INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-15-0005-2073

AFILIAS LIMITED, BRS MEDIA, INC,
AND TIN DALE, LLC,
Claimants,

and

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS,
Respondent.

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Resp. Ex. 1

Community Priority Evaluation (CPE) Guidelines

Prepared by The Economist Intelligence Unit

Version 2.0

Interconnection between Community Priority Evaluation (CPE) Guidelines and the Applicant Guidebook (AGB)

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB. This document does not modify the AGB framework, nor does it change the intent or standards laid out in the AGB. The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.

Criterion #1: Community Establishment

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not considered here, but taken into account when scoring Criterion #2, "Nexus between Proposed String and Community.")

Measured by

1-A Delineation

1-B Extension

A maximum of 4 points is possible on the Community Establishment criterion, and each sub-criterion has a maximum of 2 possible points.

1-A Delineation

AGB Criteria	Evaluation Guidelines
Scoring	
2= Clearly delineated, organized, and pre-existing community. 1= Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2. 0= Insufficient delineation and pre-existence for a score of 1.	The following questions must be scored when evaluating the application: *Is the community clearly delineated?* *Is there at least one entity mainly dedicated to the community?* *Does the entity (referred to above) have documented evidence of community activities?* *Has the community been active since at least September 2007?*
Definitions	
"Community" - Usage of the expression "community" has evolved considerably from its Latin origin – "communitas" meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest. Notably, as "community" is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some	The "community," as it relates to Criterion #1, refers to the stated community in the application. Consider the following: • *Was the entity established to administer the community?* • *Does the entity's mission statement clearly identify the community?*

understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.	Additional research may need to be performed to establish that there is documented evidence of community activities. Research may include reviewing the entity's web site, including mission statements, charters, reviewing websites of community members (pertaining to groups), if applicable, etc.
"Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.	"Delineation" also refers to the extent to which a community has the requisite awareness and recognition from its members. The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certifications aligned with community goals, etc.
"Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.	
"Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.	"Mainly" could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization. Consider the following: • *Was the entity established to administer the community?* • *Does the entity's mission statement clearly identify the community?*
Criterion 1-A guidelines	
With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the	With respect to the Community, consider the following: • *Are community members aware of the existence of the community as defined by the applicant?* • *Do community members recognize the community as defined by the applicant?*

community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."	• *Is there clear evidence of such awareness and recognition?*
With respect to "Delineation," if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.	

1-B Extension

AGB Criteria	Evaluation Guidelines
Scoring	
Extension: 2=Community of considerable size and longevity 1=Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2. 0=Community of neither considerable size nor longevity	The following questions must be scored when evaluating the application: *Is the community of considerable size?* *Does the community demonstrate longevity?*
Definitions	
"Extension" relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.	
"Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."	Consider the following: • *Is the designated community large in terms of membership and/or geographic dispersion?*

"Longevity" means that the pursuits of a community are of a lasting, non-transient nature.	Consider the following: • *Is the community a relatively short-lived congregation (e.g. a group that forms to represent a one-off event)?* • *Is the community forward-looking (i.e. will it continue to exist in the future)?*
Criterion 1-B Guidelines	
With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension." With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.	

Criterion #2: Nexus between Proposed String and Community

This section evaluates the relevance of the string to the specific community that it claims to represent.

Measured by

2-A Nexus

2-B Uniqueness

A maximum of 4 points is possible on the Nexus criterion, and with the Nexus sub-criterion having a maximum of 3 possible points, and the Uniqueness sub-criterion having a maximum of 1 possible point.

2-A Nexus

AGB Criteria	Evaluation Guidelines
Scoring	
Nexus: 3= The string matches the name of the community or is a well-known short-form or abbreviation of the community 2= String identifies the community, but does not qualify for a score of 3 0= String nexus does not fulfill the requirements for a score of 2	The following question must be scored when evaluating the application: *Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.*
Definitions	
"Name" of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.	"Others" refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.
"Identify" means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.	"Match" is of a higher standard than "identify" and means 'corresponds to' or 'is equal to'. "Identify" does not simply mean 'describe', but means 'closely describes the community'. "Over-reaching substantially" means that the string indicates a wider geographical or thematic remit than the community has.

	Consider the following:
	• *Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant's community?*
	• *Does the string capture a wider geographical/thematic remit than the community has? The "community" refers to the community as defined by the applicant.*
	• *An Internet search should be utilized to help understand whether the string identifies the community and is known by others.*
	• *Consider whether the application mission statement, community responses, and websites align.*
Criterion 2-A Guidelines	
With respect to "Nexus," for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community. With respect to "Nexus," for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not qualify for a 2.	

2-B Uniqueness

AGB Criteria	Evaluation Guidelines
Scoring	
Uniqueness: 1=String has no other significant meaning beyond	The following question must be scored when evaluating the application:

identifying the community described in the application. 0=String does not fulfill the requirement for a score of 1.	*Does the string have any other significant meaning (to the public in general) beyond identifying the community described in the application?*
Definitions	
"Identify" means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.	"Over-reaching substantially" means that the string indicates a wider geographical or thematic remit than the community has.
"Significant meaning" relates to the public in general, with consideration of the community language context added	Consider the following: • *Will the public in general immediately think of the applying community when thinking of the applied-for string?* • *If the string is unfamiliar to the public in general, it may be an indicator of uniqueness.* • *Is the geography or activity implied by the string?* • *Is the size and delineation of the community inconsistent with the string?* • *An internet search should be utilized to find out whether there are repeated and frequent references to legal entities or communities other than the community referenced in the application.*
Criterion 2-B Guidelines	
"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores	

2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness." It should be noted that "Uniqueness" is only about the meaning of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."	

Criterion #3: Registration Policies

This section evaluates the applicant's registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Measured by

3-A Eligibility

3-B Name Selection

3-C Content and Use

3-D Enforcement

A maximum of 4 points is possible on the Registration Policies criterion and each sub-criterion has a maximum of 1 possible point.

3-A Eligibility

AGB Criteria	Evaluation Guidelines
Scoring	
Eligibility: 1= Eligibility restricted to community members 0= Largely unrestricted approach to eligibility	The following question must be scored when evaluating the application: *Is eligibility for being allowed as a registrant restricted?*
Definitions	
"Eligibility" means the qualifications that organizations or individuals must have in order to be allowed as registrants by the registry.	
Criterion 3-A Guidelines	
With respect to "eligibility' the limitation to community "members" can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant's physical address be within the boundaries of the location.	

3-B Name Selection

AGB Criteria	Evaluation Guidelines
Scoring	
Name selection: 1= Policies include name selection rules consistent with the articulated community-based purpose of the applied-for TLD 0= Policies do not fulfill the requirements for a score of 1	The following questions must be scored when evaluating the application: *Do the applicant's policies include name selection rules?* *Are name selection rules consistent with the articulated community-based purpose of the applied-for gTLD?*
Definitions	
"Name selection" means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.	Consider the following: • *Are the name selection rules consistent with the entity's mission statement?*
Criterion 3-B Guidelines	
With respect to "Name selection," scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.	

3-C Content and Use

AGB Criteria	Evaluation Guidelines

Scoring	
Content and use: 1= Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for TLD 0= Policies do not fulfill the requirements for a score of 1	The following questions must be scored when evaluating the application: *Do the applicant's policies include content and use rules?* *If yes, are content and use rules consistent with the articulated community-based purpose of the applied-for gTLD?*
Definitions	
"Content and use" means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.	Consider the following: • *Are the content and use rules consistent with the applicant's mission statement?*
Criterion 3-C Guidelines	
With respect to "Content and Use," scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.	

3-D Enforcement

AGB Criteria	Evaluation Guidelines
Scoring	
Enforcement 1= Policies include specific enforcement measures	The following question must be scored when evaluating the application:

(e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms 0= Policies do not fulfill the requirements for a score of 1	*Do the policies include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms?*

Definitions	
"Enforcement" means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.	"Coherent set" refers to enforcement measures that ensure continued accountability to the named community, and can include investigation practices, penalties, and takedown procedures with appropriate appeal mechanisms. This includes screening procedures for registrants, and provisions to prevent and remedy any breaches of its terms by registrants. Consider the following: Do the enforcement measures include: *Investigation practices* *Penalties* *Takedown procedures (e.g., removing the string)* *Whether such measures are aligned with the community-based purpose of the TLD* *Whether such measures demonstrate continuing accountability to the community named in the application*

Criterion 3-D Guidelines	
With respect to "Enforcement," scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement	

mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.	

Criterion #4: Community Endorsement

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed in the application, with due regard for communities implicitly addressed by the string.

Measured by

4-A Support

4-B Opposition

A maximum of 4 points is possible on the Community Endorsement criterion and each sub-criterion (Support and Opposition) has a maximum of 2 possible points.

4-A Support

AGB Criteria	Evaluation Guidelines
Scoring	
Support: 2= Applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community 1= Documented support from at least one group with relevance, but insufficient support for a score of 2 0= Insufficient proof of support for a score of 1	The following questions must be scored when evaluating the application: *Is the applicant the recognized community institution or member organization?* To assess this question please consider the following: a. *Consider whether the community institution or member organization is the clearly recognized representative of the community.* If the applicant meets this provision, proceed to Letter(s) of support and their verification. If it does not, or if there is more than one recognized community institution or member organization (and the applicant is one of them), consider the following: *Does the applicant have documented*

<table>
<tr>
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<td>support from the recognized community institution(s)/member organization(s) to represent the community?

If the applicant meets this provision, proceed to Letter(s) of support and their verification. If not, consider the following:

Does the applicant have documented authority to represent the community?

If the applicant meets this provision, proceed to Letter(s) of support and their verification. If not, consider the following:

Does the applicant have support from at least one group with relevance?

If the applicant meets this provision, proceed to Letter(s) of support and their verification.

➤ Instructions on letter(s) of support requirements are located below, in Letter(s) of support and their verification</td>
</tr>
<tr>
<td colspan="2">Definitions</td>
</tr>
<tr>
<td>"Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of that community.</td>
<td></td>
</tr>
<tr>
<td>"Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.</td>
<td>The institution(s)/organization(s) could be deemed relevant when not identified in the application but has an association to the applied-for string.</td>
</tr>
<tr>
<td colspan="2">Criterion 4-A Guidelines</td>
</tr>
<tr>
<td>With respect to "Support," it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.</td>
<td>Letter(s) of support and their verification:
Letter(s) of support must be evaluated to determine both the relevance of the organization and the validity of the documentation and must meet the criteria spelled out below. The letter(s) of support is an input used to determine the relevance of the organization and the validity of</td>
</tr>
</table>

the documentation.

Also with respect to "Support," the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.

The applicant will score a 1 for "Support" if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on "Support" if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.

To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.

Consider the following:

Are there multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?

Does the applicant have support from the majority of the recognized community institution/member organizations?

Has the applicant provided full documentation that it has authority to represent the community with its application?

A majority of the overall community may be determined by, but not restricted to, considerations such as headcount, the geographic reach of the organizations, or other features such as the degree of power of the organizations.

Determining relevance and recognition
Is the organization relevant and/or recognized as per the definitions above?

Letter requirements & validity
Does the letter clearly express the organization's support for the community-based application?

Does the letter demonstrate the organization's understanding of the string being requested?

Is the documentation submitted by the applicant valid (i.e. the organization exists and the letter is authentic)?

To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or

expressions of support received.

4-B Opposition

AGB Criteria	Evaluation Guidelines
Scoring	
Opposition: 2= No opposition of relevance 1= Relevant opposition from one group of non-negligible size 0= Relevant opposition from two or more groups of non-negligible size	The following question must be scored when evaluating the application: *Does the application have any opposition that is deemed relevant?*
Definitions	
"Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.	Consider the following: For "non-negligible" size, "relevant" and "relevance" consider: • *If the application has opposition from communities that are deemed to be relevant.* • *If a web search may help determine relevance and size of the objecting organization(s).* • *If there is opposition by some other reputable organization(s), such as a quasi-official, publicly recognized organization(s) or a peer organization(s)?* • *If there is opposition from a part of the community explicitly or implicitly addressed?*
Criterion 4-B Guidelines	
When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for "Opposition." To be taken into account as relevant opposition, such objections or	**Letter(s) of opposition and their verification:** Letter(s) of opposition should be evaluated to determine both the relevance of the organization and the validity of the documentation and should meet the criteria spelled out below. Determining relevance and recognition *Is the organization relevant and/or*

comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.	*recognized as per the definitions above?* Letter requirements & validity *Does the letter clearly express the organization's opposition to the applicant's application?* *Does the letter demonstrate the organization's understanding of the string being requested?* *Is the documentation submitted by the organization valid (i.e. the organization exists and the letter is authentic)?* To be considered relevant opposition, such documentation should contain a description of the process and rationale used in arriving at the expression of opposition. Consideration of opposition is not based merely on the number of comments or expressions of opposition received.

Verification of letter(s) of support and opposition

Additional information on the verification of letter(s) of support and opposition:

- Changes in governments may result in new leadership at government agencies. As such, the signatory need only have held the position as of the date the letter was signed or sealed.
- A contact name should be provided in the letter(s) of support or opposition.
- The contact must send an email acknowledging that the letter is authentic, as a verbal acknowledgement is not sufficient.
- In cases where the letter was signed or sealed by an individual who is not currently holding that office or a position of authority, the letter is valid only if the individual was the appropriate authority at the time that the letter was signed or sealed.

About the Community Priority Evaluation Panel and its Processes

The Economist Intelligence Unit (EIU) is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 900 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The EIU was selected as a Panel Firm for the gTLD evaluation process based on a number of criteria, including:

- The panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role.
- The provider must be able to convene a linguistically and culturally diverse panel capable, in the aggregate, of evaluating Applications from a wide variety of different communities.
- The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and
- The panel must be able to document the way in which it has done so in each case.

The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators must ensure that no conflicts of interest exist.

- All EIU evaluators must undergo training and be fully cognizant of all CPE requirements as listed in the Applicant Guidebook. This process will include a pilot testing process.

- EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications.

- Language skills will also considered in the selection of evaluators and the assignment of specific Applications.

- All applications will be evaluated and scored, in the first instance by two evaluators, working independently.

- All Applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.

- The EIU will work closely with ICANN when questions arise and when additional information may be required to evaluate an application.

- The EIU will fully cooperate with ICANN's quality control process.

Resp. Ex. 2

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

In the Matter of an Independent Review Process

Between:

Booking.com B.V.

Applicant

-and-   ICDR Case No: 50-20-1400-0247

**Internet Corporation for Assigned Names
and Numbers (ICANN)**

Respondent

FINAL DECLARATION

The Panel:

Hon. A. Howard Matz
David H. Bernstein, Esq.
Stephen L. Drymer (Chair)

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DECLARATION

WE, THE UNDERSIGNED PANELISTS, members of the Independent Review Process Panel ("**IRP Panel**" or "**Panel**"), having been designated in accordance with ICANN Bylaws dated 11 April 2013, hereby issue the following Final Declaration ("**Declaration**"):[1]

I. INTRODUCTION

1. This Declaration is issued in the context of an Independent Review Process ("**IRP**") as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers ("**ICANN**"; "**ICANN Bylaws**" or "**Bylaws**"). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 ("**ICDR**"; "**ICDR Rules**") as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process ("**Supplementary Procedures**").

2. The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains ("**gTLDs**", also known as gTLD "**strings**") are applied for, reviewed and delegated into the Internet's domain name system ("**DNS**") root zone.

3. As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com's applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation, Bylaws and gTLD Applicant Guidebook ("**Guidebook**").

4. Reading between the lines of the parties' submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN's guiding principles – transparency and fairness – as applied to one of ICANN's most essential activities – the delegation of new gTLDs[2] – in circumstances in which various members of the Internet community, including certain members of the ICANN Board's New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

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[1] As requested by the ICDR, the Declaration was provided to the ICDR in draft form on 26 January 2015 for non-substantive comments on the text (if any). It was returned to the Panel on 2 March 2015.

[2] As stated in the very first sentence of the Guidebook: "New gTLDs have been in the forefront of ICANN's agenda since its creation."

present Declaration, in accordance with, and within the constraints of the Bylaws, the ICDR Rules and the Supplementary Procedures.

II.   THE PARTIES

A. The Applicant: Booking.com

5.   The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as "the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations."[3] Booking.com's primary focus is on the U.S. and other English-language markets.

6.   Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

B. The Respondent: ICANN

7.   The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure option of the Internet's unique identifier systems." ICANN describes itself as "a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants."[4]

8.   ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

III.   FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

9.   We recount here certain uncontested elements of the factual and procedural background to the present IRP. Other facts are addressed in subsequent parts of the Declaration, where the parties' respective claims and the Panel's analysis are discussed.

A. ICANN's Adoption of the New gTLD Program and the Applicant Guidebook

10.   Even before the introduction of ICANN's New gTLD Program ("**Program**"), in 2011, ICANN had, over time, gradually expanded the DNS from the original six gTLDs (.com; .edu; .gov; .mil; .net; .org) to 22 gTLDs and over 250 two-letter country-code TLDs.[5] Indeed, as noted above, the introduction of new gTLDs has been "in the forefront of ICANN's agenda" for as long as ICANN has existed.

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[3] Request, ¶ 10.

[4] Response, ¶ 11-12.

[5] Request, ¶ 12; see also Guidebook, *Preamble*.

11.   The Program has its origins in what the Guidebook refers to as "carefully deliberated policy development work" by the ICANN community.[6]

12.   In 2005, ICANN's Generic Names Supporting Organization ("**GNSO**"), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.[7] As noted in the Guidebook:

> Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.

13.   In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.

14.   In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.[8] As explained in the Guidebook, ICANN's work next focused on implementation of these recommendations, which it saw as "creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval."[9]

15.   This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.[10]

16.   As described by ICANN in these proceedings, the Program "constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include

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[6] Guidebook, *Preamble*

[7] Request, ¶ 13, Reference Material 7, "Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR; Reference Material 8, "GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005) at pp. 3-4. See also Guidebook, *Preamble*. Booking.com refers to the GNSO as "ICANN's main policy-making body for generic top-level domains". Article X of ICANN's Articles of Incorporation provides: "There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains" (Section 1); the GNSO shall consist of "a number of Constituencies" and "four Stakeholder Groups" (Section 2).

[8] Guidebook, *Preamble*. A review of this policy process can be found at http://gnso.icann.org/issues/new-gtlds (last accessed on January 15, 2015).

[9] Guidebook, *Preamble*: "This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook."

[10] RM 10 (ICANN resolution). The Guidebook (in its 30 May 2011 version) is one of seven "elements" of the Program implemented in 2011. The other elements were: a draft communications plan; "operational readiness activities"; a program to ensure support for applicants from developing countries; "a process for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the [Program]"; budgeted expenditures; and a timetable.

enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ...".[11]

17.   The Guidebook is "continuously iterated and revised", and "provides details to gTLD applicants and forms the basis for ICANN's evaluation of new gTLD applications."[12] As noted by Booking.com, the Guidebook "is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."[13]

B. Booking.com's Application for .hotels, and the Outcome

18.   In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.

19.   At the same time, Despegar Online SRL ("**Despegar**"), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.

20.   "Hoteis" is the Portuguese word for "hotels".

21.   According to Booking.com, Despegar is "a competitor of Booking.com".[14] Booking.com claims that it intends "to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,"[15] while Despegar similarly intends .hoteis to be dedicated primarily to "individuals that are interested in, and businesses that offer, hotel- and travel-related content."[16] That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD "on the U.S. (with its strongly Anglos-Saxon traditions) and other English-language markets,"[17] whereas Despegar intends to target "Portuguese-speaking" markets."[18]

22.   As part of the Initial Evaluation to which all applied-for gTLDS were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

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[11] Response, ¶ 14.

[12] Response, ¶ 14. The resolution (RM 10) adopting the Guidebook explicitly "authorizes staff to make further updates and changes to the Applicant Guidebook as necessary and appropriate, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process, and to prominently publish notice of such changes."

[1313] Request, ¶ 13. See also Guidebook, Module 1-2: "This Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period."

[1414] Request, ¶ 17.

[15] Request, ¶ 5.

[16] Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

[17] Request, ¶ 16.

[18] Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

String Similarity Panel ("SSP") selected and engaged by ICANN for this purpose. (Extracts of the relevant provisions of the Guidebook can be found below, at Part IV of this Declaration.) ICANN engaged InterConnect Communications Ltd. ("ICC"), a company registered under the law of England and Wales, specializing in communications sector strategy, policy and associated regulatory frameworks,[19] in cooperation with University College London, to act as the SSP.

23.   On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two "non-exact match" contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.[20] Booking.com's applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.

24.   The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

> After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.
>
> Due to this finding, the ... two strings have been placed in a contention set.[21]

25.   The impact of being put into a contention set is that the proposed strings in the set will not be delegated in the root zone unless and until the applicants reach agreement on which single string should proceed (with the other proposed string therefore rejected), or until after an auction is conducted, with the highest bidder being given the right to proceed to the next step in the review process.

C. DIDP Request and Request for Reconsideration

26.   On 28 March 2013 Booking.com submitted a request for information under ICANN's Documentary Information Disclosure Policy ("DIDP Request") asking for "all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar."[22]

27.   On the same date, Booking.com also filed a formal Request for Reconsideration ("Request for Reconsideration"). The "specific action(s)" that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

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[19] See http://www.icc-uk.com/

[20] Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a "non-exact match" connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another752 applied-for gTLDs were put into 230 identical contention sets.

[21] Request, Annex 3, ICANN letter dated 26 February 2013.

[22] Request, ¶ 30 and Annex 3.

provide a "detailed analysis or a reasoned basis" for the decision to place .hotels in contention.[23]

28.   ICANN responded to the DIDP Request on 27 April 2013. Although ICANN provided certain information regarding the review process, in its response to the DIDP Request, ICANN also noted:

> The SSP is responsible for the development of its own process documentation and methodology for performing the string similarity review, and is also responsible for the maintenance of its own work papers. Many of the items that are sought from ICANN within the [DIDP] Request are therefore not in existence within ICANN and cannot be provided in response to the DIDP Request. ICANN will, however, shortly be posting the SSP's String Similarity Process and Workflow on the New gTLD microsite ...[24]

29.   By letter dated 9 May 2013 Booking.com replied to ICANN, writing that "ICANN's response fails to provide any additional information or address any of Booking.com's concerns as conveyed in its DIDP Request or Request for Reconsideration."[25] On 14 May 2013, ICANN answered that it "intends to post the string similarity process documentation on or before ... 17 May 2013."[26] ICANN further informed Booking.com that "ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration."[27]

30.   On 7 June 2013, ICANN published the "String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description" ("**SSP Process Description**").[28]

31.   On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that "the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration." The letter concluded by stating: "Considering ICANN's obligations of transparency and accountability, there cannot be any 'compelling reason for confidentiality'.

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[23] Request, Annex 12, §3. The Request for Reconsideration (which appears to be in the form of a template) expressly states at §2 that it is a "Request for Reconsideration of ... Staff [vs. Board] action/inaction." The cover letter attaching the Request states that, "[d]espite the fact that the origin of the decisions is unclear, this Reconsideration Request is being submitted as a reconsideration of a 'Staff action'. In the event that the decisions referenced above are determined to be a 'Board action', this request may be amended." As explained below, the Request for Reconsideration was amended on 7 July 2013. That amendment did not alter the stated nature of the request in §2 or the description of the specific actions that Booking.com sought to have reconsidered (§3). Unless otherwise indicated, all further references in this Declaration to the Request for Reconsideration are understood to be the *amended* Request for Reconsideration.

[24] Request, Annex 5.

[25] Request, Annex 6.

[26] Request, Annex 7.

[27] Request, Annex 7.

[28] Request, Annex 8.

And ... there are numerous compelling reasons for publication of [the information requested by Booking.com]."[29]

32.   ICANN responded on 25 July 2013, explaining among other things that "the evaluation of the .hotels string by the SSP panel was performed according to the [SSP Process Description] ..." and "[t]he SSP's work was subjected to quality review, as has been publicly discussed."[30] Approximately six months later, on 9 January 2014, ICANN posted a letter dated 18 December 2013 addressed to ICANN by the SSP Manager at ICC (Mr. Mark McFadden) providing a further "summary of the process, quality control mechanisms and some considerations surrounding the non-exact contention sets for the string similarity evaluation ..." ("**SSP Manager's Letter**").[31] According to that Letter:

> *When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:*
>
> *• Strings of similar visual length on the page;*
>
> *• Strings within +/- 1 character of each other;*
>
> *• Strings where the majority of characters are the same and in the same position in each string; and*
>
> *• The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*
>
>   *o For example rn~m & l~i*

33.   Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: "Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013."[32]

34.   By virtue of Article IV, Section 3 of the Bylaws, ICANN's Board Governance Committee ("**BGC**") is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board's New gTLD Program Committee ("**NGPC**") receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com's Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC "conclude[d] that Booking.com has not

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[29] Request, Annex 9.

[30] Request, Annex 10.

[31] Request, Annex 11.

[32] Request, Annex 13.

stated proper grounds for reconsideration and we therefor recommend that Booking.com's request be denied" ("**BGC Recommendation**").[33]

35.   At a telephone meeting held on 10 September 2013 the NGPC, "bestowed with the powers of the Board", considered, discussed and accepted the BGC Recommendation. Booking.com's Request for Reconsideration was denied.[34]

D. The Cooperative Engagement Process

36.   Booking.com thereafter filed a request for a Cooperative Engagement Process ("**CEP**") on 25 September 2013, with a view to attempting to reach an amicable resolution of its dispute with ICANN. In its CEP request, Booking.com wrote:

> *Booking.com is of the opinion that Resolution 2013.09.10.NG02 [the Board resolution denying its Request for Reconsideration] violates various provisions of ICANN's Bylaws and Articles of Incorporation. In particular Booking.com considers that ICANN's adoption of [the Resolution] is in violation of Articles I, II(3), II and IV of the ICANN Bylaws as well as Article 4 of ICANN's Articles of Incorporation. In addition, Booking.com considers that ICANN has acted in violation of Articles 3, 5, 7 and 9 of ICANN's Affirmation of Commitment ...*[35]

37.   The CEP ultimately did not result in a resolution, and Booking.com duly commenced the present IRP.

38.   One further point should be made, here, prior to describing the commencement and conduct of the present IRP proceedings: The determination by the SSP that .hotels and .hoteis are so visually similar as to give rise to the probability of user confusion, and the resulting placement of those applied-for strings into a contention set, does *not* mean that Booking.com's application for .hotels has been denied or that .hotels will not proceed to delegation to the root zone. Rather, as noted above and explained in the extracts from the Guidebook reproduced below, the Guidebook establishes a process for resolving such contention, under which the applicants for the contending strings in the set – here, Booking.com and Despegar – may resolve the contention by negotiation, failing which the matter will proceed to auction. Ultimately, no matter the outcome of these IRP proceedings, Booking.com may yet be successful and .hotels may yet be delegated into the Internet root zone. However, the fact that .hotels has been put into a contention set does raise the risk that .hotels may never be delegated into the root zone, or that it may be more costly for Booking.com to obtain approval of its proposed string. It also has caused a significant delay in the potential delegation of the string into the root zone (which could prove to be detrimental to the ultimate success of Booking.com's proposed string if other applicants

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[33] Request, Annex 14, BGC Recommendation dated 1 August 2013, p.9. See also Request, Annex 15, NGPC Resolution dated 10 September 2013. As noted in footnote 1 to the BGC Recommendation, the Recommendation was ultimately finalized and submitted for posting on 21 August 2013.

[34] Request, Annex 15, NGPC Resolution dated 10 September 2013.

[35] Request, Annex 17.

whose strings were not put into a contention set are able to establish themselves as pioneer providers of hotel- and travel-related services under a different new gTLD).

E. The IRP Proceedings

39.   On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process ("**Request**") accompanied by numerous supporting documents and reference materials.

40.   In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.

41.   On 25 April 2014, ICANN submitted a Response to ICANN's Request with supporting documents ("**Response**").

42.   The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.

43.   On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer's appointment became effective and the Panel was duly constituted as of 1 August 2014.

44.   On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.

45.   On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.[36]

46.   In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN's Response, accompanied by additional documents ("**Reply**").

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[36] Paragraph 6 of Procedural Order No. 1 provided that, in its forthcoming Reply to ICANN's Response, "Booking.com shall only address two issues raised in Respondent's Response: (1) the nature and scope of the IRP requested; (2) the nature of the relief sought by Claimant." Paragraph 7 of Procedural Order No. 1 provided that "Respondent's Sur-Reply … shall address only the issues raised in the Reply."

47.	In accordance with the Procedural Timetable, ICANN submitted a Sur-Reply on 20 November 2014 ("**Sur-Reply**").

### F.	The Hearing

48.	As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.

49.	In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties' extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists' questions.

50.	Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.

51.	As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

## IV.	ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS

52.	We set out here the key elements of ICANN's Articles of Association, Bylaws and policies on which the parties rely in their submissions and to which the Panel will refer later in this Declaration.

### A.	Articles of Association

> 4. The Corporation shall operate _for the benefit of the Internet community as a whole_, carrying out its activities _in conformity with relevant principles of international law and applicable international conventions_ and local law and, _to the extent appropriate and consistent with these Articles and its Bylaws_, through _open and transparent processes_ that _enable competition and open entry_ in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.
>
> _[Underlining added]_

### B.	Bylaws

> **ARTICLE I: MISSION AND CORE VALUES**
>
> Section 1. MISSION
>
> The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers,

and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.

[...]

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

7. _Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process._

8. _Making decisions by applying documented policies neutrally and objectively, with integrity and fairness._

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. _Any ICANN_

body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[...]

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

[...]

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

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.*

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

> *a. evaluate requests for review or reconsideration;*

b. summarily dismiss insufficient requests;

c. evaluate requests for urgent consideration;

d. conduct whatever factual investigation is deemed appropriate;

e. request additional written submissions from the affected party, or from other parties;

f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and

g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

[...]

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

a. did the Board act without conflict of interest in taking its decision?;

b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?

[...]

11. The IRP Panel shall have the authority to:

a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;

e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

f. determine the timing for each proceeding.

[...]

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. [...]

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. [...]

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

[...]

18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

[Underlining added]

53.   Lest there be any misunderstanding as regards the proper subject matter of IRP proceedings or the role of the Panel, we note that, as was clearly established during the hearing, it is common ground between the parties that the term "action" (or "actions") as used in Article IV, Section 3 of the Bylaws is to be understood as action(s) *or inaction(s)* by the ICANN Board. The Panel observes that this understanding comports not only with the provisions of Article

IV, Section 2 of the Bylaws concerning "Reconsideration", which expressly refer to "actions or inactions of the ICANN Board", but with the clear intent of Section 3 itself, which stipulates at sub-section 11 that "[t]he IRP Panel shall have the authority to: ... (c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws."

C. The gTLD Applicant Guidebook

54.   As noted above and as understood by all, the Guidebook is (to borrow Booking.com's phrase) "the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."[37]

55.   The Guidebook is divided into "Modules", each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled "Introduction to the gTLD Application Process," provides an "overview of the process for applying for a new generic top-level domains."[38] Module 2, titled "Evaluation Procedures," describes the "evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation."[39] Module 4, titled "String Contention Procedures," concerns "situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases."

(i) Initial Evaluation

56.   As explained in Module 1, "[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness."[40] Initial Evaluation begins "immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation."[41]

57.   Initial Evaluation is comprised of two main elements or types or review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

(ii) String Review, including String Similarity Review

58.   String review is itself comprised of several components, each of which constitutes a separate assessment or review of the applied-for gTLD string, conducted by a separate reviewing body or panel. As explained in Module 2:

> *The following assessments are performed in the Initial Evaluation:*

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[37] Request, ¶ 13.

[38] Module 1-2. Each Module of the Guidebook is paginated separately. "Module 1-2" refers to Guidebook Module 1, page 2.

[39] Module 2-2.

[40] Guidebook, §1.1.2.2: "Administrative Completeness Check", Module 1-5.

[41] Guidebook, §1.1.2.5: "Initial Evaluation", Module 1-8 (underlining added).

- *String Reviews*

    - *String similarity*

    - *Reserved names*

    - *DNS stability*

    - *Geographic names*

[...]

An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.[42]

59.   As indicated, all complete applications are subject to Initial Evaluation, which means that all applied-for gTLD strings are subject to string review. String review is further described in Module 2 as follows:

[String review] focuses on the applied-for gTLD string to test:

- *Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;*

- *Whether the applied-for gTLD string might adversely affect DNS security or stability; and*

- *Whether evidence of requisite government approval is provided in the case of certain geographic names.*[43]

60.   The various assessments or reviews (i.e., string similarity, reserved names, DNS stability, etc.) that comprise string review are elaborated at Section 2.2.1 of Module 2. As mentioned, the most relevant of these reviews for our purposes is *string similarity review*, which is described in detail at Section 2.2.1.1. Because of the central importance of the string similarity review process in the context of the present dispute, this section of the Guidebook is reproduced here at some length:

2.2.1.1 String Similarity Review

This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.

Note: In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

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[42] Module 2-2. The same is true of applicant review, which is also comprised of various assessments concerning the applicant entity.

[43] Guidebook, §2.2: "Initial Evaluation", Module 2-4 (underlining added). See also Module 1-9: "String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS ..."

The _visual similarity check_ that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review _will be conducted by an independent String Similarity Panel_.

2.2.1.1.1 Reviews Performed

The String Similarity Panel's task is to _identify visual string similarities_ that would create a _probability of user confusion_.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

_[...]_

• Applied-for gTLD strings against other applied-for gTLD strings;

_[...]_

Similarity to Other Applied-for gTLD Strings (String Contention Sets) – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, _the String Similarity Panel will create contention sets_ that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or _similar to one another_. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

_[...]_

2.2.1.1.2 Review Methodology

The String Similarity Panel is _informed in part by an algorithmic score for the visual similarity_ between each applied-for string and each of other existing and applied- for TLDs and reserved names. The score will provide _one objective measure for consideration by the panel_, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that _a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review_. However, it should be noted that _the score is only indicative_ and that _the final determination of similarity is entirely up to the Panel's judgment_.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes. [footnote in the original: See http://icann.sword-group.com/algorithm/] Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

_[...]_

The panel will _examine all the algorithm data and perform its own review of similarities between strings_ and _whether they rise to the level of string confusion_. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a <u>common standard</u> to test for whether string confusion exists, as follows:

***Standard for String Confusion** – String confusion exists where a string so nearly resembles another <u>visually</u> that it is <u>likely to deceive or cause confusion</u>. <u>For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user</u>. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.*

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD <u>will not pass the Initial Evaluation</u>, and <u>no further reviews will be available</u>. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

<u>*An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.*</u>[44]

[Underlining added]

61. Module 4 of the Guidebook, as mentioned, concerns "situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases." As explained in Module 4:

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or

2. Two or more applicants for <u>similar gTLD strings</u> successfully complete all previous stages of the evaluation and dispute resolution processes, and <u>the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.</u>

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a <u>contention set</u>.

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[44] Module 2-5 to 2-9. As regards the concept of string contention, see also Guidebook, §1.1.2.10: "String Contention", Module 1-13: "String contention applies only when there is more than one qualified application for the same or similar gTLD strings. String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone."

(In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set.

[...]

<u>The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS.</u> The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets ...

[...]

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation [NB: community priority evaluation applies only to so-called "community" applications; it is not relevant here] or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

[...]

62.   As provided in Module 4, the two methods relevant to resolving a contention such as between .hotels and .hoteis are *self-resolution* (i.e., an agreement between the two applicants for the contending strings) and *auction*:

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications.

[...]

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

63. Module 5 of the Guidebook, titled *Transition to Delegation*, describes "the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone."[45] Section 5.1 states:

> ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. <u>The Board reserves the right to individually consider an application for a new gTLD</u> to determine whether approval would be in the best interest of the Internet community. <u>Under exceptional circumstances, the Board may individually consider a gTLD application</u>. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs <u>or of the use of an ICANN accountability mechanism</u>.[46]

> *[Underlining added]*

V. SUMMARY OF THE PARTIES' POSITIONS

64. The following brief summary of the parties' respective positions is provided with a view solely to assisting the reader to understand the present Declaration. It is *not* intended to recapitulate – and it does not recapitulate – the entirety of the parties' allegations and arguments. Additional references to the parties' positions, including submissions made by them in the course of the proceedings, are contained in the discussion at Part VI below.

A. Booking.com's position

(i) The Panel's Authority

65. Booking.com submits that the mandate of the Panel is "to determine whether the contested actions of the ICANN Board are consistent with applicable rules".[47] According to Booking.com:

> The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN's Affirmation of Commitments, and both of which require compliance with inter alia International law and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.[48]

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[45] Module 5-2.

[46] Module 5-4.

[47] Reply, ¶ 3.

[48] Reply, ¶ 3.

66. Booking.com submits that IRP panels have broad authority to evaluate actions of the ICANN Board. An overly restrictive interpretation of the standard of review, such as proposed by ICANN in these proceedings, would, says Booking.com, "fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain (and improve) robust mechanisms for accountability, as required by Article 9.1 of ICANN's Affirmation of Commitments and ICANN's core values.[49]

(ii) Booking.com's Claims

67. The purpose of the IRP initiated by Booking.com is, in its own words, "to challenge the ICANN Board's handling of Booking.com's application for the new gTLD .hotels."[50] This includes the determination of the SSP to place .hotels and .hoteis in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up, implementation, supervision* and *review* of the entire of string similarity review process, and the Board's alleged failure "to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination" throughout.[51]

68. In effect, Booking.com's specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.

69. Booking.com professes that this case "is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]"; it is about "ICANN's failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review."[52]

70. Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook.* Rather, as indicated, it contests "the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board."[53] Equally crucial, as will be seen, is Booking.com's acknowledgment that *the established process was followed* in the case of the review of .hotels.

a. The string similarity review process

71. According to Booking.com, the problem began when the ICANN Board failed to "provide transparency in the SSP selection process," in particular by failing "to make clear how

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[49] Reply, ¶ 6.

[50] Reply, ¶ 7.

[51] Reply, ¶ 15.

[52] Reply, ¶ 14.

[53] Reply, ¶ 17.

[ICANN] would evaluate candidate responses or how it ultimately did so."[54] The problem was compounded by the selection of ICC/University College London to perform string similarity reviews as the independent SSP. In Booking.com's words:

> [T]he identities of the unsuccessful candidates (if any) to perform the String Similarity Review remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ... There is no indication that any other candidate expressed an interest in performing the String Similarity Review. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the String Similarity Review? How did this impact on the discussions with InterConnect Communications? What are the terms of ICANN's contract with InterConnect Communications?[55]

72. Booking.com also faults ICANN for "allowing the appointed SSP to develop and perform an unfair and arbitrary review process", specifically, by allowing the SSP "to perform the String Similarity Review (i) without any (documented) plan or methodology ... (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning ...".[56]

73. Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager's Letter (see Part III.C above) only long after the string similarity review process had ended.[57]

74. It also alleges that the factors identified in the SSP Manager's Letter are "arbitrary and baseless ... not supported by any methodology capable of producing compelling and defensible conclusions ... [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data ... – to proceed while singling out .hotels/.hoteis."[58] According to Booking.com: "The failure to take actual human performance into account is at odds with the standard for assessment, i.e., the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN's own policy."[59]

75. Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.[60]

76. Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a "well-documented rationale" for each

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[54] Reply, ¶ 20.

[55] Reply, ¶ 20.

[56] Reply, ¶ 23.

[57] Reply, ¶ 24.

[58] Reply, ¶ 25.

[59] Reply, ¶ 25.

[60] Reply, ¶ 26-27.

