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

Despegar Online SRL	)	
Donuts Inc.	)	
Famous Four Media Limited	)	
Fegistry LLC	)	
Radix FZC	)	
Minds+Machines Group Limited	)	
	)	
Claimants	)	
	)	
v.	)	**ICDR Case No. 011500028061**
	)	
INTERNET CORPORATION FOR	)	
ASSIGNED NAMES AND NUMBERS	)	
	)	
Respondent	)	
	)	

ADDITIONAL SUBMISSION
REPLY TO ICANN'S RESPONSE BY DESPEGAR ONLINE SRL, DONUTS INC., FAMOUS FOUR MEDIA LIMITED, FEGISTRY LLC, RADIX FZC AND MINDS+MACHINES GROUP LIMITED

Flip Petillion,
Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels, Belgium
Counsel for Claimants

I. CONSOLIDATION WITH THE .ECO CASE

1.   On 12 May 2015, the ICDR confirmed that ICDR Case No. 011500028906 regarding the application for .eco (the '.eco Case') was merged with the present case. Parties agreed to keep written submissions separate for both proceedings, but recognized that the issues presented by both cases are closely linked and that the parties' interests in the proceedings are so similar as to merit the handling of both cases during one oral hearing.

2.   Second Claimant in the .eco case, Minds+Machines Group Limited (Minds+Machines), also applied for the .hotel gTLD. Minds+Machines fully supports the claim initiated by Claimants in this case and joins their request. That Minds+Machines join the proceedings is accepted by all Claimants.

II. PURPOSE OF IRP PROCEEDINGS – EXECUTIVE SUMMARY

3.   Claimants' purpose in initiating the IRP is that the IRP Panel impose measures on ICANN that will allow the final resolution of the dispute occasioned by ICANN's unquestioning acceptance of the advice given by the community priority evaluation ("CPE") Panel. The dispute was further aggravated by ICANN's refusal to act appropriately following a data exposure issue, further explained below.

4.   The IRP Panel has the jurisdiction to render decisions that are binding upon ICANN and that resolve the dispute. The IRP Panel's task is to look at whether ICANN's unquestioning acceptance of the CPE Panel's advice and ICANN's refusal to review the issues raised by Claimants are compatible with ICANN's fundamental obligations. The IRP Panel is also requested to assess ICANN's refusal to take appropriate action to offer redress to parties affected by the data exposure issue. In coming to its conclusion, the IRP Panel may examine all the relevant information that was available to ICANN in relation to the question of taking action.

5.	In their respective reviews, neither the ICANN Board nor the IRP Panel is limited to looking into the procedure only. Both the ICANN Board and the Panel should also look into the substance of the case when circumstances so require.

## III.	JURISDICTION OF THE IRP PANEL

### A.	Preliminary remark: Claimants' actions are timely

6.	Claimants raised objections to the erroneous CPE at the appropriate stage in the process. ICANN has argued at length that the time for Claimants to object to the CPE had long passed. ICANN relies on the reasoning of the Panel in the *Booking.com IRP Declaration* (the "Booking.com Panel") to argue that Claimants should have objected to the CPE process at the time the Guidebook was first implemented.[1]

7.	ICANN's and the Booking.com Panel's reasoning on the timing has no merit. The Booking.com Panel ignored the fact that neither the string similarity review process nor the CPE process had been established and implemented in their entirety at the time the Guidebook was adopted. At that time, it was not possible for Booking.com, Claimants, or any other interested party, to effectively challenge these, as yet unfinalized, processes. ICANN still had every opportunity to correctly implement the CPE process in accordance with the applicable policy, the Guidebook and the fundamental principles in ICANN's Articles of Incorporation ("AoI") and Bylaws. The opportunity for Claimants to challenge the erroneous application of the policy for the new gTLD program in violation of ICANN's fundamental principles only arose when the flaws in ICANN's implementation of the policy became apparent. At the time of the adoption of the policy or the Guidebook, Claimants were effectively barred from challenging the Guidebook because they could not – at that time – show any harm. The policy still needed to be implemented, which can be seen, *inter alia,*

---

[1] ICANN's Response of 17 April 2015 to Claimants request for IRP, paras. 7, 37, 45-47.

from the following facts: the Economist Intelligence Unit published its final CPE guidelines only on 27 September 2013 (**RM 45**); community-based applicants had yet to decide whether they wanted to elect the CPE; CPE panels still needed to be appointed in all transparency; the CPE panels had yet to apply the CPE standards and issue their recommendations to ICANN; ICANN had still to perform a quality review and assess the recommendations; the ICANN Board had yet to exercise the necessary due diligence before deciding if it accepted the CPE Panel's recommendation(s).

