



ARTICLE 19 response to the ICANN Status ICANN Uniform Domain Name Dispute Resolution Policy Status Report (UDRP Report)

Introduction

ARTICLE 19 welcomes the efforts of the Internet Corporation for Assigned Names and Numbers (ICANN) to engage in a multi-stakeholder process by holding this Public Comment Process for the ICANN Uniform Domain Name Dispute Resolution Policy Status Report (UDRP Report).¹

This consultation is an important opportunity, as the policy and any future amendments to the UDRP rules will impact considerably the human rights of internet users. We thus appreciate the opportunity to provide ICANN with our position on the topic and we look forward to the discussions that will follow.

This statement is made on our own behalf. We also endorse comments by the Non Commercial Stakeholder Group (NCSG) and Non Commercial User Constituency (NCUC).

About ARTICLE 19

ARTICLE 19 is an international human rights organisation that works to protect and promote free expression, which includes the right to speak, freedom of the press, and the right to access information. With regional programmes in Africa, Asia, Europe, Latin America, and the Middle East and North Africa, we champion freedom of expression at the national, regional, and international levels. The work of ARTICLE 19's Digital Programme focuses on the nexus of human rights, Internet infrastructure, and Internet governance.

At ICANN, we engage through the ICANN Empowered Community as members of the Generic Names Supporting Organisation (GNSO) under the Non-Commercial Users Constituency (NCUC) and as members of the At-Large Advisory Committee (ALAC) directly as part of the European Regional At-Large Organisation (EURALO). We work within the ICANN community with the main purpose of raising awareness of how the Domain Name System (DNS) affects human rights. This aim would ensure that Section 27.2 of the ICANN Bylaws (on Human Rights) and other Bylaws with an impact on human rights are

¹ Policy Status Report: Uniform Domain Name Dispute Resolution Policy (UDRP) <<https://www.icann.org/en/public-comment/proceeding/policy-status-report-uniform-domain-name-dispute-resolution-policy-udrp-03-03-2022>> accessed on 17 March 2022



implemented in full and put the user at the centre of policy development processes.

Summary

At the beginning of March 2022, ICANN published the ICANN Uniform Domain Name Dispute Resolution Policy Status Report (UDRP Report), seeking input from the community.

We welcome the work of ICANN on releasing the document in line with Workstream 2 Recommendations on ICANN Transparency. Our analysis shows that, primarily, the document contains several positive and commendable provisions, such as those related to proactive disclosure reporting.

However, we note that the UDRP Report fails to provide details of trademark and servicemark related cases or details of diversity data points which does not allow for sufficient independent human rights analysis and scrutiny of ICANN processes.

We also note that the UDRP Report uses the term “abuse” to generally address issues relevant to the UDRP, including trademark and service mark infringements. Given its lack of clarity and specificity, ICANN should refrain from any use of the term “abuse” until there is a clear definition agreed by the ICANN community.

ARTICLE 19 therefore urges ICANN to consider the recommendations below, which would help align the ICANN Status ICANN Uniform Domain Name Dispute Resolution Policy (UDRP Report) more closely with international law and best practice.

Comments regarding the report data

We welcome the release of the UDRP Report as it consolidates information into a single document, provides insights into UDRP procedures and provides a brief analysis of data on previous UDRP complaints and decisions.

By releasing this data, the UDRP Report will help create a culture that enhances data-driven policy making within ICANN and help ensure that any further reviews of the UDRP and of Rights Protection Mechanisms (RPMs) in all gTLD Policy Development Processes (PDP) are carried out in line with the 2019 Workstream 2 Recommendations on ICANN Transparency, the GNSO PDP 3.0 Implementation Plan and the 2018 Consensus Policy Implementation Framework.

However, we are concerned that the data released does not provide sufficient information on UDRP complaints. The data only lists the number of complaints



handled by each of the six dispute resolution providers and discloses numbers of complaints accepted, rejected, or split decisions and does not disclose further whether these were trademark or service mark issues. This lack of transparency on the exact details or citations of the trademark and servicemark related disputes is concerning, as registrants can have their domain names registrations suspended or blocked whenever they have been alleged to have violated the UDRP, sometimes without any opportunity for response or appeal. Trademark and servicemark issues can have particular implications for the right to freedom of expression, as protected forms of expression such as protest or parody may serve as grounds for fair use. Without information regarding the details of trademark and servicemark disputes, stakeholders cannot independently evaluate whether the outcomes respect and uphold international human rights principles, as ICANN is required to do under its bylaws.

