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ICANN
IRP-IOT MEETING

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>> Check. (Beep).

>> Greetings, everyone. This is David McAuley speaking, it's
the top of the hour. We will take two minutes to let others
join. Before we start the recording, I heard someone else come
in on the phone. Is there anyone on the phone bridge right now
that is not yet in Adobe? Hearing none, why don't we wait until
two minutes past, and I will come on, back on then. Thank you.
Hello. It's David McAuley again. Can I ask that the recording
be started.

>> This meeting is now being recorded.

>> DAVID McAULEY: Thank you. We have reached the threshold
for meeting, we have gone beyond our threshold of five
participants by five after, so I'm thankful for that.

I'd like to press on and see what we can accomplish in this
call.

Let's begin with the typical administrative matters, first of
all I'd like to ask if there is anybody who is on the call right
now who is on the phone, but not in the Adobe room, if they
would make themselves known.

Hearing none, let me next ask if there is anybody on the call
that wants to note a change update or anything to their
statement of interest. Hearing none again, seeing none, let's
press on to agenda item number 2. That is the status of the
sign-up sheet. My thanks to Greg and to Avri for signing up for
some issues. I have a note to Bernie that I went in the sign-up
sheet and added a line item for types of hearings. I didn't
think that fell well under discovery evidence, etcetera.

So there is another open item on the sheet, and I think I need to add my name in there for the discovery, let me, I'm taking a quick look, discovery, yes, evidence and statements. I started on that but haven't added my name. I encourage folks to look at this list, you must be getting bored hearing from me on some of these issues. And it's open for the remaining issues for people to grab them and go, I'll send another E-mail to the list, if I'm about to pick up another issue, to try and avoid that and give people an opportunity.

But we are moving through the comments, it's very nice, and so that is my food for thought. Any comments on agenda item number 2? Does anybody want to say anything?

Seeing no hands and hearing nothing, let's move to 3. This is dealing with our own time line. We are going to miss our May 29 date, I've asked Bernie if he would be, if he would speak to us about that date, what we need to do to move it. I'm hopeful that whatever we move it to is something that we can meet. I think we are making good progress now on the rules, between the list and the phone calls. But Bernie, could you chat a little bit about this, what this date is and how we can move it and those kinds of things?

>> BERNARD TURCOTTE: It's going to be sort of short, thank you, David. We are a little bit in uncharted territory here. Usually I would say a high percentage of time, the comments, analysis is posted when it was advertised. We have already extended significantly, and we are not meeting that.

Now, I do not believe that, you know, we will be fined for this, or that the storm troopers will come knocking on our doors, thank goodness. However, the community, it's a look of the community to our work. And I think it's exceptional. What I might propose, and I have to run this by the powers that be internally, since we will not be meeting our deadline, I'm wondering if people would find it acceptable if we would post a note in the comment analysis and resolution which we should post, advising that we are working on this, that some of these are really fundamental issues to how ICANN will work, and you know, everyone believes that it is best to do it right, rather than do it fast.

So back over to you, David.

>> DAVID MCAULEY: Thanks, Bernie. My hand is up as a participant. Kavouss has the floor first. Over to you.

>> KAVOUSS ARASTEH: Hello?

>> DAVID MCAULEY: Hello. We just started hearing you, Kavouss.

>> KAVOUSS ARASTEH: Do you hear me?

>> DAVID MCAULEY: Faintly, yes.

>> KAVOUSS ARASTEH: Okay. Good morning, good afternoon, good

evening and good night. How many more meetings we need? How many more sessions we need?

(muffled audio).

>> DAVID MCAULEY: Kavouss, if I heard you right, did you say how many more sessions are there in June?

>> KAVOUSS ARASTEH: No, how many more sessions you need to complete the work.

>> DAVID MCAULEY: To complete the work.

>> KAVOUSS ARASTEH: Before (overlapping speakers) the latest status, what and how many more meetings you need in order to extend to the 9th of May to some early in the middle of June, this is the question, is possible.

>> DAVID MCAULEY: Thank you, Kavouss. My personal feeling is that we are now sort of hitting stride on these comments, and it won't take us all that long. My hope is that to finish our work on the rules, so I'll answer your question in two parts. To finish on the rules, I'm thinking we need several more meetings, depending on what kind of debate that we get into. As you saw on the timing issue there was considerable back and forth. I don't know that we will have that on all of them, I have a feeling we can finish the rules in June. But the second part of my answer is the rules are not the end of our work. This is a standing committee under the bylaws now and presumably this committee will, team, the IoT will press on indefinitely. There are other things on the radar screen to do with the establishment of the standing panel to assist in the SOs and ACs and ICANN as they establish a standing panel, to do rules on other things, for instance, if the direct customers of the IANA services request special rules we can help them on that. So there are other things. But the most immediate project we have in front of us is going through these updated supplementary procedures. My hope is we can finish that in June. I think we are in stride. That is my sense. I hope that answers your question.

