



Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures

February 1, 2017

The Intellectual Property Constituency (IPC) of the GNSO appreciates this opportunity to comment on the draft Updated Supplementary Procedures for the ICANN Independent Review Process (IRP Supplementary Procedures) developed per the requirements contained in the final report of the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability, Work Stream 1) (see <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>).

We commend the IRP Implementation Oversight Team (IOT) for its efforts in drafting updated procedural rules for the IRP to reflect the enhancements provided for in the revised ICANN Bylaws of 1 October 2016. We also appreciate the helpful explanatory Report of the IRP IOT, and note that there were three issues in particular on which the IOT was unable to reach full consensus. We provide our comments on these three issues: application of the updated rules to existing but unresolved IRPs, time limits for filing, and in-person hearings and cross examination. We also provide our comments on the following additional points, which the IPC considers to be of importance: consolidation, intervention and joinder, appeals to the Standing Panel, and costs.

Summary

For the reasons set out more fully in the sections below, the IPC makes the following recommendations for changes to the Draft IRP Updated Supplemental Procedures:

Existing but Unresolved IRPs:

1. Amendments governed by the Bylaws should apply to all IRPs arising from events which post-date the adoption of the revised Bylaws, save to the extent that an issue has already been dealt with under the existing rules.
2. Amendments on which the IOT has discretion should apply to any IRP arising from events post-dating the adoption of the IRP Supplementary Procedures, but not to IRPs which are already underway at adoption.

Timing of the Claim:

1. The adoption of a constructive knowledge element as required under the Bylaws.
2. The 45-day time limit be amended to allow an initial filing window of 90 days from actual or constructive knowledge.
3. Alternatively, whilst not our preferred option, the 45-day deadline could remain in place with the caveat that only a *de minimis* IRP complaint would need to be filed within that window in order to merely provide notice to ICANN and the broader

community, with the ability to file a substantive complaint in a longer period (such as an additional 45 days from the original filing).

4. The 12-month time limit be dispensed with for all Claims, since this is inconsistent with the constructive knowledge element. If not removed for all Claims, this should in any event be removed for Claims of “facial” invalidity, as advised by Sidley and addressed in their revised text.
5. The interplay between the IRP and various other community accountability mechanisms be identified and addressed, and specifically that timing ambiguity and inconsistency be rectified.
6. Payment of the IRP fees should be by reference to the receipt of the invoice from ICDR, rather than on filing the IRP.

Consolidation, Intervention and Joinder:

1. Any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).
2. Multiple Claimants should not be limited collectively to the 25-page limit for Written Statements but shall be entitled to their own individual page limits. Unnecessary and unreasonable costs generated as a result can be addressed by the Panel when making costs awards.
3. Requests should be determined by the IRP Panel and not by a Procedures Officer.

Appeals:

1. Appeals be made to an Appeals Panel, being a subset of the Standing Panel, between 5 and 7 members, who did not hear the original IRP and who have no other conflict of interest. The Standing Panel should number sufficient members to allow for this.
2. Costs of the appeal should be in the discretion of the Appeals Panel, but there should be a presumption that a losing appellant will bear the other party’s reasonable costs of the appeal.

Costs:

1. Include language within § 15 to the effect that “Nothing in these IRP Supplementary Procedures is intended to supersede ICDR Rules, Article 20(7) and Article 21(8), including the right to request an interim order allocating costs arising from a party's failure to avoid unnecessary delay and expense in the arbitration”.

Application of the updated rules to existing but unresolved IRPs

The Report of the IRP IOT explains that the IOT was unable to reach full consensus on the applicability of the updated rules to existing but unresolved IRPs. This issue was therefore referred to the full CCWG-Accountability, which decided not to provide for such retroactivity due to concerns as to unintended consequences, including increased complexity and potential Bylaws violations resulting from doing so.

In considering this issue in particular, and the draft IRP Supplementary Procedures in general, it is important to bear in mind the intended purpose behind developing an amended IRP, namely to enhance ICANN's accountability to those impacted by its actions and inactions and specifically "to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws" (see Para 174 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations) and that ICANN should be "held to a substantive standard of behaviour rather than just an evaluation of whether or not its action was taken in good faith"(Para 175 *ibid.*). Consequently, the CCWG-Accountability proposed several enhancements to the IRP "to ensure that the process is:

- Transparent, efficient and accessible (both financially and from a standing perspective).
- Designed to produce consistent and coherent results that will serve as a guide for future actions." (Para 176 *ibid.*).