SSP determination. In the absence of reasons for each string similarity determination, says Booking.com, "there is no basis on which decisions can be evaluated and, where appropriate, challenged."[61]

77.   Another ground for Booking.com's challenge is the alleged failure by the ICANN Board to providing "effective supervision or quality control" of the SSP: "If nobody but the evaluator has any insight into how the evaluation was carried out, no effective quality control can be performed."[62]   Nor, according to Booking.com, does the quality review of the SSP's work supposedly performed by JAS Advisers (the independent consultant engaged by ICANN for this purpose) overcome the problem of a lack of transparency:

> *Booking.com is not aware that any selection process was put in place in relation to the appointment of JAS Advisors to perform the String Similarity Review quality control. No criteria for performing the quality control were published. When ICANN was looking for evaluators, no call for expressions of interest or similar document was issued for the selection of quality controllers.*[63]

78.   In any case, says Booking.com, the "quality control review over a random sampling of applications to, among other things, test whether the process [set out in the Guidebook] was followed," which ICANN claims was performed on the SSP's work,[64] could not provide adequate quality control of the string similarity review process.[65]   Finally, Booking.com argues that the arbitrary and unfair result of the string similarity review concerning .hotels – *i.e.,* the decision to place .hotels and .hoteis in contention – demonstrates that, "whatever quality control review ICANN may have engaged in …must therefore have been deficient."[66]

b.   *The case of .hotels*

79.   Booking.com argues, in part on the basis of expert evidence which it adduces in this IRP proceeding,[67] that "[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone … The SSP could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings."[68] It continues:

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[61] Reply, ¶ 28-29.

[62] Reply, ¶ 30.

[63] Reply, ¶ 31. Booking.com states that it "doubts" that any quality review was in fact performed, whether by JAS Advisers or any other entity.

[64] Response, ¶ 30.

[65] Reply, ¶ 34.

[66] Reply, ¶ 38.

[67] Request, Annex 20, Expert Report of Prof. Dr. Piet Desmet of the Faculty of Arts, Department of Linguistics of Leuven University, dated 10 March 2014. Portions of the work underlying Prof. Desmet's report were performed by Dr. Emmanuel Keuleers, Research Fellow in the Department of Experimental Psychology at Ghent University.

[68] Request, ¶ 58.

> *Since .hotels and .hoteis are not confusingly similar, the determination that they are is contradictory to ICANN policy as established in the Applicant Guidebook. Acceptance of the determination, and repeated failure to remedy the wrongful determination, is a failure to act with due diligence and independent judgment, and a failure to neutrally and fairly apply established policies as required by Bylaws and Articles of Incorporation.[69]*

80.   According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to "individually consider a gTLD application".[70]

81.   Booking.com claims that its DIDP Request alerted the Board to the need to intervene to "correct the errors in the process" related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP's review of .hotels, "giving the Board ample opportunity to correct those errors."[71] Booking.com claims that the Board's failure, when responding to the DIDP Request, "to offer any insight into the SSP's reasoning", its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that "the Reconsideration process 'is not available as a mechanism to re-try the decisions of evaluation panels'", and its failure to investigate Booking.com's complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN's governing rules regarding string similarity review.[72]

82.   According to Booking.com, among the most compelling evidence of ICANN's failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com's Request for Reconsideration was denied.[73] Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.

83.   In its written submissions Booking.com asks the Panel to grant the following relief:

> *Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;*
>
> *Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;*
>
> *Awarding Booking.com its costs in this proceeding; and*

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[69] Request, ¶ 59.

[70] Reply, ¶ 39.

[71] Reply, ¶ 41.

[72] Reply, ¶ 41. In the passage of Booking.com's submissions referred to here (as elsewhere), Booking.com speaks of violations of ICANN's obligations of "due process", which, it says, comprise concepts such as the right to be heard, the right to receive reasons for decisions, publicity, etc. For reasons explained in Part VI, below, the Panel prefers to use the terms *fairness* and *transparency* to connote the essence of ICANN's obligations under review in this IRP.

[73] See Part II.C, above.

Awarding such other relief as the Panel may find appropriate or Booking.com may request.

84. At the hearing Booking.com *further* requested that the Panel not only require ICANN to disregard the SSP determination regarding .hotels/.hoteis, but also order ICANN to "delegate both .hotels and .hoteis."

B. ICANN's position

85. ICANN's position is best summed up by ICANN itself:

> *Booking.com's IRP Request is really about Booking.com's disagreement with the merits of the String Similarity Panel's conclusion that .hotels and .hoteis are confusingly similar. But the Panel's determination does not constitute Board action, and the Independent Review Process is not available as a mechanism to re-try the decisions of an independent evaluation panel. The IRP Panel is tasked only with comparing contested actions of the ICANN Board to ICANN's Bylaws and Articles of Incorporation; it is not within the IRP Panel's mandate to evaluate whether the String Similarity Panel's conclusion that .hotels and .hoteis are confusingly similar was wrong.*[74]

86. According to ICANN, the Board "did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook."[75]

(i) The Panel's Authority

87. Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.

88. As provided in Article IV, Section 3(4) of ICANN's Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[76]

89. ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific "standard of review" set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: "did the Board act without conflict of interest in taking its decision?"; "did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?"; and "did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?"[77]

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[74] Response, ¶ 9.

[75] Response, ¶ 8. Both parties agree that, as submitted by Booking.com, the "rules" at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook.

[76] See for example Response, ¶2, ¶ 9.

[77] Response, ¶ 2.

90.   ICANN further asserts that the IRP process "is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,"[78] such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an "appeal mechanism" by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.[79]

91.   In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN "reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set" and (as requested at the hearing) that ICANN "delegate both .hotels and .hoteis" – exceeds the authority of the Panel.[80]

(ii) ICANN's Response to Booking.com's Claims

a.   The string similarity review process

92.   According to ICANN, "[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for visual confusion;" and "[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook."[81]

93.   According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, "[t]his similarity review will be conducted by an independent String Similarity Panel," not by ICANN itself. ICC was duly selected to perform the string similarity review further to "an open and public request for proposals," pursuant to which, as the successful bidder, "ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook."[82] ICANN emphasizes that "the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC's results."[83]

94.   In ICANN's submission, the alternative proposed by Booking.com, that "the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted," is "untenable and is not supported by ICANN's Bylaws or Articles."[84] As noted by ICANN, the Guidebook defines six distinct

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[78] Response, ¶ 3.

[79] Response, ¶ 49.

[80] Response, ¶ 55.

[81] Response, ¶ 15 (underlining in original).

[82] Response, ¶ 16.

[83] Response, ¶ 17.

[84] Sur-Reply, ¶ 7.

review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.

95.   ICANN submits that "there simply is no requirement – under ICANN's governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes."[85] It asserts that, consistent with well-settled legal principles, "neither ICANN's Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity."[86]

96.   Moreover, ICANN asserts that "[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage."[87]

97.   ICANN claims that that Booking.com's repeated invocation of the Board's so-called obligation to ensure "due process" in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook "specifically affords any gTLD applicant a right to procedural 'due process' similar to that which is afforded in courts of law."[88] Second, because ICANN conducts its activities in the public interest it nevertheless provides "more opportunity for parties to be heard and to dispute actions taken"[89] than most private corporate entities. Third, the "decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others."[90] Fourth, and perhaps most importantly, "ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN's stakeholders and the broader Internet community."[91]

98.   ICANN's response to Booking.com's various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP's methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

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[85] Sur-Reply, ¶ 10.

[86] Sur-Reply, ¶ 10.

[87] Sur-Reply, ¶ 11. It was established during the hearing that the several references to this discretionary authority in ICANN's written and oral submissions refer specifically to the authority conferred by Section 5.1 (Module 5-4) of the Guidebook.

[88] Sur-Reply, ¶ 18.

[89] Sur-Reply, ¶ 18.

[90] Sur-Reply, ¶ 18, fn 18.

[91] Sur-Reply, ¶ 18, fn 18.

be challenged by means of IRP proceedings; second, in any case, Booking.com's claims are *factually incorrect*, and there has been no violation of the Bylaws, Articles of Incorporation or Guidebook; third, Booking.com's claims are *time-barred* given that Article IV, Section 3(3) of the Bylaws requires that IRP requests "must be filed within thirty days of the posting of the minutes of the Board meeting ... that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."[92]

b. The case of .hotels

99.   ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.

100.   In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;[93] the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.[94]

101.   According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar.[95]

102.   In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.

103.   ICANN asks the Panel to deny Booking.com's IRP Request.

VI.   ANALYSIS

A. The Panel's Authority

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[92] Sur-Reply, ¶ 20-42.

[93] A number of these applications were subsequently withdrawn.

[94] Identical pairs, of course, received a score of 100% for visual similarity under the SWORD algorithm.

[95] Response, ¶ 53.

104. The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws. To recap, Article IV, Section 3 of the Bylaws provides:

> 4. [The IRP Panel] shall be charged with <u>comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws</u>. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
>
> > a. did the Board act without conflict of interest in taking its decision?;
> >
> > b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
> >
> > c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?
>
> [...]
>
> 11. The IRP Panel shall have the authority to:
>
> > [...]
> >
> > c. <u>declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws</u>; and
> >
> > d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
>
> [...]
>
> 18. [...] The IRP Panel <u>shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties</u> [...]
>
> <div align="right">[Underlining added]</div>

105. Similarly, Article 8 of the Supplementary Procedures reads:

> **8. Standard of Review**
>
> The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
>
> If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

106. There is no dispute as regards the Panel's duty to compare the actions of the Board to ICANN's Articles of Incorporation and Bylaws (and, in this case, Guidebook) with a view to

declaring whether those actions are inconsistent with applicable policies. Where the parties disagree is with respect to the standard of review to be applied by the Panel in assessing Board conduct.

107. ICANN submits that its Bylaws "specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board ... the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board."[96] Booking.com argues that this "is simply wrong. No such specification is made in ICANN's Bylaws or elsewhere, and a restrictive interpretation of the standard of review would ... fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain (and improve) robust mechanisms for accountability."[97]

108. In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed "[a]ny ICANN body making a recommendation or decision") shall itself "determine which core values are most relevant and how they apply to the specific circumstances of the case at hand."

109. In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN's best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.

110. There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN's actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.

111. Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with "objectively" determining whether

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[96] Response, ¶ 24.

[97] Reply, ¶ 6.

or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness.

112.   In the only other IRP of which the Panel is aware in which such questions were addressed in a published decision, the distinguished members of the IRP panel had this to say about the role of an IRP panel, and the applicable standard of review, in appraising Board action:

> The Internet Corporation for Assigned Names and Numbers is a not-for profit corporation established under the law of the State of California. That law embodies the 'business judgment rule'. Section 309 of the California Corporations Code provides that a director must act 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...' and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In 'recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization' – including ICANN -- ICANN is charged with 'promoting the global public interest in the operational stability of the Internet...' ICANN 'shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...' Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International [sic] Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. <u>In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially</u>. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct. In the instant case, <u>it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative</u>.[98]

<p align="right">[Underlining added.]</p>

113.   While on no way bound by that decision, we agree with its conclusions in this respect.

114.   At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

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[98] ICDR Case No. 50 117 T 00224 08, *ICM Registry, LLC v. ICANN*, Declaration dated 19 February 2010 ("*ICM Registry*"), ¶ 136.

the *ICM Registry* matter called an "objective" appraisal of Board conduct as measured against the policies and rules set out in those instruments; all agree that it is the Articles, Bylaws and Guidebook which are determinative.

115.   That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an "IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board." In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board's action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves[99]), but merely to apply them to the facts.

116.   With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

B.   The String Similarity Review Process

117.   The Panel is not unsympathetic to Booking.com's complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully "heard" on the substantive question of the similarity of their applied-for gTLD strings to others.

118.   Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board's New gTLD Program Committee which voted to accept the BGC's Recommendation to deny Booking.com's Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC's 10 September 2013 meeting:[100]

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[99] As discussed in more detail in the following section (at para. 117 and following) and again at Part IV of this Declaration, the important questions that Booking.com highlights in its pleadings, as to whether the string similarity review process is consistent with ICANN's guiding principles of transparency and fairness, and regarding the published views of various members of ICANN's NGPC in this respect, are matters which the ICANN Board, in its discretion, may wish to consider on its own motion in the context of the present case, in accordance with its authority under Section 5.1 (Module 5-4) of the Guidebook, or when it issues the Guidebook for round two of the New gTLD Program. Those questions include a lack of clarity surrounding the way in which the string similarity review is conducted by the SSP, and the absence of any means for applicants to be heard in the string similarity review process where they may have evidence to adduce or arguments to make (such as the evidence and arguments presented by Booking.com to this Panel), which could in fact be relevant to the SSP's determination.

[100] Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although "he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN's ... and the user's best interests."

- Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation "because there was not sufficient rationale provided for why the string similarity review panel made its determination."

- In response to a comment by the Chair that the Request for Reconsideration deserved to be denied "[b]ecause the process was followed," Mr. Ray Plzak "agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don't agree with the outcome to make an objection, other than using a Reconsideration Request."

- Mr. Plzak "recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits."

- Ms. Madruga-Forti agreed and "recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted."

- Mr. Bill Graham also agreed with Mr. Plzak's suggestion, and noted that "generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members."

- The Chair "agreed with [Mr. Graham's] sentiment."

- The General Counsel and Secretary noted that ICANN ... "has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns."

119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC's Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:

- Mr. Plzak stated that he abstained from voting "because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process."

- Ms. Madruga-Forti stated that:

    [T]he BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to

establish a better record of the rationale of the string similarity review panel in circumstances such as this.

- Mr. Kuo-Wei Wu agreed with Ms. Madruga-Forti's and Mr. Plzak's voting statements.

- Mr. Sadowsky provided the following detailed statement:

I have a strong concern regarding the ratification of the BGC recommendation to deny the reconsideration request regarding string contention between .hoteis and .hotels, and I therefore have therefore abstained when the vote on this issue was taken.

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the ... community and/or Internet users in general.

The rationale underlying the rejection of the reconsideration claim is essentially that the string similarity process found that there was likely to be substantial confusion between the two, and that therefore they belonged in a contention set. Furthermore, no process has been identified as having been violated and therefore there is nothing to reconsider. As a Board member who is aware of ICANN's ... Bylaws, I cannot vote against the motion to deny reconsideration. The motion appears to be correct based upon the criteria in the Bylaws that define the reconsideration process and the facts in this particular case. However, I am increasingly disturbed by the growing sequence of decisions that are based upon a criterion for user confusion that, in my opinion, is not only both incomplete and flawed, but appears to work directly against the concept that users should not be confused. I am persuaded by the argument made by the proponents of reconsideration in this case that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate.

Confusion is a perceptual issue. String similarity is only one consideration in thinking about perceptual confusion and in fact it is not always an issue. In my opinion, much more perceptual confusion will arise between .hotel and .hotels than between .hotels and .hoteis. Yet if we adhere strictly to the Guidebook and whatever instructions have or have not been given to string similarity experts, it is my position that we work against implementing decisions that assist in avoiding user confusion, and we work in favor of decisions that are based upon an incorrect, incomplete and flawed ex ante analysis of the ICANN Network real issues with respect to user confusion.

The goal of the string similarity process is the minimization of user confusion and ensuring user trust in using the DNS ... The string similarity exercise is one of the means in the new gTLD ... process to minimize such confusion and to strengthen user trust. In placing our emphasis, and in fact our decisions, on string similarity only, we are unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.

I cannot and will not vote in favor of a motion that reflects, directly or indirectly, an unwillingness to depart from what I see as such a flawed position and which does not reflect In my opinion an understanding of the current reality of the situation.

120.   These statements reflect to an important degree the Panel's own analysis.

121.   The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.[101]

122.   The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"[102]. The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of <u>the average, reasonable Internet user</u>."[103]

123.   The Guidebook explains that string similarity review comprises merely a "<u>visual similarity check</u>",[104] with a view to identifying only "<u>visual string similarities</u> that would create a probability of user confusion."[105]

124.   The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.

125.   Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed <u>in part</u> by an <u>algorithmic score</u> for … visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform <u>its own review of similarities between strings</u> and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is <u>entirely up to the [SSP's] judgment</u>." (Underlining added)

126.   In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

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[101] Request, ¶ 13.

[102] Guidebook, §2.2 (Module 2-4).

[103] Guidebook, §2.2.1.1.2. (Underlining added)

[104] Guidebook, §2.2.1.1. (Underlining added)

[105] Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of "visual similarity", nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of "confusion," nor any definition or description of an "average, reasonable Internet user." As Mr. Sadowski of the NGPC put it: "Confusion is a perceptual issue." (Mr. Sadowski further noted: "String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply "its own review" of visual similarity and "whether similarities rise to the level of user confusion", in addition to SWORD algorithm, which is intended to be merely "indicative", yet provides no substantive guidelines in this respect.

128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP's review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowsky referred to as "the minimization of user confusion and ensuring user trust in using the DNS". However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.

129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.

130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board's actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board's adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN's Articles of Incorporation or Bylaws.

C. The Case of .hotels

131. In the light of the preceding analysis of Booking.com's challenge concerning the ICANN Board's actions in relation to the string similarity review process generally, the Panel is not

persuaded by its challenge concerning the Board's conduct in relation to the review of .hotels specifically.

132.   There are two principal elements to this part of Booking.com's case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board's handling of Booking.com's Request for Reconsideration of the SSP's determination. However, the fundamental obstacle to Booking.com's case is that *the established process was followed* in all respects.

133.   Booking.com itself acknowledges that "the process was followed" by the SSP, which determined that .hotels and .hoteis were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that "the process was followed" – for all their stated misgivings concerning the outcome of the process.

134.   The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC's consideration of the issue, certain aspects of which are discussed above, but of the BGC's detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com's Request for Reconsideration was denied. Contrary to Booking.com's allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com's claims of lack of "due process".

135.   Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:

> ▪ *These standing requirements [for Requests for Reconsideration] 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 [or the Board] acted in contravention of established policies.*[106]
>
> ▪ *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*[107]
>
> ▪ *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

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[106] BGC Recommendation, p. 2.

[107] BGC Recommendation, p. 4. The BGC explains that "Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change."

methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of [SSP] decisions. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.[108]

▪ *Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that "it is contrary to ICANN policy to put them in a contention set." (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the [SSP]. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.[109]*

▪ *Booking.com argues that the contention set decision was taken without material information, including Booking.com's linguistic expert's opinion, or other "information that would refute the mistaken contention that there is likely to be consumer confusion between '.hotels' and '.hoteis.'" (Request, page 7.) However, there is no process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).)[110]*

▪ *Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com's call for further information on the decision to place .hotels and .hoteis in a contention set ... is similarly not rooted in any established ICANN process at issue.[...] While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.[111]*

▪ *[W]hile we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the [SSP's] decision, no such narrative is called for in the process.[112]*

▪ *The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the [SSP] in applying the methodology*

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[108] BGC Recommendation, p. 5.

[109] BGC Recommendation, p. 6.

[110] BGC Recommendation, p. 6.

[111] BGC Recommendation, pp. 6-7.

[112] BGC Recommendation, p. 7.

set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).[113]

▪ *The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.[114]*

▪ *As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.[115]*

136.   These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.

137.   It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.

138.   Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:

●   <u>The Board's adoption of certain provisions of the Guidebook</u>, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

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[113] BGC Recommendation, p. 7.

[114] BGC Recommendation, p. 8.

[115] BGC Recommendation, p. 10.

- The Board's acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP's determination. The Guidebook provides that applied-for strings "*will* be placed in contention set" where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP's determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.

- The Board's denial of Booking.com's Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN's conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGCP undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com's Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com's request.

- The Board's refusal to "step in" and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to "individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community." As pointed out by ICANN during the hearing, the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board's inaction in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).

139. The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com's dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

140. Finally, the panel notes that Booking.com's claim – largely muted during the hearing – regarding alleged "discrimination" as regards the treatment of its application for .hotels also founders on the same ground. Booking.com acknowledges that the established string similarity review process was followed; and there is absolutely no evidence whatsoever that .hotels was treated any differently than any other applied-for gTLD string in this respect. The mere fact that the *result* of the string similarity review of .hotels differed from the results of the reviews of the vast majority of other applied-for strings does not suggest discriminatory treatment. In any event, the Panel cannot but note the obvious, which is that .hotels is not alone in having been placed in contention by the SSP. So too was .hoteis; and so too were .unicom and .unicorn. Moreover, and once again, it is recalled that Booking.com does not claim to challenge the merits of the string similarity review, that is, the determination that .hotels and .hoteis are so visually similar as to warrant placement in a contention set.

D. Conclusion

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.

142. Booking.com purports to challenge "the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board"; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook.* It asks the Panel to overturn the SSP's determination in this case and to substitute an alternate result, in part on the basis of its own "expert evidence" regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of* the SSP determination and it acknowledges that *the process set out in the Guidebook was duly followed* in the case of its application for .hotels.

143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.

144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.

145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the "applicable rules" as set out in the Guidebook.

146. To the extent that the Board's adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

potentially be said to be inconsistent with the principles of transparency or fairness that underlie ICANN's Articles and Incorporation and Bylaws (which the Panel does not say is the case), the time to challenge such action has long since passed.

147.   Booking.com's IRP Request must be denied.

VII. THE PREVAILING PARTY; COSTS

148.   Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."

149.   The same provision of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."

150.   Similarly, the Supplementary Procedures state, at Article 11:

> *The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the*
>
> *prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.*
>
> *In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.*

151.   The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "**IRP costs**").

152.   ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.

153.   The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

or are not inconsistent with ICANN's Articles of Incorporation and Bylaws. We have found that the actions in question are not inconsistent with those instruments. The process established by ICANN under its Articles of Incorporation and Bylaws and set out in the Guidebook was followed, and the time to challenge that process (which Booking.com asserts is not its intention in these proceedings in any event) has long passed.

154. However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

FOR THE FOREGOING REASONS, the Panel hereby declares:

(1) Booking.com's IRP Request is denied;

(2) ICANN is the prevailing party;

(3) In view of the circumstances, each party shall bear one-half of the costs of the IRP Provider, including the fees and expenses of the Panel members and the fees and expenses of the ICDR. As a result, the administrative fees and expenses of the ICDR, totaling US$4,600.00, as well as the compensation and expenses of the Panelists totaling US$163,010.05 are to be borne equally. Therefore, ICANN shall pay to Booking.com the amount of US$2,300.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Booking.com

(4) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

Hon. A. Howard Matz
Date: March 2, 2015

David H, Bernstein
Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date:

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

__March 2, 2015__
Date

[signature]
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Date

David H, Bernstein

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Date

Stephen L. Drymer

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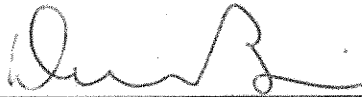
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March 2, 2015   _____
_____
Date   David H, Bernstein

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154.   However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

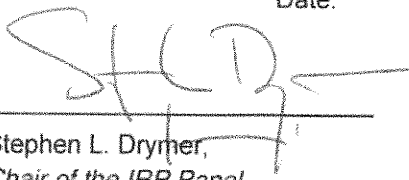FOR THE FOREGOING REASONS, the Panel hereby declares:

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(4)   This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

_____   _____
Hon. A. Howard Matz   David H, Bernstein
Date: Date:

_____
Stephen L. Drymer,
Chair of the IRP Panel
Date: 3 March 2015

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

_____   _____
Date   Hon. A. Howard Matz

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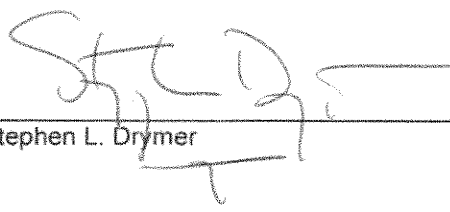Date   David H, Bernstein

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3 March 2015
_____   _____
Date   Stephen L. Drymer

Resp. Ex. 3

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Between:	)	
	)	
Vistaprint Limited	)	
	)	
Claimant	)	
	)	
v.	)	**ICDR Case No. 01-14-0000-6505**
	)	
INTERNET CORPORATION FOR	)	
ASSIGNED NAMES AND NUMBERS	)	
	)	
Respondent	)	
————————————————	)	

FINAL DECLARATION OF THE INDEPENDENT REVIEW PANEL

IRP Panel:

Geert Glas
Siegfried H. Elsing
Christopher S. Gibson (Chair)

I.   Introduction

1.   This Final Declaration ("Declaration") is issued in this Independent Review Process ("IRP") pursuant to Article IV, § 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers ("Bylaws"; "ICANN"). In accordance with the Bylaws, the conduct of this IPR is governed by the International Centre for Dispute Resolution's ("ICDR") International Dispute Resolution Procedures, amended and effective June 1, 2014 ("ICDR Rules"), as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process, dated December 21, 2011 ("Supplementary Procedures").

2.   Claimant, Vistaprint Limited ("Vistaprint"), is a limited company established under the laws of Bermuda. Vistaprint describes itself as "an Intellectual Property holding company of the publicly traded company, Vistaprint NV, a large online supplier of printed and promotional material as well as marketing services to micro businesses and consumers. It offers business and consumer marketing and identity products and services worldwide."[1]

3.   Respondent, ICANN, is a California not-for-profit public benefit corporation. As stated in its Bylaws, ICANN's mission "is to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems."[2] In its online Glossary, ICANN describes itself as "an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions."[3]

4.   As part of this mission, ICANN's responsibilities include introducing new top-level domains ("TLDs") to promote consumer choice and competition, while maintaining the stability and security of the domain name system ("DNS").[4] ICANN has gradually expanded the DNS from the original six generic top-level domains ("gTLDs")[5] to include 22 gTLDs and over 250 country-code TLDs.[6] However, in June 2008, in a significant step ICANN's Board of Directors ("Board") adopted recommendations developed by one of its policy development bodies, the Generic Names Supporting Organization ("GNSO"), for

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[1] Request for Independent Review Process by Vistaprint Limited dated June 11, 2014 ("Request"), ¶ 12.

[2] ICANN's Response to Claimant Vistaprint Limited's Request for Independent Review Process dated July 21, 2014 ("Response"), ¶ 13; Bylaws, Art. I, § 1.

[3] Glossary of commonly used ICANN Terms, at https://www.icann.org/resources/pages/glossary-2014-02-03-en#i (last accessed on Sept. 15, 2015).

[4] Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers ("Affirmation of Commitments"), Article 9.3 (Sept. 30, 2009), available at https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en (last accessed on Sept. 15, 2015).

[5] The original six gTLDs consisted of .com; .edu; .gov; .mil; .net; and .org.

[6] Request, ¶ 14.

introducing additional new gTLDs.[7] Following further work, ICANN's Board in June 2011 approved the "New gTLD Program" and a corresponding set of guidelines for implementing the Program – the gTLD Applicant Guidebook ("Guidebook").[8] ICANN states that "[t]he New gTLD Program constitutes by far ICANN's most ambitious expansion of the Internet's naming system."[9] The Guidebook is a foundational document providing the terms and conditions for new gTLD applicants, as well as step-by-step instructions and setting out the basis for ICANN's evaluation of these gTLD applications.[10] As described below, it also provides dispute resolution processes for objections relating to new gTLD applications, including the String Confusion Objection procedure ("String Confusion Objection" or "SCO") .[11] The window for submitting new gTLD applications opened on January 12, 2012 and closed on May 30, 2012, with ICANN receiving 1930 new gTLD applications.[12] The final version of the Guidebook was made available on June 4, 2012.[13]

5.   This dispute concerns alleged conduct by ICANN's Board in relation to Vistaprint's two applications for a new gTLD string, ".WEBS", which were submitted to ICANN under the New gTLD Program. Vistaprint contends that ICANN's Board, through its acts or omissions in relation to Vistaprint's applications, acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation ("Articles") and Bylaws, both of which should be interpreted in light of the Affirmation of Commitments between ICANN and the United States Department of Commerce ("Affirmation of Commitments").[14] Vistaprint also states that because ICANN's Bylaws require ICANN to apply established policies neutrally and fairly, the Panel must consider other ICANN policies relevant to the dispute, in particular, the policies in Module 3 of the Guidebook regarding ICANN's SCO procedures, which Vistaprint claims were violated.[15]

6.   Vistaprint requests that the IRP Panel provide the following relief:

   ▪   Find that ICANN breached its Articles, Bylaws, and the Guidebook;

   ▪   Require that ICANN reject the determination of the Third Expert in the String

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[7] ICANN Board Resolution 2008.06.26.02, at http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm (last accessed on Sept. 11, 2015).

[8] ICANN Board Resolution 2011.06.20.01, at http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm (last accessed on Sept. 11, 2015). ICANN states that the "Program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs." Response, ¶ 16. The Guidebook is available at http://newgtlds.icann.org/en/applicants/agb (last accessed on Sept. 13, 2015).

[9] Response, ¶ 16.

[10] Response, ¶ 16.

[11] The Guidebook is organized into Modules. Module 3 (Objection Procedures) is of primary relevance to this IRP case.

[12] Response, ¶ 5; New gTLD Update (May 30, 2012) on the close of the TLD Application system, at http://newgtlds.icann.org/en/announcements-and-media/announcement-3-30may12-en (last accessed on Sept. 11, 2015).

[13] gTLD Applicant Guidebook, Version 2012-06-04.

[14] Affirmation of Commitments.

[15] Request, ¶ 58; Vistaprint's First Additional Submission, ¶ 34.

Confusion Objection proceedings involving Vistaprint ("*Vistaprint SCO*")[16], which found that the two proposed gTLD strings – .WEBS and .WEB – are confusingly similar, disregard the resulting "Contention Set", and allow Vistaprint's applications for .WEBS to proceed on their own merits;

- In the alterative, require that ICANN reject the *Vistaprint SCO* determination and organize a new independent and impartial SCO procedure, according to which a three-member panel re-evaluates the Expert Determination in the *Vistaprint SCO* taking into account (i) the ICANN Board's resolutions on singular and plural gTLDs[17], as well as the Board's resolutions on the DERCars SCO Determination, the United TLD Determination, and the Onlineshopping SCO Determination[18], and (ii) ICANN's decisions to delegate the .CAR and .CARS gTLDs, the .AUTO and .AUTOS gTLDs, the .ACCOUNTANT and ACCOUNTANTS gTLDs, the .FAN and .FANS gTLDs, the .GIFT and .GIFTS gTLDs, the .LOAN and .LOANS gTLDs, the .NEW and .NEWS gTLDs and the .WORK and .WORKS gTLDs;

- Award Vistaprint its costs in this proceeding; and

- Award such other relief as the Panel may find appropriate or Vistaprint may request.

7.   ICANN, on the other hand, contends that it followed its policies and processes at every turn in regards to Vistaprint's .WEBS gTLD applications, which is all that it is required to do. ICANN states its conduct with respect to Vistaprint's applications was fully consistent with ICANN's Articles and Bylaws, and it also followed the procedures in the Guidebook. ICANN stresses that Vistaprint's IRP Request should be denied.

II.   Factual and Procedural Background

8.   This section summarizes basic factual and procedural background in this case, while leaving additional treatment of the facts, arguments and analysis to be addressed in sections III (ICANN's Articles, Bylaws, and Affirmation of Commitments), IV (Summary of Parties' Contentions) and V (Analysis and Findings).

A.   Vistaprint's Application for .WEBS and the String Confusion Objection

9.   Vistaprint's submitted two applications for the .WEBS gTLD string, one a standard application and the other a community-based application.[19] Vistaprint states that it applied to operate the .WEBS gTLD with a view to reinforcing the reputation of its website

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[16] Request, Annex 24 (Expert Determination in the SCO case *Web.com Group, Inc. v. Vistaprint Limited*, ICDR Consolidated Case Nos. 50 504 T 00221 13 and 50 504 T 00246 13 (Jan. 24, 2014) ("*Vistaprint SCO*").
[17] ICANN Board Resolution 2013.06.25.NG07.
[18] ICANN Board Resolution 2014.10.12.NG02.
[19] Request, Annex 1 (Application IDs: 1-1033-22687 and 1-1033-73917). A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. An applicant designating its application as community-based must be prepared to substantiate its status as representative of the community it names in the application. A standard application is one that has not been designated as community-based. Response, ¶ 22 n. 22; *see also* Glossary of commonly used terms in the Guidebook, at http://newgtlds.icann.org/en/applicants /glossary (last accessed on Sept. 13, 2015).

creation tools and hosting services, known under the identifier "Webs", and to represent the "Webs" community.[20] The .WEBS gTLD would identify Vistaprint as the Registry Operator, and the products and services under the .WEBS gTLD would be offered by and for the Webs community.[21]

10. Seven other applicants applied for the .WEB gTLD string.[22] Solely from the perspective of spelling, Vistaprint's proposed .WEBS string differs by the addition of the letter "s" from the .WEB string chosen by these other applicants. On March 13, 2013, one of these applicants, Web.com Group, Inc. (the "Objector"), filed two identical String Confusion Objections as permitted under the Guidebook against Vistaprint's two applications.[23] The Objector was the only .WEB applicant to file a SCO against Vistaprint's applications. The Objector argued that the .WEBS and .WEB strings were confusingly similar from a visual, aural and conceptual perspective.[24] Vistaprint claims that the Objector's "sole motive in filing the objection was to prevent a potential competitor from entering the gTLD market."[25]

11. As noted above, Module 3 of the Guidebook is relevant to this IRP because it provides the objection procedures for new gTLD applications. Module 3 describes "the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted."[26] The module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination. The Module states that

> *"All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection."[27]*

12. Module 3, § 3.2 (Public Objection and Dispute Resolution Process) provides that

> *In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.*

13. A formal objection may be filed on any one of four grounds, of which the SCO procedure is relevant to this case:

> *String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD*

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[20] Request, ¶ 5.
[21] Request, ¶ 17. Vistaprint states that the Webs community is predominantly comprised of non-US clients (54% non-US, 46% US).
[22] Request, ¶ 5.
[23] Request, ¶ 32.
[24] Request, ¶ 32.
[25] Request, ¶ 80.
[26] Guidebook, Module 3, p. 3-2. Module 3 also contains an attachment, the New gTLD Dispute Resolution Procedure ("New gTLD Objections Procedure"), which sets out the procedural rules for String Confusion Objections.
[27] Guidebook, Module 3, p. 3-2.

or to another applied-for gTLD string in the same round of applications.[28]

14. According to the Guidebook, the ICDR agreed to serve as the dispute resolution service provider ("DRSP") to hear String Confusion Objections.[29] On May 6, 2013, the ICDR consolidated the handling of the two SCOs filed by the Objector against Vistaprint's two .WEBS applications.[30]

15. Section 3.5 (Dispute Resolution Principles) of the Guidebook provides that the "objector bears the burden of proof in each case"[31] and sets out the relevant evaluation criteria to be applied to SCOs:

> *3.5.1 String Confusion Objection*
>
> *A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.*

16. On May 23, 2013, Vistaprint filed its responses to the Objector's String Confusion Objections.

17. On June 28, 2013, the ICDR appointed Steve Y. Koh as the expert to consider the Objections (the "First Expert"). In this IRP Vistaprint objects that this appointment was untimely.[32]

18. On 19 July 2013, the Objector submitted an unsolicited supplemental filing replying to Vistaprint's response, to which Vistaprint objected.[33] Vistaprint claims that the supplemental submission should not have been accepted by the First Expert as it did not comply the New gTLD Objections Procedure.[34] The First Expert accepted the Objector's submission and permitted Vistaprint to submit a sur-reply, which Vistaprint claims was subject to unfair conditions imposed by the First Expert.[35] Vistaprint filed its sur-reply on

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[28] Guidebook, § 3.2.1.
[29] Guidebook, § 3.2.3.
[30] Request, ¶ 23, n. 24. The ICDR consolidated the handling of cases nos. 50 504 T 00221 13 and 50 504 T 00246 13. The Guidebook provides in § 3.4.2 that "[o]nce the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections."
[31] Guidebook, § 3.5. This standard is repeated in Article 20 of the Objection Procedure, which provides that "[t]he Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards."
[32] Request, ¶ 33.
[33] Response, ¶ 26.
[34] Request, ¶ 42. Article 17 provides that *"[t]he Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response."* Article 18 states that *"[i]n order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence."*
[35] Vistaprint states that "this surreply was not to exceed 5 pages and was to be submitted within 29 days. This page limit and deadline are in stark contrast with the 58 day period taken by [the Objector] to submit a 6-page
(Continued...)

August 29, 2013.

19. On September 18, 2013 the ICDR informed the parties that the expert determination for the SCO case would be issued on or about October 4, 2013.[36] Vistaprint claims that this extension imposed an unjustified delay beyond the 45-day deadline for rendering a determination.[37]

20. On October 1, 2013, the ICDR removed the First Expert due to a conflict that arose. On October 14, 2013, the ICDR appointed Bruce W. Belding as the new expert (the "Second Expert").[38] Vistaprint claims that the New gTLD Objections Procedure was violated when the First Expert did not maintain his independence and impartiality and the ICDR failed to react to Vistaprint's concerns in this regard.[39]

21. On October 24, 2013, the Objector challenged the appointment of the Second Expert, to which Vistaprint responded on October 30, 2013. The challenge was based on the fact that the Second Expert had served as the expert in an unrelated prior string confusion objection, which Vistaprint maintained was not a reason for doubting the impartiality or independence of the Second Expert or accepting the challenge his appointment.[40] On November 4, 2013, the ICDR removed the Second Expert in response to the Objector's challenge.[41] On November 5, 2013, Vistaprint requested that the ICDR reconsider its decision to accept the challenge to the appointment of the Second Expert. On November 8, 2013, the ICDR denied this request.[42] Vistaprint claims that the unfounded acceptance of the challenge to the Second Expert was a violation of the New gTLD Objections Procedure and the ICDR's rules. The challenge was either unfounded and the ICDR should have rejected it, or it was founded, which would mean that the ICDR appointed the Second Expert knowing that justifiable doubts existed as to the Expert's impartiality and independence.[43]

22. On November 20, 2013, the ICDR appointed Professor Ilhyung Lee to serve as the expert (the "Third Expert") to consider the Objector's string confusion objection. No party objected to the appointment of Professor Lee.[44]

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reply with no less than 25 additional annexes. Vistaprint considers that the principle of equality of arms was not respected by this decision." Request, ¶ 42.

[36] Request, Annex 14.

[37] Request, ¶ 33; *see* New Objections Procedure, Art. 21(a).

[38] Response, ¶ 27; Request, Annexes 15 and 16.

[39] Request, ¶¶ 36 and 43. New Objections Procedure, Art. 13(c).

[40] Request, ¶ 37.

[41] Response, ¶ 28; Request, ¶ 39, Annex 19.

[42] Request, ¶ 39, Annex 21.

[43] Request, ¶¶ 37-40. Vistaprint states that the Objector's challenge was "based solely on the fact that Mr. Belding had served as the Panel in an unrelated string confusion objection" administered by ICDR. Request, ¶ 37. ICDR "was necessarily aware" that Mr. Belding had served as the Panel in the string confusion objection proceedings. "If [ICDR] was of the opinion that the fact that Mr. Belding served as the Panel in previous proceedings could give rise to justifiable doubts as to the impartiality and independence of the Panel, it should never have appointed him in the case between Web.com and Vistaprint."

[44] Response, ¶ 28; Request, ¶ 39, Annex 22.