8.   Booking.com raised similar concerns to these (**RM 32**), but the Booking.com Panel simply did not draw a distinction between the adoption of the general principles and their subsequent implementation. The Booking.com Panel limited its review to ICANN's compliance to the letter of the Guidebook. It refrained from reviewing the Board's actions in implementing the Guidebook, asserting that the ICANN Board had ultimate discretion whether or not to intervene.

9.   Other panels disagree with the Booking.com Panel (*infra*). And rightfully so. Indeed, ICANN's reasoning would logically result in any review of the CPE being denied, no matter how arbitrary the original evaluation may be.

B.   The IRP Panel is empowered to render decisions that are binding upon ICANN

10.   The IRP has all the characteristics of an international arbitration. The IRP is conducted pursuant to a set of independently developed international arbitration rules: the ICDR's International Arbitration Rules ("ICDR Rules") as minimally modified by the Supplementary Procedures for ICANN's Independent Review Process ("Supplementary Procedures"). The IRP is administered by 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.

11.   Within its New gTLD Program, ICANN created the IRP so as to provide an alternative to dispute resolution by courts. To submit a new gTLD application, Claimants had to agree to eight pages of terms and conditions (**RM 5**, Module 6). The terms and conditions include a waiver of all Claimants' rights to challenge ICANN's decisions on Claimants' applications in court, or in any other judicial forum, provided that, as an applicant, Claimants may utilize any accountability mechanism set forth in ICANN's Bylaws (**RM5**, Module 6-4). Assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate accountability remedy for Claimants is the IRP (*Cf.* **RM 35**, para. 40; **RM 36**, para. 73).

12.   The IRP is not a mere "corporate accountability mechanism" aimed at ICANN's internal stakeholders. The IRP is open to *any* person materially affected by a decision or action by the Board (Article IV(3)(2) of ICANN's Bylaws). It is made explicitly available to applicants such as Claimants (**RM 5**, Module 6-4), who are by definition third parties.

13.   The IRP cannot fulfil its role as an effective and robust mechanism for accountability (as required by ICANN's Affirmation of Commitments (**RM 4**, Article 9.1) and ICANN's Bylaws (**RM2-3**, Article I(2)(10)) unless it be binding upon ICANN. Otherwise, the ICANN Board's discretion would indeed be unfettered and ICANN's AoI and Bylaws would be called into question.

14.   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 35**, para. 98).

15.   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 35**, para. 101). The Supplementary Procedures <u>supplement</u> 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 idea 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 that are brought without standing, are lacking in substance, or are frivolous or vexatious. It is clear that such a decision, opinion or declaration on the part of the IRP Panel would not be considered advisory only (**RM 35**, para. 107).

16.   Finally, even if ICANN's Bylaws and Supplementary Procedures were considered to be ambiguous (*quod non*) regarding the question of whether or not an IRP Declaration is binding, this ambiguity would weigh against ICANN. The relationship between ICANN and Claimants is clearly one of an adhesion contract. 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 35**, paras. 108-109).

17.   An IRP panel in a recent decision, the *Vistaprint* decision, made a distinction between i) an IRP panel's finding on whether or not the Board has acted consistently with the AoI and Bylaws and ii) the form of relief that the IRP panel can provide by directing the ICANN Board either to take, or to refrain from taking, any action or decision. According to the panel in the *Vistaprint* decision, the former is binding; the latter would serve only as a recommendation to be reviewed and acted upon by the ICANN Board (**RM 47**, para. 140). Said IRP Panel attempted to support its reasoning by reference to a statement made by a former Chair of the ICANN Board, who advocated, in 2009, that an IRP panel's recommendations be advisory (**RM 47**, para. 142).

18.   However, the panel in the *Vistaprint* decision disregarded the fact that the IRP procedure has been modified to make ICANN more accountable, and that for the New gTLD Program the IRP procedure was conceived by ICANN as the ultimate dispute resolution mechanism (*supra*, para. 11). Maybe more importantly, the panel in the *Vistaprint* case made an erroneous reading of Article IV(3)(11) of ICANN's Bylaws, when it stated that the Panel may *only* recommend that the ICANN Board stay or take any action or decision (**RM 47**, paras. 136 and 143). Nothing in the ICANN Bylaws or the Supplementary Procedures suggests that the examples of an IRP panel's authority given in Article IV(3)(11) impose limits on the IRP Panel's authority. A recommendation can be a binding recommendation. No provision (be it in the Supplementary Procedures, in the ICANN Bylaws or elsewhere) limits the IRP Panel's task pursuant to the ICDR Rules of resolving the dispute with a final and binding decision (*infra*). This has been the interpretation of most IRP panels appointed in the context of the New gTLD Program (*infra*; **RM 34, RM 36 and RM 37**).