It is the IPC's view, therefore, that in considering the question of whether the amended rules should have retroactive effect we ought to bear these aims in mind and deliver this increased accountability where possible, without re-opening matters which have already been dealt with. In doing so, the IPC considers that it is necessary to take account of the nature of the amendment, and specifically to consider whether the amendment is one which is governed by the Bylaws, or whether the Bylaws merely grant discretion to the IOT to determine the relevant standards and rules.

Amendments governed by the Bylaws

In the former case – for example the amendment to the standard of review – the relevant provisions were adopted in October 2016 with the amended Bylaws. The implementing rules contained within the IRP Supplementary Procedures should therefore apply to any IRP arising from events which post-date the adoption of the revised Bylaws since that is the point at which all parties became bound. We understand that this is the intention, since the IRP Supplementary Procedures state that "These procedures apply to all independent review process proceedings filed after [insert effective date] of the Bylaws." To the extent, however, that matters have already been dealt with under the old rules in an ongoing IRP we would suggest that they should not be reopened, unless it would be unjust and unreasonable to one of the parties not to do so.

Amendments for which the IOT had discretion

For matters covered by the IRP Supplementary Procedures which were left in the revised Bylaws to the discretion of the IOT, including matters relating to the timing to make a claim, conduct of hearings, and the availability of appeals, these new rules should apply to any IRP arising from events post-dating the adoption of the IRP Supplementary Procedures, but not to IRPs which are already underway at adoption. To provide otherwise could lead to unfairness, since the parties to an IRP could be expected to have taken the existing rules into account when reaching their decision whether or not to proceed, and would not have had the opportunity to consider rules which were not then in existence.

Time limits for filing

Time to bring Claims is too short and has no constructive knowledge element

Although the IPC appreciates the need for finality and closure with respect to the community's ability to bring IRP proceedings, the IPC is concerned by the brevity of the proposed deadlines for filing IRPs – within 45 days of when the complainant becomes aware of the harm and no more than 12 months from the ICANN action or inaction causing the harm. See Draft IRP Updated Supplementary Procedures at 6.

First, this standard limits the filing period based on a potential claimant's actual knowledge of the harm, and does not include a constructive knowledge element, as envisaged in the ICANN Bylaws. See ICANN, Bylaws Section 4.3(n)(iv)(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). Although this formulation is likely an intentional omission by the IOT, imposing too short a time frame based on actual knowledge of a harm caused by ICANN action or inaction could be unduly prohibitive for potential claimants, and could invite "gaming" to extend the limitations period.

Indeed, while certain harms might be readily apparent within 45 days, others, and particularly those that might impact only discrete portions of the community, might reasonably take longer, even potentially longer than the 12-month final limitation on bringing claims following the ICANN action or inaction.

In this regard, we note and agree with the advice of Sidley Austin LLP in their Memorandum dated 4 January 2017. Sidley comments that the 12-month cut off for commencing a claim may have been selected by the IOT as designating the maximum time limit within which the claimant "reasonably should have become aware," and that if so "such a determination would be subject to criticism and it could result in claims being foreclosed before an injury, and hence any knowledge of any injury, had even arisen". Sidley advises that "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)".

Further, even where a harm may become apparent with these windows, it may be very difficult for Claimants to prepare and file an IRP complaint within 45 days of actual notice of the actionable event, particularly in the cases where multiple stakeholders are involved. If a situation arose where the IPC was considering filing an IRP, for example, this is not a decision which could be made by the Constituency's leadership without obtaining the approval of its membership which could, potentially, even require a vote. Since the IPC's membership itself includes a number of organisational members this process of consultation and approval must, inevitably, take a little time. We imagine that other Constituencies and Stakeholder Groups may be in a similar position, as would the full GNSO. A 45-day time limit risks denying ICANN's constituent member groups access to the IRP.

Without prejudice to the further comments made below, therefore, the IPC recommends that:

- 1) The adoption of a constructive knowledge element as required under the Bylaws;

- 2) The 45-day time limit be amended to allow an initial filing window of 90 days from actual or constructive knowledge;
- 3) Alternatively, whilst not our preferred option, the 45-day deadline could remain in place with the caveat that only a *de minimis* IRP complaint would need to be filed within that window in order to merely provide notice to ICANN and the broader community, with the ability to file a substantive complaint in a longer period (such as an additional 45 days from the original filing);
- 4) The 12-month time limit be dispensed with for all Claims, since this is inconsistent with the constructive knowledge element. If not removed for all Claims, this should in any event be removed for Claims of “facial” invalidity, as advised by Sidley and addressed in their revised text.