>> KAVOUSS ARASTEH: Yes, the last part that you mentioned in June, therefore the remaining you can continue. But the essential part, in June before the IA [inaudible] 29 of May but June is good because it is an important element that we need the content on that, thank you.

>> DAVID MCAULEY: Thank you, Kavouss. I had my hand up as a participant to comment on Bernie's statement about the date. Bernie, I think that is a very good idea that we come out with a note of some sort, saying we are working on the rules. This is, we have had considerable debate on some, but we are making progress, and we do expect to be out shortly or whatever, whatever wording we come up with. So I like the idea of making a statement as opposed to just throwing the date out. So that

would be my comment on that.

Bernie, in light of what Kavouss asked and what I said, do you have any further statement on this?

>> BERNARD TURCOTTE: Simply that I'll draft up a statement for you to review, and then at least we can get that posted for the 29th. Thank you.

>> DAVID MCAULEY: Thanks, Bernie. Anybody else have anything -- Greg, your hand is up. You have the floor.

>> This is Greg Shatan for the record. A suggestion with regard to the notice, it might be worthwhile to say in the notice that those who are interested can check the progress of our work on the wiki and by checking the publicly archived E-mail list, and the recordings transcripts, etcetera, from our meetings. So that at least they will see, they can see the work in progress, as well as know that the work is in progress.

>> DAVID MCAULEY: Thanks, Greg, very nice suggestion. Bernie, if you can take note of that, I agree with Greg. It's a great idea. So, if there is nothing further on this point, we will move to agenda item number 4, which I'll ask Sam to comment. Is it nothing except a update, if there is anything, there may not be on the policy and legal team efforts with respect to the SO and AC work that is coming up, so Sam, over to you if that is okay.

>> SAMANTHA EISNER: Sure, David. This is Sam Eisner from ICANN legal. No new update on it. We are working closely with our policy colleagues and expect to have something out probably within the next week or so to set some direction on that.

>> DAVID MCAULEY: Thanks, Sam. Anybody have any questions or comments? Okey-doke, seeing none, let's move to agenda item number 5, which is for Malcolm to take the lead on which is a update and status on the timing issue. Malcolm, over to you.

>> MALCOLM HUTTY: Thank you, David. Bernie, did you get the slides that I sent earlier today, which can accompany this. Here they come. Brilliant. Thank you. Okay. This is divided into two sections, which I think are listed on your sign-up sheets as being the 45 days time limit, and the question on repos, if we can have the first slide please. Both these issues have been discussed very fully in this group so far. There comes a point in the discussion of some things when it's sometimes rather jokingly said, that you get to the point where having has been said but not yet by everyone.

I think this particular subject, everything has been said by everyone. So I'm hoping that we can draw a line under it. David said to me at the end of the last session, that maybe now we can get to the point of asking for a first reading.

My slides now show where we have got to, and what is on the table to be proposed for first reading. To recap, the time

based on the claimant's knowledge of harm, there was a strong sense in public comment that our original proposal of 45 days was too short. We reached a compromise consensus on changing that from 45 days to 120 days.

That is to be, and we also adjusted that, so as to say that is to be based on either the claimant's knowledge of harm or if earlier, when the claimant ought to reasonably have known of the harm.

We are proposing now that that is essentially done. We have been many weeks now where we have been accepting that as a consensus on that issue. If we can have the second slide, please, the next slide, please.

This is the question of repos or the time based on ICANN's originating decision. In that, there was again a strong sense in the public comments that basing a time limit which we have previously said is one year, with a starting date of when ICANN took a decision, regardless of whether it's yet affected anyone, strong sense from that public comment that that would undermine accountability and be unfair to claimants.

In particular, it was noted that a cutoff date for filing a case should never be earlier than when claimants are first able to file the case. Sidley has argued that basing the time on the, time limits on the date of ICANN's decision is inconsistent with bylaws, which refer directly to the claimant's knowledge. ICANN legal disagrees with that interpretation, and would prefer to retain a limit based on the date when ICANN took its action regardless of any effect or implementation of that action.

