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BRENDA BREWER:

Good morning, good afternoon, good evening, everyone. Welcome to the IRP-IOT Call #70 on the 27<sup>th</sup> of April 2021 at 19:00 UTC. Today's meeting is recorded. Kindly state your name when speaking for the record, and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation.

And with that, I'll turn the call over to Susan. Thank you.

SUSAN PAYNE:

Lovely. Thanks very much, Brenda. Hi, everyone. As Brenda said, it's the IRP-IOT Call on the 27<sup>th</sup> of April. Thanks to everyone who has joined. Kurt has indicated that he will be joining us a little bit late, so hopefully we'll have him with us, too, if he's able to join us.

Just before we start with the review of the agenda and so on, I did ask this before we started recording, but just for the sake of completeness ...

Kavouss, I can see your hand is raised. If that's raised to make a point, then please do speak. Otherwise, I will assume that that's an error. Okay. I am not hearing from Kavouss. Obviously, if it's not an error and you find your microphone, please do let us know. Thank you. Okay, your hand's down. All right.

So, first up, just as usual, we will review our agenda and do the updates to Statements of Interest. I'll do that latter first. Does anyone have any amendments to their Statement of Interest that they need to bring to

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the attention of the group? Okay. I'm not hearing anyone. Thanks for that.

Just, as always, recall that if you do have any change to your circumstances, please do remember to update your SOI and let the group know. Okay.

We've got a fairly brief agenda for this week. First up, we're going to circle back to one of the action items from the last meeting which we'll come onto in a minute.

Then, I think it would be a good opportunity on this call ... I propose that we spend a bit of time thinking about some of the other issues relating to time for filing that are still outstanding and we do need to cover off in the hopes that we can make some sort of substantive progress on some of those.

And the reason for doing that was because we were anticipating or awaiting some input from ICANN Legal, and I wasn't sure to what extent we would have that in advance of this call. We actually have just had an e-mail from Liz which, as I say, we'll come back to you. But I think, since I wasn't sure whether we would have that it, it seemed appropriate to spend our time moving on to consider some of these other elements such as the tolling of time have time for other accountability mechanisms and the like.

And then, as usual, we have our next meetings identified on the agenda. It's not specifically noted, but if there's anything anyone wants to raise as AOB, please do flag it now if you'd like to, or we'll again have an

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opportunity at the end of the call to see if anyone has anything they would like to raise. Okay.

I'm not hearing anything from anyone at the moment, so circling back to our action item from the last call. Towards the end of the last call, we started talking about the Case Study 2 which is the scenario that Malcolm had put together regarding an expanded UDRP-like dispute procedure. And we're looking for some input from ICANN Legal to give their view on whether, in that particular scenario that Malcolm had set out, whether an IRP would be available to the particular claimant in that scenario.

So just before this call, Liz did circulate a quick response on that. I'm not sure to what extent people will have had the opportunity to read that or really to consider it. So I think, as I said at the beginning, I'd like us to spend some time considering other issues. But let's just spend a few minutes just touching on the response that Liz has sent around. If you wouldn't mind, Liz, I might put you on the spot and ask you to just indicate what the message that you circulated was and see whether that takes us forwards.

But, as I say, given that people possibly haven't really had the opportunity to see it and may not have had the opportunity to really give it sufficient consideration, we perhaps will come back to Case Study 2 on a future call rather than spending our time on it today.

But, Liz, is it okay to turn to you and just ask you to kind of clarify what you had circulated just a few minutes ago?

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LIZ LE:

Hi, Susan. Yes, I'm happy to clarify or just summarize what I sent on list. Essentially, during the last call, ICANN Legal was asked to respond to whether the penultimate paragraph in Malcolm's scenario #2—the Get Baked scenario—is correct. And our position is that, the way that the scenario is phrased and the way that the paragraph is phrased, the point that's set forth is not accurate. First, ICANN does not need to consent to whether or not parties can file an IRP, nor would ICANN say that challenges that can be brought on and only on an as-applied basis which is what was contemplate it in this paragraph.

I think, as we've noted many times with this group on our calls and also in writing in the past, is that if an IRP is brought within the time limit for filing an IRP, then there wouldn't be a timeliness issue. So, regardless of whether or not that IRP is challenging [an action or inaction] that is the adoption of a policy or the implementation of an adopted policy. If it is within the time limit, then there wouldn't be a timeliness issue. If it's not within the time limit for filing in IRP, then there is a timeliness issue. And that timeliness issue would be challenged as part of the IRP.

The key issue, I think, with the Get Baked scenario is that it contemplates an action that is not taken by ICANN Org or ICANN Board. It's contemplating the challenge of an action issued by the UDRP panel. UDRP panelists are not ICANN Org members. They're not ICANN Board members. So, the entire basis of the Get Baked scenario is an incomplete and false hypothetical. It's based upon something that, in reality, [would not] happen in an IRP, and the purpose of what the IRP is for.

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And then second to that, for the reasons I've just stated with respect to the penultimate paragraph, ICANN's position is that it's not accurate. Thank you.

SUSAN PAYNE:

Okay. Thanks, Liz. So, absent seeing any other hands at the moment, then I will just ask a clarifying question, if I may. Because I had been envisaging the question that you would answer in a slightly different manner, in the sense of ...

I had an envisaging it as a question about whether, in that scenario that Malcolm had expressed, not so much whether ICANN would express a view on timeliness or whether ICANN needed to consent to the IRP. I wasn't envisaging that being the question, but more the question being, in that particular scenario, can Get Baked bring an IRP? Or are they out of time because the adoption of the policy happened some years ago?

And so, I'm not sure if ... I think I'm understanding you to say, effectively, they are out of time because the adoption of the policy was some time ago. Its implementation was some time ago, and the implementation as it applies to Get Baked is by a panel which is a third party which is not ICANN.