Interplay with other accountability mechanisms is unclear

1. Cooperative Engagement Process

Prior to the filing of a Claim, parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process (CEP). It is not clear how long a CEP would take, but would likely run up against the 45-day filing period (even if revised). Based on information contained in the schedule of pending CEPs and IRPs published by ICANN, some CEPs take months or even years to complete. Thus, both the 45 day and any 12-month time limit are potentially impossible to meet if there is a CEP. This is an unsatisfactory ambiguity which ought to be directly addressed, either by the CEP stopping the clock, or by the IRP being formally commenced and then stayed pending the CEP. The latter option is not entirely satisfactory, however, since the work in preparing the IRP Claim would need to be done, and the fees paid to ICDR which may prove to have been wasted if the CEP resolves matters. Therefore, the IPC recommends that any CEP that precedes the filing of an IRP Claim toll any filing limitations period associated with the matter.

2. Request for Reconsideration

Similarly, in many cases community members would first file a Request for Reconsideration (RFR) before resorting to the IRP. For reasons similar to those referred to above in relation to the CEP, the filing of a RFR on the issue should also toll the deadline, and the IPC recommends that the IRP Supplementary Procedures should specifically identify and address this interplay between the RFR and the IRP. As with the CEP, the RFR could resolve the matter before the need to file an IRP, but in the event it does not, the deadline for filing the IRP should remain intact.

3. Community Engagement and Escalation

Further, the CCWG-ACCT Report for Work Stream 1 states that “All of these community powers can only be exercised after extensive community discussions and debates through processes of engagement and escalation. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.” Such “community powers” must presumably include the Community IRP. This escalation and engagement process could not possibly be completed and still allow the 45-day limit to be met (or possibly even a 12-month limitation), thereby potentially denying access to the Community IRP altogether.

The IPC recommends that the interplay between the Community Engagement and Escalation process and any subsequent Community IRP be identified and addressed, and that the deadline for commencement of the Community IRP be tolled.

The IPC believes that it is necessary to amend the filing limitations periods in these ways in order to best serve the underlying goal of providing adequate due process and properly effectuate the enhanced accountability mechanisms. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication).

Time for Payment of Fees

The requirement to pay the filing fee within 3 business days of filing the request may be impractical. Many entities and organisations require an invoice in order to make such a payment and experience of some IPC members is that ICDR does not issue invoices within such a short timeframe. A more practical solution would be to require payment within a set time of receipt of the invoice from ICDR, and we would suggest that 5 business days is the minimum appropriate time.

In-person hearings and cross-examination

The IPC supports the proposed language which seeks to limit the holding of in-person hearings and calling of live witnesses to only those exceptional circumstances where the requesting party can demonstrate that this is necessary for the fair resolution of the Claim and the furtherance of the purposes of the IRP, and where appropriate balancing consideration has been given to the additional time and costs which would be incurred by all parties. See IRP Supplementary Procedures § 5.

Consolidation, intervention and joinder

Under the existing IRP Supplementary Procedures, the only way for a third party to “intervene” in an IRP proceeding would be for that party to submit a statement at the request of the IRP Panel. See IRP Supplementary Procedures § 5 (“The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, **or from other parties.**”) (emphasis added). The draft Updated Supplementary Rules do not fully resolve IPC concerns about the ability of interested third parties being able to intervene or join an IRP proceeding. First, the draft merely permits **an existing party** to request the appointment of a Procedures Officer to determine whether other parties should be permitted to intervene or join the proceeding. The draft then states that any person or entity qualified to be a Claimant may intervene in an IRP with the permission of the Procedures Officer, but it is not clear what would happen if a party does not request the appointment of a Procedures Officer in the first place. In our view it is not appropriate for such important decisions to be made a Procedures Officer or by the Dispute Resolution Provider; decisions on whether to allow consolidation, joinder or intervention should always be made by the IRP Panel.

