

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

CORN LAKE, LLC,)	ICDR CASE NO. 01-15-0002-9938
)	
Claimant,)	
)	
v.)	
)	
INTERNET CORPORATION FOR ASSIGNED)	
NAMES AND NUMBERS,)	
)	
Respondent.)	
<hr/>)

**ICANN'S RESPONSE TO CLAIMANT CORN LAKE, LLC'S
REQUEST FOR INDEPENDENT REVIEW PROCESS**

Jeffrey A. LeVee
Kate Wallace
JONES DAY
Contact Information Redacted

Counsel to Respondent
The Internet Corporation
For Assigned Names and Numbers

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Response to the Request for Independent Review Process (“IRP Request”) submitted by claimant Corn Lake, LLC (“Corn Lake”) on 24 March 2015.

1. As part of the New gTLD Program, Corn Lake applied to ICANN for the opportunity to operate the new generic top level domain (“gTLD”) .CHARITY (the “Application”). Spring Registry Limited (“SRL”) also submitted an application for .CHARITY, and Excellent First Limited submitted an application for .慈善 (the Chinese translation of “charity”).

2. ICANN is administering the New gTLD Program pursuant to the Applicant Guidebook (“Guidebook”) that ICANN adopted in June 2012 following years of consideration and public input. The Guidebook establishes an independent objection and dispute resolution process, which was designed to protect certain interests and rights of third parties.¹ This process provides a path for formal objections during evaluations of the applications, and allows a party with standing to have its objection considered before a panel of qualified experts.² An objection to a gTLD application may also be filed by ICANN’s Independent Objector (“IO”).³ ICANN created the IO position for the New gTLD Program and gave him/her the authority to file Limited Public Interest Objections and Community Objections against “highly objectionable” gTLD applications to which no formal objection had been filed.⁴

3. Here, the IO filed Community Objections against the two .CHARITY applications, as well as the application for .慈善, meaning charity. The IO was concerned that, among other things, the lack of any policy restricting registrations in these gTLDs to charitable or not-for-profit

¹ Corn Lake submitted excerpts of the Guidebook as Appendix C. The complete Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb>.

² Guidebook, § 3.2.

³ *Id.* at § 3.2.5.

⁴ *Id.*

organizations created a likelihood of detriment to the rights or legitimate interests of the charity community, to users, and to the general public.⁵

4. All Community Objections are heard by independent, expert panels selected by the International Centre for Expertise of the International Chamber of Commerce (“ICC”).⁶ The ICC expert panel evaluating the IO’s Community Objection to Corn Lake’s Application (“Corn Lake Expert Panel”) rendered a determination (“Corn Lake Expert Determination”) in favor of the IO. In relevant part, the Corn Lake Expert Panel found that, because Corn Lake’s .CHARITY Application did not include registration restrictions to charitable organizations, “there is a likelihood of material detriment to the charity sector community were the Application to proceed.”⁷

5. By contrast, the ICC expert panel evaluating the IO’s Community Objection to SRL’s application (“SRL Expert Panel”) rendered a determination in favor of SRL (“SRL Expert Determination”). Specifically, the SRL Expert Panel found that SRL’s commitment set out in its .CHARITY application to restrict registration “to members of the charity sector” was sufficient to negate any concern of material detriment to the targeted community.⁸

6. The ICC expert panel evaluating the IO’s Community Objection to Excellent First Limited’s application rendered a determination in favor of Excellent First Limited. The ICC expert panel found that Excellent First Limited’s commitment in its application for .慈善 (the Chinese translation of “charity”) to limit registrations in the applied-for string to “charitable organizations or institutions which must represent and warrant that they are authorized to conduct charitable activities,” was sufficient to negate any concern of material detriment to the targeted community.⁹

⁵IO 12 October 2013 Community Objection to Corn Lake’s Application, C-Ex. 2, at 17. Citations to exhibits beginning with the prefix “C” refer to exhibits and appendices submitted with Corn Lake’s IRP Request.

⁶See Guidebook, Attachment to Module 3 (New gTLD Dispute Resolution Procedure, Art. 3(d)).

⁷Corn Lake Expert Determination, C-Ex. 8, ¶¶ 152, 156.