We discussed this very fully. The arguments and the participants other than ICANN legal, have supported basing our time limit exclusively on what I said on the previous slide, that is based on the awareness of harm, including when the claimant ought to reasonably to have been aware of the harm only, and not on the date of ICANN's decision such as the date of adoption of a policy that hasn't yet been implemented.

That is the approach that I'm now proposing that we take to a first reading. If we can see the final slides now, that will show what it would be that we would be approving at first reading. The text here in black is the existing text, with red being what we would be changing as a result of the supplementary procedures. It will say that a claimant shall file a written statement to dispute with the ICDR in no more than 120 days after a claimant becomes aware or ought to have reasonably been aware of the material effect of the action or inaction giving rise to the dispute. It does not have a statement added on there saying that it also should not be more than a year after ICANN had taken its decision.

That is what is on the table. I propose that it is ready for

a first reading unless anyone has any new issues that they wish to bring up or something that is somehow different to what we have passed through in great detail many times in this discussion. I now open it to the floor. Kavouss.

>> KAVOUSS ARASTEH: Malcolm, from the beginning I was of the view that we should not have open-ended, the way it is suggested it is open-ended. The way that ICANN suggested is six months, twelve months or whatever after that should not be, so we should have a time limit on the second part of the repose so I don't think it should be fully open. Any time limit whether 12 months or whatever, like the first part we have 45 [inaudible] the second part we have some time limit, it is not appropriate to put without any time limit. Thank you.

>> MALCOLM HUTTY: Thank you, Kavouss. David.

>> DAVID MCAULEY: Thanks, David here. I have a question. I lost my connection for a brief bit near the end of what you were saying. But when it came back on it was something about within a year. Did I hear that correctly that you said something within a year right at the end of what you were saying?

>> MALCOLM HUTTY: What I was saying is that this slide that we have now for a proposal for first reading does not have the text that we have in our first draft proposal, but required anything to be placed within a year of when ICANN had taken the decision without regards to whether it's actually yet affected anyone.

>> DAVID MCAULEY: Thanks. (overlapping speakers).

>> MALCOLM HUTTY: Not in this slide.

>> DAVID MCAULEY: Thank you.

>> MALCOLM HUTTY: Greg.

>> Greg Shatan, for the record. First I support this proposal. I do think it's ready for first reading. Second, I'm reminded of a Maxim that equity will not suffer a wrong to be without a remedy. In other words, if there is a harm, there should be a remedy for that harm. If the harm is caused by an action or inaction of the board or of a bylaw or whatever it may be, there needs to be a remedy for that.

If we don't provide it in the IRP, then people will just go to court. I don't think we can argue that this, somebody might be able to argue that the IRP has some sort of preclusive effect, that by and large there are no waiver of litigation and agreement to arbitration provisions for the empower community so I think that it's important that we have a remedy where there is a wrong, and that the concept of repose here I think would do violence to that essential concept of justice. Thank you.

>> MALCOLM HUTTY: Thank you, Greg. David.

>> DAVID MCAULEY: Thank you, Malcolm. I do have a comment in response to Greg or with relation to what Greg has said. But I

was going to ask a process question which I will wait until Sam speaks. But the first point I was going to make is, wrongs without remedies, I did want to mention at least in my opinion that the IRP process we need to come up with, we need to refashion in accordance with the bylaws, is an arbitration process that is meant to be quick, effective, hopefully not costly at least in relation to court, things like that.

But it's not meant to be perfect. I don't think we should craft perfect rules. I tend to support the thing you have, but I have some qualms that I may raise in a comment if we go to a second comment period.

But going to court is a remedy. People do have remedies at the end of the day here. I want to agree with Greg, that yes, people may have to go to court, and I see that as a remedy. Anyway, so that is my statement. And my hand is back down.

>> MALCOLM HUTTY: Thank you, David. Sam.

>> SAMANTHA EISNER: Hi, this is Sam Eisner from ICANN legal. We have made our position on the timing issue very clear, and we don't have an issue with the 120 days. So we have stated before, not having outside limit, but listening to Greg's comment about the issue of having remedies for harm, I think we need to always make sure that as we as IoT are looking at the IRP that we are remembering what the purpose of the IRP is.

