵ *Id.* at 33.

¹⁶ See Council Resolutions, *supra* note 10.

¹⁷ ICANN, Registration Abuse Policies Implementation Drafting Team, *Proposed Approach to the Recommendations Contained in the Registration Abuse Policy (RAPWG) Final Report* 1 (Nov. 15, 2010), available at <http://gns0.icann.org/fr/node/15575>.

to them by the diverse stakeholders in the RAPWG.”¹⁸ RAP-IDT ranked the UDRP PDP fourth on the list of RAPWG recommendations.¹⁹

The GNSO Council’s February 3, 2011 resolution followed.

Analysis

1. Untimely

The UDRP Report was delivered late—98 days late, to be exact. Annex A to the ICANN Bylaws unambiguously provides that “[w]ithin fifteen (15) calendar days after receiving ... a properly supported motion from a [GNSO] Council member ... the Staff Manager will create a report”²⁰ Indeed, this deadline was considered serious enough by those who drafted the bylaws to be stated twice.²¹ Fifteen calendar days after the GNSO Council’s resolution of February 3, 2011 fell on February 18, 2011. That was the bylaws deadline, the date when the UDRP Report should have been presented to the Council. Instead, it was presented on May 27, 2011, 98 days after the deadline or 750% longer than the period prescribed by the bylaws.

Nowhere does the UDRP Report mention its untimeliness, much less explain it. No exception to the deadline appears in the bylaws. No different deadline was stated in the GNSO resolution. And no extension of time by the GNSO Council is identified as justifying the delay (assuming that an extension itself might be justified under the current bylaws).²² On these points the UDRP report is simply silent.

Untimeliness is particularly significant in this instance. Few of ICANN’s bylaws prescribe any deadline, leaving ICANN staff, officers, and directors generally free to complete projects in a “reasonable” time. An IR is different. By design, the staff’s work is to be completed quickly after the GNSO Council resolves to consider commencing a PDP. That the UDRP Report was delivered more than three months late has imposed a delay in the policy-making process that violates ICANN’s bylaws.

2. Substantive Inconsistency with Bylaws

The UDRP Report is also substantively inconsistent with the bylaws.

ICANN bylaws require that an IR contain at least the following:

¹⁸ *Id.*

¹⁹ *Id.* at 6.

²⁰ Bylaws for Internet Corporation for Assigned Names & Numbers, annex A, § 2 (as amended March 18, 2011), *available* at <http://www.icann.org/en/general/bylaws.htm>.

²¹ *Id.* at §§ 2 & 2(f) (requiring delivery of the Issue Report “[w]ithin fifteen (15) calendar days” and referring to “the fifteen (15) day deadline”). Proposed amendments to Annex A would have given the ICANN staff 45 days to complete an IR. Even that generous deadline, not yet adopted, is less than half as long as the time taken to produce the UDRP Report. *See* ICANN, Policy Development Process Work Team, *Final Report & Recommendations* 12-13 (May 31, 2011), *available* at <http://gnso.icann.org/issues/pdp-wt-final-report-final-31may11-en.pdf>.

²² The validity of an extension beyond the 15-day deadline is doubtful. Otherwise, it would be superfluous for the PDP Working Team to recommend an amendment to the bylaws providing for it. *See id.*

a. The proposed issue raised for consideration; *b.* The identity of the party submitting the issue; *c.* How that party is affected by the issue; *d.* Support for the issue to initiate the PDP; *e.* A recommendation from the Staff Manager as to whether the Council should initiate the PDP for this issue²³

In addition, the staff recommendation must “include the opinion of the ICANN General Counsel regarding whether the issue proposed to initiate the PDP is properly within the scope of the ICANN policy process and within the scope of the GNSO.”²⁴ This requirement was amply satisfied when the General Counsel found the UDRP PDP within the GNSO Council’s scope, based on an analysis of all the bylaws criteria.²⁵

Unfortunately, the UDRP Report falls short of satisfying subsection (d) by all but failing to identify “[s]upport for the issue to initiate the PDP.”²⁶ The critical section of the Report is entitled “Consensus—A PDP on the UDRP May Undermine Its Effectiveness.”²⁷ Only a single expert, Professor Komaitis, is cited in support of a PDP while several other experts are cited in opposition to it. Nowhere in this section does the UDRP Report quote from the extensive work by the RAPWG or the RAP-IDT, both of which recommended a PDP unanimously. Stacking the deck against the proposal for a PDP is inconsistent with the bylaws.