⁸SRL Expert Determination, C-Ex. 11, ¶ 130.

⁹Excellent First Limited Expert Determination, §§ 129, 131, 132, available at <http://newgtlds.icann.org/en/program-status/odr/determination>.

7. Corn Lake makes three claims in this IRP, none of which establishes that the ICANN Board acted inconsistently with ICANN’s Articles of Incorporation or Bylaws.

8. **First**, Corn Lake asserts that the Corn Lake Expert Determination was substantively wrong because it cannot be reconciled with the SRL Expert Determination. Corn Lake’s disagreement with the Corn Lake Expert Determination, however, does not constitute a challenge to ICANN Board action and therefore is not appropriately asserted in an IRP under ICANN’s Bylaws. As explained herein, IRPs are not a vehicle to challenge third-party expert determinations. ICANN’s Board is not involved in the creation of third-party expert determinations, was not involved in any way in the determinations concerning the .CHARITY or .慈善 applications, and has no obligation under the Guidebook (much less the Articles or Bylaws) to review (substantively or otherwise) any such determination.

9. In an earlier IRP proceeding filed against ICANN in 2014, Booking.com made a nearly identical claim. Booking.com had applied for .HOTELS and substantively disagreed with a decision of a third-party expert concerning its application.¹⁰ In the Final Declaration dated 3 March 2015, the Booking.com IRP Panel unanimously rejected Booking.com’s claims, determining that Booking.com’s challenge to the decision of an independent evaluator did not challenge Board action¹¹ and, moreover, that the ICANN Board had no obligation to review or otherwise intervene in the conclusions reached by the third-party evaluator.¹² In this memorandum, ICANN explains why this Panel should reach the same result.

10. **Second**, Corn Lake challenges a 12 October 2014 decision of the ICANN Board New gTLD Program Committee (“NGPC”), which approved the implementation of a limited review

¹⁰*Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Determination (“Booking.com Final Determination”), C-App’x I, ¶ 80.

¹¹*Id.* at ¶ 138 (“there was no action (or inaction) by the Board here”).

¹²*Id.* at ¶¶ 129, 138 (“[T]he 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.”; *see also id.* ¶ 146.

mechanism to address perceived inconsistent expert determinations concerning just two specifically identified sets of String Confusion Objections, and specifically excluded from the review any expert determinations resulting from Community Objections, such as those lodged against .CHARITY (the “12 October 2014 Resolution”).¹³ Corn Lake contends that the expert determination relating to its application for .CHARITY should have been included in the 12 October 2014 Resolution and thereby subject to the review mechanism established therein. Such a claim, however, does not support Corn Lake’s IRP Request.

11. After careful consideration, the NGPC identified several bases to distinguish the seemingly inconsistent determinations resulting from specifically identified sets of String Confusion Objections, on the one hand, and the expert determinations resulting from Community Objections, such as those relating to .CHARITY or .慈善, on the other. Based upon these differences, the NGPC concluded that permitting the specifically identified sets of String Confusion Objection expert determinations to stand “would not be in the best interest of the Internet community,” but that “reasonable explanations” existed for the seeming discrepancies concerning determinations on Community Objections, such as for .CHARITY.¹⁴ In limiting the review to the two specifically identified sets of String Confusion Objection expert determinations, the NGPC did not breach its obligations under ICANN’s Bylaws or Articles of Incorporation. To the contrary, the NGPC clearly “exercise[d its] independent judgment in taking the decision, believed to be in the best interests of the company,” as required by the Bylaws.¹⁵

12. **Third**, Corn Lake contends that the 12 October 2014 Resolution established a new standard by which all allegedly “inconsistent and unreasonable” objection decisions would be reviewed. According to Corn Lake, that review mechanism should have been implemented to

¹³The NGPC has delegated authority from the ICANN Board to make decisions regarding the New gTLD Program.

¹⁴NGPC Resolution 2014.10.12.NG02, C-Ex. 16, at 10-11.

