

IRP IOT

11 August 2016

Agenda

A. 3 Issues with Updated Supplementary Procedures:

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

B. Next Steps

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 take effect unless a party successfully demonstrated that application of the former Supplementary Procedures would be unjust and impracticable and would not affect any party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. Such requests are to 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

Section 5: Standard for In-Person Hearing

Sidley Draft

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.

ICANN Proposal

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.

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.”

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?)