
BRENDA BREWER:

Good day, everyone. Welcome to the IRP IOT call on the 1st of December 2020 at 19:00 UTC. This meeting is recorded. Kindly state your name when speaking for the record and keep your phones and microphones on mute when not speaking. Attendance will be taken from the Zoom room. And I'd like to turn the call over to Susan. Thank you very much.

SUSAN PAYNE:

Hi. Thank you very much. And again, thanks, everyone, for joining. We've got a really good turnout on this call. And just before we start, thanks to everyone for the really interesting input that's come in largely today kicked off by Chris, but thanks also to Liz and to Malcolm and to Kurt for all of their sort of e-mails during the course of the day. It's been an interesting discussion so far. I'm sure we'll continue that. But first of all, I guess, let's have a quick look at the agenda and updates to SOIs and so on.

First off, maybe before I even review the agenda, does anyone have any statement of interest update that they need to flag to us? Cool, I'm not seeing any, so I think we can take that as no. In terms of reviewing the agenda, therefore, we'll quickly look back at the action items from previous meeting. There'll be a quick update from the consolidation subgroup meeting that that team has been—currently is working on a sort of rotation with this call, so on the off week for this group, the subgroup has been meeting.

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We'll then continue our discussions on the time for filing, which will obviously take up most of our time today. And then we'll pick up Any Other Business if anyone has any. And if there's anything you want to flag now as AOB, please do feel free to speak up or put something in the chat now. Otherwise, we'll circle back and I will try and cut the discussion off on the time for filing in time for that. And finally, our next meeting, as noted in the agenda, will be in two weeks' time at our other time slot.

Okay, so in terms of our agenda item two which is just the action items from the last meeting, we've got one for staff to prepare us a score card tracking progress against the major items. I think that one is not with us yet.

BERNARD TURCOTTE: In progress. We'll have it for the next meeting.

SUSAN PAYNE: Super. Thanks, Bernie. And I think that's fine. It's certainly something we want, but it's not something we have a crying need for on this particular call. So that's super.

And then there was a second action item which was for—well, it's expressed to be Sam, but I think Sam/Liz and others to propose counterexamples with respect to the repose. And I would say that's obviously some of what we've been having during the course of today, it may well be, depending on how the call goes, that we may well be still seeking other examples. But we do have some counterexamples now to

also consider. So I think unless anyone wants to bring anything up at the moment in relation to those action items, we can just move on to agenda item three.

Super. Okay. So now update then on the consolidation subgroup meeting. As I said, we met this time last week. It's a sort of small group. We were very much aided in our discussion on the last call by a series of questions that Liz kindly circulated and which we used to sort of structure our discussion, largely around continuing the discussion on the procedures officer role, however they become named, whether that role shifts into being something like an emergency panelist or whatever, we were discussing really how that role would work, sort of, for example, if and when there's a standing panel, how will procedures officers be appointed in terms of whose turn is it? And I think we largely feel that there would need to be kind of like a taking it in turns, a sort of taxi rank process.

I discovered on the last call that not everyone uses that term. It turns out to be a British or possibly European expression, but effectively, the standing panelists would take it in turn to be the next one up in the hot seat to be the procedures officer for whichever the next case is.

We're also considering other things, like how long will they continue to be the procedures officer, at what point do they stand down, and I think generally, the feeling was that they stay in place to the extent needed, until there's a panel in place.

And then we've been having some good discussion on things like, can the procedures officer then mutate into one of the three panelists to

hear an action, and how, what would be the appropriate guard rails for that? And probably, the direction of thinking is that we don't necessarily want to completely outlaw that, but it would need to be something that all of the parties to the action were comfortable with. And if one of them was not, then it probably wouldn't be appropriate to allow for that.

And I think that's the kind of ... from my perspective, probably the highlights. I'm sure I've missed some of the other aspects that we were talking about, but we were essentially making some good progress. Still obviously more to discuss. We'll kind of keep reporting back. And hopefully, at some point, we'll have a kind of final set of proposals on that section on consolidation intervention and participation as an amicus that we'll be able to bring back to the wider group.

Just going to pause and see if anyone from that group wants to add anything or flag anything else that I've missed. Okay, I'm not seeing anything, and I think that's probably fine. So yes, thanks very much. Obviously, if anyone's got any concerns about what we're up to or any specific questions, do feel free, or if one wanted to participate in that group. We certainly have a sort of adequate range of perspectives in that group, and are making good progress, but if someone feels very strongly that they wish they had volunteered and want to ... No one is excluded, but as I say, we're trying to work in a smaller and more nimble group and wrap up the kind of details.

Okay. Time for filing. Agenda item four. Yes, as I said at the beginning, thank you to Chris, Malcolm, Kurt, Liz, certainly those with the e-mails that I saw for your very thoughtful interjections on the e-mail list during

the course of the day. I'm not sure whether it's safe to assume everyone's had the opportunity to read them all. So I guess the first thing I should just do is see whether anyone who did post to the e-mail list would like to sort of expound on what they said on this call. So I'll give you all an opportunity to do that if you'd like to, bearing in mind that some people may not have had the opportunity to read what you circulated yet.

Yeah, David McAuley for example is saying he hasn't managed to completely read them. So just pausing briefly to give anyone who wants to an opportunity to kind of give a high-level summary—or detailed summary, if you'd like—of what you'd circulated. But also to see whether anyone has, any of you or indeed anyone else would like to kick off the discussion further.