¹⁵ICANN’s Bylaws (“Bylaws”), Art. IV, § 3.4, available at <http://www.icann.org/en/about/governance/bylaws>.

address what Corn Lake perceives to be inconsistent outcomes rendered by the Corn Lake Expert Panel and the SRL Expert Panel concerning the IO's Community Objections to each application.¹⁶ Corn Lake, however, is factually and substantively wrong. The NGPC did not establish a new standard by which all allegedly "inconsistent and unreasonable" expert determinations would be reviewed. Rather, in its 12 October 2014 Resolution, the NGPC approved a very narrow review mechanism to be applied only to specifically identified expert determinations arising out of the String Confusion Objection process. The NGPC explicitly decided not to extend the review to any Community Objection expert determinations. Moreover, the NGPC was not obligated to create or implement a broader review mechanism. Neither the Bylaws, nor the Articles, nor the Guidebook requires ICANN to have an appellate mechanism for objection proceedings that are conducted as part of the New gTLD Program.

13. Corn Lake essentially seeks any means to argue that the ICANN Board should conduct a substantive review of the Corn Lake Expert Determination. However, the Board and the ICANN community, in adopting the Guidebook, made clear that the Board would *not* undertake such a responsibility, and nothing in the Articles or Bylaws requires the Board to do so. It simply cannot be "conduct inconsistent with the Articles or Bylaws" for the Board to decline to do something that it is not required to do.

14. IRPs are conducted pursuant to Article IV, Section 3 of ICANN's Bylaws, which provide for a non-binding method of evaluating certain actions of ICANN's Board of Directors (but not ICANN's staff or other committees).¹⁷ This IRP Panel has one (and only one) responsibility: to provide a declaration stating the Panel's opinion as to "whether the Board has acted consistently with the provisions of [ICANN's] Articles of Incorporation and Bylaws."¹⁸

¹⁶ Corn Lake does not address the Expert Determination in the proceeding involving Excellent First Limited.

¹⁷ Bylaws, Art. IV, § 3.

¹⁸ *Id.* at Art. IV, § 3.4.

BACKGROUND FACTS

I. ICANN

15. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. As set forth 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,” including the domain name system (“DNS”).¹⁹

16. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors and over 300 staff members. Yet, ICANN is much more than just the corporation—it is a community of participants. In addition to the Board, the staff, and an Ombudsman,²⁰ the ICANN community includes a Nominating Committee,²¹ three Supporting Organizations,²² four Advisory Committees,²³ a group of technical expert advisors,²⁴ and a large, globally distributed group of community members who participate in ICANN’s processes.

17. In its early years, and in accordance with its Core Values, ICANN focused on increasing the number of companies that could sell domain name registrations to consumers (“registrars”). ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs (“registries”). In 2000, ICANN approved seven gTLDs in a “proof of concept” phase that was designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet. In 2004 and 2005, ICANN approved a handful of additional TLDs.

¹⁹*Id.* at Art. I, § 1.

²⁰*Id.* at Art. V.

²¹*Id.* at Art. VII.

²²*Id.* at Arts. VIII-X.

²³*Id.* at Art. XI.

²⁴*Id.* at Art. XI-A, § 2.

II. THE NEW gTLD PROGRAM

18. The New gTLD Program (the “Program”) constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. The Program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs.

19. In developing the Program with the ICANN community, numerous versions of the Guidebook were prepared, distributed for public comment, and then revised as a result of the public input received. That process repeated many times and over many years until ultimately, ICANN went forward with the Program based on the version of the Guidebook published on 4 June 2012, which provides detailed instructions to gTLD applicants and sets forth the procedures as to how new gTLD applications would be evaluated.

20. As a result, the Program has been a great success at achieving its goals: ICANN received 1,930 gTLD applications, and as of this writing, more than 600 new gTLDs have been added to the Internet, with hundreds more to come.

III. THE INDEPENDENT OBJECTOR

21. As part of the Program, ICANN established an independent objection and dispute resolution process, which was designed to protect certain interests and rights of third parties. This process provides a path for formal objections to the applications, and allows a party with standing to have its objection considered before an independent panel of qualified experts.²⁵

22. An objection to a gTLD application also may be filed by the Independent Objector (“IO”).²⁶ The IO is tasked with filing certain objections against “highly objectionable” gTLD applications to which no formal objection has been filed.²⁷ Pursuant to the Guidebook, “[n]either ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or

²⁵Guidebook, § 3.2.

