

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd., ) ICDR CASE NO. 01-18-0004-2702  
 )  
Claimant, )  
 )  
and )  
 )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S RESPONSE TO AFILIAS' POST-HEARING ARGUMENTS  
REGARDING TIME-BAR ISSUES**

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1. Rule 4 of the Interim Supplementary Procedures states that an IRP must be filed “no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE.” To apply Rule 4 the Panel must answer two questions: (1) what is the action or inaction giving rise to the Dispute; and (2) when did Afilias become aware of the material effect of that action or inaction.

2. The first issue is complicated by the fact that Afilias’ Rule 7 Claim has been a constantly moving target. In paragraph 86 of its Amended Request for IRP, Afilias states that the alleged violation of the Bylaws on which its Rule 7 claim is based is “[t]he Board’s adoption of Rule 7.” Afilias then explains, in a bullet point list, how various Bylaws provisions were purportedly violated. Those alleged violations are that: (1) the IRP-IOT Chairman counted an ICANN staff liaison towards a quorum; (2) the *amicus curiae* provisions of Rule 7 purportedly do not “conform to ‘norms of international arbitration;’” (3) the IRP-IOT did not hold a second public comment period after revising Rule 7 following the initial public comment period; and (4) the IRP-IOT purportedly violated the drafting principles that were to guide its work.

3. In its Post-Phase I Hearing Brief, Afilias attempts to reformulate its claim. **First**, Afilias states that its claim “is not limited to the conduct of the IRP-IOT,” asserting that the IRP-IOT’s alleged misconduct was done “with the knowledge and assistance of ICANN personnel.”<sup>1</sup> **Second**, Afilias states that ICANN staff violated the Bylaws by purportedly drafting an incorrect statement regarding the principles applied by the IRP-IOT, which the Board adopted as the preamble to its resolution approving the Interim Supplementary Procedures.<sup>2</sup> **Third**, Afilias states that the Board is committing a continuing violation of the Bylaws by not invalidating Rule 7 in response to Afilias’ letter of December 21, 2018.<sup>3</sup>

4. These alleged violations have not been pled by Afilias and should not be considered by the Tribunal. Afilias did not assert in its Amended Request for IRP, its submissions to the Procedures Officer, or its Supplemental Phase I Brief that the Board is committing a continuing violation of the Bylaws by not nullifying Rule 7, or that any ICANN staff member, director or officer violated ICANN's Bylaws in relation to Rule 7. Afilias also did not raise any such argument during its presentation at the Phase I hearing or in its 46-slide power point presentation.<sup>4</sup> Afilias cannot change the nature and basis of its claim in its post-hearing brief. If Afilias were permitted to do so, it would constitute a denial of ICANN's right to due process and a fair opportunity to present its defense, as required by Rule 20 of the ICDR Rules.

5. The claim properly before the Tribunal is the one that Afilias pled in its Amended IRP Request, *i.e.*, that, as a result of alleged misconduct by the IRP-IOT during the drafting process, the Board purportedly violated the Bylaws by approving Rule 7. The material effect of the Board's adoption of Rule 7 was that Rule 7 would apply to future IRPs, including this IRP. The Interim Supplementary Procedures were effective upon the Board's approval. Therefore, the material effect of approving them occurred simultaneously with their approval.<sup>5</sup>

6. Afilias was aware of the Board's approval of the Interim Supplementary Procedures—and the material effect of such approval—at the time it occurred on October 25, 2018. Indeed, Afilias' Chief Technology Officer and Executive Vice President (Ram Mohan) sat on ICANN's Board and seconded the motion to approve the Interim Supplementary Procedures.<sup>6</sup> Afilias was also aware that it intended to file an IRP Request under the new Interim Supplementary Procedures. Afilias shared a draft of its IRP Request with ICANN on October 10, 2018<sup>7</sup>, a process in which Mr. Mohan was involved, given that he executed a 17-page witness statement in support of Afilias' IRP Request, which he signed on November 1, 2018.

Accordingly, the limitations period for filing an IRP challenging the Board's approval of the Interim Supplementary Procedures began running on October 25, 2018.