19.   For all these reasons, the IRP Declaration is binding upon ICANN.

C. The IRP Panel has the authority to grant the affirmative relief that would finally resolve the dispute

20.   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*" (**RM 34**, para. 59). The IRP Panel's authority is not limited to a simple declaration that ICANN breached its obligations under its AoI, Bylaws and the Applicant Guidebook. The task of an IRP panel is to resolve the dispute: the applicable ICDR Rules (as supplemented by the Supplementary Procedures) are designed to resolve a dispute between the parties; the panel is instructed to arbitrate and to render final and binding awards. (*See* Preamble of ICDR Rules: "*These Procedures are designed to provide a complete dispute resolution framework for disputing parties.*"; Article 20(2) ICDR Rules: "*The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute.*"; Article 30(1) ICDR Rules: "*Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties.*") .

21.   To resolve the dispute and to offer effective redress to applicants, the IRP Panel may issue a binding recommendation regarding what action ICANN must take in order to cease violating its obligations. Indeed, IRP panels "*have the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.*" (**RM 36**, para. 126, emphasis added). The point is all the stronger here, as ICANN created the IRP specifically to be the sole dispute resolution mechanism available to new gTLD applicants (*supra*).

22.   Previous IRP panels have given binding recommendations to ICANN:

– In the *Dot Registry* case, the emergency independent review panelist *"ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP and .LLC"* (**RM 37**, p. 19);

– In the *GCC* case, the emergency panelist made the *"order by way of an interim declaration and recommendation to the ICANN Board that [...] ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted"* (**RM 34**, para. 96);

– In the *DCA* case, the IRP Panel issued a binding recommendation that *"ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process"* (**RM 36**, para. 149).

23.   As a result, the applicable rules and the jurisprudence clearly establish that an IRP panel is authorized to grant affirmative relief.

24.   In the *Vistaprint* case, the IRP Panel issued a non-binding recommendation for the ICANN Board. As explained above, this IRP panel considered its authority to be limited to issuing non-binding recommendations on the basis of an erroneous and isolated reading of ICANN's Bylaws (**RM 47**, para. 149). The panel in the *Vistaprint* case recognized nonetheless that it would not be uncommon for individuals, companies or even governments to agree to participate in binding dispute resolution processes with third parties in similar circumstances (**RM 47**, para. 147). Also important is that the IRP Panel in the *Vistaprint* case was unable to agree on the question of whether the ICANN Board had complied with i) the standard of non-discrimination imposed by Article II(3) of ICANN's Bylaws, and ii) the relevant core values in Article I(2) of ICANN's Bylaws (*e.g.*, applying documented policies neutrally and objectively with integrity and fairness) (**RM 47**, para. 189). Instead of ruling on

the issue, the *Vistaprint* Panel referred the matter back to the ICANN Board, giving the ICANN Board the opportunity to exercise its judgment on the issue (**RM 47**, paras. 191, 197). The Panel considered that the ICANN Board had not yet had the opportunity to do so. However, once the ICANN Board considers the issue – and it must do so pursuant to Article IV(3)(21) of ICANN's Bylaws – the ICANN Board should refrain from violating the AoI and ICANN's Bylaws. The issue of disparate treatment and fair application of ICANN's policies could again be brought before an IRP panel, as it is an IRP panel's task to examine compliance of the Board's actions and inactions with the AoI and ICANN's Bylaws. The IRP Panel in the *Vistaprint* case did not act in accordance with the ICDR Rules, as it did not finally resolve the dispute. The *Vistaprint* case illustrates the need for an IRP panel to grant affirmative relief, as was understood by the Panels in the *Dot Registry*, *GCC* and *DCA* cases.

IV. THE OBLIGATIONS OF ICANN AND ITS BOARD IN THE COMMUNITY PRIORITY EVALUATION

25.   ICANN only acts through its Board, and the ICANN Board has ultimate responsibility for the New gTLD Program. (Article II(1) of the ICANN Bylaws; **RM 5**, Module 5-4) ICANN has previously confirmed this, arguing that Californian law requires that all activities and affairs of ICANN be managed and that all corporate powers be exercised under the ultimate direction of the Board (**RM** 46, para. 41).

26.   However, the fact that the ICANN Board exercises all the corporate powers of ICANN does not mean that its actions are beyond scrutiny or that the ICANN Board has unlimited discretionary powers. The Board must still comply with its fundamental obligations and can be held accountable for any violation thereof. Ruling otherwise would imply that no Californian corporation could be held accountable in court or be subject to binding (international) arbitration.

