

# **EXHIBIT A**

# ELEMENTS OF RULE 7

| ELEMENT   | DATE(S)  | WHO PROPOSED   |
|---|--|--|
| <b>Amicus as Interested Party</b>   | <b>June 1, 2016</b><br>July 20, 2016<br>February 1, 2017<br>January 24, 2017   | Becky Burr (Meeting #3 IRP-IOT)<br>Becky Burr (Meeting #5 IRP-IOT)<br>GNSO IP Constituency*<br>Non-Commercial Stakeholders Group*  |
| <b>Amicus Rights in All IRPs</b>  | <b>February 1, 2017</b><br>January 24, 2017<br>March 23, 2017<br>March 23, 2017<br><br>May 1, 2018<br>September 25, 2018 | GNSO IP Constituency*<br>Non-Commercial Stakeholders Group*<br>D. McAuley (IRP-IOT Meeting)<br>S. Eisner (IRP-IOT Meeting) (“ <b>using the example of the expert panel</b> ”)<br>Sidley Austin (Draft of Interim Rules)*<br>Sidley Austin (Draft of Interim Rules) |
| <b>Non-discretionary Participation of Amicus</b>                                | <b>March 29, 2017</b><br>May 1, 2018<br>September 25, 2018   | D. McAuley (Email to IRP-IOT)<br>Sidley Austin (Draft of Interim Rules)<br>Sidley Austin (Draft of Interim Rules)  |
| <b>Mandatory Participation by Contention Set Members and Referenced Parties</b> | <b>October 16, 2018</b>  | S. Eisner (Email to D. McAuley)  |

\*No express limits to expert panels (Afilias disputes meaning).

## Elements of Rule 7

### *Amicus* as Interested Party

- June 1, 2016 Meeting #3 of the IRP-IOT (Afilias Ex. 225 at pp. 25-26):
  - Becky Burr: “Obviously you don’t want to allow anybody to intervene in a dispute, **but you also do want to make sure that all of the parties and interests are before the panel at the right time.** And so that, I think, is something that, as we go through the documentation, we really want to think about, that we are making sure that **there’s an efficient way for other parties who have an interest in the dispute to make their views known or to be participants.**”
- July 20, 2016 Meeting #5 of the IRP-IOT (Afilias Ex. 227 at p. 27):
  - Becky Burr: “And that consolidation, intervention and joinder would be allowed at the discretion of the procedures officer ... **So anybody who would be materially affected by the action or inaction of ICANN would be permitted to intervene** with the permission of the Procedures Officer.”
- Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures, dated February 1, 2017 (Afilias Ex. 236 at p. 29-30; McAuley Decl., Ex. B):
  - “In addition, although the IPC understands that IRPs are directed against ICANN, **there may be third parties who wish to intervene in support of ICANN’s position or to safeguard their own position.**”
  - “To rectify these concerns, the IPC suggests that **any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).** Otherwise, the IRP may not afford appropriate due process for all interested parties (not just those who may be aligned with the claimant or claimant(s) in the issue(s) under review.”
- Comments of the Noncommercial Stakeholders Group (NCSG) on the Updated Supplementary Procedures for Independent Review Process (IRP), dated January 24, 2017. (Afilias Ex. 236 at pp. 35-36; McAuley Decl., Ex. C):
  - “Currently, the IRP *Updated Supplementary Procedures* only have the disgruntled party and ICANN as the parties to the proceeding. All others have to apply to [be] accepted -- and the first argument the Claimant’s Counsel makes is “No!” That’s not the procedure in any other litigation forum which practices due process. Everywhere else, all parties to the underlying proceeding have the ***right to intervene -- the right to be heard in the challenge to their proceeding***
  - Should the winning party not have the time and resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession.”

