BRENDA BREWER: Good day everyone. This is Brenda. Welcome to the IRP-IOT call taking place on the 11th of May, 2021 at 17:00 UTC. This meeting is recorded. Kindly state your name before speaking 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. So, hi everyone. It's our regular IRPIOT call. Hopefully we've been making some progress, I think on the timing issue. It's taking us a while but I think we are getting there. First off, let's just quickly review the agenda and do the updates to statements of interest as usual. So, in terms of our agenda, we were all given an action item to review Liz's response to Malcolm regarding the Get Baked scenario and how the timing issue, if there was tolling, would work on that scenario. And so, hopefully everyone has done that. That is what we will spend some time discussing to the extent that there is discussion on this as one of our main agenda items for today.

Following that, I think we can make some further progress on our discussion about other elements that we need to be considering including things like tolling for other accountability mechanisms. And finally on the agenda, we've got the next meeting down for May the 25th. I actually have realized having let Ben put this agenda out, that actually I've got a personal conflict on that day and that will be difficult for me to make. Is there any objection if we shift by a week and we have our next call on the 1st of June instead which would normally be our

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week off? Which would mean we have three weeks before our next meeting.

I'm seeing a few non-objections and thank you very much for that. Perhaps if anyone has got concerns about that, you could flag it. It obviously changes our call rotation a little but since we have an ICANN meeting coming up, things are going to go out of whack anyway, I think. Thanks very much. So, coming back just to—okay, Kurt's saying he doesn't object to moving for the week but then don't change the call rotation afterwards. Yeah, I think we'll have to look at that, Kurt, because I think we might find—we might then—if we were to change the call rotation, I think we end up in the middle of ICANN. So, yes, if we go to three weeks this time and then one week the next, that might keep us on the same track. But I think I'll liaise with Bernard and we'll work out what the best approach is, if that's okay.

All right. Coming back then, just to item one, are there any updates to statements of interest that anyone needs to draw to our attention? Okay. I'm not hearing anything or seeing any in the chat so hopefully that's all good. Okay. So, next stop. We are circling back to just hopefully close off our discussion about the—what's the word, stress tests and particularly the second of the scenarios that Malcolm very kindly put together so many months ago now. The one regarding, what he called the UDRP max. This is the fictional expansion of a UDRP style dispute resolution process that would address DNS Abuse. And so, we had had from Liz some comments regarding timing and particularly when the actionable acts would take place. And I think we didn't—once we did have some brief discussion on that, I think it warrants a bit of further drilling down just to make sure that we're all on the same page and to

see whether this gives sufficient comfort for the group as a whole to retain some concept of a repose.

I'm hoping that people will chip in and raise your hands in the usual way and ask questions if there are elements of the response that was provided that you want to drill down on. But just to kick things off, I did have a few questions myself that I had identified and so I will ask those until I see that people are queuing up. But to set the scene, just to remind everyone of the background or the factual matrix in the hypothetical example that Malcolm gave us, the DNS Abuse Policy that developed this notion of the UDRP max was developed by the usual community policy development process and then is approved by the ICANN Board.

And then in terms of the actual implementation of that policy so that in order to reach a point where there are dispute resolution providers ready to hear the first cases, in Malcolm's scenario, that has taken some years. He suggested three years later because of various implementation work that was needed to be carried out including some possible suspected discussions or closed negotiations with contracting parties which we obviously, in our scenario, we don't know about but we have them there as an example. I've assumed that we have the drafting of the relevant rules that would govern the UDRP max and would go alongside the policy that was developed in the PDP process. And one of the items that Malcolm particularly called out was the appointment of the new dispute resolution provider with a broader, non-trademark expertise because obviously the UDRP is a very specific dispute resolution procedure related to trademark issues and in this scenario, this is a new process.

So, we've got the policy being developed, the policy then implemented and going live three years later. And then if as I understood Malcolm's example, two years after that, Get Baked lose their domain following an adverse UDRP max decision and they wish to bring an IRP. But obviously at this point in time, we're now five years beyond the point where the Board approved the policy that developed the UDRP max. And so, what we're trying to establish is, does Get Baked still have access under the—is Get Baked out of time to bring an IRP or are there other actionable acts that could effectively set the clock running again? And so, I think my first question that I'm—I know we've got Sam on the call—we have Sam and Liz, so that's perfect. Was really just to understand that obviously we have the act of approval by the Board for—of the policy and formal adoption of it and that is clearly an actionable act at the time and within the relevant time period after that decision has been made. But is that the only actionable act in this scenario that Malcolm was setting out? And I think my understanding based on what Liz had circulated is that it's not but I'd like to, if I may, defer on that question to Sam or Liz. But I'm just noticing in the chat, Becky, you did just ask a question, how many UDRPs are filed each year? I'm not sure if anyone knows the answer off the top of their head. I'd say a few thousand, just as a guess. David?

DAVID MCAULEY: Thanks, Susan. I believe that as we are working in the RPM, I think WIPO as one of the UDRP providers went over the 50,000 case Mark and UDRP has been active for 20 years. So, that's off the top of my head, I believe that was a number and—but I think it's in the thousands. Thank you.

SUSAN PAYNE: Thank you, David. Well remembered. You're absolutely right. Yes. So, yes, a few thousands a year. Becky, does that matter? I mean, are you—is your question about—does that mean there could be thousands of IRPs? I'm not sure. I mean if you want to comment, please do put your hand up. Yeah. Carry on.

BECKY BURR: I don't know, maybe it was an overly flippant comment but it just seems like from a realistic point of view, the notion that something could happen that nobody would complain about within a reasonable period of a posting is pretty low. I guess I just—we're really in the weeds.

