

27 September 2013

To the attention of:

ICANN Board Governance Committee  
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Our ref 1312790

**LETTER OF RESPONSE TO RECONSIDERATION REQUEST 13-12 FILED BY TENCENT HOLDINGS LIMITED**

Dear Members of the Board Governance Committee

On 14 September 2013, Tencent Holdings Limited submitted Reconsideration Request 13-12 in relation to the Determinations of the Experts appointed by the World Intellectual Property Organization (WIPO) for Legal Rights Objections LRO2013-0040 and LRO2013-0041 (the "Determinations"). In both proceedings, Tencent Holdings Limited was the Applicant/Respondent and Sina Corporation was the Objector.

Having carefully considered Reconsideration Request 13-12 as submitted by Tencent Holdings Limited, Sina respectfully submits that Reconsideration Request 13-12 should be rejected in its entirety as it disregards applicable rules contained in ICANN Bylaws and the new gTLD Applicant Guidebook. It is abundantly clear that Reconsideration Request 13-12 is nothing more than a mere attempt to seek to re-argue Legal Rights Objections LRO2013-0040 and LRO2013-0041. Specifically, pages 8 to 16 of Reconsideration Request 13-12 are clearly re-arguing the case and are solely discussing the merits of Legal Rights Objections LRO2013-0040 and LRO2013-0041. This is not acceptable and the Reconsideration Request mechanism is not the appropriate forum to do this and it should thus be unequivocally rejected, being a misuse of the Reconsideration mechanism.

As the Board Governance Committee has consistently stated, "**Reconsideration is not a mechanism for direct, de novo appeal of staff or panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN.**" See for instance, Recommendation on Reconsideration Request 13-2 and Recommendation on Reconsideration Request 13-5.

This attempt at obtaining from ICANN an appeal of the Determinations is inadmissible as the purpose of the Reconsideration mechanism is certainly not to re-try the determinations of the expert panels.

Substantive arguments have already been presented both by Sina Corporation and Tencent Holdings Limited in the course of Legal Rights Objections LRO2013-0040 and LRO2013-0041, through the submission of Objections, Responses and additional submissions by the parties. Thus, Sina Corporation will not respond to the new arguments or reiterated arguments contained in Reconsideration Request 13-12 in relation to the merits of the case as it is unreasonable for Tencent Holdings Limited to expect an appeal of the Determinations. However, should the Board Governance Committee wish to obtain such responses, then Sina Corporation will submit responses on all substantive points raised by Tencent Holdings Limited in Reconsideration Request 13-12.

Whilst Sina Corporation considers that Reconsideration Request 13-12 has been submitted in clear contravention of ICANN's rules, Sina Corporation would like to make the following additional comments on Reconsideration Request 13-12.

#### 1. RECONSIDERATION REQUEST 13-12 IS IN CONTRAVENTION OF ICANN RULES

According to ICANN Bylaws (Article IV, Section 2):

**"Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:**

- a. one or more staff actions or inactions that contradict established ICANN policy(ies); or**
- b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or**
- c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information."**

The mechanism of Reconsideration Request has thus a specific purpose and requires essentially that three elements be substantiated:

- (i) There needs to be an action or inaction of one or more staff of ICANN or of the ICANN Board; **and**
- (ii) It needs to be in contravention of ICANN's established policies; **and**
- (iii) It needs to have adversely affected the person or entity filing the Request.

The Reconsideration mechanism was set up to address rare cases falling within the scope of Article IV, Section 2 of ICANN Bylaws and meeting the three cumulative requirements above. In the past 5 years only 18 such Requests have been filed.

To use the Reconsideration mechanism for a purpose which clearly falls outside of the scope of ICANN Bylaws can only suggest bad faith on the part of the person or entity submitting such a Request. Sina Corporation considers that Reconsideration Request 13-12 is a misuse of the Reconsideration mechanism.

Contrary to the claims in the Reconsideration Request, Section 3.4.6 of the New gTLD Applicant Guidebook which is binding upon all applicants for new gTLDs including Tencent Holdings Limited, cannot realistically be construed as "*clearly indicating that the DRSP panels are only providing a recommendation to ICANN*". It states that: "*the findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.*"

The wording clearly says that ICANN will accept the determinations, which is very different from saying that ICANN may accept the determinations. Thus, the New gTLD Applicant Guidebook is clear on the fact that expert determinations will become binding upon being issued by the respective experts nominated by the respective Dispute Resolution Service Providers (DRSPs) and it is not at all envisaged that ICANN should carry out any review or verification of said determinations. The experts nominated by the various DRSPs are undisputed experts in their respective fields and they are independent from ICANN. Expert determinations will be accepted by ICANN as expert determinations.

An analogy could be drawn with the UDRP, which was created by ICANN and is a procedure which gives rights to expert determinations from several DRSPs. It would be absurd for the losing Respondent in a UDRP case to file a Reconsideration Request just because the UDRP was created by ICANN.

