LINX reply to IRP implementation consultation

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Executive Summary

This submission is addressed exclusively to the "Time for Filing" section (the "timing rule") of the "Draft Supplemental Rules of Procedure for the Independent Review Process" (the "Draft Rules"), and responds to the public consultation launched on 28th November 2016.

We consider that the proposed timing rule is ill-judged, and should be withdrawn.

- The 45 day limit for filing a claim is too short, and will prevent parties who did not have advance notice of the issue and extensive familiarity with ICANN, from fair access to the IRP procedure.
- The 12 month fixed limit from the date of the action is not merely too short, but miscalculated. The timing rule should be based on the date of knowledge of the harm that ICANN's action gave rise to, rather than calculated from the date of the action itself. To do otherwise would unjustly exclude important cases from being heard by the IRP.

Both these flaws are serious, but it is the latter that we consider catastrophic. The effect of the latter will be to seriously undermine, and in many cases utterly negate, the enforceability of the Mission limitation that was a key commitment by ICANN in the 2016 transition. The seriousness of this commitment is shown by statements in the bylaws promising ICANN's accountability as enforced through an accessible, transparent and just resolution of dispute by the Independent Review Process.

We submit detailed, point-by-point analysis of the bylaws to show that the proposed timing rule is inconsistent with the bylaws, and that the only timing rule acceptable under the bylaws would be one based on the aggrieved party's actual or imputed knowledge of the harm they have suffered.

As the IRP Implementation Oversight Team, in presenting the Draft Rules, did not see fit to offer a justification, we have addressed some points that we believe might have been made in their defense. We consider fears that a more permissive timing rule would expose ICANN to unlimited uncertainty; we find these unconvincing. ICANN is protected very effectively by the strictly limited nature of remedies available under the IRP. Nor do we find plausible the notion that greater access to the IRP would expose ICANN to a broader legal risk in civil courts. More generally, we do not agree that it is better to err on the side of an expeditious process: in our view, too strict a timing rule is as bad as too lax. We examine the case for relaxing the rule on Standing, but conclude it would neither be appropriate nor an adequate substitute for correcting the flawed timing rule. And finally we explain why the possibility that the Empowered Community might bring a challenge is no substitute for ensuring that the individual right to bring an IRP case is genuinely available to a materially affected party, as the 2016 transition and the ICANN bylaws promise.

For these reasons we recommend that the proposed timing rule in the Draft Rules be withdrawn. A replacement should be developed and systematically compared against the obligations in the bylaws, before being published for further public comment together with a reasoned justification.

About LINX

The London Internet Exchange, LINX, is a membership organisation for network operators. LINX operates Internet Exchange Points, IXPs, in the UK and the USA, and represents the interests of its membership on certain matters of public policy. We do not claim that our positions are supported in every respect by every one of our 740 members, but believe that the positions we take are substantially supported by our community, and in the interests of the sector as a whole, rather than any particular company or business model. Over more than 20 years, policy makers in government and other institutions have come to recognise the value of LINX's voice on behalf of the operator community.

Introduction

This submission concerns only one element of the proposed "Draft Supplemental Rules of Procedure for the Independent Review Process" (hereinafter, for brevity, the "Draft Rules"), namely section 4, "Time for Filing". It responds to the public consultation on the Draft Rules launched on 28th November 2016.

We argue that this section is defective, in that its effect would be to unduly limit (and in some cases potentially entirely exclude) a materially affected party from being able to bring an IRP case in respect of certain classes of alleged violations of the bylaws. We focus specifically cases based on allegations that ICANN had acted in a manner that was ultra vires the Mission, and so in breach of Section 1.1(b) of the bylaws, and cases based on allegations that ICANN had passed a policy that aims to restrict Internet content, in breach of Section 1.1(c).

We note, and agree with the reasoning by Sidley, independent counsel to the CCWG, that this defect would make the Draft Rules themselves inconsistent with the bylaws. In particular, we consider the Draft Rules incompatible with Section 4.1 (which sets out the purpose of ICANN accountability and review) and Section 4.3(a) ("Purposes of the IRP"), especially subsections (i)-(iii) and (vii).

The proposed timing rule

The Draft Rules state

> "4. An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material affect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.
> In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR."

