
GREG SHATAN:

Hello, and welcome to the Jurisdiction Subgroup Meeting #24 of the Work Stream 2 CCWG Accountability, March 28th, 2017 at 19:00 UTC.

I'm Greg Shatan, co-rapporteur. We'll begin with a brief review of the agenda, which is in front of you. After a couple moments of administration, we'll move onto an update on the questionnaire, which is currently out for responses until mid-April, and then to the main event of today's call, the review of ICANN's litigations. We were blessed with the presence of Mathieu Weill, who will review the cases he reviewed and summarize for the group.

Without further ado, are there any questions on the agenda or any items to be put up now for AOB? If there are no objections, we'll move on to Item 3: Administration.

First I'll ask if there are any changes to statements of interest.

Seeing none, I'll also ask if there's anybody who is only on the audio bridge to identify themselves.

It appears we have no one only on audio.

Finally, I'll ask for the person with the phone number ending in 5316 to identify themselves, unless that is in fact their name and they changed their naming to a number. If numbers were as easy to remember as names, we probably wouldn't even be here.

Phil Corwin is 5316. In any case, the questions to ICANN Legal are currently in ICANN Legal's hands. I've been told that we should an ETA

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for response from ICANN Legal fairly shortly. I don't have an exact ETA for the ETA yet, but I will hopefully at least have an ETA for the ETA, and soon after that, an ETA for the actual responses.

Let us move on now, unless there are any questions about that, to Item 4: Questionnaire updates. The update on the current responses is that there are no new responses since last week, but we still have a good amount of time for responses to come in. April 17th is the deadline.

As before, I'll remind all members of this group to publicize the existence of the questionnaire and any other groups or lists relating in any way to the Internet in which they participate so that we get the widest possible distribution and potential responses. Hopefully, following the Copenhagen meeting, members of the GAC and others who learned more about this in Copenhagen had a chance to discuss it amongst themselves and will also have publicized it within their communities. I expect that, as is typical in any ICANN exercise, we will get a flurry of responses to close to and on the 17th of April.

Finally, I'll encourage all of you to respond directly to the questionnaire as well. The questionnaire review and evaluation team has been assembled. I don't have the exact list. It was posted last week, and a couple of other people came up in addition and named themselves as either having volunteered or newly volunteered.

I'd like to remind everyone that the group is doing to review the new responses when there are some and respond to the subgroup on those responses and status and is also supposed to work on the proposed

evaluation framework for the responses; which framework will be approved by the full subgroup.

We're going to create a mailing list for this group. It'll be a usual open-type ICANN e-mail list. We want to keep the back and forth from swamping the main jurisdiction list but it'll be visible to all.

We're going to a Doodle polls shortly among the group members to schedule a call and to get started on basically the evaluation framework so that we have that fully in place before the final flurry of expected responses.

Any questions on the questionnaire?

I see Christopher Wilkinson with a question. Could staff please recall where the translations of the questionnaire are? I believe they are on the same wiki page as the English language questionnaire as well.

I see Christopher also has his hand up. Please go ahead, Christopher.

CHRISTOPHER WILKINSON: Hi. Good evening. Thank you, Greg, Just to recall, I think that in an earlier mail I did volunteer to join the evaluation group. I think my name has not made it to the list. Maybe that could be corrected. Thank you.

GREG SHATAN: Thank you, Christopher. I'll ask staff to add you to the list and to circulate an updated list to the full mail list, just so everyone can see

who is in the QRET (Questionnaire Review and Evaluation Team), possibly the worst acronym in ICANN history.

Anything else on the questionnaire?

Seeing none, I'll move on to the next. Mathieu suggests merely calling the team "Q." That seems very James Bondian. That should elevate it considerably.

Moving onto the review of ICANN's past and current litigation, let's skip over A and B for the moment because I'd like to get to the main event and make sure we have enough time to discuss the summaries of cases themselves. The sign-up sheet looks pretty much as it did last week, except that I signed up for a couple of cases. Perhaps someone else has in the recent past.

