BRENDA BREWER: Good day, everyone. This is Brenda speaking. Welcome to the IRT-IOT call on the 15th of December, 2020, at 17:00 UTC.

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I'm happy to turn the call over to Susan. Thank you.

SUSAN PAYNE: Thank you very much, Brenda. And thank you, everyone. As Brenda said, this is a call of the main IRP-IOT on the 15th of December. We have really good turnout and a few people still joining by the looking of things. So thank you very much, all of you, for joining. This is probably our last call for 2020, so let's make it a good one.

First off, just to quickly review the agenda and also do any updates to SOIs, perhaps we'll do updates to SOI first before I quickly run through the agenda. Does anyone on the call have an update at all?

Okay. I'm not hearing anything. You hopefully will all have seen—I can't see Mike Rodenbaugh on the call—his e-mail from a couple of days ago, just drawing our attention to some developments in a case that he is acting on. I don't know if he has yet formally updated his SOI, but obviously he will do so. I think, in accordance with the practice that we've taken to date, we've recognized that a number of people participating in this IOT either are involved in IRPs or have been involved very recently or potentially are involved on something which may

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become an IRP quite conceivably in the near future. We have taken the view that that's not something that precludes participation but obviously something for us all to bear in mind. We'd obviously like everyone who is participating to be mindful that they should be drawing their particular personal involvement to our attention where it's relevant to what we're discussing.

Kavouss, I see your hand.

I'm not hearing you at the moment, Kavouss.

KAVOUSS ARASTEH: Do you hear me?

SUSAN PAYNE: I do now. Thank you.

KAVOUSS ARASTEH: You hear me now. Okay. Thank you very much. I just wanted to check whether you hear me or not. Thank you. Thanks.

SUSAN PAYNE: Perfect. Thank you so much. Obviously, if anyone has any concerns about anyone's particular involvement in any IRPs, they should of course feel free to raise it. But otherwise, as I say, I think we all know that many of the participants have a direct interest in the outcome of our work, if you like, and that's rather inevitable for what we're doing.

Okay. Just quickly then to review our agenda items. We'll have quick look at the action items from the last meeting, then an update from the Consolidation Subgroup meeting of last week, and then time for filing. We'll continue our discussions on that. In particular, we're going to review the public comment input. Thank you to those who've been sending e-mails in the intervening period between our last call and this one. Some useful comments and input coming in from people on that.

If time is permitting—I suspect it won't be, but in case it is—there is the other prong of the timing issue that we do also need to formally consider because we haven't spent any time on that. So we will, if time permits, perhaps look at or begin to look at that first prong and the public input, indeed, that came in on that as well.

Finally, or as the last couple of items, if there is Any Other Business that anyone wants to raise, then if you can flag it now or in the chat, then please do so. Otherwise, I'll pause again at the end and just see if anyone has anything they do want to raise before we wrap up.

Then a suggestion of when our next meeting would be on the 5th of January—so reconvening this after the Christmas or holidays break for many of this. Whenever our next meeting is, it ought to be in the 19:00 UTC timeslot. So, again, if there are strong views that the 5th of January is not workable for people because it's too close to Christmas, then I'd like to hear them. But otherwise I would assume that we'll go ahead then.

Okay. Circling back to Agenda Item 2—the action items from the last meeting. So the first one of these is one that was sitting with Bernard:

"Staff to prepare a scorecard to track progress against the major items we need to deal with." This is now sitting in my inbox. Bernard has indeed forwarded that to me, and I unfortunately haven't had time to spend a great deal of time looking at it. So I will take an action item for myself now to just make sure that I've reviewed that and finalized it with Bernard so that we can circulate it to everyone.

The second action item we had is for Sam and others but really very strong for others as well—to be proposing other examples of issues with respect to the repose by e-mail. Largely, we were looking for examples that were taking a counter-position to the one that Malcolm has already circulated and the examples that Malcolm has circulated, although that's not obviously to preclude anyone who has strong views and wants to circulate an example or sort of scenario for us to consider whilst we're considering this issue. I didn't see any counter examples, so I think this one is still potentially a continuing action item. But let's see where we get to on this call.

Agenda Item 3 is the update on the Consolidation Subgroup meeting. I will pause briefly and see whether any of the subgroup members would like to give an update before I do so. I'd much rather have one of the members do so if they would like to.

But not seeing any hands up, perhaps I'll start. If anyone wants to chip in, then do please feel free. As you all know, we've got a small team looking at the consolidation, intervention, and participation as an amicus—the rule that deals with that. The group is tending to meet on the alternating week rather to these calls. So our last call was this time last week. We're making good progress. We spent a bit of time talking

about some of the other outstanding issues and particularly spent some time talking about timing in terms of the time to bring one of these applications [sense] checking it against when you should be measuring the time from. I think our conclusion is probably that the time should be from the commencement or at least the publication of the commencement of the case into which you're attempting to participate, whether that's by consolidating your own case in or by intervening or by participating as an amicus. So it's the timing of publication of the case you're wanting to join.

We generally felt that it would be simpler for the community and people generally to have the same time limit, whether you're bringing an application for consolidation, an application to intervene, or an application to participate as an amicus. But we all felt that, probably, 15 days was a little too short, which was the current timing on the table. We weren't necessarily agreed on what that timing should be. We felt, probably, 21 or 28 days. The likelihood is that we'll probably put both of those options to the wider working group when we have our final output and seek the views of the wider group on which they think is the most appropriate.

I think that's the main highlight from the consolidation group, but we have another call scheduled next week. We may need one or more after that, but I think we were making quite good progress. Hopefully, we'll be able to circulate a final proposal to the main working group in the reasonable near future.

Hi, Kristina. Thanks for joining. I was just giving a quick update on our consolidation group output. Happy for anyone to add in on where we've

got to if they want to. But otherwise we'll be keeping working and we'll be providing an output to the group once we've wrapped up that discussion.