SUSAN PAYNE: Thanks, Becky. I mean we are and obviously these are hypothetical scenarios. It is intended to try and drill down onto the somewhat edge cases but I think to give people comfort, I guess, that no one's being denied justice. But certainly in relation to that particular scenario, yes. I mean, I think it's an issue for discussion, I guess, of whether if after a certain period of time the possibility of challenge by an IRP is something that we can feel comfortable with and feel that the opportunity has been there, I suppose is the best way to put it. Thanks. So, to circle back Sam, if you don't mind, am I right in thinking that aside from the approval by the Board of the original policy, that for the development of the UDRP max, we've got other actionable acts along the way?

SAM EISNER: Thanks, Susan. I think that's right. And some of the previous writings that we've shared with the IOT, we've explained but we'll assume that this UDRP max is something that comes out of the consensus policy development. And so, we have a consensus policy framework, even if it's not consensus policy, we still have an implementation framework that ICANN Org then goes through with community and there are some points in there for some fairly overt acts of ICANN that could serve as a basis for challenge, I think. So, the big one would likely be typically when we have a policy development process that's been approved and goes towards implementation, ICANN would then after it's done the work planning for implementation, would issue a notice about the fact that implementation is ready and people should expect for the policy to go into effect. So, that would be one area of act, if it goes towards changing the UDRP that the rules applicable or the supplemental procedures that are applicable to the UDRP providers, typically ICANN would also be involved in a process with those UDRP providers to confirm that there's been—that the rules are updated appropriately, so there'd be another type of act from ICANN. There also be interim steps in between probably as it relates to all the ICANN's work in implementing but you would expect to see that big final announcement coming is to show that you—to serve as an act for ICANN taking an act to perpetuate a policy that someone is alleging to be outside of ICANN's mission. And that could be multiple years down the road from the time that the Board approved the policy.

SUSAN PAYNE: Okay, thanks. Thank you. That's what I'd understood. And I think that's what—hopefully that's what we'd all understood from where our

discussions have been going. So, I guess the next question, theoretically, I guess, is at that point, can Get Baked challenge that policy at that point of implementation? In terms of, are they eligible, given that at this point in time they haven't lost their UDRP max? They're just a regular registrant.

SAM EISNER: I think some of that goes to—I assume that's to me.

SUSAN PAYNE: Yeah. If you don't mind.

SAM EISNER: Thank you. So, I realized I was just jumping in. I think that some of that goes to how they plead harm. So, there has to be material harm and I think that some of that goes to how the panel would consider how they framed their harm. If they haven't experienced the loss, the bylaws as I recall—and I'll grab them again. We talk about materiality but it doesn't necessarily require any level of financial harm. And Liz, jump in if I'm recalling this incorrectly. To that question, I don't know how a panel would consider the expression of material harm from Get Baked at that point because material harm is a requirement for standing.

SUSAN PAYNE: Yeah. Okay. Thank you. That would have been my assumption too. Okay. And so, then in Malcolm's scenario, we have a further two years having passed, Get Baked lost their UDRP max. Are they now out of time to

bring an IRP? Because the last act from ICANN was the, let's say the big final announcement that was perpetuating the improper policy. The notice that that implementation is going forward. I think the answer to that question probably depends on how long the period of repose is but again, I guess, this is a question for you, Sam, just so that we're all on the same page.

SAM EISNER: Yeah. So, I think it does go directly back to how long the period of repose is. So, there's Get Baked that in this scenario if it's two years and we have a one-year period of repose, then they would not be able to—we would consider them untimely in filing an IRP two years from the last act of ICANN on there if we're assuming that the act of ICANN that we're going from is the announcement that that implementation is enforced and that they've worked with the UDRP providers to implement the updated UDRP. But there's also the possibility that someone goes forward with a UDRP against Get Baked under those new rules within six months of the announcement that implementation is ready and if UDRP or if Get Baked then loses its domain name and not UDRP within—right after that, that would fit into a one year or a two-year repose, whatever, if we were going to expand the period of repose and I know that's something that we've talked about. So, there is the possibility of a meaningful challenge to—based on that ICANN act, it really just depends on when Get Baked experiences that harm. So, I think when we've been dealing with a hypothetical with a very long timeframe, it's just as likely that someone is impacted by that policy right after it goes into effect and there surely would be a much clearer

path for someone to bring a timely challenge under the UDRP based on that.

SUSAN PAYNE: Yeah. Thanks, Sam. Again, I think that's right. And it may be therefore that if we are considering the—assuming we are considering having this concept of a repose and I know that most in this group really are in favor of that, then we—and I think we've talked about this before, we may want to think about a time limit for the repose which we feel balances the competing interests if you like. And that perhaps 12 months is maybe not long enough and maybe we want to think about it being a bit longer than that. Malcolm?

MALCOLM HUTTY: Thank you, Susan. I was just wondering about materiality here. The bylaws say that they should be available to be used—the IRP should be available to be used to make sure that ICANN doesn't engage in breaches of its bylaws. And that they are intended to provide not just a community protection but an individual protection as an alternative to litigation in ordinary courts. If we go forward with this repose, then the potential complainant is losing the benefit of that protection. The protection that was pretty fundamental to the community's willingness to allow ICANN to leave the oversight of the U.S. government. Which seems to be a difference in jurisdiction there. By jurisdiction I'm [inaudible] a little loosely but essentially, you're moving from a state where you are subject to ICANN in a rules-based system or subject to one in which ICANN is allowed to not obey the rules, its own rules,

because we apparently want to bless continued breaches of the rules so long as they've been carrying on for long enough.

