

Notes:

- (1) On timing, this is an issue that has been under discussion among Malcolm Huddy, Sam Eisner, Liz Le, and myself separately – specifically as to whether and how an overall “repose” time-limitation might be acceptable/work. I plan to send a mail to this small group tomorrow with some suggestions and ask Malcolm, Sam, and Liz to do their best to be on the call to discuss Thursday. We will give the discussion ten minutes or so (the groundwork discussions are complete and need not be revisited – we now need to seek a way forward) and if unable to complete on the call we will take the issue to the full list.
- (2) On further help for SOs and ACs, I will shortly forward a related email string, not long.
- (3) On joinder see this [email](#) for reference (both Greg Shatan’s comment and mine). In addition, we may have an email from Sam in the meantime so if that comes in please read it prior to the call.
- (4) On challenges to consensus policy I will refer to the attached four slides.
- (5) On segmenting certain issues see this [email](#) for reference.
- (6) On the remaining work plan I will be sending a new template to list in a day or so for purposes of this discussion.

[IOT] Joinder issue

Greg Shatan [gregshatanipc at gmail.com](mailto:gregshatanipc@gmail.com)

Wed Mar 29 13:39:06 UTC 2017

I agree with these points.

Purely a drafting note -- it should be clear that the "parties" referred to in item 2 are the parties in the underlying proceeding, and the "amici" referred to in item 3 are the amici in the underlying proceeding.

I would suggest considering 45 days for the time period in item 6, considering that SO/AC/SG/C parties can require levels of approval/discussion beyond those of most other parties.

Geg

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On Wed, Mar 29, 2017 at 4:14 AM, McAuley, David via IOT <[iot at icann.org](mailto:iot@icann.org)> wrote:

> Dear Members of the IRP IOT,
>
> In this email, I want to move forward and seek your input on the issue of
> "Joinder" that was mentioned in several public comments and that was raised
> in the last call Thursday March 23rd.
>
> The public comments on this topic were from (1) Fletcher, Heald & Hildreth
> <<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfAkzQ0N4xz2.pdf>>,
> (2) the GNSO's IPC
> <<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdft75S74tOev.pdf>>,
> and (3) the GNSO's NCSG
> <<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfLoCFUVHjfn.pdf>>
> (these three raised other issues as well).
>
> The comments make these suggestions:
>
> . *Fletcher*: Provide actual notice to all original parties to an
> appeal to IRP of an underlying Third Party Proceeding (see expert panel
> decision appealability at Bylaw 4.3(b) (iii) (A) (3));
>
> . *Fletcher*: Provide mandatory right of intervention to all
> parties to the underlying proceeding being appealed to IRP;
>
> . *Fletcher*: Require IRP panel to allow all such parties to be

> heard before deciding on interim relief or protection;

>

> . **IPC**: Any third party "directly involved" in underlying action

> being appealed to IRP should be able to join or intervene as claimant of in

> opposition to claimant. (Multiple claimants should not have one collective

> 25-page limit for Written Statements);

>

> . **NCSG**: Right of intervention must be added for the winning

> party below. At the least they should be able to file briefs as **Amici **-

> meaning "friends" of the panel;

>

> . **NCSG**: Emergency panels/interim relief requests must be openly

> heard with all relevant parties present.

>

> As mentioned in the call, we are directed by bylaws that provide for:

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> . Just resolution of disputes (Section 4.3(a)(vii)); and

>

> . Fundamental fairness and due process (Section 4.3(n)(iv)).

>

> In addition, the bylaws specifically direct that the rules address "Issues

> relating to joinder, intervention, and consolidation of Claims..." (Section

> 4.3(n)(iv)(B)).

>

> The current draft

> <[https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-](https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf)

> [31oct16-en.pdf](https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf)> of

> the updated supplementary procedures deals with joinder etc. at section 7

> on page 8. The current draft leaves these matters up to a procedures

> officer and allows joinder by those who qualify as a claimant - which the

> winning party below is unlikely to be.

>

> With these things in mind, as a participant in this group I propose that

> we agree the following points and, at a suitable time, ask Sidley to draft

> appropriate language into the draft supplementary procedures. I believe

> these comments have made reasonable and persuasive points about ensuring

> that the winning party below can defend the judgment below and will likely

> be a more motivated party in this respect than ICANN, although ICANN will

> be motivated, of course, to defend the notion that its compliance with an

> expert panel would not violate the article or bylaws. Suggestions:

>

> 1. That all parties to the underlying proceeding get timely notice

> (including copies of all pleadings and other filed documents) of the

> institution of IRP;

>

> 2. That all parties have a right to intervene or file an amicus

> brief, as they elect. If they elect to become a party they take on all

> rights/obligations of parties;

>

> 3. That all parties have a right to be heard in any petition for

> interim relief - whether amici can be heard on interim relief would be up

> to the panel or procedures officer (whichever is acting);

>

> 4. That all parties each enjoy equivalent rights/obligations with

> respect to pleadings - e.g. length, manner of filing, etc.

>

> 5. That other "interested" parties be able to petition the panel or

> procedures officer (whichever is acting) to intervene (as parties or as
> amici) and the decision in this respect will be up to the panel or
> procedures officer (whichever is acting).

>

> 6. That such joining parties to be given a reasonable amount of
> time to file their pleading or brief but this can be a relatively short
> period. They will have actual notice and the time should run from that
> date. They will have been a party below and so are in some degree prepared
> on the issues. I suggest 30 days here.

>

> I welcome discussion on list and, if we need, on next call.

>

> David

> David McAuley

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[IOT] segmenting certain IRP comments

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Wed Mar 29 19:36:02 UTC 2017

Dear members of the IRP IOT,

On tomorrow's agenda is an item described as "5. Attempt to segment out some issues for early decision"

I am going to ask that we consider a list (see below) of certain comments that may lend themselves to quick resolution, at least in discrete parts in some cases.

Here are the comments I refer to and my thinking on them:

1. ALAC - a comment<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf73b8iz2zV.pdf>> about continuous IRP improvement. I note that there is provision to allow for review of IRP at Bylaw 4.6(b) (ii) (F) and that, in my opinion, should be sufficient.
2. Some of IPC comments<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf75S74tOev.pdf>> - regarding invoice date, panel make-up on appeals, and wording about ICDR rules themselves not be overtaken as regards appeals, and costs of delay on appeal. In my opinion the invoice date as the date to measure when costs are due would be fine; I think the appeals panel should be left as is in current bylaw and am not sure it would be fair to eliminate the judges who ruled below; a rule specifically calling out an underlying ICDR rule seems a bad idea to me as that underlying rule could change; and costs of delays on appeals can be handled by panel as matter of discretion.
3. DotMusic - These comments<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfzqApbhRMhH.pdf>> seek to eliminate Board confirmation of standing panelists nominated by SOs and ACs. But that confirmation process is in the bylaws and we cannot overturn that.
4. DotRegistry - This comment<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfYWMiLvnODO.pdf>> seeks that any review of an IRP decision can only be made in a court and expresses concern about a standing panel of "ICANN insiders." Again, however, the bylaws on this have been adopted.
5. INTA's comment<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfyVMCP8h4dU.pdf>> seeks to enlarge the bylaws' concept of standing and allow those to be claimants who not only have suffered harm but who are at risk of imminent harm. Again, this would entail changing the bylaws in my opinion.
6. And Auerbach's comment<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/msg00003.html>> says that "materially affected" is too stringent for standing and that a party should be able to bring an IRP claim should be broadened (e.g. to at least include anyone using an IP address or

domain name, - in fact it should include "everyone"). But this is a bylaw provision.

David