23. On 24 January 2014, the Third Expert issued its determination in favor of the Objector, deciding that the String Confusion Objection should be sustained.[45] The Expert concluded that

    " the <.webs> string so nearly resembles <.web> – visually, aurally and in meaning – that it is likely to cause confusion. A contrary conclusion, the Panel is simply unable to reach."[46]

24. Moreover, the Expert found that

    "given the similarity of <.webs> and <.web>…, it is probable, and not merely possible, that confusion will arise in the mind of the average, reasonable Internet user. This is not a case of 'mere association'."[47]

25. Vistaprint claims that the Third Expert failed to comply with ICANN's policies by (i) unjustifiably accepting additional submissions without making an independent assessment, (ii) making an incorrect application of the burden of proof, and (iii) making an incorrect application of the substantive standard set by ICANN for String Confusion Objections.[48] In particular, Vistaprint claims that ICANN has set a high standard for a finding of confusing similarity between two gTLD strings, and the Third Expert's determination did not apply this standard and was arbitrary and baseless.[49]

26. Vistaprint concludes that "[i]n sum, the cursory nature of the Decision and the arbitrary and selective discussion of the parties' arguments by the [Third Expert] show a lack of either independence and impartiality or appropriate qualification."[50] Vistaprint further states that it took 216 days for the Third Expert to render a decision in a procedure that should have taken a maximum of 45 days.[51]

27. The Guidebook § 3.4.6 provides that:

    The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.[52]

28. Vistaprint objects that ICANN simply accepted the Third Expert's ruling on the String Confusion Objection, without performing any analysis as to whether the ICDR and the Third Expert complied with ICANN's policies and fundamental principles, and without

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[45] Request, ¶ 39, Annex 24 (Expert Determination, *Web.com Group, Inc. v. Vistaprint Limited,* ICDR Case Nos. 50 504 221 13 and 50 504 246 13 (Consolidated) (Jan. 24, 2014)..

[46] Request, Annex 24, p. 10.

[47] Request, Annex 24, p. 11.

[48] Request, ¶¶ 44-49.

[49] Vistaprint's First Additional Submission, ¶¶ 1-2.

[50] Request, ¶ 49.

[51] Request, ¶ 41; *see* New gTLD Objections Procedure, Art. 21(a).

[52] Guidebook, § 3.4.6. The New gTLD Objections Procedure further provides in Article 2(d) that:

    The 'Expert Determination' is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

giving any rationale for doing so.[53]

29. Vistaprint contends that ICANN's Board remains its ultimate decision-making body and that the Board should have intervened and "cannot blindly accept advice by third parties or expert determinations."[54] In this respect, Vistaprint highlights the Guidebook, which provides in Module 5 (Transition to Delegation) § 1 that:

> *ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result ... the use of an ICANN accountability mechanism.*[55]

> *[Underlining added]*

30. As a result of the Third Expert sustaining the Objector's SCO, Vistaprint's application was placed in a "Contention Set". The Guidebook in § 3.2.2.1 explains this result:

> *In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.*[56]

B. Request for Reconsideration and Cooperative Engagement Process

31. On February 6, 2014 Vistaprint filed a Request for Reconsideration ("Request for Reconsideration" or "RFR").[57] According to ICANN's Bylaws, a RFR is an accountability mechanism which involves a review conducted by the Board Governance Committee ("BGC"), a sub-committee designated by ICANN's Board to review and consider Reconsideration Requests.[58] A RFR can be submitted by a person or entity that has been "adversely affected" by one or more staff actions or inactions that contradict established ICANN policies.[59]

32. Article IV, §2.15 of ICANN's Bylaws sets forth the BGC's authority and powers for handling Reconsideration Requests. The BGC, at its own option, may make a final determination on the RFR or it may make a recommendation to ICANN's Board for

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[53] Request, ¶ 50.
[54] Vistaprint's First Additional Submission, ¶¶ 29-30.
[55] Guidebook, § 5.1.
[56] Guidebook, § 3.2.2.1. Module 4 (String Contention Procedures) provides that "*Contention sets are groups of applications containing identical or similar applied-for gTLD strings.*" Guidebook, § 4.1.1. Parties that are identified as being in contention are encouraged to reach settlement among. Guidebook, § 4.1.3. It is expected that most cases of contention will be resolved through voluntary agreement among the involved applicants or by the community priority evaluation mechanism. Conducting an auction is a tie-breaker mechanism of last resort for resolving string contention, if the contention has not been resolved by other means. Guidebook, § 4.3.
[57] Request, Annex 25.
[58] Response, ¶ 29; Bylaws, Art. IV, § 2.
[59] Bylaws, Art. IV, § 2.2.a.

consideration and action:

> *For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.*

33. ICANN has determined that the reconsideration process can be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICDR, where it can be stated that the panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.[60]

34. In its RFR, Vistaprint asked ICANN to reject the Third Expert's decision and to instruct a new expert panel to issue a new decision "that applies the standards defined by ICANN."[61] Vistaprint sought reconsideration of the "various actions and inactions of ICANN staff related to the Expert Determination," claiming that "the decision fails to follow ICANN process for determining string confusion in many aspects."[62]   In particular, Vistaprint asserted that the ICDR and the Third Expert violated the applicable New gTLD Objection Procedures concerning:

    (i)   the timely appointment of an expert panel;
    (ii)   the acceptance of additional written submissions;
    (iii)   the timely issuance of an expert determination;
    (iv)   an expert's duty to remain impartial and independent;
    (v)   challenges to experts;
    (vi)   the Objector's burden of proof; and
    (vii) the standards governing the evaluation of a String Confusion Objection.

35. Vistaprint also argued that the decision was unfair, and accepting it creates disparate treatment without justified cause.[63]

36. The Bylaws provide in Article IV, § 2.3, that the BGC "shall have the authority to":

> *a. evaluate requests for review or reconsideration;*
> *b. summarily dismiss insufficient requests;*
> *c. evaluate requests for urgent consideration;*
> *d. conduct whatever factual investigation is deemed appropriate;*
> *e. request additional written submissions from the affected party, or from other parties;*
> *f. make a final determination on Reconsideration Requests regarding staff action or inaction, without*

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[60] *See* BGC Recommendation on Reconsideration Request 14-5 dated February 27, 2014 ("BGC Determination"), at p. 7, n. 7, Request, Annex 26, and available at https://www.icann.org/en/ system/files/files/determination-vistaprint-27feb14-en.pdf (last accessed on Sept. 14, 2015).
[61] Request, ¶ 51; Annex 25, p.7.
[62] Request, Annex 25, p.2.
[63] Request, Annex 25, p.6.

reference to the Board of Directors; and
g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

37. On February 27, 2014 the BGC issued its detailed Recommendation on Reconsideration Request, in which it denied Vistaprint's reconsideration request finding "no indication that the ICDR or the [Third Expert] violated any policy or process in reaching the Determination."[64] The BGC concluded that:

> *With respect to each claim asserted by the Requester concerning the ICDR's alleged violations of applicable ICDR procedures concerning experts, there is no evidence that the ICDR deviated from the standards set forth in the Applicant Guidebook, the New gTLD Dispute Resolution Procedure, or the ICDR's Supplementary Procedures for String Confusion Objections (Rules). The Requester has likewise failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure. Therefore, the BGC concludes that Request 14-5 be denied.[65]*

38. The BGC explained what it considered to be the scope of its review:

> *In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that the Requester's applications for .WEBS are confusingly similar to the Requester's application for .WEB. Rather, the BGC's review is limited to whether the Panel violated any established policy or process in reaching that Determination.[66]*

39. The BGC also stated that its determination on Vistaprint's RFR was final:

> *In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 14-5 shall be final and does not require Board (or NGPC[67]) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-5 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.[68]*

40. On March 17, 2014, Vistaprint filed a request for a Cooperative Engagement Process

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[64] BGC Determination, p. 18, Request, Annex 26.

[65] BGC Determination, p. 2, Request, Annex 26.

[66] BGC Determination, p. 7, Request, Annex 26.

[67] The "NGPC" refers to the New gTLD Program Committee, which is a sub-committee of the Board and "has all the powers of the Board." *See* New gTLD Program Committee Charter | As Approved by the ICANN Board of Directors on 10 April 2012, at https://www.icann.org/resources/pages/charter-2012-04-12-en (last accessed Sept. 15, 2015).

[68] BGC Determination, p. 19, Request, Annex 26. As noted, the BGC concluded that its determination on Vistaprint's RFR was final and made no recommendation to ICANN's Board for consideration and action. Article IV, §2.17 of ICANN's Bylaws sets out the scope of the Board's authority for matters in which the BGC decides to make a recommendation to ICANN's Board:

> *The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. The Board's decision on the recommendation is final.*

("CEP") with ICANN.[69] Vistaprint stated in its letter:

> *Vistaprint is of the opinion that the Board of Governance Committee's rejection of Reconsideration Request 14-5 is in violation of various provisions of ICANN's Bylaws and Articles of Incorporation. In particular, Vistaprint considers this is in violation of Articles I, II(3), III and IV of the ICANN Bylaws as well as Article 4 of ICANN's Articles of Incorporation. In addition, Vistaprint considers that ICANN has acted in violation of Articles 3, 7 and 9 of ICANN's Affirmation of Commitment.[70]*

41. The CEP did not lead to a resolution and Vistaprint thereafter commenced this IRP. In this regard, Module 6.6 of the Guidebook provides that an applicant for a new gTLD:

> *MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.[71]*

C. Procedures in this Case

42. On June 11, 2014, Vistaprint submitted its Request for Independent Review Process ("Request") in respect of ICANN's treatment of Vistaprint's application for the .WEBS gTLD. On July 21, 2014, ICANN submitted its Response to Vistaprint's Request ("Response").

43. On January 13, 2015, the ICDR confirmed that there were no objections to the constitution of the present IRP Panel ("IRP Panel" or "Panel"). The Panel convened a telephonic preliminary hearing with the parties on January 26, 2015 to discuss background and organizational matters in the case. Having heard the parties, the Panel issued Procedural Order No. 1 permitting an additional round of submissions from the parties. The Panel received Vistaprint's additional submission on March 2, 2015 (Vistaprint's "First Additional Submission") and ICANN's response on April 2, 2015 (ICANN's "First Additional Response").

44. The Panel then received further email correspondence from the parties. In particular, Vistaprint requested that the case be suspended pending an upcoming meeting of ICANN's Board of Directors, which Vistaprint contended would be addressing matters informative for this IRP. Vistaprint also requested that it be permitted to respond to arguments and information submitted by ICANN in ICANN's First Additional Response. In particular, Vistaprint stated that ICANN had referenced the Final Declaration of March 3, 2015 in the IRP case involving *Booking.com v. ICANN* (the "*Booking.com Final Declaration*").[72] The *Booking.com Final Declaration* was issued one day after Vistaprint had submitted its First Additional Submission in this case. ICANN objected to Vistaprint's requests, urging that there was no need for additional briefing and no justification for suspending the case.

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[69] Request, Annex 27.
[70] Request, Annex 27.
[71] Guidebook, § 6.6.
[72] *Booking.com B.V. v. ICANN*, ICDR Case No. 50-2014-000247 (March 3, 2015) ("*Booking.com Final Declaration*") , at https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf (last accessed on Sept. 15, 2015)

45. On April 19, 2015, the Panel issued Procedural Order No. 2, which denied Vistaprint's request that the case be suspended and permitted Vistaprint and ICANN to submit another round of supplemental submissions. Procedural Order No. 2 also proposed two dates for a telephonic hearing with the parties on the substantive issues and the date of May 13, 2015 was subsequently selected. The Panel received Vistaprint's second additional submission on April 24, 2015 (Vistaprint's "Second Additional Submission") and ICANN's response to that submission on May 1, 2015 (ICANN's "Second Additional Response").

46. The Panel then received a letter from Vistaprint dated April 30, 2015 and ICANN's reply of the same date. In its letter, Vistaprint referred to two new developments that it stated were relevant for this IRP case: (i) the Third Declaration on the IRP Procedure, issued April 20, 2015, in the IRP involving *DotConnectAfrica Trust v. ICANN*[73], and (ii) the ICANN Board of Director's resolution of April 26, 2015 concerning the *Booking.com Final Declaration*. Vistaprint requested that more time be permitted to consider and respond to these new developments, while ICANN responded that the proceedings should not be delayed.

47. Following further communications with the parties, May 28, 2015 was confirmed as the date for a telephonic hearing to receive the parties' oral submissions on the substantive issues in this case. On that date, counsel for the parties were provided with the opportunity to make extensive oral submissions in connection with all of the facts and issues raised in this case and to answer questions from the Panel.[74]

48. Following the May 28, 2015 hear, the Panel held deliberations to consider the issues in this IRP, with further deliberations taking place on subsequent dates. This Final Declaration was provided to the ICDR in draft form on October 5, 2015 for non-substantive comments on the text; it was returned to the Panel on October 8, 2015.

III. ICANN's Articles, Bylaws, and Affirmation of Commitments

49. Vistaprint states that the applicable law for these IRP proceedings is found in ICANN's Articles of Incorporation and Bylaws. Both Vistaprint and ICANN make numerous references to these instruments. This section sets out a number of the key provisions of

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[73] Third Declaration on the IRP Procedure, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083 (April 20, 2015) ("*DCA Third Declaration on IRP Procedure*"), at https://www.icann.org/en/system/files/files/irp-procedure-declaration-20apr15-en.pdf (last accessed on Sept. 15, 2015)

[74] The Panel conducted these IRP proceedings relying on email and telephonic communications, with no objections to this approach from either party and in view of ICANN's Bylaws, Article IV, § 3.12 ("*In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone.*").

the Articles and the Bylaws, as they are relied upon by the parties in this IRP.[75] Vistaprint also references the Affirmation of Commitments – relevant provisions of this document are also provided below.

A. Articles of Incorporation

50. Vistaprint refers to the Articles of Incorporation, highlighting Article IV's references to "relevant principles of international law" and "open and transparent processes". Article 4 of the Articles provides in relevant part:

> *The Corporation shall operate for the benefit of the Internet community as a whole, <u>carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law</u> and, <u>to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes</u> that enable competition and open entry in Internet-related markets.*
>
> *[Underlining added]*

51. Vistaprint states that general principles of international law – and in particular the obligation of good faith – serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted.[76] The general principle of good faith is one of the most basic principles governing the creation and performance of legal obligations, and rules involving transparency, fairness and non-discrimination arise from it.[77] Vistaprint also emphasizes that the principle of good faith includes an obligation to ensure procedural fairness by adhering to substantive and procedural rules, avoiding arbitrary action, and recognizing legitimate expectations.[78] The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken.[79]

B. Bylaws

a. Directives to ICANN and its Board

52. The Bylaws contain provisions that address the role, core values and accountability of ICANN and its Board.

53. Article IV, § 3.2 specifies the right of "any person materially affected" to seek independent review (through the IRP) of a Board action alleged to be a violation of the

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[75] ICANN's Articles are available at https://www.icann.org/resources/pages/governance/articles-en (last accessed on Sept. 15, 2015). ICANN's Bylaws are available at https://www.icann.org/resources/pages/governance/bylaws-en (last accessed on Sept. 15, 2015).

[76] Request, ¶ 55. Vistaprint also states that "*U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.*" Request, ¶ 60, n.8.

[77] Request, ¶ 59.

[78] Request, ¶ 60.

[79] Request, ¶ 66.

Articles or Bylaws:

> *Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.*

54. Vistaprint has relied on certain of ICANN's core values set forth in Article I, § 2 (Core Values) of the Bylaws. The sub-sections underlined below are invoked by Vistaprint as they relate to principles of promoting competition and innovation (Article I § 2.2, 2.5 and 2.6); openness and transparency (Article I § 2.7); neutrality, fairness, integrity and non-discrimination (Article I § 2.8); and accountability (Article I § 2.10). Article I § 2 provides in full:

> *Section 2. Core Values*
>
> *In performing its mission, the following core values should guide the decisions and actions of ICANN:*
>
> *1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
>
> *2. <u>Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.</u>*
>
> *3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
>
> *4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
>
> *5. <u>Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.</u>*
>
> *6. <u>Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.</u>*
>
> *7. <u>Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.</u>*
>
> *8. <u>Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.</u>[80]*
>
> *9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
>
> *10. <u>Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.</u>*

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[80] Vistaprint states that "[t]his requirement is also found in applicable California law, which requires that decisions be made according to procedures that are 'fair and applied uniformly', and not in an 'arbitrary and capricious manner.'" Request, ¶ 62, n.9.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[Underlining added]

55. Vistaprint refers to Article II, § 3 in support of its arguments that the Board failed to act fairly and without discrimination as it considered Vistaprint's two .WEBS applications and the outcome of the *Vistaprint SCO* case. Article II, § 3 provides:

> *Section 3 (Non-Discriminatory Treatment)*
>
> *ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.*
>
> *[Underlining added]*

56. Vistaprint refers to Article III (Transparency), § 1 of the Bylaws in reference to the principle of transparency:

> *Section 1. PURPOSE*
>
> *ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.*
>
> *[Underlining added]*

57. Vistaprint also refers Article IV (Accountability and Review), § 1 as it relates to ICANN's accountability and core values, providing in relevant part:

> *In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.*
>
> *[Underlining added]*

b. Directives for the IRP Panel

58. ICANN's Bylaws also contain provisions that speak directly to the role and authority of the Panel in this IRP case. In particular, Articles IV of the Bylaws creates the IRP as an accountability mechanism, along with two others mechanisms: (i) the RFR process, described above and on which Vistaprint relied, and (ii) an unrelated periodic review of

ICANN's structure and procedures.[81]

59. Article IV, § 1 of the Bylaws emphasizes that the IRP is a mechanism designed to ensure ICANN's accountability:

The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

[Underlining added]

60. In this respect, the IRP Panel provides an independent review and accountability mechanism for ICANN and its Board. Vistaprint urges that IRP is the *only* method established by ICANN for holding itself accountable through independent third-party review of its decisions.[82] The Bylaws in Article IV, § 3.1 provides:

In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

61. ICANN states in its Response that "[t]he IRP Panel is tasked with determining whether the Board's actions are consistent with ICANN's Articles and Bylaws."[83] ICANN also maintains that while the IRP is intended to address challenges to conduct undertaken by ICANN's Board, it is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved with ICANN's activities.[84]

62. In line with ICANN's statement, the Bylaws provide in Article IV, § 3.4, that:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.[85]

[Underlining added]

63. The Bylaws also include a standard of review in Article IV, § 3.4, providing that the Panel:

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[81] Note that Article V (Ombudsman) of the Bylaws also establishes the Office of Ombudsman to facilitate the fair, impartial, and timely resolution of problems and complaints for those matters where the procedures of the RFR or the IRP have not been invoked.

[82] Request, ¶ 57.

[83] Response, ¶ 33.

[84] Response, ¶ 4.

[85] Bylaws, Art. IV, § 3.4. The reference to "actions" of ICANN's Board should be read to refer to both "actions or inactions" of the Board. *See* Bylaws, Art. IV, § 3.11(c) ("The IRP Panel shall have the authority to:…(c) declare whether an *action or inaction* of the Board was inconsistent with the Articles of Incorporation or Bylaws"); *see also* Supplementary Procedures, which define "Independent Review" as referring

"*to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation.*

"must apply a defined standard of review to the IRP request, focusing on:

    a. *did the Board act without conflict of interest in taking its decision?;*
    b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
    c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*[86]

64.   The Bylaws in Article IV, § 3.11 set out the IRP Panel's authority in terms of alternative actions that it may take once it is has an IRP case before it:

The IRP Panel shall have the authority to:

    a. *summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;*
    b. *request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;*
    c. *declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and*
    d. *recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;*
    e. *consolidate requests for independent review if the facts and circumstances are sufficiently similar; and*
    f. *determine the timing for each proceeding.*[87]

65.   Further, the Bylaws in Article IV, § 3.18 state that

"[t]he IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, <u>and in its declaration shall specifically designate the prevailing party.</u>"[88]

[Underlining added]

66.   The Bylaws address the steps to be taken after the Panel issues a determination in the IRP. Article IV, § 3.21[89] states that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value":

Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. <u>The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.</u>

[Underlining added]

C. Affirmation of Commitments

67.   Vistaprint claims that ICANN violated the ICANN's Affirmation of Commitments, in particular Articles 3, 7 and 9. This Affirmation of Commitments is instructive, as it explains ICANN's obligations in light of its role as regulator of the DNS. Article 3, 7 and 9 are set forth below in relevant part:

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[86] Bylaws, Art. IV, § 3.4.
[87] Bylaws, Art. IV, § 3.11.
[88] Bylaws, Art. IV, § 3.18.
[89] This section was added by the amendments to the Bylaws on April 11, 2013.

3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) <u>ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent</u>; (b) preserve the security, stability and resiliency of the DNS; (c) <u>promote competition, consumer trust, and consumer choice in the DNS marketplace</u>; and (d) facilitate international participation in DNS technical coordination.

*   *   *   *

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, <u>ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied</u>.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

<u>9.1 Ensuring accountability, transparency and the interests of global Internet users</u>: <u>ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders</u> by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) <u>continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof)</u>; (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, ... Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

*   *   *   *

<u>9.3 Promoting competition, consumer trust, and consumer choice</u>: <u>ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation</u>. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years.... Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

<u>{Underlining added]</u>

IV. Summary of Parties' Contentions

68. This presentation of the parties' contentions is intended to provide a summary to aid in understanding this Final Declaration. It is not an exhaustive recitation of the entirety of the parties' allegations and arguments. Additional references to the parties' assertions are included in sections II (Factual and Procedural Background), III (ICANN's Articles, Bylaws and Affirmation of Commitments) and V (Analysis and Findings).

69. The IRP Panel has organized the parties' contentions into <u>three</u> categories, based on the areas of claim and dispute that have emerged through the exchange of three rounds of submissions between the parties and the Panel. The *first* section relates to the authority of the Panel, while the *second* and *third* sections address the allegations asserted by Vistaprint, which fall into two general areas of claim. In this regard, Vistaprint claims that the ICDR and Third Expert made numerous errors of procedure and substance during the String Confusion Objection proceedings, which resulted in Vistaprint being denied a fair hearing and due process. As a result of the flawed SCO proceedings, Vistaprint alleged that ICANN through its Board (and the BGC), in turn: (i) violated its Articles, Bylaws and the Guidebook (e.g., failed to act in good faith, fairly, non-arbitrarily, with accountability, due diligence, and independent judgment) by accepting the determination in the *Vistaprint SCO* and failing to redress and remedy the numerous alleged process and substantive errors in the SCO proceedings, and (ii) discriminated against Vistaprint, in violation of its Articles and Bylaws, by delaying Vistaprint's .WEBS gTLD applications and putting them into a Contention Set, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

70. Thus, the three primary areas of contention between the parties are as follows:

- ▪ <u>IRP Panel' Authority</u>: The parties have focused on the authority of the IRP Panel, including the *standard of review* to be applied by the Panel, whether the Panel's IRP declaration is *binding* or *non-binding* on ICANN, and, on a very closely related point, whether the Panel has authority to award any *affirmative relief* (as compared to issuing only a declaration as to whether or not ICANN has acted in a manner that is consistent or not with its Articles and Bylaws).

- ▪ <u>SCO Proceedings Claim</u>: Vistaprint claims ICANN's failed to comply with the obligations under its Articles and Bylaws by accepting the Third Expert's SCO determination and failing to provide a remedy or redress in response to numerous alleged errors of process and substance in the *Vistaprint SCO* proceedings. As noted above, Vistaprint claims there were process and substantive violations, which resulted in Vistaprint not being accorded a fair hearing and due process. Vistaprint states that because ICANN's Bylaws require ICANN to apply established policies neutrally and fairly, therefore, the Panel should also consider the policies in Module 3 of the

Guidebook concerning the String Confusion Objection procedures. Vistaprint objects to the policies themselves as well as their implementation through the ICDR and the Third Expert. Vistaprint claims that ICANN's Board, acting through the BGC or otherwise, should have acted to address these deficiencies and its choice not to intervene violated the Articles and Bylaws.

▪ Disparate Treatment Claim: Vistaprint claims ICANN discriminated against Vistaprint through ICANN's (and the BGC's) acceptance of the Third Expert's allegedly baseless and arbitrary determination in *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

A. Vistaprint's Position

a. IRP Panel's Authority

71. Standard of review: Vistaprint emphasizes that ICANN is accountable to the community for operating in a manner that is consistent with the Article and Bylaws, and with due regard for the core values set forth in Article I of the Bylaws. To achieve this required accountability, the IRP Panel is "charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[90] Vistaprint states that the IRP Panel's fulfillment of this core obligation is crucial to ICANN's commitment to accountability. The IRP is the only method established by ICANN for holding itself accountable through third-party review of its decisions.[91]

72. Vistaprint contends that ICANN is wrong in stating (in its Response[92]) that a deferential standard of review applies in this case.[93] No such specification is made in ICANN's Bylaws or elsewhere, and a restrictive interpretation of the standard of review would be inappropriate. It would fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by Article 9.1 of ICANN's Affirmation of Commitments and ICANN's core values, which require ICANN to "remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness".[94]

73. Vistaprint states further that the most recent version of ICANN's Bylaws, amended on

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[90] Request, ¶ 55-56 (citing Bylaws, Art. IV, §§1 & 3.4).
[91] Request, ¶ 57.
[92] Response, ¶ 33.
[93] Vistaprint's First Additional Submission, ¶ 36.
[94] Vistaprint's First Additional Submission, ¶¶ 36-37; Request, ¶ 57.

April 11, 2013, require that the IRP Panel focus on whether ICANN's Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.[95] Vistaprint asserts, however, that these issues are mentioned by way of example only. The Bylaws do not restrict the IRP Panel's remit to these issues alone, as the Panel's fundamental task is to determine whether the Board has acted consistently with the Articles and Bylaws[96]

74. <u>IRP declaration binding or non-binding</u>: Vistaprint contends that the outcome of this IRP is binding on ICANN and that any other outcome "would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability."[97]

75. Vistaprint states that since ICANN's amendment of its Bylaws, IRP declarations have precedential value.[98] Vistaprint asserts the precedential value – and binding force – of IRP declarations was confirmed in a recent IRP panel declaration,[99] which itself has precedential value for this case. Vistaprint argues that any other outcome would effectively grant the ICANN Board arbitrary and unfettered discretion, something which was never intended and would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability.[100]

76. Vistaprint contends that the IRP is not a mere "corporate accountability mechanism" aimed at ICANN's internal stakeholders.[101] The IRP is open to any person materially affected by a decision or action of the Board[102] and is specifically available to new gTLD applicants, as stated in the Guidebook, Module 6.4. Vistaprint claims that *internally*, towards its stakeholders, ICANN might be able to argue that its Board retains ultimate decision-making power, subject to its governing principles. *Externally*, however, the ICANN Board's discretionary power is limited, and ICANN and its Board must offer redress when its decisions or actions harm third parties.[103]

77. Vistaprint argues further that the IRP has all the characteristics of an international arbitration.[104] The IRP is conducted pursuant to a set of independently developed

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[95] Bylaws, Article IV, § 3.4.
[96] Vistaprint's First Additional submission, ¶ 35.
[97] Vistaprint's First Additional Submission, ¶ 37.
[98] Vistaprint's First Additional Submission, ¶ 37 (citing Bylaws, Art. IV § 3.21).
[99] *See DCA Third Declaration on IRP Procedure,* ¶ 131 (the panel ruled that "[b]ased on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties").
[100] Vistaprint's First Additional Submission, ¶ 37.
[101] Vistaprint's Second Additional Submission, ¶ 29.
[102] Bylaws, Article IV § 3.2 ("Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.").
[103] Vistaprint's Second Additional Submission, ¶ 15.
[104] Vistaprint's Second Additional Submission, ¶ 27.

international arbitration rules: the ICDR Rules, as modified by the Supplementary Procedures. The IRP is administered by the ICDR, which is a provider of international arbitration services. The decision-maker is not ICANN, but a panel of neutral individuals selected by the parties in consultation with the ICDR, and appointed pursuant to the ICDR Rules.

78. Vistaprint provides further detailed argument in its Second Additional Submission that the IRP is binding in view of ICANN's Bylaws, the ICDR Rules and the Supplementary Procedures, and that any ambiguity on this issue should weigh against ICANN as the drafter and architect of the IRP:

> *31. As mentioned in Vistaprint's Reply, a previous IRP panel ruled that "[v]arious provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the [IRP] Panel's decisions, opinions and declarations are binding" and that "[t]here is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the [IRP] Panel either advisory or non-binding" (RM 32, para 98).[105]*

> *32. Indeed, as per Article IV(3)(8) of the ICANN Bylaws, the ICANN Board has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures (RM 32, para. 101). The Supplementary Procedures supplement the ICDR Rules (Supplementary Procedures, Preamble and Section 2). The preamble of the ICDR Rules provides that "[a] dispute can be submitted to an arbitral tribunal for a final and binding decision". Article 30 of the ICDR Rules specifies that "[a]wards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties". No provision in the Supplementary Procedures deviates from the rule that the Panel's decisions are binding. On the contrary, Section 1 of the Supplementary Procedures defines an IRP Declaration as a decision/opinion of the IRP Panel. Section 10 of the Supplementary Procedures requires that IRP Declarations i) are made in writing, and ii) specifically designate the prevailing party. Where a decision must specifically designate the prevailing party, it is inherently binding. Moreover the binding nature of IRP Declarations is further supported by the language and spirit of Section 6 of the Supplementary Procedures and Article IV(3)(11)(a) of the ICANN Bylaws. Pursuant to these provisions, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the IRP Panel would not be considered advisory (RM 32, para. 107).*

> *33. Finally, even if ICANN's Bylaws and Supplementary Procedures are ambiguous - quod non - on the question of whether or not an IRP Declaration is binding, this ambiguity would weigh against ICANN. The relationship between ICANN and Vistaprint is clearly an adhesive one. In such a situation, the rule of contra proferentem applies. As the drafter and architect of the IRP Procedure, it was possible for ICANN, and clearly within its power, to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure (RM 32, paras. 108-109).*

79. Finally, Vistaprint contends that ICANN conceived of the IRP as an alternative to dispute

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[105] Citing *DCA Third Declaration on IRP Procedure,* ¶ 98.

resolution by the courts. To submit a new gTLD application, Vistaprint had to agree to terms and conditions including a waiver of its right to challenge ICANN's decisions on Vistaprint's applications in a court, provided that as an applicant, Vistaprint could use the accountability mechanisms set forth in ICANN's Bylaws. Vistaprint quotes the *DCA Third Declaration on Procedure,* in which the IRP panel stated:

> *assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate 'accountability' remedy for [Vistaprint] is the IRP.*[106]

80. <u>Authority to award affirmative relief</u>: Vistaprint makes similar arguments in support of its claim that the IRP Panel has authority to grant affirmative relief. Vistaprint quotes the *Interim Declaration on Emergency Request for Interim Measures of Protection in Gulf Cooperation Council v. ICANN* ("*GCC Interim IRP Declaration*),[107] where that panel stated that the right to an independent review is

> *a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process.*

81. Accordingly, Vistaprint argues that the IRP Panel's authority is not limited to declare that ICANN breached its obligations under the Articles, Bylaws and the Guidebook. To offer effective redress to gTLD applicants, the Panel may indicate what action ICANN must take to cease violating these obligations. The point is all the stronger here, as ICANN conceived the IRP to be the sole independent dispute resolution mechanism available to new gTLD applicants.[108]

b. SCO Proceedings Claim

82. Vistaprint states that this case relates to ICANN's handling of the determination in the *Vistaprint SCO* proceedings following String Confusion Objections to Vistaprint's .WEBS applications, but does not relate to the merits of that SCO determination.[109]

83. Vistaprint's basic claim here is that given the errors of process and substance in those proceedings, Vistaprint was not given a fair opportunity to present its case. Vistaprint was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules. Further, Vistaprint was not given any meaningful opportunity for remedy or redress once the decision was made, and in this way ICANN's Board allegedly violated its Articles and Bylaws.[110]

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[106] *DCA Third Declaration on IRP Procedure, ¶* 40.
[107] *Interim Declaration on Emergency Request for Interim Measures of Protection in Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-0002-1065, ¶ 59 (February 12, 2015) ("*GCC Interim IRP Declaration*").
[108] Vistaprint's Second Additional Submission, ¶ 24.
[109] Request, ¶ 4.
[110] Request, ¶ 71.

84. Although Vistaprint challenged the SCO decision through ICANN's Request for Reconsideration process, ICANN refused to reconsider the substance of the challenged decision, or to take any action to remedy the lack of due process. In doing so, Vistaprint claims ICANN failed to act in a fair and non-arbitrary manner, with good faith, accountability, due diligence and independent judgment, as required by ICANN's Bylaws and Articles.[111] ICANN's acceptance of the SCO determination and refusal to reverse this decision was an abdication of responsibility and contrary to the evaluation policies ICANN had established in the Guidebook.[112]

85. A number of Vistaprint's contentions regarding the alleged violations of process and substance in SCO proceedings are described in part II.A above addressing Vistaprint's .WEBS applications and the SCO proceedings. Vistaprint's alleges as follows:

   (i)   ICDR's appointment of the First Expert was untimely, in violation of Article 13(a) of the New gTLD Objections Procedure[113];

   (ii) the First Expert (and Third Expert) improperly accepted and considered unsolicited supplemental filings, violating Articles 17 and 18 of the New gTLD Objections Procedure[114];

   (iii) ICDR violated Article 21 of the New gTLD Objections Procedure[115] by failing to ensure the timely issuance of an expert determination in the SCO;

   (iv) the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure[116];

   (v)   ICDR unjustifiably accepted a challenge to the Second Expert (or created the circumstances for such a challenge), in violation of Article 2 of the ICDR's Supplementary Procedures for String Confusion Objections (Rules);

   (vi) the Determination of the Third Expert was untimely, in violation of Article 21(a) of the New gTLD Objections Procedure;

   (vii) the Third Expert incorrectly applied the Objector's burden of proof, in violation of section 3.5 of the Guidebook and Article 20(c) of the New gTLD Objections Procedure, which place the burden of proof on the Objector; and

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[111] Request, ¶ 71.

[112] Request, ¶ 8.

[113] Article 13(a) of the Procedure provides: "The DRSP shall select and appoint the Panel of Expert(s) within thirty (30) days after receiving the Response."

[114] Request, ¶ 42. Article 17 provides that *"[t]he Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response."* Article 18 states that *"[i]n order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence."*

[115] Article 21(a) of the Procedure provides that "[t]he DSRP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel."

[116] Article 13(c) of the New gTLD Objections Procedure provides that "[a]ll Experts acting under this Procedure shall be impartial and independent of the parties." Section 3.4.4 of the Guidebook provides that the ICDR will "follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence."

(viii) the Third Expert incorrectly applied ICANN's substantive standard for evaluation of String Confusion Objections, as set out in Section 3.5.1 of the Guidebook, in particular the standards governing the evaluation of a string confusion objection.

86. Based on these alleged errors in process and substance, Vistaprint concludes in its Request:

> *49. In sum, the cursory nature of the Decision and the arbitrary and selective discussion of the parties' arguments by the Panel show a lack of either independence and impartiality or appropriate qualification on the fact of the Panel. The former is contrary to Article 13 of the Procedure; the latter is contrary to the Applicant Guidebook, Module 3-16, which requires that a panel (ruling on a string confusion or other objection) must consist of "appropriately qualified experts appointed to each proceeding by the designated DRSP".[117]*

87. Vistaprint states that ICANN's Board disregarded these accumulated infringements and turned a blind eye to the Third Expert's lack of independence and impartiality. Vistaprint asserts that ICANN is not entitled to blindly accept expert determinations from SCO cases; it must verify whether or not, by accepting the expert determination and advice, it is acting consistent with its obligations under its Articles, Bylaws and Affirmation of Commitments.[118] Vistaprint further claims ICANN would be in violation of these obligations if it were to accept an expert determination or advice in circumstances where the ICDR and/or the expert had failed to comply with the New gTLD Objections Procedure and/or the ICDR Rules for SCOs, or where a panel – even if it had been correctly appointed – had failed to correctly apply the standard set by ICANN.[119]

88. Vistaprint states that following ICANN's decision to accept the *Vistaprint SCO* determination, Vistaprint filed its Reconsideration Request detailing how ICANN's acceptance of the Third Expert's determination was inconsistent with ICANN's policy and obligations under its Articles, Bylaws and Affirmation of Commitments. Background on the RFR procedure is provided above in part II.B. Despite this, Vistaprint states that ICANN refused to reverse its decision.

89. The IRP Panel has summarized as follows Vistaprint's SCO Proceedings Claim concerning ICANN's alleged breaches of its obligations under the Articles, Bylaws and Affirmation of Commitments:

(1) ICANN failed to comply with its obligation under Article 4 of the Articles and IV § 3.4 of the Bylaws to act in good faith with due diligence and independent judgment by failing to provide due process to Vistaprint's .WEBS applications.[120] Good faith encompasses the obligation to ensure procedural fairness and due process, including equal and fair treatment of the parties, fair notice, and a fair opportunity to present one's case. These are more than just formalistic procedural requirements. The opportunity must be meaningful: the party must be given adequate notice of the relevant

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[117] Request, ¶ 49.
[118] Request, ¶ 6.
[119] Request, ¶ 6.
[120] Request, ¶¶ 69-71.

rules and be given a full and fair opportunity to present its case. And the mechanisms for redress must be both timely and effective.

Vistaprint claims that it was not given a fair opportunity to present its case; was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules; and was not given any meaningful opportunity for remedy or redress once the SCO determination was made, even in the RFR procedure. Thus, ICANN's Board failed to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles.

(2) ICANN failed to comply with its obligation under Article I § 2.8 to neutrally, objectively and fairly apply documented policies as established in the Guidebook and Bylaws.[121] Vistaprint argues that there is no probability of user confusion if both .WEBS and .WEB were delegated as gTLD strings. Vistaprint states expert evidence confirms that there is no risk that Internet users will be confused and the Third Expert could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings. As confirmed by the Objector,[122] the average reasonable Internet user is used to distinguishing between words (and non-words) that are much more similar than the strings, .WEBS and .WEB. Since these strings cannot be perceived confusingly similar by the average reasonable Internet user, the *Vistaprint SCO* determination that they are confusingly similar is contradictory to ICANN's policy as established in the Guidebook.

(3) ICANN failed to comply with its obligation to act fairly and with due diligence and independent judgment as called for under Article 4 of the Articles of Incorporation, Articles I § 2.8 and IV § 3.4 of the Bylaws by accepting the SCO determination made by the Third Expert, who was allegedly not independent and impartial.[123] Vistaprint claims that the Third Expert was not independent and impartial and/or is not appropriately qualified. However, Vistaprint claims this did not prevent ICANN from accepting the determination by the Third Expert, without even investigating the dependence and partiality of the Expert when serious concerns were raised to the ICANN Board in the RFR. This is a failure of ICANN to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles.

(4) ICANN failed to comply with its obligations under the Article 4 of the Articles, and Article I §§ 2.7 and 2.8 and Article III § 1 of the Bylaws (and Article 9.1 of the Affirmation of Commitments) to act fairly and transparently by failing to disclose/ perform any efforts to optimize the service that the ICDR provides in the New gTLD Program.[124] Vistaprint contends that the BGC's determination on Vistaprint's RFR shows that the BGC made no investigation into Vistaprint's fundamental questions about the Panel's arbitrariness, lack of independence, partiality, inappropriate

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[121] Request, ¶ 72.
[122] Request, Annex 10.
[123] Request, ¶ 73.
[124] Request, ¶¶ 52 and 77.

qualification. In addition, rather than identifying the nature of the conflict that forced the First Expert to step down, the BGC focused on developing hypotheses of reasons that could have led to this expert to stepping down. According to Vistaprint, this shows that the BGC did not exercise due diligence in making its determination and was looking for unsubstantiated reasons to reject Vistaprint's Reconsideration Request rather than making a fair determination.