If we have time, we will discuss the summary sheet because I think it could still use some improvements in regard to capturing things that are of the most interest to this group, aside from just the facts or the vital statistics of the cases. We need more things that'll highlight for discussion what the jurisdiction affects or lacks thereof [in] these cases.

I'm going to turn over the microphone to Mathieu and let him go into the summaries. Staff should have the summaries. They've been circulated previously, and I just circulated them one more time in the last few minutes. So I will turn it over to Mathieu. Thank you.

MATHIEU WEILL:

Thank you very much. The good thing in signing up first on this list was that I got to pick the most interesting cases. At least it was very

educational for me to review a number of these, including this one in front of you, which is the Verisign case – Verisign vs. ICANN. The plaintiff was Verisign. The defendant was ICANN but also about 50 John Does. It took place in several stages but started in the Central District of California, the Court of Appeals, and the California Superior Court. And there was a little arbitration in front of the International Chamber of Commerce. This one, though – yeah. We would say a [inaudible] probably, in French.

The case started in February 2004 and ended in December 2006. It was basically Verisign arguing that ICANN had violated the antitrust laws – the Sherman Act, if I'm not mistaken – had breached its contract with Verisign, and interfered with contractual relations between Verisign and all the parties.

The issue at stake was that ICANN's decisions to not allow Verisign to roll out new services, such as Site Finder, were creating restrictions and delays to Verisign's ability to offer services and that ICANN would be assuming regulatory power over Verisign's business.

So that was kind of a big case. I think some people referred to it as The Verisign Wars in ICANN's history. The outcome was that the claim was dismissed in September 2004. There was an appeal, and then at some point there was a settlement, which led to the case being dismissed in December 2006.

There was no challenge of jurisdiction. There was a preliminary relief requested but not granted. If we think of the impact on the operation of ICANN's policies, there might have been an impact had the plaintiff

claims been granted because it would have challenged ICANN's ability to enforce its contracts. Whether it's right or bad is not for us to say at this point, but at least it was clearly challenging ICANN's way of enforcing contracts.

It's important to note that there were a number of constituencies actually putting pressure on ICANN to act this way; it was not just ICANN's Board on its own.

Of course, I think it's important to remind ourselves as well that, at the time, there was no specific policy in place to define what additional services were about, and ICANN actually put out RSEP after that.

So a very interesting case overall. I think, from our jurisdiction point of view, what's interesting is that it wasn't an antitrust claim. It could probably have been filed had Verisign been a European company, for instance. That might have been the case for doing an antitrust claim against ICANN in Europe as well. So that would be a potential question. That's one of questions we've actually asked the lawyers. But this one was definitely in California, with everyone being U.S. players.

Greg, I don't know whether that's the type of summary you expect and how you want to lead the conversation on this. Maybe if there's any [inaudible] in my recollection.

GREG SHATAN:

Sure. I think that's a very helpful start. I see on the summary, at least what we have on the screen – maybe there's a more recent one than this elsewhere – the choice of law/governing law well is blank.

MATHIEU WEILL: Yes.

GREG SHATAN: Do you recall what it was in fact?

MATHIEU WEILL: That's the question in the summary that, not being a lawyer, I don't feel comfortable actually filling out because I sometimes get lost in what the choice of law/governing law [means.] So I might require some help filling it in.

GREG SHATAN: Thank you, Mathieu. I have not looked at the case, but looking at the summary, I can see that there was an attempt to apply the Sherman Act antitrust law – that's U.S. federal antitrust law – and then breach of contract and interference of contractual relations with the state law claims, typically. In the absence of a mention otherwise, and seeing that there was a California Superior case in here among that, my assumption, which is rebuttable by actual facts, is that California law was applied to the non-federal law claims. Of course, it's always possible that there was some other thing, but given you say that the jurisdiction was not contested – typically, if a jurisdiction other than the most obvious one is put in front of the court – there's going to be mention some mention of a decision on that, up or down, in the case.

Becky Burr says it would have been either California or Virginia law, which is entirely possible, given Verisign as well. So we probably should have someone go back to the case to see if there's any recitation of California state law or Virginia law or anything of that sort there.

MATHIEU WEILL: I can go back to the case and check.

