

Reclaiming assigned PI resources

Introduction

At the RIPE 59 Meeting in Lisbon, Portugal in October 2009, the RIPE NCC Services Working Group requested that the legal memorandum on reclamation of assigned PI resources be shared with the working group via the mailing list.

Hereby is a transcript of a part of the memorandum. The transcript relates to comments made in the memorandum with regard to the reclaiming of assigned PI resources.

The memorandum predates the adoption of ripe-452, ripe-457 and the publication of the LIR Direct End User Assignment Agreement Requirements and the Model Independent Assignment Request and Maintenance Agreement.

Reclaiming assigned PI Resources

With regard to assigned PI, a procedure should be designed that allows the RIPE NCC to reclaim the resources in those cases in which the End User cannot be contacted or refuses to sign an End User Assignment Agreement, while minimising risks of liability claims.

Proprietary claims to PI Resources?

Reclaiming may cause problems if a party claims to have a proprietary claim to the resource. By proprietary it is meant that the End User may validly transfer or encumber the resource and allow (sub-assign) or prevent others from using the same address.

The qualification of the claim to an Internet Number Resource is a matter of applicable national law, which may vary depending on the country where the PI has been assigned. National courts are, however, likely to look at the IPv4 address policy for guidance. This policy does not (as does the IPv6 address policy) explicitly state that IPv4 address space is not to be considered property, nor does it mention that assigned PI may not be (sub-)assigned. It does indicate at various points however that the right to use PI is meant to be conditional. The crucial provision in the policy is:

All assignments are valid as long as the original criteria on which the assignment was based are still valid and the assignment is properly registered in the RIPE Database. If an assignment is made for a specific purpose and that purpose no longer exists, the assignment is no longer valid. If an assignment is based on information that turns out to be invalid, the assignment is no longer valid.

The policy does not say what is meant by 'original criteria'. It is assumed that 'original criteria' means the need for the resource and the purpose for which it is needed as specified in the original request on the basis of which the assignment was made.

The argument that the right to use resources is conditional upon continued use by the End User for the purpose as specified in the original request, and therefore not proprietary in nature, is stronger if this condition is actually communicated to End Users:

- Assuming that End Users are network operators with specific needs for their networks, it may be argued that they may be considered to be aware of the way in which resources are assigned and that assignments of Internet Number Resources are governed by RIPE policies including PI resources.
- If the End User has seen the Provider Independent Assignment Request Form, he is likely to understand that the PI is assigned to him based upon use by him within the time frame and for the purposes as identified on the form. The form does not state however that the right to continue the use is dependent on continued actual use for the purpose mentioned on the form.
- The agreement between the LIR and the End User may provide terms that make clear that the address space is assigned conditionally.

Courts, in determining the nature of the End User's claim to a PI address, may consider it relevant that it may be difficult in practice to get PI routed if it is transferred by the End User to a third party without using the procedure accepted within the RIPE community for requesting previously assigned PI, i.e. End User returns the PI, LIR updates database, third party requests PI, database is updated. The actual transferability of assigned PI is therefore limited.

This could be different if it is established that PI is actually sub-assigned or transferred and used outside of the system as described in the IPv4 address policy.

Although the information provided to End Users on the conditions for assignment could be more explicit, the RIPE policies and RIPE NCC documents provide a basis to argue before a court that assigned PI cannot be the object of proprietary claims.

Requirements for Reclaiming Assigned PI

RIPE Policy Proposal 2007-01 provides:

In order to ensure that this contractual link is implemented for all End Users who applied for provider independent resources before there was a requirement to have a contractual link to the RIPE NCC, the RIPE NCC will make reasonable attempts to contact these End Users – either directly or indirectly through the End Users' LIRs – in order to ensure that this contractual link is put in place. If the RIPE NCC is unable to contact the End User of the provider independent resources within a period of three months, the resources will return by default to the RIPE NCC.

This procedure may not contain sufficient safeguards to avoid liability. In order to minimise the risk of liability for reclaiming and re-assigning in those cases in which the End User cannot be contacted or refuses to sign an End User Assignment Contract:

- The procedure for reclaiming should create a fair possibility for the End User to make himself known and to sign an End User Assignment contract. See below.
- The End User Assignment Contract should not be unreasonable to the extent that reclaiming upon failure or refusal to sign the PI Contract would be considered unlawful as against the End User. See below.

End Use Assignment Contract sufficiently reasonable?

