

IRP-IOT

ICANN 78

Should there be limitations on appeals? Random considerations.

ICANN Bylaw 4.3(n):

(iv) The Rules of Procedure ... shall ... address ... :

*... (G) The standards and **rules governing appeals** from IRP Panel decisions, **including which IRP Panel decisions may be appealed**.*

ICANN Bylaw 4.3(w):

***Subject to any limitations established through the Rules of Procedure,** an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within sixty (60) days of issuance of such decision.*

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Non-binding IRPs:

- ICANN Bylaw 4.3(x):
 - *The IRP is intended as a final, binding arbitration process.*
 - *(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. **Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees**; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.*

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Non-binding IRPs:

- Should 'non-binding' IRPs be appealable?
- Possibly not:
 - The claim may not have been pursued as intensely/comprehensively as a binding IRP – possibly analogous to an advisory opinion rather than a firm determination.
- Possibly so:
 - Do 'non-binding' IRP decisions constitute 'precedent'? (For 'precedent' see Bylaw 4.3(a)(vi), 4.3(g), 4.3(i)(ii), and 4.3(v)). **If precedential**, shouldn't they be appealable?

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- **Can CEP Mediator sit on *en banc* IRP appeal?**

- ICANN Bylaw 4.3(e)(iv):

- *(iv) ... any IRP Mediator appointed shall be selected from the members of the Standing Panel ... by its Chair, but such IRP Mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter.*

- Is sitting on an *en banc* appeal ‘presiding’ over an IRP?
- With ‘facts’ finally established by original panel decision why couldn’t mediator sit on precedential appeal?

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- Should these rulings be appealable:
 - **Summary dismissal** (Bylaw 4.3(o)(i)).
 - **Consolidation** (Bylaw 4.3(o)(v)).
 - **Cost/expense shifting** (Bylaw 4.3(o)(vii) and 4.3(r)).

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- **Interim Relief:**

- Possibly confusing bylaw provisions:

- Bylaw 4.3(o):

- *Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to: ...*
 - (iv) **Recommend that ICANN stay** any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered[.]

- Bylaw 4.3(p):

- *... Interim relief may only be provided **if the Emergency Panelist determines** that the Claimant has established all of the following factors:*
 - (i) A harm for which there will be no adequate remedy in the absence of such relief;
 - (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
 - (iii) A balance of hardships tipping decidedly toward the party seeking relief.

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- **Rules governing appeals – intervention:**
 - Can appeals allow for any kind of intervention other than as amicus?
 - Rules regarding amicus status at appeal?
 - Standing Panel discretion as to number/identity of amici?

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- **Rules governing appeals – submission:**
 - Submissions/briefs only? No oral arguments?
 - Recommendation – no oral argument, the record of facts has been established and a limitation to briefing-only should aid in the pursuit of efficiency – one of the purposes of the IRP (Bylaw 4.3(a)(vii)).

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- **Rules governing appeals – Cost shifting?**
 - Does the language in Bylaw 4.3(r) about the panel identifying the losing party's Claim or defense as frivolous or abusive apply to claims/defenses asserted on appeal?
 - Should this extend to all 'decisions' appealed rather than merely those relating to Claims -- for instance if we create a rule allowing appeals of such things as interim decisions or summary dismissals?
 - Should rules of appeal make this explicit?