

Comments of Paul Rosenzweig and Brett Schaefer
On the Draft Supplementary Procedures for the Independent Review Process

On November 28, 2016, ICANN published a draft of the Updated Supplementary Procedures for the Independent Review Process (IRP) for public comment. This comment reflects the observations of Brett Schaefer and Paul Rosenzweig of The Heritage Foundation (Heritage) to the Draft Supplemental Procedures. Heritage is a research and educational institution—a “think tank”—focused on U.S. domestic and international public policy and is a member of the Non-Commercial Users Constituency of the Generic Names Supporting Organization.

In our view, one particular aspect of the draft (Section 4, relating to the “time of filing” a complaint) should not be adopted in its current form because doing so would divest stakeholders of significant ability to challenge Board actions that allegedly violate the Bylaws of the Corporation.

The draft proposal addresses the question of the “time for filing” of a complaint as follows: Section 4 establishes that 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. In other words, filing of a claim of a Bylaw violation may never occur more than 12 months after the date of adoption of the Bylaw.

We believe this proposal improperly limits the ability of claimants to challenge alleged Board Bylaw violations and divests the internet community of a valuable tool for restraining Board behavior. As a result, we think the proposal should be modified to a pure discovery rule by striking the last clause establishing an outside time limit of 12 months. In other words, the time for filing a complaint should be “within 45 days of the date on which a claimant first became aware” of the ground for his complaint.

We are well aware of counter arguments. There is value in statutes of limitation and repose – especially in a commercial context where detrimental reliance on decision making will be high. But the proposal, as drafted, leaves open the prospect of an irremediable wrong – a Bylaw violation whose affect manifests itself to the public and to potential claimants more than 12 months after adoption of the offending Bylaw. In a Machiavellian world, one can imagine the beneficiary of a Board decision waiting 13 months before implementing it to purposefully avoid IRP review. In a more realistic world we can imagine many scenarios in which the implementation of a Board decision takes longer than 12 months to have an appreciable effect on the internet community. Under either scenario, the prospect of a wrongful Board action that is immune from IRP review simply because of the passage of time should be rejected. As a public non-profit organization devoted to openness and transparency ICANN should not limit the ability of its stakeholders artificially to avoid review of its actions.

The draft proposal attempts to mitigate this concern by asserting that ICANN board interpretations of policy that allegedly violate the Bylaws will still be subject to a separate statute of limitations that runs from the date of the offending interpretation. While a salutary admonition, this effort is insufficient to ease our concern for two reasons: First, as guidance in a report, the interpretation of the “time of filing” provision is not binding on subsequent IRPs. It may be a correct interpretation (and it is certainly one we would support) but it may also be one that is rejected by the IRP who may, for example, adopt a

“relation back” doctrine as a way of time-barring some complaints. Second, the proposed mitigative report language does not address the problem of delayed implementation – that is the situation where a Board decision that violates the Bylaws is not implemented for more than 12 months, such that its adverse effects are not felt before the period of limitations has expired. When combined with the provision limiting the initiation of IRPs to those who are materially affected by a Board decision, the draft in its current form is likely to oust many valid claimants from the ability to challenge Board actions.

Indeed, this seemingly procedural provision may have critical practical consequences. The IRP process is intended to be the principal means of countering the potential for ICANN mission creep. And the constrained mission is seen as the single most significant innovation of the Accountability process. The ability of the IRP to act as a check on mission creep is critically weakened by a time-constrained IRP because a Board decision’s impact on the mission may not become evident until after implementation and application in future circumstances.

Finally, we note that the 12-month period of limitation has been deemed by outside counsel to be inconsistent with the just-adopted new ICANN Bylaws. According to Sidley & Austin: “Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and without regard to when the invalidity and material impact became known to the claimant, is inconsistent with the Bylaws (and is inconsistent with the terms of Annex 7 of the CCWG Report).” For this reason alone, Section 4 must be modified.

In short, and not to put to fine a point on it, in this instance the need for commercial certainty must, in our view, yield to the equitable notion that every valid complaint should have access to an independent forum for review. As drafted, with the 12-month cutoff, we do not support the current text of Section 4 and strongly urge its modification.