But this is one of the reasons why I felt like we may need some time to kind of ponder on your response and give it more thought. But have I understood you correctly, or have I misunderstood you?

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LIZ LE: Thanks, Susan, for your question. This is Liz Le again from ICANN Legal for the record. In your question, the entire scenario of Get Baked would not be a proper IRP, regardless of time, because the action that is being challenged is not an ICANN Org action. It's an action that's taken by a UDRP panel. That person is not part of ICANN Org nor is part of ICANN Board. And a prerequisite for the IRP is to challenge an action or inaction that's taken by ICANN Board or ICANN staff that violates the bylaws or the Articles of Incorporation.

SUSAN PAYNE: Thanks, Liz. So, I've got Malcolm and Sam. Sam, did you want to clarify something that Liz had said? In which case, I might ask Malcolm if he'd prefer you to go first.

SAM EISNER: Just a little further with it. Thanks, Suzanne. And Liz is correct. So, if you're challenging the act of the panel, that's UDRP panel. That's not within ICANN. That's an act outside of it.

If the challenge was brought ... There could be a challenge brought within a timely reference of time against ICANN for the acts that ICANN took in implementing a policy that someone challenged as outside of ICANN's remit. But when the act that you'd go back to is an act of someone outside of ICANN—the act of the panel—if there was repose in place, that wouldn't then impute as an act of ICANN Org or the ICANN Board sufficient to have an IRP against ICANN based on that act.

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If the IRP is framed as an IRP against ICANN for perpetuating a policy against the mission, or the bylaws more in general, or the articles, that's one thing. But then you have to go back to the acts of ICANN that did that. And, as Liz was saying, there's no act of ICANN within that timeframe.

SUSAN PAYNE: Okay. Thanks, Sam. Malcolm.

MALCOLM HUTTY: Right. So, that actually seems a roundabout way of confirming that the paragraph is accurate them. I think Liz slightly misread the paragraph when she said that it's inaccurate because ICANN's consent is not needed. The paragraph doesn't say that ICANN's consent is not needed. It phrases ICANN Legal's position as a contention. It "contends" that the existence of the abusive policy are immune to challenge because they're both adopted more than 120 days ago.

As far as challenging the panel's decisions concern, the scenario doesn't say that Get Baked are challenging the panel's decision. They're seeking to avoid the panel's decision, not to challenge it. The paragraph explicitly states, "Get Baked, Inc. seeks a declaration from the IRP that the abusive use of DNS policy is fundamentally inconsistent with the bylaws."

And the only way to cure this is for ICANN to revoke the policy in its entirety. That's what Get Baked wishes to ask for from the IRP panel. And the question was whether ICANN Legal would take the view that

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they can't do that because they're too late. And I think I've just heard Sam to confirm that, yes, ICANN Legal would take that view, and therefore this paragraph is essentially accurate—that ICANN Legal would take the view that Get Baked are precluded from seeking such a declaration from the IRP in the terms stated in this scenario under the facts as set out in this scenario.

Which would mean that repose would prevent, under these sorts of circumstances, the IRP being used to ensure that ICANN conforms to its bylaws in respect of only having policies that are consistent with the bylaws, and only asking for policies that are consistent with the bylaws to be enforced by third parties. So, that seems to be a basic clear problem with repose that's uncovered, that Sam has just confirmed. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. And, Sam, that's a new hand. So, Sam.

SAM EISNER:

Thanks. I think one of the things is that it's difficult to discuss this in terms of what was proposed in the hypothetical versus what the question is that we're really trying to get to because part of the hypothetical suggests that ICANN is a gatekeeper to the IRP—which it's not—and that ICANN has some level of doing something other than raising a defense in an IRP. And so ICANN, when it's presented with any IRP, would raise any appropriate and applicable defense that it has. Right? ICANN also should be participating in these in good faith. That's one of the bedrocks that we think is important to it.



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And so, ICANN itself isn't the gatekeeper. It doesn't tell the IRP panel what it can do. But it also will assert, as a defense and then as part of briefing, whether or not the claim is timely. And assuming all the facts are there, assuming the fact is that there is no ... If we have a 120-day timeframe going back for an act of ICANN and there's the ultimate one year—let's just use those—if the last act of ICANN was outside of that window, ICANN likely would raise a defense in the IRP based on timeliness.

ICANN would also raise a challenge to the way that the relief was crafted if the claimant was asking for the panel to declare that the policy should be revoked. We've talked in the past situations about the scope of relief that can be provided, and having a panel declare an ICANN policy as void is not one of the powers of the panel. So, I think it's really important to make sure that ...

It's difficult to say whether or not words written by someone other than ICANN Legal are completely accurate or inaccurate as it relates to any situation, but we are ... I think we are creating a record here today that, if the facts are as I laid out and as I understand Malcolm to have laid out, ICANN likely would be raising a defense in that IRP based on timeliness. Thanks.

SUSAN PAYNE:

Okay, thanks.

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MALCOLM HUTTY:

That was really what we asked to confirm—that you would be raising that defense based on timeliness, which is what it's saying that you're doing in this scenario.

I suppose the alternative would have been that having that policy in place is considered as continuing action and that you would not raise an issue about timeliness because the panel is continuing to apply an ICANN policy. That was what it was charged for doing. And that policy is still in place. And so, there is an ICANN action that can be challenged of having this policy in place, not merely adopting the policy.

In your view, Sam, would that be sufficient for ICANN not to raise that defensive timeliness—that theory?

SAM EISNER:

Sitting here right now, I'm of the opinion that the bylaws, as they stand, don't talk about a continuing act of ICANN. Right? I don't think that we've ever recognized, in any of our IRP filings to date, the potential for a continuing act.

MALCOLM HUTTY:

Okay. Because we could hear ... We could, in our Rules of Procedure, note that when considering an action, we include continuing actions for which the latest date would be the time when it was last in force. And if we did that it might be possible, then, to agree that repose was something that we could put into the Rules of Procedure. But if we don't, then that might make it so that we can't put repose into the Rules of Procedure.