Okay. I'm not seeing anyone at the moment, so I think we can probably just move on.

Our next agenda item is to continue our discussion on the time-for-filing issue. First off, I think what I wanted to just say at the outset of this discussion or the continuing of this discussion is that, on the last call, we had had a proposal from Kurt which a number of people have expressed some interest in, both earlier in advance of the previous call and on the last call. Indeed, thank you to David and others for some of the e-mails today who have been giving some consideration to what might be a compromised position between the position held by some (certainly by Malcolm and some others)—that a repose is not in compliance or not in accordance with what the bylaws say in terms of the timing for filing an IRP versus the countervailing position, which a number also hold—that, just because the bylaws don't say you can have a repose, it doesn't mean that you can't—I'm sorry; I'm paraphrasing very broadly here—and that there's a need for the organization to have certainty and so there must be a point in time at which a decision can be considered to be final and, indeed, going into the development of the new bylaws and the new environment, that there was that certainty and finality to the timing for bringing an IRP.

So the fact that perhaps it wasn't called out specifically in the bylaws when talking about what the rules should look like doesn't necessarily mean that the intent was to remove the repose. It could equally be

interpreted—or at least some would argue that it could be interpreted—that there always was some finality of the timing for bringing an IRP, and there was no reason to assume that that doesn't continue. We've got those two different perspectives and, as I say, I've paraphrased rather broadly and certainly haven't captured all the nuance there.

On our last call, I think some were of the view that we are split on that and that we're sufficiently split on that we're not we're going to get consensus as a group on either of those two extremes and that perhaps we should be seeing where we can get to on finding some kind of middle ground. But we also did have some, I think, who weren't necessarily persuaded that we were that split and weren't confident that we didn't have the ability to reach a kind of consensus or a near-consensus view on one or others of those extremes.

With that in mind, I had talked about, on the last call, maybe needing to do some kind of a straw poll or something to take a better sense of the working group as a whole. I haven't ruled that out, but I haven't done that by e-mail as of yet. And I certainly haven't set this call up with the idea in mind to do it on this call. But I think we will see what kind of input there is on this call. I'm very conscious that obviously there are some people who've been speaking very extensively on the topic and others who've either been silent or perhaps haven't been able to be on some of the recent calls and so haven't been expressing their views.

But I'm also very conscious that we can into this reconstituted IRT group with there having been two public comment periods. And there was a comment period on the rules generally, which included soliciting some

feedback on timing, and then there was a specific comment period on timing, which asked for the input of the wider community on both prong of the timing issue and did receive some input. Whilst we've talked about that input at a very high level—Bernard has circulated some summary spreadsheets of the public comment input—we haven't, as a group, really worked through that feedback that we got from the community.

I think that it is important, in carrying out a role, that we should do that, particularly when we are uncertain at the moment of where this group has landed in terms of whether we feel that, as a group, we can get the necessary consensus. I think it's inherent on us to have really devoted the time, having asked the community on this topic. I think it's important that we should spend the time reviewing the input that we got from the community. It may be that, if there are some of this group who are somewhere on the fence or undecided, having reviewed the feedback from the community, it may help them with the decision, with their own views on this topic.

So that's what I'd like us to spend some time doing. Obviously, I would welcome anyone's views before we get to that. Happy to discuss anything that anyone wants to before we start reviewing the comments but, otherwise, I would also like us to think about the comments that we've received and discuss them as we go through them.

So I am going to ask Brenda. If you wouldn't mind, would you be able to pull up the first public comment spreadsheet? Obviously, I know that the working group did look at the first public comment input before they came up with their new version of the rules. But I think this is an

important topic and we do have a fair amount of input from the community on this issue of the repose. Therefore, to my mind, we should review both sets of public comment on this.

So this is the first public comment on the rules generally. A number of the commenters did choose to comment on the question of whether there should be a repose. That's-perfect, Brenda—the column that we need, which is the one that's entitled "12 Months Limit." That is because, in the first version of the rules that was put out for public comment, there was this proposal that there should be a period of time, which at the time was 45 days from knowing or to have known about the decision in question from the claimant, but then subject to an overall cap of 12 months from the time that the decision was made.

Obviously, we had a lot of commentors in that first public comment period on the rules. Not all of them commented on this topic. As you can see, some of them may well have commented on other aspects of the rules but didn't comment on this one. But, nonetheless, we have got comments from a number of different groups who expressed views on the 12-month time limit.

So, really, I think we should just work done. I'm going to ask Bernard this, but I think the answer is that these are paraphrases, or, rather, this is a summary of what the comments said. Aspects have been particularly pulled out and put in inverted commas so you can see where it's the specific words used by the commenter. But I think I'm right in saying that this isn't necessarily the whole of the public comment on the topic. If someone wrote very extensively, I think what'

has been done—I think it was by Bernard himself—was to pull out the really salient points that give the views of the party in question.

And he has given me a green tick, so I think that's the answer. That is yes. So it may be that, if, as we go through this, anyone is surprised or confused by any of the actual entries here, we might need to look at that actual comment itself, either on this call or perhaps afterwards by circulating some links back to the original, full comments.

MALCOLM HUTTY: Where might we find those, Susan?

SUSAN PAYNE: Ooh. That's a really good question.

BERNARD TURCOTTE: I'll post the link.

SUSAN PAYNE: Super. Yes, you certainly can find them in the archive of public comments, but yeah, that would be … Are you wanting to be able to look at them whilst we're going through this call, Malcolm, or are you hoping to be able to do so afterwards?

MALCOLM HUTTY: I'd stay open on that. I do remember that there were a couple where points were being made where, actually, when you went to the original

text, the argument was that repose was not supported. Then they went on to say, "But if you're going to insist on repose, it really shouldn't be as short as this." And I wanted to make sure that the main point wasn't lost—that they opposed it merely because they had said, in the alternative, a longer period should be considered, because that could then be taken as being support for it, which was not intended. So I wanted to make sure that that was possible and didn't escape us.