We understand this to mean that the latest time a claimant may initiate an IRP dispute is the earlier of

i) 45 days after they become aware of the material effect of the action or inaction giving rise to the dispute; and
ii) 12 months from the date of ICANN's action or inaction giving rise to the dispute.

It is important to note that time runs out when either of these conditions are met.

It is also important that a dispute can only be commenced by a "CLAIMANT", a defined term limited to a person "that has been materially affected by a Dispute". The Draft Rules also state "To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation".

The proposed timing rule suppresses access to the IRP

The "one year" fixed limit may prevent a materially affected party from ever having an opportunity to bring an IRP case

Under the Draft Rules, a party does not qualify as a CLAIMANT, and so may not bring an IRP case, unless they have suffered an injury or harm.

It is possible that more than 12 months will elapse between an action by ICANN and that action actually causing harm to a particular party.

A party that is likely to be harmed by an ICANN action, even if they are aware of the likelihood and would wish to challenge the action more promptly, is prevented from bringing an IRP case until they have suffered harm. It is possible that, in a given case, a specific harm may materialise only after at least 12 months have passed since the date of the action complained about. In such circumstances, the aggrieved party would be entirely precluded from accessing the IRP: for at least the first twelve months, because they had not yet suffered harm, and subsequently because the time for filing had expired.

A party that suffers harm from an ICANN action that materialises (at least, in respect of themselves) only more than 12 months after the action complained about, is therefore deprived entirely of the opportunity to access the IRP.

Illustrative example

To illustrate the problem in practice, we turn to the ancient dispute between those that believe a boiled egg should only be opened by cracking the shell at the round end (the "Big-Endians") and those that believe a boiled egg should be opened by cracking the shell at the pointy end (the "Little-Endians")[1].

Let us suppose that ICANN falls under the influence of Big-Endians and adopts the following policy:

> No domain name shall be used to advance Little-Endian beliefs or practices. All Registry Agreements shall be amended to require all Registries to suspend or cancel domains that have been used for that purpose.

Such a policy would be a blatant violation of Section 1.1(c) of ICANN's bylaws, which prohibit ICANN from seeking to restrict Internet content.

We should consider, however, how it is likely to play out. Once such a policy is passed, there is likely to be a lengthy implementation phase. ICANN will need to decide whether to specify the precise terms that must be imposed on domain registrants (in the Registration Agreement) to carry out this policy, or whether to leave it up to the Registry to specify those terms itself. If ICANN decides to the dictate the terms, it must also decide what they must be. This is likely to be the subject of public consultation. ICANN will also need to decide whether to establish a global process for hearing complaints about violations of this policy and issuing adjudications (as with the Uniform Dispute Resolution Policy for allegations of trademark infringement) or to leave it up to Registries to police and enforce the policy. If it chooses to establish a global process, this will likely take a substantial period to develop and implement; it will doubtless involve at least one public consultation, but it is easy to imagine it requiring several.

Once ICANN has decided how the policy is to be implemented, Registries will need a period of grace to adjust their own Registrations Agreements so as to ensure that new registrations are covered by these terms. If they have been left with the duty to consider an act upon complains of violation of the policy, they will need to establish a process for this too.

Finally, it is likely that Registries will only be able to impose the new terms on registrants of existing domains as and when those domains come up for renewal. With gTLD domains most commonly being registered on a two-year renewal cycle, but very often for periods of up to ten years, it is easy to see that it could take many years before any given domain is subject to the policy.

Accordingly, a particular party, being a strong exponent of Little-Endian principles, might not themselves be directly affected by the policy for many years, before finally themselves being told that their domain is forfeit for violation of the policy. During this interim, they will be precluded from challenging ICANN's blatant overreach.

When they do finally suffer harm themselves, namely the loss of their domain and with it their preferred publishing outlet for Little-Endians beliefs, their complaint is clearly against

[1] For further information on the dispute between the Big-Endians and the Little-Endians, see Swift (1726).