There is a possibility in the end to get some sort of remedy for harm, but the IRP is really about holding ICANN accountable to its bylaws. So someone might be harmed by an action of ICANN, that is taken in violation of the bylaws, or the articles. So they file an IRP, but that IRP isn't guaranteed to provide a remedy to the person who was harmed. That IRP, the purpose of it is to hold ICANN accountable to its bylaws. There is no monetary rights out of an IRP. There is no specific performance for those who are attorneys here, what that means, there is no directive to require ICANN to take any specific action. The only thing that comes out of an IRP is a binding, now it is binding, I'm not trying to minimize the purpose of the IRP at all, but the IRP results in a binding determination by the arbitration panel as to whether or not the panel believes that ICANN violated its bylaws or not.

So ICANN then takes that declaration and looks at it, and acts on it. But it doesn't mean that ICANN gives anything back, it doesn't give any money, it doesn't give direct relief in most instances to the people coming to ICANN or people coming to the IRP panel who are harmed. It's a little bit removed. If someone is looking for monetary relief, the IRP would never be the place to do that, though possibly a finding in IRP would be of assistance in a court proceeding or something.

I want to make sure that we understand the harm that we are

seeking to fix here, it's not necessarily about the harm that was brought upon any individual or entity, but that harm is evidence of ICANN's violation of the bylaws, which is a harm to the ICANN community at large, because ICANN did not follow its bylaws. I want to make sure we have the purpose is really clear as we continue and finalize the IoT's work on the rules.

>> MALCOLM HUTTY: Thank you, Sam. Kavouss.

>> KAVOUSS ARASTEH: Yes, Malcolm, I wanted to wait until other three or four people on the call give their views, because you gave your views, what [inaudible] I don't think that we should from the very beginning push the issue to the court, but I wait until the other people talk and see what is the situation. Until then I keep silent.

>> MALCOLM HUTTY: Thank you. I inserted myself into the queue and have risen to the top of it. I'll now speak as a participant.

I take what Sam was saying in response to Greg, it is important to understand that the IRP is a very limited remedy, it's a remedy that is intended to solve the problem at ICANN, not to provide a full range of remedies to all claimants.

But nonetheless, it is intended to be available to claimants, so as to solve those problems at ICANN, and it states clearly in the bylaws what the purposes of the IRP are. And one of them is to provide a mechanism for the resolution of disputes. Legal action in the civil courts of the United States jurisdictions, that is one of the explicit purposes of the IRP. That is not secured if the mechanism for the resolution of disputes at the IRP office is not available to the claimant at any point in time.

That would be the kind of, I think, injustice that Greg was referring to when he was speaking. I certainly, the public comments spoke clearly on this, they thought that the IRP should be available. In my own opinion, the comments that Sam just gave about the limits of remedies that are available in the IRP which are only to give a binding declaration to ICANN on the interpretation of the bylaws and not monetary damages or specific performance or other such remedies, the fact that those are limited actually removes many of the worries that might have been about leaving this process too open, that certainly spoke in favor of, to my mind, of saying that there is no harm, there is nothing to worry about, about ensuring that people have the broadest possible access to the IRP.

Because the only thing it can do is to give a definitive statement as to what the bylaws are, and ICANN can only benefit from having that when [inaudible] anyway, that is my response to the Greg, Sam discussion as a participants.

Going back to chairing I see Greg is back in the queue so

Greg.

>> Greg Shatan: I've said a bunch of things in the chat. I recognize obviously the IRP is not a forum for every harm but for only harms arising from certain types of actions and activities or inactivities, but I see that as being unlinked to the issue of repose and more to the issue of competent jurisdiction or subject matter jurisdiction and what could be heard at all.

Secondly, the issue of whether there is direct redress or relief to a party in an IRP, again, I don't know that, I was not thinking of that when I was thinking of remedies. Remedies can come in all shapes and sizes and have broader benefits and more narrow benefits. I tend to believe that unless we have the Good Samaritan complainants that they will be some benefit from the bylaws violation being cured that will inure to the benefit of the complainant, but I don't think the IRP ever contemplated money damages or, unless I'm wrong, and nor does it necessarily contemplate that the damage to the particular complainant is the primary reason at any point at any time for bringing the IRP. It's often brought out of a sense of a larger sense of justice, certainly would be for many of the empowered community type cases. I think we are getting in the weeds and maybe I'm getting in the weeds all by myself. I think the point here is that as long as there is a harm of the type that exists, that the IRP is intended to address, the IRP should be available, subject only to the rule that is in front of us now that does provide some, something in case where a claimant sleeps on their rights. But finding out that their rights evaporated before they had a chance to go to sleep, that I think is inequitable and something to be avoided. Hopefully, it will be a edge case, I suppose it would be nice if we can say that there are sections of the bylaws that can never be challenged through an IRP.

