

From: Samantha Eisner
Sent: Friday, October 12, 2018 1:30 PM
To: David McAuley
CC: Bernard Turcotte; Liz Le
Subject: OFFLIST - FW: [IOT] IOT - Meeting - 201081011 - DAIRs and raw captioning
Attachments: IRP-IOT-Meeting-20181011-DAIRs.docx; IOT-Meeting20181011-Captioning..docx; ATT00001.txt

Hi David -

I sat down with this and tried to develop some language, but realized that this is a really tricky definitional issue. Without being extremely careful, we'd be granting anyone that says that they have an interest in the case the right to participate, which then takes away the discretion from the panel on a much broader basis than is currently allowed, so we'd need to flag that change through ICDR.

As I was thinking through all of this, I realized that giving this participation as of right based on "significant interest" is also broader than what the IOT discussed in outcomes of the public comment. As I understand, we agreed as an IOT, and we have reflected in the rules, that those who participate in underlying panels should have the ability to participate as of right (either as claimant, where we've identified that they meet the material harm threshold) or as an amicus (also reflected in there). We did not have comments on, nor agree as an IOT (from what I can tell) that having an interest that might be impaired by, or is similar to that which is under discussion should give a right to participation.

I don't have an objection to continuing this conversation for the final set of rules, but I think that from the principles laid out for the interim set, this inclusion goes far beyond. Working on it to a short time frame also increases the possibility that we make it too broad, and make it very difficult to tailor in a final rule set. Finally, depending on the scope of the final rule we'd propose, we'd then have to see how significant a change it is from what was posted for comment previously.

In the interim, my thought is that the rules are broad enough that they give a very good opportunity for people to preserve their rights through the IRP. If a party could be a claimant, they can initiate an IRP and seek consolidation, even if joinder is denied under discretion of the panelist. The amicus rules are quite broad as well.

Please let me know your thoughts on this,

Thanks,

Sam

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From: IOT <iot-bounces@icann.org> on behalf of Bernard Turcotte <Redacted>
Date: Friday, October 12, 2018 at 8:49 AM
To: "iot@icann.org" <iot@icann.org>
Subject: [IOT] IOT - Meeting - 201081011 - DAIRs and raw captioning

All,

The interim rules are essentially done with the exception of rule 7 (see attached DAIRs).

For rule 7 we are waiting on language from Samantha per below:

· Rule 7 - Consolidation, Intervention and Participation as an Amicus – SE – post language based on the discussion.

○ >> MH Yes I wanted to get a quick clarification to for Sam so she knows we are not as far apart as maybe she might think we are. I'm not suggesting -- mostly for you David, for me I'm not suggesting for a moment that we should allow this language in this paragraph to change who is qualified to be claimant.

All this paragraph is intending to say, is that if you are otherwise qualified to be a claimant. If you additionally satisfy the situation described in this paragraph you should be able to intervene as a claimant as of right. Rather than wait for another case.

Similarly if you -- even if you don't qualify as a claimant, but you satisfy the conditions in this paragraph you should be allowed to intervene as an amicus and it shouldn't be merely discretionary. That's the aim. Not to change the definition of who qualifies as a claimant. That should be untouched by this language.

>> DAVID McAULEY: Thanks Malcolm. And I will also make a comment as a participant, Sam, I think that I can live with what Malcolm has just said. I think he's right in what he's saying and I think it's quite possible that we could crack this nut with amicus status as long as it's not discretionary it is a matter of right and as long as amicus can protect the language in it.

Bernard Turcotte
ICANN Staff Support to the IOT.