In addition, as it is ICANN's responsibility to ensure that its policies and fundamental principles are respected by its third party vendors, ICANN had agreed with the ICDR that they were going to "communicate regularly with each other and seek to optimize the service that the ICDR provides as a DRSP in the New gTLD Program" and that ICANN was going to support the ICDR "to perform its duties…in a timely and efficient manner".[125] However, ICANN has failed to show that it sought in any way to optimize the ICRD's service vis-à-vis Vistaprint or that it performed any due diligence in addressing the concerns raised by Vistaprint. Instead, the BGC denied Vistaprint's RFR without conducting any investigation.

(5) <u>ICANN failed to comply with its obligation to remain accountable under Articles I § 2.10 and IV § 1 of the Bylaws (and Articles 3(a) and 9.1 of the Affirmation of Commitments) by failing to provide any remedy for its mistreatment of Vistaprint's gTLD applications.</u>[126] Vistaprint claims that because of ICANN's unique history, role and responsibilities, its constituent documents require that it operate with complete accountability. In contrast to this obligation, throughout its treatment of Vistaprint's applications for .WEBS, ICANN has acted as if it and the ICDR are entitled to act with impunity. ICANN adopted the Third Expert's determination without examining whether it was made in accordance with ICANN's policy and fundamental principles under its Articles and Bylaws. When confronted with process violations, ICANN sought to escape its responsibilities by relying on unrealistic hypotheses rather than on facts that should have been verified. Additionally, ICANN has not created any general process for challenging the substance of SCO expert determinations, while acknowledging the need for such a process by taking steps to develop a review process mechanism for certain individual cases involving SCO objections.

(6) <u>ICANN failed to promote competition and innovation under Articles I § 2.2 (and Article 3(c) of the Affirmation of Commitments) by accepting the Third Expert's determination.</u>[127] Vistaprint's argues that the Objector's sole motive in filing the SCO against Vistaprint was to prevent a potential competitor from entering the gTLD market. This motive is contrary to the purpose of ICANN's New gTLD Program. The Board's acceptance of the determination in the *Vistaprint SCO*, which was filed with an intent contrary to the interests of both competition and consumers, was contrary to ICANN's Bylaws.

c. Disparate Treatment Claim

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[125] Request,¶¶ 52.
[126] Request,¶¶ 78-79.
[127] Request,¶ 80.

90. Vistaprint claims that ICANN's Board discriminated against Vistaprint through the Board's (and the BGC's) acceptance of the Third Expert's allegedly baseless and arbitrary determination in the *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

91. Vistaprint states that the "IRP Panel's mandate includes a review as to whether or not ICANN's Board discriminates in its interventions on SCO expert determinations," and contends that "[d]iscriminating between applicants in its interventions on SCO expert determinations is exactly what the Board has done with respect to Vistaprint's applications."[128]

92. Vistaprint asserts that in contrast to the handling of other RFRs, the BGC did not give the full ICANN Board the opportunity to consider the *Vistaprint SCO* matter and did not provide detailed minutes of the meeting in which the BGC's decision was taken.[129] Vistaprint states this is all the more striking as, in other matters related to handling of SCOs with no concerns about the impartiality and independence of the expert or the procedure, the Board considered potential paths forward to address perceived inconsistencies in expert determinations in the SCO process, including implementing a review mechanism. The Board also directed ICANN's President and CEO, or his designee, to publish this proposed review mechanism for public comment.[130] Vistaprint emphasizes that ICANN's Board took this decision the day before Vistaprint filed its Reconsideration Request regarding the *Vistaprint SCO*. However, this did not prevent the BGC from rejecting Vistaprint's RFR without considering whether such a review mechanism might also be appropriate for dealing with the allegedly unfair and erroneous treatment of the SCO related to Vistaprint's .WEBS applications.[131]

93. The core of Vistaprint's discrimination and disparate treatment claims is stated in its First Additional Submission:

> 7.   Other applicants have equally criticized SCO proceedings. In a letter to ICANN's CEO, United TLD Holdco, Ltd. denounced the process flaws in the SCO proceedings involving the strings .com and .cam. DERCars, LCC filed an RfR, challenging the expert determination in the SCO proceedings relating to the strings .car and .cars. Amazon EU S.a.r.l. filed an RfR, challenging the expert determination in the SCO proceedings relating to the strings .shop and .通販 (which means 'online shopping' in Japanese). The ICANN Board took action in each of these matters.
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> -   With respect to the Expert Determination finding .cam confusingly similar to .com, the ICANN Board ordered that an appeals process be developed to address the "perceived inconsistent or otherwise unreasonable SCO Expert Determination".
> -   With regard to the Expert Determination finding .cars confusingly similar to .car, the ICANN Board ordered its staff to propose a review mechanism. DERCars decided to withdraw its

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[128] Vistaprint's Second Additional Submission, ¶ 20-21.
[129] Request, ¶ 52.
[130] Request, ¶ 52 (referencing NGPC Resolution 2014.02.05.NG02).
[131] Request, ¶ 52.

application for .cars before the review mechanism was implemented. As a result, it was no longer necessary for the ICANN Board to further consider the proposed review process.

- *With regard to the Expert Determination finding .通販 confusingly similar to .shop, the ICANN Board ordered that an appeals process be developed to address the "perceived inconsistent or otherwise unreasonable SCO Expert Determination".*

8. While the ICANN Board took action in the above-mentioned matters, it did not do so with respect to the .webs / .web determination. However, the .webs / .web determination was equally unreasonable, and at least equally serious substantive and procedural errors were made in these SCO proceedings. There is no reason for ICANN to treat the .webs / .web determination differently.

 * * * *

12. When there are clear violations of the process and the outcome is highly objectionable (all as listed in detail in the request for IRP), the ICANN Board must intervene, as it has done with regard to other applications. The ICANN Board cannot justify why it intervenes in certain cases (.cars / .car, .cam / .com and .通販 / .shop), but refuses to do so in another case (.webs / .web). This is a clear violation of its Bylaws and Articles of Incorporation. The Panel in the current IRP has authority to order that ICANN must comply with its Bylaws and Articles of Incorporation and must disregard the expert determination in relation to Vistaprint's .webs applications.[132]

 * * * *

31. When the ICANN Board individually considers an application, it must make sure that it does not treat applicants inequitably and that it does not discriminate among applicants. Article II, Section 3 of ICANN's Bylaws provides that "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition". However, with regard to the SCO proceedings, the ICANN Board has done the exact opposite. It created the opportunity for some aggrieved applicants to participate in an appeals process, while denying others.

32. As explained above, there is no justification for this disparate treatment, and the ICANN Board has not given any substantial and reasonable cause that would justify this discrimination.

94. Vistaprint also contends that ICANN cannot justify the disparate treatment:

22. ICANN's attempt to justify the disparate treatment of Vistaprint's applications is without merit. ICANN argues that its Board only intervened with respect to specific expert determinations because there had been several expert determinations regarding the same strings that were seemingly inconsistent (fn. omitted). Vistaprint recognizes that the ICANN Board intervened to address "perceived inconsistent or otherwise unreasonable SCO Expert Determinations" (fn. omitted). However, ICANN fails to explain why the SCO Expert Determination on Vistaprint's .webs applications was not just as unreasonable as the SCO Expert Determinations involving .cars/.car, .cam/.com and 通販 /.shop. Indeed, the determination concerning Vistaprint's .webs applications expressly relies on the determination concerning .cars/.car, that was considered inconsistent or otherwise unreasonable by the ICANN Board that rejected the reasoning applied in the two other .cars/.car expert determinations (fn. omitted).

23. Therefore, Vistaprint requests the IRP Panel to exercise its control over the ICANN Board and to declare that ICANN discriminated Vistaprint's applications.

95. <u>Timing</u>: Vistaprint contends that the objections it raises in this IRP concerning the Third Expert's SCO determination and the Guidebook and its application are timely.[133] While

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[132] Vistaprint's First Additional Submission, ¶ 12.
[133] Vistaprint's Second Additional Submission, ¶¶ 8-12.

ICANN argues that the time for Vistaprint to object to the SCO procedures as established in the Guidebook has long passed,[134] Vistaprint responds that the opportunity to challenge the erroneous application of the Guidebook in violation of ICANN's fundamental principles only arose when the flaws in ICANN's implementation of the Guidebook became apparent. At the time of the adoption of the Guidebook, Vistaprint was effectively barred from challenging it by the fact that it could not – at that time – show any harm. Further, to raise an issue at that time would have required Vistaprint to reveal that it was contemplating making an application for a new gTLD string, which might have encouraged opportunistic applications by others seeking to extract monetary value from Vistaprint. Although the IRP panel in the *Booking.com v. ICANN* IRP raised similar timing concerns, it did not draw the distinction between the adoption of the general principles and their subsequent implementation.

B. ICANN's Position

a. IRP Panel's Authority

96. <u>Standard of review</u>: ICANN describes the IRP as a unique mechanism available under ICANN's Bylaws.[135] The IRP Panel is tasked with determining whether the Board's actions are consistent with ICANN's Articles and Bylaws. ICANN states that its Bylaws specifically identify a deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, and the rules are clear that the IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.[136] In particular, ICANN cites to Article IV, § 3.4 of the Bylaws indicating the IRP Panel is to apply a defined standard of review to the IRP Request, focusing on:

   a. did the Board act without conflict of interest in taking its decision?;
   b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
   c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

97. Further, ICANN states that the IRP addresses challenges to conduct undertaken by ICANN's Board of Directors; it is not a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved with ICANN's activities.[137] The IRP is also not an appropriate forum to challenge the BGC's ruling on a Reconsideration Request in the absence of some violation by the BGC of ICANN's Articles or Bylaws.[138]

98. <u>IRP Declaration binding or non-binding</u>: ICANN states that the IRP "is conducted pursuant to Article IV, section 3 of ICANN's Bylaws, which creates a non-binding method

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[134] ICANN's First Additional Response, ¶¶ 28-29.
[135] Response, ¶ 32.
[136] Response, ¶ 33; ICANN's First Additional Response, ¶ 10.
[137] Response, ¶ 4.
[138] Response, ¶ 12.

of evaluating certain actions of ICANN's Board.[139] The Panel has one responsibility – to "declar[e] whether the Board has acted consistently with the provisions of [ICANN's] Articles of Incorporation and Bylaws."[140] The IRP is not an arbitration process, but rather a means by which entities that participate in ICANN's processes can seek an independent review of decisions made by ICANN's Board.

99. ICANN states that the language of the IRP provisions set forth in Article IV, section 3 of the Bylaws, as well as the drafting history of the development of the IRP provisions, make clear that IRP panel declarations are not binding on ICANN:[141] ICANN explains as follows in its First Additional Response:

> *35.   First, the Bylaws charge an IRP panel with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."   The Board is then obligated to "review[]"[142] and "consider" an IRP panel's declaration at the Board's next meeting "where feasible."[143]   The direction to "review" and "consider" an IRP panel's declaration means that the Board has discretion as to whether it should adopt that declaration and whether it should take any action in response to that declaration; if the declaration were binding, there would be nothing to review or consider, only a binding order to implement.*

100. ICANN contends that the IRP Panel's declaration is not binding because the Board is not permitted to outsource its decision-making authority.[144] However, the Board will, of course, give serious consideration to the IRP Panel's declaration and, "where feasible," shall consider the IRP Panel's declaration at the Board's next meeting.[145]

101. As to the drafting process, ICANN provides the following background in its First Additional Response:

> *36.   Second, the lengthy drafting history of ICANN's independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board…that will be chosen by (and is directly accountable to) the membership and supporting organizations (fn. omitted).   And when, in 2001, the Committee on ICANN Evolution and Reform (ERC) recommended the creation of an independent review process, it called for the creation of "a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws" (fn. omitted).   The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP "decisions will be nonbinding, because the Board will retain final decision-making authority" (fn. omitted).*

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[139] Response, ¶ 2.
[140] Response, ¶ 2 (quoting Bylaws, Art. IV, § 3.4).
[141] ICANN's First Additional Response, ¶ 34.
[142] ICANN's First Additional Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.11.d).
[143] ICANN's First Additional Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.21).
[144] Response, ¶ 35.
[145] Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.21).

37. In February 2010, the first IRP panel to issue a final declaration, the ICM IRP Panel, unanimously rejected the assertion that IRP panel declarations are binding[146] and recognized that an IRP panel's declaration "is not binding, but rather advisory in effect." Nothing has occurred since the issuance of the ICM IRP Panel's declaration that changes the fact that IRP panel declarations are not binding. To the contrary, in April 2013, following the ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term "arbitration" were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word "arbitration" in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the ICM IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word "arbitration" in conjunction with the amendments to the Bylaws.

38. The amendments to the Bylaws, which occurred following a community process on proposed IRP revisions, added, among other things, a sentence stating that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value" (fn. omitted). Vistaprint argues that this new language, which does not actually use the word "binding," nevertheless provides that IRP panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, and the plain text of the Bylaws. This argument is meritless.

39. First, relying on the use of the terms "final" and "precedential" is unavailing – a declaration clearly can be both non-binding and also final and precedential:….

40. Second, the language Vistaprint references was added to ICANN's Bylaws to meet recommendations made by ICANN's Accountability Structures Expert Panel (ASEP). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN's accountability mechanisms, including the Independent Review process. The ASEP recommended, among other things, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP's recommendations in this regard were raised in light of the second IRP constituted under ICANN's Bylaws, where the claimant presented claims that would have required the IRP Panel to reevaluate the declaration of the IRP Panel in the ICM IRP. To prevent claimants from challenging Board action taken in direct response to a prior IRP panel declaration, the ASEP recommended that "[t]he declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value" (fn. omitted).

41. The ASEP's recommendations in this regard did not convert IRP panel declarations into binding decisions (fn. omitted). One of the important considerations underlying the ASEP's work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. As Graham McDonald, one of the three ASEP experts, explained, because California law requires that the board "retain responsibility for decision-making," the Board has "final word" on "any recommendation that … arises out of [an IRP]" (fn. omitted). The ASEP's recommendations were therefore premised on the understanding that the declaration of an IRP panel is not "binding" on the Board.

102. <u>Authority to award affirmative relief</u>: ICANN contends that any request that the IRP Panel grant affirmative relief goes beyond the Panel's authority.[147] The Panel does not have the authority to award affirmative relief or to require ICANN to undertake specific

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[146] *Declaration of IRP Panel, ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, ¶ 133 (Feb. 19, 2010) ("*ICM Registry Final Declaration*").
[147] Response, ¶ 78.

conduct. The Panel is limited to declaring whether an action or inaction of the Board was inconsistent with the Articles or Bylaws, and recommending that the Board stay any action or decision, or take any interim action, until such time as the Board reviews and acts upon the opinion of the Panel.[148] ICANN adds that the IRP panel in *ICM Registry Declaration* found that

> *"[t]he IRP cannot 'order' interim measures but do no more than 'recommend' them, and this until the Board 'reviews' and 'acts upon the opinion' of the IRP."[149]*

b. SCO Proceedings Claim

103. ICANN states that Vistaprint is using this IRP as a means to challenge the merits of the Third Expert's determination in the *Vistaprint SCO*.[150] As ICANN states in its Response:

> *12. Ultimately, Vistaprint has initiated this IRP because Vistaprint disagrees with the Expert Panel's Determination and the BGC's finding on Vistaprint's Reconsideration Request. ICANN understands Vistaprint's disappointment, but IRPs are not a vehicle by which an Expert Panel's determination may be challenged because neither the determination, nor ICANN accepting the determination, constitutes an ICANN Board action. Nor is an IRP the appropriate forum to challenge a BGC ruling on a Reconsideration Request in the absence of some violation by the BGC of ICANN's Articles or Bylaws. Here, ICANN followed its policies and processes at every turn with respect to Vistaprint, which is all it is required to do.*

104. ICANN states that the IRP Panel has one chief responsibility – to "determine whether the Board has acted consistently with the provisions of [ICANN's] Articles of Incorporation and Bylaws."[151] With respect to Vistaprint's claim that ICANN's Board violated its Articles and Bylaws by "blindly accepting" the Third Expert's SCO determination without reviewing its analysis or result, ICANN responds that there is no requirement for the Board to conduct such an analysis. "Accepting" or "reviewing" the Expert's determination is not something the Board was tasked with doing or not doing. Per the Guidebook, the "findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process."[152] The Guidebook further provides that "[i]n a case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures)."[153] This step is a result not of any ICANN Board action, but a straightforward application of Guidebook provisions for SCO determinations.

105. ICANN states the Board thus took no action with respect to the Third Expert's determination upon its initial issuance, because the Guidebook does not call for the Board to take any action and it is not required by any Article or Bylaw provision. Accordingly, it cannot be a violation of ICANN's Articles or Bylaws for the Board to not conduct a

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[148] ICANN's First Additional Response, ¶ 33 (citing Bylaws, Art. IV, §§ 3.4 and 3.11(d)).
[149] *ICM Registry Final Declaration*, ¶ 133.
[150] Response, ¶ 12; ICANN's First Additional submission, ¶ 4.
[151] Response, ¶ 2 (citing Bylaws, Art. IV, § 3.4).
[152] Response, ¶ 9 (citing Guidebook, § 3.4.6).
[153] Response, ¶ 9 (citing Guidebook, § 3.2.2.1).

substantive review of an expert's SCO determination. And as such, there is no Board action in this regard for the IRP Panel to review.

106. ICANN states that "the sole Board action that Vistaprint has identified in this case is the BGC's rejection of Vistaprint's Reconsideration Request. However, ICANN maintains that nothing about the BGC's handling of the RFR violated ICANN's Articles or Bylaws."[154]

107. In this regard, ICANN states that the BGC was not required, as Vistaprint contends, to refer Vistaprint's Reconsideration Request to the entire ICANN Board.[155] The Bylaws provide that the BGC has the authority to "make a final determination of Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors."[156] Because Vistaprint's Reconsideration Request was a challenge to alleged staff action, the BGC was within its authority, and in compliance with the Bylaws, when it denied Vistaprint's Reconsideration Request without making a referral to the full Board.

108. ICANN states that the BGC did what it was supposed to do in reviewing Vistaprint's Reconsideration Request – it reviewed the Third Expert's and ICANN staff's compliance with policies and procedures, rather than the substance of the Third Expert's SCO determination, and found no policy or process violations.[157] ICANN urges that Vistaprint seeks to use the IRP to challenge the substantive decision of the Third Expert in the *Vistaprint SCO*. However, this IRP may only be used to challenge ICANN Board actions on the grounds that they do not comply with the Articles or Bylaws, neither of which is present here.

109. ICANN nevertheless responds to Vistaprint's allegations regarding errors of process and substance in the SCO proceedings, and contends that the BGC properly handled its review of the *Vistaprint SCO*. ICANN's specific responses on these points are as follows:

(i) As to Vistaprint's claim that the ICDR's appointment of the First Expert was untimely, missing the deadline by 5 days, ICANN states that the BGC determined that Vistaprint failed to provide any evidence that it contemporaneously challenged the timeliness of the ICDR's appointment of the First Expert, and that a Reconsideration Request was not the appropriate mechanism to raise the issue for the first time. In addition, the BGC concluded that Vistaprint had failed to show that it was "materially" and "adversely" affected by the brief delay in appointing the First Expert, rendering reconsideration inappropriate.

(ii) Regarding Vistaprint's claim that the First Expert (and Third Expert) improperly accepted and considered unsolicited supplemental filings, violating Articles 17 and 18 of the New gTLD Objections Procedure, ICANN states that Article 17 provides the

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[154] ICANN's First Additional Submission, ¶ 4.
[155] Response, ¶ 43.
[156] Response, ¶ 44 (citing Bylaws, Art. IV, § 2.3(f)).
[157] Response, ¶ 11.

expert panel with the discretion to accept such a filing:[158] "The Panel *may decide* whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions."[159] Thus, as the BGC correctly found, it was not the BGC's place to second-guess the First (or Third) Expert's exercise of permitted discretion.

(iii)   As to Vistaprint's claim that the ICDR violated Article 21 of the New gTLD Objections Procedure by failing to ensure the timely issuance of an expert SCO determination, ICANN contends that the BGC properly determined that Vistaprint's claims in this regard did not support reconsideration for two reasons. First, on October 1, 2013, before the determination was supposed to be issued by the First Expert, the ICDR removed that expert. The BGC therefore could not evaluate whether the First Expert rendered an untimely determination in violation of the Procedure. Second, the BGC correctly noted that 45-day timeline applies to an expert's submission of the determination "in draft form to the [ICDR's] scrutiny as to form before it is signed" and the ICDR and the Expert are merely required to exercise "reasonable efforts" to issue a determination within 45 days of the constitution of the Panel.[160]

(iv)   Regarding Vistaprint's claim that the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure, ICANN argues this claim is unsupported.[161] As the BGC noted, Vistaprint provided no evidence demonstrating that the First Expert failed to follow the applicable ICDR procedures for independence and impartiality. Rather, all indications are that the First Expert and the ICDR complied with these rules as to this "new conflict," which resulted in a removal of the First Expert. Further, Vistaprint presented no evidence of being materially and adversely affected by the First Expert's removal, which is another justification for the BGC's denial of the Reconsideration Request.

(v)   Vistaprint claimed that the ICDR unjustifiably accepted a challenge to the Second Expert (or created the circumstances for such a challenge), in violation of Article 2 of the ICDR's Supplementary Procedures for String Confusion Objections.[162] ICANN contends that the BGC properly determined that this claim did not support reconsideration. The ICRD Rules for SCOs make clear that the ICDR had the "sole discretion" to review and decide challenges to the appointment of expert panelists. While Vistaprint may disagree with the ICDR's decision to accept the Objector's challenge, it is not the BGC's role to second guess the ICDR's discretion, and it was

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[158] Response, ¶ 50.
[159] New gTLD Objections Procedure, Art. 17.
[160] Response, ¶ 53, citing New gTLD Objections Procedure, Art. 21(a)-(b).
[161] Response, ¶¶ 54-56.
[162] Article 2, § 3 of the ICDR's Supplementary Procedures for String Confusion Objections provides that:

Upon review of the challenge the DRSP in its sole discretion shall make the decision on the challenge and advise the parties of its decision.
[Underlining added]

not a violation of the Articles or Bylaws for the BGC to deny reconsideration on this ground.

(vi) Vistaprint claimed that the determination of the Third Expert was untimely, in violation of Article 21(a) of the New gTLD Objections Procedure. ICANN claims that the BGC properly held that this claim did not support reconsideration.[163] On November 20, 2013, the ICDR appointed the Third Expert. Vistaprint claimed in its Reconsideration Request that pursuant to Article 21, the determination therefore "should have been rendered by January 4, 2014," which was forty-five (45) days after the Panel was constituted. Because "it took this Panel until January 24, 2014 to render the Decision," Vistaprint contended that the determination was untimely because it was twenty days late. ICANN states that, according to the Procedure, the Expert must exercise "reasonable efforts" to ensure that it submits its determination "in draft form to the DRSP's scrutiny as to form before it is signed" within forty-five (45) days of the Expert Panel being constituted. As the BGC noted, there is no evidence that the Third Expert failed to comply with this Procedure, and reconsideration was therefore unwarranted on this ground.

(vii) ICANN responded to Vistaprint's claim that the Third Expert incorrectly applied the Objector's burden of proof, in violation of section 3.5 of the Guidebook and Article 20(c) of the New gTLD Objections Procedure (which place the burden on the Objector). Vistaprint claimed that the Third Expert contravened ICANN's process because the Expert did not give an analysis showing that the Objector had met the burden of proof".[164] ICANN states that the BGC found the Expert extensively detailed support for the conclusion that the .WEBS string so nearly resembles .WEB – visually, aurally and in meaning – that it is likely to cause confusion. The BGC noted that the Expert had adhered to the procedures and standards set forth in the Guidebook relevant to determining string confusion and reconsideration was not warranted on this basis.

(viii) Finally, as to Vistaprint's claim that the Third Expert incorrectly applied ICANN's substantive standard for evaluation of String Confusion Objections (as set out in Section 3.5.1 of the Guidebook), ICANN contends the BGC properly found that reconsideration was not appropriate.[165] Vistaprint contended that the Expert failed to apply the appropriate high standard for assessing likelihood of confusion.[166] ICANN states that Section 3.5.1 of the Guidebook provides that

> *"[f]or the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user."*

ICANN claims that disagreement as to whether this standard should have resulted in a finding in favor of Vistaprint does not mean that the Third Expert violated any policy or process in reaching his decision. Vistaprint also claimed that the Third

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[163] Response, ¶¶ 61-62.
[164] Response, ¶¶ 63-64.
[165] Response, ¶¶ 65-68.
[166] Request, ¶ 47.

Expert "failed to apply the burden of proof and the standards imposed by ICANN" because the Expert questioned whether the co-existence between Vistaprint's domain name, <webs.com>, and the Objector's domain name, <web.com> for many years without evidence of actual confusion is relevant to his determination. ICANN states that, as the BGC noted, the relevant consideration for the Expert is whether the *applied-for gTLD string* is likely to result in string confusion, not whether there is confusion between second-level domain names. Vistaprint does not cite any provision of the Guidebook, the Procedure, or the Rules that have been contravened in this regard.

110. In sum, ICANN contends that the BGC did its job, which did not include evaluating the merits of Third Expert's determination, and the BGC followed applicable policies and procedures in considering the RFR.[167]

111. Regarding Vistaprint's claims of ICANN's breach of various Articles and Bylaws, ICANN responds as follows in its Response:

71. First, Vistaprint contends that ICANN failed to comply with the general principle of "good faith." But the only reason Vistaprint asserts ICANN failed to act in good faith is in "refus[ing] to reconsider the substance" of the Determination or to "act with independent judgment" (fn. omitted). The absence of an appeal mechanism by which Vistaprint might challenge the Determination does not form the basis for an IRP because there is nothing in ICANN's Bylaws or Articles of Incorporation requiring ICANN to provide one.

72. Second, Vistaprint contends that ICANN failed to apply its policies in a neutral manner. Here, Vistaprint complains that other panels let other applications proceed without being placed into a contention set, even though they, in Vistaprint's opinion, presented "at least equally serious string similarity concerns" as .WEBS/.WEB (fn. omitted). Vistaprint's claims about ICDR's treatment of other string similarity disputes cannot be resolved by IRP, as they are even further removed from Board conduct. Different outcomes by different expert panels related to different gTLDs are to be expected. Claiming that other applicants have not suffered adverse determinations does not convert the Expert Panel's Determination into a "discriminatory ICANN Board act."

73. Third, Vistaprint contends that the ICANN Board violated its obligation to act transparently for not investigating the "impartiality and independence" of the Expert Panel and thereby "did not seek to communicate with [ICDR] to optimize [its] service" (fn. omitted). Aside from the disconnect between the particular Bylaws provision invoked by Vistaprint requiring ICANN's transparency, and the complaint that the ICDR did not act transparently, Vistaprint fails to identify any procedural deficiency in the ICDR's actions regarding the removal of the First Expert, as set forth above. Moreover, Vistaprint cites no obligation in the Articles or Bylaws that the ICANN Board affirmatively investigate the impartiality of an Expert Panel, outside of the requirement that the ICDR follow its policies on conflicts, which the ICDR did.

74. Fourth, Vistaprint contends that ICANN "has not created any general process for challenging the substance of the so-called expert determination," and thus has "brashly flouted" its obligation to remain accountable (fn. omitted). But again, Vistaprint does not identify any provision of the Articles or Bylaws that requires ICANN to provide such an appeals process.

75. Fifth, Vistaprint "concludes" that the ICANN Board neglected its duty to promote competition and innovation (fn. omitted) when it failed to overturn the Expert Panel's Determination. Vistaprint claims that the Objector's "motive in filing the objection was to prevent a potential competitor from entering

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[167] Response, ¶ 69.

the gTLD market" and therefore ICANN's "acceptance" of the objection purportedly contravenes ICANN's core value of promoting competition. But every objection to a gTLD application by an applicant for the same string seeks to hinder a competitor's application. By Vistaprint's logic, ICANN's commitment to promoting competition requires that no objections ever be sustained and every applicant obtains the gTLD it requests. There is no provision in the Articles or Bylaws that require such an unworkable system.

76. All in all, Vistaprint's attempt to frame its disappointment with the Expert Panel's decision as the ICANN Board's dereliction of duties does not withstand scrutiny.

c. Disparate Treatment Claim

112. ICANN states that Vistaprint objects to the Board's exercise of its independent judgement in determining not to intervene further (beyond the review of the BGC) with respect to the Third Expert's determination in the *Vistaprint SCO,* as the Board did with respect to expert determinations on String Confusion Objections regarding the strings (1) .COM/.CAM, (2) .CAR/.CARS, and (3) .SHOP/.通販 (online shopping in Japanese).[168]

113. ICANN states that the Guidebook provides that in "exceptional circumstances," such as when accountability mechanisms like RFR or IRP are invoked, "the Board might individually consider an application"[169] and that is precisely what occurred in Vistaprint's case. Because Vistaprint sought reconsideration, the BGC considered Vistaprint's Reconsideration Request and concluded that the ICDR and Third Expert had not violated any relevant policy or procedure in rendering the Expert's determination.

114. ICANN states that the ICANN Board only intervened with respect to these other expert determinations because there had been several independent expert determinations regarding the same strings that were seemingly inconsistent with one another. That is not the case with respect to Vistaprint's applications – no other expert determinations were issued regarding the similarity of .WEB and .WEBS.[170] "Unlike .WEB/.WEBS, the COM/.CAM, .CAR/.CARS, and .SHOP/.通販 strings were all the subject of several, seemingly inconsistent determinations on string confusion objections by different expert panels. So, for example, while one expert upheld a string confusion objection asserting that .CAM was confusingly similar to .COM, another expert overruled a separate string confusion objection asserting precisely the same thing."[171]

115. Further, ICANN explains that

16. Given what were viewed by some as inconsistent determinations, the BGC requested that ICANN staff draft a report for the ICANN Board's New gTLD Program Committee ("NGPC"), "setting out

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[168] ICANN's First Additional Submission, ¶ 14.
[169] ICANN's First Additional Submission, ¶ 5 (citing Guidebook, § 5.1). ICANN quotes the *Booking.com Final Declaration*, where the IRP Panel stated in relation to § 5.1 *"the fact that the ICANN Board enjoys such discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com."*
[170] ICANN's First Additional Submission, ¶ 5.
[171] ICANN's First Additional Submission, ¶ 15.

options for dealing...[with] differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes...."[172] The NGPC subsequently considered potential approaches to addressing perceived inconsistent determinations on string confusion objections, including possibly implementing a new review mechanism.[173] ICANN staff initiated a public comment period regarding framework principles of a potential such review mechanism.[174] Ultimately, having considered the report drafted by ICANN staff, the public comments received, and the string confusion objection process set forth in the Guidebook, the NGPC determined that the inconsistent expert determinations regarding .COM/.CAM and .SHOP/.通販 were "not[] in the best interest of the New gTLD Program and the Internet community" and directed ICANN staff to establish a process whereby the ICDR would appoint a three-member panel to re-evaluate those expert determinations.[175]

116. ICANN contends that Vistaprint has identified no Articles or Bylaws provision violated by the Board in exercising its independent judgment to intervene with respect to inconsistent determinations in certain SCO cases, but not with respect to the single expert SCO determination regarding .WEBS/.WEB. The Board was justified in exercising its discretion to intervene with respect to the inconsistent expert determinations regarding .COM/.CAM, .CAR/.CARS and .SHOP/.通販 – the Board acted to bring certainty to multiple and differing expert determinations on String Confusion Objections regarding the same strings.[176] That justification was not present with respect to the single *Vistaprint SCO* determination at issue here. Thus, ICANN contends Vistaprint was not treated differently than other similarly-situated gTLD applicants.

117. <u>Timing</u>: Finally, ICANN also states that the time for Vistaprint to challenge the Guidebook and its standards has past. The current version of the Guidebook was published on June 4, 2012 following an extensive review process, including public comment on multiple drafts.[177] Despite having ample opportunity, Vistaprint did not object to the Guidebook at the time it was implemented. If Vistaprint had concerns related to the issues it now raises, it should have pursued them at the time, not years later and only after receiving the determination in the *Vistaprint SCO*. ICANN quotes the *Booking.com Final Declaration,* where the IRP stated,

> *"the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws."[178]*

118. ICANN states that while the Guidebook process at issue in this case is different for the

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[172] *See* BGC Determination on Reconsideration Request 13-10, at 11.

[173] *See* Rationale for NGPC Resolution 2014.02.05.NG02, at https://www.icann.org/resources/board-material/resolutions-new-gtld-20 14-02-05-en (last accessed Sept. 15, 2015).

[174] *See* https://www.icann.org/public-comments/sco-rramework-principles-20 14-02-11-en (last accessed Sept. 15, 2015).

[175] ICANN's First Additional Submission, ¶ 16; *see* NGPC Resolution 2014.1 0.12.NG02, *at* https://www. icann.org/resources/board- material/resolutions-new-gtld-2014-1 0-12-en#2.b (last accessed Sept. 15, 2015).

[176] ICANN's First Additional Submission, ¶ 18.

[177] ICANN's First Additional Response, ¶ 27.

[178] *Booking.com final Declaration,* ¶ 129.

process at issue in the *Booking.com IRP* – the SCO process rather than the string similarity review process – the Booking.com IRP panel's reasoning applies equally. ICANN argues that because both processes were developed years ago, as part of the development of the Guidebook, challenges to both are time-barred.[179]

V. Analysis and Findings

a. IRP Panel's Authority

119. <u>Standard of Review</u>: The IRP Panel has benefited from the parties submissions on this issue, noting their agreement as to the Panel's primary task: comparing contested actions (or inactions)[180] of ICANN's Board to its Articles and Bylaws and declaring whether the Board has acted consistently with them. Yet when considering this Panel's comparative task, the parties disagree as to the level of deference to be accorded by the Panel in assessing the Board's actions or inactions.

120. Vistaprint has sought independent review through this IRP, claiming that is has been "harmed" (i.e., its .WEBS application has not been allowed to proceed and has been placed in a Contention Set) by the Board's alleged violation of the Articles and Bylaws. In accordance with Article IV, § 3.2 of the Bylaws:

> *Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.*

121. As noted above, Article IV, § 1 of the Bylaws emphasizes that the IRP is an accountability mechanism:

> *The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws.*

122. The Bylaws in Article IV, § 3.4 detail the IRP Panel's charge and issues to be considered in a defined standard of review:

> *Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be <u>charged</u> with <u>comparing</u> contested actions of the Board to the Articles of Incorporation and Bylaws, and with <u>declaring</u> whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*
>
> *a. did the Board act without conflict of interest in taking its decision?;*
> *b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*

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[179] ICANN's First Additional Submission, ¶ 28.

[180] Bylaws, Art. IV, § 3.11(c) ("The IRP Panel shall have the authority to:…(c) declare whether an <u>action or inaction</u> of the Board was inconsistent with the Articles of Incorporation or Bylaws" (underlining added).

>   c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*[181]
>
>   [Underlining added]

123. The Bylaws state the IRP Panel is *"charged"* with *"comparing"* contested actions of the Board to the Articles and Bylaws and *"declaring"* whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgment in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the Articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstances may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard, the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As Vistaprint has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through *independent third-party review* of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

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[181] The Supplementary Rules provide similarly in section 1 that the IRP is designed "to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation" with the standard of review set forth in section 8:

> *8. Standard of Review*
>
> *The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*
>
> *If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.*

125. The IRP Panel is aware that three other IRP panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of them have reached the same conclusion: the Board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard, without any presumption of correctness.[182] As the IRP Panel reasoned in the *ICM Registry Final Declaration*:

> *ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In "recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization" – including ICANN – ICANN is charged with "promoting the global public interest in the operational stability of the Internet..." ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law..." Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN...that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.[183]*

126. The IRP Panel here agrees with this analysis. Moreover, Article IV, §3.21 of the Bylaws provides that "<u>declarations of the IRP Panel</u>, and the Board's subsequent action on those declarations, are final and <u>have precedential value</u>" (underlining added). The IRP Panel recognizes that there is unanimity on the issue of degree of deference, as found by the three IRP panels that have previously considered it. The declarations of those panels have precedential value. The Panel considers that the question on this issue is now settled. Therefore, in this IRP the ICANN Board's conduct is to be reviewed and appraised by this Panel objectively and independently, without any presumption of correctness.

127. On a related point as to the scope of the IRP Panel's review, the Panel agrees with ICANN's point of emphasis that, because the Panel's review is limited to addressing challenges to conduct by ICANN's Board, the Panel is not tasked with reviewing the

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[182] *ICM Registry Final Declaration*, ¶ 136 ("the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially"); *Booking.com final Declaration,* ¶ 111 ("the IRP Panel is charged with 'objectively' determining whether or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."); Final Declaration of the IRP Panel in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, ¶ 76 (July 9, 2015) ("*DCA Final Declaration*"), at https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf (last accessed on Sept. 15, 2015) ("The Panel therefore concludes that the "standard of review" in this IRP is a *de novo*, objective and independent one, which does not require any presumption of correctness").
[183] *ICM Registry Final Declaration*, ¶ 136.

actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN (such as the ICDR or the experts in the *Vistaprint SCO*). With this in mind, and with the focus on the Board, the only *affirmative* action of the Board in relation to Vistaprint's .WEBS gTLD application was through the BGC, which denied Vistaprint's Reconsideration Request.[184] ICANN states that "the sole Board action that Vistaprint has identified in this case is the Board Governance Committee's ('BGC') rejection of Vistaprint's Reconsideration Request, which sought reconsideration of the Expert Determination."[185] It appears that ICANN's focus in this statement is on affirmative action taken by the BGC in rejecting Vistaprint's Reconsideration Request; however, this does not eliminate the IRP Panel's consideration of whether, in the circumstances, inaction (or omission) by the BGC or the full ICANN Board in relation to the issues raised by Vistaprint's application would be considered a potential violation of the Articles or Bylaws.

128. As discussed below, the Panel considers that a significant question in this IRP concerns one of "omission" – the ICANN Board, through the BGC or otherwise, did not provide relief to Vistaprint in the form of an additional review mechanism, as it did to certain other parties who were the subject of an adverse SCO determination.

129. <u>IRP declaration binding or non-binding</u>: As noted above, Vistaprint contends that the outcome of this IRP is binding on ICANN, and that any other result would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability. ICANN, on the other hand, contends that the IRP Panel's declaration is intended to be advisory and non-binding.

130. In analyzing this issue, the IRP Panel has carefully reviewed the three charter instruments that give the Panel its authority to act in this case: the Bylaws, the Supplementary Procedures, and the ICDR Rules. The Panel views that it is important to distinguish between (i) the findings of the Panel on the question of whether the ICANN Board's conduct is consistent (or not) with the Articles and Bylaws, and (ii) any consequent remedial measures to be considered as a result of those findings, at least insofar as those

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[184] The BGC is a committee of the Board established pursuant to Article XII, § 1 of the Bylaws. Article IV, § 2.3 of the Bylaws provide for the delegation of the Board's authority to the BGC to consider Requests for Reconsideration and indicate that the BGC shall have the authority to:
    a.   evaluate requests for review or reconsideration;
    b.   summarily dismiss insufficient requests;
    c.   evaluate requests for urgent consideration;
    d.   conduct whatever factual investigation is deemed appropriate;
    e.   request additional written submissions from the affected party, or from other parties;
    f.   make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
    g.   make a recommendation to the Board of Directors on the merits of the request, as necessary.
The BGC has discretion to decide whether to issue a final decision or make a recommendation to ICANN's Board. In this case, the BGC decided to make a final determination on Vistaprint's RFR.
[185] ICANN's First Additional Submission, ¶ 4. By contrast to the IRP Panel's focus on the Board's conduct, the BGC in its decision on Vistaprint's Reconsideration request considered the action or inaction of ICANN staff and third parties providing services to ICANN (i.e., the ICDR and SCO experts).

measures would direct the Board to take or not take any action or decision. The Panel considers that, as to the first point, the findings of the Panel on whether the Board has acted in a manner that is consistent (or not) with the Articles or Bylaws is akin to a finding of breach/liability by a court in a contested legal case. This determination by the Panel is "binding" in the sense that ICANN's Board cannot overrule the Panel's declaration on this point or later decide for itself that it disagrees with the Panel and that there was no inconsistency with (or violation of) the Articles and Bylaws. However, when it comes to the question of whether or not the IRP Panel can *require* that ICANN's Board implement any form of redress based on a finding of violation, here, the Panel believes that it can only raise remedial measures to be considered by the Board in an advisory, non-binding manner. The Panel concludes that this distinction – between a "binding" declaration on the violation question and a "non-binding" declaration when it comes to recommending that the Board stay or take any action – is most consistent with the terms and spirit of the charter instruments upon which the Panel's jurisdiction is based, and avoids conflating these two aspects of the Panel's role.

