

IRP IOT

17 August 2016

Agenda

A. 4 Issues with Updated Supplementary Procedures:

1. Filing timeline
2. Standard for in-person hearings
3. Cross examination in in-person hearings
4. Application of subsequent modifications of the rules to existing IRPs

B. Next Steps

Filing Timeline

- Final Report:
 - A complaint must be filed “within a certain number of days (to be determined by the IRP Subgroup) after becoming aware of the alleged violation and how it allegedly affects them.”
- Draft Updated Supplementary Procedures:
 - A Claimant shall file a written statement of a Dispute with the ICDR no more than 45 days after a Claimant becomes aware *or reasonably should have been aware* of the action or inaction giving rise to the Dispute.”

Background on Burden of Persuasion

- Specifies which *standard of proof* the Party must follow in presenting evidence to the panel - the amount of evidence the Party needs to provide in order for the Panel to reach a particular determination.
- In US civil cases, usually 3 choices, with escalating requirements:
 - Preponderance of evidence
 - Clear and convincing evidence
 - Substantial evidence (usually limited to administrative matters NA here)

Comparison of Evidentiary Standards

- **Preponderance of the Evidence**

- Applies in most civil cases.
- Would require the Panel to permit an in-person hearing if the requesting Party is able to show that it is more likely than not to meet the specified criteria.

- **Clear and Convincing Evidence**

- In some civil cases, the burden of proof is elevated to a higher standard called “clear and convincing evidence.”
- Would require the Panel to permit an in-person hearing if the requesting Party demonstrates that it is substantially more likely than not to meet the specified criteria.
- Some courts have described this standard as requiring the plaintiff to prove that “there is a high probability that a particular fact is true.”

Section 5: Standard for In-Person Hearing

Sidley Draft	ICANN Proposal
<p>An in-person hearing shall be allowed only in extraordinary circumstances where, upon motion by a Party, the IRP PANEL determines that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing.</p>	<p>The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, which are limited to circumstances where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated, with clear and convincing evidence, that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.</p>

Section 5: Cross Examination at In-Person Hearing

- Should cross examination be permitted and under what circumstances?
- Current text states:

“All hearings shall be limited to argument only; all evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.”
- Alternative for consideration:

“Cross examination of live witnesses shall be allowed only in extraordinary circumstances where, upon motion by a Party, the IRP PANEL determines that (1) it is necessary for a fair resolution of the claim; (2) it is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of such a measure.”

Section 2: Scope

- Updated Supp. Proc. Apply when they go into effect (Oct 1)
- IRPs commenced prior to effective date continue under existing supplementary rules
- Subsequent changes to Updated Supp. Proc. Apply to prior-filed IRPs under limited circumstances:

*In the event that any of these Updated Supplementary Procedures are subsequently amended, such amendments will not apply to any IRPs pending at the time such amendments **come into force** unless a party successfully demonstrated that application of the former Supplementary Procedures would be unjust and impracticable **to the requesting party** and application of the amendments and would not **materially disadvantage** any party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. **Requests to apply amended Updated Supplementary Procedure** will be resolved by the IRP PANEL in the exercise of its discretion.*

- ICANN concerned that this language will unnecessarily complicate the process without real benefit and urge deletion

Application of Updated Rules to Existing IRPs

Current Proposed Text

IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

Avri Proposed Text

Same re procedural rules; New re Standard of Review

IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Standard of Review set forth in the Supplementary Procedures in effect at the time such IRPs were commenced unless a party successfully demonstrated that application of the former Standard of Review would be unjust and impracticable to the requesting party and application of the amended rule would not materially disadvantage any party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Standard of Review. Requests to apply the amended Standard of Review will be resolved by the IRP PANEL in the exercise of its discretion

Next Steps

- Attorneys to prepare and circulate revised draft of Updated Supplementary Procedures to IOT
- Becky to draft cover explanation of purpose of Updated Supplementary Procedures and circulate to IOT for email consideration
- IOT to review and sign off at next meeting (17 Aug) and send to CCWG for discussion at next meeting
- Post for public comments (simultaneously?)