So, I'm wondering if the mere act of passing from the rules-based to the lawless ICANN is a circumstance which itself could be a material harm. Any registrants in this circumstance at the point at which they might otherwise lose under the doctrine of repose, the right to bring a challenge, is faced with material harm at that point because they—not because they've lost their domain under this policy, but because they'll be subject to a policy that they would have no right to challenge which if they don't bring it now rather than one which they have the right to challenge. So, I'm wondering if that would actually constitute a material harm in itself. Sam says that that's what the EC powers are for but this is governance. That's confusing the idea that this—that the IRP is simply there as a mechanism in ICANNs governance but it isn't totally that. It's an individual right as well. It's an individual protection which the EC powers are not. And so, clearly the community might be collectively protected by EC powers but the individual entity is not and so they're losing the benefit of that protection. I'm wondering if that could be a material harm.

SUSAN PAYNE: Thanks, Malcolm. It's certainly an interesting concept. And it would then allow—that does then envisage the notion of an individual company who could be harmed. They're putatively harmed in future, aren't they? And so, I think that's what Sam was saying when she was talking about it comes down to a question of how it's pleaded to some extent

MALCOLM HUTTY: The downside of this, of course, is that instead of extending the potential to bring such a challenge in narrow circumstances but extending it in time in order to ensure that it is closed in time, it is extended essentially to the whole world as a result because everyone suffers from ICANN no longer being challengeable. I'm not sure whether that's better but it might be where this doctrine of repose takes us. I restrain myself from adding adjectives there but the doctrine of repose.

SUSAN PAYNE: Okay. Thanks, Malcolm. I think we have two hands up who may well have been pondering on the point that you raised. So, David.

DAVID MCAULEY: Thank you, Susan. I have been pondering on the point that Malcolm was making but I'd also like to first just begin with the defense of the notion of repose and I'm not going to surprise anybody by saying that, we're in a difficult area. In my opinion, it is somewhat opaque and we have to make our best way through it. I believe that we have moved off of the original draft 12-month capped repose. And I think we've been talking in terms of maybe there'd be a two or three-year repose. In either one of those, I would like to second what I think Becky was getting at earlier, that is, with the Get Baked and with perhaps any example we can come up with, we're dealing with a really, what would be called an edge case, a corner case or something that's just completely rare. It's good, I guess, to have the discussion conceptually but this example presumes that a policy to pass judgment on content would get enacted and would not be

challenged within a period of repose of two or three years. It just strikes me as being odd.

Having said that, I still believe that this as an edge case, my answer would be, yes, Get Baked would be unable to bring an IRP. And what I'm trying to support is the notion of certainty and predictability which I think a repose period would serve and I think we're entitled to [enact.] Now, I said I would comment on Malcolm's point. One of the difficulties in the bylaws is that they were written very quickly by Sidley Austin, they had to be in order to get the IANA transition done, and they lead to some interesting arguments. But to the point that Malcolm was making, let me just mention that bylaw 4.3P gives the power to an IRP panel to issue interim relief. And that can be interlocutory relief, it can be declaratory relief. It can be possibly a stay, a request to ICANN's Board to stay in action. The interesting legal question that could keep lawyers going for months and months is, who can ask for interim relief? Well, under 4.3P, a claimant can ask for interim relief. Who can be a claimant? A claimant is someone who is materially affected by an ICANN action. So, if it requires an action to be a claimant and yet you can request that ICANN stay an action, we can see that the bylaws leave us with interesting arguments that could go on and on and on. So, from all of this, I think we should construct rules that say, "There would be an ultimate repose period of two years or three years, whatever the group agrees and we should try and clarify, I think what is meant by interim relief." Thank you.

SUSAN PAYNE: Thank you, David. Scott?

SCOTT AUSTIN: And Susan, first of all, I apologize everyone. I'm in a restaurant and I did not have an opportunity to be able to move because of a meeting I couldn't get out of so there's background noise. But just quickly to note, I concur with David that I believe there needs to be, for purposes of finality, which is reference is one of the benefits for statute of repose in the materials that I sent around to the members of this group. And I think that the two or maybe three years given the concerns that have been raised in the various debates, there was also talk at one point of whether or not it solely is the sanctity of a statute of repose to add a—we called it the—I don't know, failsafe or a relief valve, a pressure relief valve, so to speak, Kurt, had raised. If that can be incorporated into a statute of repose or if that's something that's more related to a statute of limitations, I leave it for the group to decide. I think lawless is an extremely strong term and I disagree with that being applied in this context. But I do think that there needs to be some determination made and I think that there are other options that would be available, whether it's the courts or whether it's as has been suggested by David within the bylaws themselves that could be taken for the panelist to act if something does appear to be in fact lawless in the way that the ICANN is behaving. Thank you.

SUSAN PAYNE: Thank you, Scott. So, Sam, Malcolm has put in the chat that he'd love to hear your views on 4.3P and comments that it appears to him to offer forms of relief on an interim basis that are not available on a final basis. I don't know whether that's something you're comfortable to comment

on the hoof. You may feel that that's putting you somewhat on the spot but if you had any views on that that you do want to share, please do.

SAM EISNER: Sure. So, I don't think that 4.3B is necessarily inconsistent with the powers that the panel has at the end. What 4.3P does is it creates the ability of a panel to stay actions which, Malcolm, you're correct, like the panel at the end doesn't have the power to tell ICANN that it can or cannot move forward with an action that it's already taken. What 4.3P does, it's a concept that's very common within litigation. It's a desire to maintain the status quo to keep from additional harm from being rendered while the panel is considering the outcome. And so, if the claimant alleges that an act of ICANN is against the bylaws and that there's harm if that act moves forward and that ICANN shouldn't be taking any further movement towards that and that's an element of emergency relief, right? That ICANN shouldn't continue acting on that until the panel's had the ability to say yes or no, that's within the bylaws or not, that's what the interim relief is for. And so, it's not—because it's interim in nature, ICANN has agreed that a panel can tell it or the emergency panelist can tell it, stop doing something for now, but that will get resolved. That interim direction will cease being in existence once we issue our declaration or possibly at a time before that. But it is a preservation of status quo that's a very—it's a frequent concept used within litigation, at least in the United States. We see it used either for temporary injunctions. That's a typical phrase we would use here in litigation.