Speaking entirely for myself, and unlike many people, towards the end of this afternoon, I've quickly read as much as I can of the various e-mails, and frankly, trying to speak completely impartially, there's merit to my mind in both sides of the argument in the sense that I am ... Chris and others have argued very persuasively that it's sort of inconceivable or certainly difficult for a board to have, and the organization to have the incredible lack of certainty of the risk of decisions being challenged five or ten years down the line, possibly by a party who wasn't even in existence at the time a particular decision was made or a particular policy was adopted which potentially is ultra vires.

And that's certainly a very persuasive argument, but I am also against—trying to speak incredibly neutrally—I'm also quite persuaded by Malcolm's perspective which is taking a literal reading of the bylaws

which are tasking us with coming up with the timing, the time for filing, based on the time when the claimant knew or ought to have known about the act in question. And in order for them to be a claimant, we've got a definition in the bylaws that say they have to be damaged or harmed. And so until you're harmed, you aren't eligible. And the bylaws don't say to this group, in coming up with our rules, to come up with a rule on timing and also to come up with any cutoff repose that we feel is appropriate.

And so I am, again, not having been involved in the CCWG, I can't help but feel that, had the CCWG felt that a repose was appropriate, then various things are built into the bylaws, including a precise explanation of when timing should run from and the CCWG, had it intended to provide some limit on that, could have been expected to say so.

So I genuinely am torn between both of those two perspectives, and indeed, I think we'll circle back—and I'm pleased to see a couple of hands up, but it may be that we have to go back to the community and specifically ask the various parts of the community if they'd intended what Malcolm is saying they intended, or if they'd in fact never given it enough thought, and no, of course that wasn't what they meant. Becky.

BECKY BURR:

Thanks. I've been reluctant to weigh in on this, but I think just on that last point, Susan, I feel compelled to speak up. I was quite involved in the CCWG accountability, and in particular in this area, this IRP, and as people I think know, one of my primary goals in the CCWG—and this

was long before I was on the board—was to create a real constitutional judiciary for ICANN.

I think that we should decide this issue on principle and not on imagining ... And I mean that in the most polite way, not in overreading the presence or absence of something in the bylaws. What the CCWG did on this was put together sort of structure and framework. It was always intended that there would be a group that worked on filling in details, what got translated to the bylaws was also an imperfect process

So I would really urge people to resist debate about what the CCWG intended, because to my mind, the CCWG didn't actually have a view on this, and if pressed would have said that's something for the IRP IOT to come up with. And let's decide this on the basis of principle and what we need.

SUSAN PAYNE:

Okay. Thanks, Becky. So David, I think you're next, and then Malcolm has his hand up as well.

DAVID MCAULEY:

Thanks, Susan. The reason I raised my hand is because even though I haven't read the mails, I did skim them, and I homed in on one part of what Malcolm wrote. And I was wondering what would happen if I stayed silent on that point. And then when you gave your very apt, objective summary of both sides of the position and restated the point about the literal interpretation of the language of the bylaw, I think that it's a fair characterization of what Malcolm is at least in part arguing on.

I wanted to state my position, and that is I would like to reiterate that I sent an e-mail to the list on November the 2nd that gave my position or my thoughts on why we are not limited in creating a repose, and it was my view that the language in the bylaws of doing this at a minimum and also the purposes of the IRP allowed for construction of a period of repose, and the fact that the bylaws say, "Look, you should come up with a rule for how long someone has to file when they become aware of an issue or should have become aware of an issue doesn't preclude us from creating an overall time limit on the other side."

So I just worry about being silent, so I don't want to be silent on that point. I haven't changed my position, and that's my view. And then the other thing I would say is, to what you just suggested we might consider, and I would not agree with it, and that is the idea of going to the community and asking them, is this what you meant? I don't think we should do that. There are words on paper, and we ought to do our best to come up with a rule. I very much appreciate Kurt's idea of a compromise and while I don't agree with it yet, as I said, I've just read these e-mails. I need time to think about it. But I don't think it would be wise to go and ask people what they meant. The words are the words. So those are the things I wanted to state right now. Thank you, Susan.

SUSAN PAYNE:

Thanks, David. Malcolm.

MALCOLM HUTTY:

Thank you, Susan. I appreciate Susan suggesting that going back to the community to ask what they really intend might help get us out of a

difficult spot, and it's well intentioned. And actually, also going back to the community, I'm confident would support my case because I've already had essentially at least half the GNSO write in favor of my case directly to the board.

Nonetheless, I put my hand up actually to agree with Becky, and as it turns out, David, that it's not good to inquire into the legislative process. Becky actually understated her involvement with the development of this in the CCWG. She was the chair, and a very able and dedicated and effective chair of the subgroup that was working on this precise text.

And I was one of the people that probably contributed most in that subgroup, alongside Becky working on that text. I know what my opinion is on that. I've made that very clear. But my opinion doesn't make it the CCWG's opinion. I'm not really sure that you could really look at the CCWG's opinion other than in what its output was, because that was closely negotiated text including its reports and the proposed wording of the bylaws.

And more than that, it isn't just the CCWG members and participants who are relevant in this, because as the whole of the rest of the community that looked at that output and decided whether or not to support it, I know that the community that I represent, my organization which is in a membership association and the larger European umbrella association of which I'm part, absolutely were briefed by me, very directly, on the import of this and how it was crucial to ICANN's accountability and that the fact that we'd achieved it was a real success

in my view and that therefore, we could have confidence in supporting the transition process.

I know that that's what I briefed, and I'm confident that at least for my own organizations, the ones that I'm employed by, they supported that position. Others in the community will have looked at it in a [light] fashion and decided to support or not or glossed over. We do not know how much detail and how much there is there. All we have is the process. So all we can really do is look at, as David says, the words on the page, because those words on the page were not achieved lightly. They were put through possibly the most rigorous process of scrutiny of which the multi-stakeholder community is capable. I think we need to work with them. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. Well, yes, fair enough if we need to work with them, but we appear to have two very differing perspectives on what those words mean, and I'm not sure how one breaks that impasse. But luckily, I don't have to make that decision. We have to make it collectively. Greg.