SUSAN PAYNE: Certainly. And I think that is captured, but you're right to want to be sure of that.

Okay. So the first entry in our list is the National Law University, Delhi, which is not a group that—I mean, I'm obviously familiar with the university and so on—I think participates extensively in ICANN these days but perhaps was very involved during the accountability work. In any event, the summary of the entry that we have for them is that they aren't supporting the proposal for the 12-month limit, pointing out that the CCWG Accountability's external counsel noted that applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction, without regard to when the invalidity or material impact becomes known to the claimant, is inconsistent with the bylaws. So I would say that's a comment from that group that is making a similar point to the one that Malcolm as been expressing on our calls. Please do put your hands up if anyone has comments as we're going through this or wants to discuss it.

DotMusic. We've got one from them. At that time, DotMusic, I think, would not have been an actual registry, although they're listed as being a registry. They were an applicant for the DotMusic registry.

Yeah. Becky is saying someone with connections to the university participated in the original IRP. Yeah, that's quite likely.

So DotMusic have said furthermore there should be no statute of repose. "The 12-month limit on commencing an IRP, regardless of when the claimants became 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 affirms ICANN's commitment to transparency. The imposition of a statute of response encourages not 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." So this, again, is another comment that is opposing the notion of a repose.

This concern expressed by DotMusic is one that I think David McAuley, in his e-mail earlier, was perhaps channeling, although that be coincidental. I'm not suggesting that he necessarily got the idea from here, although he, I'm sure, can speak for himself. But David's e-mail earlier was very much, again, of the mindset of that, perhaps if we are working on a compromise, is the basis on which a late IRP might be permitted perhaps a circumstance where material information that would have impacted whether a decision to bring an IRP would have been made, whether that had been late-published or deliberately hidden from them and therefore impacted on the ability to meet the timing?

David is commenting, "No. It was coincidental." But he notes the point.

Malcolm?

MALCOLM HUTTY: Thank you, Susan. I don't know if you wanted us to make comments on these as we go through them or if you just really want to read them into the record, but if you wanted a comment, I would say that DotMusic's thing actually is quite interesting in that it adds something new to our discussion that we haven't really focused on. So is now a timely moment for that?

SUSAN PAYNE: I was just putting in the chat that, yes, I would very much like to encourage people to speak up and comment on the specific inputs that we've received. So, yes, this is very timely. Thank you.

MALCOLM HUTTY: Okay. Thank you. A lot of this discussion on repose has focused on, firstly, the question of consistency with the bylaws and the reading of the bylaws that says that the committee is only invited to make rules of procedure on certain limited grounds and that one of those grounds is the time after the claimant becomes aware or reasonably is to become aware of it and that that language simply doesn't permit a repose that would expire before awareness was even possible and before the person was affected.

The other main ground that we've debated at length is one essentially of good policy—what is actually a good idea to do this—or whether it would actually harm the interests of the claimant unduly because they would be shut out from ever being able to bring a claim.

DotMusic is interesting and there's an entirely different line of reasoning here—that, actually, repose is harmful to ICANN, that it encourages the kind of behavior within ICANN that we wouldn't wish to see, and that, by offering it—the opportunity to escape scrutiny if it keeps its behavior untransparent—then that that provides a malign incentive to be untransparent so as to be able to avoid this kind of review.

Now, that's an analysis not really from the perspective of the claimant who has an individual interest in their claim being heard in the interest of justice but from the perspective of more the community interest in encouraging good and proper behavior on ICANN's part and the harm that inadvertently could be done to this and to ICANN by encouraging it into a kind of behavior that would be a natural response for those seeking to defend their position but is nevertheless contrary to what we would want, as a whole, as a collective, as a community, ICANN to behave and that, therefore, this would actually be, in DotMusic's view, against ICANN's own interests and its long-term structure to be able to carry on in this way.

So that's an interesting new line of argument and, I think, another string to our bow. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Oh, sorry. There's a couple of comments in the chat that I'm not sure … I think they're on this point.

MALCOLM HUTTY: I expect Chris is saying he doesn't agree with it.

SUSAN PAYNE: Well, David is comment that creating malign incentive says nothing about the intended recipient of the incentive.

MALCOM HUTTY: I'm not sure I understand that. David, could you elaborate on that, please?

DAVID MCAULEY: Thank you. Can you hear me, Susan?

SUSAN PAYNE: Yes. Thank you. And thanks, David, for … This will be helpful.

DAVID MCAULEY: Thank you. What I meant by that is that just creating—thank you, Malcolm; I think you did characterize what DotMusic was saying right—incentives, to me, doesn't say anything about the recipient—ICANN. ICANN, in our experience—at least in my experience—has been reputable. I don't think, if someone says, "Well, here. Why don't you veer off this good path? Because I'll create an incentive for you?" …

That's a comment about the quality of people who would create such an incentive, not a comment about ICANN. To say there's an incentive for ICANN to misbehave doesn't diminish ICANN's reputation, in my view.

MALCOLM HUTTY: If it created an incentive to misbehave, and then that incentive resulted in it being more likely to do so, and it were, would that not … You might not think that it would follow that incentive to misbehave, but if it did, would that not undermine its reputation in your view?

DAVID MCAULEY: Thanks, Malcolm. No. I guess where I disagree is in the phrase you used—"would it not make them more likely to misbehave?" I don't believe that. I think what I'm saying is I agree with Chris, who said it better, I guess. So—

MALCOLM HUTTY: Okay, but whether or not … You're not disagreeing with my characterization of DotMusic's argument—

DAVID MCAULEY: No.

MALCOLM HUTTY: But you're just disagreeing with DotMusic's position. Is that right?