SUSAN PAYNE: Okay. Lovely. Thanks, Sam. That's helpful and clear, I think. Okay. I'm not seeing any other hands. Are there any other views that people want to express on this? Otherwise, I feel that we as a group have talked around the notion of whether it's appropriate to have a repose or not for quite some period of time. I know that not all of the members of this group are supportive of it, quite clearly. But overall, it seems to me that the most of this group can live with or positively support putting in some period of repose provided that we build in some safeguards around how long that repose period ought to be. And the safety valve, that Kurt proposed safety valve that we keep coming back to. Does that sound fair? And I can see that Greg has a virtual hand up, so Greg?

GREG SHATAN: Thanks. Can you hear me?

SUSAN PAYNE: Yes.

GREG SHATAN: For some reason, I can't find the place to raise my hand, even though I've never had that problem on desktop before. It's under reactions. Well, I never thought of it being that reactive or proactive but, in any case, found it. So, I am comfortable with where we're ending up. I thought the original repose plan was too quick. We were burying things before they really should be buried. And now I think we have created enough length and other controls around this that while it is not a time unlimited right or an otherwise unlimited right, there is I think more

time for fundamental fairness to complainants at the same time. I see fairness to the overall process of policy development and implementation. And I think that we've reached perhaps that magic point where everyone is slightly disappointed and some people are maybe mostly undisappointed and some may be terribly disappointed but by and large, everyone is reasonably satisfied. At least I feel that's where I'm at and what I'm hearing from all but Malcolm and while I feel Malcolm's pain, I don't think that we are descending into lawlessness. I think we are—this is I think an aspect as was mentioned about U.S. procedure at least which I know best. It's an aspect of the rule of law and there has to be some time at which your civil procedure teacher in law school, assuming you go to law school, looks at you and explains a fact, a hypothetical and indicates that the answer is so sad, too bad. So, it does come up eventually because there were other unfairness that result from perpetual openness. And I think we have achieved something reasonable here. Thanks.

SUSAN PAYNE: Thank you, Greg. Kurt?

KURT PRITZ: Thanks very much. I think I have two things to say. One is, I think we need to think about unanticipated consequences of having an infinitely long period to lodge an IRP. And so, one I can think of where there's a real-world example is that ICANN will in some way have to protect itself against an unforeseen litigation going on through years and years, the risks of that and so they will have to establish a fund to protect against

that. So, it's likely that that would take away from resources that can be used much more constructively elsewhere in the DNS community, the money that's harvested from the registrants for this purpose. And a real-world example is that ICANN sitting on, I don't know the exact sum, but tens of millions or $100 million dollars in overpaid new gTLD application fees waiting for the risk to run out and so that they can refund that money in whichever way it's been determined it can be refunded.

And with infinite repose, that money that was essentially overpaid by the gTLD applicants can never be paid back because there's always going to be a risk that a new gTLD applicant will find an IRP reason, and I think this logic extends to other examples. And I personally think—and one of the reasons I joined this—requested to join this group is that the purpose of the IRP is not to future-proof against all bad behavior of the Board. It's to settle disputes between two parties, ICANN and somewhere else. And there's no real other forum or mechanism in ICANN's quiver. The reconsideration request methodology doesn't get to anything substantive. The ombudsman really doesn't. So, I joined to make this IRP the cheapest and rapidest way possible to resolve disputes that people have with ICANN. And so, I would resist trying to make it a broader forum for justice and focus on the person versus ICANN Board scenario. Thank you.

SUSAN PAYNE: Thank you, Kurt. Malcolm?

MALCOLM HUTTY: Thank you, Susan. I would just briefly reply to Kurt that I think he misunderstood when he said that, if we don't have repose, then there would be an infinite time of challenge and the risk would never settle and you would never be able to return that overpaid money. Nobody, nobody at all has argued that there should not be a time limit on filing. No one's made such a suggestion. We are talking about people who are filing as soon as they are able and are still told that they are out of time because the deadline expired. That's what repose means. It doesn't mean an infinite time. Nobody is arguing for an infinite time.

They were arguing that the window should not close before it's ever been opened. Arguing only that the time for finding is supposed to prevent people from sitting on their actions and doing nothing about them and holding them over ICANN's head like a Sword of Damocles indefinitely, as Kurt just said, that's the purpose of a time for filing. We all support having such a deadline to provide that to finality just as Kurt was just referring to. But the doctrine of repose does something very different. It isn't about providing finality. It's about excluding the possibility of challenge at all. It's essentially a back door route to change the standing rule, which we have absolutely no authority to change.

So, Kurt was misstating the opposition to repose [inaudible]. Maybe I [inaudible] but that was not an accurate statement of my position. No one is arguing for an infinite time to file, only to protect the fundamental principle that those that are harmed, if they act promptly, should be able to have that challenge heard which is iterated again and again and again in the bylaws as in 4.3 as being the purpose and the intent here, and that this doctrine that we have conjured from whole cloth has no basis in that section and runs directly contrary to what we

were instructed time and again. So, if we're going to do it, well, I've said what I can to persuade you otherwise, it seems that I have not been successful. Maybe we'll have to move this to another venue.