²⁶*Id.* at § 3.2.5.

²⁷*Id.*

not to file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.”²⁸

23. The IO may file objections on the grounds of Limited Public Interest and Community. The IO asserted Community Objections against both the .CHARITY and .慈善 (meaning “charity”) applications. The IO’s standing to file a Community Objection is triggered when there is at least one comment in opposition to the application made in the public sphere.²⁹ All Community Objections are heard by independent, expert panels selected by the ICC.³⁰ ICANN is not involved in the selection of the expert panels or in the evaluation of any specific objection.

24. The standards for evaluating Community Objections include a four-part test to help an expert panel determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the IO must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.³¹

25. Evaluation of a Community Objection necessarily goes far beyond a review of the string, and instead requires careful consideration of the application materials and an applicant’s proposed commitments, which may (and likely do, as here) vary among applicants. As a result, one could reasonably expect that Community Objections filed against different applications, even applications for the same string, may be resolved differently.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Guidebook, Attachment to Module 3 (New gTLD Dispute Resolution Procedure, Art. 3(d)).

³¹ Guidebook, § 3.5.4.

IV. RELEVANT FACTS REGARDING THE IO'S COMMUNITY OBJECTIONS TO THE .CHARITY AND .慈善 APPLICATIONS

26. Corn Lake, a Donuts, Inc. affiliate, applied to ICANN for the opportunity to operate the .CHARITY gTLD. The other applicant for .CHARITY is SRL. Excellent First Limited applied for .慈善 (the Chinese translation of "charity").

27. On 12 March 2013, the IO filed a Community Objection against Corn Lake's Application, asserting that there is "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."³² The IO's objection was premised in part on the "pro-open registry philosophy"³³ set forth in Corn Lake's Application, which included the following language:

The TLD is a generic term and its second level names will be attractive to a variety of Internet users. Making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD.³⁴

28. The IO found that the "various comments in opposition" to Corn Lake's Application "mainly focused on the views that the string should be administered by a not for profit organization and/or that there are insufficient protection mechanisms in place such that non-*bona fide* organizations may adopt the .CHARITY gTLD, and create confusion in the mind of the public over what is in fact a charity."³⁵ The IO concluded that "[t]he absence of preventive security measures assuring the charitable nature, the integrity and also the trustworthiness of the entities represented and the information provided under the gTLD .Charity, e.g., through stringent eligibility criteria established in advance in collaboration with the community and its stakeholders, creates a

³²IO 12 October 2013 Community Objection to Corn Lake's Application, C-Ex. 2, at 4; Guidebook, § 3.2.1.

³³IO 22 August 2013 Reply In Support of Community Objection, C-Ex. 4, ¶ 27.

³⁴IO 12 October 2013 Community Objection to Corn Lake's Application, C-Ex. 2, ¶ 2.

³⁵*Id.* at ¶ 4.

likelihood of detriment to the rights or legitimate interests of the charity community, to users and to the general public.”³⁶

29. The IO filed similar Community Objections against SRL’s .CHARITY and Excellent First Limited’s application for .慈善 (the Chinese translation of “charity”).³⁷

30. On 6 June 2013, Corn Lake responded to the IO’s objection.³⁸ Corn Lake maintained its position that it “would make the <CHARITY> registry open to all consumers.”³⁹

31. On 4 July 2013, the ICC appointed Tim Portwood to serve as the expert panel to individually consider each of the Community Objections to the .CHARITY applications and the application for .慈善.

32. On 9 January 2014, the Corn Lake Expert Panel rendered a determination in favor of the IO. The Corn Lake Expert Panel determined that the IO had standing to object, and that the IO established each of the requisite four elements to prevail on a Community Objection.⁴⁰ In particular, the Corn Lake Expert Panel noted the public opposition statements that “focus[ed] on the need clearly to distinguish charitable organizations from for-profit enterprises,” stating:

[The public opposition statements] point out the absence of any limitation in the Application of the “.Charity” string to not-for-profit or charitable organizations ... and emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law.⁴¹

33. The Corn Lake Expert Panel found that the public statements of opposition evidenced a particular harm that would occur “if access to the ‘.Charity’ string were not restricted to

³⁶*Id.* at ¶ 46.