GREG SHATAN:

I have considered this at length, and Chris and I even discussed this offline. Yeah, I think it is in essence—there is a level of interpretation that is left to us that I think other than going back to some body that really doesn't currently exist, we kind of have to solve for ourselves. If this were a GNSO working group, we might go back for policy guidance to the GNSO council, but it's not, and there is no communitywide group

that we would go back to. But I think we have sufficient brainpower and indications that we can work from.

And I don't think that either party or either side, if you will, of this is absolutely wrong. I think this is a decision that either way does have consequences, clearly, but we need to decide kind of which one better carries out the role of this, which was, to my mind, to increase the use of this as a substantive accountability tool as opposed to the process driven accountability tool that it was before.

And now that we're kind of on—maybe it's somewhat of an edge case with kind of the late arriving, late harm that comes from a decision. Ultimately, the question though is the same, which is whether a policy that was decided on is within or outside the board's remit to decide—or within or outside ICANN's mission. I think implicit in that is some level of fiduciary duty, business judgment as well on the part of the board. So this isn't just a kind of de novo review by the IRP. The board decision needs to get adequate deference.

It's interesting, and I say this neutrally, that those who support the idea of ultimate repose are those who are or have been on the board and that those who seem more uncomfortable with it—or I should say maybe more comfortable with a continued chance for a case to be brought are those who have not been on the board. Everyone of course is part of the community, so that's not a dividing line that would be either appropriate or to describe anything, because maybe it's having been seasoned in the board that gives that view.

And I'm not saying it's black and white as to who's on which side, but I think that—and having been on some boards, although not this one, I'm sympathetic to the idea that being perpetually second guessed is an issue, nonetheless, we're looking here at oversight issues and recognizing that there's a second nonlitigation oversight body or methodology which is the community and the empowered community which also has the chance to bring up matters like this under certain circumstances.

So I don't have any sort of gordian knot cutting ending to this little soliloquy. My sympathies personally tend to be on the side of allowing a challenge whenever it arises within a period of time that's relevant to that complainant. So in other words, a complainant that does not have harm or that is not around at the time. Their time period would start later and run later than parties that were around at the time a decision was made and could have brought a case at that time. Thank you.

SUSAN PAYNE:

Thanks, Greg. Scott.

SCOTT AUSTIN:

Thanks so much. Wow, there is so much to look at here and to digest. I've really tried hard. I thought that Malcolm's examples and hypotheticals were brilliant and really enjoyed the nuances, but by the same token, I am actually more persuaded, I believe, by Chris's comments. But that's not to say they both aren't extremely deep. I don't think either one of them could be charged with having provided a

shallow analysis. And I'm beginning to think they must run into each other in the faculty lounge or perhaps the barrister's lounge.

But having said that, one of the things in doing my own research—and I thought that, gee, I'll have to come up with my own hypothetical to gain a deeper understanding. And I haven't done that yet, so fear not. But one of the things that I did run across was a fairly good analysis, albeit American, perhaps not with the history of the British background on the subject, but it does make some distinctions between a statute of limitation and a statute of repose, and I don't know that that necessarily is dispositive here, but at least it gave me a way of grappling with some of the distinctions in this context to move me more toward the sense that there really does need to be an ultimate limitation, but at least to put it in this context.

Here's what it came down to. The idea being that a potential distinction—and this was in a tort context, so I'm going to say that right off the bat, not necessarily a policy context. But the idea being that tort statute of limitations is really more in a procedural context, and whereas a statute of repose is more on a substantive context because a statute of repose bars a cause of action before the injury occurs.

And I think that's what we're grappling with, is a concern that there may be some injury that is so important because of the mistake or the lack of insight or the political intrigue that may have prompted that injury, that we should not leave a prospective claimant without some manner of redress.

The other distinction that I got from this piece was the note that a statute of limitations is really something that really deals with the statute of repose includes a statute that begins to run at the same time as a traditional tort or contract statute of limitations but has a longer limitation period than the traditional statute of limitations and has no discovery provision. And by discovery it means that you've actually realized that you've been harmed.

So for example, a traditional tort statute of limitations might run for two years with an exception that the statute doesn't run until a Plaintiff discovers or through exercise of [reasonable] diligence should discover the injury. But additional statutory language provides that in no event should a cause of action for that be brought more than in this case six years after the running.

And there's other ways to disclose it, but to me, that sort of was a convenient and meaningful distinction that allowed me to see the difference, and it was a meaningful difference and gave me a sense that, okay, if we're going to rule out a cause of action or eliminate cause of action, then I guess, what is the appropriate time period? But I do think that there is a point at which some bar should be raised. That's my thought on the subject for now.

SUSAN PAYNE:

Thanks, Scott. And Chris has put in the chat something I think I'd concur with, which is if you had the time, could you possibly put an e-mail together setting that out or setting a link to at least what you were referring to? Because I think there was quite a lot in there and I think

we'd probably find that helpful, all of us, rather than trying to grapple with those concepts on the call. If you wouldn't mind.

SCOTT AUSTIN: Sure, I'd be happy to.

SUSAN PAYNE: Thanks, Scott. So I think it's Mike.

MIKE SILBER: Thanks, Susan. I am cognizant of the fact that we don't want to disempower people from raising issues. At the same time, we can't have an organization that is continuously acting with one eye looking backwards and continuously trying to work out if past actions have led to the situation that may cause an IRP at some stage in the future. You'll never progress if you've got to relook every previous decision in the face of current circumstances.