DAVID MCAULEY: Yes. Well, I am, but I'm … That's exactly right, yes. I'll just leave it at that. I think you correctly characterized what they said, at least from what I see on the screen here.

MALCOLM HUTTY: Thank you.

SUSAN PAYNE: Thanks for that. And Chris had put a comment in the chat, but I just saw your hand, Chris, or at least I thought I did.

CHRIS DISSPAIN: You did, Susan. I was just in two minds. I'm not sure that you can draw the bow that Malcolm is seeking to draw from the DotMusic comment. But in any event, even if you can, it doesn't stand up as far as I'm concerned. I think David has said that.

The other end of the continuum would be to say that allowing open-ended opportunities to bring actions encourages people to invent circumstances in which such actions can be brought. I wouldn't say that, and I think it's nonsense. It's a risk, but there's a risk in everything.

But I just don't accept and can't accept the suggestion that setting up a particular structure … In fact, what prompted me to comment was Malcom's comment that it would be perfectly natural behavior for ICANN to hide things or to be nontransparent because it would be in its

best interest as a litigant. I just don't accept that that's a viable statement. Thanks.

SUSAN PAYNE: Thanks, Chris. I think it's clear that we understand what DotMusic is suggesting, anyway. It seems to me that … If I could paraphrase it differently—this is not exactly what they're saying, but I think this is where their comment is coming from—it is that, to some extent, the timing of the reveal of information is entirely in ICANN's hands and that, therefore, ICANN has some element of control over when and whether people are aware of decisions having been taken.

Now, I think it would be difficult to sit on a decision for so long that 12 months had gone by, but this is just my personal view. But I think what they're perhaps saying, or perhaps what's underlying what they're saying, is that time can go by whilst things have not been published, and that's entirely in the hands of one of the parties to this potential dispute and not the other.

Let's all remember while we're doing this that we're not talking specific individuals here or a lack of trust of the Board as it currently exists or the staff as they currently exist, but we are trying to create a set of rules for the future. I'm not suggesting that people are taking this personally in any way, but we do have to remember not to, whether we're talking about what the community might do or whether we're talking about what Board or Org might do. We're talking about some putative future group that isn't any of us in the room here.

Malcolm?

MALCOLM HUTTY: I was wondering whether Chris was actually arguing that ICANN didn't have an interest in avoiding review.

Also, when it came to actually the understanding of what we mean here by nontransparent behavior, I think, Susan, when you said that sitting on something for a year might be difficult, I'm not sure it would be because nontransparent behavior is rather broader than just simply keeping the decision secret. It could encompass a much broader … and things that didn't really look like they were actually intended to subvert the process but might include a series of private negotiations within interested parties about how you would do things in an implement. That might go on for an extended period in the hope of publishing not only the decision but a fully developed means of carrying it out that had been agreed to in private consultation with input and stakeholders.

Now, that sort of thing might be characterized as nontransparent but [inaudible] it might certainly be felt by a claimant that was later told that that meant that the time had passed and that that had been nontransparent. But it's quite different from the Board taking some decision and then putting it under deal and making sure that nobody gets to hear about it, purely for the purpose of subverting the review process.

So I don't think we need to assume that kind of active malignancy on then part of the Board, as the only sort of circumstances that might fall into the sort of description that DotMusic is referring to here.

SUSAN PAYNE: Thanks, Malcolm. Good point. Nigel?

NIGEL ROBERTS: Thanks for that. I must admit I'm ever so slightly confused about the straw scenarios that seem to be being bandied around here. Maybe I'm just taking a far-too-simple approach to this, but pretty much clearly to me, any form of limitation, which of course if what repose is subspecies of, can only start to run from the date or the time that the complainant would be reasonably expected to learn of the decision or the lack of decision.

So, if ICANN were hypothetically … Don't forget that, going back 20 years, I was perhaps one of ICANN's most vocal critics for, should we say, lack of respect for the rule of law and lack of respect for process. I think the organization done good and learned better over the intervening years. But surely the whole thing starts from the day when a decision is published and them time starts to run. Otherwise, it would make a nonsense. An ICANN could make some decision and not tell anybody about it, and then, when that's finally published or revealed, nobody could complain. It wouldn't make sense to me. I don't think that's how it works.

SUSAN PAYNE: Thank you, Nigel. I'll respond to that, but I can see that Kavouss his hand up, so I will go to Kavouss first.

KAVOUSS ARASTEH: Do you hear me, please?

SUSAN PAYNE: I do, yes. Thank you.

KAVOUSS ARASTEH: Okay. I have keenly listened to these discussions. There are two angles to look into the matter. The first one is distrust or lack of trust to ICANN functioning. Some people—I don't say who—believe that ICANN has the ability and control to prevent the claimant to learn about its action or inaction. This is one side of the coin.

The other side of the coin, if that is true—which in my view, it's not true—that is no evidence that ICANN even attempted to prevent the claimant to be deprived or not to learn about its action or inaction. I said I don't believe that. Putting any additional measures, and if ICANN has the same purpose and the same intention to hide the things or prevent or deprive the claimant to learn, that does not solve the problem.

I think everything you're discussing is hypothetical. There is no evidence to that. I have seen this distrust when I participated in ICG, CCWG 1 and 2, IRP-IOT, and EPDP Phase 1. Always this distrust exists. But we have some measures, if we really see that either ICANN itself or one ICANN Board member or the entire Board attempts and does such action. There are some measures for how to do that. I don't understand all of these discussions that you are promoting. When we discussed in the initial CCWG the IRP, this 12-months was discussed at length. Various periods were suggested, and this 12-months was taken as something which would largely satisfy the situation.

