

Annex A

David McAuley's Comments on Joinder Rights

Prior to December 2017	After June 2018
<p>“Fletcher basically pointed to the fact that the Applicant Guidebook from the 2012 round of new gTLDs basically did not provide an appeal to people who lost before an expert panel. Those were the panels that heard legal rights objections, string confusion objections, and community objections. But now the Bylaw explicitly says that expert panel decisions can be brought to IRP.</p> <p><i>And so Fletcher is making the point that we in the rules need to be clearer and explicit about parties who won before the expert panel, therefore they're not likely to bring a claim. Parties that lost are likely to bring a claim. And in doing that, Fletcher's question is – what about the parties that won? How are they going to be heard...?</i></p> <p>...</p> <p>So <i>Fletcher suggested three safeguards</i>: 1) that we should have a rule that provides <i>actual notice to all the original parties before the expert panel</i>, 2) that we should provide a <i>mandatory right to intervene to all the parties</i> – they can decline it but they would have a right to do it, and 3) <i>require the IRP panel to hear from everybody that was involved below</i> before they give any interim relief.</p> <p>Frankly, I think these are sensible provisions.”</p> <p style="text-align: right;">- 2 March 2017¹</p>	<p>“I had my hand up because I want to speak as a participant here.</p> <p>And I do have concern[s] about this and what I believe is that on joinder intervention, whatever we are going the call it <i>it's essential that a person or entity have a right to join an IRP if they feel that a significant -- if they claim that a significant interest they have relates to the subject of the IRP.</i></p> <p><i>And that adjudicating the IRP in their absence would impair or impede their ability to protect that.</i></p> <p>And in addition when there's a question of law or fact that the IRP is going [to] decide that is common to all that is are similarly situated.</p> <p>And especially given the finality of these kinds of proceedings it's my view that intervention, whatever term we are using needs to capture that.</p> <p>So I'm putting that on, I would be happy to provide specific language with respect to this concept tomorrow on list. And we talk about it on Thursday. But that's what I wanted to mention as a participant with respect to this particular rule.”</p> <p style="text-align: right;">-9 October 2018²</p>

¹ IRP-IOT Meeting #15 (2 Mar. 2017), Transcript, [Ex. 201], pp. 30-31 (emphasis added).

² IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202], p. 15 (emphasis added).

“The suggestions that I made are that we come up with rules that allow *everybody that was a party at the underlying proceeding – the Expert Panel* basically such as a string confusion objection. Those kind of panels – everybody that was a party there would get notice and an opportunity to be a party at the IRP if the loser below brings an IRP, that *all parties have a right to intervene or file an amicus brief*, and that if they become parties, they have the rights of a party under this kind of conflict, that all parties have a right to be heard in any petition for interim relief.”

-6 April 2017³

“So what I’m doing is suggesting *only those persons or entity participating in the [underlying] proceedings* receive notice from a claimant, this is the expert panel challenge instance, of the full notice of IRP and the request for IRP including copies of all related file documents. And they receive that contemporaneous with the climate [*sic*] serving the document on ICANN. *The second point I’m suggesting [is that] all such part[ies] have a right to intervene in the IRP.* The timing and aspect intervention shall be managed pursuant to the applicable rule of ICDR except otherwise indicated here. *The manner should be up to the procedure officer who may allow such intervention through granting IRP party status or by allowing such partying to file amicus by briefs.*”

-7 September 2017⁴

“What I added [was] the following[:]. [I]n addition any person[,] group [or] entity [shall have a right to intervene as a claimant where (1)] that person[,] group [or] entity [claims a] *significant interest to subjects of independent review process and adjudicating [the independent review process in that person,] group or [entity’s] absence might impair the person[,] group [or entity’s] and ability to protect such interests* [and/]or [(2)] [where] any question of law or fact [that is common to all who are] similar[ly] situated as [that person,] group or entity is likely to arise in the independent review process.”