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So, there's the possibility for some flexibility here, maybe, on ICANN Legal's part.

Sam.

SAM EISNER: Susan, is it okay if I proceed?

SUSAN PAYNE: Sorry. Yes, indeed. Please. Thanks, Sam.

SAM EISNER: Thank you. So, from the ICANN Org side, I clearly am not prepared to agree to any form of a continuing act definition in that we would try to bake that in.

I think one of the things that we've always been on record as talking about within the history of the IOT and looking at how the repose period within the IRP itself has evolved over the years there. There is a need for predictability in order to enforce legitimacy of the system. We've talked before and we cannot say it enough. The very particular ways that the commercial contracts that ICANN holds with the contracting parties that allow them to bring in consensus policies, that we have this community path to change commercial agreements on a regular basis as long as appropriate thresholds are made, etc.

There's already this very strange part of ICANN's contracts that the contracted parties, as part of serving the legitimacy of the naming part

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of the DNS and increasing predictability ... It's something that they buy into. And I think that we can't overstate the import of not building in additional places where that predictability might go away. It's really important for the broader legitimacy of ICANN.

Now that doesn't mean that the issue that—Malcolm—you're basing the hypothetical on isn't important to the legitimacy of ICANN. And it is. And that's one of the reasons that we talk about all of the other acts that happen. Because, still, building a hypothetical on the fact that no one throughout all of the safety points within the system and all of the places for impact and action across the ICANN community that this wasn't raised—already takes us to an edge case.

And I think one of the questions that I would pose to the IOT is, do we need to base our views of repose—and I'm not talking about how long the period of repose is—but do we need to base a yes or no decision as to whether or not repose would be appropriate within the accountability of system of ICANN to be the safety valve for the hypothetical that Malcolm creates? Because maybe we don't need it to be that because there are so many other places to build in the safety valve, including the empowered community processes and those.

And I think that's a really important question. Do we need to use the repose to address that, or can we look at all the other places across ICANN where we can also seek accountability?

SUSAN PAYNE:

Okay. Thanks, Sam. So, Malcolm, I see your hand. I don't see any other hands. I think, for now, I'll suggest maybe this could be the final word on

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this. I'm not trying to shut off the discussion, but I think perhaps everyone on the call needs to reflect on this a bit further and we could come back to it.

But, Malcolm, over to you.

MALCOLM HUTTY:

Thank you. I would like to respond to this idea that we don't need this because we've got other mechanisms. If this were the CCWG Accountability that was drafting what these bylaws should be post-Transition, then I think Sam's point would be one that would be open for consideration whether it was really necessary to do that or whether we could rely on the alternative mechanisms.

But that time has passed. We're not here to consider whether or not this is necessary. We are here to implement the IRP as provided for in the bylaws. And the bylaws state that the IRP is available. It's not open to us to say, "Oh, well. It's not really needed in these circumstances because we've got something else." The IRP is something that is promised to materially affected parties who are claimants.

And it's not really for us to say, "Oh, well. You don't need that because somebody else would have stepped in beforehand." In the scenario that I constructed, nobody had stepped in beforehand.

Now, in such a scenario ... And you may say that it is unlikely that that will come up because you hope that the rest of the community will have stepped in and made sure that this would never happen. But if it hasn't, the bylaws promise that the IRP is available for claimants to bring

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claims/ disputes against ICANN so as to ensure that ICANN does not exceed the scope of its mission and, otherwise, complies with its Articles of Incorporation and bylaws, and for other purposes.

It's not for us to take that away. Not even if we think that there are other mechanisms that could achieve that goal. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. And, obviously, noting in the chat that Sam has just reminded us that, on the ICANN side, they obviously disagree with that interpretation on the scope of the bylaws. And, of course, we've had other working group members—I think, notably, David McAuley—expressing a different take on how that should be interpreted.

As I say, I don't want to cut off discussion on this. I think it would be something that working group members could fruitfully reflect on, and particularly reflect on whether, for example, the type of discretion that we were considering giving the panel to waive timeliness in certain circumstances might be an adequate safety valve. Being very conscious that, as we've discussed before, we've got two reasonably polarized views on this.

And we do have strong views that we need to have some certainty and timeliness. So, I don't want to cut this off, but I perhaps do want to cut it off for today's call and come back to this. Perhaps we could ... If we can, we could have further discussion on this on our e-mail list. But if not, we could also revert back to this further when people have had time to reflect on what might be some appropriate safety valves if there were a repose.

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Malcolm, is that a new hand?

MALCOLM HUTTY: No. My apologies. Let me remove it.

SUSAN PAYNE: That's okay. Thanks. And I'm noting what you're saying in the chat, pointing to Article 4, Section 4.3 of the bylaws. And you've very kindly incorporated the text from that in the chat so that people will have that available to them when they're reflecting on this. Okay, all right.

Well, thank you very much. It's not the end of the discussion, but if you will bear with me, I think, having teed up on our agenda that we would consider some of the other issues that we do still have to put to bed in terms of time limits, then I think it would be helpful for us to spend some time on this call doing that and allowing this particular conundrum to percolate a bit more.

So, as I say, moving on. We have a couple of different things, or at least a couple of different things to consider. One of which—which isn't expressly set out in the agenda, but is something that we've touched on from time to time—is that there are what was what was previously referred to in some e-mail exchanges as two prongs to the time limit element on the IRP.

And the first prong of this ... We've been talking a lot about the second prong which is the repose, the outer limits of whatever time period it is. We haven't formally discussed the first prong which is the time periods after the complainant knew or ought to have known about the event in

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question—the decision that they're challenging. And that, in the second public comment period, it was proposed that that should be 120 days. So, effectively, a complainant has—what would that be, four months—effectively 120 days from when the relevant decision is made or the implementation of the decision or whatever the act is that they're challenging; from when they know that happened or when they reasonably to have known about it. They've got 120 days.