Could anyone give an example of a use case that such an action/attempt by ICANN has occurred to deprive or to prevent the claimant to be aware or to learn from its action and inaction? If that is the case, then on what ground did ICANN do that, and what was the purpose of that? So, until we have a clear answer—all of these studies are hypothetical—I am not sure that we get anywhere. Rather, [to] have some theoretical repose or timeframe extension or any other measures to allow the claimant which has been deprived or refrained to learn about the action or inaction, that does not have any purpose at all.

So, you should look into the matter from the root. First give an example of what you are saying here, why you need that. We discussed that at length in Phase 1 and Phase 2 of the CCWG. I don't recall that anyone put this time—12 months—in doubt after the discussions. Yes, it was various discussions, but at the end, it was agreed by everybody. Now, we agree on something, put it into the bylaw, and we start to interpret that. That means giving some tolerances, which may be in favor of some, and disfavor some others. So please kindly, dear Susan, clarify the matter.

I think we spent considerable amount of time discussing some nonexistent issue. Until it is proved that it exists or could exist, with the good reason that ICANN does this attempt to deprive the people from learning of action or inaction, and we have no possibility to punish ICANN, either the Board or a member or the staff, it is not very productive and efficient to further continue discussing this. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Nigel, you still have your hand up. I don't know if that's a new one. I'm kind of—

NIGEL ROBERTS: That's an old hand.

SUSAN PAYNE: Thank you. So I said I was going to respond to what you said. I think there's a certain amount of responding having gone on in the chat. You had made the point that you felt that, clearly, any form of limitation could only run from the date that the complainant could reasonably be expected to have learned of the decision. That's certainly the view that some are taking, but I don't think it's the view of all, or at least certainly it's not then position as our temporary rules are currently drafted. We have, at the moment, 12 months from the date of the action or inaction, not 12 months from the publication of the action or inaction.

So that is something that I think there's a bit of discussion going on in the chat about—whether that is a change that we need. It may be that, if we retain a repose, whether that's 12 months or some other period of time, at a minimum, we want to be looking at when that 12 months runs from. But I just wanted to react to that point in particular because it doesn't seem to me at the moment that that is what our interim rules say.

Chris?

CHRIS DISSPAIN: Thanks, Susan. I think we're in danger of tying ourselves up in knots again, simply by trying to interpret a comment from a member of the community in the public comments. You can extrapolate all sorts of arguments, but fundamentally ICANN has a set of rules and systems that say that stuff must be published within certain times of decisions being made.

Leaving aside the issue of whether the rules say the time runs from the date that it's made or the date that it's published for a minute, trying to craft a set of rules to allow for the possibility that that doesn't happen is not the right way to fix a hypothetical problem. If it doesn't happen, there are mechanisms in place that ensure that that can get fixed. But suggesting that we should craft our IRP rules around the possibility that ICANN misbehaves outside of its own rules and regulations, to me, doesn't make any sense. Our rules and the IRP stuff and the timings need to be based on the principle that ICANN operates in accordance with the way that its rules and bylaws say that it will, [apart] from a timing point of view, and, if it doesn't, there are remedies in place to fix that. Clearly, you can bring a claim in an IRP in respect to it not publishing stuff in time, etc., etc. But we're trying ourselves in all sorts of knots based on a hypothetical possibility that ICANN doesn't publish something in accordance with the timing it's supposed to, which doesn't make sense to me.

And—no disrespect to anybody intended at all—it is now nearly two-thirds of the way though the call, and we are still on what is, in essence, the first comment.

SUSAN PAYNE: Thanks, Chris. You're absolutely right. I've got a couple more hands. After Kavouss and Malcolm, I think we will keep going and look at the rest of the comments. I don't want us to spend weeks and weeks going through the comments, but I think, if we need to spend some time talking about the comments and either agreeing with them or discounting them, we have to do that. We ask the community to give us input, and it's our job to look at it and to consider it properly before we discount it or take it on board and move on. But, yes, I think we all think that we're spending a long time on this issue, but it is, as we've worked out in this group and as we've seen from the previous comment, one of the thorniest issues we have. It's very polarizing and people feel very passionately about it. So we do have to try to get it right. And I wasn't getting offended, Chris. Don't worry. But you're absolutely right to point out that time is moving on.

Kavouss?

KAVOUSS ARASTEH: Yes, Susan, you said that many people don't agree with me. I don't mind. I can express my views. If, in a country or in a state or in a province, an entity or a staff are doing something wrong, you don't change the constitution of that country or that state. What you're doing is you're changing the constitution or convention or rules here in the IRP. Go and correct that. If ICANN staff do not publish on time, correct that. Investigate what is the reason for that and make necessary action for that. But I don't think that, for that, you go for such hard discussions and meeting after meetings, discussing about these 12 months and so on and so forth once again. Whether you put any extension, any

measures, or any other action, if that sort of, I would say, thinking or treatment—or comportament in French—exists in ICANN, you [can] change that. You should go and remove that difficulty there but not change the rules. You don't change the constitution because somebody did not do his duties and so on and so forth.

So I think the issue exists, but your approach doesn't seem to resolve that. It may appear in a different case. Whatever you do may be in favor of some groups and not in favor of other groups. I am totally neutral. I don't have any case to bring to the IRP. I am one of the most, I would say, neutral persons in this group. I don't have any registries. I am not a registrar. I am not having any DNS. I have nothing, absolutely, but only technical and administrative. I don't think that these measures would eliminate what you have. It may eliminate problems or solve problems for someone and create problems for the others. So your approach doesn't seem to be correct. Thank you.

SUSAN PAYNE: Thank you, Kavouss. I apologize if it sounded as though I was disagreeing with you or saying many people disagreed with you. I didn't believe that that's what I was saying, but I do believe that we have a set of public comment input and we should go through it, even if ultimately a number of people on this call—you included—are feeling that the concern about the transparency expressed by DotMusic is perhaps being overstated and perhaps is one that we don't need to be so troubling ourselves with.

Malcolm?