ICANN. Their objection is not against their Registry for having misapplied the policy: they do not deny that they are Little-Endians, nor that the main purpose of the domain they have registered is to support the publication of Little-Endian views, nor do they deny that this is a clear violation of the policy. They do not deny that the policy requires the cancellation of their domain, nor allege that the Registry has acted unreasonably or excessively in the light of the policy. Nor is their complaint that ICANN staff have somehow misapplied the policy, limiting a discretion that the Registry ought otherwise to have had to permit them to use their domain in some limited way to support Little-Endian Practices. No: the aggrieved party's complaint is simple, straightforward, and utterly compelling: ICANN acted illegitimately in passing the policy in the first place, tainting all that followed. The required remedy is equally clear: ICANN must withdraw the policy, freeing Registries to accept Little-Endian business once more.

The fact that the Draft Rules would prevent the aggrieved Little-Endians from bringing an IRP case as soon as the policy is passed is unfortunate; the fact that they would also prevent them from doing so once they lose their domain is unconscionable. It is also a clear violation of the intent of the CCWG Final Report, and of the bylaws.

The example of the Big-Endian/Little-Endian dispute may seem whimsical, but the general situation described above is far from fanciful: on the contrary, we describe what is very likely to occur if ICANN should ever decide to seek to restrict a certain type of Internet content. This was precisely the overreach Section 1.1(c) of the Bylaws sought to prevent. Indeed, it has been argued that Section 1.1(c) is superfluous: any action that violated it would also constitute a violation of the more general restriction to the Mission contained in Section 1.1(b). But this threat was considered so serious that it was important to make explicit and highly visible that ICANN was precluded from such activity. How damning, then, would it be to adopt rules of procedure that prevent complaints of this most serious violation from ever being heard?

45 days is an unreasonably short limit for parties not "ICANN insiders"

Under the Draft Rules, an IRP dispute may only be initiated by filing "a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material affect of the action or inaction giving rise to the DISPUTE".

In order to do this, after becoming aware of the harm they have suffered, the aggrieved party will need to complete the following steps:

i) to trace the cause of the harm, and to identify ICANN as the root cause;
ii) connected with the preceding, to discover ICANN's existence, to understand its role and how it relates to the matter at issue;
iii) to understand, probably on the basis of legal advice, that an ordinary legal dispute with ICANN is not indicated;
iv) to discover that there is an IRP process;
v) to understand the limited remedies available in an IRP case;
vi) to learn how the IRP process is conducted and, in particular, the means to initiate it;
vii) to learn about the permissible grounds for bringing an IRP cases, and to assess their own case against those criteria;

viii) to discover and learn about the likely costs of bringing an IRP case, including the possibility of being liable for ICANN's costs, and to assess and make a decision upon their willingness to incur them;

ix) to draft a statement of complaint setting out their claim, in terms based upon the ICANN bylaws alleging violation of the same

x) to finally take the decision to go ahead and to actually file with the ICDR

While longstanding and active members of the ICANN community, including Registries, Registrars and other regular ICANN meeting attendees ("ICANN insiders") can reasonably be expected to know all of (i)-(v) and to understand a fair portion of (vii-viii), by virtue of that participation, parties with no previous engagement with ICANN, such as Registrants (who might well have cause to bring an IRP case) and other non-contracted stakeholders often will not.

45 days is a tight deadline even if you are fully prepared, know the issue is coming, and all you have to do is draft and submit your case. For parties who have an extensive learning curve to climb before reaching the point of being able to draft a submission, so short a deadline would be exclusionary.

The 45 day limit unfairly discriminates in favour of ICANN insiders, in contravention of the Fundamental Commitments

One of the "Fundamental Commitments" in the ICANN bylaws is that it should
Section 1.2(a)(v) of the bylaws provides that it is a Fundamental Commitment to:

> "Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, **without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)"** **(emphasis added)**

Section 2.3 of the Bylaws further provides

> "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."

For the reasons stated in the previous section, the timing rule proposed in the Draft Rules would make a material difference on the accessibility of the IRP between at least two clearly identifiable classes of potential claimants, namely contracted parties and other regularly engaged members of the ICANN community, on the one hand, and other stakeholders on the other. In short, ICANN insiders would have a much more realistic prospect of being able to access the IRP to challenge ICANN and hold it accountable, while those without a pre-existing relationship would not have a realistic opportunity to do so.

