ICANN80 | PF – ICANN80 Fellowship Program Participants Meet and Greet Session
Monday, June 10, 2024 – 9:00 to 10:00 KGL

BRENDA BREWER: Thank you. Hello, and welcome to the IRP-IOT public session at ICANN80. My name is Brenda Brewer, and I am a participation manager for this session. Please note this session is being recorded and is governed by the ICANN Expected Standards of Behavior.

If you would like to speak during this session, please raise your hand in Zoom. When called upon, virtual participants will be given permission to unmute in Zoom. Onsite participants will use a physical microphone to speak. Please state your name for the record and speak at a reasonable pace. I will now hand the floor over to Susan Payne. Thank you.

SUSAN PAYNE: Thank you very much, Brenda. So yes, welcome, everyone. Welcome to those who've joined us in person. Welcome to those who are online. Although I think we have not a huge turnout, this session will obviously be recorded, so hopefully will form a useful resource for the community in due course when our rules go out for public comment.

So this is the public meeting of the Independent Review Procedure-Implementation Oversight Team or IRP-IOT. It's a bit of a mouthful. So we do use the acronym. As you can see from this agenda, we'll just briefly give a bit of an introduction to the group and the work that we've been doing, explain about the public comment that is coming up, and then give an overview at a relatively high level of the proposals that we're making for amendments to the IRP rules, and then some more practical information about that public comment where you can find documents and so on. And then we'll just highlight some of the other tasks that this IRP-IOT group has on our slate that we will also be addressing, and then an opportunity for questions and comments and so on, although I'm personally quite happy to run this relatively informally. And so if someone has a question about what's being said and you would like to put your hand up while we're doing the presentation, that's also fine by me. We'd like this to be an opportunity for people to understand what we're proposing. So with that, we can go on to the next slide, please, Brenda. Thank you.

So just by way of introduction, the Bylaws in 4.3(i) provide for this group, it's to be comprised for members of the Internet community, and a number of roles but the one specifically referred to in that Bylaws provision is about developing the rules for the IRP that will conform to international arbitral norms and are streamlined, easy to understand, and apply fairly to all parties. And so we've had that in our minds when we've been doing our work. And really the amendment of ICANN's Bylaws which occurred as a result of the IANA transition and the work of the CCWG on Accountability meant that there were changes made to the Independent Review Procedure so that the IRP-IOT was convened to review and revise the IRP Supplementary Procedures or the easiest way to refer to them as the IRP rules, but they're called the Supplementary Procedures because they supplement the general arbitration rules of the IRP provider, which is an external organization that offers arbitration services, and that is that ICDR. So ICDR has some very general arbitration rules that do apply insofar as they are applicable. But obviously there are specific revisions that are relevant to the IRP, and so that's what these rules do.

In terms of the IRP-IOT, it's a fairly long standing group the sort of first iteration of the group was in place between 2016 and 2019. And they did do a lot of work on developing draft IRP Supplementary Procedures and held two public consultations. The first of those consultations was a sort of general one on various proposed amendments. And as a result of the input from that, the group made some revisions to the proposed IRP rules to take that into account.

Then there was one specific issue which was about the time for filing an IRP. That was viewed as needing more work. So, the second public consultation was just about the time for filing an IRP. As a result of that work in October 2018, the Board adopted what's been called the interim IRP Supplementary Procedures. Those interim rules have been in place since October 2018. But those interim Supplementary Procedures don't address the time for filing and the feedback that came during that second public comment period. So when the group was reconvened with new volunteers to kind of get the work back underway, that was one of our key tasks was to address that public comment input that came on the time for filing, and also to look at some other issues that had become apparent as a result of the IRP being used by that point by some parties who'd actually bought IRPs under the sort of revised procedure. Next slide, please, Brenda. Yes.

As I said, we have this reconstituted group with some additional volunteers. One of our first objectives, therefore, was to finalize the rules because we're still running on the interim rules. So we address, as I said, the input from the second public consultation, and we also took some feedback from IRP users. That included members of our group, both on the ICANN side and on the practitioner side, who'd actually been using the IRP. We also had the opportunity of being able to look at some of the cases that had been run in the intervening period.

So we're sharing our proposals here. They will go out to public comment hopefully very soon after this meeting. I would say it's been a fairly significant piece of work. In the reconstituted group, we've been working for actually more like four years now. And it's been quite challenging at times. I think what we're proposing represents a level of compromise by everyone in the group. There's one issue in particular, which we'll come on to, which relates to the time for filing. We certainly don't have full consensus of our group on what we've come up with. But everyone supported where we've got to sufficiently to bring it to the community and get further community input. Then one of the other things that I think we're obviously seeking input from the community on all of our work, but we did want to highlight that we've made various proposals about times for doing particular tasks like the time within which you must file a certain statements and that kind of thing. It is our intention to review them for consistency at the end. We've tried to balance, allowing parties sufficient time to do what they need to do against the Bylaws' intent, which is that the IRP process should run for six months. Now, that certainly is only honored in the breach at the moment. I don't think there's any IRPs that I've only run for six months, but that's the intent. And so in developing the rules, we've tried not to develop rules that make six months an impossibility, but we definitely welcome input on the timing. Next slide, please.

Okay. The rules that we are making proposals on address issues of the selection of the panelists for the IRP panel, the time for filing, and that includes the initiation, the baseline time within which you must bring an IRP, and some provisions that we developed to give some leeway on that, both where other accountability mechanisms have followed or if there are very limited circumstances where it's impossible to meet the deadline for some reason outside of the claimant's control. Then we also looked at the rule on translation, and finally on consolidation, intervention, and participation as an Amicus. So I think with that, we can go on to the next slide. I think we are on to panel selection. I'm going to hand over to my colleague, Greg Shatan, who's going to just introduce the proposals on this.

