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ICANN's New Ombudsman Has a 'Community' Service Mission

BY M. SCOTT DONAHEY

On July 1, 1997, the president directed the U.S. Commerce Secretary to privatize the domain name system, referred to in this article as DNS, in order to increase competition and to facilitate international participation in its management. In 1998, the Commerce Secretary called for creating a private corporation to manage Internet names and addresses. See Statement of Policy on the Management of Internet Names and Addresses at www.ntia.doc.gov/ntia-home/domainname/6_5_98dns.htm.

The four DNS functions that were to be performed by the new corporation were:

- to set policy for and direct the allocation of Internet protocol number blocks;
- to oversee the operation of the Internet root server system;

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ADR PROCESSES

- to oversee policy for determining the circumstances under which new top-level domains would be added to the root system; and
- to coordinate the development of other technical protocol parameters as needed to maintain universal connectivity of the Internet.

In addition, the new corporation was to establish minimum criteria for registrars that would promote registrar competition. Finally, the new corporation would oversee and implement a program for the resolution of disputes between domain name registrants and trademark holders, based on recommendations developed by the World Intellectual Property Organization.

In late 1998, the Internet Corporation for Assigned Names and Numbers—better known as ICANN—was formed as a California not-for-profit corporation. ICANN entered into a contract with the Department of Commerce to take over DNS management.

Since its inception, ICANN has served as a lightning rod for public criticism of the

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ICANN's Ombudsman

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DNS, and has received both praise and blame for the operation of the Uniform Domain Name Dispute Resolution System. In an effort to provide more accountability, ICANN modified its bylaws to, among other changes, create an ombudsman office, which, according to general counsel John Jeffrey, ICANN hopes to have operating by the end of the month.

While having many similarities to corporate and governmental ombudsmen, the ICANN ombudsman is most closely akin to the NASD Inc.'s ombudsman. The ICANN ombudsman's power has been carefully circumscribed, and the ombudsman was directed to develop a policy that rejects out of hand inappropriate claims. The ICANN ombudsman's restrictions create a different office from that of any of the traditional ombudsmen.

HOW IT WORKS IN COMPANIES

The typical corporate ombudsman is employed by the corporation to assist the company's employees in resolving work-related problems. Brenda V. Thompson, "Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsman Be Entitled to Privilege?" 61 *U. Cin. L. Rev.* 653 (1992). Most corporate ombudsmen report to a chief executive officer, or to a direct report of the CEO. Mary P. Rowe, "The Corporate Ombudsman: An Overview and Analysis," *Negotiation Journal*, 127, 128 (April 1987). A corporate ombudsman's role is to serve as a neutral or impartial manager, providing confidential and informal advice to employees in the workplace setting. (A legal privilege generally hasn't been accorded to ombudsmen communications. See 12 No. 9 *Fed. Litigator* 260 (West Group 1997); See also Rowe, *supra*, and Thompson, *supra*.)

The corporate ombudsman acts as factfinder, investigator, and counselor and gives feedback to management. See Thompson at 656; see also F. Waxman and H. Gadlin, 4 *Disp. Resol. Mag.* 21 (Summer 1998). The corporate ombudsman may informally resolve the dispute or employ mediation, advocacy, and arbitration in an effort to resolve it. Even though the ombuds-

man is directly employed by the corporation and reports to corporate officers, to be successful, the ombudsman must attain the trust and confidence of the employees. See Thompson, *supra*, at 658. This can be difficult. In performing the assigned roles, a good ombudsman will take into account the structure and culture of the organization. Generally, the corporate ombudsman is permitted to keep the source of the grievance or complaint confidential. See Waxman and Gadlin, *supra*, at 23. The exception is when there is a perceived threat to life or safety. Rowe, *supra*, at 129.

THE GOVERNMENT'S WAY

The governmental ombudsman is appointed by law, usually by the legislature, to handle complaints concerning administrative and judicial actions. Shirley A. Wiegand, "A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model," 12 *Ohio St. J. on Disp. Resol.* 95, 98 (1996). The hallmarks of a governmental ombudsman are functional autonomy, independence of both legislature and executive, popular accessibility, and visibility. *Id.*

While the ombudsman is empowered to investigate, criticize, recommend, and publicize, the ombudsman has no power to override administrative actions. Kenneth C. Davis, "Ombudsmen in America: Officers to Criticize Administrative Action," 109 *U. Pa. L. Rev.* 1057, 1059 (June 1961). The governmental ombudsman can investigate complaints, issue reports, and make investigations. While the governmental ombudsman generally has a duty of confidentiality, including as to the identity of the complainant, in certain countries (such as Sweden and Finland), a case, once completed, is open to public examination. See Wiegand, *supra*.

THE NASD'S VIEW

The National Association of Securities Dealers ombudsman is an independent and confidential channel for complaints concerning the operations, enforcement, or other activities of the NASD or its staff. See www.nasd.com/corp_info/ombudsman.asp. The NASD ombudsman serves as an informal source for discussion, shuttle diplomacy and mediation.

The NASD ombudsman has no power to independently resolve disputes. The office is not intended to replace already existing programs of adjudication, dispute resolution, internal review, or other internal NASD processes. Where an existing program addresses a complainant's concern, the ombudsman should refer the complainant to the appropriate process.

All complaints are treated as strictly confidential, both as to subject matter and complainant, unless the ombudsman receives explicit instructions otherwise. The ombudsman also may serve as a channel for anonymous communications to management.

The NASD ombudsman reports directly to the Audit Committee of the NASD's Board of Governors. The ombudsman may

The typical corporate ombudsman may informally resolve a dispute, or employ mediation, advocacy, or arbitration in an effort to resolve it.

advise the committee of trends resulting from complaints and of any matter that might have a significant adverse effect on the NASD.