But last, and this is last, courts are going to be a good deal more expensive, time-consuming, etcetera, than the IRP I think in most cases. I think we do want to encourage the IRP where it is appropriate to be a jurisdiction of choice. Thanks.

>> MALCOLM HUTTY: Thank you, Greg. Kavouss.

>> KAVOUSS ARASTEH: Yes. I think we have heard Malcolm two times, heard Kavouss two times and heard [inaudible] two times, what about the others of the group on the call. What is their view? Because I think we should give the possibility, either they are [inaudible] or have some view. Thank you.

>> MALCOLM HUTTY: Thank you, Kavouss. That is a very good point. Let me go to the chat. I see Robin who has not chosen to speak up on the phone on this issue has spoken on the chat twice. Says firstly, thanks for the work on this issue, I agree with the proposal to extend the timing. Then further down, I

don't think by creating a remedy and providing accountability are mutually exclusive concepts. They are both.

Sam also said that she thought that the harm in allowing timing to be extended is that there is an allowance for ICANN to continue to act in violation of bylaws for a indetermined period of time. There is a element to the accountability to the ICANN community. If ICANN was acting outside its bylaws, that should be flagged as quickly as possible.

Now I believe that Sam is saying that in a, against the first reading, although to my mind what she just said there supports there being a first reading because it allows the case to be heard, rather than striking it out and leaving it to somebody else to bring a similar case later. That to my mind would speak in favor of the proposal on the table.

But I'm not sure that Sam agrees with my reading of her intervention.

Avri says, I am fine with the proposal in general, I favor longer timings. Okay. We are getting towards the point where we really have to make a call as to whether this is done or not. Greg -- David, I think, Greg, is that a stale hand or a new hand? That is a stale hand. Thank you.

David, I think that's a new hand from you. I'm going to actually look to you to see if we can actually draw a line under this or whether we need to keep on talking about this until some of us are just too exhausted. David, you have the floor. Can you help me?

>> DAVID MCAULEY: Thanks, Malcolm, I'll try to.

Kavouss raised a good point, I'm going to ask Bernie to help me in this respect. As we get ready for first readings and I need to remind myself of this as do I first readings on other issues, we will bat them around on this call but we also have to go to the list to get the first reading accomplished, because we do have a fair number of people who do not attend the calls.

But I think by right, they have a chance to speak up on lists in a first reading. Bernie, could you talk a little bit about the first reading, and whether I've got that wrong or what you think, I'd appreciate your thoughts.

>> BERNARD TURCOTTE: Thank you, David. My understanding of the process for workstream 2, if you want to follow it, and it seems to resonate with the community, but for the IoT it really is your independent call to do so, the process would be that a first and second reading are done at an actual meeting, but that the document that is being approved for first and second reading, has been published for at least a week on the group's list, and comments have been taken on, and then after that week, at least one week, there is a meeting. Then those that attend, if we meet the minimum requirements, considering the comments

that have been made on the list, can make a decision. That is my understanding. I hope that helps. Thank you.

>> DAVID MCAULEY: That helps, Bernie. I'll make a suggestion. First of all, let me thank Malcolm for leading this, and hopefully we are at close to the point of exhaustion, but still have an ounce of energy left. I'll ask Malcolm to take the slides, to me that would be the document, I don't think we need much more, put them to list, in the next day or so, because to have at least a week, our next meeting is on Tuesday June, I think the 6th. In order to do that, in order to meet that, it would have to be out in a day or so but we need to come up with a message, Malcolm, maybe you and I can work on it. But the message would be, this is now, discussed as a first reading. We want to confirm that at the next meeting. Here is what is discussed and present it to the list, with a notice that that is what is going to happen at the next meeting. People can do what they want with that. But it's fair to pass it by everybody in the group.

I'm interested if there is any reactions to that suggestion. Kavouss, your hand is up.

>> KAVOUSS ARASTEH: Yes, David. I think the long list of participants at this meeting is not sufficient for any final decision, first or second reading, because there are nine, three times, eight, you are the Rapporteur and you should be totally neutral, not taking this side or that side. I don't think that is sufficient to decide on this. What about if, alternative, it is tabled and we give those two alternatives to upper level.