³⁷<http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/charity-cty-spring-registry-limited/>; <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/慈善-cty-excellent-first-limited/>. On 7 May 2013, the ICC consolidated the proceedings concerning the IO’s Community Objections to the .CHARITY applications and application for .慈善.

³⁸Corn Lake’s 6 June 2013 Response to IO’s Community Objection, C-Ex. 3.

³⁹*Id.* at 6.

⁴⁰Corn Lake Determination, C-Ex. 8, ¶¶ 112, 161.

⁴¹*Id.* at ¶¶ 150, 151.

persons (whether incorporated entities, unincorporated associates or entities, foundations or trusts) which can establish that they are a charity or a not-for-profit enterprise with charitable purposes.”⁴² Because Corn Lake’s Application “expressly avoids such a limitation and therefore the protection that the Expert Panel considers should exist,” the Corn Lake Expert Panel concluded that the IO had established the likelihood of material detriment.⁴³

34. In the SRL proceeding, the SRL Expert Panel articulated the same concerns as those relating to Corn Lake’s application, namely the need to clearly distinguish charitable organizations from for-profit enterprises and, in particular, with respect to public giving and fund-raising activities.⁴⁴ In the SRL proceeding, however, the SRL Expert Panel found that SRL’s proposed eligibility policy adequately assuaged the Panel’s concerns:

The eligibility policy defined by Applicant [SRL] and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by Applicant with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel’s view to the Detriment test concerns raised by IO.⁴⁵

35. Specifically, SRL committed to an eligibility policy that defined the subset of the community to which registration will be limited as “incorporated entities, unincorporated associations or entities, foundations or trusts which can establish that they are a charity or ‘not for profit’ enterprise with charitable purposes.”⁴⁶ The process for registration would further require each registrant applicant to provide the registrar with evidence of its charitable purposes.⁴⁷ As the SRL Expert Panel stated with respect to SRL’s .CHARITY application:

⁴²*Id.* at ¶¶ 152, 156.

⁴³*Id.* at ¶ 153 (citing the statement in Corn Lake’s application that “we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants”).

⁴⁴SRL Expert Determination, C-Ex. 11, ¶ 129.

⁴⁵*Id.* at ¶ 129.

⁴⁶*Id.* at ¶ 130 (citation omitted).

⁴⁷*Id.*

[R]egistration will be limited to members of the charity sector as narrowly defined by analogy with the definitions of ‘charity’ and ‘charitable purposes for the public benefit’ found in the UK Charities Act 2011.⁴⁸

36. On 9 January 2014, the ICC notified Corn Lake of the Corn Lake Expert Panel’s decision.

37. On 24 January 2014, Corn Lake filed a Reconsideration Request with ICANN’s Board Governance Committee (“BGC”), asking the BGC to reverse the Corn Lake Expert Determination.⁴⁹ Reconsideration is an accountability mechanism available under ICANN’s Bylaws and involves a review process administered by the BGC.⁵⁰

38. On 27 February 2014, the BGC denied Corn Lake’s Reconsideration Request, finding no evidence that the Corn Lake Expert Panel violated any process or policy in reaching its determination. Corn Lake does *not* challenge the BGC’s denial of its Reconsideration Request in this IRP.

V. RELEVANT FACTS REGARDING PERCEIVED INCONSISTENT EXPERT DETERMINATIONS IN SPECIFICALLY IDENTIFIED STRING CONFUSION OBJECTIONS

39. String Confusion Objections, which must show that an applied-for string is confusingly similar to another string (existing or applied-for), are substantively and procedurally different than Community Objections. Section 3.5.1 of the Guidebook provides that a String Confusion Objection will be upheld according to the following standard:

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String

⁴⁸*Id.* The IO’s Community Objection against Excellent First Limited’s application was likewise denied. The ICC expert panel found that Excellent First Limited’s commitment to limit registrations in the applied-for string to “charitable organizations or institutions which must represent and warrant that they are authorized to conduct charitable activities,” was sufficient to negate any concern of material detriment to the targeted community. Expert Determination ¶ 129, available at <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/慈善-cty-excellent-first-limited/>.