27.   In this respect, one must distinguish between i) the ICANN Board's internal role towards its stakeholders, and ii) ICANN (and the ICANN's Board)'s external responsibility

9

towards third parties. Internally, towards its stakeholders, ICANN might be able to argue that its Board retains ultimate decision-making power, subject to its governing principles. Externally, the ICANN Board's discretionary power is limited. ICANN and its Board must offer redress, when its decisions or actions harm third parties. ICANN has the obligation to act "*consistently with relevant principles of international law, including the general principles of law recognized as a source of international law*" by virtue of Article IV of the AoI (**RM 27**, para. 140).

28.   The ICANN Board's latitude in its decision making does not bestow the Board with "*an unfettered discretion in making decisions. [...] The decision or action [of the ICANN Board] should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion*" (**RM 34**, para. 76). Some of ICANN's obligations are so fundamental that limitations to the ICANN Board's discretion are explicitly mentioned in the ICANN Bylaws. In this respect, the ICANN Bylaws expressly provide that ICANN may not discriminate and that it must operate in an open, transparent and fair manner:

-      "*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.*" (Article II(3) of the ICANN Bylaws)

-      "*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 III(1) of the ICANN Bylaws)

29.   The obligations of the ICANN Board in its decision making are "*reinforced by the standard of review for the IRP process [...] when the action of the Board is compared to the requirements under the [AoI] and Bylaws.*" (**RM 34**, para. 77). As made apparent *inter alia*

by the applicable standard of review, ICANN is *"bound by its Bylaws to conduct adequate diligence to ensure that it [is] applying its procedures fairly."* (**RM 36**, para. 105).

30. It is unsustainable for ICANN to adopt a purely process-focused position. The ICANN Board has an overriding responsibility to make fair, reasoned and non-discriminatory decisions under conditions of full transparency. Simply following the processes and procedures developed by ICANN cannot alone be sufficient grounds for declining to review a decision. If the requirements of fairness, reasoned decision-making, non-discrimination and transparency have not been met in the implementation of the process and procedures, the ICANN Board must, when invited to do so, conduct a meaningful review (**RM 36**, para. 107). Claimants understand that the ICANN Board may be required to take advice and recommendations from its constituent bodies or third party experts into consideration; however, the Board is not obliged to follow those recommendations (**RM 36**, para. 111). Also, when the ICANN Board receives an advice or recommendation, it is expected to (at the very least) investigate the matter before taking a decision (**RM 36**, para. 113), and conduct a meaningful review when reviewing a challenged decision (**RM 36**, para. 107).

31. With respect to the CPE, ICANN is merely given a recommendation by the CPE Panel (**RM 15**, p. 4). The CPE Panel's recommendation has no effect unless ICANN accepts it, and there is no legal basis for ICANN to accept it unquestioningly.

32. Interventions by the ICANN Board in specific cases support the finding that a recommendation by a CPE panel is not a final decision. Indeed, with respect to the CPE for .gay, the Board Governance Committee ("BGC") ordered the CPE Panel to reevaluate, on the grounds that the CPE Panel *"inadvertently neglected to verify some of the letters submitted in support of the Application."* (**RM 38**, p. 31). One may wonder how the BGC was able to conclude that the neglect was inadvertent. The complainant in the .gay case considered that the actions by the CPE Panel were deliberate (**RM 39**, p. 9). Perhaps a more pertinent

question is: why did the BGC not decide that the CPE was equally inadvertently negligent (or even deliberately incorrect) in its evaluation of the .hotel application? In its evaluation of the .gay application, the CPE Panel neglected information; in its evaluation of the .hotel application, the CPE Panel invented information. Why did the BGC allow a re-examination for .gay but not for .hotel? There is no reasonable justification to distinguish between these two cases.

33. ICANN sought to reassure new gTLD applicants by stating that *"[t]he evaluation process for selection of new gTLDs [was going to] respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination."* (**RM 18**, p. 5). However, when Claimants showed the ICANN Board that these obligations had been violated, ICANN refused to correct these errors in its implementation of the CPE process for some cases, hereby discriminating even further.

34. To the fact that i) Claimants had no information regarding the identity or qualifications of the CPE panelists to assess potential conflicts, ii) the materials considered by the CPE Panel were not publicly posted, and iii) the CPE Panel provided insufficient and erroneous analysis and reasons for its decisions, ICANN's BGC simply replied that *"[n]one of these concerns represent a policy or procedure violation for purposes of reconsideration under ICANN's Bylaws."* (**Annex 11**, p. 10). In other words, the ICANN Board decided not to check whether or not the evaluation process had been implemented in compliance with the principles of fairness, transparency, avoiding conflicts of interest and non-discrimination. ICANN's view is incompatible with the requirement for its Board to conduct a meaningful review.