ICANN'S OMBUDSMAN

Article V of ICANN's Amended Bylaws, effective Dec. 15, 2002, established an ombudsman's office to be managed by an ombudsman to be appointed by the board of directors. The initial term is two years. ICANN Bylaws, as amended effective June 26, 2003 (referred to below as "Current Bylaws"), Art. V, §§ 1(1) and (2). The ombudsman is to report to ICANN's board, and can only be removed by a three-fourths

vote of the entire board. Current Bylaws, Arts. V, § 4(4) and V, § 1(3).

The ICANN ombudsman's role is "to act as a neutral dispute resolution practitioner" for matters that have neither been submitted to the board's Reconsideration Committee

imate interest in the Internet and in ICANN's function with regard to the Internet.

The ombudsman mandate runs to the fundamental concept of fairness, a broad scope indeed. ("The Ombudsman shall

had not given fair consideration to a proposal presented by a specific member of the ICANN community should be found to be within the ombudsman's jurisdiction. The ombudsman is expressly precluded from instituting, joining, or supporting any legal challenges to the ICANN structure, procedures, processes, or conduct by the ICANN Board, staff, or constituent bodies. Current Bylaws, Art. V, § 4(5).

In performing his or her role, the ombudsman may determine that complaints be maintained in confidence, and ICANN staff and "participants" are obligated to "observe and respect" such determinations. Current Bylaws, Art. V, § 4(2). The ombudsman may make whatever reports to the board he or she deems appropriate; the reports are to be posted on the ICANN Web site, unless the ombudsman determines such posting to be inappropriate. Current Bylaws, Art. V, § 4(4). The ombudsman is to publish annually a consolidated analysis of the complaints received and their resolutions, respecting the confidentiality in so doing. Current Bylaws, Art. V, § 5. The annual report is to be posted on the ICANN Web site.

* * *

The ICANN ombudsman—whose appointment at press time was imminent—will walk a tightrope between the fair and appropriate resolution of legitimate complaints and the rejection of complaints that fall outside his or her jurisdiction, either because they are expressly excluded or because they are insufficiently specific. How this balancing act is accomplished and how the conduct of the office is perceived will likely determine whether the office will succeed and become a permanent part of ICANN's organizational structure.

Like the first Chief Justice of the U.S. Supreme Court, the first ombudsman must be both careful and cautious in the exercise of his or her power, but most important always must be seen to be reasonable and fair. The ICANN ombudsman has an opportunity to build a degree of trust within the ICANN community, and all who wish to see ICANN succeed as an independent, non-governmental entity must hope for success. ▀

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The domain name corporation's first ombudsman will be limited to a quasi-mediation function, to negotiate, to facilitate, and to engage in shuttle diplomacy.

(Current Bylaws, Art. IV, § 2), nor have been submitted for independent third-party review by an independent review panel operated by an international arbitration provider. Current Bylaws, Art. IV, § 3.

Reconsideration may be sought regarding any action or inaction taken by ICANN, whether it's by ICANN staff or by the board. Current Bylaws, Art. IV, § 2(2). Independent review may be sought by any requestor who believes that an action taken by the ICANN board is inconsistent with ICANN's articles of incorporation or bylaws. Current Bylaws, Art. IV, §§ 3(1) and (2).

Thus, the ombudsman's purview is seemingly broad. It encompasses the "independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board, or an ICANN constituent body *has treated them unfairly*." Current Bylaws, Art. V, § 2 (emphasis added).

"The ICANN community" is a term that is used seven times in the Current Bylaws, although it is never defined. See Current Bylaws, Art. III, § 2; Art. V, § 2; Art. V, § 3(1); Art. V, § 4(1) twice; Art. IX, § 2(2)(a)(3), and Art. XI, § 2(2)(a)(4). Other terms in the bylaws that seem to be used in a similar, if not synonymous, fashion include "Internet community" (Current Bylaws, Art. I, § 2(10) and Art. VII § 4(5)), "community" (Current Bylaws, Art. IV, § 1 and Art. V, § 3(2)), "community of Internet users" (Current Bylaws, Art. III, § 3), and "community of individual Internet users" (Bylaws, Art. XI, § 2(4)(j)(3)).

The term "ICANN community" appears to encompass anyone with a legit-

serve as an objective advocate for fairness. . . ." Current Bylaws, Art. V, § 2.) The ombudsman is directed to "where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies. . . ." But this broad grant of powers is circumscribed, not only by the choice of the aggrieved party to submit a given grievance either to the Reconsideration Committee or to an Independent Review Panel, but also by other express limitations. Current Bylaws, Art. IV, §§ 2 and 3.

The ombudsman's power is limited to a quasi-mediation function, to negotiate, to facilitate, and to engage in shuttle diplomacy. Current Bylaws, Art. V, § 2. The ombudsman has no express power to finally resolve a specific complaint.

Complaints concerning ICANN's vendors and suppliers, employees, internal administrative matters, personnel matters, and issues relating to board membership are all expressly outside the jurisdiction of the ICANN ombudsman. Current Bylaws, Art. V, §§ 3(1) and (2). The ombudsman also is directed to develop procedures "to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN's interactions with the community, so as to be inappropriate subject matters for the Ombudsman to act on." Current Bylaws, Art. V, § 3(2).

For example, a complaint that ICANN Board meetings are not open to the public likely would be found to be "insufficiently concrete" and would involve policy matters outside the ombudsman's jurisdiction. On the other hand, a complaint that the Board