

Zoom Chat - IRP-IOT Call #74 | 20 July 2021 @ 17:00 UTC

00:31:53 David McAuley (Verisign): It does seem unusually busy for summertime

00:33:52 Becky Burr: Greetings all, apologies for joining late.

00:45:26 David McAuley (Verisign): maybe just think of 'subject' here as action or inaction

00:45:59 Kurt Pritz: Sorry for joining late

00:46:44 Mike Rodenbaugh: Another example is when ICANN takes "No Resolution". As in a recent RFR I filed.

00:47:02 Sam Eisner: (A)for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

(B)for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action; or

(C)for requests challenging either Board or Staff inaction, within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

00:50:42 Mike Rodenbaugh: True that resolutions are posted, but haphazardly and without formal public notice — that is the problem we should solve.

00:51:33 Mike Rodenbaugh: How to alert the community promptly when and where resolution or other decisions are posted??

00:51:52 Mike Rodenbaugh: And bind ICANN to a process for that notice.

00:51:53 David McAuley (Verisign): But no one would know a decision relates to IRO until a claim is made - hard to have a gazette IMO

00:52:08 David McAuley (Verisign): IRP, that is

00:53:42 Sam Eisner: Resolutions are posted within 2 business days of Board action, under the Bylaws, and are always available on the Board materials page on ICANN. The improvements coming with ITI will enhance the community's experience with receiving notifications on Board materials. Also, I provided this as an example of how we are working to express the timing, and it's not clear that the resolution posting itself is the proper timeframe for an IRP

00:55:28 Sam Eisner: IRPs in the past have been timed from the availability of minutes, not from resolutions, because of the additional information likely available within the minutes regarding the Board deliberations

00:56:33 Scott Austin: Agree with Mike and have past IRP proceedings demonstrated that resolutions are always in the same place. What is evidence of inaction. It presumes there was a prior conduct, filing or action that presumed or obligated or created a duty for a subsequent action that did not occur.

00:57:01 Scott Austin: That is published in the same place.

01:02:44 Mike Rodenbaugh: Minutes are posted much more haphazardly, often weeks or months later

01:03:17 Mike Rodenbaugh: With no public notice whatsoever

01:04:56 Sam Eisner: Minutes are posted within 1 business day of approval, which typically happens at the subsequent meeting of the Board. The improvements with ITI will assist in tracking postings.

01:06:24 Mike Rodenbaugh: CEP tolls time for filing IRP now, but only per ICANN case by case agreement

01:09:55 Scott Austin: I appreciate Malcom's concern but thought this proposal had already taken any prior analysis into account so this change was considered needed by ICANN and the group. A canon of US statutory construction is when Congress is silent not to read into that anything. Is there legislative history of the framers of the Bylaws consideration of this subject and dismissing it along the lines Malcom suggests or did they never consider it.

01:13:02 Mike Rodenbaugh: 'Restart' dates on this slide must add at least 30 days. So e.g. if RFR was filed on last possible day, then claimant only has zero days to file IRP, upon ICANN's unpredictable, unilateral action

01:13:46 Mike Rodenbaugh: It is a real concern

01:16:25 Malcolm Hutty: @Scott The bylaws are not silent. They set out the basis on which the time for filing rule must be met.

01:18:18 David McAuley (Verisign): Scott, Malcolm makes the case very well that there can be no prong two. I have been on the other side of the issue, however, and have been of the view that prong two is fully justified

under the bylaw. I have made that case in meetings and also mentioned it in an email a while back. I will try to find that mail and send you a copy. It may be over a year old, but I will try to find it. And others may have other views, but the issue has been a difficult one for us.

01:21:31 Malcolm Hutty: I can summarise briefly if it helps. You argued that the fact that the bylaws specifies that the time for filing shall be based on knowledge of the harm doesn't prevent us creating a deadline for filing based on some other time, as an independently controlling requirement.

01:23:49 Malcolm Hutty: That is not consistent with any canon of statutory construction with which I am familiar. If a law says "Anyone who drives through a STOP sign without stopping is guilty of an offence", that doesn't authorise the court to say also that someone who drives through a GIVE WAY (YIELD) sign without stopping is guilty of an offence, merely because the law failed to explicitly state that the offence was limited to STOP signs only.

01:24:40 Bernard Turcotte: time check: 30 minutes left in call

01:24:51 David McAuley (Verisign): Thanks, Malcolm. I will try to find the mail and if I do I will copy the IOT as well as Scott.

01:40:56 Mike Rodenbaugh: CEP calls for mediation; in my recent experience, mediations can take six months to get scheduled and complete

01:41:18 Mike Rodenbaugh: So a maximum time limit would need to be at least a year...

01:41:51 Mike Rodenbaugh: And of course, ICANN can still always to agree to toll the period longer, i.e. if they want to keep a CEP going for eight years

01:44:01 Scott Austin: Thank you David for raising this information, your prior case/argument and I look forward to the email. Malcolm your response and hypothetical deserves a more detailed response than I can presently provide, so I will work on one by separate email. I was not focusing on the final rule and judicial activism interpreting it, but the basis for the law as adopted and the framers analysis of the basis for its adoption, specifically whether the issue represented by prong two was considered and dismissed and why or it was never considered; i.e. whether the founders already addressed the proposed concept. in prong two and dismissed it Your comments lead I understood as saying if the framers found it was needed they would already have provided for it in the Bylaws, They didn't so we shouldn't add it. If I misunderstood please let me know . Thanks.

01:50:51 Malcolm Hutty: The last portion (beginning "Your comments lead") onwards does indeed correctly summarise my view. As for the extent to which the authors considered it explicitly, that is a more complicated question. Remember the authorship went through an extremely complex process, the CCWG, public comment, superior oversight out of the output by community institutions etc.

01:52:07 Gregory Shatan: On this particular call, at least, CP reps are quite out-numbered....

01:54:32 Scott Austin: @Malcolm thank you. Il look FORWARD TO David's EMAIL AND WILL FOLLOW UP AFTER THAT.

01:55:06 Scott Austin: Upper case unintended due to imminent close of meeting - sorry.

01:55:39 David McAuley (Verisign): Thanks Susan, Bernie, Brenda, and all. Bye

01:55:51 Scott Austin: Thanks all.

01:55:51 Bernard Turcotte: bye all

01:55:53 Malcolm Hutty: No worries Scott :-)