V. THE IRP PANEL'S REVIEW ON THE MERITS OF THE CASE

A. The IRP Panel controls ICANN and its Board's exercise of its discretion

35.   The Applicant Guidebook explicitly 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*" (**RM 5**, Module 6-4). An ICANN decision only becomes final when its Board has expressed itself on the issue. Any other reasoning would be impossible according to ICANN's own logic: that all the activities and affairs of ICANN must be managed and that all corporate powers must be exercised under the ultimate direction of the Board. As confirmed in the Applicant Guidebook, the ICANN Board remains responsible for the New gTLD Program (**RM 5**, Module 5-4). And any final decision can be challenged in an IRP. Even if a decision is made entirely pursuant to the Guidebook, that decision remains subject to possible review by the IRP Panel (**RM 34**, para. 79). *E.g.*, the ICANN Board's decision regarding the DCA Trust's application for .africa might have been correct from a purely process-focused perspective; the fact that the Board's actions and inactions with respect to DCA Trust's application "*were not procedures designed to insure the fairness required by Article III[(1) of the ICANN Bylaws]*" was sufficient for the IRP Panel to conclude that the Board's actions and inactions were inconsistent with the AoI and Bylaws, and required review (**RM 36**, para. 109). It is not too late to challenge either applicable policy or the Guidebook, if implementation is inconsistent with the AoI and Bylaws. According to established case law of the U.S. Supreme Court, a policy's age or the age of an implementing regulation cannot be used as an excuse for clear inconsistency with fundamental legal principles.[2] Even if a statute of limitations is imposed on challenges to a specific policy, it does not prevent those affected by the application of the policy to challenge

---

[2] See *e.g.*, *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (**RM48**); *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (**RM 49**).

that application on the grounds that the policy conflicts with a more fundamental legal principle.[3]

36. As explained above, the CPE Panel's recommendation only becomes final when the parties have accepted the CPE or when the ICANN Board has expressed its opinion. When the Board intervenes (or elects not to intervene) on a CPE advice, that action (or inaction) of the Board is subject to review by the IRP Panel. The IRP Panel must review and determine whether the contested actions of ICANN and its Board are consistent with i) ICANN's AoI and Bylaws and ii) secondary rules created by ICANN. These rules require ICANN and its Board to act in good faith and in accordance with the principles of international law. The IRP Panel's mandate includes a review as to whether or not ICANN's Board acts in a discriminatory manner with regards to its interventions on CPE, and as to whether ICANN "*act[s] and make[s] decisions 'neutrally and objectively with integrity and fairness.'*" (**RM 36**, paras. 95-97).

B. The IRP Panel adopts an objective standard of review

37. IRP panels are required "to '*objectively' determine whether or not the Board's actions are in fact consistent with the [AoI], Bylaws and Guidebook*" (**RM 33**, para. 111; **RM 36**, para. 75). They must appraise the Board's conduct "*independently, and without any presumption of correctness.*" (**RM 33**, para. 111; **RM 36**, para. 75). Consequently, the standard of review in an IRP is "*a de novo, objective and independent one, which does not require any presumption of correctness.*" (**RM 36**, para. 76; *see also* **RM 33**, para. 112-114; **RM 27**, para. 136; **RM 47**, para. 125).

C. The remit of the IRP Panel's review covers both process and substance

---

[3] *Weaver v. Federal Motor Carrier Safety Admin.*, 744 F. 3d 142, 145 (D.C. Cir. 2014) (**RM 50**).

38.   The IRP Panel is competent to determine whether ICANN's implementation of the CPE – and in particular the Board's actions and inactions in this respect – were consistent with ICANN's AoI and Bylaws. The IRP Panel's task entails a review as to whether ICANN and its Board act fairly, neutrally and in a non-discriminatory manner (**RM 36**, para. 94). The Panel must review ICANN's compliance with its fundamental obligations, including:

- Did ICANN apply its policies "*neutrally and objectively, with integrity and fairness*"? (Article I(2)(8) of the ICANN Bylaws; **RM 36**, paras. 94-96);

- Did ICANN operate "*in an open and transparent manner and consistent with procedures designed to ensure fairness*"? (Article III(1) of the ICANN Bylaws);

- Has ICANN applied "*its standards, policies, procedures, or practices inequitably or single[d] out any particular part for disparate treatment*" without justification by substantial and reasonable cause? (Article II(3) of the ICANN Bylaws; **RM 36** para. 96).