Despite the above, Tencent Holdings Limited seems to expect that ICANN should verify and review the substantive findings of all expert determinations. This is clearly not what was intended by ICANN and would not in any event be within ICANN's remit or expertise, whereby ICANN's recourse to highly regarded third party DRSPs and experts. This was also confirmed by the Board Governance Committee in its Recommendation on Reconsideration Request 13-5: "*In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of Panel decisions. and Dismissal of a request for reconsideration is appropriate if the Board Governance Committee ("BGC") finds that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws. These standing requirements are intended to **protect the reconsideration process from abuse** and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff acted in contravention of established policies.*"

ICANN's role is not to act as an appeal body for DRSPs decisions and Tencent Holdings Limited's arguments to the contrary are ill-founded.

Thus Tencent Holdings Limited's contention in Reconsideration Request 13-12 that an action or inaction of the ICANN Board or of one or more staff of ICANN is in contravention of ICANN's established policies, is ill-founded.

In conclusion Tencent Holdings Limited's Reconsideration Request is not at all within the scope of Article IV, Section 2 of ICANN Bylaws and Sina Corporation submits that Reconsideration Request 13-12 should be dismissed and that Tencent Holdings Limited has no standing at all.

## 2. RELIANCE ON STRING CONFUSION OBJECTION EXPERT DETERMINATIONS

In an attempt to seek to justify Reconsideration Request 13-12, Tencent Holdings Limited has put forward an argument relating to an alleged inconsistency in the expert determinations issued for String Confusion Objections (see page 3 of Reconsideration Request 13-12: "*other similarly situated applicants/respondents across the various DRSP (...) have suffered inconsistent or erroneous decisions by panellists*", followed by a list of five examples including four expert determinations relating to string confusion).

This point is far-fetched and wholly immaterial as it seeks to rely on alleged inconsistencies of expert determinations and their substantive reasoning in the context of a completely different type of objection, before a wholly separate DRSP. The fact that Tencent Holdings Limited has relied on this irrelevant argument as one of its main arguments is telling of the fact that Tencent Holdings Limited was not in a position to present pertinent arguments in support of its Reconsideration Request.

### 3. THE ALLEGED INCOMPETENCE OF THE WIPO EXPERT PANEL

Tencent Holdings Limited has not hesitated to repeatedly question the competence and expertise of the experts nominated by WIPO, especially Ms. Susanna H.S. Leong (incidentally but notably the expert chosen by Tencent Holdings Limited) and Dr. Hong Xue (the Presiding Panelist). For instance, Reconsideration Request 13-12 states that the Expert Determination is "*a split decision overlooked key aspects of trademark law*" and alludes to the experts' "*incorrect understanding of Chinese Trademark law*". Leaving aside the fact that these statements are disrespectful, it is clear that they cannot be taken remotely seriously, and that the reality is quite the opposite, since both Dr. Hong Xue and Ms. Susanna H.S. Leong are some of the most revered and renowned experts on Chinese trade mark law which is precisely why they were selected by WIPO in the first place and precisely why Ms. Susanna Leong was chosen by Tencent Holdings Limited.

The very impressive Curricula Vitae of Dr. Hong Xue and Ms. Susanna H.S. Leong are attached for ease of reference and speak volumes about their in-depth expertise and knowledge of international and Chinese trade mark law.

Sina Corporation respectfully submits that statements from Tencent Holdings Limited in relation to Dr. Hong Xue and Ms. Susanna H.S. Leong are unreasonable and ill-founded.

### 4. FACTUAL MISSTATEMENTS AND MISQUOTES

Even though this is not relevant as Reconsideration Request 13-12 is in contravention of ICANN rules and not within the scope of ICANN Bylaws, Sina Corporation must stress that the new arguments and reiterated arguments put forward by Tencent Holdings Limited are ill-founded and contain a number of misstatements and misquotes.

By way of illustration, Tencent Holdings Limited sought to mislead the Board Governance Committee on the substantive point relating to the future use of the TLDs .WEIBO and .微博. Indeed Tencent Holdings Limited stated in Reconsideration Request 13-12 that it would not make any use of the TLDs in relation to the types of services for which Sina Corporation has registered its 微博 trade mark (i.e. class 35 of the Nice International Classification of Goods and Services which covers, *inter alia*, advertising and compilation of information into computer databases). A brief consideration of Tencent Holdings Limited's applications makes it abundantly clear that it is in fact not the case, quite the opposite in fact, as numerous references are made to services falling within class 35 of the Nice International Classification of Goods and Services (for instance in response to question 18 "*The ability to create domain names on demand for its micro-bloggers, as well as for specific marketing, specialty service and product development, supports these goals*"; "*Use of third party ad networks such that a user's information may be used in target advertising*", "*Tencent will engage with the different markets for its new .weibo domain names, including reaching out to individual users through a range of events, radio promotions and on-campus promotions*".

### 5. CONCLUSION

Sina Corporation respectfully considers that Tencent Holdings Limited's Reconsideration Request constitutes an abuse of the Reconsideration mechanism by using it for the purpose of seeking an

appeal of the Determinations. In addition, the substantive re-arguments and new arguments of Tencent Holdings Limited are misleading and wholly immaterial.

For the above reasons, Sina Corporation respectfully request that Reconsideration Request 13-12 be dismissed entirely.

Respectfully submitted

David Taylor, Partner