So really, in many cases, we likely never come up against that repose issue at all. I'm not saying it's not important. But for most complainants where there's a particular decision and it relates to them and they get notified of the decision by whatever means and they've got 120 days. And that's the important time limit for them. They never have 12 months or two years or three years, or whatever it is. That's never consideration for them.

Now, I think we do as a group have to agree on that 120-day time period. In the first public comment period, the first proposal was a 45-day time period. And that was widely felt by the community to be too short. And so, in the second public comment period, a proposal was put out instead that that time period should be 120 days. And that was, I would say, overwhelmingly supported.

I'm happy to turn to the actual public comment input if people would like to see it, but I know that you all have had the summary spreadsheet of the second public comment responses circulated a number of times. And we previously just discussed all of us reviewing it and familiarizing ourselves with it and identifying if there was anything that we wanted specifically to raise.



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But just to summarize, basically the BC, the IPC, the NCSG, the Registries Stakeholder Group, the Registrar Stakeholder Group—will [inaudible] with some particular comment—ICANN Org, the ISPs, the International Trademark Association and Verisign—and I think that's all the commenters that there were—all agreed and approved that 120 days. Now, in some cases, with some suggestions about additional time being needed in certain circumstances.

But in order, basically, for us to have just formally made a decision on that, can we agree as a group that we're happy with that proposal that it be 120 days? Or does anyone have any concerns about that 120 days as a starting point?

Malcolm, your hand's up but I think it's still your old one.

MALCOLM HUTTY: No, no, no. It's a new one.

SUSAN PAYNE: Okay. Malcolm.

MALCOLM HUTTY: I don't think you can detach the 120—or the support for 120 days from those participants from the fact that those same participants also objected, in the strongest possible terms, to repose. I think that if there is no repose, then 120 days is an acceptable timeframe. However, if there were repose, I don't think it would be.

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And I think if there were repose, then the period would have to be very much longer to take account of the deleterious aspects, the affects, that repose would have on the system as a whole. And we're probably talking something like 5 years or 10 years there, and I don't think you can take the support of those organizations when they are saying, "And there must be no repose," to be support for it even if there is repose.

In fact, I believe that the BC in one of its submissions explicitly said that, in the alternative, if repose were adopted despite their recommendation, they would want something longer. I think the BC said that explicitly. I hope I'm not misleading the community. It's not my intention to do so, but that's my recollection from memory.

In any case, I don't think you can detach these two in those. I think we must take it as a conditional support. On the basis of there being no repose, then, yes, 120 days would be acceptable. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. David has his hand up, so we'll go to David.

But I think we should circle back to that, and I'll ask Brenda, while David is speaking, if perhaps you could call up the spreadsheet for the comments on the second public comment so that we could see what the BC said because I don't recall that. But I'm not challenging Malcolm. I just don't recall that that was said.

But in the meantime, David.

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DAVID MCAULEY:

Thanks, Susan. I do recall from the public comments that the number of those in the group called for a repose of something from two to three years. And so, I think in such a circumstance, 120 days seems an adequate time to me.

I think something that we need to keep in mind on this, however, is that we who are going to work on the rules for the Cooperative Engagement Process need to keep in mind that, at least in the bylaws, it's a little opaque. We ought to put a firm start date on CEP. In other words, a firm ability to decide when a CEP started and when it ended so that that period could be told from whatever period we're talking about to file a claim. Thank you.

SUSAN PAYNE:

Thanks, David. Yes, I think that was what I was going to come on to next, was that interplay with other accountability mechanisms and whether there needs to be tolling. But first, let's go back.

Brenda, I think that BC comments might be the first few lines. I may be wrong, but I think they may be at the top of the spreadsheet. Okay, so we've got ... Yeah. So, line two. We've got the BC endorsing the amendment such that 120 days.

Next entry. "... becomes aware of a material effect [inaudible] ..." Okay. Hang on. So, the next, line three, is support for the removal of the repose/ Line four is, "Any time period should not include the time within which parties are formally engaged in any other ICANN accountability mechanism."

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Is that what you were thinking of, Malcolm?

MALCOLM HUTTY: That line four that you just read, I think, was actually the point that David just made.

SUSAN PAYNE: Indeed.

MALCOLM HUTTY: Now, the point that I was referring to. Actually, I was looking at the BC's input. Not the spreadsheet, but the BC's input itself where, at the top of page five, they say, having said that they wish that there be "no overall time limit." That's the phrase and wording that they used for what we're calling repose.

And they go on to say, "If an overall time limit for as-applied disputes is retained, it should be for substantially longer than 12 months. We would suggest a minimum of three years to assure that where there is a material [harming and a] resulting right to challenge, there is a practical remedy to provide redress."

And that, however, must be taken together with their recommendation that there is no such overall time period; but that if there were, then it should be for substantially longer than 12 months. "We would suggest a minimum of three years," is what they wrote.

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I don't think that that paragraph has made it into the staff summary, but I'm reading from the actual input that they wrote.

SUSAN PAYNE:

Thanks, Malcolm. Okay, sorry. I was misunderstanding your point then.

So, I think that's a point that we will come on to. I wanted us to first off talk about the 120 days and, indeed, about the interplay with other accountability mechanisms. But then we do need to move on and consider, if there is to be a repose, the significant input that said that if there's a repose, 12 months is too short and it should be longer.

So, I'm not trying to—

MALCOLM HUTTY:

Oh, right. I beg your pardon. So, are you saying that what you'd like to discuss now is, in the circumstances where the person was aware, how long should they have?

SUSAN PAYNE:

Indeed, yes.

MALCOLM HUTTY:

I beg your pardon. Thank you, Susan. I hadn't followed you clearly.