GREG SHATAN: Thank you. Becky has her hand up, so I'll call on Becky.

BEKY BURR: I just think that ICANN used to put a choice of law in its contract. Of course, that would have been California. It doesn't do that anymore. My guess is that the contractual claims, which would have been state law, probably were California at that point.

But that was mandated by ICANN contract at the time, which it doesn't do anymore.

GREG SHATAN: Thank you, Becky. And thank you, Mathieu. If you could go back and take a look at the case, I think I or any of the others of those who suffer from the U.S. legal affliction would be happy to help [inaudible] on the question, if it's unclear to you what law is actually being applied by the court.

MATHIEU WEILL: Thanks. Could we put the action item [inaudible]. I'll do a first check and then send out what I find.

GREG SHATAN: Thank you. Does anybody else have any questions on the Verisign case in front of us?

If not, why don't you go ahead to the second case?

MATHIEU WEILL: The second is Arizona state, right?

GREG SHATAN: Yeah.

MATHIEU WEILL: Yes. The state of Arizona. That's my personal favorite, obviously, given that it was related to Work Stream 1. It's a quite recent one and a pretty simple one as well because it didn't last long.

The plaintiff was the state of Arizona, and a few other states actually, I think, if I'm not mistaken. I have not mentioned them maybe because I didn't see them mentioned in the documents. The defendant was NTIA, the Department of Commerce, the Secretary of Commerce, Assistant Secretary for Communications and Information. There was an impressive list of [inaudible] in the list – the Internet Association, [inaudible] Internet Society. A number of people, and maybe some of

you around this call were on this list, including individuals such as Alissa Cooper, Jari, [inaudible], and Andrew [inaudible].

When reading the documentation, it wasn't clear to me what ICANN's status was in this case, so that's why I made a note of it. I read the material a couple of times. It wasn't clear to me whether ICANN was actually a party in this and what role it was playing in the process. So that's why I'm putting this note.

Most parties of the case were from the U.S., but not all of them, and there Jari Arkko, who is from Finland and was a party. I think that's also an important aspect for us to monitor.

The court was the U.S. District Court, Southern District of Texas, Galveston division. I see choice of law was federal law because it was challenging a decision by the federal government, if I'm not mistaken, if I'm learning right what this means.

The action was against the IANA Stewardship Transition, arguing that there was a violation of the property clause of the U.S. Constitution, the First Amendment, as well as the Administrative Procedure Act, violating the IANA contract's [expiration].

Okay. So the issues were that ICANN might take unilateral actions affecting .gov or even deleting it. There would be possible interference in state's property, interest from foreign governments, and a possible violation of the First Amendment by ICANN.

The relief was [inaudible] injunctive relief. It was not granted. The injunction was denied. It never went further obviously. There was a

challenge against jurisdiction. The defendants argued that the court in Galveston had no subject matter jurisdiction over the claim. I'm quoting the argument here, which certainly goes way beyond my skill. But at least there was a challenge in the jurisdiction, but obviously the challenge [was] against this particular court in the U.S. and not any claim to move the case outside of any federal court, obviously, since these were mostly U.S. parties.

There was no impact on ICANN's accountability because this transition took place, but obviously, if the relief had been granted, then we would probably still be discussing Work Stream 1 for another three or five years. So one should say that, if it had proceeded, then the accountability mechanisms of ICANN would not be the same.

I think that's my summary on this one. There's probably some aspects which can be clarified, especially on the choice of law/governing law, etc.

GREG SHATAN:

Mathieu, this is Greg Shatan. One question with regard to the contested jurisdiction: did the court come to a decision as to whether this was in the wrong court and should have been in the court of federal claims?

MATHIEU WEILL:

No. there was no mention of that in the decision section, to my knowledge.

GREG SHATAN:

Thanks. I guess we can assume to some extent that, since the court came to a decision on America, more or less, they took jurisdiction over the case and didn't reject it. [inaudible] implicitly they continued, they took jurisdiction.

As far as the law/governing laws, you mentioned there's the federal law. I guess we'll just need to double check that there was no state law aspects that were cited in the case.

Anybody have any questions for Mathieu or generally about the case?