-11 October 2018⁵

³ IRP-IOT Meeting #18 (6 Apr. 2017), Transcript, [Ex. 203], p. 22 (emphasis added).

⁴ IRP-IOT Meeting #28 (7 Sep. 2017), Transcript, [Ex. 204], pp. 3-4 (emphasis added).

⁵ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 12 (emphasis added) (corrections based on audio recording).

“I think we’ve agreed that *anybody that has participated in the underlying expert panel proceedings, and with respect to a certain section of the bylaw*, that they would get -- if they participated as a party there and another person challenges that, then those participants below would get full notice of the IRP and the request for IRP, those two things together sort of create the statement of the IRP, at the same time that the complaint is filed. And all of these parties would have a right -- a right -- to intervene in the IRP. *But how that right is exercised would be within the discretion of the procedures officer. And you can see from the text, you know, that that might be as a full party, it might be as an amicus*, whatever is decided.”

-11 May 2017⁶

“But if it were moved to an amicus thing I would like to take a look at the language you came up with. You can tell between this and rule 8, where I’m coming from is a [competitive] situation. *Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that are affected by ICANN have to be able to [protect] their interest in competitive situations.* [So I] use[d] language [that] largely followed U.S. federal rules of procedure. But these rules are fairly—I think, a least I common law countries—fairly routinely accepted that someone has an interest can defend themselves [because] they can’t look [for] the defendant to make [their] argument for them.”

-11 October 2018⁷

“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 that went out for comment.*”

-21 July 2017⁸

“And I will also make a comment as a participant, Sam, I think that I can live with what Malcolm has just said. I think he’s right in what he’s saying and *I think it’s quite possible that we could crack this nut with amicus status as long as it’s not discretionary it is a matter of right* and as long as amicus can protect the language in did [*sic*].”

-11 October 2018¹⁰

⁶ IRP-IOT Meeting #21 (11 May 2017), Transcript, [Ex. 206], p. 6 (emphasis added).

⁷ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 14 (emphasis added) (corrections based on audio recording).

⁸ Email from D. McAuley to Members of the IRP-IOT (21 July 2017), *available at* <https://mm.icann.org/pipermail/iot/2017-July/000279.html> (last accessed on 26 Jan. 2019), [Ex. 207] (emphasis added).

¹⁰ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 15 (emphasis added).

“There needs to be rules and criteria established as to who can join intervene by right as who may be properly allowed to join, allowed to intervene at the discretion of the panels. My suggestion was intended to allow ***all parties at the underlying proceeding*** to have a right of intervention but that the IRP panel through the procedures officer could limit such intervention to being that of an amicus. Not in division to allow nonparties from below or others to join under these provisions. Noting that these provisions deal with parties below. Basically an expert panel hearings.

We’re not displacing rule number 7 will consolidation, intervention joinder from the draft supplementary rules [that] were up for comment.”

-27 July 2017⁹

⁹ IRP-IOT Meeting #26 (27 July 2017), Transcript, [Ex. 208], p. 21 (emphasis added).

Annex B

~~DRAFT as of 31 October 2016—Updates to ICDR Supplementary Procedures~~

7. Consolidation, Intervention, and ~~Joinder~~²⁴. Participation as an Amicus

~~At the request of a party, a~~ A PROCEDURES OFFICER ~~may~~shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Except as otherwise expressly stated herein, requests for consolidation, intervention, and ~~joinder. Requests for consolidation, intervention, and joinder/or participation as an amicus~~ are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for ~~interim relief~~consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER. ~~CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.~~²⁵, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

²⁴ There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issue be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07—Recommendation #7, at § 20.

²⁵ See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

~~In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.~~

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an Amicus Curiae

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an amicus before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an amicus must contain the same information as the Written Statement (set out at Section 6), specify the interest of the amicus curiae, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an amicus curiae.

⁴ During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of amicus curiae and in then considering the scope of participation from amicus curiae, the IRP PANEL shall lean in favor of allowing broad participation of an amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

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