

# Types of IRP Hearings

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*Tue Feb 20 15:58:50 UTC 2018*

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Dear members of the IRP-IOT:

There is one issue from among that public comments that we have touched on but not focused on specifically, as we have the others.

That is the one falling under the 'Types of Hearings' heading on our sign-up sheet.

I copy some of the relevant comments and provisions relating to them below.

My recommendation as a participant, not as leader, is that no change is needed to the rule as drafted. It allows the panel discretion to use video or telephonic conferences "where necessary." And in-person hearings have a presumption against them that can be overcome in "extraordinary circumstances," as described. This leaves discretion where it should be - with the IRP Panel - and sets the guidelines for the panel consistent with the expected expeditious handling of the disputes.

Please weigh in if you feel otherwise - on list or on call. Any requested change should have specific text suggested, please.

Here are some of the comments:

For instance, DotMusic said<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfzqApbhRMhH.pdf>>:

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.

The BC said<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf01LDGYUeOv.pdf>>:

The BC appreciates that the IRP Bylaws and Updated Supplementary Procedures are designed with expediency and cost effectiveness in mind. However, the proposed threshold for witness testimony and cross examination should be less stringent. In particular, we feel that the IRP panel should consider the following factors:

- \* Is a witness necessary for a fair resolution of the claim?
- \* Is a witness necessary to further the purposes of the IRP?

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.

And Richard Hill said<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/msg00007.html>>:

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.

Here are certain provisions relating to the draft rules and hearings:

Bylaw section 4.3(g):

... Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written response ("Response") in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. ...

Bylaw section 4.3(i):

Each IRP Panel shall conduct an objective, de novo examination of the Dispute. ...

Bylaw section 4.3(n) (i) describes what the rules should be:

... clear published rules for the IRP ("Rules of Procedure") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. ...

And Bylaw section 4.3(n) (iv) (E) asks us, the IRP-IOT, to decide:

Whether hearings shall be permitted, and if so what form and structure such hearings would take;

The draft USP we came up with provides, in part, in paragraph 5 (Conduct of the Independent Review) (footnotes excluded):

... 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.

Best regards,

David