Seeing none, I will move onto the third case, which is now being posted. Why don't you go ahead, Mathieu?

MATHIEU WEILL:

Sorry, I was on mute. The third case is quite complex because this part with ICANN is only part of a larger case. The plaintiff is Susan Weinstein from the U.S.A. The defendant is the Islamic Republic of Iran. ICANN is a [inaudible], which I understand is someone – well, I'll let the lawyers explain what it means. So ICANN is part of the case, but neither as the plaintiff or defendant. But it certainly would be affected by the decision. The United States government intervened as a [inaudible]. So it's quite a critical case. So we have parties in the U.S. and parties outside of the U.S. – obviously the defendant.

The venue is the U.S. District Court for the District of Columbia. I'll pass on choice of law/governing law of the moment – probably elaborate on that later. It began in June 2014 and ended in 2016 in September.

Basically, the case is about an attempt to seize an asset, the .ir ccTLD. There's plenty of developments from the defendants about the fact that ccTLDs are not attachable properties and cannot be seized. There are some of the exceptions on federal regulations on this.

As I said, it's part of a wider litigation, and this is just the part where the plaintiff is asking for a specific measure: seizing the .ir ccTLD. So we don't have all the underlying discussions developed, the other [arguments].

There was no preliminary relief requested or granted. The motion for seizing .ir was denied in the end. There was no contest of jurisdiction. Of course, the interest of the case, especially for ccTLD managers like I am, is that it was raising the possibility to overrule ccTLD policy and operations through a United States court decision.

I just quoted – because I found it an excellent summary – from one of ICANN's memos: it would wreak havoc on the DNS system. But it was not granted.

That's my summary.

GREG SHATAN:

Thank you, Mathieu. Do we have any questions about this case?

Again, we'll need to go back and check on the governing law issue here. It might be a little more interesting in some cases, given what was the overall subject matter and that we have a relatively small group today.

MATHIEU WEILL: Greg, this is Mathieu.

GREG SHATAN: Yeah?

MATHIEU WEILL: How would you find about this governing law aspect in this particular case?

GREG SHATAN: Well, sometimes it's listed in the head notes of the case, depending upon what report you're looking at. In other cases, it may just be discussed as the case goes along. There'll be mention of particular statutes or laws that are being cited to and even sometimes the cases that are being cited as precedent. It needs to be in many cases teased out of the overall report of the case. Sometimes, either where the judge is being nice or where the issue or jurisdiction has been directly contested, there'll be a real discussion, or at least a mention, of what law is being applied.

But here in particular, since we're in the U.S. District Court for the District of Columbia, I'll assume almost that we're not applying District of Columbia district law, to the extent that that even exists, for purposes like this. This is likely a federal question. Sometimes in a federal case it will say it's a federal question or say what type of jurisdiction it is. If it's a federal question, it'll be a federal claim by definition. There can be federal and state claims in the same case, of course.

So the short answer is that there is no short answer and it depends.

MATHIEU WEILL: Excellent. I just love this.

GREG SHATAN: That's why I'm paying those big student loan bills. Well, I finally stopped. It took a long time.

In any case, any questions? I know this is a case that some people have been waiting to hear about. Unfortunately, I don't see some of them on this particular call. We may end up revisiting this case, perhaps after we explore the jurisdiction and governing law question. We may want to come back to this one, just so that people that it's been fully dealt with.

Becky Burr, please go ahead.

Becky, you may be on mute. Is anyone hearing Becky? Because I'm not hearing Becky.

MATHIEU WEILL: I'm not hearing anything except you, Greg.

BECKY BURR: Sorry, I was on mute, but I didn't have anything important to say.

GREG SHATAN: You can say it anyway if you'd like.

BECKY BURR: Never mind. I thought better of it.

GREG SHATAN: No problem. In any case, that takes us through these cases. I don't know if there are any overall comments on the three cases generally or any comments on how these have been summarized or whether there are issues.

Here Becky does have something interesting to say, apparently, after all. Becky says there was a long discussion in the cases, since it's a high-end case and related cases, regarding which attachment law the state law of attachment applied in this particular case. The decision there, again, was between D.C. law, which does exist, and California law.