GREG SHATAN: Thank you, Susan. We have a rule that in the interim Supplementary Procedures was just one fairly meaty paragraph, but it covered a lot of ground very quickly. So there were some things that really needed to be fleshed out. Other things, that just hadn't been discussed properly. I think as we've done with all these rules, we try to look at "what if" scenarios and make sure that we had rules that took care of not ridiculous edge cases, but things that we would expect to come up in the ordinary course. So we've expanded the section quite substantially.

One thing that we did, we didn't have any timing requirements in the interim supplementary rule. We've added time limits throughout. Of course, we want people to comment on whether people think those time limits are adequate, too long, too short, whatever they might be. We address things that could go wrong in the selection of panelists in terms of timing, in terms of agreement between the parties since the panelists are chosen. Typically, if you have a three-panelist panel, each party selects one and the third is selected by the two panelists. So you have to have some level of agreement. We could have a logjam in various ways so we had to deal with what would happen then and how long will we allow things to fester before moving to the next part of the rule. We also dealt with when the panel might not have capacity, which primarily means literally bandwidth or person hours available, because the Standing Panel is going to be a relatively small group of experts. And if there are a number of IRPs running at the same time, we could well run out of panelists because they can't take an infinite number of panel positions simultaneously. So it's possible we could run out. There could also be an issue with whether there's a particular expertise or the like that might indicate that none of the panelists qualify or the panelists that do are already fully booked, and we'd have to deal with that. So again, we have some rules there about selecting somewhat from the outside or the bench if there is a bench to get through that. We didn't have a lot of discussion of this. We had dealt previously with conflict of interest in really just one sentence. Whereas in arbitration and in judging generally, conflicts of interest, appearance of conflict of interest, lack of conflict of interest are quite important, and there's often quite a lot of rules around them in the real world. While there are some rules that would apply, I think, from the ICDR, ICANN is obviously a special case. We're always a special case. And of course, the panelists need to have a certain level of knowledge and experience and understanding with ICANN, but they can't be kind of part of the day-to-day rumble. So there are various ways that we need to make sure that that conflicts don't arise, appearances of conflict don't arise. So now that rule is in several sub parts. A lot of things that were brief statements have now been kind of explained with rationales that are really part of the rule now, kind of the cause part of the sentence as opposed to just making pronouncements and moving on. In our comment package, there'll be actual rationales that are explanatory as well. So, you'll be able to understand further why some of the rules have been suggested.

So, the panel selection is critical. I also served as part of the team that selected or the nominated the group of panelists. I think we have a great set of panelists. But it will be very interesting to see how this all works from these rules are ultimately in place. So, Susan, I think unless there's any other thing about panel selection—and, of course, if you're just selecting wall paneling, that's an entirely different selection process. We don't need to talk about that. Thank you.

SUSAN PAYNE: Thanks, Greg. Okay. All right. Next slide, please. We can go on to Rule 4, which is about time for filing actually is broken down into four parts at the moment. So we've called them A, B, C, and D. We've kept the rule numbering at the moment for the purposes of the public comment in order not to cause more confusion. But I think once we have a final set of rules, it's quite possible that we'll actually just start from the beginning and renumber them all. But for now, we're working on these sort of As and Bs where we needed to or we're slotting something additional in.

So the first part of the timing rule addresses initiation of an IRP. Really, there was relatively little language about initiation in the rules at the moment. Sometimes there'd be a sort of sentence or two dotted around the rules that covered some of it, and we felt it was helpful to pull it all into one particular place. And really, most of what we've covered in this 4(a) section on initiation really relates to the costs of the IRP and what is paid when and by whom. Where, as I say, I think some of it was there that maybe not gathered in one place, some of it is more something that's considered in the Bylaws language, and some of it has been addressed in panel decisions. So we took the opportunity where recent IRP panels have made determinations on certain issues about the cost allocation. We've tried to capture that in the rules so that it's more apparent for potential claimant.

One thing in particular that we addressed and we've we spent quite some time talking about was about whether there should be a filing fee or not. In the ICANN Bylaws, there is some language. Forgive me, I won't identify the rule number, but there is language in the Bylaws that talk about the costs of the IRP mechanism being borne by ICANN. I think it's the administrative costs of the IRP mechanism, if I am more precise. So we discussed what is the filing fee and what is it used for. Obviously, that goes to the IRP provider. And that is, in this case, ICDR. It kind of is a largely administrative fee. So we had some discussion about whether it was appropriate for a claimant to be paying a filing fee. And ultimately, where we've come down is that we do think it is appropriate. We think it serves a really useful purpose as a gate to frivolous and vexatious claims, but obviously without wanting it to be set to be so high as to be chilling. But following what we saw from some of the actual cases, that filing fee that then generally was being recovered from ICANN at the conclusion of the IRP as part of the panel determination about cost. So in our proposals, we're actually formalizing that and making it clear that yes, there is a filing fee. But come the end of the case, absent sort of particularly frivolous and vexatious behavior by the claimant, the expectation is that ICANN would be repaying that as part of some of the other fees that get reallocated to ICANN.

So that was, I think, one of the key things. We haven't set a fee. We didn't feel it was appropriate to set a fee, but we did discuss in quite some detail some of the principles that we thought were important in what the fee should be. Also, I think one of the other issues that that we addressed was around the costs of the panelists. It's captured in the Bylaws that ICANN's responsible for the Standing Panel costs. Obviously, we're very close now to having that Standing Panel in place and hopefully the number of cases where panelists are taken from outside the Standing Panel will be sort of vanishing. But it's still envisaged in the Bylaws that there might be situations where the Standing Panel are unable to take a case for some reason. For example, if there were so many IRPs, that the rule all just completely tied up. The Bylaws do account for the possibility of panelists coming from outside the Standing Panel. So we felt it was important to address that. So we have proposed and included in our proposal that the cost of the Standing Panel and the cost of panelists are something that is worn by ICANN because it is part of the cost of the administration of the IRP proceedings. I think we were confident that that was the intent. When we looked back to the CCWG Accountability recommendations that led to the changes where one of the things viewed as really important was that that cost of panelists shouldn't be something that was a bar to accessibility to the IRP proceedings. So that was another area that we highlighted.