>> DAVID MCAULEY: Thank you, Kavouss. My audio cut out at the end. But I believe I have what you were saying. What I'm suggesting is Malcolm will put something on the list and say this will be blessed as a first reading accomplished at the next call. That is what I was suggesting. Theoretically, or at least in my mind, it would be capable of second reading approval shortly thereafter, probably with not much intervention.

But again, that is what I was trying to get across. (overlapping speakers).

I'm sorry, I should have said there will just be, Kavouss, there will be just one solution. Malcolm's, on the list. So people will have to speak against it if they want to speak against it. I don't think we should put alternative us because that will be a continuation of the discussion. I think what Malcolm is getting to is we have done that. You know, there may be points made on the list but the hope is to try and move this to conclusion, and so I personally doubt that there would be more than one proposal that Malcolm puts out there. Thank you.

>> KAVOUSS ARASTEH: Okay. You have to mention because, under which this proposal has been [inaudible] for the first time,

number of people, number of participants, to have one single suggestion, that is it. The second reading so much else come and have a counterproposal, but the number of the participants in my view is not sufficient balance to be reflective of views of the participation [inaudible] thank you.

>> DAVID McAULEY: Thank you, Kavouss. But I think we are still together as a group on list and I've seen some folks come on list that don't typically come to meetings. Today is not a first reading. But Malcolm has discussed it. He has helpfully in my view discussed it as such. It is set up for first reading at the next meeting. That is what Malcolm is going to confirm on list. But I did hear Malcolm's voice. He's got his hand up too. Over to you, Malcolm.

>> MALCOLM HUTTY: Yes. Thank you. It's just on the process issue, David. [inaudible] it is a concern that there is so little participation in the group. We have a quorum. We have met it. Technically, this is okay. But it is a worry that there aren't more people. But I think ultimately, you need to make the call there as to whether we have had sufficient support, and if we do not have it, then the answer is that we can't complete our work. We have to understand that. The choice is not between supporting this or saying there is not enough people and therefore must be something else. It's do we have enough people to support anything, or if we don't have enough people to support anything, then we have failed. Then we cannot conclude draft supplemental procedures. That would be a great shame.

I would urge everyone in the group who has taken the trouble to be here, to try and encourage our fellows to attend, so that we can reach a conclusion on this. Ultimately, whether we are able to reach that conclusion is going to have to be your call as chair, David.

>> DAVID McAULEY: Thanks, Malcolm. I think that the process that I, and I'm trying to answer Avri's questions in this too, the process that I just outlined where you come to the list with what you just presented, and tell the list, this will be blessed as a first reading at the next meeting, either make a comment here or be at the meeting, I think that will be sufficient. If we don't have a quorum at the next meeting, that is something I'll have to deal with or we will have to deal with.

But for now, are there any -- does anybody object to Malcolm putting this out for the next meeting?

>> KAVOUSS ARASTEH: [inaudible] for second meeting.

>> DAVID McAULEY: First, Kavouss, yes. I'm going to come to you, Kavouss but Greg has his hand up in the queue before you.

>> KAVOUSS ARASTEH: I'll wait, sorry.

>> DAVID McAULEY: Greg, you have the floor.

>> Greg: Thanks. Greg Shatan for the record. I want to clarify whether this is a first reading or this plus additional ascent or dissent on the list from those who did not participate constitutes the first reading. Or is it this plus the interim plus the next call that is the first reading? So we are going to have to have a third call to have a second reading? I'm still not quite clear. That is my first point.

Second point is that this is not a particularly large group to begin with. Putting aside Jones, Day and staff, but counting Sam it is maybe only about 16 people anyway. 16 or 17.

Some of those have never surfaced. So I think to some extent this needs to be considered as a coalition of the willing. I think that to my mind, is certainly ample support. I think lastly, and this is a point I've had a number of discussions, we need here to look for support in the absence of opposition. So I think it's just right, David, that you are asking whether anybody was opposed to this. I support it. I do believe we should move on, I think we have an adequate number of people here plus appearance on the list to do everything we can based on the size of the overall group that we have. Thank you.

>> DAVID MCAULEY: Thanks, Greg. Before I comment, Kavouss, go ahead. You have the floor.

>> KAVOUSS ARASTEH: Yes, David. I am not in favor of having intermediate reviews and the second reviews, two more readings. Why not everybody, if everybody agrees with the limited number that are here, 7 or 8, if you include yourself to take it as the first reading, but trying to encourage have more people. I don't want any intermediate. Thank you.

>> DAVID MCAULEY: Thanks, Kavouss. Malcolm has his hand up. Then I'll ask Bernie to comment. Malcolm, go ahead.