MALCOLM HUTTY: Thank you. I first put my hand up to say that I didn't think that we could go on the principle that ICANN always conforms with the bylaws and that therefore we [inaudible] in what we write that ICANN has fully conformed with the bylaws in all respects. And the purpose of the IRP is to provide a remedy when somebody feels that ICANN has not conformed with the bylaws, and, indeed, sometimes—at least we have to be open to the possibility—that ICANN will indeed not conform to the bylaws. After all, the first case that we hear under this new set of bylaws that goes against ICANN would not be the first IRP case that had gone against ICANN. ICANN is quite often really found to have not comported itself with the bylaw.

So we have to uphold the original purpose of the IRP in providing a mechanism that doesn't just assume that ICANN is always right but allows for a proper and independent test of whether it is.

That said, I thought that Kavouss made a very interesting point and a very helpful contribution when he urged us not to try and change the bylaws because we think it would be beneficial in some way or that it would protect ICANN in some way that we think is worthwhile and that we need to accept the bylaws that they are and that, in deciding how we implement this, we should be looking at not the random hypothetical but we should see actual evidence.

Now, I've heard a lot of comments against some of the points that I've made—mainly from Chris, I have to say, and from others sometimes—of, "Well, I simply don't agree with that," "Oh, I don't accept that," or,

"Oh, well, I see it differently." Well, I went through the trouble of constructing circumstances that could be investigated and deliberated and where we could see how the rules would apply to a given situation. What I haven't seen is the same thing from the pro-repose side of the argument.

In regard to this point that we're talking about for DotMusic, they make a claim that allowing ICANN to escape scrutiny by a statute of repose would encourage nontransparent behavior. When Chris says, "I simply don't accept that input there," I would like to know, well, why not? It doesn't really strike me as very respectful of the comments that we received, just to simply dismiss them out of hand without an answer. We need to see, well, what other circumstances are there that you imagine where this might happen, and it would not result in that, and why not? If the case for repose is going to be prosecuted any further by those that would argue for it, they need to produce, as Kavouss says, some actual evidence. These hypotheticals are simply changing the bylaws. So they're not really good enough. Thank you.

SUSAN PAYNE: Thank you, Malcolm. Okay. So I've now got lots of hands. I want to be respectful of your desire to comment. So we will hopefully move down the list of comments here, but first of all, I do have four of you who do want to speak, I suspect, in many cases, in response to what Malcolm just said. So Scott first.

SCOTT AUSTIN: Thank you, Susan. I'm really trying to get my mind/hands/arms around the various permutations that we have here. One of the things that struck me in looking at DotMusic—this was after we were looking at what Kurt had offered as a compromise, which I think is very helpful—is that, in DotMusic, one of the things they focus on is "regardless of when claimants become aware." I guess one of the questions I'm having now is, if there was consideration … Because the research that I've looked at—my apologies for not having put some of that into the e-mail last week, but it has just been crazy busy this past week, but I will do that—has made this distinction between a statute of repose and a statute of limitations based in large parts … I will tell you I will reveal that that was in a personal injury context mostly in terms of the analysis because that's where there are frequent variances in state law in the United States over statutes of repose and statutes of limitations.

But my point is that statutes of limitations traditionally are, through convention, considered to be instances where there is a start time based on the plaintiff becoming aware of the claim, of the injury, of what is the basis for their claim. If that's not in what we have, then the likelihood is that we have more of a true statute of repose.

So my question is whether or not there was an analysis done at the time when this bylaw was implemented of the distinction between a statute of repose being one where there is no knowledge requirement—it just basically is a flat time start based on some event—or was there consideration of the notion of a start time based on awareness by the claimant and then, in both of the instances—I did put sort of a paraphrase of this in the chat—if that would make a difference on the implementation of Kurt's … what I'll refer to as a safety valve; that is the

panel—I'm not a fan of ICANN being able to do the waiving or non-waiving because I think there's an conflict-of-interest issue—being able to waive the limitation based on hardship or based on some equity, if you will, that they come across.

So, again, two questions—one in the original discussion for the bylaw. Was repose versus statute of limitation, knowledge versus no knowledge as a requirement considered, and then the second being, if we were to add knowledge, would we then still need what Kurt is proposing as a safety valve at the other end? Thank you.

SUSAN PAYNE: Thank you, Scott. Kavouss?

Not hearing you, Kavouss. I think you might be double-muted.

KAVOUSS ARASTEH: I'm here.

SUSAN PAYNE: Thank you.

KAVOUSS ARASTEH: Listen, Susan. June 2021 will be my 50th year of working on the international scene—June 1971, 27 years before the establishment of ICANN. I have [treated] many, many, many cases, and I have one principle and one logic, which has two parts.

Part 1: Do not make any specific case a general case. Treat a specific case case by case. If you make a general case, then you have to modify the principles. Your principle here is the bylaw. If you modify that by some rules, those rules may be interpreted by different people differently, and you may not achieve your objectives. That is what I encountered.

I am someone which was living and is still living in that period in the Cold War. I have encountered many, many cases like this. Always that has been my principle. Don't make a specific case a general case. And don't produce any rules that may be misinterpreted and misused and abused, which may totally [end up] the opposite to what you were thinking of. That is what I want to share with you. Whether you agree with that or disagree, that is up to you. But that is what I learned. This afternoon, I had another meeting, I said the same thing. There were the rules in some other organization in 2003, and this has been interpreted and now totally misused and creates considerable difficultly which is not repairable. So please kindly don't do anything which is not repairable.

Last point I want to make. I am not against or in favor of any organization, but what I learned, unfortunately in ICANN, is that a group of people sitting around each other physically or remotely talk and talk and talk and agree on something, and, all of a sudden, one or two or three public comments totally destroy that. That I don't accept. Sometimes we had 150-160 people talking about these things, and we agree with these 12 months without any extension, without any interpretation, and all of a sudden, by XYZ—I don't want to name anybody; I don't want to create any enemies for myself—you just totally forget what you have done. There is no sufficient evidence and

argument and logic and legality for this. This is I share with you. I have two types of formations: engineer and legal background.