In addition to that, we did talk about various sort of principles about initiation that didn't really fall within the rules. So we don't have specific rules on them. But we're likely to have some kind of output that explains some of those. So that includes things like making terminology uniform across the IRP and the ICDR documents in some way, clarifying that the claimant isn't agreeing to be bound by parts of the ICDR rules and procedures which had been superseded. One of the things that was a concern was the form when you submit to the ICDR, you have to make certain agreements as to things like payments, which actually we have our own procedure and our own principles in the Bylaws and in these rules about who's paying what, and so there's a conflict there. And those kinds of issues. So we have a set of sort of principles as well that we're proposing that I think just come as part of our output. But there's not a specific Supplementary Procedure or a specific rule that we needed to propose for that. Okay. I think we're good on initiation. We could go on to the next slide.

So the next one is 4(b), and that deals with the time for filing. The current interim rules do have a time for filing. They also have a principle of a period of repose, which is a sort of outer time limit, after which you can't file an IRP. So the time for filing is broken into two parts. The first part is based on that a claimant has a period of 120 days after the date on which they became aware or reasonably should have become aware of being materially affected by the action that's being challenged in the dispute. The concept of being materially affected is a concept that comes from the Bylaws. But part of our task in setting out the rules was to identify what the time for filing should be. This is obviously being subject to a couple of public consultations. I think 120 days is a sort of decent compromise that people got behind during the public consultation. So we did slightly tweak the language just the way in which the rule is framed and the interim Supplementary Procedures is a little bit clunky and difficult to understand. So we have tried to just not to change the concept but to make it just a little bit more understandable by rewording. But then the second head of this time for filing is the question of whether there's an outer time for filing. So, obviously, the main principle is that you have 120 days from when you become aware or reasonably should have become aware. But the second head is this issue of having a repose whereby there's an outer time limit. And what we have proposed is that it should be 24 months from the decision in question in which to bring your claim. So in the interim rules, the repose period is 12 months. And so that means 12 months after the decision from the action or inaction from the Board or staff, that's the actual provision. Twelve months after whatever the action or inaction is, there's a cut-off after which you cannot bring an IRP. We've changed that to 24 months. So that means that in addition to you having that 120 days from when you became aware or should have become aware of being materially affected, if that only happens, you only become aware or only are materially affected after 24 months, then subject to some of the things that I'll come on to in a minute, you are out of time for bringing an IRP.

I would say this is the most difficult issue that we had to address. It was extremely difficult for us within the group. We had the benefit of input from the two public comments. It's not an easy issue. On the one hand, there were concerns raised by the community in previous public comments and they were shared by some members of our group that there should be no outer time limit for bringing an IRP because the Bylaws don't explicitly refer to this, but only refer to the time limit for the claimant to bring the IRP which has to run from when they become aware or reasonably should have become aware of being materially affected by the action or inaction. This idea, therefore, that someone might become out of time because they are not aware or they are not actually affected and their time for filing has already run out. So there were definitely some in our group and some of the public input argued that there shouldn't be any period of repose on the one hand. And then on the other hand, there were other IOT members and I think also some of the public comment inputs that argued that decisions can't be open indefinitely. There has to be some cut-off point. The Board's decisions or staff decisions, you couldn't be 10 years down the line and have people still challenging a decision that everyone has been working for 10 years. So there needed to be some period of repose. Although the Bylaws don't specifically allow for it, they equally don't specifically prohibit that being a repose applied.

As I say, this was a really difficult issue for the group. We definitely were not in agreement on this. We discussed it extensively. I think it's fair to say within the group, we reached consensus on this compromise when taken into account the 4(b) and 4(c) that we'll come on to. We had a consensus. We certainly didn't have full consensus. We were sufficiently aligned that we felt it was okay to put this out and get further public input on this. But yes, we don't have full consensus on this. We then have a final sort of cut-off that is an outer cut-off of absolutely no IRP after four years. And that's to take into account that we do have a couple of additional kind of leeway for a claimant in 4(c) and 4(d). I'll just quickly check. Yeah, I don't have any comments.

So if we go on to 4(c), please, Brenda. One of the things that we were concerned about when we were thinking about this time for filing—and this is both actually the 120 days and the 24 months—is that it's quite possible that a claimant might seek to use one of the other accountability mechanisms allowed for in the Bylaws before they go to what's viewed as the kind of the more nuclear option of bringing an IRP. So another mechanism that exists is called the Request for Reconsideration or RFR. There are other mechanisms as well, including things like going to the Ombuds or seeking documentary disclosure is maybe something that one would do prior to bringing an IRP. So we discussed that, and we were very concerned that we shouldn't be dissuading claimants from using other mechanisms that might serve to either narrow down the issue in dispute or potentially resolve it for fear of them being out of time in order to bring their IRP. So we did discuss how best to address that and including which mechanisms, it was appropriate to address this for. And we concluded that, really, the Request for Reconsideration is the one where it's most applicable. In terms of going to the Ombuds, we did actually have a meeting with the Ombuds at the time, to get his views on whether it was appropriate to do something in relation to Ombuds proceedings. Actually, he was not really in favor of that for a number of reasons, including because of the nature of the Ombuds proceedings and the fact that they're confidential and so on.

So just in respect of the Request for Reconsideration, we discussed finding some way in order to either toll the time limit for the time that you spend on the Request for Reconsideration or some other mechanism. In the end, a proposal was made, which the group coalesced around, which was that we would use a concept of kind of fixed additional time, we felt that tolling made things very complex. So instead, we came to the conclusion that what was best was to allow a 30-day time period, so that by the time you reach the end of your RFR proceedings, if you've got less than 30 days left in your time for bringing your IRP, then you would be given additional time in order to allow for that so that everyone would have at least 30 days in order to bring their IRP. Then that removes this concern that you might run out of time. But it's the sort of relatively simple process. Everyone knows they'll have 30 days, and so they're able to work towards that.