The obligations of the End User pursuant to the End User Assignment Contract as defined in the RIPE Policy Proposal 2007-01 are:

- End User must provide up-to-date registration information to the LIR; some or all of the data will be published in the RIPE WHOIS database
- End User may not sub-assign resources to third parties
- End User must pay annual fee to the LIR for the resources
- Resources will return by default to the RIPE NCC if the End User cannot be contacted or if the annual fee to the LIR is not paid.
- Use of resources is subject to RIPE policies as published on the RIPE web site and which may be amended from time to time.

In addition it is advised to include in the End User Assignment Contract:

- Recitals stating the goals of the assignment policy, the need to formalise the relationship with the End User and the need to do this in a uniform manner throughout the RIPE region.
- That End Users who have been assigned PI in the past may only continue to use that PI if and as long as it uses that PI for the purpose as specified in the request on the basis of which it was originally assigned.
- That the End User upon termination of its contractual relationship with the sponsoring LIR may only continue to use the PI if it signs an End User Assignment Contract with the RIPE NCC or a new sponsoring LIR and communicates the change to the RIPE NCC.
- That the contract may be terminated if the End User does not comply with its obligations arising from the contract (or RIPE policies referred to in the contract) and does not remedy this within a specified period and that the resources will return to the RIPE NCC by default upon termination.

Could the End User argue that the End User Assignment contract is unreasonable to such an extent that it is unlawful for the RIPE NCC to reclaim the resource for refusal to sign the End User Assignment Contract? Below is a discussion of the most important elements of the End User Assignment Contract.

Prohibition of sub-assignment

The End User may want to sell the resources and therefore object to this condition. In view of the following circumstances it is not likely that courts would consider the prohibition of sub-assignment unreasonable to such an extent that the End User

may hold the RIPE NCC liable for reclaiming upon refusal to sign the End User Assignment Contract:

- The rationale for the PI address policy as set out in the IPv4 Address Policy and the reclaiming policy as set out in the PI policy draft.
- The IPv4 policy states that the assignment is no longer valid if the address is no longer used by the End User for the purpose for which it has been originally assigned. This circumstance may be less convincing if the End User can establish that he reasonably may have understood that he could sub-assign the resource to a third party.
- The fact that a transfer outside the accepted RIPE policies may give rise to limited routability of the PI address space.
- Third parties who wish to obtain resources may apply for PA or PI themselves.

Annual fee:

The PI policy draft mentions that the contract requires the End User to pay an annual fee to the LIR for the resources.

Note that in those cases in which the End User has a contract with an LIR, requiring the LIR to ask an annual fee may be unnecessarily restrictive on LIRs. To ensure that the RIPE NCC is paid for its PI services, it is not strictly necessary to contractually require the LIR to ask for an annual fee. If the RIPE NCC takes the PI managed by the LIR into account in calculating the service fee to be paid by the LIR to the RIPE NCC, the RIPE NCC gets paid and the LIR can decide whether and how to invoice the customer to cover its RIPE NCC costs (as it does with PA resources).

In those cases in which the End User has always paid the LIR for services, asking an additional fee for managing the PI resources may be unreasonable if the LIR cannot establish that his costs for managing the PI have increased.

If the End User, upon terminating his relationship with the LIR, prefers to enter into a contract with the RIPE NCC instead of another sponsoring LIR, the contract should include the obligation to pay a service fee. The fee should preferably be cost related i.e. covering the actual services provided by the RIPE NCC to manage the resources as well as the overhead costs related thereto. As long as the fee can be justified by the costs of service and overhead, this requirement is unlikely to be considered unreasonable.

Return by default if the End User cannot be contacted or if the annual fee to the LIR is not paid

This may be considered unreasonable as it does not provide for a remedy period.

The original criteria for assignment must be met

Since the term 'original criteria' is not defined, discussion may arise as to what this means and what evidence is required to establish that the original criteria have been met. It is advisable to amend this requirement to state that the End User who has been assigned PI in the past may only continue to use that PI if and as long as it uses that PI for the purpose as specified in the request on the basis of which it was originally assigned. As discussed, an End User may possibly object to this requirement if he can establish that he cannot reasonably have understood that the PI was assigned to him under this condition.

Use of resource subject to existing or future RIPE policies

In view of the goals of RIPE address policy, the scarcity of IPv4 and the procedure for adoption of the policies (RIPE policy process), it is unlikely that this provision will be considered unreasonable in itself. However, individual elements of (future) RIPE policies may be unreasonable and should therefore be assessed on their effects on existing holders of PI resources.

The provisions of the PI Contract discussed above are the essential elements of the current IPv4 address policy as relates to PI and of the draft PI Policy. Taking into account the above comments and suggestions, these provisions will probably not be considered unreasonable.