And the one thing I wanted to point out is that it's not as if parties have no power. They have power through the policy development process and through the bottom-up process. It's just a question of now holding the organization and the board accountable for historical inaccuracy. So it can't be something new, at least in my opinion. And that's where I actually really like Kurt's idea, because we don't want to create an absolute rule which could lead to a miscarriage of justice, but we also don't want to turn this organization into one that has to look in every direction before every step that it takes.

And on that basis, I think that it's fair and reasonable to put a time limit and then also to indicate that in the event of a significant miscarriage, then a claimant can approach either the board or the panel to condone late filing based on good cause shown. But other than good cause having been shown and putting the onus on them, I don't think the organization can survive continuously having to look in every direction at all times.

SUSAN PAYNE:

Thanks, Mike. And yes, I think one of the things we want to circle back to is Kurt's compromise suggestion. Good to get your thoughts on that. Chris.

CHRIS DISSPAIN:

Thanks, Susan. A couple of things. I agree with what Mike just said, and I agree also with Kurt's ... I think obviously, the devil is in the detail, but I think Kurt's outlined suggestion certainly has merit. I also was agreeing with what Scott said. I think I understood it, but the reason I asked for it to be put in an e-mail is to get clear exactly what he was saying. But I think I understood it, and if I did, I agree.

I just wanted to make one point, which is that, to be clear here, a person is not disenfranchised. We're not talking about somebody not being able to seek a remedy. We're talking specifically about somebody not being able to use the IRP. There are other opportunities, as Malcolm has said in the examples he's given, I've said and others have said all the way through the conversation, there are other ways of seeking remedy.

And in fact, there are even ways of using the IRP to seek a remedy, because the remedy itself is different from that which we are discussing and arises in a different way.

So it's not about us saying this person is disenfranchised, it's about us saying this person has to go a different way in order to see Kerry Ann remedy because, in my view, otherwise it, as Mike has said, makes the organization untenable in being able to make decisions going forward. Thank you.

SUSAN PAYNE:

Thanks, Chris. Greg again.

GREG SHATAN:

Thank you. I think that Kurt's idea has merit, and I like the way Mike talked about it as well. It occurs to me that the late arriving complainant has a higher burden anyway, and that should be recognized, in that they are challenging a decision, really, or policy that was enacted based on a decision making process that has been understood to be within the mission and the rights of the board to enact, and that they're really going to have to show that at the time it was enacted, it needs to have been inappropriate.

I think that there may be other ways to look at things that may have become inappropriate over time, but I'm hoping that by and large, that isn't a big set, or hopefully it's a null set, look for some consistency even as we evolve. But I think that essentially seeking leave and needing to kind of show why, making an initial showing that in spite of this having

been put in place and being in place for a period of years, it is now appropriate to question the capacity of the organization to have had that policy for this period of time.

And it's kind of also hinting at another question about retroactivity or lack thereof. If a policy is challenged and is recognized as ultra vires, that kind of raises the question about whether anything that's already happened is going to be reopened or whether there is repose for those acts that have already occurred.

Maybe that's something that needs to be let to the wisdom of the panel, because it's hard to predict the circumstances under which any of this may arise and even if we did a good job of predicting them, the reality is that something else would come up.

So I'm not merely looking for compromise, but I don't see the later complainants kind of having the same, necessarily, easy path that an earlier complainant would have, because it can't just be because they're around that it is now outside the realm of policy. The policy should be agnostic in a sense to the complainant's views or positions. So it really has to be against policy for all purposes even if the complainant's circumstances that have brought them to bring the challenge. So I think that creates a higher barrier.

And I do feel it's a good idea to kind of state that higher barrier. So maybe this is like a ... Is it a second bite at the apple where it requires a second bite license, so to speak? Thanks.

SUSAN PAYNE: Thanks, Greg. Malcolm.

MALCOLM HUTTY: Thank you, Susan. I'm a little torn, because I'm actually quite open and recognize the weight of particularly the position as Mike just put it. I understand that he's in alignment with others who I've disagreed with strongly, but the way that Mike put that as a situation, that's not an outcome in any way that I'm seeking to bring about, and I'm looking for opportunities to adjust or compromise this in a way that would remove that as a problem, that would ensure that we wouldn't reach that, while still providing the protection that I believe we have promised.

And I'm personally uncomfortable right now because I do feel that we are actually required to act in a certain way. I believe that that is the way the bylaws are written and that it would be wrong to act otherwise, even if I would prefer it. But suppose we look for some form of compromise that we could actually all agree, "You know what? Regardless of the dispute about the interpretation of the bylaws, maybe we can think this would be something that would actually be a workable and good outcome."

Is that a proper thing to do? Technically, no, it's not if you believe that this is precluded by the bylaws as I do. Then that raises the possibility of saying, well, note an objection for the record that I think this is the wrong way to go ahead, but nonetheless, we'll do that in the interest of finding some collegiate way forward that we can work on and preserve the opportunity to raise objections later through some other channel if thought appropriate, and by those who think appropriate.

I'm particularly uncomfortable in doing that because the last time this came up within the previous incarnation of this group, I specifically said in relation to the interim rules that I disagreed with us going forward, but nonetheless, that had been decided by the group and I was prepared to work on the way that it happened. And that was later brought back to me, indeed reported directly to the chairman as being my support for the interim rules when actually, what it was was disagreement with there being interim rules or being interim rules in that form, but nonetheless, working on those bits that I could in an attempt to be cooperative rather than obstructive while preserving the disagreement that arose.