So that is what our proposal was. Just to note that we didn't hold for the time in engaging in the cooperative engagement process, which is a kind of a discussion process that comes at the beginning of the IRP, which is very much encouraged in the Bylaws. But that is something that is addressed at the moment in the current outdated cooperative engagement process rules will be it. One of the tasks we have is to look at those rules and we probably will look at that again. At the moment, this timing issue here and foresee as just in respect of the Request for Reconsideration, but our expectation is that they would be some kind of similar concept applied to the cooperative engagement process when we look at the rules for that.

I'll just quickly see if there's any messages. I will mention the comment that we have here from I think it's Malcolm. I can see Malcolm in the window, who just points out that it's worth noting that there's also no consensus on certain aspects of what the Bylaws allow, require, or prohibit in regards to the time for filing whether our proposal is consistent with the Bylaws or not, and I think that's right. And obviously, this is an important issue. We are hoping we will get input from the community on it.

Okay. Then we can move on just then now to 4(d), which is the other safeguard that we built in. Again, recognizing that we're bringing in this concept of repose and wanting to be as fair as possible to potential claimants, but seeking to get that balance between having IRPs being brought multiple years down the line. So we also built in in 4(d) these limited circumstances for requesting permission to file after the 24-month limit. Again, it's intended to meet this compromise. We felt that there should be sort of circumstances where if a claimant for extraordinary exceptional circumstances outside of their control was either prevented from becoming aware of the matter that is the subject to the dispute or was prevented from being eligible under the Bylaws to be a claimant for circumstances outside of their control. Or if there were exceptional circumstances not caused by the claimant that prevent them from being able to file a written statement of dispute within the 24-month time limit, then they would be able to file an application for leave to bring their IRP late. That sort of decision would be made by a single panelist who would basically determine whether they felt the claimant sort of met the necessary criteria. We hope that if and to the extent that this provision is used, that panelists would then take into account both the purposes of the IRP which are sort of set out in the Bylaws, but include things like the fair determination of disputes and also previous jurisprudence as it develops from previous IRP panels. There would, obviously, for the avoidance of doubt, ICANN would have a right to respond to any such request and make their own submissions on it. So that is what we proposed. I think that's probably as much as it's worth saying on that one. Again, the idea of this is to make this sort of compromise between just a kind of 24-month cut-off, and there might be circumstances just entirely outside of someone's control, especially in terms of the second ground of not being able to file your statement of dispute, we were thinking about wars and natural disasters type situations.

Okay. So I think that's all I was going to say on Rule 4, the time for filing. We could probably move on to the next rule which is 5(b), I think, on translations. I think I'm handing over to you, Greg, is that right? Yes.

GREG SHATAN: That's correct. Thank you, Susan. So with translations, as with other things, a lot of the changes are really fleshing out the supplemental rule, but also thinking more about fundamental fairness issues around language, which is obviously very important in any proceeding, especially a complex proceeding with a lot on the line. Again, primarily details, but nonetheless important details.

The IRP panel generally is where requests for translation services will be decided. So that's being decided by the panel that's already been put in place unless there's some sort of exceptional circumstances. And the IRP panel will have discretion to decide whether the translation services are needed and how broadly they will be applied since there's translation of the proceedings and oral meetings, as well as translation of written documents that are being submitted to the panel or issued by the panel, and then documentation that is being reviewed by the panel being perhaps submitted as evidence or underlying issue but not being prepared particularly for the panel. And the language as well. Initially, we had just translation into the six UN languages plus Portuguese. But that rule has been broadened, realizing that that would be unfair for a complainant or for any of the parties whose native language or language they're most comfortable in is not one of those seven languages. So we do want to make sure that these procedures are fair. And at the same time, there's not an infinite amount of money to be spent on this. The translation services are going to be coordinated with ICANN's language services providers and it will be an administrative cost of the IRP, which will be paid essentially by ICANN. So in essence, it's part of the service, as opposed to something that is paid for by one of the parties, although potentially there could be issues where that becomes more complex. So, that's the rule. Again, we took something that was fairly short and put a lot of meat on the bones and I think made it a better rule for all that. So I'll hand it back to Susan.

SUSAN PAYNE: Lovely. Thanks, Greg. Okay. We can go on to the next page, please, Brenda. Lovely. This final Rule 7 deals with consolidation of cases, intervention, where someone who's not a claimant—well, in theory, either party, I guess. But generally speaking, it would be a not a claimant would intervene in the proceedings or participation as an Amicus curiae, whereby you don't join as a party per se but you have an opportunity to participate and maybe put forward briefings or positions on the action. This concept of consolidation, intervention, and participation as an Amicus is in the interim rules already. But one of the significant changes that we're proposing is that the current rules have a concept of a procedures officer who will make these determinations from third parties to participate in the IRP. We received feedback from practitioners and we saw in some recent cases that the procedures officer role seemed to be very poorly understood and, really, sort of not really fit for purpose. So we discussed what changes to be made. We did throw around the possibility more of a sort of renaming, maybe having this still done by a single panelist, but giving them a different title that maybe made it a bit clearer what their role is as a decision-maker. Ultimately, we came to the conclusion that actually these requests to participate, they're pretty important. So there were some in the group who felt very strongly that this is a decision that ought to be made by the three-member IRP panel rather than by a single panelist. I think, as I say, some felt very strongly, maybe some of us didn't feel quite so strongly but still felt we were persuaded. So, our proposal therefore removes this concept of the procedures officer and instead has the IRP panel making these determinations. That did obviously have some knock on effect in terms of us having them to build in some processes for the timing of when these requests can be made or at least when these requests can be determined because you may have a request being made at a time when the IRP panel isn't in place. And it also required us to allocate the responsibility. If you're consolidating two cases, then which IRP panel, which case is the deciding panel? So we've allocated responsibility to the IRP that was filed first, which seemed the most appropriate. In the general scheme of things, you'd expect that one to be further along the line, and therefore, closer to having its IRP panel in place. And also as the first filed IRP, it just seemed more appropriate that that's where this decision-making should be allocated. And if the consolidation happens, then it's consolidated into that first case. And that is the panel that stays in place unless there's some kind of conflict of interest situation. So that was I think one of the quite important changes that we made.