It is also worth noting that most ICANN actions occur in consequence of, and indeed in furtherance of, the actions of the community that is less disadvantaged by the proposed timing rule.

Given these facts, the proposed timing rule constitutes a prejudicial distinction between different parties. No justification for such a distinction has been offered nor, it is submitted, could one be found, let alone one that constitutes a "substantial and reasonable cause".

The Bylaws require a realistic opportunity to bring an IRP case

The purposes of ICANN accountability generally, and the IRP specifically, are set out in the bylaws

Section 4.1 of the bylaws sets out the purpose of ICANN's various accountability and review procedures, stating:

> ARTICLE 4 ACCOUNTABILITY AND REVIEW
> Section 4.1. PURPOSE
> **In carrying out its Mission, ICANN shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws.** This Article 4 creates reconsideration and independent review processes for certain actions as set forth in these Bylaws and procedures for periodic review of ICANN's structure and operations, **which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws**, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 4.3(a) of the bylaws defines the purpose of the IRP specifically:

> Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS
> (a) In addition to the reconsideration process described in Section 4.2, ICANN shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("IRP"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):
>
> (i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
>
> (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).
>
> (iii) Ensure that ICANN is accountable to the global Internet community and Claimants.
>
> (iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)).
>
> (v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.
>
> (vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(emphasis added)

The purpose of the IRP Rules of Procedure is set out in the bylaws

Section 4.3(n) of the Bylaws provides

(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("Rules of Procedure") **that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties.** Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) **The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP.** Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems **appropriate to fulfill the Purposes of the IRP**, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN.

(iv) **The Rules of Procedure are intended to ensure fundamental fairness and due process** and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

[…]

(C)Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN's Response;

[…]"

(emphasis added)

The permitted purposes of the Draft Rules is exhaustively defined in the bylaws, and adherence to those purposes is mandatory

The framework for the purpose of the IRP set out in the bylaws is exhaustive. It is abundantly clear from the above-quoted provisions of the bylaws that it is mandatory for the Draft Rules to support the purposes set out in those sections, and no other. While these purposes allow for considerable latitude in the Draft Rules to adopt, and allow a broad discretion as to whether one particular proposal or another would better support the purposes set out, they do not allow ICANN the discretion to balance these purposes against other purposes that cannot be found in the bylaws.

It is not a permitted purpose of the Rules of Procedure to seek to secure certainty for ICANN

Accordingly, it is not legitimate for ICANN to adopt a timing rule that would admittedly limit access to the IRP on the basis of a claim that it achieves a fair balance between the purpose of the IRP and ICANN's administrative convenience.

This does not necessarily prevent ICANN from adopting Draft Rules that contain some form of time bar. It would be potentially legitimate to adopt a time bar if it could show that allowing claims to be filed any later would *reduce* fundamental fairness and *undermine* due process, contrary to Section 4.3(n)(iv). By contrast, it would not be not legitimate to adopt a time bar on the basis that the purposes of the IRP have been sufficiently achieved and a shorter deadline would benefit ICANN by creating certainty that its actions will stand, not if allowing claims to be filed after the deadline date would better advance the purposes of the IRP, and not undermine any of them. Certainty for ICANN is not an objective authorised by the bylaws.

It is not a permitted purpose of the Rules of Procedure to seek to secure prompt action by claimants for its own sake

It is also worth noting that the bylaws do not contain anything that directly imposes on claimants a duty to act promptly. Accordingly, ICANN is not authorised to adopt rules for the purpose of requiring claimants to act promptly for its own sake: promptness may be required in order to achieve one of the specified purposes, but that must be justifiable. It is not legitimate to say that "Claimants could reasonable file within (a given period) and so they may not file outside that period" without further justification.

The Bylaws require a rolling time bar

The Bylaws authorise ICANN to adopt "Rules governing written submission including … time for filing", Section 4.3(n)(iv)(C). However that provision is directed toward written submissions, rather than the more platonic notion of the initiation of a process. The Bylaws speak more specifically of limits on when an IRP can be initiated in Section 4.3(n)(iv)(A)

> (iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:
>
> (A) The time within which a Claim must be filed **after a Claimant becomes aware or reasonably should have become aware** of the action or inaction giving rise to the Dispute;
>
> **(emphasis added)**

This clearly indicates that the bylaws envisage that the deadline for initiating an IRP case should be calculated relative to when the Claimant became aware or reasonably should have become aware of the action or inaction giving rise to the dispute, and not relative to the date on which the action giving rise to the dispute took place.