131. The IRP Panel shares some of Vistaprint's concerns about the efficacy of the IRP as an accountability mechanism if any affirmative relief that might be considered appropriate by the Panel is considered non-binding on ICANN's Board (see discussion below); nevertheless, the Panel determines on the basis of the charter instruments, as well as the drafting history of those documents, that its declaration is binding only with respect to the finding of compliance or not with the Articles and Bylaws, and non-binding with respect to any measures that the Panel might recommend the Board take or refrain from taking. The Panel's Declaration will have "precedential value" and will possibly be made publicly available on ICANN's website.[186] Thus, the declaration of violation (or not), even without the ability to order binding relief vis-à-vis ICANN's Board, will carry more weight than would be the case if the IRP was a confidential procedure with decisions that carried no precedential value.

132. To the extent that there is ambiguity on the nature of the IRP Panel's declaration (which perhaps could have been avoided in the first place), it is because there is ambiguity and an apparent contradiction created by some of the key terms of the three charter instruments – the Bylaws, the Supplementary Procedures, and the ICDR Rules. In terms of a potential interpretive hierarchy for these documents – to the extent that such hierarchy is relevant – the Bylaws can be said to have created the IRP and its terms of reference: the IRP is established as an accountability mechanism pursuant to the Bylaws, Article IV, § 3 (Independent Review of Board Actions). Article IV, § 3.8 of the Bylaws, in turn, delegates to the "IRP Provider" the task of establishing rules and procedures that are supposed to be consistent with Article IV, § 3:

> *Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures,*

[186] The Panel observes the final declarations in all previous IRPs that have gone to decision, as well as declarations concerning procedure and interim relief, have been posted on ICANN's website. In this respect, Supplementary Procedures, Rule 10(c) provides that a "Declaration may be made public only with the consent of all parties or as required by law". However, ICANN has also agreed in Rule 10(c) that subject to the redaction of confidential information or unforeseen circumstances, "ICANN will consent to publication of a Declaration if the other party so requests."

which shall implement and be consistent with this Section 3.

[Underlining added]

133. Thus, the Supplementary Procedures and ICDR Rules were established pursuant to Article IV, § 3.8 of the Bylaws; however, the requirement of consistency as between the texts was imperfectly implemented, at least with respect to the ICDR Rules, as discussed below. As between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures will control, as provided in Supplementary Rule 2:

> *In the event there is any inconsistency between these Supplementary Procedures and the Rules, these Supplementary Procedures will govern.*

134. The Bylaws in Article IV, § 3.4 provide that the Panel *shall* be charged with *comparing* contested actions of the Board to the Articles and Bylaws, and with "*declaring*" whether the Board has acted consistently with them. The IRP panel in the *ICM Registry Final Declaration* stressed that the IRP panel's task is "to 'declare', not to 'decide' or to 'determine'."[187] However, the word "declare", alone, does not conclusively answer the question of whether the IRP's declaration (or any part of it) is binding or not. "To declare" means *"to announce or express something clearly and publicly, especially officially."*[188] Declarations can and do serve as the predicate for binding or non-binding consequences in different contexts. For example, a declaratory relief action – in which a court resolves legal uncertainty by determining the rights of parties under a contract or statute without ordering anything be done or awarding damages – can have a binding result because it may later preclude a lawsuit by one of the parties to the declaratory lawsuit. Further, in a non-legal context, "declaring" a state of emergency in a particular state or country can have binding consequences. Thus, the word "declare," in itself, does not answer the issue.

135. Moreover, nothing in the Bylaws, Supplementary Procedures or ICDR Rules suggests that the IRP Panel's declaration is non-binding with respect to the Panel's core task of deciding whether the Board did, or did not, comply the Articles or Bylaws. There is no provision that states the ICANN Board can reconsider this independent and important declaration. To the contrary, the ICDR Rules, which apply to the IRP proceedings, can be read to suggest that both the Panel's finding of compliance (or not) by ICANN's Board, and the Panel's possible reference to any remedial measures, are binding on ICANN. As Vistaprint indicates, the preamble of the ICDR Rules provide that *"[a] dispute can be submitted to an arbitral tribunal for a final and binding decision,"* and Article 30(1) of those Rules specifies that *"[a]wards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties"* (emphasis added).

136. However, these terms in the ICDR Rules arguably contradict specific provisions of the Bylaws and Supplementary Procedures, at least to the extent that they are read to cover any measures that the IRP Panel would direct the ICANN Board to take or not take. In this way, if there is a contradiction between the texts, the Bylaws and Supplemental rules would govern. However, focusing on the relief that the Panel is authorized to grant

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[187] *ICM Registry Final Declaration*, ¶ 133.
[188] Cambridge English Online Dictionary (United States version).

provides a decisive clue as to the question of whether the IRP declaration, or any part of it, is binding or non-binding, and produces a faithful and harmonized reading of all the texts. While the Bylaws and Supplementary Procedures say nothing to limit the binding effect of the IRP Panel's "liability" declaration, they both contain provisions that expressly indicate the Panel may only "recommend" that the Board stay or take any action or decision. In particular, the Bylaws in Article IV, § 3.11 sets out the IRP Panel's authority in terms of alternative actions that it may take once it is has an IRP case before it:

> The IRP Panel shall have the authority to:
>
> a. _summarily dismiss requests_ brought without standing, lacking in substance, or that are frivolous or vexatious;
> b. _request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;_
> c. _declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and_
> d. _recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;_
> e. _consolidate requests for independent review_ if the facts and circumstances are sufficiently similar; and
> f. _determine the timing for each proceeding._
>
> [Underlining added][189]

137. Article IV, § 3.11(a) provides that the Panel may summarily dismiss an IRP request in certain circumstances. A fair reading of this term is that an IRP panel's dismissal of a case pursuant to § 3.11(a) would be a binding decision, both for the party who brought the IRP request and for ICANN. In other words, ICANN could not require that the IRP panel take-up the case again once it has been dismissed by the panel.[190] Further, the IRP panel can "request additional written submissions" from the parties (including the Board) or certain third parties. Here again, a fair reading of this term is that it is not subject to any review by ICANN Board before it can be implemented and is therefore binding on those who receive such a request.

138. By comparison, any form of relief whereby the IRP Panel _would direct the Board_ to take, or refrain from taking, any action or decision, as specified in § 3.11(d), must be "recommend[ed]" to the Board, which then "reviews and acts upon the opinion of the IRP."[191] The Panel's authority is thus limited (and in this sense non-binding) when it

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[189] Bylaws, Art. IV, § 3.11.

[190] Supplementary Rule 6 provides similarly that:

An IRP Panel may summarily dismiss any request for Independent Review where the requestor has not demonstrated that it meets the standing requirements for initiating the Independent Review.

Summary dismissal of a request for Independent Review is also appropriate where a prior IRP on the same issue has concluded through Declaration.

An IRP Panel may also dismiss a querulous, frivolous or vexatious request for Independent Review.

[191] Supplementary Rule 7 provides similarly (as regards interim measures of protection) that:

An IRP Panel may _recommend_ _that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration. Where the IRP_

(Continued...)

comes to providing ICANN's Board with potential courses of action or inaction in view of Board's non-compliance with the Articles or Bylaws.[192]

139. Several other provisions of the Bylaws and Supplementary Procedures can be fairly read to relate to decisions of the IRP panel that would be considered binding, even as to ICANN's Board. Article IV, § 3.18 provides *"[t]he IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party*." There is no mechanism for the Board to overrule the IRP panel's designation as to which party is the prevailing party. Article IV, § 3.20 provides *"[t]he IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets*." A fair reading of this provision is that the IRP panel's decision concerning such questions of confidentiality would be binding on all parties (including ICANN) in the IRP procedure. Consolidating IRP requests and determining the timing for each IRP proceeding are also decisions of the panel that are binding and not subject to review. Finally, Supplemental Procedures, Rule 11, directs that "[t]he IRP Panel shall fix costs in its Declaration." Here too, this decision of the IRP panel can be fairly read to be binding on the parties, including the Board.

140. Thus, the IRP Panel's authority to render binding or non-binding decisions, orders or relief can be considered in relation to four basic areas:

(i) summary dismissals by the IRP Panel (for different reasons as stated in the Bylaws and Supplementary Procedures) are final and binding on the parties. There is no mechanism for appeal of such dismissals and they have precedential value.

(ii) the designation of prevailing party, fixing costs for the IRP, and other orders in support of the IRP proceedings (e.g., timing of proceedings, confidentiality, requests for additional submissions, consolidation of IRP cases) are binding decisions of the IRP Panel, with no review by the Board or any other body.

(iii) the IRP Panel's declaration of whether or not the Board has acted consistently with the provisions of the Articles and Bylaws is final and binding, in the sense that there is no appeal on this point to ICANN's Board or any other body; it is a final determination and has precedential value.

(iv) any form of relief in which the IRP Panel would direct the Board to take, or refrain from taking, any action or decision is only a recommendation to the Board. In this sense,

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Panel is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision

[192] The word "recommend" is also not free of ambiguity. For example, Article 47 of the ICSID Convention (concerning investor-State arbitration) provides in relevant part that "the Tribunal may, if it considers that the circumstances so require, *recommend* any provisional measures which should be taken to preserve the respective rights of either party" (emphasis added). The use of the word "recommend" in this context may refer to an order of the Tribunal that is intended to be binding on the parties. Nevertheless, in the context of the IRP, the Panel considers that use of the word "recommend" conveys that the Panel's direction of any action or inaction on the part of the Board is a non-binding reference.

such a recommendation is not binding on the Board. The Bylaws and Supplementary Procedures provide specific and detailed guidance in this key area – i.e., relief that would require the Board to take or refraining from taking any action or decision – where the IRP Panel's decisions <u>would not</u> be binding on the Board, but would serve only as a recommendation to be reviewed and acted upon by the Board.

141. The other decisions of the IRP panel, as outlined above and including the declaration of whether or not the Board violated the Articles and Bylaws, would be binding, consistent with the Bylaws, Supplementary Procedures and ICDR Rule Article 30(1). This approach provides a reading that harmonizes the terms of the three charter instruments. It also provides interpretive context for Article IV, § 3.21 of the Bylaws, providing that *"[w]here feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting."* The IRP panel in the *ICM Registry Final Declaration* stated that "[t]his relaxed temporal proviso to do no more than 'consider' the IRP declaration, and to do so at the next meeting of the Board 'where feasible''', emphasizes that it is not binding."[193] However, consistent with the analysis above, the IRP Panel here reads this statement in the *ICM Registry Final Declaration* to relate only to an IRP panel's decision to "recommend" that the Board take, or refrain from taking, any action or decision. It does not relate to the other decisions or duties of the IRP panel, as explained above.

142. Vistaprint contends that the second sentence in Article IV, § 3.21 – providing *"[t]he declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential valu*e" – which was added in April 2013 after the issuance of *ICM Registry Final Declaration,* was a change that supports the view that the IRP panel's outcome, including any references to remedial relief, is binding. However, the Panel agrees with ICANN's view that "a declaration clearly can be both non-binding and also final and precedential."[194] Further, the preparatory work and drafting history for the relevant provisions of the Bylaws relating to the IRP procedure indicate the intention for a non-binding procedure with respect to the Panel's authority to advise the Board to take, or refrain from taking, any action or decision. As summarized in ICANN's contentions above, ICANN has submitted evidence that those who were initially involved in establishing the IRP considered that it should be an advisory, non-binding procedure *in relation to any policies that the Board might be requested to consider and implement by the IRP panel.*[195]

143. Thus, the Bylaws and the Supplementary Procedures draw a line: when the measures that an IRP panel might consider as a result of its core task require that the Board take or refrain from taking any action or decision, the panel may only "recommend" this course of action. On the other hand, if the IRP panel decides that the Board had violated its Articles or Bylaws, or if the panel decides to dismiss the IRP request, designate a prevailing party,

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[193] *ICM Registry Final Declaration*, ¶ 133.
[194] ICANN's First Additional Submission, ¶ 39.
[195] ICANN's First Additional Submission, ¶ 38, n 53 (Vint Cerf, the former Chair of ICANN's Board, testified in the *ICM* IRP that the independent review panel "is an advisory panel. It makes recommendations to the board but the board has the ultimate responsibility *for deciding policy for ICANN*" (italics added)). *ICM v. ICANN,* Hearing Transcript, September 23,2009, at 592:7-11).

set conditions for confidentiality, consolidate IRP requests, request additional written submissions or fix costs, a fair reading of the Bylaws, Supplementary Procedures and ICDR Rules relevant to these determinations would be that the IRP panel's decisions on these matters are binding on both parties, including ICANN.

144. Finally, in view of Article IV, § 3.21 providing that the declarations of IRP panels are final and *have precedential va*lue, the IRP Panel here recognizes that, in addition to the *ICM Registry Final Declaration*, two other IRP panels have considered the question of the IRP panel's authority. In the *Booking.com Final Declaration*, the IRP panel focused on the independent and objective standard of review to be applied to the panel's core task of assessing whether the Board's actions were consistent with the Articles, Bylaws and Guidebook.[196] However, the IRP panel in *Booking.com*, as ICANN acknowledges in its Second Additional Response, did not directly address whether an IRP panel may issue a binding declaration (although ICANN contends that the panel implicitly acknowledged that it cannot).[197]

145. In the *DCA Final Declaration,* the IRP panel addressed directly the question of whether or not the panel's declaration was binding. The panel ruled that its declarations, both as to the procedure and the merits of the case, were binding. The IRP panel in that case raised some of the same concerns that Vistaprint has raised here[198]:

> *110. ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.*
>
> *111. The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor; and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.*
>
> *[...]*
>
> *115. Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process.*

146. The IRP panel in the *DCA Final Declaration* also emphasized that, according to the terms of the Guidebook, applicants for a new gTLD string waive their right to resort to the courts

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[196] *Booking.com Final Declaration,* ¶¶ 104-115.
[197] ICANN's Second Additional Response, ¶ 29.
[198] *DCA Final Declaration,* ¶ 23 (quoting *DCA Declaration on the IRP Procedure* (Aug. 14, 2014)).

and therefore the IRP serves as the ultimate accountability mechanism for them:[199]

> *15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do not include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:*
>
> > *"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM."*
>
> *Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.*

147. The IRP Panel in this case considers that the IRP panel in the *DCA Final Declaration,* and Vistaprint, have made several forceful arguments in favor of why the outcome of the IRP should be considered binding, especially to ensure the efficacy of the IRP as an accountability mechanism. Vistaprint has also urged that the IRP, at least with respect to applicants for new gTLD strings, is not merely a corporate accountability mechanism aimed at *internal* stakeholders, but operates to assess ICANN's responsibilities in relation to *external* third parties. And the outcome of the IRP is binding on these third parties, even if it is not binding on ICANN and its Board. In similar circumstances, it would not be uncommon that individuals, companies or even governments, would agree to participate in dispute resolution processes with third parties that are binding, at least *inter partes*.

148. However, as explained above, the IRP Panel concludes that the distinction between a "binding" declaration on the violation/liability question (and certain other matters as discussed above), on the one hand, and a "non-binding" declaration when it comes to recommending that the Board take or refrain from taking any action or decision, on the other hand, is most faithful to the terms and spirit of the charter instruments upon which the Panel's jurisdiction is based. To the extent that there is any disagreement with this approach, it is for ICANN to consider additional steps to address any ambiguities that might remain concerning the authority of the IRP panel and the legal effect of the IRP declaration.

149. <u>Authority to award affirmative relief</u>: The IRP Panel's analysis on this issue is closely related to, and dependent upon, its analysis of the binding vs. non-binding issue

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[199] *DCA Final Declaration,* ¶ 38 (quoting *DCA Third Declaration on IRP Procedure*).

immediately above. To the extent that the IRP Panel renders any form of relief whereby the Panel would direct the Board to take, or refrain from taking, any action or decision, that relief must be "recommend[ed]" to the Board, which then "reviews and acts upon the opinion of the IRP," as specified in § 3.11(d) of the Bylaws. Relatedly, Supplementary Rule 7 provides that an "IRP Panel may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration." Consequently, the IRP Panel finds that it does not have authority to render affirmative relief requiring ICANN's Board to take, or refrain from taking, any action or decision.

b. SCO Proceedings Claim

150. The IRP Panel has carefully reviewed Vistaprint's arguments concerning ICANN's alleged violation of its Articles and Bylaws in relation to this *SCO Proceedings Claim*. However, as stated above, the IRP Panel does not review the actions or inactions of ICANN's staff or any third parties, such as the ICDR or SCO experts, who provided services to ICANN. Instead, the IRP Panel's focus is on ICANN's Board and the BGC, which was delegated responsibility from the full Board to consider Vistaprint's Request for Reconsideration.[200]

151. The core of Vistaprint *SCO Proceedings Claim* is that ICANN's Board improperly disregarded accumulated errors made by the ICDR and the SCO experts (especially the Third Expert) during the *Vistaprint SCO* proceedings, and in this way ICANN violated Article IV of the Articles of Incorporation and certain provisions of the Bylaws, as well as the Guidebook.

152. Vistaprint contends that ICANN's Board must verify whether or not, by accepting the SCO expert determination, it is acting consistent with its obligations under its Articles, Bylaws and Affirmation of Commitments,[201] and that ICANN would be in violation of these obligations if it were to blindly accept an expert determination in circumstances where the ICDR and/or the expert had failed to comply with the Guidebook and the New gTLD Objections Procedure and/or the ICDR Rules for SCOs, or where a panel had failed to correctly apply the standard set by ICANN.[202]

153. The IRP Panel disagrees with Vistaprint's contention on this point. Although the Guidebook provides in § 5.1 that ICANN's Board of Directors has ultimate responsibility for the New gTLD Program, there is no affirmative duty stated in the Articles, Bylaws or

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[200] Article IV, §2.15 of ICANN's Bylaws provides that:

For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.

[201] Request, ¶ 6.
[202] Request, ¶ 6.

Guidebook that the Board must to review the result in each and every SCO case. Instead, the Guidebook § 3.4.6 provides that:

> *The findings of the [SCO] panel will be considered an expert determination and advice <u>that ICANN will accept within the dispute resolution process</u>.*[203]

[Underlining added]

154. In the case of an adverse SCO determination, the applicant for a new gTLD string is not left without any recourse. Module 6.6 of the Guidebook provides that an applicant "*MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION*" (no emphasis added).[204]

155. The Reconsideration Request is an "accountability mechanism" that can be invoked by a gTLD applicant, as it was used by Vistaprint, to challenge the result in SCO proceedings. Article IV, § 2.2 of the Bylaws provides that:

> *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. <u>*one or more staff actions or inactions that contradict established ICANN policy(ies)*</u>; 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.*

156. In line with Article IV, § 2.2 of the Bylaws, Vistaprint submitted its Reconsideration Request to challenge actions of the ICDR and SCO experts, claiming their conduct contradicted ICANN policies. While Guidebook, § 5.1 permits ICANN's Board to individually consider new gTLD applications, such as through the RFR mechanism, it does not require that the Board do so in each and every case, *sua sponte*. The Guidebook, § 5.1, provides in relevant part that:

> *ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. <u>The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result … the use of an ICANN accountability mechanism.</u>*[205]

157. The IRP Panel determines that in the absence of a party's recourse to an accountability

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[203] Guidebook, § 3.4.6. The New gTLD Objections Procedure further provides in Article 2(d) that:

> *The 'Expert Determination' is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).*

[204] Guidebook, § 6.6.
[205] Guidebook, § 5.1.

mechanism such as the RFR, the ICANN Board has no affirmative duty to review the result in any particular SCO case.

158. In this case, Vistaprint did submit a Reconsideration Request and the BGC did engage in a detailed review of the alleged errors in process and procedures raised by Vistaprint. The BGC explained what it considered to be the scope of its review, which is consistent with the mandate in Article IV, § 2.2 of the Bylaws for review of "staff actions or inactions that contradict established ICANN policies":

> *In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that the Requester's applications for .WEBS are confusingly similar to the Requester's application for .WEB. Rather, the BGC's review is limited to whether the Panel violated any established policy or process in reaching that Determination.[206]*

159. In contrast to Vistaprint's claim that the BGC failed to perform its task properly and "turned a blind eye to the appointed Panel's lack of independence and impartiality", the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.[207]

160. For example, in relation to Vistaprint's contention that the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure, the BGC reasoned:

> *The only evidence the [Vistaprint] cites in support of its argument that Mr. Koh failed to maintain his independence during the proceeding is the ICDR's statement that it had decided to remove Mr. Koh "due to a new conflict." (Request, Section 10, Pgs. 9-10.) The ICDR did not provide any further information as to the nature of the conflict. Conflicts can take many forms, such as scheduling or personal conflicts unrelated to the proceedings. There is no evidence that the conflict that inflicted*

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[206] BGC Determination, p. 7, Request, Annex 26.

[207] Vistaprint also asserted that based on the Third Expert's determination in the *Vistaprint SCO,* the Third Expert lacked impartiality and independence, or alternatively lacked qualification. On a complete review of the entire record in this case, including the SCO proceedings and the Reconsideration Request before the BGC, the IRP Panel has found no foundation for these allegations against the Third Expert, and no violation of ICANN's Articles or Bylaws in the manner in which the BGC handled these assertions. The BGC found that these assertions were insufficient to merit reconsideration, as stated in its RFR decision, in footnote 10:

> *[Vistaprint] concludes with the following claim: "The cursory nature of the Decision and the arbitrary and selective discussion of the parties' arguments by the Panel show the lack of either the Panel's independence and impartiality or the Panel's appropriate qualifications." (Request, Section 10, Pg. 23.) [Vistaprint's] assertion is not accompanied by any discussion or further explanation for how ICANN processes were purportedly violated. [Vistaprint's] summary conclusions are without merit and insufficient to warrant reconsideration. Furthermore, [Vistaprint's] claim that the Determination was "cursory" and only contained "selective discussion of the parties' arguments" is unsupported. The Determination was eighteen pages long and contained more than six pages of discussion of the parties' arguments and evidence.*

Mr. Koh was related to the instant proceedings or otherwise impacted Mr. Koh's ability to remain impartial and independent.

Furthermore, [Vistaprint] neither claims to have been, nor presents any evidence of being, materially and adversely affected by Mr. Koh's removal. Indeed, had [Vistaprint] successfully challenged Mr. Koh for lack of independence at the time he was removed, the remedy under the applicable ICDR procedures would have been the removal of Mr. Koh, which was the result here.[208]

161.   The BGC concluded that Vistaprint provided no evidence of being materially and adversely affected by the First Expert's removal. Moreover, to the extent that there was an impact due to the First Expert stepping down, this conduct was attributable to the First Expert, not to the ICDR. As the BGC states, had there been a concern about the First Expert's lack of independence, the remedy under the applicable ICDR procedures would have been the removal of that expert, which is what actually occurred.

162.   Vistaprint also argued that the BGC conducted no investigation as to the nature of the new conflict that confronted the First Expert and instead "developed baseless hypotheses for the other reasons that could have led to this Panel stepping down."[209] In this respect, perhaps the BGC could have sought to develop evidence on this issue by inquiring with the ICDR about the circumstances concerning the First Expert. Article IV, § 2.13 of the Bylaws provides the BGC "may also request information relevant to the request from third parties," but it does not require that the BGC do so. However, it would not have changed the outcome, as noted above. It is also noteworthy that Article IV, § 2.2(b) of the Bylaws provides that a party may submit a Reconsideration Request to the extent that the party has been adversely affected by:

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.

163.   Here, there was no showing that Vistaprint attempted to develop information concerning how the removal of the First Expert might have had a material and adverse impact on Vistaprint, or information concerning the reasons for the First Expert stepping down.

164.   Vistaprint also alleged that the ICDR unjustifiably accepted a challenge to the Second Expert, or created the circumstances for such a challenge. As the BGC noted, the procedure governing challenges to experts is set forth in Article 2 § 3 of the ICDR's New gTLD Objections Procedure, which provides:

Upon review of the challenge the DRSP in its sole discretion shall make the decision on the challenge and advise the parties of its decision.

165.   The BGC reasoned that while Vistaprint may disagree with the ICDR's decision to accept the challenge to the Second Expert, that decision was in the "sole discretion" of the ICDR and it was not the BGC's role to second guess the ICDR's discretion in this regard.[210] The IRP Panel finds that the BGC violated no Article, Bylaw or the Guidebook by taking this

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[208] BGC Determination, p. 12, Request, Annex 26.
[209] Request, ¶ 77.
[210] BGC Determination, p. 12, Request, Annex 26.

view. However, it does appear that the ICDR might have avoided the challenge situation in the first place by appointing someone other than the Second Expert – who had served as the expert panel in previous SCO case administered by the ICDR – given that the basis for the challenge against him, which the ICDR accepted, was his involvement in the previous case.

166. Vistaprint also claimed that the Third Expert incorrectly applied both the burden of proof and the substantive criteria for evaluating the String Confusion Objection. The BGC rejected these contentions and the IRP Panel agrees. The BGC's decision looked closely at the standard to be applied in String Confusion Objection proceedings, as well as how the Third Expert extensively detailed the support for his conclusion that the .WEBS string so nearly resembles .WEB – visually, aurally and in meaning – that it is likely to cause confusion.[211] In this respect, the BGC did not violate ICANN's Articles or Bylaws by determining that the Third Expert properly applied the relevant Guidebook policy for String Confusion Objections. As the BGC noted,

> *The Requester's disagreement as to whether the standards should have resulted in a finding in favor of Requester's application does not mean that the panel violated any policy or process in reaching the decision.[212]*

167. The Guidebook provides that the following evaluation standard is be applied in String Confusion Objection proceedings:

> *3.5.1 String Confusion Objection*
>
> *A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.*

168. Vistaprint in its Request emphasized that ICANN has indicated that the SCO test sets a high bar[213]:

> *22. At various times, ICANN has indicated that the string confusion test sets a high bar:*
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> *- "[T]he standard indicates that confusion must be probable, not merely possible, in order for this sort of harm to arise. Consumers also benefit from competition. For new gTLDs, the similarity test is a high bar, as indicated by the wording of the standard.[…] Therefore, while the objection and dispute resolution process is intended to address all types of similarity, the process is not intended to hobble competition or reserve a broad set of string [sic] for a first mover."(fn. omitted)*
>
> *- "Policy discussions indicate that the most important reason to disallow similar strings as top-level domain names is to protect Internet users from the increased exposure to fraud and other risks that could ensue from confusion of one string for another. This reasoning must be balanced against unreasonable exclusion of top-level labels and denial of applications where considerable investment*

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[211] BGC Recommendation, pp. 15-18, Request, Annex 26.
[212] BGC Determination, p. 17, Request, Annex 26.

[213] Request, ¶¶ 22-23.

has already been made. As the top-level grows in number of registrations, drawing too large a circle of "similarity protection" around each existing string will quickly result in the unnecessary depletion of available names. The unnecessary exclusion of names would also tend to stifle the opportunity of community representation at the top-level and innovation." (fn. omitted)

23. ICANN's high standard for dealing with string confusion objections has been explicitly confirmed by the NGPC, which states that in the Applicant Guidebook 'similar' means:

"strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone. During the policy development and implementation design phases of the New gTLD Program, aural and conceptual string similarities were considered. These types of similarity were discussed at length, yet ultimately not agreed to be used as a basis for the analysis of the string similarity panels' consideration because on balance, this could have unanticipated results in limiting the expansion of the DNS as well as the reach and utility of the Internet. […] The NGPC reflected on existing string similarity in the DNS and considered the positive and negative impacts. The NGPC observed that numerous examples of similar strings, including singulars and plurals exist within the DNS at the second level. Many of these are not registered to or operated by the same registrant. There are thousands of examples […]" (NGPC Resolution 2014.02.056. NG02).

169. The passages quoted by Vistaprint, referencing ICANN materials and a resolution of the NGPC, arguably provide useful context in applying the test for String Confusion Objections. After citing these passages, however, Vistaprint contends in its Request that

    "[a]s a result, two strings should only be placed in a contention set if they are so similar that they would create a probability of user confusion were both to be delegated into the root zone, <u>and the finding of confusing similarity must be balanced against the risk of unreasonable exclusion of top-level labels and the denial of applications</u>" (no underlining added).[214]

170. However, the problem with the test as posited by Vistaprint is that it would add a balancing element that is <u>not</u> in the Guidebook's standard: according to Vistaprint the finding of confusing similarity <u>must be balanced against the risk of unreasonable exclusion of top-level labels and the denial of applications</u>. This part of the standard (as advanced by Vistaprint) is not in the Guidebook, although the concerns it represents were reflected in the other ICANN materials. The Guidebook standard is as follows:

    String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

171. There is no reference in this standard to balancing the likelihood of confusion against the needs to promote competition and to guard against the unreasonable exclusion of top-level strings. While it might be advisable to consider whether the standard for String Confusion Objections should be revised to incorporate such a balancing test, these elements were not in the policy that was applied by the Third Expert. Nor was there a violation, by the BGC or the ICANN Board, of any Articles or Bylaws in formulating the SCO standard as it was formulated (based on community input), and in determining that the Third Expert properly applied this policy.

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[214] Request, ¶ 24.

172. ICANN has argued that the time for Vistaprint to have objected to the Guidebook and its SCO policy has long since passed. Vistaprint has responded that it contests the *implementation* of the Guidebook and its *policies*, not just the policies themselves. Even assuming that the Guidebook's policies could be challenged at this point, the IRP Panel finds that the relevant polices, such as the standard for evaluating String Confusion Objections, do not violate any of ICANN's Articles or Bylaws reflecting principles such as good faith, fairness, transparency and accountability. However, the Panel does agree with ICANN that the time for challenging the Guidebook's standard for evaluating String Confusion Objections – which was developed in an open process and with extensive input – has passed.

173. Vistaprint has also complained that it was not provided with the opportunity to appeal the Third Expert's decision on the merits, such that the BGC or some other entity would re-evaluate the Expert's string confusion determination. As noted above, the BGC's review focused on whether the ICDR and the Third Expert properly applied the relevant rules and policies, not on whether the BGC, if it had considered the matter *de novo*, would have found string confusion as between the .WEBS and .WEB strings.

174. The IRP Panel finds that the lack of an appeal mechanism to contest the merits of the Third Expert's SCO determination is not, in itself, a violation of ICANN's Articles or Bylaws. ICANN's commitment through its Articles and Bylaws to act in good faith and with accountability and transparency, and to apply documented policies neutrally, objectively and fairly, does not require that it must have designed the SCO mechanism so that the result of a string confusion determination would be subject to a right of appeal. Other significant dispute resolution systems – such as the international legal regime for commercial arbitration regarding awards as final and binding[215] – do not normally provide for a right of appeal on the merits.

175. In respect of Vistaprint's *SCO Proceedings Claim*, the IRP Panel denies each of Vistaprint's claims concerning ICANN's alleged breaches of obligations under the Articles, Bylaws and Affirmation of Commitments, as follows:

    (1) Vistaprint claims that ICANN failed to comply with its obligation under Article 4 of the Articles and IV § 3.4 of the Bylaws to act in good faith with due diligence and independent judgment by failing to provide due process to Vistaprint's .WEBS applications.[216] The IRP Panel denies Vistaprint's claim that Vistaprint was not given a fair opportunity to present its case; was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules; and was not given any meaningful opportunity for remedy or redress once the SCO determination was made, even in the RFR procedure.

    (2) Vistaprint claims ICANN failed to comply with its obligation under Article I § 2.8 to neutrally, objectively and fairly apply documented policies as established in the

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[215] *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).*
[216] Request, ¶¶ 69-71.

Guidebook and Bylaws.[217] As discussed above, the IRP Panel rejects Vistaprint's claim that the *Vistaprint SCO* determination – finding that the .WEBS and .WEB gTLD strings are confusingly similar – is contradictory to ICANN's policy for String Confusion Objections as established in the Guidebook.

(3) Vistaprint claims ICANN failed to comply with its obligation to act fairly and with due diligence and independent judgment as called for under Article 4 of the Articles of Incorporation, Articles I § 2.8 and IV § 3.4 of the Bylaws by accepting the SCO determination made by the Third Expert, who was allegedly not independent and impartial.[218] As noted above, the IRP Panel finds that there was no failure of the BGC to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles, when it determined that Vistaprint's claim – that the Third Expert was not independent and impartial and/or was not appropriately qualified – did not merit reconsideration.

(4) Vistaprint claims that ICANN failed to comply with its obligations under the Article 4 of the Articles, and Article I §§ 2.7 and 2.8 and Article III § 1 of the Bylaws (and Article 9.1 of the Affirmation of Commitments) to act fairly and transparently by failing to disclose/perform any efforts to optimize the service that the ICDR provides in the New gTLD Program.[219] The IRP Panel rejects Vistaprint's contention that the BGC's Reconsideration determination shows that the BGC made no investigation into Vistaprint's fundamental questions about the Third Expert's arbitrariness, lack of independence, partiality, inappropriate qualification, or that the BGC did not exercise due diligence in making its determination on this issue.

(5) Vistaprint claims ICANN failed to comply with its obligation to remain accountable under Articles I § 2.10 and IV § 1 of the Bylaws (and Articles 3(a) and 9.1 of the Affirmation of Commitments) by failing to provide any remedy for its mistreatment of Vistaprint's gTLD applications.[220] The IRP Panel disagrees with Vistaprint's claim that ICANN's Board and the BGC adopted the Third Expert's SCO determination without examining whether it was made in accordance with ICANN's policy and fundamental principles under its Articles and Bylaws. In particular, as described above, the IRP Panel rejects Vistaprint's claim that the *Vistaprint SCO* determination is contradictory to ICANN's policy as established in the Guidebook and agrees with the BGC's analysis on this issue. Regarding Vistaprint's contention that ICANN should have created a review mechanism for challenging the substance of SCO expert determinations, as discussed above, the IRP Panel finds that the lack of such a general appeal mechanism creates no inconsistency with ICANN's Articles or Bylaws.

(6) Vistaprint claims ICANN failed to promote competition and innovation under Articles I § 2.2 (and Article 3(c) of the Affirmation of Commitments) by accepting the Third

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[217] Request, ¶ 72.
[218] Request, ¶ 73.
[219] Request, ¶¶ 52 and 77.
[220] Request,¶¶ 78-79.

<u>Expert's determination</u>.[221] Finally, the IRP Panel disagrees with Vistaprint's contention that the Board's acceptance of the determination in the *Vistaprint SCO* was contrary to ICANN's Bylaws because it was contrary to the interests of competition and consumers.

c. Disparate Treatment Claim

176. Vistaprint's final claim is one that raises a close question for this IRP Panel. Vistaprint contends that ICANN's Board discriminated against Vistaprint through the Board's (and the BGC's) acceptance of the Third Expert's determination in the *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation[222], or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

177. The IRP Panel agrees with Vistaprint's statement that the "IRP Panel's mandate includes a review as to whether or not ICANN's Board discriminates in its interventions on SCO expert determinations."[223]   As discussed above, in the Guidebook, § 5.1, ICANN has reserved the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community:

> *....The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application....* [224]

178. However, as a counterbalance against this reserved power to individually consider new gTLD applications, the ICANN Board must also comply with Article II, § 3 of ICANN's Bylaws, providing for non-discriminatory treatment:

> *Section 3 (Non-Discriminatory Treatment)*
>
> *ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment <u>unless justified by substantial and reasonable cause</u>, such as the promotion of effective competition.*

179. As Vistaprint maintains in its First Additional Submission, "[w]hen the ICANN Board individually considers an application, it must make sure that it does not treat applicants inequitably and that it does not discriminate among applicants."[225]

180. As discussed above in relation to standard of review, the IRP Panel considers that the Board's actions or omissions in this area of alleged non-discriminatory treatment bear the scrutiny of independent and objective review, without any presumption of correctness. Moreover, ICANN's Bylaws in Article I, § 2 set out its core values that should guide the

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[221] Request,¶ 80.
[222] ICANN has permitted the delegation of the .car and .cars gTLDs, the .auto and .autos gTLDs, the .accountant and .accountants gTLDs, the .fan and .fans gTLDs, the .gift and .gifts gTLDs, the .loan and .loans gTLDs, the .new and .news gTLDs and the .work and .works gTLDs.
[223] Vistaprint's Second Additional Submission, ¶ 20.
[224] Guidebook, § 5.1.
[225] Vistaprint's First Additional Submission, ¶ 31.

decisions and actions of ICANN, including the requirement, when balancing among competing core values, to exercise judgment to determine which core values are the most relevant and how they apply to the specific circumstances at hand. Of particular relevance to Vistaprint's disparate treatment claim are the core values set out in §§ 2.8 and 2.9:

> *8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
>
> *   *   *   *   **
>
> *10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
>
> *These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. <u>Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.</u>*
>
> *[Underlining added]*

181. Vistaprint's disparate treatment claim is based on the following allegations:

   ▪ On <u>June 25, 2013</u>, the NGPC, a sub-committee of ICANN's Board, determined in Resolution 2013.06.25.NG07 that no changes were needed to the existing mechanisms in the Guidebook to address potential consumer confusion from allowing singular and plural versions of the same gTLD string. The NGPC had addressed this issue in response to advice from the ICANN's Government Advisory Committee ("GAC") that due to potential consumer confusion, the Board should "reconsider its decision to allow singular and plural version of the same strings."

   ▪ On <u>February 5, 2014</u>, the day before Vistaprint submitted its Reconsideration Request to the BGC on <u>February 6, 2014</u>, the NGPC approved Resolution 2014.02.05.NG02, which directed ICANN's President to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent String Confusion Objection expert determinations. The NGPC resolution provides in relevant part:

   > *Whereas, <u>on 10 October 2013</u> <u>the Board Governance Committee (BGC)</u> requested staff to draft a report for the NGPC on String Confusion Objections "setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied-for String and TLDH's Applied-for String."*
   >
   > *Whereas, <u>the NGPC is considering potential paths forward to address the perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process, including implementing a review mechanism. The review will be limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM.</u>*
   >
   > *Whereas, <u>the proposed review mechanism, if implemented, would constitute a change to the current String Confusion Objection process in the New gTLD Applicant Guidebook.</u>*
   >
   > *Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the*

Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.02.05.NG02), <u>the NGPC directs the President and CEO, or his designee, to publish for public comment the proposed review mechanism for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process</u>.