SUSAN PAYNE:

Yes, sorry. I perhaps wasn't being very clear.

MALCOLM HUTTY: It was probably my fault.

SUSAN PAYNE: I just felt that we keep glossing over this because I think it's probably a relatively small point. But for completeness, I think we do need, as a group, to confirm whether we're happy with that 120 days that had been proposed and that got quite a lot of public comments for it.

Kristina.

KRISTINA ROSETTE: Hi. Greetings, everyone. I just wanted to note that I think in line with the public comment. The 120 days seems to have broad support, but I just do want to flag a fairly significant caveat. And I think this goes in the direction, Susan, that you were heading, namely that I think we should have it be “120 days, but.” And the “but” is that I do think it should be told, “while the potential claimant is pursuing other ICANN accountability mechanisms.”

And I will just speak from my personal experience, some of which I’m going to be talking about reflects on my prior professional experience. When I was at Amazon working on .amazon—but just, again, for the record I’m not representing them or speaking on their behalf. But I do just want to note that there is a significant amount of time that Amazon spent pursuing the other accountability mechanisms before ultimately proceeding with an IRP.

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And I do think it's important that if we want to encourage the community—affected members of the community, potential claimants—to pursue those other accountability mechanisms, I do think that we need to toll the 120 days while those mechanisms are being pursued and while the potential claimant is awaiting Board or, in some cases, ICANN staff action them.

And just to run through for those of you who may not be as familiar with the relevant timing for purposes of .amazon. The initial Board decision accepting the GAC advice was in May 2014. There was an initial Request for Reconsideration filed on May 30. I'm sorry, initial one on May 23<sup>rd</sup> 2014. Then there was another one filed on May 30<sup>th</sup> 2014. There was a the DIDP request, and then a Request for Reconsideration on that the DIDP request as well as the Ombudsman conducting an investigation.

So, quite frankly, just adding those time periods alone between when those various mechanisms were initiated and when the final—for purpose of that mechanism—action was rendered, that easily gobbles up almost, if not more than, the entire 120 days.

So, I think it's not only fair, but I think it also sends an important message that the potential claimant should be encouraged to pursue those other accountability mechanisms. Because, quite frankly, as a practical matter, regardless of who the potential claimant is, it seems extremely unlikely to me that if they know that the 120-day clock is not going to be tolled while they pursue those mechanisms, they won't pursue them. In which case, what's the point? And I think it will just lead to a huge increase in IRPs filed, perhaps, that, in some circumstances, might not ultimately have been filed. Thanks.

SUSAN PAYNE: Thanks very much, Kristina. Yes, you're absolutely right. That was indeed what I was hoping to move us on to. And so, your intervention and the benefit of your experience is very timely and helpful.

Flip.

FLIP PETILLION: Thank you, Susan. To add on this. As you know, I've been representing Amazon in one of these requests. Not now. I've been representing many others. And what I want to add to the story is that it has always been the purpose to use all mechanisms available and to actually postpone, or avoid even, an IRP if it is really not helpful or necessary.

And I must also add that quite a number of these have been openly discussed with ICANN Legal, and I want to share with the team that never ever have we had a discussion about timing. There has always been a clear willingness by ICANN Legal and its representatives to be rational with mechanisms with a view to giving every single step the possibility to be successful. I hope this helpful.

SUSAN PAYNE: Thanks, Flip. Yes, indeed. It certainly is helpful. And I think it gives a great deal of comfort to everyone to know that, in practice, ICANN Legal have always been very, very reasonable as to timing and so on. But I think from our perspective, when we're creating these rules where we know that this is a likely issue and an important issue, it makes sense for



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us to specifically address it and not leave it to the good will of the ICANN legal team.

And I don't get the sense that that's what you were suggesting we did. Quite the reverse. I got the sense that you were suggesting that it does make sense to allow for tolling.

Greg, I see in the chat, has also said that this makes common sense and is a good point.

If you'll bear with me, then perhaps for completeness we could just quickly look at the comments that I saw in the second public comment period who made reference to this. I think it's worth quickly looking at them just to give comfort to anyone who doesn't recall.

So, we did already look at the BC comment on this, which was the line four where they make the point about taking into account the time that parties are engaged in other accountability mechanisms.

We have a similar point being made by the IPC just below, which is in line eight. If you wouldn't mind scrolling. Thanks, Brenda. That's the one. It's quite a long entry. Oh, sorry. Just down slightly. Thank you. Thank you, perfect.

Where the IPC—it's quite a long comment on this, but again—are saying that they believe it's necessary to amend the time for filing periods to ensure that the time for filing an IRP should be tolled during the time that the parties are formally engaged in other accountability mechanisms over the same issue.

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And they particularly identify the mechanisms that they're considering. So, for example, the Cooperative Engagement Process which David just mentioned. Which, as they point out, is a voluntary but strongly encouraged step that you should commence prior to commencing an IRP. And it's specifically referred to in that bylaws Section 4.3(e). And, similarly, an ongoing reconsideration request, an Ombudsman review, and a request under the Document Information Disclosure Policy, or DIDP.

Again, so there's that comment from the IPC. And then if we again scroll down to—I think it's line 14—the Registries Stakeholder Group comment. Perfect. Again, talking about 120 days and being supportive of it. But pointing out, again, that the Registries Stakeholder Group is suggesting that the time should be—that 120 days should exclude the time in which the complainant is engaged in a cooperative engagement or a reconsideration request or an ongoing Ombudsman review or, they suggest, the first or second ongoing Document Information Disclosure Policy request.

So, the Registries Stakeholder Group has gone a bit further and actually suggested allowing time for two particular DIDPs. I suppose, in their mind, the Registries Stakeholder Group are presumably reflecting on the fact that in some of the disputes, particularly some of the disputes relating to the new gTLD round, the 2012 round.