39.   To assess whether ICANN has applied its standards, policies and procedures in a fair, equitable and non-discriminatory fashion, it is imperative that the IRP Panel reviews the application of standards, policies and procedures in detail. One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied. A review of the substance is required, and it must be examined whether standards have been applied consistently to ensure fairness and non-discrimination. The ICANN Board has consistently refused to perform such a review, and is currently arguing that an IRP panel should not engage in such a review. Arguing that "*ICANN's general commitment to fairness and transparency cannot form a basis for reconsideration*" (**Annex 11**, p. 10), the ICANN Board deliberately refused to examine whether the standard was applied correctly, fairly, equitably and in a non-discriminatory manner. The ICANN Board instead limited its review

15

to the question of whether the CPE Panel had made mention of the applicable standard. Such a limited review is not a meaningful one.

40. Claimants have demonstrated that numerous process violations in the CPE process have led to erroneous advice by the CPE Panel. Claimants were not given due process and ICANN's acceptance of the CPE was not a fair and neutral application of ICANN's policy on CPE.

41. Rather than correcting these errors, the ICANN Board discriminated against Claimants even further by granting remedies to certain other parties, but not to Claimants. As mentioned above, there is no reasonable justification for the BGC to allow a re-examination for .gay but not for .hotel. When ICANN was asked to review so-called string confusion objection (SCO) expert determinations, the ICANN Board intervened to address "*perceived inconsistent or otherwise unreasonable SCO Expert Determinations*" (**RM 40**). However, the ICANN Board never explained why it elected not to intervene with respect to other SCO expert determinations that were just as unreasonable (**RM 41-42**). On 9 October 2015, the *Vistaprint* IRP panel recommended that the ICANN Board exercise its judgment on the question of whether an additional review mechanism be appropriate to re-evaluate an SCO expert determination in view of ICANN's Bylaws concerning core values and non-discriminatory treatment (**RM 47**).

42. It is not justifiable for ICANN to invoke the fact that the Guidebook does not explicitly mention due process guarantees in order to deny applicants their elementary right to due process. The ICANN Board's interventions with respect to .gay and certain specific SCO expert determinations show the Board's ability to adapt the implementation of ICANN policies in cases where there has not been fair application of those policies. However, ICANN and its Board fail to provide reasonable justification for intervening in some cases and not in others. That is simply arbitrary.

43.   Moreover, the Guidebook makes explicit mention of the availability of accountability mechanisms, which are designed to offer applicants a meaningful review and serve as a guarantee of due process.

VI.   THE IRP PANEL MUST ORDER ICANN TO REJECT HTLD'S APPLICATION FOR .HOTEL AND TO REJECT THE DETERMINATION THAT HTLD'S APPLICATION FOR .HOTEL BE GRANTED COMMUNITY PRIORITY

44.   The CPE Panel's assessment of the community-based application for .hotel violates both process and substance. *E.g.*, through ICANN's use of anonymous evaluators, Claimants were deprived of their right to be heard by an independent and impartial adjudicator (Request for IRP, para. 57).

45.   As the IRP Panel's task includes a review as to whether ICANN discriminated in the application of its policies and standards, the IRP Panel is obliged to consider how the standards were applied in different cases. Such a review would show that the standards for community priority were applied inconsistently and erroneously in the case of .hotel. ICANN has always made it very clear that the requirements to be met in order to qualify for community priority are strict. The Guidebook explicitly mentions:

> "*It should be noted that a qualified community application 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 [...]. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication [that] the community itself is in some way inadequate or invalid.*" (**RM 5**, Module 4-9, emphasis added).

As demonstrated in Claimants' request for IRP, the CPE Panel has strictly applied the very stringent requirements for qualification of a community-based application in most cases. The CPE has generally not allowed applicants to play the application process by invoking an alleged community with a view to obtaining community priority for a highly sought-after

generic word (Request for IRP, paras. 49 and following; **RM 43-44**).[4] However, in the case of .hotel, the CPE Panel did allow for HTLD to play the system (**Annex 8**). HTLD was able to achieve community priority only due to i)) the CPE Panel's application of the very stringent requirements in an unusual and inaccurate manner and ii) the CPE Panel's invention of nonexistent facts (Request for IRP, paras. 48-60).

46.   ICANN and its Board should never have accepted such an erroneous CPE recommendation. Asking the CPE Panel simply to reevaluate would not now be an effective remedy. The competence and objectivity of the CPE Panel is compromised, and the evaluation would suffer from the same lack of due process if the same Panel were asked to reevaluate.