In addition, although the IPC understands that IRPs are directed against ICANN, there may be third parties who wish to intervene in support of ICANN's position or to safeguard their own position. This possibility does not appear to be accounted for in the draft which states

only that “Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER”. In particular, where the IRP is being brought effectively to challenge the decision of an ICANN-appointed panel, such as in the case of a Legal Rights Objection (LRO), the IRP would be brought by the losing party. The LRO itself, however, would have been an action between two or more parties and the winning party or parties have a direct interest in the outcome of the IRP and it is inequitable to deny them the opportunity to request permission to intervene.

To rectify these concerns, the IPC suggests that any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s). Otherwise, the IRP may not afford appropriate due process for all interested parties (not just those who may be aligned with the claimant or claimants on the issue(s) under review).

We see no reason for restricting all Claimants collectively to the 25-page limit for Written Statements. Even where a third party is participating as an additional Claimant it is not inconceivable that the multiple Claimants will have slightly different arguments and positions they wish to advance. It would appear to be a denial of access to justice to impose this limit collectively. We consider that to the extent that there is some increased cost as a result of the parties submitting their own Written Statements, this can be addressed in any costs award made by the Panel as necessary and appropriate.

Again, these rights of intervention and joinder are necessary to serve the due process goals of the enhanced IRP. *Cf., e.g., Martin v. Wilks*, 490 U.S. 755 (1989) (discussing a four-part test for determining whether a lawsuit can proceed in satisfaction of due process in the absence of a necessary party, including (1) whether “a judgment rendered in the person’s absence might be prejudicial to him or those already parties”; (2) whether the court can reduce or eliminate prejudice by “the shaping of relief or other measures”; (3) whether the judgment rendered without the outsider will be “adequate”; and (4) the costs on the plaintiff of a dismissal for non-joinder.).

Appeals to the Standing Panel (Section 14)

Composition of the Appeals Panel

The Standing Panel is defined as an “omnibus standing panel of at least seven members”. It is thus envisaged that the Standing Panel may consist of more than seven members, even, theoretically, an unlimited number. It may not be practical, therefore, to have the entire Standing Panel hear an appeal *en banc* for the following reasons:

- 1) the number of members may make such a panel unnecessarily unwieldy;
- 2) a Standing Panel which consisted of an even number of members could result in no majority decision being reached (i.e., a tied decision);
- 3) some members of the Standing Panel may be subject to a conflict of interest;
- 4) three members of the Standing Panel will have been the original deciding panellists. This might itself be considered a conflict of interest since it must be extremely difficult for one of the deciding panellists to impartially determine that they made a “clear error of judgment” or applied “an incorrect legal standard”. Certainly there would be

a risk of the appearance or perception of bias which would undermine the appeal process. We also contend that it is contrary to principles of natural justice that those who reached the original decision should participate in the determination of the appeal.

If there is to be an appeal process, the IPC recommends that the appeal be to an Appeals Panel consisting of:

- 1) an odd number of Standing Panel members, being a minimum of 5 and a maximum of 7 members to be selected at random;
- 2) such 5 members to exclude any Standing Panel member who participated in the original decision and any panellists who have a conflict of interest;
- 3) to the extent that the number of available Standing Panellists is fewer than 5, additional Standing Panellists shall be appointed.

Such a solution would not be inconsistent with the Bylaws, which state that “Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc...” (ICANN Bylaws Section 4.3 (w)).

Costs of Appeal

Although matters of costs should be left to the ultimate discretion of the Appeals Panel, it seems reasonable, in the interests of justice, that there should be a presumption that an unsuccessful appellant will bear their opponents reasonable costs of the appeal. Such a provision ought to discourage frivolous appeals with little or no prospects of success.

Costs (Section 15)

It is common in such proceedings to seek to ensure the good conduct of parties by means of the threat of costs and other sanctions. The ICDR Rules do so at Article 20(7) and Article 21(8). Since the IRP Supplementary Procedures state that in case of conflict between the two sets of rules, the IRP Supplementary Procedures will apply (See IRP Supplementary Procedures § 2), and since the IRP Supplementary Procedures § 15 includes language regarding the treatment of the costs of the IRP, as provided for under ICANN Bylaws Section 4.3(r), the IPC believes it would be beneficial to clarify that no conflict exists in this regard. The addition of language within § 15 to the effect that “Nothing in these IRP Supplementary Procedures is intended to supersede ICDR Rules, Article 20(7) and Article 21(8), including the right to request an interim order allocating costs arising from a party's failure to avoid unnecessary delay and expense in the arbitration” would be beneficial in removing any possible doubt.

Respectfully Submitted,

Intellectual Property Constituency