

From: McAuley, David
Sent: Friday, August 25, 2017 3:10 PM
To: iot@icann.org; aloup@usc.edu
Subject: Joinder issues toward FIRST READING [renamed subject line]

Dear members of the IRP IOT:

This email is intended to accomplish the **First Reading** of the **Joinder** issue – note also that whatever we agree on Joinder will also affect our work on the rule concerning challenges to **Consensus Policy**.

You can see a summary of some of the joinder discussion in the email of July 21st forwarded below.

This proposal is my attempt to draw the various joinder views together in an acceptable final proposal. Keep in mind that the final language we adopt will be our instructions to Sidley as to how to amend the applicable rule – our language will not be the actual rule itself.

The aim is to **confirm first reading** at our next meeting, Thursday, September 7, at 19:00 UTC. **Second reading** should then be a largely pro forma exercise at our subsequent meeting on September 21st at 19:00 UTC.

If you object or propose different treatment please say so on list as soon as possible prior to September 7th and **be specific and suggest specific alternative language**.

HERE IS THE SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. The manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.
3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.
4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

Best regards,
David

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From: iot-bounces@icann.org [<mailto:iot-bounces@icann.org>] **On Behalf Of** McAuley, David via IOT
Sent: Friday, July 21, 2017 9:57 AM
To: iot@icann.org
Subject: [EXTERNAL] [IOT] Issues Treatment - Joinder

Dear members of the IRP IOT:

Let's move some issues along on list -see our [sign-up sheet\[docs.google.com\]](https://docs.google.com) for issues. This email deals with the **joinder issue**.

These following three numbered paragraphs constitute the previous [proposal](#) on joinder:

1. That all those who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.
3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

On July 9th Liz Le of ICANN Legal listed concerns/questions with respect to this proposal in an [email](#).

My comments (as participant and issue lead):

I will note the **gist of Liz's concern/question in *italics*** and then **my proposal/answer in red**.

One overall note: This joinder proposal is strictly with respect to "parties" to expert panels as per #1 above – when we deal with challenges to consensus policies we can there deal with how SOs may intervene in those matters (remembering that we will ask Sidley to come up with actual "rules" language once we finish our work).

Liz's points (not necessarily her entire comments):

First, there needs to be rules and criteria established as to who can join/intervene by right as well who may be properly joined/allowed to intervene at the discretion of the IRP panels.

The intent is to allow all “parties” at the underlying proceeding to have a right of intervention, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. It is not envisioned to allow non-parties from below (or others) to join under these provisions – noting that these provisions just deal with parties below. We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary [rules\[icann.org\]](https://www.icann.org/rules) that went out for comment.

Second, clarification and development is needed on the standard of review that is to be applied by the Procedures Officer when determining the extent to which an intervenor may participate. What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation by ICANN of the Bylaws or Articles? What are appropriate interests that will be supported?). What types of briefings and opportunity to be heard are needed in order to allow an interested party to petition the Procedures Officer to exercise his or her discretion and allow the party to join in the IRP?

I don't think the intervenor would have to allege or show harm – that is the job of the Claimant (presumably the “loser” below) – and that Claimant will have to allege/show that the decision by the panel below, if implemented by ICANN, would violate the Articles or Bylaws. The intervenor here would simply need to show party-status below. I would think that a request for joinder would have roughly the same information required of a Claim as per Bylaw 4.3(d) and would also require an equivalent filing fee.

Third, Also fundamental to this question is understanding if there are different levels of “joining” an IRP? Should a person/entity that can allege that they have been harmed by an alleged ICANN violation the Bylaws/Articles be treated differently than a person/entity that just has an interest in someone else's claim that the Bylaws were violated? Keeping the purpose of the IRP in mind, does it make sense to treat each of these as having “IRP-party status”?

I think that in these circumstances (dealing with an expert panel below decision) the “winner” below would most probably be accorded party status and would have an obvious interest. The more difficult case might be an intervenor who was also a “loser” below in cases where there may have been more than two parties. Maybe we should require that they allege and show a material likelihood of winning on rehearing if the IRP panel were to advise ICANN to call for a rehearing.

Fourth, It would also be helpful to clarify if IRP-party status includes the ability to be a prevailing party, is entitled to its own discovery, and if such discovery would be coordinated or consolidated with that of the claimant?

My suggestion would be that anyone with party status (rather than amicus status) have discovery rights as coordinated by the IRP panel.

Fifth, An amicus curiae, as generally understood, typically does not participate as a party to a proceeding. The concept of allowing for briefing at the interim relief stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate,

but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve.

Perhaps this right should be limited to instances where requested interim relief, if granted, could materially harm the amicus's ability to pursue/achieve their legitimate interest.

Sixth, What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an expedited process to provide emergency relief. For example, at what point in time can an amicus curiae comment on interim relief – during the briefing stage seeking interim relief or after the IRP Panel makes a determination on interim relief?

If the above responses don't address standard sufficiently then a specific proposal is invited. As for timing, I propose notice of intent to file within 10 days of receipt of the claim (not business days) with timing for briefs (whether as party or amicus) determined by PROCEDURES OFFICER.

Seventh, In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP. What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties? Parties should not be required to prolong an IRP if they would prefer to end it. ... how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential?

This seems a fair point and perhaps the right to intervene as to a settlement must be limited to parties.

Eighth, Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

The reference (to Bylaw Section 4.3(s)) in paragraph 3 of the original proposal is intended to address this.

Ninth, further clarification and development is needed regarding timing of the joinder and intervention processes. The amount of time in which a party has to intervene or join in the IRP and the briefing schedule for such motion should take into consideration the intent under the Bylaws for IRP proceedings to be completed expeditiously with a written decision no later than six months after the filing of the Claim if feasible.

Suggest 10 days for notice etc., as noted under SIXTH above.

Tenth, another issue for consideration pertains to the extent to which confidential information can/should be shared with parties intervening/joining. For example, if a claimant wants to submit

confidential information in support of its IRP, it should be able to protect that information from being accessible to intervenors, some of whom could be competitors or contracted parties. Do intervenors get access to information exchanged between ICANN and the claimant? How will discovery methods apply to intervenors? Do intervenors have all rights as any other party to the proceeding, up to and including the ability to be determined as the prevailing party?

I would think that the panel, operating under ICDR rules, can handle these matters – e.g. I believe the rule on confidentiality here would be Article 21, subsection 5, which provides:

The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

(I am referring here to these rules: [file:///C:/Users/dmcauley/Downloads/ICDR%20%20\(1\).pdf](file:///C:/Users/dmcauley/Downloads/ICDR%20%20(1).pdf))

Best regards,
David

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