Worse yet, the UDRP Report fails to answer the questions posed by the GNSO Council. Its resolution requested the ICANN staff to create an IR discussing (1) “[h]ow the UDRP has addressed the problem of cybersquatting to date”; (2) “any insufficiencies/inequalities associated with the process”; (3) “[w]hether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated”; and (4) “suggestions for how a possible PDP on this issue might be managed.”²⁸ Only item 2 is discussed at any length, and the tenor of that discussion is heavily weighted in favor of the UDRP in its current form.²⁹ Other items are omitted altogether. The UDRP Report does not discuss how the current UDRP addresses cybersquatting. It says nothing about how cybersquatting is effectively defined under the existing UDRP language or about whether that definition ought to be reviewed or changed. And rather than offering suggestions about how to manage a PDP, the Report offers unsolicited advice about how to avoid conducting one.³⁰

²³ Bylaws, *supra* note 20, at §§ 2(a)-(e) (italics added).

²⁴ *Id.* at § 2(e).

²⁵ The UDRP Report, *supra* note 1, at 17 (analyzing the proposed PDP according to the criteria set forth in section 2(e) of Annex A to the ICANN bylaws and concluding that “it is the opinion of the ICANN General Counsel that commencing a PDP on the UDRP would be in scope for the GNSO Council”).

²⁶ Bylaws, *supra* note 20, at annex A, § 2(d).

²⁷ The UDRP Report, *supra* note 1, at 14.

²⁸ Council Resolutions, *supra* note 10, at Resolution #2.

²⁹ *See* the UDRP Report, *supra* note 1, at 9 (“By accommodating evolving norms and practices, the UDRP has proven to be a flexible and fair dispute resolution system.”).

³⁰ *Id.* at 4 (recommending that the GNSO Council convene “a small group of experts to produce recommendations to improve the *process or implementation* of the UDRP” and only after that group has produced recommendations does that staff recommend “a more focused PDP”).

The GNSO Council's decision to commission an IR to seek the staff's assistance in commencing a PDP on the UDP originated with the ICANN staff's own recommendation. It was, after all, the staff that suggested researching whether "an initial review or analysis of the UDRP [is] required."³¹ Now—three years later—the staff argues against a PDP. It is difficult to understand how the staff can be so inconsistent, but in any event the GNSO's time and resources should not be subject to being turned on and off at a whim.

In short, the UDRP Report is untimely and unresponsive. It satisfies neither the timeline prescribed by the bylaws nor the substantive criteria of an IR. Rather than assisting the GNSO Council, the Report dismisses the Council's questions and concerns and presents a one-sided advocacy brief against conducting a PDP. This it does despite the barely acknowledged unanimous support for a PDP on the UDRP expressed by the Council, the RAPWG, and the RAP-IDT.

These process failures, distinct from the merits of reviewing the UDRP or of what the UDRP should be, are significant in themselves. Even as a preliminary work product, the UDRP Report illustrates ICANN's institutional tendency to wink at its own rules. Nothing in the bylaws authorizes the staff to substitute its judgment for the GNSO Council's or to misstate the level of community support for a particular policy. The Report sadly fails to meet the basic elements of an IR and should be rejected as inconsistent with the bylaws and with the Council's resolution.

Informal reports from multiple reliable sources allege that staff members were privately pressured to oppose a PDP in this IR. Such reports are disappointing if true. Applying personal pressure on the staff is an odious tactic in ICANN's multi-stakeholder community, but giving into pressure only invites more of the same. The right answer instead is for the staff to cleave to the bylaws and to advise any concerned stakeholder of the fair, open, and public opportunities to advocate a policy. Any other response damages the multi-stakeholder process by empowering a single stakeholder to prevail over every other in private. In this instance, if the rumors are true, a three-year-long policy deliberation was hijacked at the last minute behind closed doors. That result not only violates the bylaws, it is insulting to GNSO members and other stakeholders who invested many hours in researching and discussing the need for a fresh review of the UDRP.

Recommendations

The UDRP deserves review according to a process that is faithful to the bylaws, and staff should be given another chance to get it right. Accordingly, the following steps are recommended:

1. The GNSO Council should hold a vote on the UDRP Report, formally resolving that it is withdrawn as inconsistent with the ICANN bylaws and directing staff to produce a revised IR that fully complies with the bylaws within 15 calendar days.
2. Following publication of the revised IR, public comment on it should be available for no fewer than 30 days.

³¹ ICANN, *Issues Report*, *supra* note 12, at 6.

Conclusion

The UDRP Report conflicts with the ICANN bylaws. Not only was it issued 98 days late, it fails to meet the bylaws criteria for an IR and is unresponsive to the GNSO Council's directives. Given the importance of the UDRP and of ICANN's fidelity to its own bylaws, the current UDRP Report should be withdrawn and replaced by a new IR that fully complies with the ICANN bylaws and the GNSO Council's instructions.