

IRP: Updated Supplementary Rules

CCWG-ACCT F2F

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Hyderabad, India

Implementation of WS-1 Recommendations

Requires:

- Initiation of tender process for selecting an organization to provide administrative support for the IRP;
- Selection of a standing Panel; and
- Development of detailed rules of procedure.

Updated Supplementary Rules

- ICANN IRPs currently governed by the ICDR's [International Dispute Resolution Procedures](#) as modified by [Supplementary Procedures for ICANN's IRP](#).
- In the event of any inconsistency between the ICDR Procedures and the Supplementary Procedures, the ICANN-specific Supplementary Procedures take precedence.
- Revise the Supplementary Procedures to reflect the substantive and procedural changes to the IRP in the new Bylaws.

Definitions

- Most new defined terms reflect procedural enhancements, e.g., “Emergency Panelist,” “Procedures Officer,” etc.
- “Dispute” covers:
 - Actions or inactions that violate ICANN’s Articles of Incorporation or Bylaws
 - Claims that ICANN has not enforced its contractual rights under the IANA Naming Function Agreement
 - Complaints by direct customers of the IANA naming function that are not resolved by mediation

Scope

Applies to cases filed on or after their effective date:

- Further changes to USP (other than standard of review) may apply retroactively if otherwise unjust and impracticable to the requesting party and no material disadvantage to other party's substantive rights
 - But - standard of review (Section 11) is established by ICANN's Bylaws, so Section 11 of the USP is in effect as of 1 October and cannot be amended without a corresponding Bylaws change.
- Significant discussions regarding application of the same standard (unjust/impracticable without material disadvantage to the other party) to cases filed before the effective date of the USP
 - Concerns about unintended consequences, including increased complexity and potential Bylaws violations resulting from doing so.

IRP Panel Composition

Mechanism for:

- Selecting members of a decisional panel
 - each party selects one panelist, and those panelists select the third, selection deadlock rules
- Confirmation of the independence and impartiality of those panelists
- Substitution of panelists in the event of vacancy or removal

Time for Filing

- IRP claims must be filed within 45 days of the date on which a claimant first becomes aware of the material affect of the action or inaction giving rise to the dispute, but in any case, no more than twelve (12) months from the date of the alleged Bylaws violation.
 - Balance awareness gap with the need for finality
 - But, actions or inactions giving rise to an IRP claim can occur more than twelve months following the adoption of a particular rule, e.g., new interpretation of policy.
- Applicable fees must be paid to the dispute resolution provider within three days of filing an IRP request

Conduct of Review

Goal: resolve disputes expeditiously and cost effectively while ensuring fundamental fairness and due process.

- Proceed by electronic means except in “extraordinary circumstances”
 - where the IRP PANEL determines that the party seeking an in-person hearing has demonstrated 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.
- Ordinarily limited to legal argument only, but fact witnesses permitted where Panel determines that a the requesting has demonstrated that such testimony/cross examination meets “extraordinary circumstances” test.

Written Statements

- Unchanged from existing Supplementary Procedures
 - How long
 - When submitted

Consolidation, Intervention, Joinder

- Added to address the WS-1 Recommendation, as reflected in Article IV, Section 4.3(o) (ii)
- Creates “Procedures Officer” to resolve questions re consolidation, joinder, intervention
- Questions for input on notice of/opportunity to participate in IRPs by affected third parties

Discovery Methods

New section to address WS-1 recommendation -
Article IV, §4.3(n) (iv) (D)

- Provides for discovery of documents or other information likely to be relevant and material to resolution of the Dispute
- Depositions, interrogatories, and requests for admission not permitted

Summary Dismissal

- Provides for summary dismissal of a request for Independent Review where:
 - Claimant has not demonstrated that it has been materially affected by the action/inactions
 - Where the request lacks substance, is frivolous, or is vexatious

Interim Measures of Protection

Interim relief granted if Emergency Panelist determines that the Claimant has established all of the following factors:

- A harm for which there will be no adequate remedy in the absence of such relief;
- Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- A balance of hardships tipping decidedly toward the party seeking relief.

Standard of Review

Objective, de novo examination of the dispute

- Did action or inaction violate ICANN'S Articles or Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- For Claims involving Board's exercise of its fiduciary duties, the IRP PANEL may not replace Board's reasonable judgment so long as the action or inaction is within the realm of reasonable business judgment.
- Claims re enforcement of the IANA Naming Function Agreement - whether there was a material breach of ICANN's obligations under the Agreement that resulted in material harm to the Claimant.
- IRPs related to PTI by IANA customers will be subject to a separate standard of review as defined in the IANA Naming Function Contract.

Decision, Form & Effect

- Replace Section 9 of the existing procedures (Declarations) consistent with new Bylaws
- Section 10 has been revised to reflect the new Bylaws requirement for a written decision, specifically designating the prevailing party, and setting out a well-reasoned application of how the Dispute was resolved in light of prior IRP Decisions, the Articles and Bylaws and norms of applicable law.

Appeal

- To full standing panel sitting en banc within 60 days of the issuance of such decision if the appealed decision was based on a clear error of judgment or the application of an incorrect legal standard.
- The en banc panel may also resolve any disputes between panelists on an or the Procedures Officer re: consolidation, intervention or joinder.

Costs

- Each party bears its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP,
- Except with respect to a Community IRP, the panel may shift administrative costs and/or fees if the losing party's Claim or defense was frivolous or abusive.

Next Steps

- CCWG-Accountability to issue Updated Supplementary Procedures for public comment
 - Comments received will be considered by IOT and USP may be revised
- IRP-IOT to finalize Call for Expressions of Interest to identify potential panelists
- IRP-IOT to draft detailed procedures for identifying potential panelists, review of EOIs, community selection of Standing Panel for Board approval