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January 30, 2017

Re: DotMusic Public Comments concerning the Updated Supplementary Procedures for Independent Review Process (IRP)

Dear ICANN and IRP-IOT:

DotMusic appreciates the opportunity to submit public comments concerning the Updated Procedures for the Independent Review Process¹ under the new ICANN Bylaws. Relevantly, DotMusic submitted public comments to ICANN on May 21, 2016 that was also pertinent to the IRP component of the New ICANN Bylaws.²

DotMusic urges that both ICANN and the IRP-IOT strongly consider amending the USP because of significant issues that compromise the credibility, impartiality and independence of the new IRP procedures to hold ICANN truly accountable in light of the Dot Registry IRP Determination,³ the Council of Europe (COE) report *Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective* by Eve Salomon and Kinanya Pijl,⁴ and the ICANN Community gTLD Applications and Human Rights webinar findings and recommendations.⁵ Namely:

New Rule 3. Composition of the Independent Review Panel

The current rule calls into question the Standing Panel's impartiality. According to ICANN's May 2016 Bylaws, Article IV, Section 4.3(j), the Standing Panel members are nominated by ICANN's Supporting Organizations and Advisory Committees, and confirmed by the ICANN Board. This is

¹ ICANN, Public Comments - Updated Procedures for the Independent Review Process, <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>; See <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>

² DotMusic public comments to ICANN, *DotMusic public comments on the Draft New ICANN Bylaws*, May 21, 2016, <https://forum.icann.org/lists/comments-draft-new-bylaws-21apr16/pdfrrv4M1ldlr.pdf>

³ Dot Registry, LLC v. ICANN (.INC/.LLC/.LLP), Independent Review Proceeding Final Declaration, July 29, 2016, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

⁴ Eve Salomon and Kinanya Pijl, Council of Europe report DGI (2016) 17, *Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806be175>

⁵ ICANN Webinar, *Community gTLD Applications and Human Rights*, January 18, 2017, <https://community.icann.org/display/gnsononcomstake/Meeting+Notes>; Presentation: <https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>; Transcript: https://community.icann.org/download/attachments/53772757/transcript_cwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2



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problematic because ICANN —the organization that confirmed the IRP Panelists— will be a party before the same Panelists.

The appearance of impartiality implicates due process principles highlighted in the Council of Europe’s Report. ICANN’s May 2016 Bylaws commits ICANN to respect internationally recognized human rights. With such right, due process provides for “a competent, independent and impartial tribunal.” Furthermore, the Council of Europe Report stresses that “ICANN needs to guarantee there is no appearance of conflict of interest.”

It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN’s vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest.⁶

ICANN will not meet this standard through use of the Standing Panel. To ensure impartiality, eliminate any appearance of conflict of interest and mitigate ICANN’s legal and reputational risk, it is recommended that an independent 3rd-party provider with experience in dispute resolution, such as the International Centre for Dispute Resolution (ICDR), administrate the IRP with neutral, independent Panelists that have no ties with ICANN or the ICANN community.

New Rule 4. Time for Filing

It is recommended that the statute of limitations be extended. Given that ICANN has created a system where it demands that all necessary evidence be filed with the initial written submissions, more than 45 days is necessary to ensure that Claimants are given a full and fair opportunity to present their case. It is interesting to note that the timeframe for filing an appeal of an IRP decision under the proposed rules (60 days) is longer than the existing timeframe for filing an IRP (45 days).

Furthermore, there should be no statute of repose. The 12-month limitation on commencing an IRP, regardless of when Claimants become aware of the relevant action or inaction unnecessarily limits Claimants’ ability to seek redress for ICANN’s actions or inactions. Both the May 2016 ICANN Bylaws and the Council of Europe affirm ICANN’s commitment to transparency. The imposition of a statute of repose encourages non-transparent behavior. If ICANN can prevent Claimants from learning about its actions or inactions for 12 months then Claimants cannot commence an IRP against ICANN.

New Rule 5. Conduct of the Independent Review Panel

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.”

⁶ COE Report, *Independent, transparent and accountable decision-making*, p.44



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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.

Moreover, the parties should be able to present evidence, such as witness statements and expert opinions, at the hearing. The New Rules restrict hearings to legal arguments except under specific circumstances. As stated in the Council of Europe, due process requires a “fair and public hearing” as stipulated by the International Covenant on Civil and Political Rights (ICCPR),⁷ a multilateral treaty adopted by the United Nations that commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial:

Due process rights are traditionally known among human right experts to centre on the right to a fair trial and the right to an effective remedy. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within Article 14(1) of the ICCPR and is applicable to both criminal and non-criminal proceedings.⁸

This rule prevents the parties from engaging in a “fair” hearing, as required by due process rights, because the Panel will be unable to personally assess the witnesses and experts, and therefore determine their reliability.

New Rule 6. Written Statements: The requirement to file “all necessary and available evidence” should be removed from the Supplementary Procedures entirely in light of the short deadline to initiate IRP proceedings as well as the reality that both parties should be entitled to file at least one additional set of responsive pleading with such factual and legal support as they deem appropriate.

Furthermore, this requirement contradicts with the new requirement in New Rule 5, which requires that all evidence must be submitted in writing “[X] days” in advance of any hearing. Such a requirement indicates that additional “necessary and available evidence” can be submitted after the initial written submissions and before the hearing.

Further, the Rules must provide for a right of reply that is not limited only to expert evidence. As currently drafted, the Requestor is entitled to only a single, 25-page submission filed simultaneously with its Notice of IRP and one right of reply to expert evidence.

New Rule 7. Consolidation, Intervention and Joinder: The appointment of a Procedures Officer from within the Standing Panel to consider issues of joinder, intervention, and consolidation is

⁷ United Nations, International Covenant on Civil and Political Rights, No. 14668, March 23, 1976, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

⁸ COE Report, *Due Process*, p.26; See also Article 13 and 15 ICCPR.



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unfair and liable to generate unnecessary costs. These issues should be decided by the duly constituted IRP Panel already hearing a claim, which will be best placed to gauge whether there is sufficient common ground for joinder or intervention.

New Rule 8. Discovery Methods: The request for discovery is a basic facet of requiring equality of arms between the parties in international arbitration and should not be consigned to the discretion of the of the IRP Panel as a matter of principle but instead the IRP Panel should be required to rule on both parties individual requests for discovery and whether such requests are relevant and material to the claims advanced in the arbitration. In accordance with this, there should not be a complete bar on all depositions, interrogatories, and requests for admission.

Additionally, consider whether it would be appropriate to make reference to the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration given the reference in the May 2016 Bylaws to developing “clear published rules for IRP . . . that conform with international arbitration norms” Alternatively, discovery rules could also be drawn from the IBA Rules on the Taking of Evidence.⁹

Respectfully Submitted,

Constantine Roussos
 DotMusic
 Founder

Website: <http://www.music.us>

Supporting Organizations: <http://www.music.us/supporters>

Governance Board: <http://www.music.us/board>

⁹ International Bar Association, *Practice Rules and Guidelines - Rules on the Taking of Evidence in International Arbitration* (2010), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx and <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>