

From: IOT [<mailto:iot-bounces@icann.org>] On Behalf Of McAuley, David via IOT
Sent: Tuesday, January 02, 2018 10:04 AM
To: iot@icann.org; aloup@usc.edu
Subject: [EXTERNAL] [IOT] IOT call Jan. 11 at 19:00 UTC and comments on one agenda item (Types of Hearings)

Dear members of the IRP IOT:

Happy new year to you all.

We have our next call next week, on Thursday, January 11, at 19:00 UTC. I will send an agenda early next week. Let me comment here about one item that will be on that agenda:

One subject of public comments that we have not yet directly addressed is under the heading "Types of Hearings" on our sign-up sheet (and in column 'H' of the public-comments-analysis spreadsheet that Bernie sent to us on Feb. 3, 2017).

Here are my thoughts as a participant of this group.

There are five specific comments to consider. The five comments are from:

- * DotMusic;
- * The GNSO Business Constituency;
- * The GNSO Noncommercial Stakeholder Group;
- * The International Trademark Association; and
- * Richard Hill.

Their comments are included at bottom after my signature lines.

The draft supplementary procedure most involved is #5, Conduct of the Independent Review. It is quoted below as well, after the comments - however the footnotes that appear with #5 (footnotes 16 - 19) have not been included - you can see them via the link in this paragraph.

Some Bylaws considerations:

- * Bylaw 4.3(a)(vii) says that one of the purposes of IRP is to secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.
- * Bylaw 4.3(n)(iv)(E) provides that the supplementary procedures are intended to ensure fundamental fairness and due process and shall at a minimum address [among other things] ... whether hearings shall be permitted, and if so what form and structure such hearings would take.
- * Bylaw 4.3(s) provides that an IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.

In my opinion as a participant, the comment from Richard Hill states the best approach - supporting the rule as currently drafted. It appears to me that the current draft of Rule #5 strikes the right balance among presumptions and permitted flexibility while adhering to the idea that IRP is to be expeditious. The lack of a hearing, except in exceptional circumstances, does not mean that the IRP is unable to provide accessible, transparent, efficient, consistent, coherent, and just resolution of disputes as the purpose of the Bylaw requires.

There is one other issue we should decide while on this rule. Rule 5 currently says, in part: "All evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing."

I suggest we insert 15 calendar days in this provision - that should leave time for the panel to allow a rebuttal offer if it is so inclined.

Best regards,
David

Five comments on types of hearings:

1. DotMusic:

"The phrase "[w]here necessary" should be removed from the sentence "[w]here necessary, the IRP Panel may conduct live telephonic or video conferences." Some members of the IOT also suggested to remove the phrase "where necessary." The parties should be also permitted to engage in an in-person hearing for all IRPs, instead of only under "extraordinary circumstances." Claimants should have the opportunity to present their arguments directly before the Panel and not have to meet such a high threshold."

2. GNSO BC:

"...the proposed threshold for witness testimony and cross examination should be less stringent." - "The panel should only consider the time and expense of witness testimony after first considering the fairness and furtherance of the IRP and the gravity of actual or potential harm to the claimant." - "Further, the panel should only consider the time and expense related to witness testimony and cross examinations if one party to the claim can provide proof that such a delay or expense would create a legitimate and unjustifiable financial hardship. A claimant should not be precluded from offering witness testimony or conducting cross examinations simply because it might increase expenses or slightly delay the resolution of the dispute."

3. GNSO NCSG:

"Everywhere else, all parties to the underlying proceeding have the right to intervene -- the right to be heard in the challenge to their proceeding. Here too, such a Right of Intervention (a material change to Section 7 of these Procedures) must be added." - "Emergency Panels and Interim Measures of Protection Must be Openly Heard with All Relevant Parties Present"

4. INTA:

"INTA believes that witness testimony and interrogatories are important methods of discovery that should not be preemptively ruled out" - "INTA recommends that a claimant be given an opportunity to demonstrate a good faith need for either a deposition or interrogatories based on the standard used to determine whether a witness is necessary at the hearing, namely, that the deposition or interrogatory requests (1) are necessary for a fair resolution of the claim; (2) are necessary to further the purposes of the IRP; and (3) considerations of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense of the deposition and/or interrogatory requests. INTA would support that a limited number of requests for admissions be allowed."

5. Richard Hill:

"Regarding article 5, Conduct, I support the language that restricts in-person hearings. As mentioned in my previous comment, I see the IRP as a kind of administrative law proceeding, and, in my experience, in-person hearings are not usually required for such proceedings, because the evidence is normally found in written documents, and written pleadings on the legal issues suffice to inform the arbitrators. This is particularly the case when, as here, the applicable law is relatively concise, consisting in our case of the ICANN bylaws and policies." - "Regarding article 14, Appeal, you may wish to consider making the grounds for appeal more precise. You could consider the grounds for appeal of the UN labor-dispute process..."

Current draft language for draft supplementary procedure #5 (less footnotes):

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct live telephonic or video conferences.

The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

All hearings shall be limited to argument only unless the IRP Panel determines that a the [sic] party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.

With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.