Accordingly, the 12-month fixed deadline contained in one leg of the proposed timing rule in the Draft Rules is not authorised by this clause of the Bylaws.

Section 4.3(n)(iv) is non-exhaustive as to the "elements" that the Rules of Procedure may address, merely setting out a minimal set of elements that *must* be addressed by those rules. Nonetheless, it is submitted that since Section 4.3(n)(iv)(C) describes *how* the deadline for the initiation of an IRP case should be addressed (namely, relative to the date of the Claimant's knowledge rather than relative to the date of the action), ICANN does not have the authority to adopt a rule that addresses that issue in a contrary manner.

In the alternative, even if that clause is not determinative on its own, it is submitted that the clause clearly strongly indicates a rolling deadline, and contraindicates a fixed one. When read in combination with other parts of the bylaws, the bylaws as a whole prohibit a fixed deadline.

It is therefore submitted that the requirement proposed in the Draft Rules that an IRP claim "may not be filed more than twelve (12) months from the date of such action or inaction" must be removed, and that no limit may be adopted that is calculated relative to the date of the action.

The Bylaws prohibit time-barring cases that should be heard

The bylaws are highly explicit on the important purposes served by the IRP.

Amongst other things, the IRP forms a vital mechanism for ensuring that ICANN conforms to its Mission and does not stray beyond that Mission, nor engage in explicitly prohibited activity[2]. It avoids the need for recourse to the civil courts, an especially important goal given that stakeholders are based in no specific jurisdiction but come from all nations of the

[2] Section 4.3(a)(i)

world[3]. In particular, the IRP secures the transparent and just resolution of disputes, and ensures that the mechanism to ensure that is accessible to all materially affected parties[4].

These purposes cannot be fulfilled if cases are unnecessarily barred.

Part of this purpose requires that the settlement of disputes must be just. It may be that in particular classes of cases, the passage of time may prevent an IRP hearing from arriving at a just resolution: over time, memories fade, witnesses cease to be available, documents are lost. This would justify a time bar for cases of this type. But these concerns speak to the effects of time on *factual evidence* that may be required in a particular case in order to achieve a just resolution. No such consideration applies to cases that are purely legal in nature, such as a claim that a particular activity is in its entirety ultra vires the Mission or prohibited by Section 1.1(c) of the bylaws (as with the case given in the illustrative example described earlier in this document).

It may therefore be suggested that the question should be considered whether any time bar at all should be applied for cases that do not rely on factual evidence, other than to establish standing.

Whatever the outcome, we submit that the IRP should always retain the discretion to hear a case notwithstanding that a time bar has been exceeded, if the IRP believes both that it is necessary to hear the case to achieve a just result, and that the passage of time is unlikely to compromise the integrity of the outcome.

The IRP IOT acted arbitrarily and without justification in its selection of a proposed time bar text

The Draft Final Report of the IRP Implementation Oversight Team (IOT) describes the timing rule it proposes for the Draft Rules, but offers no justification for the rule it proposes. There is no reasoning whatsoever.

There is no evidence that the IOT considered the extensive requirements set out in the bylaws for the rules of procedure, not that it even took those requirements into account when developing its proposal, much less that it sought to systematically evaluate its proposal against those requirements.

We believe that the IOT should withdraw the current Draft Rules, either to proceed with a version that omits the timing rule, or to bring forward a replacement proposal with a new timing rule. If the IOT wishes to bring forth a timing rule, it should restart its consideration of this issue, develop a new proposal on a timing rule, and subject this proposal to systematic analysis against the requirements in the bylaws, before presenting a reasoned proposal for new Draft Rules in relation to this matter in a new round of public comment.

Because the IRP IOT failed to offer reasoning, it is left to us to construct, as well as to analyse, possible justifications for the rule.

