

Comments on Recommendation #7

- *From:* Kathryn Kleiman <kleiman@xxxxxxxxxxx>

Comments to CCWG-Accountability Draft Proposal on Work Stream 1
Recommendations

We commend the work of the CCWG and the effort invested in the writing of the recommendations now before the Internet Community. In support of this process and strengthening of the recommendations, we provide this narrowly-tailored comment on an issue still requiring additional work.

Recommendation #7: Strengthening ICANN's Independent Review Process.
Paragraph 234 is insufficient to accomplish the goal we believe it is trying to achieve. A critical problem in recent years has been the use of IRP actions as a means to appeal not only Board actions, but also decisions by third parties. Thus, the results of the New gTLD Objection proceedings are being appealed through the IRP, but without including the party who actually prevailed in the Objection proceeding.

We know of no other forum in which a losing party can appeal a decision without a) notifying the other parties directly involved and b) without the appeals process providing the winning party an equal opportunity to participate in the appeal process. To prevent the IRP from continuing to be used in this unfair manner, it is incumbent on the CCWG to draft special protections.

Paragraph 234 in this draft proposal appears to be addressing this issue, but to achieve equality, balance and justice in the IRP forum, the protections will need to be clarified and substantially strengthened.

The current paragraph reads:

? "Be more accessible: Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. The CCWG-Accountability requires also giving the Empowered Community the right to have standing with the Independent Review Process"

This is necessary, but insufficient. Paragraph 234 should allow all "materially-affected" parties to participate in the IRP proceeding on an equal basis regardless of who brings the IRP proceeding. If one party challenges a decision in which there are clear directly and materially-affected other parties, the IRP process should:

1. Require clear and timely notification by the party filing the CEP and/or IRP actions to all parties known to be materially affected by the

process or decision being challenged;

2. Require timely publication to the larger community by ICANN of the CEP and IRP filing so that other interested and materially affected parties can come forward to participate (currently CEP and IRP negotiations can be well underway before others learn of the filings); and

3. Enable and support full and equal participation in an IRP proceeding by all materially affected persons, groups and entities who are directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation: both those who suffer harm from the alleged violation and those who will suffer harm should the IRP Panel reverse or change existing policies and/or decisions.

To that end, we request and recommend that paragraph 234 be amended as follows:

? "Be more accessible: Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to equal participation in CEP and IRP proceedings. Accordingly, the party filing a CEP notice and/or a complaint under the IRP for redress shall provide timely notification to all parties known to be materially affected by the process or decision being challenged. ICANN shall provide prompt and timely publication to the larger community of the CEP and/or IRP filing so that other interested and materially affected parties can come forward to participate (currently CEP and IRP negotiations can be well underway before others learn of the filings). The CEP and IRP proceedings shall enable and support the timely, full and equal participation of all materially affected parties. The CCWG-Accountability requires also giving the Empowered Community the right to have standing with the Independent Review Process"

These changes will achieve the fairness, balance, accessibility and inclusion that the CCWG is seeking to achieve in this important paragraph and reflect how similarly processes are conducted throughout the world.

Respectfully submitted,

Kathy Kleiman
Robert J. Butler
Attorneys with Fletcher, Heald & Hildreth
Arlington, Virginia USA