In addition to just to kind of tidy up of the rules, we did try to pull all the rules that related to consolidation into one place and all the rules on intervention and another. Because although that was largely the case in the interim rules, it wasn't entirely. So sometimes you could find that some information that an application consolidation needed was somewhere else. And so we tried to sort of do a bit of a tidy up. We also made a change in relation to the page limit for the pleadings. It is envisaged in the interim rules that where cases are consolidated or where someone intervenes that there's a single page limit that applies to all of the new claimants. We felt that that was sort of unreasonable and kind of unworkable. And that if there are multiple claimants, they should each have their own page limits or being able to make out their case. So we've proposed that change.

One of the other things we did discuss and we have tried to address is it's come up in a few areas of our work, but then in relation to nonbinding IRPs, and how they should be treated. Generally speaking, IRPs are now viewed under the new Bylaws as being binding and as setting precedent for future cases. But there is a provision in the Bylaws that says that if a claimant doesn't want the IRP to be binding, then they can sort of seek leave for it not to be in there. It is subject to agreement by ICANN, and so on. But it's theoretically possible that you could have a nonbinding IRP. None of us can conceive of a reason why anyone would want to bring an IRP that was nonbinding. But nevertheless, the Bylaws have this provision in there. So we then wanted to think about was it appropriate if there's a binding IRP and a nonbinding IRP? Is it appropriate to consolidate the two of them? I think, generally, the feeling would be no, but what we've basically said is when you're consolidating cases, they shouldn't change the status of one IRP into a different status. So when you consolidate, it shouldn't turn a binding IRP into a nonbinding one or vice versa. So that was something that we felt was worth addressing, albeit that we do think that this is quite a rare occurrence.

What else did we address? We also addressed the situation of the Supporting Organization that's responsible for a policy. I think in the interim rules, this is covered. I think it came out of some public comment in the first public comment, this idea that the Supporting Organization ought to be able to intervene in the proceedings to kind of defend their work. In the interim rules, they're expressed to be participating in the proceeding as a claimant. We were not comfortable with that because they don't meet the definition of a claimant when you look at what the definition of a claimant is under the Bylaws, which is about someone who has been materially affected by the decision or lack of action by the Board or staff, and the Supporting Organization is in a slightly different position. So we didn't exclude them on that basis. But we have proposed, we've just made a change so that they're not joining as a claimant because they're not.

But they are still joining as a party to the proceeding, although they would also be able if they wanted to seek permission to join as an Amicus as well.

As I said, we restructured for clarity. There's also a provision that was again already captured that if there's a third party been involved in an underlying action, which is the subject of an IRP, then they ought to be allowed to participate as well. This is to try to achieve some fairness. I think some specific proceedings are identified, although it's not exhaustive. Then we built in a few what we felt were perhaps useful sorts of safeguards around the kind of intent of the parties, and so we thought it was appropriate that where someone is seeking to participate in one of these proceedings, they should make a declaration that what they're saying is true and correct. They're not intentionally misleading the panel and they're not seeking to participate in the IRP proceedings for improper purposes. Then we identified a couple, three examples, I think, usually of improper purposes, which might be sort of having your primary intent to delay the IRP action or delay the sort of resolution of an underlying procedure, seeking to [inaudible] either ICANN or one of the other, the IRP claimant or some other party or potential party, or having the primary intent of kind of changing the panelists selection in a way by sort of gaming the idea of conflicts of interest.

So we tried to build that in just to give a little bit of safeguards so that people wouldn't be using these processes of intervention for kind of improper purposes. Then I think it's probably worth highlighting on the participation as an Amicus in particular. The rule, as it's currently drafted on that, I think we felt was a little bit unclear as to whether participation as an Amicus is something that's as of right or whether it's something where you seek leave for permission to do so. So it seems a little ambiguous. After our discussions, we felt that it was something that this would be normally something where one would seek permission or seek leave to participate as an Amicus, and we felt that that seemed appropriate. So we've sort of built in that concept as well of seeking leave, but there being certain circumstances where there would be a kind of default expectation that you would be granted leave. So that was, I think, a useful sort of a clarification, really, that we've tried to suggest just to better align I think with usual sort of litigation and arbitration practices.

I think those are probably the key points that are worth highlighting on this Rule 7. It's quite lengthy. It is quite lengthy because we've tried to restructure it. So there's a certain amount of duplication in terms of the provisions because some of the processes are very similar for if you're trying to consolidate two cases or if you're seeking to intervene in a case. But we felt it was helpful to break that out into two separate sections, so that if you're an intervener, you know where all the rules are relating to an intervention. It's a little bit long and a bit duplicative but hopefully it gives a bit more clarity for the actual participants. I think that's probably as far as we need to go on Rule 7. So if we could go on to the next slide, please. Thanks, Brenda.

Again, to give a bit more of a heads up. We're expecting that our draft rules will go out to public comment very early in July, possibly even sooner. But certainly by early July, the document package has been sent off to the Public Comment team now. So hopefully it will get posted shortly. We're proposing that it would close on September the

15th. That's more than the minimum 40 days that's required. This is quite important. We do want the community to have time to look at this. We were conscious that, at least in the Northern Hemisphere, there's a kind of summer holiday period. And we quite often see where that happens. Groups come back and request extensions of time. So we wanted to just factor that in. But because we're giving a longer period than the minimum, the usual 40 days, our expectation is that we would hope that people would be able to get their comments in by the 15th of September and not still be seeking further extensions on top of that.

What our package of documents will include is an introduction to the IOT, just a sort of explanation of some of our work and what we've been doing, the current interim Supplementary Procedures so that people have it to hand, a redline of our changes as against the current interim rules. And that document also includes our rationales for the changes that we're proposing and why we're doing what we're doing. Then there's also a clean version as well as the proposed changed rules for if someone wants to be able to read a kind of cleaner version that's perhaps a little easier to read than the redline.