>> MALCOLM HUTTY: David, while I was prepared to act in accordance with your request there, and propose this out on the list as being a proposal for first reading, I've seen in the chat that Avri says, I would have preferred this being called first reading, that's okay, but Robin says I agree, Avri. But Greg says I support calling this the list responses as a first reading and it was also my understanding from what you had mailed me beforehand, that this meeting would have been considered the first reading as well.

I would ask you on the basis of those interventions that I'm reading from the chat, and do we not have sufficient here to say, this is a first reading, this goes out to the list now, if anybody has an objection on the list, they are on notice that the next meeting will be a second reading, and that they are therefore able to intervene in that light, they still haven't lost opportunity to do it, but we are moving forward rather than just calling it another discussion group.

>> DAVID MCAULEY: Thanks, Malcolm. I like the idea. Wait. I'm sorry. Kavouss.

>> KAVOUSS ARASTEH: Yes.
(muffled audio).

Time we have spent, I suggest that we take Malcolm's proposals, take it as a first reading, and trying to put it for second reading for those having objections, whatever and take it up on the second reading but take this one as the first reading [inaudible] put the number here. Thank you.

>> DAVID MCAULEY: Thank you, Kavouss. I have listened to what everyone said and frankly it makes sense to me. I'm going to reverse my course stated a minute ago and say I'd like to go with the plan that Malcolm just stated, but let me first ask if anybody here objects to that. (pause).

Hearing and seeing none, then we will call this a first reading, and go out to list. Malcolm, I'll look to you to do that pretty much the way you just stated.

>> MALCOLM HUTTY: Thank you.

>> DAVID MCAULEY: Okay. I think that draws a line under this discussion for agenda item number 5.

Thank you all for that. Thanks, Malcolm for leading that discussion.

Moving on to the agenda, we have about 13 minutes left. I thought we would get to a first reading on certain issues that we had spoken about before, not as extensively as timing but I don't think they are as controversial as the timing issue. I put them in the agenda yesterday. I mentioned them in a E-mail last Friday. The first is retroactivity which has two subparts. Retroactivity of the rules themselves, and retroactivity of the substantive standard of review.

I actually came to the list with a E-mail about this, on May 2. I will put a copy of that E-mail in the chat. On the retroactivity, I think we didn't, I didn't hear or see any objections on the list or when I last mentioned it on a call, that the retroactivity recommendations for first reading would be as follows. I'm reading from some slides that I sent. First with respect to retroactive substantive IRP standard, I believe that our position is there will be no retroactivity. The bylaws are the bylaws. That's it.

2, with respect to retroactivity of the supplementary rules of procedure, I'll give you, I'll read out, it's not too long, what the position I mentioned and I think we have agreed. With respect to the retroactive application of the new rules to the IRPs now pending and filed on or after October 1, 2016, I recommend that we insert a provision allowing a party to request the panel hearing the case to decide this as a matter of discretion, we should add a standard for the panel and reviewing

such requests specifically that unless all parties consent, it shall not allow new rules to apply to pending cases, if that action would work a substantial unfairness or increase in costs to any party or otherwise be unreasonable in the circumstances.

That is the suggested first reading for the retroactivity comments.

I'm opening the floor to people if they want to comment on that. Kavouss, please, you have the floor.

>> KAVOUSS ARASTEH: Yes, with respect to the first one, no problem. With respect to the --
(very muffled audio).

Initially, the support [inaudible] some time ago [inaudible] that covers because you put it not a automatic retroactivity but subject to some discretion of the panel that seems to cover the point of the people, that it is not without reason, it is under circumstances and certain conditions. We have described or made the condition and discussion of the panel. In my view it seems okay. Thank you.

>> DAVID MCAULEY: Thank you, Kavouss. Does anybody else have a comment? Kavouss, I'm having a little bit difficulty hearing, but I believe you said that was okay. I did hear a lot of what you said, I think that you concluded by saying it was okay, is that correct?

>> KAVOUSS ARASTEH: Yes, I said that is okay for me with the explanation of the text you have provided giving a opportunity to substantive discussion of the panel retroactive, could be possible.

>> DAVID MCAULEY: Thanks, Kavouss. That was much clearer on the phone.

>> Greg: I agree with your entire formulation and agree to expectations add on as well, but there is nothing that shocked my conscience. We are in good shape on this.

