



Bernard Turcotte <turcotte.bernard@gmail.com>

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## Re: [IOT] Use Case on Time for Filing IRP with an Outer Limit

1 message

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Samantha Eisner via IOT <iot@icann.org>

Wed, Apr 7, 2021 at 6:34 PM

Reply-To: Samantha Eisner <Samantha.Eisner@icann.org>

To: Susan Payne <susan.payne@comlaude.com>, Elizabeth Le <elizabeth.le@icann.org>, "iot@icann.org" <iot@icann.org>

Dear IOT –

Apologies for my absence at our last meeting. I went back and listened to the recording and noted that on the discussion of the Edutania example, there was a lot of focus on potential issues of “as applied” as opposed to raising a challenge in the IRP to the Board’s initial approval of the program. I wanted to make sure ICANN Legal’s position on the question that Malcolm raised is clear. Around the 38<sup>th</sup> minute of the call, Malcolm asked: “Can Edutania raise the argument that [ICANN org’s act to expand the program into Edutania] is ultra vires, or is that argument to be struck on the grounds that it should have been made five years ago [at the time of Board approval of the program] if it was to be made at all? If I understand [Liz’s] advice correctly, because the specific action that is complained of is one that is proximate, is within time, then there’s no reason why that argument gets struck out. They can make whatever argument they’d like in respect of an action that is within time to be challenged. And so the case can go ahead. Am I reading that correctly?”

The answer is yes, that if Edutania raises that question within the period of repose as timed from ICANN org’s act bringing the program into Edutania, then the IRP claim is not time-barred. (There of course remain the other relevant standing issues, but we will assume for the sake of example that those are met, therefore the IRP can proceed.)

Much of the ensuing conversation seemed to be about matters of how a pleading would be drafted. For example, if Edutania stated that the action they were challenging was the introduction into Edutania, but drafted an IRP focusing on the Board’s initial approval five years prior, then Edutania has a pleading issue and leaves itself open to a panel determination that Edutania is really trying to challenge a time-barred action. But if Edutania states and drafts an IRP that focuses on how the recent act was ultra vires, that pleading issue is gone. Stated more simply, IRP claimants should be encouraged to clearly state IRPs based on the act they identify as giving rise to their injury/claim. With that caution, whether the situation is “as applied” or “initial policy” really shouldn’t matter – the act that causes the ultra vires issue is the focus. The IOT’s conversation recognizes that there might be more than one act that causes an ultra vires issue.

As both Malcolm, Susan and Liz each discussed during the meeting, assuming that an IRP Panel declares the act to be ultra vires, it is then up to the Board to consider how to apply that declaration and whether it needs application beyond the specific challenged act. While we cannot presume to know how the Board would respond, unless there were significant facts distinguishing the rollout in Edutania from the rollout in prior program years, if the Board applied only the most narrow remedy to the Edutania rollout that may not be well received by the community. Any ensuing act of the Board could be subject to further IRP or other accountability mechanisms.

Looking forward to continuing our conversation next week.

Sam

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**From:** IOT <[iot-bounces@icann.org](mailto:iot-bounces@icann.org)> on behalf of Susan Payne via IOT <[iot@icann.org](mailto:iot@icann.org)>  
**Reply-To:** Susan Payne <[susan.payne@comlaude.com](mailto:susan.payne@comlaude.com)>  
**Date:** Tuesday, March 16, 2021 at 9:23 AM  
**To:** Liz Le <[elizabeth.le@icann.org](mailto:elizabeth.le@icann.org)>, "[iot@icann.org](mailto:iot@icann.org)" <[iot@icann.org](mailto:iot@icann.org)>  
**Subject:** Re: [IOT] Use Case on Time for Filing IRP with an Outer Limit

Thanks very much Liz, this is very helpful. Hopefully we can get further views on this approach during our call a little later today, and perhaps also consider Malcolm's second stress test (on the UDRP expansion to DNS abuse). Regarding this DNS Abuse example, based on Liz's input below, it seems to me the domain name registrant would not be in a position to challenge the policy per se, because they would be out of time. Where does an actionable act of ICANN Staff or Board arise with the exercise of a DRS by a third party provider that – the registrant contends – is contrary to the Bylaws? Would this be in scope as a covered Action that “resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws?” Art 4.3(b)(A)(3). I'm not sure that it would. But perhaps this is a circumstance where we should be exploring how to ensure the registrant knew (or ought to have known) earlier, before they were timed-out?

For everyone's convenience I am attaching the two stress tests. I am also attaching the short powerpoint of points for discussion from a couple of calls ago – although we have been discussing the issues on the first slide we will also need to consider the second slide. Finally, again for convenience in case we need to refer, I am attaching the summary of public comment input on timing.

**Susan Payne**

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**From:** IOT <[iot-bounces@icann.org](mailto:iot-bounces@icann.org)> **On Behalf Of** Elizabeth Le via IOT  
**Sent:** 10 March 2021 23:19  
**To:** [iot@icann.org](mailto:iot@icann.org)  
**Subject:** [IOT] Use Case on Time for Filing IRP with an Outer Limit

Dear IOT members,

During our last IOT discussion, ICANN org took an action item to provide in writing the use case on the time for filing an IRP with an outer time limit under the EduTania scenario (Scenario 1) set forth by Malcolm. This example assumes that the current 120 day/1 year limitation is in place, though the timing could change based on the final outcomes of the IOT's deliberation.

Though ICANN approved the program five years before, in that fifth year ICANN org implements the 5-by5-by5 program in Ruritania. That act of implementation is an ICANN staff action that could be challenged under IRP, assuming the claimant meets the other standing requirements. Specifically, the claimant's filing of an IRP would be considered timely (i.e., not capable of

challenge on timing grounds) so long as it filed within 120 days after the claimant became aware of the material effect of action which is not more than 12 months from the date of the action (i.e., ICANN's introduction of the program into Ruritania). The claimant, of course, has other procedural items it must fulfill, such as alleging the harm caused by the act and that ICANN's act was outside of the Bylaws/mission, but those obligations exist separate from the timing issue.

As part of its timely IRP case, the claimant will be able to challenge the program and its implementation as applied to Ruritania. So, while the claimant would be time barred from challenging the Board's initial adoption of the program five years prior or potentially how the program was implemented in prior years (depending on the specific dates of roll-out), the claimant would not be time barred from challenging the year 5 implementation. If there is Panel declaration in the claimant's favor (i.e., that ICANN did in fact violate its Articles or Bylaws in the implementation), the ICANN Board would likely evaluate how that declaration impacts both the specific implementation of the program and well as the program as a whole.

This example demonstrates that there are many touch points along the way where an action may be taken by either the Board (the initial approval) or the org (new implementation action) that supports a claimant's ability to act in a timely manner while challenging ICANN's accountability. Claimants can challenge ICANN's actions without introducing time frames (or lack thereof) for challenges that diminish the certainty of ICANN's actions. It also reduces the need to create new specific briefing processes to consider and weigh timeliness of claims, so that panels can more quickly proceed to the substantive merits.

Best regards,

Liz

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Elizabeth D. Le

Associate General Counsel | ICANN

Los Angeles, CA

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