[3] Section 4.3(a)(ix)
[4] Section 4.3(a)(vii)

Fears of harmful effects of late challenges are unwarranted or overblown

While we have focussed on potential IRP challenges to ICANN policy, as in the illustrative example, we are aware that others are more focussed on potential challenges to ICANN administrative decisions such as new gTLD delegations, as in previous IRP cases conducted under the old, pre-transition bylaws. There may be a fear that without a strict, fixed deadline for filing an IRP challenge, ICANN would be exposed to the risk of very late reversals of decisions that others rely upon, such as the delegation of top level domain registries.

We think this concern is misplaced.

Basing the timing on the knowledge of being affected will force early challenge by gTLD applicants and others similarly situated

It would be a mistake to confuse a timing rule that was calculated from when the materially affected party became aware of the harm they had suffered, or should have been aware of it, with abolishing the time bar altogether. A time bar calculated based on the party's knowledge is still an effective and significant limit.

A person who is directly involved in an ICANN process will know (or ought to know) how the process affects them immediately, or very soon. The clock may then start on a knowledge-based timing rule.

For example, if an applicant to run a gTLD Registry believes they have been mistreated in the applications process, the time would run from the point when the applicant became aware that it was not going to be assigned to run the gTLD. This is not a long delay.

The occasion when the date of the action and the date of knowledge of the affect will differ materially will be when a party was not affected for an extended period, and so had no right to challenge earlier.

The limited remedies available under the IRP protect ICANN

There are only strictly limited remedies available to successful claimants under the IRP. This limits ICANN's exposure dramatically, and so significant undermines any argument that ICANN needs to be protected from late claims.

Under the IRP the only remedy available is a finding that ICANN has acted inconsistently with the bylaws.

The IRP does not have the power to make money awards to successful claimants as compensation for their loss. Permitting IRP claims to be filed late therefore does not expose ICANN to a long-running potential for compensation.

Nor does the IRP precisely have the power to require ICANN to correct its fault. Admittedly, a finding that ICANN has acted inconsistently with the bylaws carries with it an implicit requirement that ICANN cease acting in that prohibited fashion, and an instruction to forbear from acting in such a fashion in the future. However, it does not necessarily amount to an instruction to undo what has been done, certainly not if undoing it is outside ICANN's reasonable control. For example, if ICANN were found to have breached its bylaws in the award of a registry contract to a particular applicant, thereby unfairly prejudicing the

interests of a competing applicant, we would expect ICANN to take the decision again (possibly, but not necessarily, awarding the registry to the previously unsuccessful applicant) if ICANN had only reached the stage of deciding to make the award; by contrast, if the award had been made and executed, and the initially successful applicant had established a proprietary interest in the new registry, we would not expect that an IRP ruling finding fault in the award process would require ICANN to shut down or transfer that registry.

We therefore find fears that late claims would compromise ICANN's ability to operate its essential functions effectively to be unconvincing.

The Draft Rules can neither extend nor reduce access to the civil courts

It would be a mistake to think that adopting any particular timing rule in the Draft Rules would affect ICANN's liability to be sued in the ordinary civil courts.

The civil courts have their own rules on standing (which are likely to be more restrictive, in important respects, than the Draft Rules) and on time for filing. Their rules are unaffected by the Draft Rules. If a person is aggrieved at an ICANN action, they may be heard in civil courts if they have a cause of action, they have standing, they file in time, and the court has jurisdiction, and if they satisfy any other relevant requirements. We should not believe that adopting a more restrictive timing rule for the IRP will help to keep civil litigants out of the civil courts; it will not, nor should it. Similarly, adopting a timing rule in the Draft Rules that gives more extensive access to the IRP will not give anyone a right to be heard in civil court that did not already have it.

Other policy considerations

Too strict a time limit is as bad as too lax

It would be a mistake to approach the question of the time for filing solely from the perspective of "how long do claimants need in order to ensure a fair process?": this can easily result in an unduly short period being selected for failure to foresee all future eventualities. It is better to begin with the question "At what point is a claim so late that the lateness itself undermines the fairness and equitability of the process?". This approach lends itself more easily to a proper demand for a legitimate justification for debarring a claim, which is more likely to lead to a just result, not to mention compliance with the purposes set out in the bylaws.