So I look into the matter in both sides. I don't believe that what you are doing would resolve the occurrence of such a thing that you are afraid of and for which you want to have the rules. But if you establish any rules, I would be in the minority, and I follow the majority. But please kindly, all distinguish[ed] people that are much, much, much more knowledgeable than me, carefully listen to what I say. Thank you.

SUSAN PAYNE: Thank you, Kavouss. I think we're all certainly trying not to create rules that will be misinterpreted down the line. I think that's very strongly our desire.

Okay. But I have to say that the 12 months is not in the bylaws. If the 12 months was in the bylaws, we wouldn't be having this conversation. So I'm sorry that we are. If the bylaws were not as, perhaps, to use your term, open to difference of interpretation, we would know our path and we wouldn't be debating this at length, unfortunately.

Chris?

CHRIS DISSPAIN: Gosh. Sorry. Thank you. Hello. A couple of things. First of all, let me apologize to Malcolm if my communication hasn't been clear enough that has led him to misunderstand it on a couple of points.

So, firstly, I'm not in any way dismissing DotMusic's comment. Neither am I questioning their right to comment or the importance of the public comments. What I'm saying is that I don't accept what they say, and I'm not 100% convinced that it can be interpreted in the way that Malcolm seeks to interrupt it. That's a matter for him—how he interrupts it. But I'm just saying I don't get quite the same connection that he says that he gets, and that's perfectly fine.

I also want to respond to his comments about examples and so on. I thought I had made it clear—but maybe I didn't in my notes—that … Two things, really. One, I did put in an example, which is the example of GDPR. Secondly, I said—I may not have said this clearly—that I thought that the two examples Malcolm had given were excellent examples and in fact were useful in arguing my points.

Specifically, to be clear again, I'm saying that, in both of the hypotheticals that Malcolm had put forward, I am not suggesting—and I don't think anyone is suggesting—that the two claimants would have no right to bring an IRP. In both cases, Malcolm says they would have a right to bring an IRP but in respect to seeking a personal remedy rather than in respect to the question of the mission. That's where we don't verge.

And I just want to say, Susan—I apologize; I'll be very quick—Flip did send me a note asking me to explain the conversation he and I had. I know we're not going to get to it today, but just because it's on that point, let me say that is precisely what Flip was saying in his note. There is a difference between being able to bring a claim where the remedy is between the two parties—i.e., between the claimant and ICANN—and a

difference between being a claim where the remedy affects everybody. That distinction is the distinction he made in his e-mail as a possible way of dealing with it and is in fact what Malcolm said in his examples where he said, “Yes, of course they can bring a claim, to say, for example, “The education one—don’t launch it in my country.” But they choose to—and should have the right to choose—question the decision that was made five years ago in respect to the mission. And that is where we diverge. I hope that’s clear and helpful. Thank you.

SUSAN PAYNE: Lovely. Thanks very much, Chris. And thanks for clarifying Flip’s comment, which I think—I can’t speak for everyone, but certainly speaking for myself—I had also sought some kind of clarification on because I wasn’t sure if I was understanding his comment correctly or not.

CHRIS DISSPAIN: There’s a lot more to say on it, but that’s not for now. I just wanted to mention it so that he didn’t feel as if he was under [inaudible].

SUSAN PAYNE: Hopefully, we can perhaps even do so on a time when Flip is able to join us.

Mike?

MIKE SILBER: Thanks, Susan. Can I just say we've been two comments and we've almost used our time up? Can I suggest that participants take the time to actually go through the comments? Hopefully, we can have a more engaging discussion not dominated by any group of people and we can actually try and work towards solutions instead of complaining about each other and the fact that people hold views and they're not willing to budge. So I'd like to end it over there because, personally, I've not found this session to be constructive in the slightest.

SUSAN PAYNE: Okay. Thanks, Mike. Nigel?

Nigel, I'm not hearing you, but I also see your hand has gone done. So …

Okay. Can't hear Nigel. Kurt, let's turn the mic over to you. Nigel can come in after you if he did intend to speak.

KURT PRITZ: Great. Thanks, Susan, and thanks to everyone. My contribution is very similar to Mike Silber's comment about trying to find a way home here, and that is that maybe the path to read through the comments before the next meeting and then talk about which comments swayed us—especially swayed us from our present position. So somehow bundle a homework assignment so we can just talk about comments that we found particularly meaningful.

Second, for the next meeting, we might think about taking the temperature of the room to determine where we stand as a group. I [thought of] your e-mail about having those who had not spoken up

speak up so we understood where we are. Understanding where we all are might drive us to a point where we have a compromise or we decide not to. Thanks.

SUSAN PAYNE: Thank you, Kurt. Kavouss. And, Nigel, your hand is back up, so I'll come back to you after Kavouss, if that's all right.

KAVOUSS ARASTEH: I don't know to whom Mike referred to. I did not dominate anybody, anything. I just expressed my views. It was not domination, if you referred to me. It was not domination. I'm not dominating anything. I did not monopolize the microphone and so on and so forth. What I said is the following. Don't create a precedent that may turn against you. I know the 12 months is in the bylaws. Go ahead with what was discussed and agreed to. It is not the end of the world. At a later stage—two years, three years, when the first issue comes into actions—after sufficient experience is gained, if there is any need to change that, change that. But don't work on purely theory. Thank you.

SUSAN PAYNE: Thanks, Kavouss. I'm sure that Mike was not referring to you. Nigel?

NIGEL ROBERTS: Thank you, Susan. Before I say what I was going to say, I'll just follow on what Kavouss has just said. There's actually nothing wrong with a bit of domination when you're right, which I think he probably was.