47.   Any relief ordered must effectively avoid another unfair, arbitrary and discriminatory decision. Claimants are convinced that HTLD's application for .hotel would not have been given community priority – and that there would have been a different decision on the merits – if the CPE process had been organized, implemented and supervised in accordance with ICANN's established policies and ICANN's fundamental obligations. In fact, a proper implementation of the CPE process would have led to a different decision on the merits. The IRP Panel is capable of making this determination and is therefore competent to establish that the granting of community priority to HTLD's application for .hotel must be rejected by ICANN.

VII.   DEVELOPMENTS SINCE THE FILING OF THE REQUEST FOR IRP REQUIRED ICANN TO REJECT HTLD'S APPLICATION FOR .HOTEL

A.   ICANN exposed sensitive data of .hotel applicants

---

[4] This is mentioned in ICANN documents explaining the Guidebook. The fact that something is not explicitly mentioned in the Guidebook does not prevent it being part of the policy for new gTLDs. The Guidebook is only one of the policy implementation documents.

48.   Between 17 March 2014 and 27 February 2015, the user credentials of one person (D. Krischenowski) were used to conduct over 60 searches that resulted in over 200 unauthorized access incidents across an unknown number of TLDs. In this way, sensitive and confidential business information concerning several of the .hotel applicants was obtained. Claimants expressed their deep concern about the issue with ICANN, as D. Krischenowski, the holder of the user credentials, is associated with competing TLD applicants, including the competing applicant for .hotel, HTLD, to which community priority status had been granted and which forms the subject of discussion in the current IRP.

49.   The limited information that has so far become available shows that the user was deliberately looking for sensitive and confidential business information concerning competing applicants. *E.g.*, portfolio applicant Donuts Inc. had its relative net worth of gTLDs reviewed, revealing how much Donuts was willing to pay for contested gTLDs at auction. On 5 June 2015, Claimants asked ICANN and its Board for full transparency and appropriate measures (**Annex 16**). On 5 July 2015, ICANN's staff denied the request for full transparency (**Annex 17**). The Board has never responded to Claimants' request. During the preliminary hearing, parties were invited to seek resolution on the data exposure issue by 8 September 2015. No resolution was found, as ICANN never showed any willingness to take appropriate measures.

B.   HTLD's application for .hotel must be rejected

50.   In addition to HTLD's attempt to play the application process by invoking community priority for a highly sought-after generic word, the user credentials of an individual associated with HTLD were used between 17 March 2014 and 27 February 2015 to access sensitive and confidential data of competing applicants for .hotel. This data gives an unfair competitive advantage over competing applicants. The extent of the data breach as well as the amount and nature of the data that was retrieved show a deliberate intent to gather as much

confidential information as possible. To date, HTLD has never openly distanced itself from the individual who accessed the sensitive data. It is thus very likely that HTLD benefits from this unfair competitive advantage created by the unauthorized access to sensitive information. This alone should suffice to disqualify HTLD from the application process. The misuse of the user credentials to access sensitive and confidential business plans and information qualifies as theft of trade secrets, a crime[5] that was committed involving the use of computers and the Internet. ICANN has made it clear through the adoption of background screening criteria that *"applications from any entity with or including any individual [who] has ever been convicted of any crime involving the use of computers [...] or the Internet to facilitate the commission of crimes"* were going to be *"automatically disqualified from the program"* (**RM 5**, Module 1-22). In this case, a crime was committed seemingly with the specific purpose of obtaining a better position within the new gTLD program, and the crime was made possible due to the misuse of user credentials for which HTLD (or an individual associated to HTLD) was responsible. ICANN introduced background screening *"to protect the public interest in the allocation of critical Internet resources"* and reserved *"the right to deny an otherwise qualified application"* (**RM 5**, Module 1-24). It would indeed not be in the public interest to allocate a critical Internet resource to an entity that is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials. ICANN refused to give Claimants further information regarding the data exposure issue (**Annex 17**). Nevertheless, the available information allows the conclusion that ICANN should not allocate critical Internet resources to HTLD and that HTLD's application for .hotel must be denied.

---

[5] The theft of trade secrets is a federal crime (18 U.S. Code § 1832) which is also sanctioned in specific legislation in California (Cal. Civil Code §§ 3426-3426.11).

VIII. RELIEF REQUESTED

51. Based on the foregoing and Claimants' request for IRP, and reserving all rights to rebut ICANN's response in further briefs and during a hearing, Claimants respectfully request that the Panel:

- Declare that ICANN has breached its Articles of Incorporation, its Bylaws, and/or the gTLD Applicant Guidebook;
- Declare that ICANN must reject the determination that HTLD's application for .hotel be granted community priority;
- Declare that ICANN must reject HTLD's application for .hotels;
-
- Award Claimants their costs in this proceeding; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or any other relief that Claimants may request after further briefing or argument.