Then, in the meantime, if and to the extent that people want to already start looking at this before it gets published, these slides and I think the redline version with the rationales is I think it should have been posted in relation to this session here, and it will also be in the IOT's wiki working space, so that people can see that now if they want to do so before the documents get published for the public comment. Okay. Next slide, please.

Okay. As I mentioned at the beginning, there are some other tasks that we have on our plate. I'm going to hand to David McAuley who's participating remotely, who's going to just cover this.

DAVID MCAULEY: Thank you, Susan. I just want to do a quick sound check if I can be heard. Thank you. Good morning, colleagues. Good morning, everyone, visiting the IOT session. My name is David McAuley. I'm employed by Verisign and I've been a member of the IOT since we began and was also a member of the CCWG and Accountability that developed the IRP design.

As Susan points out, we have other tasks assigned to us as a working group past these rules. The rules obviously are important and what we have focused on for quite a long time. I think Susan's description early on that this has been challenging work is a fair description and compromise has been required along the way. But once we finished with these, which were largely done, until we get the results of public comment, we do have other things on our plate. For those of you who are interested, we'll go right through the slide here. This should be very quick. I will also map out for you where you can find Bylaw provisions relating to these. The Bylaw that you want to be aware of, if you do have an interest in the IRP, is ICANN Bylaw 4.3.

One of the first things we will do, moving on, is to look at review and revise rules regarding the cooperative engagement process. If you're interested in this, turn to Bylaw 4.3(e), subsection e. The cooperative engagement process is a voluntary process by which the claimant and ICANN should try to resolve or at least narrow the issues that are being presented to the IRP panel. As I mentioned and as the Bylaws say, it's a voluntary process, but it's also got sort of a telling consequence if there's not a good faith engagement by the claimant. And that is if there is not a good faith engagement by a claimant in the cooperative engagement process, at the end of the IRP decision, if ICANN prevails, there could be a cost shifting impact to the claimant, which is rather important. So this is an important part of the process, trying to clear the field, narrow the issues so that the IRP will be both impactful but also narrowly focused. The rules regarding this will be rather important and we will turn to them looking at what's worked in the past, anticipating hearing from practitioners on both sides, and tailoring them for the future with this new IRP process that Bylaw 4.3 has created.

The next thing we will do is proposed rules and limitations regarding appeals. Now, if you are interested in the Bylaw, this is 4.3(w) that deals with appeals. We can come up with rules for appeals and limitations on appeals. And in the past, the IRP has not been appealable, it is now. As we've heard from Susan, this is a rather impactful IRP process because rules are binding and they create precedent, and so the existence of an appeal is no surprise. When we turn to this, we will look at this in depth. We recently had a presentation and discussed among ourselves what this might involve and it involves quite a bit. And if you're interested, we had one or two meetings ago, we have slides in there, etc. You can go and look at what's involved. But just one example is Susan mentioned just recently that there is the potential for the existence of a nonbinding IRP. So one limitation we may consider is should a nonbinding IRP be appealable? There's good reasons why it should, and there's good reasons why it should not. So we'll have that discussion and we will come up with rules regarding appeals.

The next item on the slide is to propose additional rules for the IRP Standing Panel regarding conflicts of interest. And the word additional appears because in the Bylaw, I believe it's 4.3(j) that describes the Standing Panel, there is a description of some of the rules that will apply to the panel. On additional rules, for instance, this section—and I'm talking now about 4.3(q)—this section calls out for us to consider issues like restrictions on appointment of panelists whose term has come to an end to ICANN position. Should there be limitations on that? There's also called out there for us to develop term limits for panelists. So this is something we will turn to as well.

The final issue here on this slide is input regarding educational and briefing materials for the Standing Panel. We've largely gone through this and finished this. But one of the benefits of having a Standing Panel is that over time the panel will become familiar with and knowledgeable of all the intricacies of the unique ICANN space that we're all aware of, the unique mission of coordinating the Internet naming space. So as the panelists develop this knowledge and this background, this context, that's very good, obviously, for informed decisions coming out of the IRP process. So our job here has been to look at what training should they get. In addition to serving over time and gaining experience, are there training materials at the outset that would be useful? Our good members, Liz Le and Sam Eisner from ICANN Org, who are members of the group, have helped us here. There's existing courses and things of that nature. So we've talked about and sort of set the course there. So this is the work that we have on our plate.

Susan, that concludes my remarks. But I want to thank you. And I want to mention to the group that this is a detail heavy working group. And the work of our chair, Susan, is exemplary. There's a ton of work that she has pulled together. And I also would like to call up, thanks to our secretariat, Bernie Turcotte, who I don't believe is there, and Brenda Brewer, who I believe I see in the back. We have an excellent secretariat. We have a lot of hard work that we've done and that we have in front of us. That's it for me, Susan. Thank you.

SUSAN PAYNE: Thanks very much, David. That's really very kind. Okay, next slide. I think the next slide might be questions, but let's just say yes, questions. I think that's the end of our presentation. I will, again, just mention to the other members of our group—there's a handful of our group here in the room and also a handful who are online. If there's anything anyone else wants to flag up in this time now, do please feel free. But also just an opportunity, if anyone has any questions or comments for us before we carry on. Brilliant. Malcolm?

MALCOLM HUTTY: Thank you, Susan. I did want to speak a little bit about the time for filing. But given that I'm a member of the group, I would like to—if there are a lot questions from the floor in the room that I can't see, I would like to yield in favor of those so that they have the opportunity to raise anything.

SUSAN PAYNE: Just quickly look around. I don't see any other hands at the moment, Malcolm, and there are no questions in the room at the minute. So over to you.

MALCOLM HUTTY: Okay. Thank you. In that case, I would like to add a little to what has been said so far on the time for filing. My apologies to those who are members of the group who have heard me discuss this at considerable length before. This is really for the benefit to those who are coming new to these issues.

