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ICANN has asked Jones Day for some assistance in evaluating the inputs received by Sidley on 6 April. Below is Jones Day's response to Sidley's input.

As Sidley notes, the Bylaws (Section 4.3(n)(iv)(A)) provide that time limits on seeking IRP redress will run from when a claimant "becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute":

"The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements: The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute." (Emphasis supplied.)

The Bylaws further provide that the determination concerning the appropriate number of days a claimant has to file an IRP was a decision left to the IRP IOT. See Section 4.3(n)(iv); see also Annex 7 of the CCWG report, paras. 18-19. It is thus entirely consistent with the Bylaws and within the IRP IOT's discretion to propose a rule that limits the total number of days a claimant may have to file an IRP. Sidley emphasizes that that decision must be tethered in some fashion to the time a claimant knew or should have known of the action giving rise to the dispute; the current draft rule (as posted for comment) meets that standard. The IRP IOT also is empowered under the Bylaws and the CCWG Proposal to recommend that, to further the purposes of the IRP, a claimant reasonably "should have known" or "should have become aware" of the challenged action within 12 months of the time the offending conduct occurred. Nothing in the Bylaws or the CCWG Report suggests that the IRP IOT can't recommend a rule to that effect.

In fact, Sidley appears to concede as much in its 4 January 2017 memo (at p. 4): "It may be that the IRP Subgroup has determined that 12 months is the period in which a claimant reasonably should have known of the action or inaction giving rise to the Dispute in all circumstances." While Sidley goes on to express its view that such a determination could be subject to criticism because "it could result in claims being foreclosed before an injury, and hence knowledge of an injury, had ever arisen," it appears that Sidley previously agreed that such a determination was feasible under the Bylaws.

Further, a 12-month (or other outside limit of repose) only runs from an individual action or inaction causing the harm, not from only the first time an action or inaction occurred on a particular issue. As stated in the IRP IOT Report:

"[A]ctions or inactions giving rise to an IRP claim can occur more than twelve months following the adoption of a particular rule. For example, were ICANN to interpret a policy in a manner that violated the Bylaws, the time

period would run from the date on which the offending interpretation occurred, not the date on which the policy was adopted."

See Draft IRP Updated Supplementary Procedures: Report of the IRP IOT, 31 Oct. 2016, at 3 (emphasis added). Accordingly, a claimant who believes that ICANN acted to apply a rule/policy in a manner that violates the Bylaws/Articles and caused the claimant harm would, under a period of repose, bring that claim within 12 months of the action (and within a certain number of days, currently proposed within the IOT as 120, from the time of becoming aware or when they should have become aware of the action). If there was an earlier action adopting the rule/policy, that separate and earlier action would have its own 12 month repose. See id.

Furthermore, eliminating the statute of repose entirely is inconsistent with the CCWG's stated goal of enhancing ICANN's accountability. As stated in Annex 7 of the CCWG Report: "The overall purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws." (CCWG Report at ¶ 1). In particular, the CCWG proposal makes clear that the IRP "should … ensure that ICANN is accountable to the community and individuals/entities." (See also id. ¶ 7.) Permitting IRPs challenging ICANN Board or Staff actions to be brought at any time does not further this purpose; to ensure accountability, actions should be challenged in a timely manner.

Finally, Draft Rule 4 already constitutes a substantial expansion from the time limitations set forth in the previous iteration of ICANN's Bylaws. Specifically, prior to the adoption of the 2016 ICANN Bylaws, "[a] request for independent review must [have been] filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Article of Incorporation." ICANN Bylaws, Art. IV, § 3.3 (30 July 2014). In an effort to "[e]nsure that ICANN is accountable to the community and individuals/entities for actions or inaction outside its Mission or that otherwise violate its Articles of Incorporation of Bylaws" (CCWG Report ¶ 7), the IRP IOT sought "to balance the fact that individuals may not always become aware of ICANN actions when they occur with the need for certainty about the finality of ICANN actions." (Report of the IRP IOT at 3, 31 October 2016.)

As a result, the CCWG proposed (following much debate) that claimants be permitted 45 days after the claimant "becomes aware of the material [e]ffect of the action or inaction giving rise to the dispute," with an absolute bar of 12 months from the date of the action or inaction. See Draft Rule 4. Following the public comment period, the IRP IOT is contemplating extending the 45-day period to 120 days. The 120-day limit, combined with an outside statute of repose as included in the draft for public comment remains in line with the Bylaws and the CCWG Proposal, while giving more time for IRP complainants to bring their claims.

Best regards,
Liz
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