There have been some disputes when numerous document disclosure requests were made, effectively in relation to the same issue. And I suppose that they're seeking to put some limits on this and suggesting two as a maximum.

And then, finally, the Registrar Stakeholder Group also commented on this. And that, actually—if we can scroll back—is line 11, Brenda. The reason I came to them last is because they've taken a slightly different approach. The registrars have expressed concern that 120 days from simple awareness might be insufficient, given other accountability processes that might be in play.

And so, they've come at it from a slightly different stance whereby the registrars have suggested that the 120 days should run from the later of either when the claimant became aware or reasonably ought to have become aware of the dispute; or ICANN's most recent action following the material effect. So, they're seeking to run time from a different period.

But I think, as I'm understanding that effectively, if there were a Request for Reconsideration, for example the 120 days would run from the end of that instead of from when the original act took place. I think it's the same outcome, if I understand what the registrars are saying correctly. They've just come at it from a slightly different perspective.

So, again, I suppose, just looking to this group to see whether anyone has any concerns about us building this concept in. Any disagreement with this or, well, agreements? Bearing in mind that we've got relatively limited public comment input. But in terms of ... There were a relatively small number of commenters on this second public comment period. But various of the stakeholder groups within ICANN who could be expected to be bringing an IRP were raising this very important point.

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And I think Kristina put it very, very clearly that if the parties are to be encouraged to take these other processes and to try to avert an IRP by utilizing other accountability mechanisms first, then we feel that the rules should be set up in such a way as to encourage that rather than positively to discourage that.

Flip, is that a new hand or an old one?

FLIP PETILLION: Sorry, Susan. Old one.

SUSAN PAYNE: Okay, thank you. So, I'm not seeing any hands. Yeah. Sam has just put in the chat that she needs to drop, but she thinks it might be helpful to identify the various accountability mechanisms that we think are appropriate for tolling in this group. And so, I think that would be helpful. I'm not hearing any objection to the notion of trying to tell for other mechanisms, but it would be good for us to reach agreement on what those should be.

I think as a starting point, again, we can look to the input that we had in that public comments process whereby, essentially, we've had four different mechanisms identified or suggested, namely: a Request for Reconsideration which obviously is frequently, I think, generally utilized prior to bringing an IRP—Kristina's put them in the chat as well; the Document Information Disclosure Process request—I can't ever remember what DIDP stands for; a complaint to the Ombudsman; and the Cooperative Engagement Process.

And Kristina has commented that she thinks we could deal with the CEP when we focus on those rules. We certainly could, but that does leave some concern in my mind in the interim whereby we have in the bylaws, as I mentioned, this encouragement to use the Cooperative Engagement Process and to do so before you bring an IRP, and with the best will. I'm not aware of any Cooperative Engagement Process that wrapped up within 120 days. And so, on the one hand, in the bylaws, you're being told to use the CEP. And on the other hand, if you use it, you're immediately out of time. And I do think, if we're tolling for other accountability mechanisms in these rules, I think it makes sense to cover off the Cooperative Engagement Process as well.

Kristina.

KRISTINA ROSETTE:

Yeah. Just to clarify my point about CEP. I think it absolutely needs to be identified, but my point was slightly different; namely that to the extent that we may consider whether or not there are going to be conditions or circumstances relating to the potential complainant's use of the other accountability mechanisms and just to use, by way of example, some of those identified in the Registries Stakeholder Group comment—and to be clear, not that I'm saying that we should necessarily adopt those.

But to the extent that we would adopt any kind of circumstances or conditions, my point really was that, to the extent that we would want to put any such conditions or restraints on CEP, that I think we could deal with those specifically when we get to those rules. Sorry.

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SUSAN PAYNE: Oh, super. Thanks, Kristina. Yes. That makes sense to me. Flip.

FLIP PETILLION: Thanks, Susan. I agree, and I think we really need to discuss it and the use of it and the usefulness of it. And the same for Ombudsman. I think there are quite a number of misconceptions about that function and how effective and useful it is or not. But I'm very happy to participate in the discussion when we are there.

SUSAN PAYNE: Thanks, Flip. Well, to some extent, I think we are somewhat there now. I think if ... At some point, we need to ...

If we're going to agree on this 120 days and we are going to identify the accountability mechanisms that we think we should be tolling the timing for, then I think this as good a time as any for us to have that discussion. I hesitate to put words into your mouth, but my sense is that you feel that perhaps the Ombudsman processes is of limited value. But I defer to you to expand on that if you'd like to.

And I've got both Flip and Kristina with hands up. I'm not sure if that's a new hand, again, Flip. Or if it's the same one from before.

FLIP PETILLION: It's a new ... Please, Kristina.

SUSAN PAYNE: Then, Flip.

FLIP PETILLION:

Okay. Thank you. Yes. Actually, you phrased it quite well, Susan. I don't think I have to add anything. I personally have the experience that there was a lack of knowledge at the other side and it was a completely useless process.

With regard to CEP, I think it's worth mentioning that, again, in the framework of the Cooperative Engagement Process, there has always been a willingness from both parties—in the different cases that I have personally handled—a willingness to be conscious about timing. But frankly, nobody has ever abused it.

What I would encourage in the future is that the CEP remains to be used, but is a two-way process; is not only a process where one party, which is ICANN, wants clarity about what the intentions are of the claimant. But it would actually also be useful for the claimant to know what the intentions are of ICANN. I think that would pretty much [add] to a dialogue rather than a discussion. And it will actually enhance the empathy that both should show with a view to avoiding further procedures. If that is a topic that we can discuss, I think that would be really useful one. Thank you, Susan.

SUSAN PAYNE:

Thanks, Flip. That sounds very interesting. I think that sounds as though that's something we should pick up when we discuss the CEP rules. That's certainly a piece of work that we are due to do, and so it does make sense to pick that up then. So, I'll maybe ask—Bernard—if you

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don't mind. Could you keep a note of that for us so that we don't forget it when we come on to do the CEP rules, please?