First, I'd like to thank Susan for valiantly trying to present a highly contentious and difficult and complex subject in as fair a manner as possible. And I want to recognize the great efforts that she went to to navigate her way through that. Nonetheless, it is the case that the rule on the time for filing is a difficult and contentious area that people who are new to this may find difficult to get to grips with.

You would have noticed that it's nearly eight years since the IANA transition occurred. And this group has yet to present its final report to the Board, implementing the IRP rules that were one of the key points of the changes that were made in the accountability process that happened at the time of the IANA group transition. I think it's fair to say having served on that group this entire time that nothing comes close to having taking up as much time in this group as arguments and disputes over the time to find it, over the time to find the rule. So with that understanding, it's worth noting what is and is not in dispute here. That the group as a whole reached full consensus on the idea that claimants that had a dispute against ICANN under the Bylaws should have a limited period in which to bring that dispute, and if they fail to do so should forfeit the right to do so. There was also a wide degree of consensus within the group that that period should be fairly short, that we should prioritize the speedy and efficient resolution of such disputes and not allow claimants to sit back and doodle over bringing matters forward ICANN given great importance to the communities as a whole.

As for the 120 days, that was a compromise. Some people wanted longer, some people wanted shorter. But it was compromised that the group was able to get behind as a matter of full consensus. What we are not able to agree about is when that 120 days should start. That is the issue. The ICANN Legal for its parts and the majority position, the position has been put forward by the IOT says that that time should start when the decision or action is taken regardless of whether anyone is aware of it, has noticed it, become affected by it, or has been harmed by it. The time should start when the action is taken and then runs out 120 days after that. Potentially, we've now got some compromise period with a longer extension period, but nonetheless, a finite cap on how long that can run.

The alternative view points to the fact that the claimant cannot bring a dispute until they have actually been materially affected by the harm themselves and says that they are consistent with all normal principles of law that a claim should be brought within a finite period of when you have suffered the harm that you are claiming about. We also point to the Bylaws themselves which states that the [inaudible] of this group is to set the time for filing that is within a period after the claimant became aware or recently ought to become aware of having suffered harm. So the minority view on this issue is that we actually have no power under the Bylaws to set a cap on when things can be claimed based on some entirely other criteria. But setting aside difference of interpretation over the Bylaws, it is worth pointing out the real practical effect of this. For under the old pre-transition Bylaws, really the only sorts of disputes that we would expect under the IRP were disputes between registries in ICANN, the operators of the gTLDs. Under the post-transition Bylaws, any member of the community is supposed to be able to bring a complaint that ICANN has breached its Bylaws if they themselves have been materially affected by that. It's supposed to be much broader. This is the main mechanism by which the community can hold ICANN to account so that it upholds its Bylaws. So while it might be the case for things like a dispute between a registry applicant under the new gTLD process of ICANN that there is really no significant difference between how these disputes would happen because they would always be aware of what is going on within a timely fashion. For other kinds of disputes such as a dispute where a non-contracted party is saying that ICANN is acting entirely outside its limited mission and it should not do so, they may not have standing to bring that dispute until an awfully long time after ICANN has decided to go down that route.

For example, let's consider the obvious question of ICANN seeking to regulate content on the Internet. That it is specifically precluded under the Bylaws. If ICANN were ever to seek to do such a thing, I think we can all agree that beyond the point at which the Board decided upon a rule on this and it actually being implemented through registry contracts would likely take years and years before anyone was actually directly affected. And then as soon as somebody is directly affected, they will be told, “This thing that you are complaining about happened years ago.” You’re out of time. You have never had the opportunity to tell ICANN or to dispute with ICANN whether or not its action was indeed committed under the Bylaws.

Really, this comes down to a difference of perspective. Do you see the IRP process as being simply a matter for arbitration between two commercial parties that are involved with each other? Or do you see the IRP process as the mechanism by which ICANN’s fundamental Bylaws are upheld by the community by which the community holds ICANN to account? The Bylaws themselves are quite clear on this. They are supposed to be the latter. But if you think that, then a rule that says that you cannot bring a dispute that ICANN is currently and in an ongoing fashion in breach of the Bylaws because you are out of time before you’ve ever had an opportunity to dispute it, that is the matter on which there is no agreement here.

I’m speaking without notes here. Sam is pointing out some matters of detail that there wasn’t—for example, a rule in there that a non-contracted party specifically couldn’t bring a dispute under the Bylaws under pre-transition rule. And she’s quite correct on that. But the broad point still stands. If we adopt these rules, it is entirely foreseeable that certain kinds of disputes will never be capable of being heard, and that that is most likely in the types of disputes specifically where it is about the community’s ability to hold ICANN to account to compliance with its Bylaws and not merely about some matter of its ordinary operations. That is why this is contentious.

Now, I would like to yield the floor back, but before I do, I would like to point out the two previous public comment periods we’ve had. The first time we went to public comments, we consulted on a number of matters, including this issue. And by far, the largest portion of the public comments that were received were on this issue. And they were overwhelmingly to say that there should be no report post and that people should be allowed to bring a dispute if they have one after they have been materially affected within a fixed time after they have been materially affected, but with no limit based on ICANN's previous actions what was proposed. ICANN should not be fully absolved of the obligation to [buy via] files. So we changed our initial proposal to say to remove repose. And we went to ask public comment again. The second time we went out to public comment, we had a much smaller response rate, understandably, but those that did said overwhelmingly—not all of them, but overwhelmingly, that they supported the change that had been made to remove repose and urged us not to revert it. In this third public comment, we will be doing just that, reverting to the original idea that ICANN should have repose and the risking that there will be classes of cases in which nobody ever has the right to bring a case because they're out of time before they're ever eligible to bring a case.

That, to me, strikes me as something that ought to be brought to the community's attention. I thoroughly urge community members to apply to this public comment and to object to the reversion on this issue and to urge the community to go back to where we were at the time of second public comment where there is prompt resolution of actual disputes but where ICANN is not placed in repose so that it isn't capable of being challenged on matters that take a long time to implement. Thank you.