[Underlining added]

▪ Vistaprint emphasizes that ICANN's Board (through the NGPC) took this decision the day before Vistaprint filed its Reconsideration Request; however, this did not prevent the BGC from denying Vistaprint's RFR less than one month later without considering whether such a review mechanism might also be appropriate for dealing with the SCO determination involving .WEBS/.WEB.[226]

▪ Vistaprint's Reconsideration Request and the BGC's decision on that Request rendered on <u>February 27, 2014</u> contain <u>no reference</u> to the concerns that had been raised both by the BGC (on October 10, 2013 in a prior RFR determination) and the NGPC in its February 5, 2014 resolution concerning inconsistent expert SCO determinations, some of which involved plural and singular versions of the same gTLD string. Neither Vistaprint nor the BGC raised any discussion of disparate treatment at that time. The BGC's determined that its decision on Vistaprint's Reconsideration Request "shall be final and does not require Board (or NGPC) consideration."[227]

▪ On <u>October 12, 2014</u>, approximately 8 months after the BGC's decision on Vistaprint's Reconsideration Request, and after Vistaprint had filed its Request in this IRP (in June 2014), the NGPC approved Resolution 2014.10.12.NG02, in which it identified certain SCO expert determinations "as not being in the best interest of the New gTLD Program and the Internet community," and directed ICANN's President to establish processes and procedures to re-evaluate certain previous SCO expert determinations. Resolution 2014.10.12.NG02 also stated in its rationale:

The NGPC also considered whether there was a reasonable basis for certain perceived inconsistent Expert Determinations to exist, and particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not. The NGPC notes that while on their face some of the Expert Determinations may appear inconsistent, including other SCO Expert Determinations, and Expert Determinations of the Limited Public Interest and Community Objection processes, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively.

First, on a procedural level, each expert panel generally rests its Expert Determination on materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting identical issues could – and if appropriate should – reach different determinations, based on the strength of the materials presented.

Second, on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in "inconsistent" or "unreasonable" results, presented nuanced distinctions

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[226] Request, ¶ 52.
[227] BGC Recommendation, p. 19, Request, Annex 26.

relevant to the particular objection. These nuances should not be ignored simply because a party to the dispute disagrees with the end result. Further, the standard guiding the expert panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion. However, for the identified Expert Determinations, a reasonable explanation for the seeming discrepancies is not as apparent, even taking into account all of the previous explanations about why reasonably "discrepancies" may exist. To allow these Expert Determinations to stand would not be in the best interests of the Internet community.

The NGPC considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections, as well as other String Confusion Objection Expert Determinations, and possibly singular and plural versions of the same string. The NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

It should also be noted that in response to advice from the Governmental Advisory Committee (GAC), the NGPC previously considered the question of whether consumer confusion may result from allowing singular and plural versions of the same strings. On 25 June 2013, the NGPC adopted a resolution resolving "that no changes [were] needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string" http://www.icann.org /en/groups/board/ documents/resolutions-new-gtld-25jun13-en.htm#2.d. The NGPC again notes that the topic of singular and plural versions of the same string also may be the subject of further community discussion as it relates to future rounds of the New gTLD Program.

The NGPC considered community correspondence on this issue in addition to comments from the community expressed at the ICANN meetings. The concerns raised in the ICANN meetings and in correspondence have been factored into the deliberations on this matter.

- In view of the NGPC's Resolution 2014.10.12.NG02, Vistaprint describes its disparate treatment claim in its First Additional Submission as follows:

13 .... Since the filing of Vistaprint's request for IRP, the ICANN Board clarified how the string similarity standard must be applied. In its resolutions of 12 October 2014, the ICANN Board identified certain SCO determinations "as not being in the best interest of the New gTLD Program and the Internet community" and set out the rules for a re-evaluation of these SCO determinations (fn. omitted):

- A first SCO determination that needed re-evaluation is the SCO determination in which ICDR's expert accepted Verisign Inc.'s objection to United TLD Holdco Ltd. ('United TLD')'s application for .cam. We refer to this SCO determination as the 'United TLD Determination'. In the United TLD Determination, ICDR's appointed expert found United TLD's application for .cam confusingly similar to Verisign Inc. ('Verisign')'s .com gTLD (RM 23). The ICANN Board decided that (i) the United TLD Determination was not in the best interest of the New gTLD Program and the Internet community and (ii) a new three-member panel must be established to re-evaluate the United TLD Determination (fn. omitted).

Verisign had also raised a SCO on the basis of its .com gTLD against the application for .cam by Dot Agency Limited and the application for .cam by AC Webconnecting Holding B.V. In both cases, the appointed experts determined that no confusing similarity existed between the .cam and .com strings (fn. omitted). We refer to these SCO determinations as the 'Related .cam/.com Determinations'. The ICANN Board decided that the Related .cam/.com Determinations need no

re-evaluation. In addition, the ICANN Board recommended that the three-member panel charged with re-evaluating the United TLD Determination must review the Related .cam/.com Determinations as background (fn. omitted).

- *Another SCO determination that needed re-evaluation is the determination in which ICDR's appointed expert accepted Commercial Connect LLC's objection to Amazon EU S.à.r.l. ('Amazon')'s application for .通販 (which means .onlineshopping in Japanese) (fn. omitted). We refer to this SCO determination as the 'Onlineshopping Determination'. ICDR's appointed expert found in the Onlineshopping Determination that Amazon's application for .通販 was confusingly similar to Commercial Connect LLC's application for .shop. Commercial Connect LLC also invoked its application for .shop in a SCO against Top Level Domain Holdings Limited's application .购物 (which means 'shop' in Chinese). ICDR's appointed expert rejected the latter SCO (fn. omitted). We refer to this SCO determination as the 'Related shop/.shop Determination'. The ICANN Board decided that a three-member panel needs to re-evaluate the Onlineshopping Determination and that no re-evaluation is needed for the Related shop/.shop Determination. The ICANN Board decided that the Related shop/.shop Determination must be reviewed as background by the three-member panel that is charged with re-evaluating the Onlineshopping Determination (fn. omitted).*

14.   The ICANN Board's recommendations to the three-member panels charged with the re-evaluation of the United TLD Determination and the Onlineshopping Determination are clear. Related determinations – involving the same gTLD string(s) and finding that there is no confusing similarity – will not be re-evaluated and must be taken into account in the re-evaluations.

15.   Upon instigation of the ICANN Board, ICANN had developed the same process for re-evaluating the SCO determination in which ICDR's appointed expert accepted Charleston Road Registry Inc. ('CRR')'s objection to DERCars, LLC's application for .cars. We refer to this SCO determination as the 'DERCars Determination'. In the DERCars Determination, ICDR's appointed expert found DERCars, LLC's application for .cars confusingly similar to CRR's application for .car. CRR had also objected to the applications for .cars by Uniregistry, Corp. and Koko Castle, LLC, claiming confusing similarity with CRR's application for .car. The latter objections by CRR were not successful. ICANN decided that DERCars, LLC should be given the option of having the DERCars Determination reviewed. ICANN was not allowing a review of the other SCO determinations involving .car and .cars (fn. omitted).

16.   The above shows that ICANN and its Board have always decided in favor of co-existence of 'similar' strings. The ICANN Board explicitly allowed singular and plural gTLD strings to co-exist (fn. omitted). To support this view, the ICANN Board referred to the existence of thousands of examples of singular and plurals within the DNS at second level, which are not registered to or operated by the same registrant. The ICANN Board inter alia referred to the co-existing car.com and cars.com (fn. omitted).

17.   Why did the ICANN Board intervene in the DERCars determination – involving the strings .car and .cars – but refused to intervene in the SCO Determination involving .web and .webs? In view of the small number of SCO Determinations finding confusing similarity between two strings (fn. omitted), it is a true mystery why the ICANN Board intervened in some matters, but refused to do so in the SCO determinations on Vistaprint's applications for .webs.

18.   If anything, the .webs/.web string pair is less similar than the .cars/.car string pair. Cars is commonly used as the plural for car. Web, however, commonly refers to the world wide web, and as such, it is not normally a word where the plural form would be used.

182.   Vistaprint contends that ICANN cannot justify the disparate treatment described above. While Vistaprint recognizes that ICANN's Board intervened to address perceived inconsistent or otherwise unreasonable SCO expert determinations, ICANN failed to explain why the SCO determination on Vistaprint's .WEBS applications was not just as unreasonable as the SCO expert determinations involving .cars/.car, .cam/.com, and 通販

/.shop.

183. In response to Vistaprint's disparate treatment claim, ICANN contends that ICANN's Board only intervened with respect to certain SCO expert determinations because there had been several independent expert determinations regarding the same strings that were seemingly inconsistent with one another. ICANN states that is not the case with respect to Vistaprint's applications, as no other expert determinations were issued regarding the similarity of .WEB and .WEBS.[228] ICANN further urges that the Board was justified in exercising its discretion to intervene with respect to the inconsistent SCO expert determinations regarding .COM/.CAM, .CAR/.CARS and .SHOP/.通販, because the Board acted to bring certainty to differing SCO expert determinations regarding the same strings.[229] However, this justification was not present with respect to the single *Vistaprint SCO*.

184. Finally, ICANN stated that "Vistaprint has identified no Articles or Bylaws provision violated by the ICANN Board *in exercising its independent judgment to intervene with respect to certain inconsistent expert determinations on string confusion objections unrelated to this matter, but not with respect to the single Expert Determination regarding .WEB/.WEBS*" (italics added).[230]

185. The IRP Panel has considered carefully the parties' contentions regarding Vistaprint's disparate treatment claim. The Panel finds that, contrary to what ICANN has stated above, ICANN's Board did not have an opportunity to "exercise its independent judgment" – in particular, in view of its decisions to implement an additional review mechanism for certain other inconsistent SCO expert determinations – to consider specifically whether it should intervene with respect to the adverse SCO expert determination involving Vistaprint's .WEBS applications.

186. It is clear that ICANN's Board, through the BGC and the NGPC, was aware of the concerns involving inconsistent decisions in SCO proceedings when it decided Vistaprint's Reconsideration Request in February 2014. The NGPC, on the day (February 5, 2014) before Vistaprint filed is Reconsideration Request and in response to a request from the BGC, initiated a public comment period on framework principles for a potential review mechanism to address perceived inconsistent SCO expert determinations. However, the BGC's decision on the Reconsideration Request rendered on February 27, 2014 made no mention of these issues.[231] By comparison, there is no evidence that

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[228] ICANN's First Additional Submission, ¶ 5.
[229] ICANN's First Additional Submission, ¶ 18.
[230] ICANN's Second Additional submission, ¶ 21.
[231] In this regard, the IRP panel in the *Booking.com final Declaration* (¶ 119) quoted Mr. Sadowsky, a member of the Board's NGPC committee, commenting on the Reconsideration process as follows:

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the…community and/or Internet users in general.

Vistaprint was aware of these issues at the time it filed its Reconsideration Request on February 6, 2014. Vistaprint has raised them for the first time in a timely manner during the pendency of this IRP.

187. In accordance with Article 1, § 2 of the Bylaws, the Board *shall* exercise its judgment to determine which competing core values are most relevant and how they apply to arrive at a defensible balance among those values in relation to the case at hand. Given the timing of Vistaprint's Reconsideration Request, and the timing of ICANN's consultation process for potential review mechanisms to address inconsistent SCO expert determinations, this exercise of judgment by the Board has not yet occurred in the case of Vistaprint's .WEBS gTLD applications.

188. Here, ICANN is subject to the requirements of Article II, § 3 of its Bylaws regarding non-discriminatory treatment, providing that it shall not apply its "standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause." ICANN has provided additional relief to certain gTLD applicants who were subject to adverse decisions in String Confusion Objection cases. In those cases, the differences in the gTLD strings at issue were not too dissimilar from the .WEBS/.WEB gTLD strings. One of the cases in which ICANN agreed to provide an additional mechanism for review involved a string confusion objection for the .CAR/.CARS strings, which involve the singular vs. plural of the same string. Meanwhile, many other singular and plural variations of the same gTLD strings have been permitted to proceed to delegation, including AUTO and .AUTOS; .ACCOUNTANT and ACCOUNTANTS; .FAN and .FANS; .GIFT and .GIFTS; .LOAN and .LOANS; .NEW and .NEWS; and .WORK and .WORKS.

189. This IRP Panel, among its three members, could not agree – in regards to the specific circumstances of Vistaprint's gTLD applications – whether the reasons offered by ICANN in its Resolution 2014.10.12.NG02 for refusing the "to expand the scope of the proposed review mechanism to include other [SCO] Expert Determinations" would meet the standard of non-discrimination imposed by Article II, § 3 of the Bylaws, as well as the relevant core values in Article 1, § 2 of the Bylaws (e.g., applying documented policies neutrally and objectively, with integrity and fairness). For instance, one view is that limiting the additional review mechanism to only those SCO cases in which there were inconsistent decisions is a sufficient reason for intervening in these cases, but not in other SCO cases involving similar singular vs. plural gTLD strings were the applicant received an adverse decision. On the other hand, another view is that the real focus should be on the developments involving single vs. plural gTLDs strings, including the inconsistency of decisions and the offering of additional review mechanism in certain cases, and the delegation of so many other single/plural variations of the same gTLD strings, which are, at least in this way, similarly situated to the circumstances of the .WEBS/.WEB strings.[232]

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[232] Regarding inconsistent decisions, Vistaprint quoted the statement dated October 8, 2014, of ICANN's former Chief Strategy Officer and Senior Vice President of Stakeholders Relations, Kurt Pritz, who had apparently been leading the introduction of the New gTLD Program, concerning ICANN's objection procedure:

(Continued...)

190. The IRP Panel is mindful that it should not substitute its judgment for that of ICANN's Board. The Board has not yet considered Vistaprint's claim of disparate treatment, and the arguments that ICANN makes through its counsel in this IRP do not serve as a substitute for the exercise of independent judgment by the Board. Without the exercise of judgment by ICANN's Board on this question of whether there is any inequitable or disparate treatment regarding Vistaprint's .WEBS gTLD applications, the Board would risk violating its Bylaws, including its core values. As the Emergency IRP Panel found in the *GCC Interim IRP Declaration*:

> *The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as "defensible", that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion.*

> *This obligation of the ICANN Board in its decision making is reinforced by the standard of review for the IRP process under Article IV, Section 3.4 of the Bylaws, quoted at paragraph 42 b. above, when the action of the Board is compared to the requirements under the Articles and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgment.* [233]

191. Here, the IRP Panel finds that due to the timing and scope of Vistaprint's Reconsideration Request (and this IRP proceeding), and the timing of ICANN's consultation process and subsequent NGPC resolution authorizing an additional review mechanism for certain gTLD applications that were the subject of adverse SCO decisions, the ICANN Board has not had the opportunity to exercise its judgment on the question of whether, in view of ICANN's Bylaw concerning non-discriminatory treatment and based on the particular

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There is no doubt that the New gTLD Program objection results are inconsistent, and not predictable. The fact is most easily demonstrated in the 'string confusion,' objections where challenges to exactly the same strings yielded different results. [...] With globally diverse, multiple panelists invoking untried standards and questions of first impression in an industry with which they were not familiar and had little training, the panelists were bound to deliver inconsistent, unpredictable results. ICANN put no mechanism put [sic] into place to rationalize or normalize the answers. [...] It is my opinion that ICANN, having proven in the initial evaluation context that it could do so, should have implemented measures to create as much consistency as possible on the merits in the objection rulings, requiring DRSPs to educate and train their experts as to the specific (and only) standards to employ, and to review and correct aberrant results. The failure to do so resulted in violation of the overarching policy articulated by the GNSO and adopted by the Board at the outset of the new gTLD Program, as well as policies stated in the Bylaws and Articles of Incorporation concerning on discrimination, application of document policies neutrally, objectively and fairly, promotion of competition, and accountability." (fn. omitted).

[233] *See GCC Interim IRP Declaration, ¶¶ 76-77 ("Upon completion of the various procedures for evaluation and for objections under the Guidebook, the question of the approval of the applied for domain still went back to the NGPC, representing the ICANN Board, to make the decision to approve, without being bound by recommendation of the GAC, the Independent Objector or even the Expert Determination.* <u>*Such a decision would appear to be caught by the requirements of Article 1, Section 2 of the Bylaws requiring the Board or the NGPC to consider and apply the competing values to the facts and to arrive at a defensible balance among those values*</u>*" ¶ 90 (underlining added).*

circumstances and developments noted above, such an additional review mechanism is appropriate following the SCO expert determination involving Vistaprint's .WEBS applications.[234] Accordingly, it follows that in response to Vistaprint's contentions of disparate treatment in this IRP, ICANN's Board – and not this Panel – should exercise its independent judgment on this issue, in light of all of the foregoing considerations.

VI. Prevailing Party; Costs

192. Article IV, § 3.18 of ICANN's Bylaws requires that the IRP Panel "specifically designate the prevailing party." This designation is relevant to the allocation of costs, given that the same section of the Bylaws provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."

193. Article IV, § 3.18 of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."

194. Similarly, the Supplementary Procedures provide in Rule 11:

> *The IRP Panel shall fix costs in its Declaration. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP Panel may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.*
>
> *In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP Panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.*

195. Here, Vistaprint engaged in the Cooperative Engagement Process, although the process did not resolve the issues between the parties. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the

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[234] The IRP Panel observes that the NGPC, in its Resolution 2014.10.12.NG02, sought to address the issue of why certain SCO expert determinations should be sent back to the ICDR while others should not. In that resolution, the NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be appropriate as part of future rounds in the New gTLD Program. The NGPC stated that applicants may have already taken action in reliance on SCO expert determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. However, in this case Vistaprint does not fall within the category of applicants who have taken such actions in reliance. Instead, it is still asserting its claims in this IRP proceeding. In accordance with the Bylaws, Vistaprint is entitled to an exercise of the Board's independent judgment to determine, based on the facts of the case at hand and in view of ICANN's Bylaws concerning non-discriminatory treatment and core values, whether Vistaprint should be entitled to the additional review mechanism that was made available to certain other gTLD applicants.

Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the IRP Panel members and of the ICDR.

196. ICANN is the prevailing party in this IRP. This designation is confirmed by the Panel's decisions concerning Vistaprint's requests for relief in this IRP:

   ▪ Vistaprint requests that the Panel find ICANN breached its Articles, Bylaws, and the Guidebook. The Panel declares that ICANN's Board (including the BGC) did not violate the Articles, Bylaws and Guidebook.

   ▪ Vistaprint requests that the Panel require ICANN to reject the Third Expert's determination in the *Vistaprint SCO*, disregard the resulting "Contention Set", and allow Vistaprint's applications for .WEBS to proceed on their merits. The Panel determines that it does not have authority to order the relief requested by Vistaprint. In addition, the Panel declares that the Board (through the BGC) did not violate the Articles, Bylaws and Guidebook in regards to the BGC's handling of Vistaprint's Reconsideration Request.

   ▪ Vistaprint requests, in the alternative, that the Panel require ICANN to reject the *Vistaprint SCO* determination and organize a new procedure, in which a three-member panel would re-evaluate the Third Expert's decision taking into account (i) the ICANN Board's resolutions on singular and plural gTLDs, as well as the Board's resolutions on the DERCars SCO Determination, the United TLD Determination, and the Onlineshopping SCO Determination, and (ii) ICANN's decisions to delegate the following gTLDs: .CAR and .CARS; .AUTO and .AUTOS; .ACCOUNTANT and ACCOUNTANTS; .FAN and .FANS; .GIFT and .GIFTS; .LOAN and .LOANS; .NEW and .NEWS; and .WORK and .WORKS. The Panel determines that it does not have authority to order the relief requested by Vistaprint. In addition, the Panel recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings.

197. The IRP Panel also recognizes that Vistaprint, through its Request and submissions, raised certain complex and significant issues and contributed to the "public interest" involving the New gTLD Program and the Independent Review Process. It is therefore appropriate and reasonable to divide the IRP costs over the parties in a 60% (Vistaprint) / 40% (ICANN) proportion.

FOR THE FOREGOING REASONS, the IRP Panel hereby:

(1) Declares that Vistaprint's IRP Request is denied;

(2) Designates ICANN as the prevailing party;

(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;

(4) In view of the circumstances, Vistaprint shall bear 60% and ICANN shall bear 40% of the costs of the IRP Provider, including the fees and expenses of the IRP Panel members and the fees and expenses of the ICDR. The administrative fees and expenses of the ICDR, totaling US$4,600.00 as well as the compensation and expenses of the Panelists totaling US$229,167.70 are to be borne US$140,260.62 by Vistaprint Limited and US$93,507.08 by ICANN. Therefore, Vistaprint Limited shall pay to ICANN the amount of US$21,076.76 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN upon demonstration that these incurred fees and costs have been paid; and

(5) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

_____   _____
   Siegfried H. Elsing   Geert Glas
   Date: Date:

_____
                        Christopher Gibson
                       Chair of the IRP Panel
                       Date: 9 Oct. 2015

(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;

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_____
Siegfried H. Elsing
Date: 9 October 2015

_____
Geert Glas
Date:

_____
Christopher Gibson
Chair of the IRP Panel
Date:

(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;

(4) In view of the circumstances, Vistaprint shall bear 60% and ICANN shall bear 40% of the costs of the IRP Provider, including the fees and expenses of the IRP Panel members and the fees and expenses of the ICDR. The administrative fees and expenses of the ICDR, totaling US$4,600.00 as well as the compensation and expenses of the Panelists totaling US$229,167.70 are to be borne US$140,260.62 by Vistaprint Limited and US$93,507.08 by ICANN. Therefore, Vistaprint Limited shall pay to ICANN the amount of US$21,076.76 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN upon demonstration that these incurred fees and costs have been paid; and

(5) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

Siegfried H. Elsing
Date:

Geert Glas
Date: 9 October 2015

Christopher Gibson
Chair of the IRP Panel
Date: 9 Oct. 2015

Resp. Ex. 4

ICANN Board Rationales for the Approval of the Launch of the New gTLD Program

*Note: The Rationales are not final until approved with the minutes of the Board meeting.

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ICANN Board Rationales

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8. ICANN Board Rationale on String Similarity and String Contention Associated with the gTLD Program

8. ICANN Board Rationale on String Similarity and String Contention Associated with the gTLD Program

I.   Introduction

Through the development of the new gTLD program, the Board has given consideration to issues of potential user confusion resulting from the delegation of many similar TLD strings, as well as to creating procedures for resolving contention cases (i.e., where there is more than one qualified applicant for a TLD).

The foundational policy guidance for the program contains the principle that strings likely to cause user confusion should be avoided. Additionally, policy guidance recommended that there should be a preference for community applications in contention situations.

This memorandum focuses on the Board's review of these issues in implementing these principles in the new gTLD program. The memorandum summarizes the Board's consideration of these issues, and the Board's rationale for implementing the new gTLD program with the provisions on string contention and string similarity.

II.   Brief History of ICANN's Analysis of String Similarity and String Contention Associated With the gTLD Program

This section sets forth a brief history of significant actions on the subject of string contention associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for other reasons.

- In February 2007, Bruce Tonkin sent an email to the GNSO Council, describing the type of contention resolution methods under discussion for the gTLD process, including self-resolution, among the parties, third-party mediation, a bidding process, auctions, and testing for community affiliations.

http://forum.icann.org/lists/gtld-council/msg00358.html;
http://forum.icann.org/lists/gtld-council/msg00359.html

- In March 2007, the Governmental Advisory Committee issued its GAC Principles regarding New gTLDs. This included: 2.4: In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains, no two letter gTLDs should be introduced.
  http://gac.icann.org/system/files/gTLD_principles_0.pdf

- In August 2007, the GNSO issued its final report regarding the introduction of new gTLDs, including Recommendation 2, which stated that "strings must not be confusingly similar to an existing top-level domain or a Reserved Name."
  http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- The GNSO's Final Report also included Implementation Guideline F, which stated: If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe; ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and; iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

- In March 2008, ICANN reported on preliminary work with SWORD to develop a potential algorithm that could help to automate the process for assessing similarity among proposed and existing TLD strings. http://www.icann.org/en/minutes/prelim-report-27mar08.htm

- On 26 June 2008, the Board adopted the Generic Names Supporting Organization's ("GNSO") policy recommendations for the introduction of new gTLDs, and directed ICANN staff to continue to develop a detailed implementation plan.
  See Board Resolution at
  http://www.icann.org/en/minutes/resolutions-

26jun08.htm#_Toc76113171; see Board Meeting Transcript at
https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt

- In August 2008, ICANN considered the use of auctions as a tie-breaking mechanism within the new gTLD process.
  https://www.icann.org/en/topics/new-gtlds/program-updates-2008.htm

- Also in August 2008, ICANN posted a paper for community discussion, entitled "The Economic Case for Auctions," which explores the potential benefits of auctions as a tie-breaking mechanism. https://www.icann.org/en/topics/economic-case-auctions-08aug08-en.pdf

- Also in August 2008, ICANN considered the use of a string similarity algorithm to help automate the process for assessing similarity among the proposed and existing TLD strings. SWORD completed a beta algorithm and reviewed several test cases with ICANN staff to refine the parameters and discuss how the algorithm could be successfully integrated as a tool to help implement the GNSO's recommendation that new gTLD strings should not result in user confusion.
  https://www.icann.org/en/topics/new-gtlds/program-updates-2008.htm;
  http://www.icann.org/en/announcements/announcement-08aug08-en.htm

- In October 2008, the Board passed a resolution, authorizing the CEO, COO and/or General Counsel of ICANN to enter into an agreement for algorithm related services with SWORD.
  https://www.icann.org/en/minutes/prelim-report-01oct08.htm

- On 24 October 2008, ICANN published Version 1 of the new gTLD Applicant Guidebook ("Version 1"), as well as an explanatory memorandum, "Resolving String Contention,", http://www.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf, describing the reasons for the contention procedures found in the draft Guidebook. The Guidebook included a preliminary establishment of contention sets based on similarity between strings, opportunities for applicants to self-resolve such contention, a comparative evaluation process, and an objective

mechanism as a last resort.
http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf

- These procedures have been continually revised, updated, and posted for comment through successive drafts of the Guidebook. In February 2009, auctions were identified as an objective mechanism of last resort for resolving string contention, included in an updated memorandum, http://www.icann.org/en/topics/new-gtlds/string-contention-18feb09-en.pdf, and beginning in draft version 2 of the Guidebook. http://www.icann.org/en/topics/new-gtlds/draft-string-contention-clean-18feb09-en.pdf

- Comments on successive drafts of the Guidebook expressed a desire for greater clarity around the standards to be used for comparative evaluation, including requests for examples of applications that would and would not meet the threshold. In response to these comments, ICANN developed detailed explanatory notes for each of the scoring criteria to give additional guidance to applicants. These were included beginning in draft version 3 of the Guidebook.
http://www.icann.org/en/topics/new-gtlds/draft-string-contention-clean-04oct09-en.pdf

- In May 2010, ICANN issued draft version 4 of the Guidebook. The comparative evaluation was renamed the Community Priority Evaluation, to more accurately convey the purpose and nature of the evaluation (i.e., not comparing applicants to one another but comparing each against a common set of criteria). Version 4 also included definitions for terms used in the explanatory notes as well as clarifications and expanded guidance in several areas.
http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm

- In June 2010, the GNSO Council and the Registries Stakeholder Group requested that exceptions be granted from findings of confusing similarity. The reason for granting an exception would be that a string pair that was found to be confusingly similar constituted a case of "non-detrimental confusion."
http://gnso.icann.org/mailing-lists/archives/council/msg09379.html;
http://forum.icann.org/lists/string-similarity-

amendment/msg00002.html;
http://www.icann.org/en/minutes/board-briefing-materials-1-
25sep10-en.pdf

- In September 2010, the Board discussed the subject of string
  similarity and resolved to encourage policy development as needed
  to consider any exceptions from findings of confusing similarity.
  http://www.icann.org/en/minutes/resolutions-25sep10-
  en.htm#2.4

- On 30 May 2011, ICANN posted the Applicant Guidebook for
  consideration by the Board.
  http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm

III. The Board's Analysis of String Similarity and String Contention

A. Brief Introduction to String Similarity and String Contention

1. String Similarity

This section sets forth an overview of the string similarity determination:

- What is the Concern over String Similarity?

  o The Board determined that delegating highly similar TLDs in the
    new gTLD program created the threat of detrimental user
    confusion.

- How Is It Determined that String Similarity Exists?

  o The preliminary similarity review will be conducted by a panel of
    String Similarity Examiners, who will use the following standard
    to test for whether string confusion exists:

    > String confusion exists where a string so nearly resembles
    > another visually that it is likely to deceive or cause
    > confusion. For the likelihood of confusion to exist, it must
    > be probable, not merely possible that confusion will arise
    > in the mind of the average, reasonable Internet user.
    > Mere association, in the sense that the string brings
    > another string to mind, is insufficient to find a likelihood
    > of confusion.

- o The examination will be informed by human judgment assisted by criteria and an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs. http://icann.sword-group.com/algorithm/

- What Happens Once the Determination is Made that String Similarity Exists?

  - o In the simple case in which an applied-for TLD string is identical to an existing TLD, the application system will not allow the application to be submitted.

  - o An application that fails the string confusion review and is found too similar to an existing TLD string will not pass the Initial Evaluation stage of the evaluation process, and no further reviews will be available.

  - o An application that passes the string similarity review in the Initial Evaluation is still subject to challenge regarding string similarity in the current application round. That process requires that a specific string similarity objection be filed by an objector having the standing to make such an objection. Such category of objection is not limited to visual similarity. Rather, confusion based on any type of similarity may be claimed by an objector, visual, phonetic, and semantic similarity.

  - o An application that passes the string similarity review and is not subject to a string confusion objection would proceed to the next relevant stage of the process.

2. String Contention

This section sets forth an overview of the string contention process:

- What is String Contention?

  - o String contention is said to occur when the strings of two or more applications are identical or found to be so similar that delegation of both will create a threat of user confusion.

- What Components Are Involved in the String Contention Process?

- o Identifying gTLD strings that are likely to deceive or cause user confusion in relation to either existing TLDs or reserved names or applied-for gTLDs; and

- o Resolving the string contention.

- How is a Contention Set Identified?

  - o In the initial evaluation of an applied for gTLD, a string similarity panel, using the procedures described above, will determine whether two or more applications for gTLDs are in direct string contention. The applications that are determined to be in direct string contention will be marked for later resolution of the contention and proceed to the subsequent process steps. Applications that are not part of a contention set can proceed to the next stage of the evaluation process without further action.

    - ➢ Applications are in direct string contention if their proposed strings are identical or so similar that string confusion would occur if both were to be delegated as TLDs. The determination is based on human judgment assisted by an algorithmic test performed on applications.

    - ➢ Two applications are in indirect string contention if they are both in direct string contention with a third application, but not with each other.

  - o During the objection process, an applicant may file a string confusion objection to assert string confusion. If the objection is upheld by the panel adjudicating the objection, the applications will be deemed to be in a direct string contention and the relevant contention sets will be modified accordingly.

  - o The final contention sets are established once the extended evaluation and objection process have been concluded, because some applications may be excluded in those steps.

- How is a Contention Set Resolved?

o Voluntary settlements or agreements can occur between applications that result in the withdrawal of one or more applications. These can occur at any stage of the process, once ICANN has posted the applications received. However, material changes to an application may require a re-evaluation.

o Community priority evaluation can be used only if at least one of the applications involved is community-based and has expressed a preference for community priority evaluation. A panel will receive and score the community-based applications against the established criteria for: (1) community establishment; (2) nexus between the proposed string and community; (3) dedicated registration policies; and (4) community endorsement. If one application is a "clear winner" (i.e., meets the community priority criteria), the application proceeds to the next step and its direct contenders are eliminated. If there is no "clear winner," the contention set will be resolved through negotiation between the parties or auction. It may occur that more than one application meets the community priority criteria, in which case time will be allowed for resolving the remaining contention by either applicant withdrawing, otherwise an auction between those applicants will resolve the contention.

o A community application that prevails in a community priority evaluation eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria. Arriving at the best outcome in a contention situation requires careful balancing of several variables, and this is the reason that a number of factors are included in the analysis.

o Auction is available as a last resort mechanism for resolving string contention when (1) contending applicants successfully complete all evaluations; (2) contending applicants elect not to use community priority evaluation, were not eligible for community priority evaluation, or

community priority evaluation did not provide a "clear winner"; and (3) contending applications have not resolved the contention among themselves.

B.   Why The Board Addressed String Similarity and String Contention

- The new gTLD program will increase the number of domain names available, implying a risk that "confusingly" similar strings will appear.

- It is in the interests of consumer confidence and security to protect against the threat of user confusion and to avoid increasing opportunities for bad faith entities who wish to defraud users.

- Measures should be in place to protect internet users from the potential harm in delegating confusingly similar strings in the new gTLD program.

- The Board wants to create greater certainty in the domain name marketplace by crafting a fair and practical approach on how to identify and how best to resolve contention sets.

- The Board adopted the GNSO policy recommendations, including the implementation guideline implying that a community-based TLD application could be given a priority in cases of contention.

C.   Who the Board Consulted

- Legal Counsel

- The GNSO

- The GAC

- The ALAC

- The ccNSO

- The SSAC

- All other Stakeholders and Community members through public comment forum and other methods of participation.

D.   What Significant Non-Privileged Materials the Board Reviewed

- **GNSO Policy Recommendations**

  o Recommendation 2: Strings must not be confusingly similar to an existing top-level domain or a Reserved Name http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

  o Implementation Guideline F: If there is contention for strings, applicants may:

  i) resolve contention between them within a pre-established timeframe

  ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and

  iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

- **GAC Principles**

  o Recommendation 2.4: In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains, no two letter gTLDs should be introduced http://gac.icann.org/system/files/gTLD_principles_0.pdf

- **Comments from the Community**

  o http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm

E. **What Concerns the Community Raised**

- There is a need for clarification on the definition of "confusing similarity."

- There are questions about the definitions for "standard" vs. "community-based" TLD types.

- There is a need for objective procedures and criteria for the community priority evaluation.

- A special form of resolution should be considered for a contention set involving two community-based applicants of equal strength, so that such a contention set is not required to go to auction.

- There is concern over using the auction process (and the receipt of auction proceeds) as a means to resolve contention for TLDs.

- There is concern that the string similarity algorithm only accounts for visual similarity, and does not accurately gauge the human reaction of confusion.

- Proceeds from auctions may be used for the benefit of the DNS and be spent through creation of a foundation that includes oversight by the community.

F.   **What Factors the Board Found to Be Significant**

- There should be a consistent and predictable model for the resolution of contention among applicants for gTLD strings;

- The process should be kept as straightforward as possible to avoid unnecessary risks;

- There is potential harm in confusingly similar TLD strings that extends not only to the interests of existing TLD operators, but also to Internet users; and

- The protections set forth in the current string similarity process will safeguard both user and operator interests;

IV.   **The Board's Reasons for Supporting the String Contention Process Contemplated in the new gTLD Program**

- The Algorithm is a tool to aid the string similarity analysis.

  o The algorithm will be a consistent and predicable tool to inform the string confusion element of the new gTLD program. The algorithm will provide guidance to applicants and evaluators;

  o The role of the algorithm is primarily indicative; it is intended to provide informational data to the panel of examiners and expedite their review.

- o The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes

- Human judgment will be the determining factor in the final decisions regarding confusing similarity for all proposed strings.

- Contending applicants should be given the opportunity to settle contention among themselves – this will result in innovative and economic solutions.

- The community priority evaluation stage of the string contention process features sufficient criteria to: (a) validate the designation given to community-based applications; and (b) assess a preference for community-based applications in a contention set. Both the GNSO Final Report and GAC Principles encourage the special consideration of applications that are supported by communities. http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm; http://gac.icann.org/system/files/gTLD_principles_0.pdf

  - The GAC Principle that two-letter TLDs should not be delegated to avoid confusion with ccTLDs was adopted.

  - There are advantages to an auction as a resolution mechanism of last resort.

    - o It is an objective test; other means are subjective and might give unfair results, are unpredictable, and might be subject to abuses.

    - o It assures the round will finish in a timely way.

    - o It is thought than few auctions will actually occur. A negotiated settlement will be a lower-cost solution for the parties than an auction. The availability of auctions will encourage parties to settle. Even if there are proceeds from auctions, these will be expended in a process that includes independent oversight.

    - o Ascending clock auctions typically employ an "activity rule," where a bidder needs to have been "in" at early prices in the auction in order to continue to stay "in" at later prices. This is useful because in an ascending clock auction, bidders are

informed of the number of contending applications that have remained "in" after each round, but not their identities. With the specified activity rule, this demand information has real significance, as a competitor who has exited the auction cannot later re-enter.

- The auctioneer in ascending clock auctions has the ability to pace the speed at which prices increase. This facet has greatest importance if related items are auctioned simultaneously, as their prices can then be paced to increase together in relation to the level of demand. This has the advantage of providing bidders with information about the level of demand for other new gTLDs—and hence the value of a new gTLD—while the auction is still in progress.

9. ICANN Board Rationale On Trademark Protection in the New gTLD Program

9. ICANN Board Rationale On Trademark Protection in the New gTLD Program

I.   Introduction

One of ICANN's core values is "[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest." http://www.icann.org/en/general/bylaws.htm. In furtherance of this core value, ICANN is committed to ensuring that the concerns of all community members, including trademark holders, are considered and addressed to the extent practicable before launching the new generic top level domain ("gTLD") program.

ICANN has long recognized the importance of ensuring that the introduction of new gTLDs is conducted consistently with the protection of the rights of trademark holders, communities and other rights holders from abusive registration and infringement. In each previous expansion to the domain name system ("DNS"), the protection of legal rights of third parties was a feature of the application and evaluation process. For the new gTLD Program, ICANN has sought input from numerous stakeholders, including trademark holders, trademark lawyers, businesses, other constituencies and governments, to devise a multi-layered approach to protecting the rights of third parties. The approach includes a pre-delegation dispute resolution process for protecting existing legal rights at the top level. Also included in this approach are numerous rights protection mechanisms at the second level such as: (i) the establishment of a trademark clearinghouse to support both sunrise and trademark claims processes, a trademark post-delegation dispute resolution procedure (PDDRP), the Uniform Rapid Suspension System (URS) and the requirement for registries to maintain a thick Whois database. Of course, also available to all is the existing, long-standing and tested Uniform Domain Name Dispute Resolution Policy (UDRP).

II.   History of the Board's Consideration of Trademark Protection

This section contains a brief history of significant actions taken to address trademark protection in the new gTLD program.

- On 1 February 2007, the Generic Names Supporting Organization ("GNSO") Council approved a request to form a Working Group on

Protecting the Rights of Others.
http://gnso.icann.org/meetings/minutes-gnso-01feb07.html

- On 15 March 2007, the GNSO Council ratified a Statement of Work for the newly-formed GNSO Working Group on Protecting the Rights of Others. http://gnso.icann.org/meetings/minutes-gnso-15mar07.html

- On 26 June 2007, the GNSO Working Group on Protecting the Rights of Others published its Final Report. gnso.icann.org/drafts/pro-wg-final-report-26jun07.pdf

- On 8 August 2008, the GNSO issues its "Final Report – Introduction of New Generic Top-Level Domains," including a recommendation that "Strings must not infringe the existing legal rights of others". http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- On 21 December 2007, ICANN requested "expressions of interest from potential dispute resolution service providers for the new gTLD program." http://www.icann.org/en/topics/drsp-call-for-expressions-of-interest.pdf

- On 26 June 2008, the Board adopted the GNSO's Policy recommendations for the introduction of new gTLDs. See Board Resolution at http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171; see Board Meeting Transcript at https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt

- On 22 October 2008, ICANN published an Explanatory Memorandum on Protection of Rights of Others in New gTLDs and solicited comments. http://www.icann.org/en/topics/new-gtlds/protection-rights-22oct08-en.pdf

- After receiving significant community input, on 6 March 2009, the Board recognized trademark protection in the new gTLD program as an issue requiring additional input and analysis, the resolution of which would benefit the new gTLD program. The Board requested that the GNSO's Intellectual Property Constituency convene an Implementation Recommendation Team ("IRT") to solicit input,

analyze the issue, and prepare draft and final reports.
http://www.icann.org/en/minutes/resolutions-06mar09.htm#07

- On 24 April 2009, the IRT published its Preliminary Report for public comment.
http://www.icann.org/en/topics/new-gtlds/irt-draft-report-trademark-protection-24apr09-en.pdf; see public comments at http://forum.icann.org/lists/irt-draft-report/

- On 16 May 2009, the Board participated in a workshop on issues related to the new gTLD program, including trademark protections in particular.