Respectfully submitted,

Flip Petillion

19 October 2015

Flip Petillion,
Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels, Belgium
Counsel for Claimant

Table of Contents

List of Reference Material (RM)

1. ICANN's Articles of Incorporation
2. ICANN's Bylaws of 11 April 2013
3. ICANN's Bylaws as amended on 16 March 2012, *available at* http://www.icann.org/en/about/governance/bylaws/bylaws-16mar12-en.htm
4. Affirmation of Commitments
5. gTLD Applicant Guidebook (v. 2012-06-04)
6. 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
7. GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005)
8. ICANN Resolution 2008.06.26.02, http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm
9. ICANN Generic Names Supporting Organization, Final Report - Introduction of New Generic Top-Level Domains, 8 August 2007, Part A: Final Report, http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm
10. ICANN Resolution 2011.06.20.01, http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm
11. ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, http://www.icann.org/en/groups/board/documents/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf
12. Information on the Applicant Guidebook as published on http://newgtlds.icann.org/en/applicants/agb
13. New gTLD Update (30 May 2012) on the close of the TLD Application system, http://newgtlds.icann.org/en/announcements-and-media/announcement-3-30may12-en
14. Transcript of Karla Valente morning session in Abu-Dhabi on 4 August 2009, as published on https://archive.icann.org/en/topics/new-gtlds/consultation-outreach-en.htm
15. Community Priority Evaluation Panel and its Processes, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf
16. ICANN's Webpage on the Evaluation Panels Selection Process
17. ICANN call for expressions of interest (EoIs) for a New gTLD Comparative Evaluation Panel of 28 February 2009, https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf
18. ICANN call for expressions of interest (EoIs) for a New gTLD Community Priority Evaluation Panel – formerly Comparative Evaluation Panel of 31 July 2009, https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf
19. Michael Sarazar, "Preparing Evaluators for the new gTLD Application Process, 22 November 2011
20. Community priority evaluation report of Starting Dot's application to operate the .immo gTLD, dated 17 March 2014
21. Community priority evaluation report of dotgay llc's application to operate the .gay gTLD, dated 6 October 2014
22. Community priority evaluation report of Dadotart Inc's application to operate the .art gTLD, dated 10 September 2014
23. Community priority evaluation report of EFLUX.ART, LLC's application to operate the .art gTLD, dated 10 September 2014
24. Community priority evaluation report of Taxi Pay GmbH's application to operate the .taxi gTLD, dated 17 March 2014

25. Community priority evaluation report of MUSIC LLC's application to operate the .music gTLD, dated 6 October 2014

26. Community priority evaluation report of Tennis Australia ltd's application to operate the .tennis gTLD, dated 17 March 2014

27. ICDR Case No. 50 117 T 00224 08, *ICM Registry v. ICANN*, Declaration of the Independent Review Panel, DATE

28. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits)

29. Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June)

30. International Covenant on Civil and Political Rights (ICCPR)

31. IAComHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00

32. ICDR Case No. 50-20-1400-0247, *Booking.com v. ICANN*, Post-hearing communications in

33. ICDR Case No. 50-20-1400-0247, *Booking.com v. ICANN*, Final Declaration of the Independent Review Process Panel, DATE

34. ICDR Case No. 01-14-0002-1065, *GCC v. ICANN*, Interim Declaration on Emergency Request for Interim Measures of Protection, 12 February 2015

35. ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Panel Declaration on the IRP Procedure, 14 August 2014

36. ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Final Declaration of IRP Procedure, 9 July 2015

37. ICDR Case No. 01-14-0001-5004, *Dot Registry v. ICANN*, Interim Declaration on Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection, 23 December 2014

38. Board Governance Committee determination on Request for Reconsideration 14-44 of 20 January 2015

39. Amended Request for Reconsideration 14-44 of …

40. RM 22 Vistaprint

41. ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Additional submission Vistaprint

42. ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Second additional submission Vistaprint

43. Community priority evaluation report of GMO Registry, Inc.'s application to operate the .shop gTLD, dated 8 October 2015

44. Community priority evaluation report of Commercial Connect LLC's application to operate the .shop gTLD, dated 26 November 2015

45. CPE Guidelines of 27 September 2013, available at http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en

46. ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, ICANN's response to Vistaprint's first additional submission

47. ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Final Declaration of the Independent Review Panel, 9 October 2015

48. *Brown v. Gardner*, 513 U.S. 115, 122 (1994)

49. *Rapanos v. United States*, 547 U.S. 715, 752 (2006)

50. *Weaver v. Federal Motor Carrier Safety Admin.*, 744 F. 3d 142, 145 (D.C. Cir. 2014)