Becky, do you recall which way they came out?

BECKY BURR: I think that they applied D.C. law because that's where the parties were seeking to apply the attachment. I recall that there was some concern that you'd have a different outcome if it went the other way. But I could be 180 degrees wrong on that.

GREG SHATAN: Thanks, Becky. That's helpful, and I think that highlights the issue of effect of jurisdiction. If in fact the application of California law would have given a different result, then the question of jurisdiction, or at

least the question of governing law, would have been critical, although in this case, interestingly, they applied D.C. law and not the California law. That shows that California law is not the overwhelming law of all things ICANN. As Becky said, not would have but potentially could have.

So perhaps we should go back and explore that. Maybe this exposes another issue of jurisdiction that needs to be explored in these cases. There's an actual discussion of whether the application of a different law or the law of a different jurisdiction could have or potentially had a different result. So that is an effect of jurisdiction here.

I see here that David McAuley says, "Just getting wind of this discussion." David is having audio issues in Brussels. In the case on screen, I think the court applied D.C. law, which is a tad unusual, on attachment. Becky notes that the plaintiff sought the attachment in D.C., so the plaintiffs controlled here. David and Becky seem to be on the same wavelength.

So we may well come back to this case just so we can try to highlight the effects of potential different choices of law to the extent that they were actually discussed in the case. We're not looking for hypotheses about what would have happened if this case had been brought in Kansas or Kuwait but rather anything that's in the body of the case that discusses the choices of law, choices of venue – the place where the case occurred – or any other related matters.

Any other questions on this particular case? Or comments?

Seeing none, let's keep this summary up on the screen for a moment. We don't have any other cases to review, so we'll give you some of your life back.

But before we do that, I would like to ask whether there is, in essence, anything missing from this summary. As I mentioned before, perhaps we don't highlight enough whether there was any effect of jurisdiction in the case. Maybe we need a ratings scale or some form of a place to highlight the effective jurisdiction. In this case, if there was a potential difference between D.C. law and California law, then the effect of having applied D.C. law could have been significant or could have been substantial.

It may also be that the fact that the case was brought in the U.S. District Court for District of Columbia and not in another court – for instance, California – also had an effect. Perhaps it led to the application of D.C. law. Personally I doubt that in California they would have applied D.C. law, but that really depends more on the reasoning the court used to apply D.C. law.

So I think there's a need to try to tease out of these cases and perhaps have a little bit more in the summary – a line or two, a row or two – where we try to highlight the effect of jurisdiction question.

Mathieu, go ahead, please.

MATHIEU WEILL:

Thanks, Greg. I think any assessment of whether the outcome would have been different should a different jurisdiction had been chosen or

used seems to me to not be a type of assessment because it cannot only be conducted by reviewing the case itself. You need to do some speculation about how it would have turned out in the case where these would have been chosen. So I would probably not go there yet.

I'd focus at the moment on what I find quite interesting: once we find out, basically, which courts were used in the various litigations ICANN has been facing, we can use statistics to look at the various geographic distribution. Once we find out what type of laws were used in the choice of law section, we can look at what the most frequent and less frequent are and whether there are any challenges.

I think that's all we can do in terms of fact gathering. Then we'll certainly have to go on to more elaborate discussions. But at the moment I would probably not add too much to that. It's already pretty significant.

What we need is to look at the list of cases as a statistical group and see what we can find from there. For instance, it's obvious to me in just reviewing the list that there's only one litigation that you place outside of the U.S. it's the Pool.com case. It didn't go very far. I think I sent a form on the Pool.com case. At least I've reviewed it and the form is ready. I don't know if I shared it on the list, actually.

So I think that's really what we can achieve as an outcome of this exercise. If we start looking at what ICANN is being challenged with and where it's challenged and whether – if we find out the only litigations were with U.S. companies, for instance, that's already useful information. I would start simple with this before going into legal

analysis about what would have happened if other choices had been made.

Sorry it was a bit long. That was my point.