Additionally Workstream 2 Recommendations require that the following metrics be used as a common starting point for all diversity considerations within ICANN: 1) Geographic/regional representation; 2) Language; 3) Gender; 4) Age; 5) Physical Disability; 6) Diverse Skills; and 7) Stakeholder group or constituency. We note that the report does not disclose any of these data points in relation to UDRP complaints and decisions.

By providing only vague and incomplete data, the UDRP Report does not allow stakeholders to independently evaluate whether the UDRP mechanism is accessible, fair, and rights-respecting for all impacted individuals and communities, and whether ICANN is meeting its vision of being a truly global organisation.

We thus recommend that the UDRP Report is redrafted to provide more information on the UDRP complaints including information on details of exact trademark and servicemark cases and data on diversity considerations. In the instance that these data are not available, they must be collected going forward and released in future iterations of the UDRP Report.

Comments regarding the use of the term “abuse”

We are concerned by the use of the term “abuse” across the report to refer to trademark and service mark infringement. The UDRP was created in 1999 with the goal of creating a dispute resolution procedure that deals with challenges limited to the intersection of domain names and intellectual property rights, with specification of “trademarks” and “service marks”. On the other hand, “abuse” is a vague term with no consistent definition in the context of ICANN and the DNS. While ICANN’s Guide to Registrar Abuse Reporting Practices defines DNS abuse in such a way that includes, but is not limited to, trademark infringement issues,



the 2019 Framework to Address Abuse has a more technical definition that does not include trademark infringement at all. By using a vague and overly broad term such as “abuse” – which implicates issues as far-reaching as botnets, malware, and phishing – the UDRP Report opens the door to expanding the scope of the UDRP beyond the clear and limited issue for which it was created.

We thus recommend that the UDRP Report is redrafted to use a more specific and appropriate term, such as “trademark infringement and service mark infringement”, in place of “abuse”. We also take this opportunity to recommend more generally to ICANN and its board that any process to develop a working definition of DNS abuse must include a multi-stakeholder approach, through efforts such as meaningful public comments proceedings or consultations, that considers all positions on DNS abuse from across the ICANN Empowered Community.

Comments regarding dispute resolution provision

We note that there are currently six ICANN-approved dispute resolution providers authorised to conduct administrative proceedings:

1. World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, based in Geneva, Switzerland
2. FORUM, based in Minneapolis, Minnesota in the United States
3. Asian Domain Name Dispute Resolution Centre (ADNDRC), based both in mainland China and Hong Kong
4. Czech Arbitration Court (CAC), based in Prague, Czech Republic
5. Arab Center for Dispute Resolution (ACDR), based in Amman, Jordan
6. Canada International Internet Dispute Resolution Centre (CIIDRC), based in Vancouver, Canada

However, four of these six providers are based in North America and Central Europe; conversely, there is not a single provider based in Central and South America or Africa. Due to the lack of available information, it is unknown whether there have been any applications from providers in these regions or what criteria ICANN used to evaluate such applications. ICANN should not only provide more data on the process for accepting dispute resolution providers in future UDRP reports, but it should go farther and actively facilitate the recruitment of dispute resolution providers from regions where there may be a lack of competent applications. This would significantly address the disproportionately high financial and cultural barriers to access to justice for individuals and communities based in the Global South, and ensure that ICANN achieves its vision of being a truly global organisation.



Conclusion

ARTICLE 19 is grateful for the opportunity to engage with ICANN in this process, in light of the Workstream 2 Recommendations and the five objectives under ICANN's Strategic Plan for Fiscal Years 2021-2025.

We look forward to continued collaboration to strengthen human rights considerations in the Domain Name System and particularly in ICANN's policies and procedures. We welcome further engagement opportunities and avail ourselves in case of any questions or concerns.

If you would like to discuss this analysis further, please contact Ephraim Percy Kenyanito, Senior Digital Program Officer, at ephraim@article19.org. Additionally, if you have a matter you would like to bring to the attention of the ARTICLE 19 Digital Programme, you can contact us by e-mail at digital@article19.org.