



**COMMENTS OF THE INTELLECTUAL PROPERTY CONSTITUENCY (IPC)**

**THE INDEPENDENT REVIEW PROCESS IMPLEMENTATION OVERSIGHT TEAM  
(IRP-IOT) DRAFT RECOMMENDATIONS**

**August 10, 2018**

The Intellectual Property Constituency (IPC) of the Generic Names Supporting Organization (GNSO) appreciates the opportunity to comment on the Independent Review Process (IRP)-Implementation Oversight Team (IOT) proposed Updated Supplementary Procedure rule #4, Time for Filing.<sup>1</sup>

We commend the IRP Implementation Oversight Team (IOT) for its efforts in drafting updated procedural rules for the IRP to reflect the enhancements provided for in the revised ICANN Bylaws of 1 October 2016. We respectfully submit the following comments with respect to the time for filing period:

1. **Regarding the change from 45 to 120 days for filing a claim**, while the IPC does support this increased time period, in some cases an even longer time period may be warranted as damage resulting from ICANN actions may not be realized immediately. It is perfectly possible for a party not to be immediately affected by an illegal or inconsistent ICANN policy at the time of its adoption, but for the party to be affected by the very same policy when that policy is implemented or applied to the party's detriment. In such cases, a damaged party should not be barred from bringing its claim and the time for filing rule should not be used to justify a policy that contradicts ICANN's essential obligations. We assume that is the intention of the language "*after a CLAIMANT becomes aware, or ought reasonably to have been aware, of the material affect of the action or inaction giving rise to the DISPUTE*", and by the Bylaws, which define a Claimant as "*any legal or natural person, group, or entity ... that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation*". but it would be beneficial to make this absolutely clear in these Rules when finalized.

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<sup>1</sup> <https://www.icann.org/public-comments/irp-iot-recs-2018-06-22-en>

2. **On the removal of the separate 12-month limitation**, as the IPC commented during the previous public comment on the draft Supplementary Procedure<sup>2</sup>, the previously-proposed overarching limitation period would appear to be inconsistent with the constructive knowledge requirement under the ICANN Bylaws, as confirmed in the advice by the Sidley law firm. The IPC therefore supports its removal.

In the event that the outcome of this public comment and the further deliberations of the IRP-IOT do conclude that some overall limitation period, or repose, is nevertheless required, the IPC asserts that there must be a reasonable limitation period from the date of ICANN's action or inaction. We believe that 12 months is inadequate, and that 24 months or 36 months is far more in line with analogous "statute of limitations" principles in established statutes and case law. Again, any such 24 or 36 months period should not prevent a party from raising a violation of ICANN's Articles of Incorporation or Bylaws when the harm only results from a later implementation of an ICANN action or inaction.

3. **Interplay with other accountability mechanisms remains unclear.** We, and others, have previously expressed our strong belief that it is necessary to amend the time for filing periods to ensure that the deadline for filing an IRP be tolled during the time within which the parties are formally engaged in other accountability mechanisms over the issue(s) being referred to IRP, in particular:
  - a. The Cooperative Engagement Process (CEP), which is a voluntary but strongly encouraged step prior to the commencement of an IRP (Bylaws Section 4.3(e));
  - b. An ongoing Reconsideration Request process, including any Ombudsman review which forms a part of that process pursuant to Bylaw Section 4.2(1);
  - c. A request under ICANN's Documentary Information Disclosure Policy (DIDP); and
  - d. A complaint to the Ombudsman pursuant to Bylaws Article 5. Since complaints to the Ombudsman generally are not subject to set time limits we recognize that this might give rise to concerns of undue delay. Nevertheless, Ombuds complaints are out of the hands of the Complainant and they should not be penalized for something which they cannot control.

An IRP is an extremely costly and time-consuming process. It is not to be entered-into lightly. All members of the community deserve the opportunity to attempt to resolve their dispute using the other accountability mechanisms in place without the concern that they will serve to exhaust the limitation period for bringing an IRP.

4. **The IPC believes that the starting point of the time for filing period must be unambiguous.** The time for filing period should not start running before the publication of the adopted minutes setting out the reasoning of the action or inaction. Whenever an action or inaction immediately affects a party, or multiple parties, that can be identified in the action or inaction, ICANN should immediately communicate the publication of the minutes to the parties concerned and inform them about the possibilities for redress and the timing and procedure for introducing redress.

Thank you for your consideration of these comments.

Respectfully submitted,

Intellectual Property Constituency

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<sup>2</sup> <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf75S74tOev.pdf>