So if I offer a route of compromise—and I would very much like to—I must preface that by being extremely clear that I do not believe that any approach that is not based specifically on when the person had knowledge that they'd been harmed, any additional criteria on the timing that seeks to preclude them according to any other criteria, is in my view inconsistent with the bylaws and reserve the right to take whatever alternat I've recourse may be available. Clearly, there would be a time when the board considers this, and I'm sure I will be making direct representations to the board in objection, and maybe RFR and who knows what.

But in the interest of moving forward, Kurt has come up with something that I think, separate from his specific proposal, is a structural thing which is to say suppose that we had a rule that had a fixed limit, but we had an exception according to some circumstance.

Now, Kurt proposes the board's discretion. Well, that's one option. There could be others. We could consider what other methods, what other things would fit that pattern. I.e., a fixed deadline based repose but in certain circumstances, exceptions to that where there was no repose, and then limit and more tightly constrain those circumstances or how that would operate or what the procedure should be, and we can discuss that instead. And maybe that could move us forward.

As I say, I don't believe we're authorized to do that, but if we're at an absolute deadlock right now—and we do appear to be—maybe some version of that discussion is all we can latch on to and then if it gets litigated further, then so be it. I don't know. I'm trying to be constructive about this while not in any way accepting a waiver here, because I know that there are those—I'm not alone in this. There was a substantial portion of the community that has put pen to paper in support of the position that I've been raising, and I absolutely don't want to betray or compromise their position. But I'm struggling here, in good faith, trying to help you, Susan, to find some way of moving this forward if we're in an absolute deadlock. Thank you.

SUSAN PAYNE:

Thank you, Malcolm. I'm noting both your spirit of compromise and also your extreme reservations about doing so, and your reserving of your position. Thank you. I think that's extremely helpful. I think it's extremely helpful that you raise something which actually came up in one of our earlier calls, I think even from you, where you floated the prospect that perhaps there may be a compromise around some types

of breach that cannot be subject to a repose and other types of breach where perhaps a repose can be considered appropriate.

I think I'd like us to circle back to that as well, again noting what you're saying, that even that compromise is one you're very uncomfortable with, but I think it is also one we could explore. But I've got a couple of hands up, so we'll go to David first and then Scott again after that. So David.

DAVID MCAULEY:

Thanks, Susan. I respect Malcolm's position. I'm coming at it from the other side, as I have on a number of positions like this in this discussion, and that is to look at the compromise that's been proposed by Kurt, and first of all, thank Kurt for it, and then secondly say with great reservation, maybe we could look at it.

My reservation—as you know and as I've said earlier, I don't think the literal language and the rules of construction preclude us from creating an overall time limit. But my major concern here is that we not have sort of a lack of a repose rule because to me, the more important part is to protect one of the purposes of the IRP, the creation and the preservation of precedent and certainty, predictability, the things that people look for in a system like this, at least I think so, and I certainly do.

But if we were to look at the compromise—and as I said, I haven't really had time to think it through—I do want to make a point of clarification, because as I listened to Mike remark on it, I thought I saw a difference between what Kurt may have proposed and what Mike is proposing.

Kurt's proposal, as I read it very quickly, was to have a period of repose allow for a waiver in a case by the ICANN Board, but then I think I heard Mike say allow for a waiver by the ICANN Board or the IRP. I would certainly not like the idea of the IRP panel having that capability. But I thought to myself, would it be unfair to have a rule that could be waived by the ICANN Board? Is that illusory?

And then I thought to myself, well, no, the ICANN Board actually could, and would reasonably, waive it. How would that happen? Well, it would certainly happen if an IRP panel came out with a precedential rule but it was unclear. We should not assume that the IRP panel is going to be above the fray here and speak with clarity of an oracle. They are human too. They may create a rule that's simply unclear and a waiver would be inappropriate in such a case. The board may say, "Hey, look, you guys need to go back and talk about this again. Nobody understands your decision." So it's possible. And as I think of Kurt's proposal, maybe there's room for it and we ought to think about it. So that's my comment. Thank you.

SUSAN PAYNE:

Yes. Lovely. Thank you, David. Scott.

SCOTT AUSTIN:

Going back through and thinking and listening, and frankly, Malcolm in his most recent comment about providing what I'll dub as a safety valve for the inflexibility that's perceived by a statute of repose and is probably one of the reasons for being, because, again, my reading on this is that a statute of repose begins not at the time of injury but may begin

at the time of creation of whatever it is that has the potential to cause harm. My analog for that in the manufacturing world would be the creation of the defect and that there be a certain period of time or the drug or whatever the thing is that's out there and thrust into the sea of commerce and has the potential to do harm, that is that it doesn't require someone to come up with knowledge.

But again, that's not in a policymaking context. So that's the thing that somewhat skews this. I'm going to be very interested if anyone in this group has any experience with a statute of repose in a policymaking context, because the other side of it is that there is a body that goes through a lengthy process. And anyone who's [been on a WG] or who's been in some of the other procedural meetings—and clearly, obviously the board and the CCWG and so forth—would recognize the amount of time and effort that goes into thinking through every possible permutation that could adversely affect someone by what's about to be put on paper.

So you're not arriving at a particular policy determination without an incredible amount of diligence, thinking, debating and a crucible of searching for the truth, for lack of a better term in terms of the potential harm that it could do. So I think that that has to be put into the context and the analysis of when you finally do have this policy, maybe it's not such a terrible draconian measure to have a period of time at which enough is enough and to consider. I think Malcolm has hit upon a potential, as I say, safety valve. But other than that, I think repose is very different from a statute of limitations because then there is a question of injury. And it sounds to me like we've toyed with both and now we have to come down to—I'm not sure that we have a false

dilemma there either. Perhaps we can have both in terms of a knowledge of a harm by something that's been created as a result of this policy as a separate time period, and that's your statute of limitations. And whether that's the 120 days or something else is to be determined, but I think that distinction is important.