⁴⁹<https://www.icann.org/resources/pages/14-3-2014-01-30-en>.

⁵⁰See Bylaws, Art. IV, § 2.

confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion.⁵¹

In assessing a String Confusion Objection, the expert focuses on the string itself (*e.g.*, visually, phonetically, its meaning), and does not focus on the registration policies or any other commitment set forth in the application or proposed registry agreement. Thus, it is more difficult to reconcile differing expert determinations regarding string confusion involving the same two strings.

40. In the context of the New gTLD Program, sixty-seven String Confusion Objections were filed by various objectors.⁵² Of these, only three sets of strings were the subject of seemingly inconsistent expert determinations by different expert panels appointed by the ICDR, only two of which are still relevant: (1) .SHOP/.通販; and (2) .COM/.CAM.⁵³ 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.⁵⁴

41. As a result, the BGC requested that ICANN staff prepare a report for the NGPC, “setting out options for dealing . . . [with] differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes. . . .”⁵⁵ The NGPC subsequently considered various approaches to address perceived inconsistent determinations on String Confusion Objections, including possibly implementing a new review mechanism.⁵⁶ ICANN staff then initiated a public

⁵¹ Guidebook, § 3.5.1. The Guidebook provides that the International Centre for Dispute Resolution (“ICDR”) will administer the dispute resolution process for String Confusion Objections. *Id.*, § 3.2.3.

⁵² <http://newgtlds.icann.org/en/program-status/odr/filings>.

⁵³ The expert determinations reached with respect to .CAR/.CARS were not at issue because two of the applicants for .CARS had withdrawn their applications and the contention set was resolved.

⁵⁴ *Compare* Expert Determination, ICDR Case No. 50 504 T 229 13, *available at* <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1255-75865-en.pdf> *with* Expert Determination, ICDR Case No. 50 504 T 00224 13, *available at* <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1234-83704-en.pdf>.

⁵⁵ *See* BGC Recommendation on Reconsideration Request 13-10, at 11, *available at* <https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf>.

⁵⁶ *See* Rationale for NGPC Resolution 2014.02.05.NG02, C-Ex. 14.

comment period regarding the framework principles of this potential review mechanism.⁵⁷

Ultimately, after considering the public comments received, including Donuts' comment that if any review mechanism is adopted it should be expanded beyond String Confusion Objections, 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." The NGPC directed ICANN staff to establish a review process limited to only the two String Confusion Objection proceedings concerning .COM/.CAM and .SHOP/.通販, whereby the ICDR would appoint "a three-member panel to re-evaluate the materials presented, and the [specifically identified] Expert Determinations ... and render a Final Expert Determination on these two proceedings."⁵⁸

STANDARD OF REVIEW

42. The IRP is a unique, non-binding process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with ICANN's Articles or Bylaws.⁵⁹ The IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN's Articles or Bylaws.⁶⁰ ICANN's Bylaws specifically identify the standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

- a. [D]id the Board act without conflict of interest in taking its decision?;
- b. [D]id the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

⁵⁷ See <https://www.icann.org/public-comments/sco-framework-principles-2014-02-11-en>. Some commenters urged the Board not to adopt any review mechanism. See <https://www.icann.org/en/system/files/files/report-comments-sco-framework-principles-24apr14-en.pdf>. This proposed framework made clear that ICANN had no obligation to do anything with respect to the seemingly inconsistent String Confusion Objection expert determinations.

⁵⁸ NGPC Resolution 2014.10.12.NG02, C-Ex. 16, at 3-4, also available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.

⁵⁹ Bylaws, Art. IV, §§ 3.1, 3.2.

⁶⁰ See *id.* at Art. IV, §§ 3.2, 3.4.

c. [D]id the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?⁶¹

43. The IRP Panel is not to substitute its judgment for that of the Board.⁶² As the IRP panel in *Booking.com v. ICANN* explained:

[s]o 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 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 by the Guidebook.⁶³

44. ICANN has appointed the ICDR as ICANN’s IRP Provider. ICANN’s Bylaws and the Supplementary Procedures that the ICDR has adopted specifically for ICANN IRP proceedings apply here.⁶⁴ The Bylaws provide that the IRP be conducted via “email and otherwise via the Internet to the maximum extent feasible.”⁶⁵ The IRP Panel may also hold meetings via telephone where necessary, and “[i]n the unlikely event that a telephone or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.”⁶⁶

45. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written declaration designating, among other things, the prevailing party.⁶⁷ The Board will give serious consideration

⁶¹*Id.* at Art. IV, § 3.4.