SUSAN PAYNE: Thanks, Malcolm. I do appreciate your comments. We all are trying to find a reasonable path forward that I think as Greg says, "Certainly isn't what everyone would prefer." And I guess we're endeavoring by—if we go down this path and build in some safeguard by which one could make a request to the panelist for the right to file an IRP out of time, that is the safety valve to try to prevent a genuine miscarriage of justice. I do have a question for you which I will come back to you but I can see Scott has his hand up. So, I think I should go to Scott first.

SCOTT AUSTIN: Thank you very much for doing that because I want to make sure I remember the things that I've heard quickly. And Malcolm, I think that there is a compromise here and I think that that was the reason that I felt the distinction is in the definition of the term repose versus statute of limitation. The statute of limitation, as I understand it and that's why I sent the materials I did, I believe is based on when the claimant becomes aware. The starting point is when they have knowledge of the fact that they have been injured of their damage, the damage has occurred, whereas the statute of repose doesn't care about that. It starts at the time the policy is adopted, not at the time that someone down the road, as you've eloquently put in your hypothetical, determines if they've been injured by this policy.

And so, I think that it may be in what we are saying. It's not the length of time. It hasn't to do with infinite aspects. And I do think finality is important whether it's based on a statute of repose which has a hard starting date related to the policy, as I understand it, the adoption of policy to be more accurate, versus a statute of limitations which basically says, "You can't sit on your rights once you know you have them any longer than a certain period of time." And that's, I think is a distinction that's meaningful if it would help to reconcile the two positions here. That's sort of I'm going to have to get off and let you respond. Thank you.

SUSAN PAYNE: Thanks, Scott. Malcolm, did you want to speak or are you happy with what you've put in the chat?

MALCOLM HUTTY: I think Scott's alternative would be an important and useful distinction for us to attend to. I think it would help.

SUSAN PAYNE: Okay. Scott, could you restate that so that we all can appreciate the difference? If you don't mind.

SCOTT AUSTIN: Sure, I'll try and do it. Again, I apologize for being outside now. I've tried to move away from the maddening crowd at the restaurant. The distinction being that the statute of repose has literally a hard starting

date that has no relationship to the injury itself or the awareness of the injuries. Probably a better way to put it, the knowledge of the particular claimant, knowing that it has been injured, it's been harmed somehow by the policy as adopted. The repose begins, boom, the policy has been adopted, you now have three years. Well, you may not even exist yet as a would-be claimant but this policy has been adopted, that's just the way it is. And I can understand and I certainly share Malcolm's concern and as I said, I think that hypothetically, squarely basis that potential and sitting here today we cannot perceive that three years would handle all of the various potential claimants and injuries that would arise based on particular policy.

On the other hand, there's a moving starting date on a hard starting date with the statute of limitations. The idea being that the moving starting date is based on the individual claimant's knowledge of their injury—of their damage. And then it is incumbent upon that claimant to act upon that injury within a certain period of time. Again, perhaps three years, perhaps two years, the idea being that once they have knowledge or should have knowledge then—that's a whole separate argument, but let's say for now has knowledge, then the gate is running. And that's one of the—I mean, lawyers live by that because one of the first things, when a new client, prospective client calls in is well, let's assess these facts and determine what law applies because that law may have a statute of limitations that is about to run. That is about to—you're at the deadline and if it's not [inaudible] because of some unforeseen circumstances or certain circumstances beyond their control, then that time period is going to pass and you will no longer be

able to have standing. You will no longer be able to go into court based on that claim.

But the point is, they're not suddenly looking up and saying, gee, 10 years ago that law was passed and I realized that it's been violated and it's injuring me but I can't do anything about it but it's too much time [inaudible]. Now, that's the kind of thing that I think they talk about in some of the materials I sent around about defect in a particular technology when it comes out because again, manufacturers want to know that, hey, this thing's going to be used for 10 years, we're not suddenly going to have a class action suit based on all of the parties that have been injured through the use of it. So, that's the kind of thing that gets statute of repose, whereas certain claims for torts, if you're injured in a car accident, then there's a particular period of time or injured, for example, by malpractice because the lawyer didn't do what he was supposed to do. There's a particular period of time based on the acts that supported that—of that injury. So, that to me is my understanding of the distinction. I hope I've stated appropriately so it can be understood. Thank you.

SUSAN PAYNE: Thanks, Scott. I would like to circle back to that but I can see Kavouss has his hand up as well so, Kavouss, first over to you.

KAVOUSS ARASTEH: Thank you, Susan. The problem is that people always talking from concept, one concept, to other concept, tens of concept. There has been no concrete proposal in a written way, proposal one, 5 or 6 or 10 lines

but [inaudible] of concept, philosophy and so on, so forth, we are turning around ourselves for many, many, many meetings here. This is not a well conducted discussions. I'm very sorry to say that because every time we have a new idea, there was one person in the center of everything. I don't want to name that. There are other people talking of concept but there is no concrete proposal. Alternative one, alternative two, and so on, so forth. I made one but nobody followed that and then we are talking of a new one. Every day a new one. Now becoming like some of the ICANN meeting. I don't want to say which one that is at the 70 workshop and then at the end of the day we have nothing. No conclusion and no output and no way forward. So, we need to have concrete proposal. Please kindly I appreciate all your effort, what you're saying, good thinking, but put it into concrete proposals. Every time we're having new proposals. I think previously it was better conducted up to now. I don't understand that. I'm about to be disappointed with the way you're working. Sorry. Thank you.