7. Afilias argues that it did not become aware of certain facts concerning the IRP-IOT's alleged misconduct until December 2018.<sup>8</sup> But, under Rule 4, the time-period for filing an action runs from the date Afilias became aware "of the material effect of the action giving rise to the Dispute." The "action giving rise to the Dispute"—*i.e.*, the alleged Bylaws violation—is the Board's adoption of the Interim Supplementary Procedures. Afilias was aware of that action and its "material effect" on October 25, 2018. When Afilias concluded that it might have a claim or chose to investigate the IRP-IOT's conduct is irrelevant.

8. Moreover, even if the date on which Afilias became aware of certain facts underlying its claim were relevant (and it is not), it is clear that Afilias knew or should have known most of those facts when the Interim Supplementary Procedures were adopted. As noted, in its Amended IRP Request, Afilias lists four purported facts forming the basis for its claim that the Board's adoption of the Interim Supplementary Procedures violated the Bylaws (*supra* ¶ 2), and each was known or knowable when the Interim Supplementary Procedures were adopted.

- a. It was public knowledge that the IRP-IOT had been counting an ICANN liaison towards its quorum requirement since at least June 2017<sup>9</sup>;
- b. The extent to which Rule 7 "conforms to norms of international arbitration" is a matter of comparing Rule 7 to pre-existing norms of international arbitration and should have been known to Afilias immediately upon reviewing Rule 7;
- c. It was public knowledge that the IRP-IOT did not hold a second public comment period; and

d. Whether the IRP-IOT followed the drafting principles that Afilias contends applied could be determined by examining the publicly available transcripts of the IRP-IOT meetings and its correspondence. There was no need for any additional information that became available after the Interim Supplementary Procedures were approved, as Afilias now claims.

9. Afilias also argues, again for the first time in its post-hearing brief, that ICANN should be equitably estopped from relying on Rule 4 of the Interim Supplementary Procedures. Afilias does not identify the law under which it asserts a claim for equitable estoppel or explain how that doctrine could possibly be satisfied here. ICANN is a California corporation and therefore claims that its Bylaws are governed by California law. Under California law, “[t]he doctrine of equitable estoppel . . . provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment.”<sup>10</sup> That standard plainly is not met here.

10. Afilias bases its equitable estoppel claim on four e-mails between the parties’ counsel on January 9 and 10, 2019.<sup>11</sup> In the first e-mail, Afilias states that it intends to file an Amended IRP Request after the Procedures Officer rules on the *amici* requests, so ICANN does not need to not file a response to the initial IRP Request.<sup>12</sup> ICANN responds by asking why Afilias is delaying its Amended IRP Request and stating ICANN’s view that Afilias should file it without further delay.<sup>13</sup> Afilias answers that the amendments will not affect the matters before the Procedures Officer and that it is “possible” that some amendments will be based on “the legislative history briefing” before the Procedures Officer.<sup>14</sup> ICANN replies that it will not file its response to the IRP Request and that the parties should discuss the timing of Afilias’ Amended IRP Request to avoid delaying this proceeding.<sup>15</sup>

11. This exchange does not satisfy any of the elements of equitable estoppel. ICANN was not aware of any facts to which Afilias was ignorant, and ICANN did not induce Afilias to act on any assumed set of facts. Further, contrary to Afilias' assertion that ICANN agreed to its filing an Amended IRP Request,<sup>16</sup> ICANN stated only that it would not be filing an answer to the original IRP Request. Afilias did not ask for ICANN's approval to file an Amended IRP Request and ICANN did not give such approval. The parties' e-mail exchange did not mention or refer to Rule 4, and nothing in ICANN's messages suggested that it intended to waive Rule 4 or any other defenses to the amended pleading that Afilias had yet to file. And, needless to say, ICANN was under no obligation to advise Afilias of the legal consequence of delaying its filing.

12. Finally, Afilias asserts that ICANN's production of documents in April 2019 that purportedly are responsive to Afilias' December 21, 2018 DIDP request somehow justifies Afilias' delay in bringing its Rule 7 claim.<sup>17</sup> This makes no sense. Afilias does not contend that it needed the documents before it could file its Amended IRP Request. Indeed, Afilias filed its Amended IRP Request on March 21, 2019, a month *before* the documents were produced.