Kristina.

KRISTINA ROSETTE:

Two points. First, just picking up on Flip's excellent point about CEP. I think we should be mindful that there may be circumstances or issues that are potentially going to become IRPs in which there are, as a practical matter, parties other than the potential claimant and ICANN involve. And that CEP can give an opportunity to potentially explore resolutions that would be of interest to those other parties, potentially; and that may avoid the need for the IRP. So, just another item to put a pin in, the CEP.

And second, I know that I started this conversation by saying "120 days works as long as we toll." But I think I might kind of take that back because I want to crunch some numbers, simply because I'm just adding up in my head here how long, how much time passed between—again, just using the .amazon example. If the potential claimant is losing from its 120 days the time that it takes to prepare and file a first Request for Reconsideration, for example, or a DIDP request or a second Request for Reconsideration, you could very easily end up with a period of time that's significantly shorter than then 120 days. And I think we just need to be mindful of that.

So, unfortunately, I think I'm going to take back my hard and fast "120 days plus tolling works." Sorry.



SUSAN PAYNE: Thanks, Kristina. If I could understand you correctly, is what you're saying that by the time you've had, let's say, a couple of weeks to prepare your document disclosure request before you file it, so you've lost a couple of weeks. And then you get a result of that, but you file a reconsideration request. So, you spend another couple of weeks preparing that before you file it. So, you've now lost another couple of weeks, even though the time then tolls off once you've filed it. That you're running down your own clock.

KRISTINA ROSETTE: Yes. That's exactly my concern. So, if we want to avoid that, then I think we can draft around that. But, yes, that was exactly the point I was making.

SUSAN PAYNE: Yeah, okay. On the other hand, is that a decision ... Well, I suppose ... I was going to say is that the decisions that the claimant has to make, whether they want to run down their own clock or preserve as much time as possible for bringing their IRP? But I suppose that circles us back to the question of, are we wanting to encourage parties to use these other mechanisms?

Perhaps that will require a bit of consideration, either on how best we draft it. One might draft it, for example, that if there were time periods for bringing these other mechanisms—which I think there are certainly for some of them, such as a Request for Reconsideration. If you bring

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such a Request for Reconsideration in a timely manner and then that whole time period during which you were preparing it has been tolled, that might be a way around that concern rather than trying to arbitrarily extend the 120 days in all cases. But that's perhaps something we need to circle back to.

But in terms of in terms of the mechanisms in question. If we're trying to at least reach agreement on the accountability mechanisms that should toll the time limit, I think that there seems to be a good level of support for the Cooperative Engagement Process and for the Request for Reconsideration process tolling the time. I think I've also heard, to the extent that people have expressed views, I've heard support for the DIDP. I'm not going to try and set that out and full again because I keep getting it wrong.

What about the Ombudsman process? Obviously, hearing Flip express some reservations about the value of that process, does that nevertheless ... Even if some believe it's not a particularly effective process, it is an accountability process that exists and that the parties are encouraged to use in appropriate cases. So, do we nevertheless feel that it would be appropriate to toll the time limit to allow for that?

Yeah. Okay, so we've got a couple of votes for yes in the chat from Kristina and Greg. David, "unsure", I guess, is the best way to put David's comment. A bit on the fence on it. And I'm just scrolling back. And Kurt has suggested that perhaps the 120 days begins when an alternative accountability process closes. So, it starts when the Ombudsman or the RFR or the CEP closes. I think, in practice, Kurt, I think it's the same thing. But I think, for the scenario where a claimant doesn't pursue any

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other accountability mechanism first, we have to have a fallback of when their time begins to run. And so, I think that's why it's been expressed as tolling rather than the other way around.

David.

DAVID MCAULEY:

Thank you, Susan. I just wanted to clarify my “on the fence” [inaudible]. I have to admit, and preface my comment, by saying that when it comes to Ombudsman, I don't know much. But I do have the sense that it is an office that, at least with respect to actions or inactions that amount to a violation of articles or bylaws, I think that the Ombuds officer—I suspect or I wonder—does it have the ability to affect a remedy? Or is it just a mediation room?

I think reconsideration requests can do that. I just wonder about the Ombudsman even having that power. It might be a nice [inaudible], but I need to look at the bylaws and see what an Ombudsperson can do. I just have the sense that it's not what we mean for tolling. But that's my own personal opinion. Thank you.

SUSAN PAYNE:

Thanks, David. Yeah. I think that's right. There's certainly, in relation to the RFR, a built-in process of consulting with the Ombuds. I also would need to check whether the same applies in relation to an IRP, and I'm not sure that it does.

Greg.

GREG SHATAN:

Thanks. I think that if the Ombudsman is being approached as part of the attempt to resolve the dispute or to move the dispute along, it should toll the time regardless, unless ... If the Ombuds has no jurisdiction and that's clear on its face, then I guess the Ombuds would turn it down. But even for the time while the party is approaching the Ombuds to see if they will in some way be able to resolve the dispute, the time should toll. To my mind, at least the point about a statute of limitations is more about— [especially this] 120-day period—is about avoiding sleeping on one's rights. And that if one is pursuing, in good faith, an element intended to address those rights, the time must be tolled. Thanks.

SUSAN PAYNE:

Thanks, Greg. And, Flip.

FLIP PETILLION:

Thank you, Susan. Just to be clear, I think it would be helpful—and we don't have a lot of time left today—but it may be helpful for the next meeting that we make a list of when does what procedure start or when can it start and what is the timing of one procedure or mechanism; and when does it end. I don't think actually, for example, calling upon the services of the Ombudsman tolls. I don't think so. I think it's a separate mechanism. And you have the Request for Reconsideration, which is a separate mechanism which starts once an initiative is taken. And you only go to the next step which is usually the CEP if you fail in the Request for Reconsideration.