SUSAN PAYNE: Thanks, Kavouss. I'm hoping you aren't about to be disappointed. I'm hoping—or at least I was hoping when I had no further hands up—that we could move to having exactly as you suggest something in writing. And I was going to ask Sam and Liz if they wouldn't mind taking the pen and trying to craft something that reflects what we've been discussing, namely that we retain a period of limitation which is the 120 days that we have been talking about, that we do have a period of repose. We do need to consider whether that is more than 12 months. I think the group generally, as David had indicated, I think we had coalesced around something that would be longer than 12 months. And that we also try to

build in the safety valve of an application to the panel by a claimant for the ability to bring an IOP out of time in certain limited circumstances where—I'm sorry, I've forgotten the wording that was being suggested that originally came from Kurt. And I think that that would at least give us something to review as a potential way forward or by albeit recognizing that we appreciate that Malcolm is not supportive of that notion. I would say I was under the impression that Scott was supportive of that approach but I'm less clear on that since his intervention. And it's something that I did want to explore just to understand better whether Scott is now expressing a different view to the one that I thought he was expressing. But first, I see you have your hand back up so I will come back to you, Kavouss.

KAVOUSS ARASTEH: Yes. If you allow me, I want to be more specific. We have three issues. 120 days. Do we have any problem with that? One. Two, repose. One year or one year above, 18 months, two years but there is no unlimited. Three, specific applications for the case that Malcolm raised before. So, we have three issues. Let's us take it one by one. If you have no problem with 120 days, take 120 days as at least provisionally agreed. Go to the repose, one year plus and how much is the plus? Six months? 24 months? And there is a cap, not more than three years. So, we have to find something between one year and three year. It's not difficult with advantage and disadvantage. Then a specific application, specific cases which could be treated specifically and on a case by case. So, I think discussion should be around these three things but not going to find this philosophical description and so on, so forth. All of you are knowledgeable. The only stupid person is me, that I don't follow you.

Really, I don't follow because you're turning around from one to the other one. So, if it is three subject, around the three subject, 120 days, put it aside. One year plus up to two years or up to three years, then a specific issue. Take them one by one, [distinguished,] but not going round and round and round. I'm very sorry. I apologize to everybody but that is the way that I'm thinking. Thank you.

SUSAN PAYNE: Thanks, Kavouss. I don't believe that we're on a different path here. That is, I hope, where we are going with this and what, as I said, I was hoping having given people the opportunity to air their views, that we were going to ask Sam and Liz if they would please try—if they could come up with some suggested wording for us that captures exactly what you have said. Now, we do, I think, have to agree as a group if there is to be a repose, what that period of repose is, and we haven't agreed it. I think we do have agreement that it should be more than 12 months in order to provide a degree of fairness. I think perhaps to—in terms of what had been input during the public comment period, I think generally—I'm trying to find my notes from the comments that we received previously. There were relatively few comments on this, obviously but we had a range of proposals from different parts of the community with some saying 24 months and some saying 36 so two years or three years. I think perhaps two years seems to be a more appropriate compromise on that provided that we are then going on to talk about the tolling of time limits to ensure that someone isn't out of time purely because they've been experiencing or taking part in another accountability mechanism. So, I think I would propose to the group that we have a

repose period of—or that we have as a proposal a repose period of 24 months. Are there objections to that? Okay. I'm not seeing anyone.

MALCOLM HUTTY: New objections, you mean?

SUSAN PAYNE: Yes, Malcolm, obviously. I appreciate you.

MALCOLM HUTTY: I'm not trying to be deceptive, Susan.

SUSAN PAYNE: No, I know. No. I appreciate that. Absolutely. I was not seeking to argue that you now have given up your objections.

MALCOLM HUTTY: No. I know you wouldn't but I must be careful with the record because the record has been used against me already when I sought to be constructive in the way that business was handled when it was being decided against me.

SUSAN PAYNE: Very good. Okay. But we're on the same page. We appreciate that obviously you are objecting to the repose whether it be 12 months or 36 months. Yes. Scott?

SCOTT AUSTIN: Yes. I don't want to leave a sense either that I'm being deceptive or changing my views, etc. And I appreciate Kavouss reminding us that we do have a job to do and we need to get things into a position where we can decide and not endlessly go over the philosophical concepts presented here. My position, I would be in favor of such a repose that was at least 36 months. I think that that would give people and ICANN a chance to see a particular policy play out if there's going to be something as draconian as an actual—a full bar. Secondly, as far as statute of limitations, I think that's what the four month is supposed to be. But my concern would be with the start date and how that's determined in terms of knowledge or should have known those kinds of concepts, that would be my only concern there. And finally, as Kavouss has considered the third one, essentially, I believe is the safety valve or there is exceptional circumstances. And I think that's in some wordsmithing that we're going to see when it comes back from Liz and Sam. Thank you.

SUSAN PAYNE: Thanks, Scott. That that's very helpful. Thank you. And thank you for—possibly I was misunderstanding you so thank you for putting me straight. Okay. So, we have certainly Scott, I think favoring 36 months. I mean, perhaps we can circle back to what the duration of the repose should be whether it be 24 or 36. But perhaps if as a starting point, Sam, is it okay for me to suggest that perhaps you and/or Liz could have a go at trying to capture where we're reaching agreement so that we have some actual wording that we could look to on the next call?

SAM LEISNER: Yes, that's fine. Thank you.

SUSAN PAYNE: Thank you. Okay. I think you raised a very good point, Scott, about the knowledge or when does the time run from and I think in some respects it may depend on the particular circumstances, the nature of the dispute, if I can put it that way. In the past, under the old rules, timing's run from the publication of the minutes of the particular Board meeting or the like.

SAM EISNER: That's correct. I think it was 60 days.

SUSAN PAYNE: Yeah. And can you correct me, am I right in thinking that that wouldn't have changed, Sam, in the case of—if it was something like the adoption of a policy that someone was wanting to challenge. It would still effectively be from the publication of the Board minutes, would it not?

SAM EISNER: That's right.