13. In sum, Afilias' Rule 7 claim is that the Board violated the Bylaws on October 25, 2018, when it adopted the Interim Supplementary Procedures, including Rule 7. The material effect of that alleged violation was that Rule 7 would apply to future IRPs, including this one. Afilias was immediately aware of that effect – it was public knowledge, Afilias' own Executive Vice President was the ICANN Board member who seconded the motion to adopt the Interim Supplementary Procedures, and Afilias was on that date already on the verge of filing its IRP. Afilias was required to bring any claims arising from that Board action within 120 days, *i.e.*, by February 22, 2019. Afilias' Rule 7 claim was first asserted in its Amended IRP Request filed on March 21, 2019. Therefore, it is time-barred.

Respectfully submitted,

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Dated: November 27, 2019

## ENDNOTES

<sup>1</sup> Afilias' Post-Phase I Hearing Brief ¶ 3.

<sup>2</sup> *Id.* ¶¶ 4, 11.

<sup>3</sup> *Id.* ¶¶ 4, 7, 15.

<sup>4</sup> Afilias asserted at paragraphs 21 through 26 of its Sur-Reply to Amicus Curiae Requests that "ICANN staff" drafted the purportedly incorrect rationale adopted by the Board for approving the Interim Supplementary Procedures, and Afilias asserted at paragraph 84 of its Amended IRP Request that the IRP-IOT's alleged misconduct was done "with the knowledge and assistance of ICANN personnel." However, Afilias did not allege that the drafting by ICANN staff of a purportedly incorrect rationale, or that ICANN staff's alleged knowledge of or assistance to the IRP-IOT's conduct, violated the Bylaws. The only purported Bylaws violation alleged by Afilias in its Amended IRP Request was the Board's adoption of Rule 7.

<sup>5</sup> In fact, the Interim Supplementary Procedures were effective retroactively to all IRPs filed after 1 May 2018. *See* Interim Supplementary Procedures, Preamble.

<sup>6</sup> *See* Transcript of October 25, 2018 Board Meeting at p. 26 (available at <https://static.ptbl.co/static/attachments/192259/1540518957.pdf?1540518957>). Further, the Chairman of Afilias' Board of Directors, Jonathan Robinson, was also in attendance during the ICANN Public Meeting (held from 20 to 25 October 2018) during which the Interim Supplementary Procedures were adopted, and he was likely present at the actual publicly-held Board meeting since he was recognized as one of ICANN's community leaders immediately after that Board meeting. *See* Transcript of October 25, 2018 Community Recognition Program Meeting at 2 (available at <https://static.ptbl.co/static/attachments/192308/1540578021.pdf?1540578021>).

<sup>7</sup> *See* Ex. 260, Afilias Letter to the ICANN Board dated December 21, 2018 at 4 ("On 10 October 2018, Afilias provided a confidential draft of its IRP Request to ICANN's legal department in the context of its ongoing Cooperative Engagement Process with ICANN over the rights to the .WEB gTLD.").

<sup>8</sup> Afilias Post-Phase I Hearing Brief ¶¶ 11-14.

<sup>9</sup> *See, e.g.*, June 12, 2017 Meeting Transcript at 1 (available at [https://community.icann.org/pages/viewpage.action?pageId=66061567&preview=/66061567/66080085/IRP-IOT\\_6-12-17%20ICANN%20IRP-IOT.pdf](https://community.icann.org/pages/viewpage.action?pageId=66061567&preview=/66061567/66080085/IRP-IOT_6-12-17%20ICANN%20IRP-IOT.pdf)); April 27, 2017 Meeting Transcript at 1 (available at [https://community.icann.org/pages/viewpage.action?pageId=64077897&preview=/64077897/64948112/IOTIRP\\_0427ICANN1900UTCfinal%5B1%5D.pdf](https://community.icann.org/pages/viewpage.action?pageId=64077897&preview=/64077897/64948112/IOTIRP_0427ICANN1900UTCfinal%5B1%5D.pdf)).

<sup>10</sup> *McGlynn v. State*, 21 Cal. App. 5th 548, 561 (2018) (citation and quotation marks omitted) (RE-LA-9).

<sup>11</sup> Afilias' Post-Phase I Hearing Brief ¶ 17 (citing Exs. C-0086, C-0087 and C-0088).

<sup>12</sup> Ex. C-0086.

<sup>13</sup> Ex. C-0087.

<sup>14</sup> *Id.*

<sup>15</sup> Ex. C-0088.

<sup>16</sup> Afilias' Post Phase-I Hearing Brief ¶ 17.

<sup>17</sup> *Id.* 13-14.