GREG SHATAN:

Thank you, Mathieu. That was long but not excessive. I agree largely with what you've said. The only point is that, if in fact the case itself discusses jurisdiction or what might have happened under a different application of a different law, then we should bring it out in the summary. But I agree entirely that we should not be doing any original legal analysis or hypothesizing. Even the best-qualified of us to do that shouldn't be doing that, at least certainly not at this stage. At this point, we are merely reporting the cases out. If the case itself does not discuss alternate laws or jurisdictions or outcomes, then that's beyond the scope of this exercise. We just need to make sure to get out of each case every possible bit of information that relates to the multiple layers of jurisdiction so we can use it but not go beyond that to independent work and theorizing. We will have time for that at some point, perhaps, if it's necessary or appropriate, but not in reporting the cases themselves.

So thank you, Mathieu, for that. I probably went on almost as long as you did but said far less. In any case I thank you very much for summarizing each of those cases. Again, if you go back to the case and see if there's anything more direct on the jurisdictional issues, I'm sure it'll help. Any of us who are lawyers can help you back on any of the specifics on the issues if there's something that you see that appears to

be relevant but you can't quite make out what it's trying to say because it's all legalese.

I thank you advance for the Pool case. I look forward to that in an upcoming meeting. I'll encourage all of those who have signed up to analyze cases to complete their analyses so we can get them out on the list in advance of the next meeting because if we're only going to listen to Mathieu summarize cases, that's quite unfair to our tri-Chair to make him our star performer as well.

Thank you, Mathieu, again, for volunteering and for being ready to report on each of these cases.

Any questions on these cases? Or any comments on the summary sheet generally? Anything you would change about the summary that you don't like, that's missing? Anything you think is a waste of time or is expressed in a way that you just can't understand it and wish it was said differently?

Seeing no other concerns on that, I'll see if there's a way to tweak it a little bit to bring out the jurisdictional issues. But overall I think it's a pretty useful tool.

I see that both David and Avri have noted that they will report cases out and that David, having already done the two we heard last week, will do more. So Avri and I and others hopefully will have their cases ready for the consideration of the group and that we'll be heading toward the point where we can, as Mathieu states, engage in some statistical analysis or an overall view of trends and aggregate data about these case histories of ICANN as a litigant.

Let's put the agenda back up on the screen, please. Thank you. Here we have it. We are up to All Other Business.

I see a question from Christopher Wilkinson: "Will the completed forms be archived on the wiki?" They should be. We'll need to be sure that we are getting information ultimately onto the wiki, which is the permanent repository of information, outcomes, and deliverables. We're using, for collaborative, live documents, Google Docs primarily, but the wiki will be the long-term home of all completed works. So we should get those out there.

Any other Other Business?

Hearing no other business, I'll just check when our meeting is next week. Do we have a meeting scheduled for next week? I'll ask staff. I need to have it on my calendar, but perhaps I didn't click on it.

Yes, we do have a meeting: April 4th, Tuesday. Really it's Monday night. On my calendar it's coming up at 1:00 A.M. U.S. time. Oh joy. 05:00 UTC. I'll be traveling but able to share this at 1:00 A.M. from a hotel room somewhere.

In any case, we did say that, from time to time, we would use the 05:00 slot, which is apparently convenient to some people. And they are very important people and we will make sure that these convenient times are used for them from time to time.

Any questions or comments or concerns?

I see that Cheryl-Langdon Orr briefly came up as coming off mute, perhaps to remark that she in fact is one of those people for whom 05:00 is a good time.

CHERYL LANGDON-ORR: I was going to comment, but I won't.

GREG SHATAN: Thank you for not commenting, Cheryl. We understand that, once or month or so, you are in fact at a convenient time. There are many, many more times when you are at an inconvenient time, sitting in the dark with your dogs and taking pictures of your feet and engaging fully in the multi-stakeholder process. So we thank you, especially those who take on this work that primarily puts them into inconvenient time. Let's all remember that when we grouse. Once a month or every few weeks, we have something that falls outside of our sunny times.

I'll stop talking, as I should have about a minute ago. If there's nothing further, we will adjourn this meeting. We can stop the recording. I thank you all.

CHERYL LANGDON-ORR: Thanks, Greg. Bye for now.

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