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So, with a view to understanding the concept of tolling, I think it would be helpful if we just make a small list of duration and moments in time when processes are actually starting, ending, etc.

I hope I'm clear and I'm not confusing things, but let me know, Susan. Thank you.

SUSAN PAYNE:

Yeah. Thanks, Flip. And I think that makes sense. That probably would be quite helpful. I was going to say we didn't have any further hands, but Greg.

GREG SHATAN:

Thanks. This a question for Flip in case I'm not understanding what he's saying. If he's saying that approaching the Ombudsman with regard to the problem in question should not toll the 120-day period, it seems that the result of that could be that if the process with the Ombudsman takes 120 days and it does not satisfy the needs of the claimant, that they've run their period while trying to solve the problem and without any recourse. If I understand what Flip is saying.

Or even if the Ombuds doesn't take the full 120 days, that it's eating into the 120 days which would disadvantage people who are trying to use the Ombuds as a mediating device in order to solve the problem. If they're not capable of solving the problem, that should be figured out fairly quickly. But either way, the party should get its 120 days, and certainly should not lose a right while it's pursuing another aspect of that right or that resolution. Thank you.

SUSAN PAYNE: Thanks, Greg. And I think Flip maybe wants to respond on that. So, Flip.

FLIP PETILLION: Thank you, Susan. "Respond" is a big word. I do hear you and I do understand your point, Greg. And you have a point. And therefore, I think it would be good if we clarify what's the possible relationship between mechanisms. For example, I don't see a relationship between an RFR once the 120 days starts running because that's over. That's the past. Then you are in a period where you actually have a CEP followed by a possible IRP.

So, I think it would help if we clarify what a possible relationship is. And actually, it means when can people initiate what mechanism. Once we have cleared that up, I think we can avoid probably confusion and discussions.

SUSAN PAYNE: Thanks very much. I think it's a good suggestion, Flip. So, perhaps we can take that as an action point for ... I'm not sure. I guess it's for me, maybe. Bernard and I will discuss this, but we'll try to do that before we have the next call.

Okay, I can see we're coming close to the end of our call. And perhaps this a good point at which to call a halt for this week and leave it with that.

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I think we've started to have this very useful discussion. It's an aspect of the timing rule that we definitely do need to decide on. It is important for many of the IRP cases that happen. The time period within which they knew or ought to have known of the matter that they're challenging is the only time period that will effectively come into play. And so, it is important that we get this right.

Kristina.

KRISTINA ROSETTE:

Hi. I just have a quick question for the ICANN Legal folks who might still be on, or for those of you who might just happen to know. Has there ever been an IRP filed in which the claimant did not, before filing that IRP, pursue a Request for Reconsideration or other accountability mechanism? I suspect the answer is no, but I don't know for sure. Thanks.

FLIP PETILLION:

Susan.

SUSAN PAYNE:

Flip, do you have an answer for us on this?

FLIP PETILLION:

Thank you, Susan. To my knowledge, none. To my knowledge, all went through the RFR and then followed by CEP and then followed by IRP. There is one I'm hesitating about, and I really don't know why by heart.

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And that's the very first one, but that's under really old rules. It's more than a decade ago and may be irrelevant. But all the rest since 2012, I do think that the answer is affirmative, Kristina.

SUSAN PAYNE:

Thanks, Flip. Okay. Yeah. Kristina is saying that's what she thought. That's certainly my sense of it, too. But perhaps ... I don't know if Liz is still on. She may not be still with us. We could perhaps also ask Liz or Sam to just confirm if they have a different answer before the next call.

Flip, is that a new hand again?

FLIP PETILLION:

It is new, Susan. And maybe to add, I think there was some uncertainty over the past 10 years of whether or not you could actually initiate an IRP right away. There was uncertainty, and also there was uncertainty about what the consequences would be. Don't forget that the CEP expressly mentioned that if an IRP would be launched without making CEP even possible and give it a chance of success, that could actually be a reason for ICANN to claim the payment of its costs by the claimant.

So, that is, let's say, a reason or an incentive for people to go through the previous mechanism before initiating the IRP. And, frankly, there is also another explanation. That is, common sense. I think people really wanted to give any possible mechanism that was less expensive, more rapid—give it a chance with a view to resolving the dispute.



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SUSAN PAYNE: Thanks, Flip. And David has asked in the chat if Cooperative Engagements have a discernible start and end date now. I don't think they do.

FLIP PETILLION: No. They do not, Susan. And again, they are very much guided by the willingness of the parties involved—ICANN and the other party—to have an open dialogue with a view to understanding each other's position and arguments and objectives. And in my experience, they have always been extended, pronounced. There have never been really hard deadlines. Although, I must add that at the very end, if it is the claimant who asks for delays or deference of dates, it comes up to ICANN Legal General Counsel to decide when the time is up. And that is very understandable. ICANN, of course, does not want to give the impression that it is treating a claimant favorable or more favorable than another claimant in another procedure. So, it must follow a reasonable path that is reasonable for everybody who's involved in an IRP or a CEP.

SUSAN PAYNE: Thanks very much, Flip. That's very helpful. We will also ask ICANN Legal if they will just confirm if they know any differently in terms of this last discussion. But I think we've got a fairly good sense here. Okay.

So, we're very close to the end. Just pausing briefly to see whether anyone has anything they wanted to raise as Any Other Business before we wrap up. Okay. I'm not hearing anyone.

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So, thanks very much, everyone. There's a little bit of background information on the other accountability mechanisms for us to pull together, and that question to ICANN Legal. Please also give some further thoughts to our repose question and in the context of Malcolm's scenario two in advance of next week's call. Sorry, next time's call. I think it will be in two weeks' time.

Okay. Thanks, everyone. Thanks, Brenda. We can stop the recording for this call.

**[END OF TRANSCRIPT]**