SUSAN PAYNE:

Thanks, Scott. And it may well be that in the past, I've probably used the terms statute of limitations and repose a bit interchangeably, and probably inaccurately. And I think if one is going to use the concept of a statute of limitations, I think you're right that that's the 120 days or whatever that time period becomes effectively, which in a sort of wider breach of contract, tort kind of scenario, 120 days is a very short statute of limitation, but that's effectively your time period from when you're aware of the harm as opposed to an outright repose from when the act happened.

Greg.

GREG SHATAN:

Thanks, Susan. This is certainly a knotty question. I am thinking that one of the things we have not really considered is the relationship between statutes of repose and concepts of continuing harm or continuing violations. So looking for instance at the statute of repose for securities fraud, while it's stated as a statute of repose, it only starts after the Defendant's final violation of the rule. So that is something called a continuing fraud exception. I'm not saying we have fraud involved here, but that's what this is in this case.

So on the other hand, the court then rejected the application of the continuing fraud exception to the [inaudible] statute of repose and did not see room for kind of essentially tolling or stopping the statute of repose under that situation.

I think the idea of a statute of repose is, as near as possible, unqualified [rest], if you will, which does potentially leave a harm or a damage without a remedy—not necessarily without any remedy, as others have pointed out. There may be other remedies available. But in this case, there's at least some argument, if you think about trademark infringement, there's a continuing harm there so there's never really a statute of repose or even statute of limitations other than how far back you can go in terms of claiming damages. But as long as there's a continuing problem, it's a live issue.

So, what do we do about that? If there is in fact something that potentially everyone recognizes as being outside the powers of ICANN, yet it's too late to challenge it. Maybe the point is it's only too late to challenge it through an IRP. There are certainly many other ways it could be challenged, both softer and harder ways of cleaning this up, including convincing the board that they have a problem on their hands, because certainly no one wants to be operating outside the realm of one's mission.

Last point I'll make is that unlike David, I feel more comfortable giving the independent review panel the chance to waive a statute of repose upon good cause shown, as opposed to leaving that to the board, because I think the board [is our definition] dependent, or not independent. It's basically their ox be gored, and there may be any

other reason why they disagree, and the idea that they can squash the challenge before it can be brought, even if a panel of worthies would find it to be worthy, I find that troublesome. Thanks.

SUSAN PAYNE:

Thanks, Greg. Yeah, I think if we are to go down this compromise path, it's certainly a question for a discussion. Kurt in his e-mail proposing this compromise does consider the question of whether it's right to leave this to the board. So it is something that he ... Certainly to his mind, addresses, is this something we can trust the board with? And took the view that it is. But it may well be that there are others of us that maybe do feel that given that this is a challenge to the action of the board and therefore, is it right to be asking the board to be the arbiters of whether the challenge can happen? And perhaps that alternative of allowing the panel to make that decision would give a greater comfort if we were to go down this path.

I'm not sure that I'm following all of the chat, so if there is anything in the chat that would be useful to actually raise out loud, please do. I know there have been a number of comments from people about the purpose of the IRP and the fact that it's not the only mechanism, people aren't being disenfranchised, no one is preventing them from going to court, and so on.

But just to throw into the mix for people to chew on, we do have in 4.3 of the bylaws, 4.3(a)(ix), one of the stated purposes of the IRP—there are many of them. Obviously, this is the ninth one. But one of those stated purposes is to provide a mechanism for the resolution of disputes

as an alternative to legal action in the civil courts of the United States or other jurisdictions.

And I'm only saying that because yes, we've all been pointing out that it's not the only mechanism. That's absolutely correct. But actually, part of the purpose of the IRP, in addition to all these other things including providing a binding mechanism and setting of precedent, is for there to be a mechanism which isn't going to court. Mike.

MIKE SILBER:

Thanks. Maybe let me respond to David, because he felt I was going off on a tangent by bringing the panel in. And on further reflection, I think he's correct, because if the board does not make a rational decision in reviewing the grave injustice that may be done to an applicant, then that would be capable of being brought before an IRP.

So I think the board is the correct place, and I think that direct recourse to the IRP to allow the IRP to open up—the IRP pane lot open up the IRP to such a party would be inappropriate in the circumstances, because it wouldn't be a decision of the board or the organization. So I'm inclined to agree with David, and I think that's the correct way that we should be going, is the aggrieved party should make its case and if it's strong enough and the board ignores it, then there's a mechanism to challenge.

SUSAN PAYNE:

Thanks, Mike. Sam.

SAM EISNER: Thanks, Mike. Just a question, and just to start trying to put some of the pieces together as we're thinking about this. And I know there's no agreement. We're not baking anything today, but just as I think about what you just said, Mike, would this be something that maybe would be an appropriate topic for part of the CEP? Is that where we'd see that sort of entreaty to the ICANN Board to lift the defense of time and to proceed to an IRP? Is that kind of how we want to think about all the different parts of how the IRP operates, including the CPE that we still have to do some work on? Is that one of the possible ways that this could all come together?

SUSAN PAYNE: Thanks ,Sam. I know Malcolm's got his hand up. If you don't mind me just leaping in ahead of you.

MALCOLM HUTTY: Please go ahead.

SUSAN PAYNE: That might be a possibility, Sam, but I think if I'm remembering the rules correctly, I think you have to bring your IRP—oh, no, you're right, you bring your CEP first before you commence your IRP, don't you? Although we do have to think about the timing of that in itself. Yeah, sorry, ignore me. Malcolm.