- On 29 May 2009, the IRT published its Final Report and an "Open Letter from the IRT Introducing our Work." ICANN and the IRT recognized that a significant intersection exists in between strategies to facilitate trademark protection and strategies to mitigate the risk of increased malicious conduct on the Internet.
http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf

- On 20 June 2009, the Board participated in another workshop on issues related to the new gTLD program, including trademark protection.

- On 21 June 2009, the IRT presented its Final Report to the ICANN Board at the ICANN Sydney Open Meeting and provided briefings to the GNSO, interested constituencies and others.
http://syd.icann.org/full-sched

- On 26 June 2009, the Board acknowledged and thanked the IRT for its "intensive engagement" and its "detailed and articulate proposals."
http://www.icann.org/en/minutes/resolutions-26jun09.htm

- Also on 26 June 2009, the Board acknowledged that ICANN staff had posted material on the new Draft Applicant Guidebook for public comment; thanked the community; and requested that all further comments be submitted by the close of the comment period on 20 July 2009. The Board also requested that the ICANN staff prepare a comprehensive set of implementation documents before the Board's meeting on 30 October 2009. See Board

Resolution at https://icann.org/en/minutes/resolutions-26jun09.htm; see Board Meeting Transcript at http://syd.icann.org/files/meetings/sydney2009/transcript-board-meeting-26jun09-en.txt

- On 12 September 2009, the Board continued its discussion about trademark protection in new gTLDs at a Board Retreat.

- On 12 October 2009, the Board sent a letter to the GNSO, requesting that it review trademark protection policy for the new gTLD program as described in the Draft Applicant Guidebook and accompanying memoranda, including the proposals for a Trademark Clearinghouse and a Uniform Rapid Suspension System. http://www.gnso.icann.org/correspondence/beckstrom-to-gnso-council-12oct09-en.pdf

- On 28 October 2009, the GNSO adopted a resolution creating the Special Trademarks Issues review team ("STI"), which included representatives from each stakeholder group, the At-Large community, nominating committee appointees, and the Governmental Advisory Committee ("GAC"). http://gnso.icann.org/resolutions/#200910

- On 30 October 2009, the Board issued a resolution encouraging additional comments on the Draft Applicant Guidebook and new gTLD program. See Board Resolution at https://icann.org/en/minutes/resolutions-30oct09-en.htm; see Board Meeting Transcript at https://icann.org/en/minutes/index-2009.htm

- On 11 December 2009, the STI published its Report. See link to Report in http://gnso.icann.org/resolutions/#200912

- On 18 December 2009, the GNSO unanimously approved the recommendations contained in the STI's report. http://gnso.icann.org/resolutions/#200912

- On 15 February 2010, ICANN published for public comment proposals for trademark protection in the new gTLD program, including the Trademark Clearinghouse, a Uniform Rapid Suspension System, and a post-delegation dispute resolution procedure.

http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm

- On 10 March 2010, the GAC outlined to the Board some concerns and recommendations for the new gTLD program and its comments on version 3 of the Draft Applicant Guidebook. http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-10mar10-en.pdf

- On 12 March 2010, the Board acknowledged the community recommendations for trademark protections in the new gTLD program, including the development of a Trademark Clearinghouse and a Uniform Rapid Suspension System; resolved that the proposals for both be incorporated into version 4 of the Draft Applicant Guidebook; and directed ICANN staff to review any additional comments and develop final versions of the proposals for inclusion in the Draft Applicant Guidebook. http://www.icann.org/en/minutes/resolutions-12mar10-en.htm

- Also on 12 March 2010, the Board approved the concept of a post-delegation dispute resolution procedure; and directed ICANN staff to review any additional comments and synthesize them, as appropriate, into a final draft procedure, and include the procedure in version 4 of the Draft Applicant Guidebook. http://www.icann.org/en/minutes/resolutions-12mar10-en.htm

- On 28 May 2010, in response to further comments from the community, ICANN published for public comment revised proposals for the Trademark Clearinghouse, Uniform Rapid Suspension System, and a post-delegation dispute resolution procedure. http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm

- On 5 August 2010, the Board responded to the GAC's comments on version 3 of the Draft Applicant Guidebook and described the steps it took to protect trademarks in version 4 of the Draft Applicant Guidebook. http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-05aug10-en.pdf

- On 23 September 2010, the GAC outlined to the Board its concerns and recommendations for the new gTLD program and its comments on version 4 of the Draft Applicant Guidebook.

http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf

- On 24-25 September 2010, the Board participated in another workshop on issues related to the new gTLD program, including trademark protections and passed some resolutions specifically addressing trademark protections.
http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6

- On 12 November 2010, ICANN posted for public comment version 5 of the Draft Applicant Guidebook, incorporating a number of protections for the rights of others, and a series of papers explaining certain aspects of the current proposals for the Trademark Clearinghouse, the Uniform Rapid Suspension System and related comments and analysis.
http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf

- On 10 December 2010, the Board resolved that ICANN had addressed the issue of trademark protection in new gTLDs by adopting and implementing various measures, including the establishment of a Trademark Clearinghouse, the Uniform Rapid Suspension System and the Post-Delegation Dispute Resolution Procedure. The Board further stated that these solutions reflected the negotiated position of the ICANN community, but that ICANN would continue to take into account public comment and the advice of the GAC.
See Board Resolution at https://icann.org/en/minutes/resolutions-10dec10-en.htm; see Board Meeting Minutes at https://icann.org/en/minutes/minutes-10dec10-en.htm

- On 21 February 2011, ICANN published numerous briefing papers on the trademark issues the GAC had identified as "outstanding" in September 2010.
http://www.icann.org/en/announcements/announcement-6-21feb11-en.htm

- On 23 February 2011, the GAC issued it "Indicative Scorecard" which included 30 specific recommendations relating to trademark protections on which it intended to consult with the.

http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf

- On 28 February 2011 and 1 March 2011, the GAC and the Board participated in a special two-day consultation to address the remaining outstanding issues related to the new gTLD program, including certain issues related to trademark protection. http://www.icann.org/en/announcements/announcement-23feb11-en.htm

- On 4 March 2011, the Board published its comments on the GAC Scorecard. http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf

- On 15 April 2011, ICANN published an Explanatory Memorandum on Trademark Protection in the new gTLD program. http://www.icann.org/en/topics/new-gtlds/trademark-protection-claims-use-15apr11-en.pdf

- Also on 15 April 2011, ICANN posted for comment version 6 of the Draft Applicant Guidebook, incorporating additional protections for the rights of others. http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm

- Also on 15 April 2011, ICANN issued "Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response" http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf

- On 19 April 2011, the GAC issued "Remaining points of difference between the ICANN Board and the Governmental Advisory Committee on New gTLD Rights Protection Mechanisms" http://gac.icann.org/system/files/20110419-GAC_comments_on_NewgTLD_Rights_Protection.pdf

- On 26 May 2011, the GAC issued "GAC comments on the Applicant Guidebook (April 15th, 2011 version)" http://www.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf

- On 30 May 2011, ICANN posted the current version of the Applicant Guidebook.
  http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm

III.   The Board's Analysis of Trademark Protection in the New gTLD Program

A.   Why the Board is Addressing This Issue Now

- ICANN's mission statement and one of its founding principles is to promote competition. The expansion of gTLDs will allow for more innovation and choice in the Internet's addressing system. The ICANN Board seeks to implement the new gTLD program together with measures designed to protect the rights of others on the Internet.
  http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm

- The Board endorsed GNSO policy recommendation states that gTLD strings should not infringe the rights of others. The Board took that recommendation as an emphasis on the need to protect intellectual property rights.

- ICANN committed to the Internet community and governments, including the U.S. Department of Commerce that it would address trademark protection in new gTLDs prior to implementing the program.

- The ICANN Board is committed to making decisions based on solid factual investigation and expert analysis.

B.   Who the Board Consulted

- The GNSO
  http://gnso.icann.org/

- The GAC
  http://gac.icann.org/

- The ICANN Implementation Recommendation Team ("IRT")
  https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:20090407232008-0-9336/original/IRT-Directory.pdf

- The GNSO's Special Trademark Issues Working Team ("STI")

- The At-Large Advisory Committee ("ALAC")
  http://www.icann.org/en/committees/alac/

- All other stakeholders and members of the community

- Legal counsel

C.   What Significant Non-Privileged Materials the Board Reviewed

- In addition to all public comments received on all versions of the Applicant Guidebook, as well as all relevant GAC Communiqués (*see* http://gac.icann.org/communiques), the ICANN Board reviewed the following reports from Stakeholders:

  o 1 June 2007 GNSO Working Group on Protecting the Rights of Others' Final Report
    http://www.gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf

  o 8 August 2007 GNSO Final Report – Introduction of New Generic Top Level Domains.
    http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

  o 24 April 2009 IRT Draft Report and Public Comment Summary
    http://forum.icann.org/lists/irt-draft-report/pdfuyqR57X82f.pdf

  o 24 April 2009 IRT Preliminary Report, and public comment thereon
    http://www.icann.org/en/topics/new-gtlds/irt-draft-report-trademark-protection-24apr09-en.pdf; see public comments at http://forum.icann.org/lists/irt-draft-report/

  o 29 May 2009 IRT Final Report
    http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf

  o 29 May 2009 Implementation Recommendation Team Final Draft Report to ICANN Board

http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf

- o 4 October 2009 ICANN Comment and Analysis on IRT Report: Post-Delegation Dispute Mechanism and Other Topics http://www.icann.org/en/topics/new-gtlds/summary-analysis-irt-final-report-04oct09-en.pdf

- o 11 December 2009, STI Report
  See link to Report in
  http://gnso.icann.org/resolutions/#200912

- o 12 December 2009 letter from the members of the former IRT to ICANN unanimously supporting the work of the STI process and recommendations concerning a trademark clearinghouse and a mandatory Uniform Rapid Suspension system http://www.icann.org/en/correspondence/irt-group-to-dengate-thrush-15dec09-en.pdf

- o 23 February 2011 GAC "Indicative Scorecard" http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf

- o 19 April 2011 GAC issued "Remaining points of difference between the ICANN Board and the Governmental Advisory Committee on New gTLD Rights Protection Mechanisms" http://gac.icann.org/system/files/20110419-GAC_comments_on_NewgTLD_Rights_Protection.pdf

- o 26 May 2011, the GAC issued "GAC comments on the Applicant Guidebook (April 15th, 2011 version)" http://www.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf

- • ICANN prepared materials

- o Each version of the Applicant Guidebook, including all ICANN created explanatory memoranda and the specific proposals for trademark protections, along with hundreds of pages of public comment summaries and analysis related to trademark protections.
  (i) http://www.icann.org/en/topics/new-gtlds/comments-

en.htm; (ii) http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm#expmem; (iii) http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm; (iv) http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm; (v) http://www.icann.org/en/topics/new-gtlds/gnso-consultations-reports-en.htm; (vi) http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm; (vii) http://www.icann.org/en/topics/new-gtlds/summaries-4-en.htm; (viii) http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm; (ix) http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm; (x) http://www.icann.org/en/topics/new-gtlds/dag-en.htm; (xi) http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm; and (xii) http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm

D.   What Concerns the Community Raised

- There is a need for adequate protection of intellectual property rights in new and existing gTLDs.

- If the introduction of new gTLDs leads to increased malicious conduct on the Internet, then trademark owners may pay a disproportionate percentage of costs associated with enforcing standards of behavior.

- Defensive domain name registrations in new gTLDs generate substantial costs for trademark owners.

- Registry behavior may cause or materially contribute to trademark abuse, whether through a TLD or through domain name registrations in the TLD.

- Legal rights that a party seeks to protect through Rights Protection Mechanisms should be capable of being authenticated, at least if the authenticity of such rights is challenged.

- Administrative dispute resolution procedures provide trademark owners with relatively swift and inexpensive alternatives to arbitration and litigation.

- Recurring sanctions may not be a sufficient remedy for wrongful conduct; suspension and termination may be necessary remedies.

- Policies developed to prevent and remedy trademark abuses in the DNS are expected to build upon the framework of existing intellectual property laws to minimize burdens on trademark owners and contribute to the orderly functioning of the DNS.

- The introduction of new gTLDs may lead to consumer confusion if one trademark owner registers its mark in one gTLD while another registers an identical or similar mark in another gTLD. To the extent that Internet users are unable (or become unaccustomed) to associate one mark with a specific business origin, the distinctive character of the mark will be diluted.

E. **What Steps ICANN Has Taken or Is Taking to Protect the Rights of Others in New gTLDs**

The Board believes the following measures will significantly help to protect the rights of others on the Internet. ICANN has incorporated the majority of these measures into the current version of the Applicant Guidebook and the registry agreement, and its efforts to implement the remaining measures are ongoing:

- Pre-delegation objection procedures.

- Mandatory publication by new gTLDs of policy statements on rights protection mechanisms, including measures that discourage registration of domain names that infringe intellectual property rights, reservation of specific names to prevent inappropriate name registrations, minimization of abusive registrations, compliance with applicable trademark and anti-cyber squatting legislation, protections for famous name and trademark owners and other measures.

- Mandatory maintenance of thick Whois records to ensure greater accessibility and improved stability of records.

- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for trademark holders, registries, and registrars

- The requirement for all new registries to offer <u>both</u> a Trademarks Claims service and a Sunrise period.

- Post-delegation dispute resolution procedures that allow rights holders to address infringing activity by a registry operator that may be taking place after delegation.

- Implementation of the Uniform Rapid Suspension System that provides a streamline, lower-cost mechanism to suspend infringing names

- The continued application of the Uniform Domain Name Dispute Resolution Policy on all new gTLDs.

F.   What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of trademark protection in the new gTLD program. The Board found the following factors to be significant:

- The GNSO's Working Group on Protecting the Rights of Others was not able to reach consensus on "best practices" for Rights Protection Mechanisms;

- While economic studies revealed that there will be both benefits and cost to trademark holders associated with new gTLDs, no determination could be made that the costs outweigh the benefits.

- New gTLDs would promote consumer welfare.

- The availability and efficacy of dispute resolution mechanisms and appropriately-designed modifications of ICANN procedures for protecting intellectual property.

- The need for dispute resolution mechanisms to be comprehensive enough to expand with the addition of new gTLDs.

- The need to balance the protection of trademark rights with the practical interests of compliant registry operators to minimize operational burdens and the legitimate expectations of good faith domain name registrants.

- The risk of increasing exposure of participants to litigation.

- The lack of reported problems with ICANN's previous introductions of new TLDs.

IV. The Board's Reasons for Proceeding to Launch the New gTLD Program While Implementing Measures to Protect Trademarks and Other Rights

- ICANN's "default" position should be for creating more competition as opposed to having rules that restrict the ability of Internet stakeholders to innovate.

- New gTLDs offer new and innovative opportunities to Internet stakeholders.

- Brand owners might more easily create consumer awareness around their brands as a top-level name, reducing the effectiveness of phishing and other abuses.

- Revised applicant procedures and agreements reflecting the measures to mitigate the risk of malicious conduct will permit ICANN to address certain risks of abuse contractually and also will permit ICANN to refer abuses to appropriate authorities. ICANN can amend contracts and the applicant guidebook to address harms that may arise as a direct or indirect result of the new gTLD program.

- ICANN has addressed the principal concerns raised by stakeholders about the potential for proliferation of malicious conduct in the new gTLD space by implementing measures to mitigate that risk, including centralized zone file access, a high security TLD designation and other mechanisms. A combination of verified security measures and the implementation of DNSSEC will allow users to find and use more trusted DNS environments within the TLD market.

- ICANN has addressed the principal concerns raised by stakeholders about the protection of trademarks in the new gTLD space by

implementing other measures to enhance protections for trademarks and other rights, including pre-delegation dispute resolution procedures, a trademark clearinghouse, and post-delegation dispute resolution procedures.

- To the extent that there are costs to trademark owners or others, ICANN has worked with the community to address those concerns, and ICANN pledges to continue that effort.

Resp. Ex. 5

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ICANN Documentary Information Disclosure Policy

NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on ICANN¹s website, unless there are exceptional circumstances requiring further redaction.

ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

A principal element of ICANN's approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN makes available on its website as a matter of course.

Specifically, ICANN has:

- Identified many of the categories of documents that are already made public as a matter of due course

- Developed a time frame for responding to requests for information not already publicly available

- Identified specific conditions for nondisclosure of information

- Described the mechanism under which requestors may appeal a denial

Resources - ICANN

- Groups

  Business

- Contractual
  Compliance

- Registrars

- Registries

  Operational
  Metrics

- Identifier
  Systems
  Security,
  Stability and
  Resiliency (IS-
  SSR)

- ccTLDs

- Internationalized
  Domain Names

- Universal
  Acceptance
  Initiative

- Policy

- Public Comment

- Technical
  Functions

- Contact

- Help

- Annual Reports – http://www.icann.org/en/about/annual-report

- Articles of Incorporation –
  http://www.icann.org/en/about/governance/articles

- Board Meeting Transcripts, Minutes and Resolutions –
  http://www.icann.org/en/groups/board/meetings

- Budget – http://www.icann.org/en/about/financials

- Bylaws (current) – http://www.icann.org/en/about/governance/bylaws

- Bylaws (archives) –
  http://www.icann.org/en/about/governance/bylaws/archive

- Correspondence – http://www.icann.org/correspondence/

- Financial Information – http://www.icann.org/en/about/financials

- Litigation documents – http://www.icann.org/en/news/litigation

- Major agreements – http://www.icann.org/en/about/agreements

- Monthly Registry reports –
  http://www.icann.org/en/resources/registries/reports

- Operating Plan – http://www.icann.org/en/about/planning

- Policy documents – http://www.icann.org/en/general/policy.html

- Speeches, Presentations & Publications –
  http://www.icann.org/presentations

- Strategic Plan – http://www.icann.org/en/about/planning

- Material information relating to the Address Supporting Organization
  (ASO) – http://aso.icann.org/docs including ASO policy documents,
  Regional Internet Registry (RIR) policy documents, guidelines and
  procedures, meeting agendas and minutes, presentations, routing
  statistics, and information regarding the RIRs

- Material information relating to the Generic Supporting Organization
  (GNSO) – http://gnso.icann.org – including correspondence and
  presentations, council resolutions, requests for comments, draft
  documents, policies, reference documents (see
  http://gnso.icann.org/reference-documents.htm), and council
  administration documents (see http://gnso.icann.org/council/docs.shtml).

- Material information relating to the country code Names Supporting

Organization (ccNSO) – http://ccnso.icann.org – including meeting agendas, minutes, reports, and presentations

- Material information relating to the At Large Advisory Committee (ALAC) – http://atlarge.icann.org – including correspondence, statements, and meeting minutes

- Material information relating to the Governmental Advisory Committee (GAC) – http://gac.icann.org/web/index.shtml – including operating principles, gTLD principles, ccTLD principles, principles regarding gTLD Whois issues, communiqués, and meeting transcripts, and agendas

- Material information relating to the Root Server Advisory Committee (RSSAC) – http://www.icann.org/en/groups/rssac – including meeting minutes and information surrounding ongoing projects

- Material information relating to the Security and Stability Advisory Committee (SSAC) – http://www.icann.org/en/groups/ssac – including its charter, various presentations, work plans, reports, and advisories

Responding to Information Requests

If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.

Defined Conditions for Nondisclosure

ICANN has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and

ICANN agents.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.

- Trade secrets and commercial and financial information not publicly disclosed by ICANN.

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN shall not be required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.

Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN, the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN Bylaws, which can be found at http://www.icann.org/en/about/governance/bylaws.

DIDP Requests and Responses

Request submitted under the DIDP and ICANN responses are available here: http://www.icann.org/en/about/transparency

Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at http://www.icann.org/en/groups/board/meetings) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm.

To submit a request, send an email to didp@icann.org

You Tube

Twitter

LinkedIn

Flickr

Facebook

RSS Feeds

Community Wiki

ICANN Blog

Who We Are

Get Started

Learning

Participate

Groups

Board

President's Corner

Staff

Careers

Newsletter

Development and Public Responsibility

Contact Us

Offices

Global Support

Security Team

PGP Keys

Certificate Authority

Registry Liaison

AOC Review

Organizational Reviews

Request a Speaker

For Journalists

Accountability & Transparency

Accountability Mechanisms

Independent Review Process

Request for Reconsideration

Ombudsman

Governance

Documents

Agreements

AOC Review

Annual Report

Financials

Document Disclosure

Planning

Dashboard Beta

RFPs

Litigation

Correspondence

Help

Dispute Resolution

Domain Name Dispute Resolution

Name Collision

Registrar Problems

WHOIS

Privacy Policy   Terms of Service   Cookie Policy

Resp. Ex. 6

PROCESS FOR RESPONDING TO ICANN'S DOCUMENTARY INFORMATION DISCLOSURE POLICY (DIDP) REQUESTS

The following sets forth the process guidelines for responding to a DIDP Request.

1. Upon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested and the staff members who may be in possession of or have knowledge regarding information responsive to the Request.

2. Staff conducts interviews of the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.

3. Documents collected are reviewed for responsiveness.

4. A review is conducted as to whether the documents identified as responsive to the Request are subject to any of the Defined Conditions for Nondisclosure identified at http://www.icann.org/en/about/transparency/didp.

5. To the extent that any responsive documents fall within any Defined Conditions for Nondisclosure, a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.

6. Documents that have been determined as responsive and appropriate for public disclosure are posted in the appropriate locations on ICANN's website. To the extent that the publication of any documents is appropriate but premature at the time the Response is due, ICANN will so indicate in its Response to the DIDP Request and notify the Requester upon publication.

7. Staff prepares a Response to the DIDP Request within thirty calendar days from receipt of the Request. The Response will be sent to the Requester by email. The Response and Request will also be posted on the DIDP page at http://www.icann.org/en/about/transparency in accordance with the posting guidelines set forth at http://www.icann.org/en/about/transparency/didp.

Resp. Ex. 7

DRAFT - New gTLD Program - Evaluation Process

Application period closes

Applicants register in TAS and pay deposit

Applicants submit applications and evaluation fees

ICANN starts Administrative Completeness Check

ICANN posts applications

ICANN ends Administrative Completeness Check

Application period opens

- *Application Comment & Early Warning Periods Open - 60 days*

- *Objection Period Opens - 7 months*

Background Screening

Application Comment & Early Warning Periods Close

Applicant receives Early Warning?

Yes

Applicant decision?

Withdraw

Ineligible for further review

No

Continue

Applicants have 21 days from close of Early Warning Period to decide.

String Similarity

DNS Stability

Geographic Names

Technical & Operational Capability

Financial Capability

Registry Services

IE results posted

- Objection filing period closes

- Receipt of GAC Advice expected

Board Consideration

Yes

Is applicant subject to GAC Advice?

No

A

Key	
	Key
	Application - Module 1
	Initial Evaluation - Module 2
	Extended Evauation - Module 2
	Dispute Resolution Proceedings - Module 3
	String Contention - Module 4
	Transition to Delegation - Module 5
Thicker Line	Indicates quickest path to delegation

DRAFT - New gTLD Program - Evaluation Process, Page 2

ICANN

A

Extended Evaluation and Dispute Resolution will run concurrently

Applicant passes all elements of Initial Evaluation?

No →

Yes ↓

Applicant elects to proceed to Extended Evaluation (EE)

No

Yes ↓

Applicant enters EE for any combination of the four elements below:
- Technical & Operational
- Financial
- Geographic Names
- Registry Services

Applicant passes all elements of Extended Evaluation?

No ↓

Ineligible for further review

The application can be objected to based upon any combination of the four objection grounds at the same time. Additionally, the application may face multiple objections on the same objection ground.

Are there any objections?

Yes ←   No →

String Confusion proceedings

Legal Rights proceedings

Limited Public Interest proceedings

Community Objection proceedings

Does applicant clear all objections?

No ←   Yes →

Is there string contention?

Yes   No →

Contract execution

Pre-delegation check

Delegation

Are applicants with contending strings able to self-resolve contention?

Yes

No →

One or more community-based applicant(s) elected Community Priority?

Yes ←   No →

Community Priority Evaluation

No ↓

Is there a clear winner?

No →   Yes

Auction proceedings

Successful applicant secures string

Resp. Ex. 8

RECOMMENDATION

OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-5

1 AUGUST 2013[1]

On 7 July 2013, Booking.com B.V. ("Booking.com"), through its counsel, Crowell &

Moring, submitted a reconsideration request ("Request"). The Request was revised from

Booking.com's 28 March 2013 submission of a similar reconsideration request, which was put

on hold pending the completion of a request pursuant to ICANN's Documentary Information

Disclosure Policy ("DIDP").

The Request asked the Board to reconsider the ICANN staff action of 26 February 2013,

when the results of the String Similarity Panel were posted for the New gTLD Program.

Specifically, the Request seeks reconsideration of the placement of the applications for .hotels

and .hoteis into a string similarity contention set.

I.   Relevant Bylaws

As the Request is deemed filed as of the original 28 March 2013 submission, this Request

was submitted and should be evaluated under the Bylaws that were in effect from 20 December

2012 through 10 April 2013. Article IV, Section 2.2 of that version of ICANN's Bylaws states

in relevant part that any entity may submit a request for reconsideration or review of an ICANN

action or inaction to the extent that it has been adversely affected by:

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[1] At its 1 August 2013 meeting, the Board Governance Committee deliberated and reached a decision regarding this Recommendation. During the discussion, however, the BGC noted revisions that were required to the draft Recommendation in order to align with the BGC's decision. After revision and allowing for the BGC member review, the BGC Recommendation on Request 13-5 was finalized and submitted for posting on 21 August 2013.

> (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.

A third criteria was added to the Bylaws effective 11 April 2013, following the Board's adoption of expert recommendations for revisions to the Reconsideration process. That third basis for reconsideration, focusing on Board rather than staff conduct, is "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." (See http://www.icann.org/en/about/governance/bylaws#IV.)

When challenging a staff action or inaction, a request must contain, among other things, a detailed explanation of the facts as presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). See Article IV §2.6(g) of the 20 December 2012 version of Bylaws (http://www.icann.org/en/about/governance/bylaws/bylaws-20dec12-en.htm#IV) and the current Reconsideration form effective as of 11 April 2013 (http://www.icann.org/en/groups/board/governance/reconsideration/request-form-11apr13-en.doc).

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.

The Request was originally received on 28 March 2013, which makes it timely under the then effective Bylaws.[2] Bylaws, Art. IV, § 2.5.

II.   Background

Within the New gTLD Program, every applied-for string has been subjected to the String Similarity Review set out at Section 2.2.1.1 of the Applicant Guidebook. The String Similarity Review checks each applied-for string against existing TLDs, reserved names and other applied-for TLD strings (among other items) for "visual string similarities that would create a probability of user confusion." (Applicant Guidebook, Section 2.2.1.1.1.) If applied-for strings are determined to be visually identical or similar to each other, the strings will be placed in a contention set, which is then resolved pursuant to the contention resolution processes in Module 4 of the Applicant Guidebook. If a contention set is created, only one of the strings within that contention set may ultimately be approved for delegation.

After issuing a request for proposals, ICANN selected InterConnect Communications ("ICC") to perform the string similarity review called for in the Applicant Guidebook. On 26 February 2013, ICANN posted ICC's report, which included two non-exact match contention sets (.hotels/.hoteis and .unicorn/.unicom) as well as 230 exact match contention sets. http://www.icann.org/en/news/announcements/announcement-26feb13-en.htm. The String Similarity Review was performed in accordance with process documentation posted at http://newgtlds.icann.org/en/program-status/evaluation-panels/geo-names-similarity-process-07jun13-en.pdf. As part of ICANN's acceptance of the ICC's results, a quality assurance review

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[2] ICANN staff and the requester communicated regarding the holds placed on the Request pending the DIDP Response, and the requester met all agreed-upon deadlines, thereby maintaining the timely status of this Request.

was performed over a random sampling of applications to, among other things, test whether the process referenced above was followed.

Booking.com is an applicant for the .hotels string. As a result of being placed in a contention set, .hotels and .hoteis cannot both proceed to delegation. Booking.com will have to resort to private negotiations with the applicant for .hoteis, or proceed to an auction to resolve the contention issue. Request, page 4.

Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision. Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change.

III.   Analysis of Booking.com's Request for Reconsideration

Booking.com seeks reconsideration and reversal of the decision to place .hotels and .hoteis in a non-exact match contention set. Alternatively, Booking.com requests that an outcome of the Reconsideration process could be to provide "detailed analysis and reasoning regarding the decision to place .hotels into a non-exact match contention set" so that Booking.com may "respond" before ICANN takes a "final decision." (Request, Page 9.)

A.   Booking.com's Arguments of Non-Confusability Do Not Demonstrate Process Violations

The main focus of Booking.com's Request is that .hotels and .hoteis can co-exist in the root zone without concern of confusability. (Request, pages 10 – 12.) To support this assertion, Booking.com cites to the opinion of an independent expert that was not part of the string

similarity review panel (Request, pages 10-11), references the intended uses of the .hotels

and .hoteis strings (Request, page 11) and the difference in language populations that is expected

to be using .hotels and .hoteis (Request, page 11), references ccTLDs that coexist with

interchangeable "i"s and "l"s (Request, page 11), notes the keyboard location of "i"s and "l"s

(Request, page 12), and contends that potential users who get to the wrong page would

understand the error they made to get there (Request, page 12).

Booking.com does not suggest that the process for String Similarity Review set out in the

Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN

policy in accepting the String Similarity Review Panel ("Panel") decision on placing .hotels

and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review

methodology for assessing visual similarity should have been, as opposed to the methodology set

out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology,

Booking.com is asking the BGC (and the Board through the New gTLD Program Committee

(NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the

decision. 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.. While Booking.com

may have multiple reasons as to why it believes that its application for .hotels should not be in

contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the

decisions of the evaluation panels.[3]

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[3] Notably, Booking.com fails to reference one of the key components of the documented String Similarity Review, the use of the SWORD Algorithm, which is part of what informs the Panel in assessing the visual similarity of strings. .hotels and .hoteis score a 99% on the publicly available SWORD algorithm for visual similarity. See https://icann.sword-group.com/algorithm/.

Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that "it is contrary to ICANN policy[4] to put them in a contention set." (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the Panel. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.

Booking.com argues that the contention set decision was taken without material information, including Booking.com's linguistic expert's opinion, or other "information that would refute the mistaken contention that there is likely to be consumer confusion between '.hotels' and '.hoteis.'" (Request, page 7.) However, there is *no* process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).) As ICANN has explained to Booking.com in response to its DIDP requests for documentation regarding the String Similarity Review, the Review was based upon the methodology in the Applicant Guidebook, supplemented by the Panel's process documentation; the process does not allow for additional inputs.

Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com's call for further information on the decision to place .hotels and .hoteis in

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[4] It is clear that when referring to "policy", Booking.com is referring to the process followed by the String Similarity Review.

a contention set "to give the Requester the opportunity to respond to this, before taking a final decision" is similarly not rooted in any established ICANN process at issue. (Request, page 9.) First, upon notification to the applicants and the posting of the String Similarity Review Panel report of contention sets, the decision was already final. While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.

Second, while we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the Panel's decision, no such narrative is called for in the process. The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the Panel in applying the methodology set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of Panel's reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).[5]

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[5] In trying to bring forward this Request, Booking.com submitted requests to ICANN under the Documentary Information Disclosure Policy (DIDP). As of 25 July 2013, all requests had been responded to, including the release of the Panel process documentation as requested. See Request 20130238-1 at http://www.icann.org/en/about/transparency. Booking.com describes the information it sought through the DIDP at Pages 8 – 9 of its Request. The discussion of those requests, however, has no bearing on the outcome of this Reconsideration.

B.   Booking.com's Suggestion of the "Advisory Status" of the String Similarity Panel Decision Does Not Support Reconsideration

In its Request, Booking.com suggests that the Board has the ability to overturn the Panel's decision on .hotels/.hoteis because the Panel merely provided "advice to ICANN" and ICANN made the ultimate decision to accept that advice. Booking.com then suggests that the NGPC's acceptance of GAC advice relating to consideration of allowing singular and plural versions of strings in the New gTLD Program, as well as the NGPC's later determination that no changes were needed to the Applicant Guidebook regarding the singular/plural issue, shows the ability of the NGPC to override the Panel determinations. (Request, pages 5-6.) Booking.com's conclusions in these respects are not accurate and do not support Reconsideration.

The Panel reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the Panel, ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the Panel considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and *different* process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.

The subsequent receipt and consideration of GAC advice on singular and plural strings does not change the established process for the development of contention sets based on visual

similarity. The ICANN Bylaws require the ICANN Board to consider GAC advice on issues of

public policy (ICANN Bylaws, Art. XI, Sec. 2.1.j); therefore the Board, through the NGPC, was

obligated to respond to the GAC advice on singular and plural strings. Ultimately, the NGPC

determined that no changes were needed to the Guidebook on this issue. (Resolution

2013.06.25.NG07, at http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-

25jun13-en.htm#2.d.) Notably, neither the GAC advice nor the NGPC resolution focused on the

issue of visual similarity (which the String Similarity Review Panel was evaluating), but instead

the issue was potential consumer confusion from having singular and plural versions of the same

word in the root zone. It is unclear how the NGPC's decision on a separate topic – and a

decision that did not in any way alter or amend the work of an evaluation panel – supports

reconsideration of the development of the .hotels/.hoteis contention set.

VIII. Recommendation And Conclusion

Based on the foregoing, the BGC concludes that Booking.com has not stated proper

grounds for reconsideration and we therefore recommend that Booking.com's request be denied

without further consideration. This Request challenges a substantive decision taken by a panel in

the New gTLD Program and not the process by which that decision was taken. As stated in our

Recommendation on Request 13-2, 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

http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-nameshop-

01may13-en.pdf.

The BGC appreciates the impact to an applicant when placed in a contention set and does

not take this recommendation lightly. It is important to recall that the applicant still has the

opportunity to proceed through the New gTLD Program subject to the processes set out in the

Applicant Guidebook on contention. We further appreciate that applicants, with so much

invested and so much at stake within the evaluation process, are interested in seeking any avenue

that will allow their applications to proceed easily through evaluation. However, particularly on

an issue such as visual similarity, which is related to the security and stability of the domain

name system, there is not – nor is it desirable to have – a process for the BGC or the Board

(through the NGPC) to supplant its own determination as to the visual similarity of strings over

the guidance of an expert panel formed for that particular purpose. As there is no indication that

either the Panel or ICANN staff violated any established ICANN policy in reaching or accepting

the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request

should not proceed.

If Booking.com thinks that it has been treated *unfairly* in the new gTLD evaluation

process, and the NGPC adopts this Recommendation, Booking.com is free to ask the

Ombudsman to review this matter. (*See* ICANN Bylaws the Ombudsman shall "have the right to

have access to (but not to publish if otherwise confidential) all necessary information and records

from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and

to assist in dispute resolution where feasible (subject only to such confidentiality obligations as

are imposed by the complainant or any generally applicable confidentiality policies adopted by

ICANN)".)

Resp. Ex. 9

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☐ Registrars

☐ Registries

   Operational Metrics

☐ Identifier Systems Security, Stability and Resiliency (IS-SSR)

Minutes | New gTLD Program Committee

18 May 2013

Note: On 10 April 2012, the Board established the New gTLD Program Committee, comprised of all voting members of the Board that are not conflicted with respect to the New gTLD Program. The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of incorporation, Bylaws or ICANN's Conflicts of Interest Policy) to exercise Board-level authority for any and all issues that may arise relating to the New gTLD Program. The full scope of the Committee's authority is set forth in its charter at http://www.icann.org/en/groups/board/new-gTLD.

A Regular Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held in Amsterdam, The Netherlands on 18 May 2013 at 17:00 local time.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Fadi Chehadé (President and CEO), Chris Disspain, Bill Graham, Olga Madruga-Forti, Erika Mann, Gonzalo Navarro, Ray Plzak, George Sadowsky, Mike Silber, Judith Vazquez, and Kuo-Wei Wu.

Thomas Narten, IETF Liaison and Francisco da Silva, TLG Liaison, were in attendance as non-voting liaisons to the committee. Heather Dryden,

Initiative

☐ Policy

☐ Public Comment

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   Functions

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☐ Help

1. **Consent Agenda**
   a. Approval of Board Meeting Minutes

   b. BGC Recommendation on Reconsideration Request 13-1
      Rationale for Resolutions 2013.05.18.NG02 –
      2013.05.18.NG03

   c. BGC Recommendation on Reconsideration Request 13-2
      Rationale for Resolution 2013.05.18.NG04

2. **Main Agenda**
   a. Addressing GAC Advice from Beijing Communiqué

The Chair introduced the agenda, noting that there are items on the consent agenda and then the Committee would be discussing the GAC advice received in Beijing.

1. Consent Agenda

   The Chair introduced the items on the consent agenda and called for a vote. The Committee then took the following action:

   Resolved, the following resolutions in this Consent Agenda are approved:

   a. Approval of Board Meeting Minutes

      Resolved (2013.05.18.NG01), the New gTLD Program Committee approves the minutes of the 26 March 2013, 5 April 2013 and 11 April 2013 Meetings of the New gTLD Program Committee.

   b. BGC Recommendation on Reconsideration Request 13-1

      Whereas, Ummah's Digital, Ltd.'s ("Ummah") Reconsideration Request, Request 13-1, sought reconsideration of the staff conclusion that the Ummah gTLD application "is ineligible for further review under the New gTLD Program," which was based on the Support Applicant Review Panel (SARP) determination that Ummah's application did not meet the criteria for financial assistance.

Whereas, the BGC recommended that Reconsideration Request 13-1 be denied because Ummah has not stated proper grounds for reconsideration, and Ummah's stay request fails to satisfy the Bylaws' requirements for a stay.

Whereas, the BGC noted that "Ummah raises some interesting issues in its Request and suggests that the Board direct that the concerns raised in Ummah's Request be included in a review of the Applicant Support Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round."

Resolved (2013.05.18.NG02), the New gTLD Program Committee adopts the recommendation of the BGC that Reconsideration Request 13-1 be denied on the basis that Ummah has not stated proper grounds for reconsideration and that Ummah's stay request fails to satisfy the Bylaws' requirements for a stay.

Resolved (2013.05.18.NG03), the Board directs the President and CEO to include the concerns raised in Ummah's Reconsideration Request in the review of the Applicant Support Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round.

Rationale for Resolutions 2013.05.18.NG02 – 2013.05.18.NG03

In July 2009, as part of the comprehensive GNSO Improvements program, the ICANN Board approved the formal Charters of four new GNSO Stakeholder Groups (see ICANN Board Resolution 2009.30.07.09).

ICANN's Bylaws at the time Reconsideration Request 13-1 was filed, called for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC's recommendation with respect to Reconsideration Request 13-1 and finds the analysis sound. The full BGC Recommendation, which includes the reasons for

recommending that the Reconsideration Request be denied can be found at:
http://www.icann.org/en/groups/board/governance/reconsideration

Having a Reconsideration process set out in ICANN's Bylaws positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

To assure that ICANN continues to serve the global public interest by ensuring worldwide accessibility to the Internet and opportunities for operating a registry, ICANN will include the issues raised in Ummah's Request in its review of the Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

c. BGC Recommendation on Reconsideration Request 13-2

Whereas, Reconsideration Request 13-2, sought reconsideration of: (1) Staff and Board inaction on the consideration of Nameshop's letter of "appeal" sent after denial of Nameshop's change request to change its applied-for string in the New gTLD Program from .IDN to .INTERNET (the "Change Request"); and (ii) the decision of the Support Applicant Review Panel ("SARP") that Nameshop did not meet the criteria to be eligible for financial assistance under ICANN's Applicant Support Program.