Relaxing the rule on standing is prohibited by the bylaws and would create its own problems

The illustrative example we have offered demonstrates that for important classes of challenge, under the current limitations to standing in the Draft Rules it may not be possible to initiate an IRP challenge for many years, even if it is known in advance that a challenge is appropriate.

This begs the questions: would it be better to relax the rules on standing?

Unfortunately, in our view, this creates its own problems. Considering the example of a challenge to an ICANN policy as being ultra vires (as in the illustrative example), if the rules of standing were relaxed so as to accept not only those that had experienced actual harm, but also those that might reasonably expect to experience harm in the future, then a broad class of potential claimants is created. At that point, if there were a flood of claimants, how would the IRP decide between them? Would the IRP designate someone as a class

representative? There is already a procedure for collective representation through the Empowered Community; the standing rules are intended to provide for vindication of individual rights, not collective action.

We therefore view with caution the option of relaxing the rules on standing so as to enable early review of challenges to ICANN actions that might otherwise be subject to challenge only after a protracted delay. Nonetheless, we accept that substantial delay in review is a problem; we recommend that this issue be subject to further study.

Community challenge is not an adequate substitute for an individual right

The community cannot be relied upon to challenge breaches of ICANN's bylaws by using the power of the Empowered Community to initiate the IRP. In particular, it cannot be relied upon to challenge breaches of the Mission limitation or the prohibition on restricting Internet content: ICANN generally acts at the behest of its community, so if ICANN were to breach the Mission limitation it is quite plausible that it would be doing so with the consent and support of its community (at least in the sense of regular community "insiders"). This is especially true because a considerable degree of community consensus is needed to exercise Empowered Community rights; even significant opposition to an ICANN action within the ICANN community may be insufficient to cause the Empowered Community to initiate the IRP. Nonetheless the Mission limitation exists to protect the interest of a broader community of stakeholders, who might be harmed by ICANN overreach but who do not – and should not be obliged to – regularly engage in ICANN decision-making processes. This must be capable of being enforced through an individual IRP case, even if the Empowered Community fails to act.

Moreover, the bylaws seek to protect not only the rights of the community, but also the rights of the individual affected party: a materially affected party who has been harmed by ICANN's breach of the bylaws should not be deprived of his right to challenge ICANN in the IRP merely because the community has failed to act.

Conclusion: the proposed timing rule in the Draft Rules is both bad policy and fails to conform to the requirements of the bylaws

The proposed timing rule in the Draft Rules unfairly and unreasonably prevents challenge to ICANN actions that breach the bylaws and bring material, concrete and particularised harm to affected parties only after an extended period has elapsed. In so doing, the Draft Rule denies such parties the benefit of the protection of the IRP promised by the Bylaws – a protection that was one of the major achievements of and conditions for the 2016 transition.

If these Draft Rules are adopted, the whole ICANN community will suffer, because it will largely negate some of the most important commitments in the bylaws and the transition process, namely the promise that ICANN will act only within a limited, defined Mission, and that it would not exploit its role in the DNS to bring about content or business service restrictions on the Internet. The timing rule proposed in these Draft Rules would make any IRP challenge unavailable in most such cases.

We believe that it is incumbent on ICANN to honour its commitment to accountability, and adopt Draft Rules that enable, support and reinforce access to the a fair and just review of its actions through the IRP. The timing rule in these Draft Rules does not do so. It should be withdrawn.

Recommendations

1. The current timing rule in the Draft Rules should be withdrawn.
2. Any future timing rule should be calculated relative to the later of the following the dates:
    a. The date that the claimant became aware, or reasonably should have become aware, that they have suffered harm
    b. The date that the claimant became aware, or reasonably should have become aware, of ICANN's action or inaction that is said to have given rise to that harm.
3. Any future timing rule should cut off no sooner than necessary to secure the purposes of the IRP; this will be much longer than 45 days.
4. The IRP Panel should be given the discretion to hear claims filed after they are out of time under the timing rule adopted, if they believe that doing so would advance the purposes of the IRP.
5. The IRP IOT should reconsider the timing rule, and bring forward a fresh proposal. In conducting that reconsideration, the IRP IOT should systematically assess the options against the requirements set out in the bylaws.
6. The IRP IOT should publish its new proposal for a further round of public comment. In doing so, it should also publish the reasons justifying its recommendation.