SUSAN PAYNE: And in some other circumstances, it may be that there's—where it's a decision in relation to say a particular TLD applicant, a decision would be

made but it would still be something that would be—where there would be a published decision, whether that be a Board decision or an action that staff have adopted. Again, am I right? I'm talking off the top of my head here, Sam and I'm hoping you're going to correct me and help me out.

SAM EISNER: Well, so Susan, you're pointing out that the whole of information that led us into this conversation. So, during the accountability work, it was decided that the IRP should no longer solely be limited to acts of the Board, which that timing was timed from the publication of the minutes, and that it should also go to acts of Org. And so, we had no timeframe from which to do that and we recognize within the CCWG discussions that we couldn't keep the same timing that was in the bylaws because Org doesn't produce minutes of its decisions, right? It's not the governing body in that way. And so, that's why the issue of how long there was to file was moved into an implementation discussion for the IOT.

So, we saw during the IRP as it existed before 2016, we saw many IRPs being raised that weren't necessarily about Board decisions but were more so about things that more likely were classified as Org. So, in that way, I think, updating the IRP actually makes it a much clearer process, right? It makes it clearer for the claimants and everyone to be able to state an IRP and not go through the logical hurdles that people were jumping through to try to tie it back to an act of the Board. But that created that void of, we didn't have any meaningful timeframe defined yet for how to identify when someone should file after an act of org. So,

in this way, you're seeing a large expansion of the timeframe from which you can challenge an act of the Board and a new definition of the timeframe for when you can challenge an act of Org because we never had a timeframe before. But people would try to get it within the 60 days of a last act kind of thing, as they were trying to impute other actions to the Board. So, on the whole, this appears to be a very large expansion of time which it's fine. It's where we're going as a community.

SUSAN PAYNE: Thanks, Sam. So, yes, you're right to correct me. And hence, that's why I guess the bylaws now refer to it being the claimant knowing or reasonably ought to have known about the act or the decision because it's by reference to when they had actual knowledge or when any reasonable claimant really ought to have had knowledge. Yes. And I'm wondering whether perhaps that we could assist claimants including potentially claimants who are outside of the ICANN community and not perhaps following everything that ICANN does on a daily basis, if perhaps there's scope for this group to give some guidance about, there should be a place where decisions get published or something of that nature. Again, I'm thinking off the top of my head. I would welcome people's thoughts on this. And I can see Kavouss has his hand up which may be unrelated but, Kavouss.

KAVOUSS ARASTEH: Yes. I have a little bit of concerns about what Sam said, very large extension. What is large and what is very large? This is something that ... Then the other thing that I have, we are thinking of one side of the case

claimant, but what about the other side? We are always defending claimant but they should defend the other side [inaudible]. So, we have to see that who are the other side of the issue? Claimant and the TLD but on the expense of whom? So, we should not unilaterally help one side, we should help both sides. Moreover, all of these issues were substantially and extensively discussed in CCWG and it is recorded in the minute of the meeting or in the output of the meeting. We have to go to that one to see, we don't want to start a new discussions and having something totally new. Something on which a discussion has been closed, reopening and reviewing everything. So, we have to see as someone says that to find some way, I would say the massaging the time or tweaking the time or adjustment but not saying they're very large and so on, so forth. So, I would like that Sam clarify what she mean by very large extension. Thank you.

SAM EISNER: Susan, would you like me to go forward?

SUSAN PAYNE: Yes, I would. And I was talking on mute. Sorry.

SAM EISNER: Thanks, Kavouss. Please don't read too much into my use of adjectives. It is an expansion of time and I'm not trying to create any judgment as to whether or not it's too large of an expansion or not. We've agreed that it's appropriate to expand the timeframe from which someone found out that they were harmed or believes that they were harmed to when

they can file an IRP and from ICANN Org, we support that. Just to clarify, the prior filing requirement was actually within 30 days of the publication of the minutes that typically wound out to be between a 60 and 90-day window based on our minute preparation timing. There was a fixed period of 30 days from publication of the minutes. However, you typically would see that full window from the act of the Board through the time that that IRP window would close or the time for filing IRP would typically be around 90 days. Sometimes as long as the 120, sometimes as low as 60 so this also gets a little bit more predictability to that process because it's not a floating window anymore.

SUSAN PAYNE: Thanks, Sam. And Kavouss, if you wouldn't mind, I just want to try to understand one of the points that you were making when you talked about us having to be aware of and safeguarding the interests of the other side of the issue. And if you wouldn't mind, are you able to clarify what you meant by that a little further? The reason I ask is just because this is the IRP process, the other side of the issue strictly speaking is ICANN. And obviously ICANN is aware of the decisions it's been making and so on. And so, I don't see that we need to be safeguarding ICANN in the context of making sure they're aware of the decision but I think maybe you have in mind third parties who may also have an interest in the outcome of an IRP but I wonder if you could clarify.

KAVOUSS ARASTEH: Susan, exactly what you said. I am thinking of the third-party not of the ICANN. Yes, ICANN also, I am in favor of not to close the hand of the

Board and so on, so forth. But I'm thinking of the probability of likelihood of the third party. So, whatever time we decide should also take into account that occurrence or probability of the third party. So, we are independent here. We, the "I" of the oversight team, we should think of everybody and we should have a totally neutral and impartial way but not one side, not protecting the third party totally and not protecting the claimant. We have to find something which suit everybody but no doubt you have to also think of ICANN and we have to have the—I would say conscious and mindful that normally ICANN would decide appropriately according to their bylaw, according to the mission, according to the feelings and actions, according to many things, and we have the possibility to object to the decision that they have made which was [forced in bylaws.] So, I was thinking if you want exactly of the third party, [should] this timing would impact of a probable or likelihood of the interest of the third party or not. Thank you.

