

Cherine Chalaby
Chair
Internet Corporation for Assigned Numbers and Names (ICANN)

RE: Independent Review Process – Interim Supplementary Rules of Procedure – Consent
Agenda Item for the ICANN Board Meeting

Cc:

Avri Doria
Matthew Shears
Becky Burr
David McAuley

23rd October 2018

Dear Cherine,

We are informed that at the Board meeting on Thursday the Board intends to consider for approval Interim Supplementary Rules of Procedure (“Interim Rules”) for the Independent Review Process (“IRP”), as proposed by the IRP Implementation Oversight Team.

We are writing to draw your attention to an incompatibility between the proposed Interim Rules and ICANN’s bylaws. I am copying the GNSO NCPH representatives on the Board, as well as Becky Burr, who was Chair of the IRP Implementation Oversight Team prior to joining the Board, and David McAuley, the current Chair.

According to the proposed Interim Rules a dispute may only be heard by the IRP provided that the claimant files the claim before the earlier of:

- a) 120 days after the claimant becomes aware of the material effect of the action or inaction giving rise to the dispute; and
- b) Twelve months from the date of such action or inaction. (“the deadline”)

By virtue of Section 4.3(b)(i) of the bylaws, a prospective claimant may not bring an IRP case unless the claimant has suffered injury or harm caused by the alleged violation. (“the standing rule”)

The first deadline, in which the 120 day time period does not start to run until harm has occurred, is reasonable. Unfortunately, the alternative deadline is problematic because time starts to run before anyone is affected.

As a result of the interaction of the standing rule in the bylaws and the deadline in the proposed Interim Rules, **if an action by ICANN does not cause anyone harm within 12 months, it will not be possible for that action to be reviewed by the IRP for consistency with ICANN’s bylaws.** In particular, a Board decision that is not implemented for 12 months, and so never harmed anybody in that time, would be forever immunised from the possibility of IRP review.

This could potentially immunise many important and controversial ICANN actions from IRP review, such as the adoption of policies that would need to be implemented by Registries and Registrars.

I do not need to remind you that the opportunity for IRP Review is a cornerstone of ICANN's accountability, and the guarantor of the commitments made at transition from US government oversight.

Adopting the deadline in the proposed Interim Rules would be contrary to numerous provisions of ICANN's bylaws, including (without limitation):

- i) Section 4.3(a), which sets out the "Purposes" of the IRP, and requires that Section 4.3 be interpreted consistently with those purposes. The listed purposes include "Ensur[ing] that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws", and "Provid[ing] a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdiction", both of which purposes would be defeated by adopting a deadline that would enable ICANN to immunise certain Board actions from IRP review.
- ii) Section 4.3(n)(i), which requires that the Rules of Procedure comply with international arbitration norms, and Section 4.3(n)(ii), which requires they be consistent with the Purposes of the IRP.
- iii) Section 4.3(n)(iv), which requires that the Rules of Procedure "ensure fundamental fairness and due process" and sets out that the deadline for filing must be based on a date "after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute", rather than after the date of the action itself.

We would also like to make you aware that the independent counsel retained by the IRP Implementation Oversight Team, Sidley Austin LLP, has written twice to advise of concerns that a deadline in the form proposed in the Interim Rules is not compatible with the bylaws, stating on Jan 4th 2017:

"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)."

Finally, we would like to make you aware that between 22nd June 2018 and 10th August 2018 the IRP Implementation Oversight Team ran a public consultation on the deadline for filing, in which it proposed dropping the 12 month limit based on the date of the action, and proceeding only with the 120 day limited based on the claimant's knowledge (or imputed knowledge) of suffering harm. In response to this consultation the Business Constituency,

the ISPCP, the Non-Commercial Stakeholder Group and the Registrar Constituency all opposed the 12 month limit; the Intellectual Property Constituency had also opposed the 12 month limit in a previous public consultation.

Yours sincerely,

Farzaneh Badii, on behalf of the Non-Commercial Stakeholders Group

Steve DelBianco, on behalf of the Business Constituency

Wolf-Ulrich Knoblen, on behalf of the Internet Service Providers and Connectivity Providers Constituency (ISPCP)

Brian Winterfeld, on behalf of the Intellectual Property Constituency

Extract from Interim Rules of Procedure, with problematic text highlighted.

4. Time for Filing¹

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; **provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.**

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

¹ The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.