MALCOLM HUTTY: Thank you. Before we get too many people who've been on—and [disagree with me on the main point] leaping in to say, "Oh, yes, we can have an exception provided it's entirely at the discretion of the board," I do need to say that when I was imagining that there might be some compromise that might get to some position that might be in some way workable to all sides—

CHRIS DISSPAIN: Is it just me, or has it all gone very quiet?

SUSAN PAYNE: Oh, no, it has. I actually was getting messages saying my Internet was unstable, so I thought it was just me.

CHRIS DISSPAIN: No, but I think Malcolm's back now. Malcolm, are you there?

MALCOLM HUTTY: I'm here. I thought it was just me. Okay.

CHRIS DISSPAIN: Well, it was just you, clearly.

SUSAN PAYNE: Maybe it's you and me. Is anyone else with us?

MALCOLM HUTTY: Well, the participant list says we have 17 participants.

SUSAN PAYNE: We're laughing away here, but actually, Chris, it may just be you and me. I don't know where everyone else is.

CHRIS DISSPAIN: I think we lost Malcolm briefly but he's back now, so let's—

SUSAN PAYNE: Malcolm, are you with us?

MALCOLM HUTTY: Okay, if everyone is here and you can hear me, I don't know where I got to that you missed, but what I was trying to say was that when I suggested earlier that we might try to find—

SUSAN PAYNE: Okay, I—

MALCOLM HUTTY: Susan, can you hear me?

BRENDA BREWER: I can hear you.

SCOTT AUSTIN: I can hear you fine.

MALCOLM HUTTY: All right. Thank you. Sorry, I'll carry on. When I suggested that there might be some compromise based around the idea of a repose but with some exceptions in certain circumstances, that we might be able to work to that could—I'm getting feedback from somebody, Helen I think. Thank you. That might provide us some viable way forward that might attract some more broadly—

[Part 2]

MALCOLM HUTTY: Might get some more broadly based support than merely just one half of the divide on the thing that has divided us all this time. I certainly did not have in mind that there would be repose that could be waived at the discretion of the board. I cannot think that anybody who was on the side that I had been arguing for and that have written in in support of this—remember the community input that this group received, written input form the community was overwhelmingly on my side of this point. I do not expect that any of those would consider that “repose but could be waived at the discretion of the board” would be a sufficient exception or anything approaching a sufficient exemption.

I think we have more in mind some more objective circumstances. And Greg spoke to some a moment ago, and I'm afraid I don't wish to try

and reiterate those because Greg had some good ideas and I would like him to put it in his words. And there were others too.

It certainly does occur to me that some of the things that ICANN Legal have said repeatedly have been about raising questions of evidential matters and a difficulty of presenting evidence a long time after an issue has passed, and yet the examples that we've been discussing have been the kinds of examples in which evidence is really not at issue. These are facial matters. So that might be one thing in itself.

We've spoken about the continuing harm aspect. That's another thing that might be at issue in itself. It might indeed be that we can look at— there were certain types of disputes that are necessarily essentially facial matters. Anything around the mission limitation is an example of that. Anything around what I'll call the anti-censorship clause. Forgive me for using such loose terminology, but I think you know the article that I'm speaking of. Potentially stuff around the fundamental commitments too.

These things are not likely to involve evidential matters, so we could maybe carve them out as an exception to the repose rule. Or maybe indeed require that the IRP were satisfied that it didn't turn on ancient evidence that might be partial or incomplete.

There are all sorts of things that we could look at in this area to work on if we are willing to work together in good faith and in the spirit of compromise to try to find something that will bring a more broadly based support recognizing that there is a serious body of support for both sides of this argument.

If, on the other hand, we are going to take the approach that that's not required and only something that entirely protects the view of those that wish to see the greatest degree of repose, if only that is to be considered, then I'm afraid, at least for myself on the other side of this, there is not much discussion to be had from my part either and there's no point in me trying to suggest areas of potential compromise if it's just going to be thrown back at me.

So, I think we need to open up the areas that we could look at that could carve out those sorts of exceptions and look at what might be the reasons that could cause the sorts of harms that some of you are thinking of by allowing late claims, and construct exceptions that precluded those kinds of outcomes.

If that's something you're willing to work on together. If not, then we are probably going to be stuck in our trenches. Thank you, Susan.

SUSAN PAYNE:

Thank you, Malcolm. I think a few of us were having some Zoom problems. I don't think it was just me. I did get kicked out for a while and so I may have missed some of what you said, although I think I certainly got the gist and came back in for hopefully the majority. I hopefully didn't miss too much of what you were saying.

MALCOLM HUTTY:

As long as it was clear that the idea that merely the discretion of the board would be adequate exception is a complete nonstarter as far as I'm concerned.

SUSAN PAYNE: Yes. Thanks. I certainly heard that loud and clear. To my mind, it seems to me that we do have a potential here if people are indeed willing to try to work together to carve out some boundaries. It seems like we do have at least the sort of workings of the potential for a compromise.

I'm not sure ... Chris is saying it's not a nonstarter as far as others are concerns. That being this to be a decision at the discretion of the board alone, Chris, I'm assuming. Yeah.

MALCOLM HUTTY: Yes. I understand that. There were clearly some people on the other side of this argument. But is there anybody that actually thinks that that would be an adequate exception who was previously of the opinion that repose should not happen, or is it only those who were arguing in favor of repose that think that this would be a suitable outcome? Because if so, it's just one side's position, it's not compromise.