SUSAN PAYNE: Lovely. Thanks. Thanks very much Kavouss for clarifying. Greg?

GREG SHATAN: Thanks. And I think Kavouss raises an interesting point here but I do in fact think that we have been thoughtful or thinking of the third party. Obviously, the third party can vary significantly based on the facts of each case and there can be different third parties that are situated differently. I think in the most high-level way, there are going to be third parties who depend on having expectation of—are pleased with the ICANN policy or decision that is being potentially challenged so they're

happy with the status quo. They would like to have the ability to rely on the ICANN action that has taken place and may be that many people would like that. Of course, we have no way of knowing whether a decision is one that a few would oppose and that others would not or vice versa. There are also going to be third parties who are more similarly situated to the complainant whose interests will be more aligned with the complainants.

And then we have the interest of the, if you will, the multi-stakeholder model and those who have sat in and created the policy and worked on it, who have a certain interest in believing that they in good faith arrived at an end result which has now been adopted and they have an interest in it as those who have devoted themselves to try to find what they thought was the right answer, for talking about a policy that came out of the PDP, I think there are interests there. So, I think that we have—clearly when you're talking about a statute of limitations or repose, we're talking about cutting off the complainant's rights.

So, we do tend to focus on the complainant unduly but I think there's two sides to every coin. And for at least those third parties who would benefit from repose or who benefit from the rule as it is and those who created the rule as it is and those will believe that it's appropriate, now they are all in essence—their interests favor repose. So, we are trying to balance their rights there and ICANN's rights and interest as well. Fortunately we have ICANN's rights and interests or Org's rights and interests well-represented. But I don't think we are neglecting the third party. It's kind of a seesaw. There is another body on the opposite side of the seesaw and it really isn't ICANN. ICANN is, if you will, the hinge

that causes the seesaw to go one way or another or that causes it to balance.

So, any action that keeps things alive or keeps a challenge alive to an extent disadvantages those who are hoping to depend on, if not, of certainty and finality. And of course so much of this can always be changed not only by adversarial means but also by future PDPs depending on what the topic is. So, I feel confident that we have looked at a variety of different viewpoints and actors here. Lastly, I would say that I have a general positive feeling toward the 36-month proposal but I don't want to jump the gun on that. Thanks.

SUSAN PAYNE: Thanks for that, Greg. It's a very helpful thing for us all to bear in mind and I think you're absolutely right. I mean that's essentially why we are having this conversation about repose at all because of the desire, not only to balance the fairness to the claimant or the potential claimant but also recognizing that as you say, there's someone else, quite often someone else or some number of other parties on the other side of the pivot who are disadvantaged to the extent that there is not certainty and there is continued prospect of challenge. And so, that has been underpinning the reason for I think this notion of a repose and the discussion that we've been having.

Okay, I'm looking at the time. It's probably at this point, I think relatively good time to wrap up. Not wanting to cut people off, but I'm not seeing a queue of hands. And so, I think we have a path forward where Sam and Liz are going to take a stab at some language for us. I think as yet,

we're not completely decided on whether the period of repose ought to be 24 or 36 months. I think we'll revisit this but so please give further thoughts to that and I think in doing so, we'll be trying to bear in mind this need to balance the interests of the opposing views, opposing parties, if you like, the third parties who are impacted by the change.

We haven't spent more time discussing the notion of tolling of time periods to allow the time—the clock to stop running or not to start running until something like a request or reconsideration has finished or cooperative engagement and negotiation discussion has finished. I think we can come back to that on our next call but hopefully I did my best to pull out the different timings for those procedures which I hope is useful to have in mind when we're thinking about what are we tolling for and why do we think we need to. And I think it's most clear in relation to the request for reconsideration where very clearly a standard RFR process could see you out of time to bring your IRP and I don't think anyone feels that that's in anyone's interest. I'm putting words into all of your mouths but we had some discussion on this last time and I think generally felt that fairness was not served by that. So, that's me. I've finished wrapping up but I have noticed Kavouss, you have your hand up and apologies for not coming back to you sooner.

KAVOUSS ARASTEH: Yes. I don't want to delay the wrapping up the situation but I would like to say that the three issue I have raised and I think you have to talk to them one by one, whether for the first 120 days maximum, we have still problem. The second is the repose. For the repose, I suggest that they put X months and then repose have two period X1, automatic repose, 12

months, 16 months, 18 months, and another repose which is subject to a specific situation with sort of the justification. And the third issue is the policy issue that the ICANN policy may raise difficulty for the people which may not be fit probably or perfectly within the repose time.

So, if you could divide these three issues and not jumping from one to the other, we may better address the matter. So, can I suggest that if next meeting, we talking about repose, where there would be X months, yes. And what do the X without specifying the X saying that X1 is automatic for everyone and X2 which is there for a specific case based on justification but totally X1 plus X2 should not exceed X and then we start. If we have X1 12 months and for X2 wait between, I don't know, six months plus or 12-month plus become 24 or maybe 12 months plus 12 months become 36. But at this, they have to have the structure and discussion and so on, so forth. X1 and X2. Thank you.

SUSAN PAYNE: Thanks, Kavouss. We can certainly consider that further on the subsequent discussion. Okay. All right. I am not seeing any further hands, just a reminder that despite what it says in the agenda, our next call is going to be in three weeks on the 1st of June but in that 19:00 UTC time slot. Bernard and I will take a look at the upcoming calendar and timing of ICANN meeting and so on to work out when our following call after that ought to be so as not to lose too much ground. Thanks very much everyone for—hopefully what you found a useful discussion, I think. Appreciate the frustration but we are making progress. Thank you all. I think, Brenda, we can stop the recording.

[END OF TRANSCRIPT]