Whereas, the BGC recommended that Reconsideration Request 13-2 be denied because Nameshop has not stated proper grounds for reconsideration.

Whereas, the BGC concluded that the Reconsideration Request 13-2 challenges: (i) an "appeal" process that does not exist; and (i) the substantive decisions taken within the New gTLD

Program on a specific application, not the processes by which those decisions were taken and that the reconsideration process is not, and has never been, a tool for requestors to seek the reevaluation of decisions.

Resolved (2013.05.18.NG04), the New gTLD Program Committee adopts the BGC's recommendation that Reconsideration Request 13-2 be denied on the basis that Nameshop has not stated proper ground for reconsideration.

Rationale for Resolution 2013.05.18.NG04

ICANN's Bylaws at the time Reconsideration Request 13-2 was filed, called for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC's recommendation with respect to Reconsideration Request 13-2 and finds the analysis sound. The full BGC Recommendation, which includes the reasons for recommending that the Reconsideration Request be denied can be found at: http://www.icann.org/en/groups/board/governance/reconsideration.

Having a Reconsideration process set out in ICANN's Bylaws positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

Request 13-2 challenges an "appeal" process that does not exist, and challenges the substantive decisions taken in implementation of the New gTLD Program on a specific application and not the processes by which those decisions were taken. Reconsideration is not, and has never been, a tool for requestors to seek the reevaluation of substantive decisions. This is an essential time to recognize and advise the ICANN community that the Board is not a mechanism for direct, de novo appeal of staff (or evaluation panel) decisions with which the requester disagrees. Seeking such relief from the Board is, in itself, in contravention of established processes and policies within ICANN.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

All members of the Committee voted in favor of Resolutions 2013.05.18.NG01, 2013.05.18.NG02, 2013.05.18.NG03, and 2013.05.18.NG04. The Resolutions carried.

2. Main Agenda

a. Addressing GAC Advice from Beijing Communiqué

Chris Disspain led the Committee in a discussion regarding the GAC Advice from the Beijing Communiqué, stressing that the Committee is not being asked to take any decisions today. Rather, there are goals to understand the timing of decisions to be taken in the future, with particular focus on those items that the Committee is likely to accept.

Akram Atallah provided an overview of a timeline for proposed action, focusing on those items of advice that are applicable across all strings, and noting that it is a priority to deal with those items first. The next in priority are the items that affect strings in related categories. The public comment is still open on the safeguard advice, and there will be time needed to provide the Board with a summary of those comments. A decision will be needed soon after to keep the Program on track.

The Chair summarized his understanding of the items that needed to be ready for decision soon after the close of the comment period: The safeguards applicable to all new gTLDs; IGO protections; the Registry Agreement; the GAC WHOIS principle; IOC/RC protections; and the category of safeguards for restricted access policies. While many on the Committee are eager to discuss the singular/plural issue and .Africa and .GCC, those decisions are not essential for moving forward with the Program.

Chris confirmed that there is a plan to deal with the individual

issues as well as the general issues. For the .Africa and .GCC pieces of advice, the Committee first has to consider the applicant input, as well as for .Islam and .Halal. Applicant comments also have to be considered on the groups of strings identified in the Communiqué. The advice on singular/plural and IGO protections are on track to be dealt with separately, and there is ongoing work for all other portions of the advice.

Thomas Narten pointed out that there could be a need for further public comment in the even that the NGPC takes a decision that requires further input.

Olga Madruga-Forti and Tarek Kamel both noted that it is important for the Committee to take the GAC Advice seriously and respond in a timely manner, and not to solely focus on the process that is not as well understood among all of the governments of the world. In addition, some of the focus on the issues raised in the Communiqué has gone beyond the governments.

Gonzalo Navarro agreed and urged the Committee to be proactive in its responses.

Heather Dryden confirmed that the members of the GAC worked carefully to create this Communiqué.

The President and CEO urged the Committee that, when appropriate, even if formal action or decision is not ripe, the Committee should indicate the direction in which it is leaning on some of the more sensitive areas of advice.

Chris confirmed that particularly in regards to the portion of Communiqué where the GAC indicated it needed further time for discussion, the progress on this will in part be based upon the outcomes of that further discussion. However, for some of the names identified, there are already objection processes underway and so the results of those objections may remove the need for GAC action. However, it is possible for the Committee to telegraph how it anticipates acting in regards to these items, particularly when provided along with a clear statement of the Committee's understanding of the GAC's position.

Olga agreed with Chris' suggestion.

Heather stressed the import of being responsive to the GAC while still allowing the objection processes to run.

Gonzalo Navarro shared his expectation that we will see heightened government participation at the Durban meeting as a result of the Communiqué, and the messaging within the GAC and the Committee will be very important.
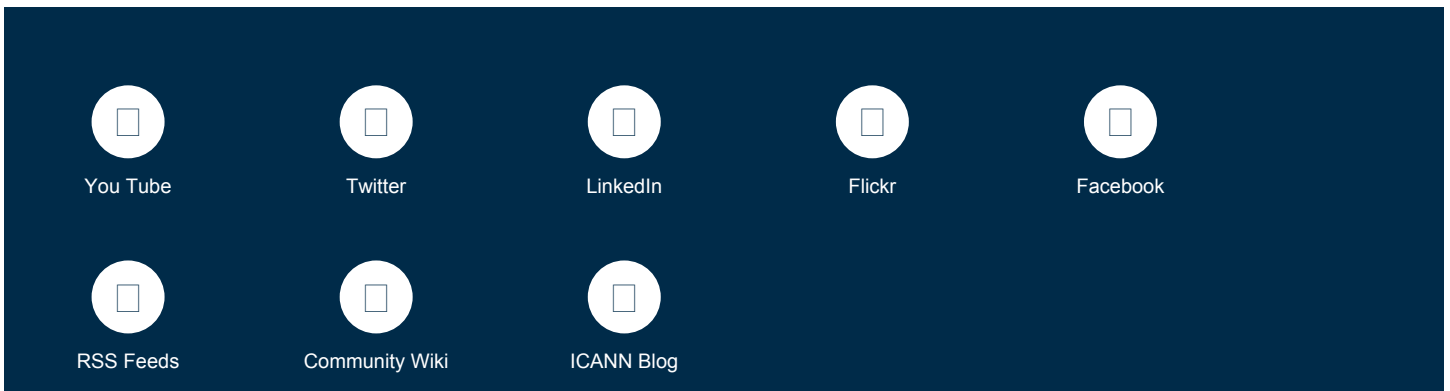
Bill Graham agreed with Heather that it is important to proceed with caution, and to not signal potential action by the Committee that may not be feasible if the GAC or objection process leads to a change in course.

Chris then walked the Committee through proposed responses for inclusion in Scorecard and the Committee suggested modifications throughout the document. While discussing the Scorecard, Chris confirmed that the Committee would have further discussion on the singular/plural issue at a future call of the Committee, as a decision on this point could have great impact regarding future rounds of the program. For the IGOs, the Committee will be going into consultation with the GAC, and a letter will be sent to the GAC thanking it for its willingness to engage. The Committee had previously stated to the GAC that the deadline for addressing the IGO acronym issue is in Durban, to allow the Committee to take a resolution as soon after Durban as possible. Chris also noted that addressing the GAC advice on RAA, the GAC Whois Principles and the IOC/Red Cross should be very straightforward. For the safeguard advice applicable to all strings, Chris briefly led the Committee through some proposed Scorecard language, and requested that staff provide the Committee with additional information and explanations for the proposed suggestions of how to address the GAC Advice. As it related to the safeguard advice for particular categories of strings, Chris noted that due to lack of time, it made sense to postpone a review of these items.

Chris then confirmed that the topic for the Committee's next call should be to address those areas that will have a 1A on the Scorecard, so that the Committee can take further action. He also agreed that the staff should provide an update to the community on the Committee's progress.

The Chair then called the meeting to a close.

Published on 19 June 2013

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Resp. Ex. 10

DETERMINATION

OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-34

22 AUGUST 2014

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Despegar Online SRL, DotHotel, Inc., dot Hotel Limited, Fegistry, LLC, Spring McCook, LLC and Top Level Domain Holdings Limited (collectively, the "the Requesters") seek reconsideration of the Community Priority Evaluation Panel's Report ("Report"), and ICANN's acceptance of that Report, finding that HOTEL Top-Level-Domain S.a.r.l.'s application for .HOTEL prevailed in Community Priority Evaluation ("CPE").

I.   Brief Summary.

All six Requesters applied for .HOTEL. HOTEL Top-Level-Domain S.a.r.l. ("Applicant") also applied for .HOTEL as a community applicant. All seven .HOTEL applications were placed into a contention set. Having submitted the only community application for .HOTEL, the Applicant was invited to and did participate in a CPE for .HOTEL. On 12 June 2014, the Application prevailed in CPE. The Requesters now claim the CPE Panel ("Panel") failed to comply with established ICANN policies and procedures in rendering its Report. Specifically, the Requesters contend the Panel: (i) improperly interpreted and applied the CPE criteria set forth in the New gTLD Applicant Guidebook ("Guidebook"); and (ii) breached "other ICANN [p]rinciples" set forth in the ICANN Bylaws. (Request, § 8, Pgs. 5-11.)

The Requesters' claims are unsupported. First, while the Request is couched in terms of the Panel's purported violations of various procedural requirements, the Requesters do not identify any misapplication of a policy or procedure, but instead challenge the merits of the Panel's Report, which is not a basis for reconsideration. Second, the Requesters' allusions to the

broad fairness principles expressed in ICANN's Bylaws cannot serve as a basis for reconsideration, as the Requesters do not identify any specific Panel action that contravenes those principles. Because the Requesters have failed to demonstrate that the Panel acted in contravention of established policy or procedure, the BGC denies Request 14-34.

II. Facts.

A. Background Facts.

All six Requesters applied for .HOTEL.

The Applicant filed a community application for .HOTEL (*i.e.*, a seventh application for .HOTEL).

On 19 February 2014, the Applicant was invited to participate in the CPE process for .HOTEL. The Applicant elected to participate in the process, and its .HOTEL community application ("Application") was forwarded to the CPE Panel assembled by the Economist Intelligence Unit ("EIU").

On 11 June 2014, the Panel issued its Report. The Panel determined the Application met the requirements specified in the Guidebook and therefore concluded that the Application prevailed in the CPE. Because the Application prevailed in CPE, each of Requesters' applications in the .HOTEL contention set will not proceed. (*See* Guidebook, § 4.2.3.)

On 12 June 2014, ICANN posted the Report on its microsite.

On 28 June 2014, the Requesters filed Request 14-34, requesting reconsideration of the Panel's determination that the Application prevailed in CPE.[1]

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[1] Reconsideration Requests must be filed within 15 days of "the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action." Bylaws, Art. IV, § 2.5.b. Requesters arguably "should have become aware of" the CPE Panel's Report on 12 June 2014, the day it was publicly posted, in which case Requesters Reconsideration Request – which was submitted on 28 June 2014 – is untimely. However, because the Requesters represent that they did not in fact become aware of the CPE Panel's Report until 13 June 2014, the BGC will consider the Request on the merits.

B. The Requesters' Claims.

The Requesters contend that the Panel failed to comply with ICANN policies and procedures in two ways. First, the Requesters claim "there are three instances where the Panel has not followed the AGB policy and processes for conducting the CPE." (Request, § 8, Pg. 5.) Second, the Requesters claim "the Panel, and ICANN staff, have breached more general ICANN policies and procedures in the conduct of this CPE." (Request, § 8, Pg. 5.)

C. Relief Requested.

The Requesters suggest "that the current finding that the Applicant has prevailed in CPE should be set aside . . . [and] should be remitted to the Panel for re-examination, with the Panel directed to have regard to [*sic*] the matters raised in the reconsideration request[.]" (Request, § 9, Pg. 11.)

III. Issues.

In view of the claims set forth in Request 14-34, the issues are whether the Panel acted in contravention of established policy or procedure by:

A. Improperly applying the criteria set forth in the Guidebook in determining that the Application prevailed in CPE; and

B. Violating other ICANN policies and procedures by: (i) providing insufficient information regarding the Panel's qualifications; (ii) failing to publicly post communications that might have taken place between the Panel and the Applicant; or (iii) providing insufficient analysis of the Panel's determination.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Priority Evaluation.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in

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accordance with specified criteria.[2] (Bylaws, Art. IV, § 2.) Dismissal of a request for

reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or

the NGPC[3] agrees to the extent that the BGC deems that further consideration by the Board or

NGPC is necessary, that the requesting party does not have standing because the party failed to

satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined

that the reconsideration process can properly be invoked for challenges to expert determinations

rendered by panels formed by third party service providers, such as the EIU, where it can be

stated that the Panel failed to follow the established policies or procedures in reaching its

determination, or that staff failed to follow its policies or procedures in accepting that

determination.[4]

In the context of the New gTLD Program, the reconsideration process does not call for

the BGC to perform a substantive review of CPE reports. Accordingly, the BGC does not

evaluate the Panel's substantive conclusion that the Applicant prevailed in the CPE. Rather, the

BGC's review is limited to whether the Panel violated any established policy or process, which

the Requesters suggest was accomplished when the Panel: (i) purportedly misapplied the CPE

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[2] Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has 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.
[3] New gTLD Program Committee.
[4] *See* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc, BGC Recommendation on Reconsideration Request 13-5.

criteria set out in the Guidebook; and (ii) violated core ICANN principles set forth in its Bylaws. (Request, § 8, Pg. 5.)

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – has published supplementary guidelines ("CPE Guidelines") that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.[5]

CPE will occur only if a community-based applicant selects this option and after all applications in the contention set have completed all previous stages of the process. (Guidebook, § 4.2.) Community priority evaluations will be performed by an independent community priority panel appointed by EIU to review these applications. (*See* Guidebook, § 4.2.2.) The panel's role is to determine whether any of the community-based applications fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in a CPE, an application must receive a minimum of 14 points on the scoring of foregoing four criteria, each of which is worth a maximum of four points (for a maximum total of 16 points).

V.   Analysis and Rationale.

The Requesters have failed to demonstrate that the Panel violated any established policy or procedure in rendering the Report.

1.   The Panel Properly Applied the CPE Criteria.

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[5] The CPE Guidelines may be found here: http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.

The Requesters identify three ways in which the Panel allegedly failed to apply the Guidebook criteria. First, the Requesters claim the Panel did not analyze whether a "community," as that term is defined in the Guidebook, has been identified. Second, the Requesters argue the Panel was "confused or mistaken" about the criteria required to support a finding that the community is sufficiently delineated. Third, the Requesters assert the Panel failed to apply the Guidebook's test for uniqueness. (Request, § 8, Pgs. 6-11.) As discussed below, the Requesters have provided no support for their contention that the Panel incorrectly applied any policy or procedure.

       (a)   **The Panel Properly Analyzed Whether The "Hotel Community" Meets the Guidebook Definition of a Community.**

Guidebook section 4.2.3 sets forth the requirements for "Community Establishment." It states that whether an Applicant has established a "community" for CPE purposes will be "measured by" two factors: delineation and extension. In addition, Guidebook section 4.2.3 provides:

> [A]s "community" is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.

The Requesters concede the Panel "did refer to these definitions" (Request, § 8, Pg. 6), but contend the Panel erred in failing to "consider the first and vital question of whether there was first a cohesive community" separate and apart from the specified above-listed criteria. (Request, § 8, Pg. 6.) However, the Requesters point to no obligation to conduct any inquiry as to the definition of a community other than those expressed in section 4.2.3 of the Guidebook, which Requesters admit the Panel took into account. As such, the Requesters fault the Panel for adhering to the Guidebook's definition of a "community" when evaluating the Application.

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Given that the Panel must adhere to the standards laid out in the Guidebook, this ground for reconsideration fails.

The Requesters also contend the Applicant's proposed community, *i.e.,* the "Hotel Community," does not qualify as a community for CPE purposes because "rather than showing cohesion, [it] depend[s] on coercion; every hotelier is deemed a member of this community, even if they have never heard of it[.]" But the Panel reached the contrary conclusion, noting "the community as defined in the application has awareness and recognition among its members. This is because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services." (Report, Pg. 2.) As even the Requesters note, a request for reconsideration cannot challenge the substance of the Panel's conclusions, but only its adherence to the applicable policies and procedures. Accordingly, reconsideration is not warranted based on the Requesters' complaint that the Panel came to a different conclusion than Requesters' would have liked as to whether the Hotel Community enjoys sufficient recognition amongst its members.

(b)   The Panel Properly Applied the Test for Delineation.

Guidebook section 4.2.3 provides that delineation "relates to the membership of a community," and that membership must be "[c]learly delineated, organized, and pre-existing [the completion of the new gTLD policy recommendations in 2007]." The Requesters contend the Panel committed an "error of process" because it "imported the test for determining whether there is a 'community' . . . into the test for 'delineation.'" (Request, § 8, Pg. 7.) Specifically, the Requesters fault the Panel for purportedly ignoring the requirements that the community be organized and preexisting before 2007. (*Id.*) The Requesters' claim is unsupported, as the Report shows that the Panel fully examined all three requirements for delineation.

The Panel began its assessment of the test for delineation by noting: "Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members." (Report, Pg. 1.) As the Requesters admit, the Panel then "proceeds through the proper requirements of Delineation, which it names accurately[.]" (Request, § 8, Pg. 8.) The Requesters thus defeat their own argument, as they squarely concede the Panel assessed the "proper requirements" of the test for delineation.

Again, the Requesters dispute the Panel's allusion to the "awareness and recognition" of the Hotel Community's members not because that reference constitutes any procedural violation, but because the Requesters simply disagree whether there is any such recognition amongst the Hotel Community's members. In fact, in the same section where they fault the Panel for considering self-awareness in the process of the delineation inquiry, the Requesters also complain of the Panel's purported "failure to consider the issue of self-awareness and recognition." (Request, § 8, Pg. 8.) At bottom, the Requesters do not challenge how and when the Panel applied either the delineation or self-awareness tests, but instead seek reconsideration of the substance of the Panel's determination that the Hotel Community is clearly delineated and its members are sufficiently self-aware. Disagreement with the Panel's substantive conclusions, however, is not a proper basis for reconsideration.

(c) The Panel Properly Applied the Test for Uniqueness.

The second criterion by which the Application is assessed in CPE is the nexus between the proposed string and the community. (Guidebook, § 4.2.3.) This criterion evaluates "the relevance of the string to the specific community that it claims to represent" through the scoring of two elements—2-A, nexus (worth three points), and 2-B, uniqueness (worth one point). (Guidebook, § 4.2.3.) To fulfill the requirements for element 2-B, the string must have "no other

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significant meaning beyond identifying the community described in the application."
(Guidebook, § 4.2.3.)

Here, the Panel concluded that .HOTEL "has no other significant meaning beyond identifying the community described in the application." (Report, Pg. 4.) The Panel cited the Application's definition of "hotel" as "an establishment with services and additional facilities where accommodation and in most cases meals are available." (Request, § 8, Pg. 9; Report, Pg. 2.) The Requesters contend the Panel erred in so finding because "[p]atently, the word 'hotel' has another 'significant meaning' apart from identifying a community – it means a place where a customer can purchase lodgings." (Request, § 8, Pg. 9.) In other words, the Requesters claim that the string .HOTEL has a significant meaning apart from identifying the Hotel Community, because it claims the Hotel Community is an "association of business enterprises that run the hotels," whereas the word "'hotel' means to most of the world what the [Application's] definition says it means – a place for lodging and meals." (Request, § 8, Pgs. 9-10.)

The Requesters have identified no procedural deficiency in the Panel's determination that the uniqueness requirement was met. The Requesters concede that "HOTEL" has the significant meaning of a place for lodging and meals, and common sense dictates that the Hotel Community consists of those engaged in providing those services. The attempt to distinguish between those who run hotels and hotels themselves is merely a semantic distinction. Again, while the Requesters may disagree with the Panel's substantive conclusion, that is not a proper basis for reconsideration. The Requesters do not identify any Guidebook or other procedural requirement that the Panel purportedly violated in reaching its determination that "HOTEL" has the significant meaning of a place for lodging and meals, and the Requesters arguments that the finding was erroneous do not form the grounds for a reconsideration request.

2.   The Panel Did Not Breach Any Provisions of the ICANN Bylaws.

The Requesters argue that three aspects of the CPE process violate core ICANN values of promoting fair and transparent decision-making. (Request, § 8, Pgs. 10-11 (citing ICANN Bylaws, Art. 1, § 2.8; *id*., Art. III, § 1; *id*., Art. IV, § 2.2; ICANN Affirmation of Commitments, Art. 7).) In particular, the Requesters argue the CPE process is "prejudicial to standard applicants" because: (1) the standard applicants are not given enough information regarding the identity or qualifications of the Panelist to assess potential conflicts; (2) the materials considered by the Panel are not publicly posted; and (3) the Panel provided insufficient "analysis and reasons" for its conclusions.

None of these concerns represent a policy or procedure violation for purposes of reconsideration under ICANN's Bylaws. The Guidebook does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application. In essence, the Requesters argue that because the Guidebook's CPE provisions do not include Requesters' "wish list" of procedural requirements, the Panel's adherence to the Guidebook violates the broadly-phrased fairness principles embodied in ICANN's foundational documents. Were this a proper ground for reconsideration, every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request. Such a result would undermine the stability of the New gTLD Program and ICANN's accountability mechanisms. ICANN's general commitment to fairness and transparency cannot form a basis for reconsideration here because the Guidebook simply does not confer upon standard applicants the benefits that the Requesters complain they did not receive, and reconsideration is only warranted where a staff action "contradict[s] *established* ICANN policy(ies)[.]" (Bylaws, Art. IV, § 2, emphasis added.) Moreover, the Guidebook was extensively vetted by the ICANN stakeholder community over a course of years and included a total of ten versions with multiple notice and public comment

periods.[6] To stray from the Guidebook's terms and impose additional requirements, as the

Requesters would have the BGC do here, would violate many of the very same fairness

principles the Requesters invoke.[7]

VI.   Determination.

Based on the foregoing, the BGC concludes that the Requesters have not stated proper

grounds for reconsideration, and therefore denies Reconsideration Request 14-34. Given that

there is no indication that the Panel violated any policy or procedure in reaching, or staff in

accepting, the conclusions in the Panel's Report, this Request should not proceed. If the

Requesters believe they have somehow been treated unfairly in the process, the Requesters are

free to ask the Ombudsman to review this matter.

In accordance with Article IV, § 2.15 of the Bylaws, the BGC's determination on

Request 14-34 shall be final and does not require Board consideration. The Bylaws provide that

the BGC is authorized to make a final determination for all Reconsideration Requests brought

regarding staff action or inaction and that the BCG's determination on such matters is final.

(Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-34 seeks reconsideration of a staff

action or inaction. After consideration of this Request, the BGC concludes that this

determination is final and that no further consideration by the Board (or the New gTLD Program

Committee) is warranted.

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[6] The current version of the Guidebook is available at http://newgtlds.icann.org/en/applicants/agb. The prior versions of the Guidebook are available at http://newgtlds.icann.org/en/about/historical-documentation. As noted in its Preamble, the Guidebook was the product of an extensive evaluation process that involved public comment on multiple drafts.
[7] Moreover, any challenge to the terms of the current version of the Guidebook are untimely, as more than fifteen days have elapsed since it was promulgated in June 2012. (*See* Bylaws, Art. IV, § 5 (setting forth fifteen day deadline to file reconsideration request after challenged action.)

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. (*See* Bylaws, Article IV, § 2.16.) To satisfy the thirty-day deadline, the BGC would have to have acted by 28 July 2014. Due to the volume of Reconsideration Requests received within recent months, it was impractical for the BGC to consider Request 14-34 prior to 22 August 2014.

Resp. Ex. 11

DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-39

11 OCTOBER 2014

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The Requesters—Despegar Online SRL; Radix FZC; Famous Four Media Limited;

Fegistry, LLC; Donuts Inc.; and Minds + Machines—seek reconsideration of ICANN staff's

response to the Requesters' request for documents pursuant to ICANN's Document Information

Disclosure Policy ("DIDP"). The Requesters sought documents relating to a Community

Priority Evaluation Panel's Report finding that HOTEL Top-Level Domain S.à.r.l.'s community

application for the New gTLD .HOTEL prevailed in Community Priority Evaluation.

I.   Brief Summary.

The Requesters each applied for .HOTEL. Hotel Top-Level-Domain S.à.r.l. ("Applicant")

filed a community application for .HOTEL. Because the Applicant participated and prevailed in

Community Priority Evaluation ("CPE"), none of the Requesters' applications for .HOTEL will

proceed.

The Requesters subsequently filed a request pursuant to ICANN's DIDP ("DIDP

Request"), seeking documents relating to the CPE Panel's Report finding that the Applicant had

prevailed in CPE. In its response to the DIDP Request ("DIDP Response"), ICANN identified

and provided links to all publicly available documents responsive to the DIDP Request and

further noted that many of the requested documents did not exist or were not in ICANN's

possession. With respect to those requested documents that were in ICANN's possession and

not already publicly available, ICANN explained that those documents were not produced

because they were subject to certain of the Defined Conditions of Nondisclosure ("Nondisclosure

Conditions") set forth in the DIDP.

On 22 September 2014, the Requesters filed Request 14-39, seeking reconsideration of

ICANN's Response to the DIDP Request. The Requesters do not identify any policy or

procedure that ICANN staff violated with respect to the DIDP Response, but simply disagree

with ICANN staff's determination that certain requested documents were subject to one or more

of the DIDP Nondisclosure Conditions and therefore not appropriate for public disclosure.

Because the Requesters have failed to demonstrate that ICANN staff acted in contravention of

established policy or procedure in responding to the DIDP Request, the BGC concludes that

Request 14-39 be denied.

II.   Facts.

A.   Background Facts.

All six Requesters applied for .HOTEL.

The Applicant filed a community application for .HOTEL (*i.e.*, a seventh application for

.HOTEL).

On 19 February 2014, the Applicant was invited to participate in the CPE process for

HOTEL. The Applicant elected to participate in the process, and its .HOTEL community

application ("Application") was forwarded to the CPE Panel ("Panel") assembled by the

Economist Intelligence Unit ("EIU").

On 11 June 2014, the Panel issued its Report. The Panel determined that the Application

sufficiently met the requirements specified in the Applicant Guidebook to achieve the necessary

scores to prevail in CPE. Because the Application prevailed in CPE, none of the Requesters'

applications in the .HOTEL contention set will proceed. (*See* Guidebook, § 4.2.3.)

On 28 June 2014, the Requesters filed Request 14-34, seeking reconsideration of the

Panel's determination that the Application prevailed in CPE.

On 4 August 2014, the Requesters filed their DIDP Request, seeking:

1.   All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication ("Communications") between individual member[s] of ICANN's Board or any member[s] of ICANN Staff and the Economist Intelligence Unit or any other organisation or third party involved in the selection or organisation of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated within the 12 month period preceding the date of the Report;

2.   The curriculum vitas ("CVs") of the members appointed to the CPE Panel;

3.   All Communications (as defined above) between individual members of the CPE Panel and/or ICANN, directly relating to the creation of the Report; and

4.   All Communications (as defined above) between the CPE Panel and/or Hotel TLD or any other party prior with a material bearing on the creation of the Report.

 (*See* DIDP Request, Pgs. 1-2, *available at* https://www.icann.org/en/system/files/files/request-

donuts-et-al-04aug14-en.pdf.)

On 22 August 2014, the BGC denied Request 14-34, determining that the Requesters

"d[id] not identify any misapplication of a policy or procedure [with respect to the Report], but

instead challenge[d] the merits of the Panel's Report, which is not a basis for reconsideration."

(14-34 Determination, Pg. 1, *available at*

https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-22aug14-en.pdf.)

The BGC also determined that "the Requesters' allusions to the broad fairness principles

expressed in ICANN's Bylaws [could not] serve as a basis for reconsideration, as the Requesters

d[id] not specify any specific Panel action that contravene[d] those principles." (*Id*., Pgs. 1-2.)

On 3 September 2014, ICANN responded to the Requesters' DIDP Request. (*See* DIDP

Response, *available at* https://www.icann.org/en/system/files/files/response-donuts-et-al-

03sep14-en.pdf.) ICANN identified and provided links to all publicly available documents

responsive to the DIDP Request. ICANN noted that many of the requested documents, such as "CVs for the CPE Panel," "documentation regarding the appointment of the specific CPE Panel for the .HOTEL CPE," and "communications . . . with the evaluators that identify the scoring for any individual CPE," did not exist or were not in ICANN's possession. (*Id*., Pg. 2.) With respect to those requested documents that were in ICANN's possession and were not already publicly available, ICANN explained that those documents would not be made publicly available because they were subject to certain DIDP Nondisclosure Conditions. (*Id*., Pgs. 2-3.)

On 22 September 2014, the Requesters filed Request 14-39, seeking reconsideration of the DIDP Response.

B.   The Requester's Claims.

The Requesters contend that reconsideration is warranted because ICANN staff violated established policy and procedure by withholding from production certain documents determined to be subject to certain DIDP Nondisclosure Conditions. (Request, § 10, Pgs. 12-13.)

C.   Relief Requested.

The Requesters ask the Board to: (i) "independently evaluate the legitimacy of ICANN's claimed grounds for withholding the Requested Information"; (ii) "[r]egardless of whether certain protections against disclosure arguably exist, find that production of the Requested Information would serve policy interests that override any claimed basis for non-disclosure"; and (iii) "[o]rder ICANN to produce the Requested Information, subject to a protective order if the BGC deems it appropriate." (Request, § 9, Pg. 11.)

III.   Issues.

In view of the claims set forth in Request 14-39, the issues for reconsideration are whether ICANN staff violated established policy or procedure by declining to produce certain

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documents sought through the DIDP Request and determined to be subject to certain DIDP

Nondisclosure Conditions.

IV.   The Relevant Standards for Evaluating Reconsideration Requests and the Documentary Information Disclosure Policy.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in

accordance with specified criteria.[1] (Bylaws, Art. IV, § 2.) Dismissal of a request for

reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or

the NGPC agrees to the extent that the BGC deems that further consideration by the Board or

NGPC is necessary, that the requesting party does not have standing because the party failed to

satisfy the reconsideration criteria set forth in the Bylaws.

ICANN considers the principle of transparency to be a fundamental safeguard in assuring

that its bottom-up, multi-stakeholder operating model remains effective and that outcomes of its

decision-making are in the public benefit and are derived in a manner accountable to all

stakeholders. A principal element of ICANN's approach to transparency and information

disclosure is the commitment to make publicly available on its website a comprehensive set of

materials concerning ICANN's operational activities. In that regard, ICANN has identified

many categories of documents that are made public as a matter of due course. (*See*

https://www.icann.org/resources/pages/didp-2012-02-25-en.) In addition to ICANN's practice of

making so many documents public as a matter of course, the DIDP allows community members

to request that ICANN make public documentary information "concerning ICANN's operational

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[1] Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has 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.

activities, and within ICANN's possession, custody, or control," that is not already publicly

available. (*Id*.)

In responding to a request for documents submitted pursuant to ICANN's DIDP, ICANN

adheres to the "Process For Responding To ICANN's Documentary Information Disclosure

Policy (DIDP) Requests," which is available at https://www.icann.org/en/system/files/files/didp-

response-process-29oct13-en.pdf. Following the collection of potentially responsive documents,

the DIDP process provides that "[a] review is conducted as to whether any of the documents

identified as responsive to the Request are subject to any of the [Nondisclosure Conditions]

identified at http://www.icann.org/en/about/transparency/didp." (*Id*.)

Pursuant to the DIDP, ICANN reserves the right to withhold documents if they fall

within any of the Nondisclosure Conditions, which include, among others: (i) "[i]nformation

provided by or to a government or international organization . . . in the expectation that the

information will be kept confidential and/or would or likely would materially prejudice

ICANN's relationship with that party;" (ii) "[i]nternal information that, if disclosed, would or

would be likely to compromise the integrity of ICANN's deliberative and decision-making

process […];" (iii) "[i]nformation exchanged, prepared for, or derived from the deliberative and

decision-making process between ICANN, its constituents, and/or other entities with which

ICANN cooperates […];" and (iv) "[i]nformation subject to the attorney-client, attorney work

product privilege, or any other applicable privilege." (*See*

https://www.icann.org/resources/pages/didp-2012-02-25-en.) In addition, ICANN may refuse

"[i]nformation requests: (i) which are not reasonable; (ii) which are excessive or overly

burdensome; (iii) complying with which is not feasible; or (iv) [which] are made with an abusive

or vexatious purpose or by a vexatious or querulous individual." (*See id*.)

The DIDP process also provides that "[t]o the extent that any responsive documents fall within any [Nondisclosure Conditions], a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure." (*See* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.) It is within ICANN's sole discretion to determine whether the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure. (*Id*.) Finally, the DIDP does not require ICANN staff to "create or compile summaries of any documented information," including logs of documents withheld under one of the Nondisclosure Conditions. (*Id*.)

V.   Analysis and Rationale

The Requesters disagree with ICANN staff's determination that certain requested documents were subject to DIDP Nondisclosure Conditions, as well ICANN's determination that, on balance, the potential harm from the release of the documents subject to the Nondisclosure Conditions outweigh the public interest in disclosure. (Request, § 8.7.2, Pg. 9 ("Requestors do not agree with ICANN's asserted bars to disclosure.").) The Requesters claims do not support reconsideration.

A.   ICANN Staff Adhered To The DIDP Process In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.

The Requesters identify no policy or procedure that ICANN staff violated with respect to the DIDP Response. Instead, Requesters disagree with ICANN staff's application of the DIDP

Nondisclosure Conditions, and claim that ICANN, in declining to produce such documents, violated ICANN's core commitment to transparency. (Request, § 10, Pgs. 12-13.)[2]

Specifically, the Requesters object to ICANN's determination to withhold: (1) "documentation with the EIU for the performance of its role … as it relates to the .HOTEL CPE"; (2) "communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE […]"; and (3) certain emails sent to the CPE Panel for the purpose of validating letters of support or opposition to an application, on which ICANN from time to time is copied. (Request, § 8, Pgs. 9-10.) The Requesters state that as to those categories of documents, they "do not agree with ICANN's asserted bars to disclosure." (*Id*., § 8, Pg. 9.) The Requesters, however, fail to demonstrate that ICANN contravened the DIDP process.

The DIDP identifies a number of "conditions for the nondisclosure of information," such as documents containing "[i]nformation subject to the attorney-client [privilege], attorney work product privilege, or any other applicable privilege" and/or containing "[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications." (*See* https://www.icann.org/resources/pages/didp-2012-02-25-en.) It is ICANN's responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP process, "a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified at http://www.icann.org/en/about/transparency/didp." (*See* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf (Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests).)

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[2] The Requesters do not challenge the DIDP Response insofar as it states that certain documents do not exist within ICANN's custody.

Specifically, pursuant to the DIDP process, "a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified at http://www.icann.org/en/about/transparency/didp." (*See* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.)

Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process. Specifically, as to "documentation with the EIU for the performance of its role" and "communications with persons from EIU who are not involved in the scoring of a CPE," ICANN analyzed the Requesters' requests in view of the DIDP Nondisclosure Conditions. ICANN determined that the requested documents were subject to several Nondisclosure Conditions, including those covering "information exchanged, prepared for, or derived from the deliberative and decision-making processes" and "confidential business information and/or internal policies and procedures." (DIDP Response, Pg. 3.)[3] As to the validation emails, ICANN determined that those documents were subject to the Nondisclosure Condition covering "information exchanged, prepared for, or derived from the deliberative and decision-making processes." (*Id*.)

As ICANN noted in the DIDP Response, notwithstanding the fact that Requesters' "analysis in [their DIDP] Request concluded that no Conditions for Nondisclosure should apply, ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply." (Response, Pg. 4.) In conformance with the publicly posted DIDP process (*see* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf), ICANN

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[3] ICANN also noted that at least some of these documents were draft documents and explained that drafts not only fall within a Nondisclosure Condition but also are "not reliable sources of information regarding what actually occurred or standards that were actually applied." (DIDP Response, Pgs. 3-4.) In their DIDP Request, the Requesters acknowledged that there were not seeking disclosure of drafts. (DIDP Request, Pg. 2.)

undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response.

While the Requesters may not agree with ICANN's determination that certain Nondisclosure

Conditions apply here, the Requesters identify no policy or procedure that ICANN staff violated

in making its determination, and the Requesters' substantive disagreement with that

determination is not a basis for reconsideration.

> **B.** **ICANN Staff Adhered To The DIDP Process In Determining That The Potential Harm Caused By Disclosure Outweighed the Public Interest In Disclosure.**

The DIDP states that if documents have been identified within the Nondisclosure

Conditions, they "may still be made public if ICANN determines, under the particular

circumstances, that the public interest in disclosing the information outweighs the harm that may

be caused by such disclosure." (*See* https://www.icann.org/resources/pages/didp-2012-02-25-en.)

The Requesters appear to argue that the publication of the documents they wished for ICANN to

have made public through the DIDP "would serve policy interests that override any claimed

basis for nondisclosure." (Request, § 9, Pg. 11.)   Here again, the Requesters' disagreement with

the determination made by ICANN in responding to the DIDP Request does not serve as a basis

for reconsideration.

The fact that the Requesters believe that in this case the public interest in disclosing

information outweighs any harm that might be caused by such disclosure does not bind ICANN

to accept the Requesters' analysis. Here, in accordance with the DIDP process, ICANN

conducted a review of all responsive documents that fell within the Nondisclosure Conditions,

and determined that the potential harm did outweigh the public interest in the disclosure of

certain documents. (DIDP Response, Pg. 4.) Specifically, ICANN stated that "ICANN has

determined that there are no particular circumstances for which the public interest in disclosing

the information outweighs the harm that may be caused to ICANN, its contractual relationships

and its contractors' deliberative processes by the requested disclosure." (*Id.*) Indeed, as noted

above, many of the items in the DIDP Request seek documents whose disclosure "would or

would be likely to compromise the integrity of . . . [the] deliberative and decision-making

process." (*Id*. at Pg. 2.) Again, the Requesters identify no policy or procedure that ICANN staff

violated in making its determination, and the Requesters' substantive disagreement with that

determination is not a basis for reconsideration.

Finally, the BGC notes that the Requesters refer to their DIDP Requests as "Requests for

Production," which is terminology typically used in discovery requests in litigation and wholly

inapplicable in the DIDP context. The use of that terminology reflects a misunderstanding of the

purpose and intent of the DIDP. The DIDP is not a litigation tool, but rather "is intended to

ensure that information contained in documents concerning ICANN's operational activities, and

within ICANN's possession, custody, or control, is made available to the public unless there is a

compelling reason for confidentiality." (*See* https://www.icann.org/resources/pages/didp-2012-

02-25-en.) The suggestion that the BGC could or should require the use of a litigation tool such

as a protective order "to facilitate production while preserving any confidentiality concerns"

further illustrates the Requesters' misunderstanding of the DIDP. The DIDP is not about making

pieces of information available to specific interested parties; it is about whether requested items

of information are proper for public disclosure.

In this case, ICANN staff properly followed all policies and procedures with respect to

the Requesters' DIDP Request—they assessed the request in accordance with the guidelines set

forth in the DIDP and determined, pursuant to those guidelines, that certain categories of

requested documents were not appropriate for disclosure.

VI.   Determination.

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Request 14-39. As there is no indication that ICANN violated any policy or procedure with respect to its response to the Requesters' DIDP Request, Request 14-39 should not proceed. If the Requesters believe they have somehow been treated unfairly in the process, the Requesters are free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board (or NGPC) consideration is required. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-39 seeks reconsideration of a staff action or inaction. As such, after consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.