>> DAVID MCAULEY: Thank you, Greg. Does anybody else wish to make comment on this? Hearing none, we will consider that a first reading accomplished on retroactivity recommendations, and I'll come to the list with a note that will be similar to Malcolm's. I'll wait to look at Malcolm's and plagiarize it and use it for the retroactivity thing. I'm looking at the clock. 8 minutes left. The next item that I had up for first reading was the issue of standing and sometimes described as materially affected and I'll put a second E-mail in the chat. I wrote about this in the E-mail on May 8. Let me just put that in here. I believe this is it.

On the materially affected issue, there were a couple of recommendations. One, there was a comment that asked, essentially anybody could bring an IRP claim. I recommended, I think we recommended against that, as beyond the provisions of

the bylaws.

Then there was a request, I believe it was by several commenters but I remember INTA, the trademark association, most clearly. But this was probably from several, talking about standing for people would be subject to imminent harm and Becky came in the E-mail list with a comment about this and pointed out bylaw provision, I think it was 4.3P. I thought that was a good comment that Becky made.

So the recommendations here are, one, as I said, that we reject the comment that anyone can bring an IRP, and 2, with respect to the imminent harm, the recommendation is that we revise the definition of a claimant, Kavouss, I'll get to you in a minute, in section 1 of the new rules to take into account the strict provisions of bylaw section 4.3P. Even though the definition of claimant follows the provision of bylaw 4.3B1. In other words, I think definition of ...

(captioner loses internet connection for about 30 seconds.)

>> KAVOUSS ARASTEH: Criteria for evident or nonevident, that is clear. We can go ahead with that. But for the time being, I have some doubt, because it would be a little bit subjective. Thank you.

>> DAVID MCAULEY: Thank you, Kavouss. Bylaw 4.3P simply says a claimant may request interim relief, interim relief may include prospective relief, interlocutory relief or declaratory injunctive relief, etcetera and it's not a defined term there that I see. I believe this would be up to the possible. That would be my answer to your question. Anybody else, comments or questions? Sorry, go ahead.

>> KAVOUSS ARASTEH: Imminent or not.

>> DAVID MCAULEY: I didn't hear that. Could you say it one more time?

>> KAVOUSS ARASTEH: Imminent objective [inaudible] before harm or just put it harm and refer it back to the bylaw.

>> DAVID MCAULEY: I think, yes, that is my understanding. Malcolm, you had your hand up but took it down. Did you want to comment?

>> MALCOLM HUTTY: Yes. I was going to, I don't find the fact that the panel was determined whether a thing was imminent in the context of giving interim relief to be surprising, it's perfectly normal before panels to have that kind of thing to prevent issues that will be before them being rendered moot by some kind of irreversible action. I'm quite sure that any panelist that has the appropriate experience of such things, to be a suitable panelist will be familiar with it. I have every confidence they can work it out. I don't see a issue, I don't hear a difficulty here.

>> DAVID MCAULEY: Thanks, Malcolm. Sam, your hand is up.

You have the floor next.

>> SAMANTHA EISNER: Thanks, and Sam Eisner for the record. Where I agree with Malcolm, I like to put it on the record. Malcolm, agreed with your comment. But I'm not clear on what the, what you are proposing to bring in to the definition of claimant to account for 4.3P. I'm just not clear on what that means.

>> DAVID MCAULEY: Thanks, Sam. Let me answer that quickly. We are at the top of the hour I want to mention something else. What I hope to accomplish is that Sidley basically make, do a once, due diligence check on the language that we have for the claimant to make sure that language allows for people to make, people to take advantage of 4.3P, and that the language in the rules doesn't somehow preclude that. But I can explain that more. We are not going to finish this particular issue on this call. So if it's okay -- thanks, Sam. I may move on. I was going to try to get to ask Greg if he wanted to speak to agenda point 9 which is just getting to a explanation discussion of the process that we need to follow after we conclude this, it was Greg that asked me about that. We don't have time for that. I'll put that higher on the agenda for the next call.

But I would like to thank everybody, and we have reached first reading on two issues on this call. I think we are going to be, I'll be coming to list with a number of issues. I'm hoping again as I said before through the list and the calls to get a number of these pushed through first reading and obviously then through second reading. If anybody would like to make a final comment on this process, please go ahead, and speak up.

If not, I think we can, thank you, Sam, I think we can wrap this call and give everybody back a minute of their day. I'd like to thank everybody and especially Malcolm for leading on that issue. We can end the recording. Good-bye, all.

>> Bye.

>> Thank you.

(end of meeting at 3:00 p.m. CST)

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