## Elements of Rule 7

### *Amicus* Rights In All IRPs

- Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures, dated February 1, 2017 (Afilias Ex. 236 at p. 29-30; McAuley Decl., Ex. B):
  - “To rectify these concerns, the IPC suggests that **any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).**”
- Comments of the Noncommercial Stakeholders Group (NCSG) on the Updated Supplementary Procedures for Independent Review Process (IRP), dated January 24, 2017. (Afilias Ex. 236 at pp. 35-36; McAuley Decl., Ex. C):
  - Should the winning party not have the time and resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession.”
- March 23, 2017 IRP-IOT Meeting (Afilias Ex. 237 at p. 29; McAuley Decl., Ex. D):
  - **D. McAuley**: “So, there are ways that we can approach this. I think it’s a fair request that involved below who won at the expert panel, and now see their win being challenged, should be able to be parties, and should have a right to be parties, I can see that. **We can also consider whether there are ancillary parties that might have a right to file an amicus brief, a friend of the court kind of brief.**”
  - **S. Eisner**: “I think we do need to be careful as we consider these, that we recall what the definition of disputes are, and that we don’t write rules that allow people to re-litigate a panel decision through the IRP, but make sure that any one that we would allow jointer, **or for this instance, using the example of the expert panel**, that it’s tethered to whether or not that expert panel decision resulted in a violation of ICANN bylaws or articles, and that we make sure that we tailor any jointer to supporting that discussion within the IRP.”
- Draft as of 1 May 2018 -- Draft Interim ICDR Supplementary Procedures. (McAuley Decl., Ex. F; ICANN Ex. 11 (with R. Grapsas July 11, 2018 cover email):
  - Rule 7: “Any person or entity that did not participate in the underlying proceeding may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, **such persons may intervene as an amicus if the PROCEDURES OFFICER determines, in his or her discretion, that the proposed amicus has a material interest at stake** directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.”
- Draft as of 25 September 2018 -- Updated Draft Interim Supplementary Procedures: (Afilias Ex. 256; McAuley Decl., Ex. H):
  - Rule 7: “**Any person, group, or entity that has a material interest relevant to the DISPUTE** but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws **may participate as an amicus curiae** before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus curiae* before the IRP PANEL.”

## Elements of Rule 7

### Non-discretionary participation as *Amicus*

- March 29, 2017 Email from D. McAuley to IRP-IOT:
  - With these things in mind, as a participant in this group I propose that we agree the following points and, at a suitable time, ask Sidley to draft appropriate language into the draft supplementary procedures. I believe these comments have made reasonable and persuasive points about ensuring that the winning party below can defend the judgment below and will likely be a more motivated party in this respect than ICANN, although ICANN will be motivated, of course, to defend the notion that its compliance with an expert panel would not violate the article or bylaws. Suggestions:
    - 2. **That all parties have a right to intervene or file an amicus brief, as they elect.** If they elect to become a party they take on all rights/obligations of parties;
    - 5. That other "interested" parties be able to petition the panel or procedures officer (whichever is acting) to intervene (as parties or as amici) and the decision in this respect will be up to the panel or procedures officer (whichever is acting).
- Draft as of 1 May 2018 -- Draft Interim ICDR Supplementary Procedures. (McAuley Decl., Ex. F; ICANN Ex. 11 (with R. Grapsas July 11, 2018 cover email):
  - Rule 7: "If a person, group, or entity participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)), (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. Such a person, group or entity **shall have a right to intervene in the IRP as a CLAIMANT or as an amicus...**"
- Draft as of 25 September 2018 -- Updated Draft Interim Supplementary Procedures: (Afilias Ex. 256; McAuley Decl., Ex. H):
  - Rule 7: "Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. **A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an amicus curiae before the IRP PANEL.**"

## Elements of Rule 7

### Interested Parties Include Contention Set Members and Persons Referenced in IRPs

- Tuesday, October 16, 2018 email from S. Eisner to B. Turcotte and D. McAuley (McAuley Decl., Ex. L):
  - “Here is a proposed addition (in underline), including a footnote, for the amicus section:
  - Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus curiae* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN’s New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the PANEL.”