So what I was going to say is kind of a little bit behind the curve because the discussion from Mike and from Kavouss has moved it on quite helpfully. But it was stated—to discuss when the complainant became aware of the problem or the action or inaction. But that's actually not really quite right. It's when the claimant should reasonably have been aware of the problem. You're not [comporting] actual knowledge, but you're looking to a reasonable [man's] standard, I think. That was the comment I was going to make. But as I said, the discussion has moved on slightly since then. Thanks.

SUSAN PAYNE: Thanks, Nigel. And, yes, you're absolutely correct. That is the standard in the bylaws—that awareness or should reasonably have been aware. Prong 1, if you like—the first element of the timing rule, which is the one that we haven't really spent any time talking about—is based on that and does run from that. That is what is currently in the interim rules—the 120 days.

Okay. In light of where this discussion has gone—I'm very conscious of Mike's comments—I've got Mike and Kurt's hands up, but I think they're both old hands. You can both correct me if I'm wrong. But, look, in light of Mike's comments—and others have expressed frustration that this is taking so long—I understand your frustration. I am very happy to give people homework. I feel that, in the past, we have circulated that these summaries of the comments before, and I'm not confident that people have read them—not everyone, anyway. I'm sure some people have, but we haven't really engaged in that discussion on the comments or really engaged in a review of them. I felt that it was important that we

try to do that. I must confess that I had imagined that we would get through this a bit quicker than we have. So I'm very happy to take on board your feedback, and we'll try this a different way.

So I'm going to give you all some Christmas homework, which is, as Mike has suggested, to read all of the comments in this spreadsheet and the one for the second public comment period. Then we will come back and discuss this further.

As I said when we started this discussion, we've had a suggestion from Kurt of, "Can we try to find a compromise?" We've also had a number of people who have been interested in exploring that. And Malcolm himself, in fact, has very strong views on this topic, but he did express a willingness to explore compromise on the last call. But we did also equally, I would say, as a group as a whole … It wasn't clear whether we were so split that we needed to be exploring that notion of compromise. I think we do, and I'm basing that on my knowledge of what some people have said either on this call or previous calls or in e-mails or, indeed, in this public comment. I believe that we do need to try and explore a compromise because I think we have these two perspectives, and I don't think one or other of them will carry the day. But I would like to feel that the group agreed with me on that and that I wasn't just imposing my interpretation. I think part of our job is to make sure that we've generally taken on board what the community has said to us in the public comment.

So that's a hugely long explanation of why I was trying it this way. I agree with you. I think this hasn't worked. So we'll try another path. Hopefully, if we come out of that discussion agreeing that trying to find

a middle ground is the way forward, then we can start working on what that compromise might look like. I really hope we can do that.

So we have about six minutes left. I'm not going to start looking at the BC comment, not least because it's quite lengthy but in fact the actual BC comment—the full comment that they filed—was much longer than this. That is one of the comments that is quite detailed, as I think is the IPC one below it.

So we have homework. I have two hands that I will just hear from, and then I will just see whether anyone has any other business they want to raise before we wrap up and break up for Christmas and do our homework. So Kavouss, please.

KAVOUSS ARASTEH: Yes, I agree with you, not because of the public comment but because of our reflection on what we had already, I would say, concluded or agreed to or so on and so forth. We felt that it might be appropriate to give another look—not a fresh look but another look—to what we already had. It's good to have a compromise. I am always in favor of compromise. There are several colors between black and white. No one could claim that he is right and the other is wrong and so on and so forth. The importance is that we need to convince each other. Convincing each other is to achieve what you said—a compromise.

So, if as January homework or Christmas homework, people could work on a workable compromise, not because of the X comment or Y comment but because of our reflections on the matter that we have not

rushed into anything that might have some inappropriate consequences, I have no difficulty and I fully agree with you. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Malcolm?

MALCOLM HUTTY: Sorry. I was double-muted.

SUSAN PAYNE: There you are.

MALCOLM HUTTY: It's not just a matter of compromising amongst ourselves, of course. We need to give, and show how we have given, adequate consideration to the community input in what we come up with. Therefore, it seems to me that we ought to be, in a sense, compromising between the points that are raised within the community feedback, which would require us to fully understand the points that are being made and to see how much of those points and those concerns can be addressed in what we come up with. I think this goes beyond this one point but more generally to all the community feedback on all issues. That of course does require us to understand and to engage with that community feedback deeply. So, yes, lots of work over Christmas. Thank you for that.

SUSAN PAYNE: Super. Thanks, Malcolm. Okay. We have a path.

Does anyone have anything to raise as AOB? I'm assuming not, from not seeing any hands to that effect, in which case we have three minutes to go, but I am not going to wrap the call up. We will meet again on the 5th of January. I hope that those of you who do celebrate this particular holiday have an enjoyable one and that we can all come back refreshed—sorry, Kavouss, I just saw your hand. Is that a new one?

KAVOUSS ARASTEH: Yes.

SUSAN PAYNE: Please go ahead. Sorry.

KAVOUSS ARASTEH: Do you hear me?

SUSAN PAYNE: I do hear you now.

KAVOUSS ARASTEH: Okay. Thank you very much. I think that we wish—or I wish, at least if you also join me—to wish everybody a Merry Christmas, a Happy New Year, and God's help in a very difficult situation that we are. At least in Europe, we have a very, very difficult situation. I'm wishing a safe and secure—you, your family, your surroundings, your relatives, your

friends, and so on and so forth … That is the only thing that we could pray for—that we will be safe and that you will be safe and that everybody will be safe. So God bless all of you. Thank you.

SUSAN PAYNE: Thank you, Kavouss. I don't think I could have said it better than that. So thank you very much. I very much appreciate it and second it.

So thank you all for being on the call. Merry Christmas. Speak to you in the new year. Thanks, Brenda. We can stop the recording.

[END OF TRANSCRIPTION]