SUSAN PAYNE: Thanks, Malcolm. I will just quickly respond. I can see David's got his hand up. I'm not going to address the specific points that you make. In this group, people observing are getting a good flavor here of the nature of the discussions that we have had and why this has been so difficult for us as a group. Malcolm's reading of the Bylaws is a perfectly valid interpretation. It's not the only one and we have grappled with it. As I said in the main presentation, we sought to find some kind of compromise that set some outer time limit, but also that allowed for things like tolling of time for if you're bringing another accountability mechanism or for exceptional circumstances, as kind of to try to thread the needle on this. Malcolm's not the only person to share that viewpoint and that is why this group has taken four years. David?

DAVID MCAULEY: Thank you, Susan. Hi, again, everybody. My comment is really largely along the lines that you just said, Susan. There are different points of view on this. Malcolm, I believe, is the most eloquent spokesperson for the views that he just gave. I have not reviewed my notes to get into the substance of this argument in this session, and so I can't really get into detail. But I can say that there is a strong argument on the other side in support of what we've done that's based on the Bylaws on Section 4.3(n) calling in concepts of fundamental fairness, due process, preservation of precedent, things of that nature. So I agree that Malcolm is a strong and eloquent, passionate opponent of the views that he just expressed. There are other sides to this argument and I agree with Malcolm that the conclusion should be please look at this seriously and make a public comment. Thank you.

SUSAN PAYNE: Thanks, David. To reiterate, that is why, as I said, we couldn't reach full consensus on this. We were in sufficient agreement that we felt it was timely to put this out to the community. We would like input on this. It's a complex issue. That's another reason why there is this long time period for the public comment because we would like people to review this and think carefully about it and give us their views. Thanks. Kathy?

KATHY KLEIMAN: Kathy Kleiman joining late, so my apologies. Susan, we're dealing with an issue that sounds like it's really important. And so one of the questions I'd like to ask is will the public comment period flag the issue that Malcolm has raised, show us the history of what's been done? I mean, if his characterization of the comments is right, we're now 180 degrees from what was proposed originally. Will it flag it? Will it show the history? Will it tell us? Or does somebody have to go all the way back in the history and understand what you've been doing for four years? Which is practically impossible for most public commenters. If this is an issue that's been so huge for you, can this be made very, very, very clear to the public with as many details as you can provide?

SUSAN PAYNE: I think we've made it clear for putting out. And this issue is highlighted in both the introduction and in the section on Rule 4, which explains our thinking. We have also linked back to the previous public comments and the reports on those so that people can very easily look. But without having to search for them, can very easily see what the report of the previous public comment was. I hope so.

KATHY KLEIMAN: If I might follow up, if I'm hearing correctly, and of course I haven't read this material, but let me ask who's a member of the working group? Who's here? We're seeing this in lots and lots of other areas of ICANN, so I'm not just picking on you. Is it clear that you're going forward with something that's 180 degrees different than what you went forward with in the last round on this issue? That's what it sounds like. That before there was a draft [inaudible] either, there was a draft that said that the 180 degrees would start at a different time, and now the draft is saying it's starting an earlier time. I'm mischaracterizing. Sorry, jetlag.

SAM EISNER: I don't think you're mischaracterizing based on what you've heard here today. I don't think that anyone else other than Malcolm came here really right up on the details of the history of the time for filing an issue that he went into. I don't recall that how he's summarized the public comments, etc., is a fair summary of what happened. So I don't know that that's necessarily what happened, but also our prior postings on the public comment were really about alternatives that could be there. So there has been a lot of discussion in the community about alternatives, and this is moving from both of the alternatives that were posted many years ago. I don't think that this is a 180 situation from anything we've seen before. It's a compromised position.

SUSAN PAYNE: Malcolm, I can see you've got your hand up. We've only got five minutes. Also, I do think we can't get into a huge detailed discussion on our areas of conflict. But Malcolm?

MALCOLM HUTTY: Okay. Just on that last point from Sam. We can have a dispute about characterizing the public comment that was received in previous rounds, but they can be no dispute over what we put out for public comments in previous rounds. The first time we went out for public comments, it had a period of repose in it. As a result of that public comment, we removed the reposed issue and went based solely on a time based on when the dispute has been made and the claimants were aware of the basis of the dispute. The second public comment round was therefore based on there being no period of repose. The third public comment round, the one that we were about to enter into, goes back to the same position as in the first public comment round. We have fifth lot on this issue, and we've done so under Sam's lobby. Thank you.

SUSAN PAYNE: I will just have one more thing, which is a mild correction on something that Malcolm had said previously, which you may have heard, Kathy. We haven't run the 120 days. The 120 days is when a claimant is aware or reasonably to have become aware of being materially affected by the decision in question. That is the 120 days and that is the time period you have to bring a claim. We haven't run that time period 120 days from the date of the Board decision. It runs from awareness or when you ought reasonably to have become aware.

But there is a time period that does run from the date of the Board decision, which is this so-called repose, which we are proposing being 24 months. It's correct that there could be a situation where a future claimant, they aren't aware or they aren't materially affected within that 24 months. That is correct. But the general time for the 120 days, it runs from awareness or when one reasonably to have become aware. It doesn't run from the Board decision. Just to clarify.

Okay. As you can see, it is a really important issue. It's complex and challenging. We very much welcome public comment input. If you weren't here earlier, we're hoping that this will go out very shortly after this meeting. We've given an extra time for the comment period because we think it's important and we'd like people to give us their views. We have to stop now. I think we're more or less out of time. I will just note the references that Brenda has put up on the final slide, which is where you can find the wiki for our workspace, our mailing list, and the e-mails for myself and Bernard and Brenda who are the self-support.

Thank you. Thank you very much, everyone, for coming. We look forward to your input. Thank you.

BRENDA BREWER: Let's stop the recording.

[END OF TRANSCRIPTION]