SUSAN PAYNE: Okay. Thank you. So we've got three hands in quick succession then, Chris, David and Mike. And I think I'm going to try and close the list at that point because it's 20 past and on previous weeks, I've managed to overrun badly every time. So Chris.

CHRIS DISSPAIN: I'll be quick, Susan. I'm not in the mode of negotiating or discussing a compromise at the moment. I'm saying if there is an impasse on this

group—and I don't know yet if there is. I know that there are some people that disagree with the view about repose and some people who are not sure and some people who think that there shouldn't be repose. But I'm not clear at this stage if there is a majority in favor one way or another.

But leaving that aside for a second, I'm not in the mode of negotiating, I'm simply saying if this group finds itself—I'm simply willing to say at this stage, I think, if this group finds itself in a position where it is at an impasse, then it may be that there is a way through by following a line of argument that Kurt has started and Mike has finessed. But whether that's even necessary at this point, I'm not entirely sure. Thanks.

SUSAN PAYNE:

Thanks, Chris. David.

DAVID MCAULEY:

Thanks, Susan. I think I can be very brief because I think I agree with what Chris just said. What I was going to suggest, however, is we ought to try and think of what we're going to do on December the 15th. And maybe in the meantime, we could look at Kurt's compromise proposal on list. Maybe on the 15th, it might be a good idea. I'm just making a proposal that we might want to look at the first part of the time for filing rule. That is the one that's four months, 128 days, whatever it is.

I'm just worried that the conversation that we're having now is I would expect we would want to do more than that on December the 15th, so

I'm just trying to find a way to do that and hope that people using the list [inaudible] Kurt's idea. Anyway, thank you.

SUSAN PAYNE:

Thanks, David. So yeah, that's a really good point at which to wrap up, in a way. I think Chris makes a good point that from his perspective, he's not currently persuaded necessarily that as a group, we're wholeheartedly split on this. And I think that's probably, to some extent, a reflection of the fact that we're a relatively small group. We've got some of us who are missing. We've heard very clearly from Malcolm and from Greg, but we've also heard very clearly from Chris and a number of others taking a contrary position. So we've clearly got two distinct positions, but I guess Chris's point is, are we at the point where we're at an impasse, or do we in fact have a small minority of people disagreeing with the majority?

So I think one of the things that probably needs to happen is just a sort of very high-level summary to the list to pick up those of our members who haven't been on this call and perhaps even missed the last one as well to try to get a clearer sense of the degree of impasse we're at.

I think we're at one, and therefore we're at a point where we need to try and pursue a compromise, but just to be clear. And then potentially, yes, to explore the possibility of compromise—and I agree with you, I think whilst we may well come back to this discussion further next time, I think there is also some discussion to be had around the 120 days or whatever time period it is. I think there is a reasonable level of support

for that 120 days, but as a group, we do need to review and address that.

And there is a discussion point to be had about to what extent other accountability mechanisms might toll any of these deadlines. And to my mind, it's more important that the 120 days, that there's scope for tolling that, frankly, rather than any repose period, because if you only have 120 days to bring an IRP, but you're in a cooperative engagement process that goes on for six months, you're out of time.

So we think we need to talk about that as well, and I think that's probably a useful discussion for us to have on December the 15th, not to forget this discussion but to allow perhaps some working on the e-mail list, perhaps even through a small group to get together and talk about what compromise might look like if indeed we need to have that conversation. I think we do, but I recognize Chris's point that perhaps that hasn't been demonstrated yet.

Okay, hopefully that sounds like a plan. I would like to thank everyone. This has been a really useful discussion. Really useful engagement. I think the examples people have been giving are very helpful. And we may come at this, or people on the group may come at this from different perspectives. But I think we are all trying to do the right thing here, and I think everyone recognizes that.

Okay, I've got—Becky is just reminding us that in many cases, application of a policy to a particular player would start the period running again. And we probably need to think about that as well. And I think that I agree with that too.

Okay, so does anyone have anything to raise as AOB for the time being? Okay, I'm not seeing anyone, not hearing anyone. So there you go. I've now managed to finish early rather than late. But I think that's fine. Anyone have any last thoughts that they want to bring up before we wrap up and I let you get back to your day?

MALCOLM HUTTY: Yes, the date of the next meeting. Is it possible to change it?

SUSAN PAYNE: Possibly.

MALCOLM HUTTY: I'm afraid I'm going to be—assuming that travel is allowed after the close of lockdown and so forth, I expect to be in international travel on that date. I know that's fairly optimistic at this stage.

SUSAN PAYNE: Yeah. I don't know why we're even having this conversation, Malcolm. The only thing I would say is that we are tending to do these calls on a Tuesday, and the following Tuesday I think takes us very much into Christmas week if I have my timing right. I'm kind of reluctant to lose the date.

MALCOLM HUTTY: Hold on a second. I beg your pardon. I was looking at the wrong Tuesday. I was talking about Tuesday the 22nd. I take that back. [inaudible] 15th will be fine. I beg your pardon.

SUSAN PAYNE: I think you still won't be traveling on the 22nd, Malcolm, but ...

MALCOLM HUTTY: Oh god, please [inaudible].

SUSAN PAYNE: Come on now. All right. Excellent. So our next meeting then—

MALCOLM HUTTY: If there's one thing that seems more [interminable than this group, it's COVID.]

SUSAN PAYNE: Come on. I'm feeling quite nice hunkered down in my house now. I almost never want to leave it. Right, everyone's wrapping up and trying to leave. Our next meeting is the 15th of December. It's at our 17:00 slot. I will see you all there, but hopefully on the e-mail before that. Thanks, everyone. Bye.

[END OF TRANSCRIPTION]