⁶²*See id.*

⁶³*Booking.com* Final Declaration, C-App’x I, ¶¶ 108-109.

⁶⁴Absent a governing provision in ICANN’s Bylaws or the ICDR’s Supplemental Procedures, the ICDR Rules apply. In the event of any inconsistency between the Supplementary Procedures and the ICDR’s Rules, the Supplementary Procedures shall govern. Bylaws, Art. IV, § 3.8; *see also* ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process (“Supplementary Procedures”), § 2, *available at* <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

⁶⁵Bylaws, Art. IV, § 3.12.

⁶⁶*Id.* at Art. IV, § 3.12; Supplementary Procedures ¶ 10.

⁶⁷Bylaws, Art. IV, § 3.18.

to the IRP Panel’s opinion and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.⁶⁸

ARGUMENT

At its core, Corn Lake’s IRP Request challenges the merits of the Corn Lake Expert Determination. In an effort to obtain review of that determination (an appellate procedure that is not permitted through ICANN’s Articles, Bylaws or the Guidebook), Corn Lake initiated this IRP claiming that: (1) the Corn Lake Expert Determination must be wrong since it reaches a different conclusion than the SRL Expert Determination; (2) the expert determinations from the .CHARITY Community Objections should have been included in the limited review mechanism approved in the 12 October 2014 Resolution; or, at the very least, (3) the ICANN Board should have extended the limited review process set forth in the 12 October 2014 Resolution to evaluate the .CHARITY Community Objection expert determinations. None of these arguments, however, establishes that the ICANN Board acted inconsistently with ICANN’s Articles of Incorporation or Bylaws.

I. SUBSTANTIVE DISAGREEMENT WITH THE CORN LAKE EXPERT DETERMINATION IS NOT A BASIS FOR INDEPENDENT REVIEW.

46. The basis of this IRP is Corn Lake’s substantive disagreement with the Corn Lake Expert Panel’s determination sustaining the IO’s Community Objection against Corn Lake’s .CHARITY Application. To support its claim, Corn Lake compares the Corn Lake Expert Determination to the SRL Expert Determination, and concludes that the Corn Lake Expert Panel must have erred because, according to Corn Lake, its conclusion was inconsistent with the SRL Expert Determination. Moreover, Corn Lake’s requested relief—that the IRP Panel “direct the Board to reverse the .CHARITY objection ruling against Corn Lake”—confirms that this IRP is

⁶⁸*Id.* at Art. IV, § 3.21.

nothing more than an attack on the Corn Lake Expert Determination.⁶⁹ However, as discussed herein, IRPs are not a forum for challenging third party expert determinations, which involve no Board action whatsoever.

47. As set forth in the Guidebook, all Community Objections lodged by the IO are heard by independent, expert panels, not by ICANN, much less ICANN’s Board.⁷⁰ Following a public request for proposals, ICANN selected the ICC to adjudicate Community Objections. There is no requirement—under ICANN’s governing documents or imposed by law—that requires the ICANN Board to inject itself into the day-to-day affairs of the evaluation process in the manner Corn Lake proposes.⁷¹ Indeed, a corporate board must be in the “position of being an effective overseer of corporate operations—not to micro-manage such operations but to exercise a more in-depth, informed, and objective oversight role.”⁷² Consistent with these well-settled legal principles, neither the Articles, nor the Bylaws, nor the Guidebook requires the ICANN Board to conduct *any* analysis of the determinations of third party experts retained to consider Community Objections. ICANN and the community elected not to make the Board the “court of appeal” for these determinations, and nothing obligated the Board to serve such a function.

48. Further, it is not the role of the Board (or, for that matter, this IRP Panel) to second-guess the substantive determinations of independent, third-party experts. The decision not to have ICANN (much less ICANN’s Board) perform substantive reviews of third party expert determinations reflects a considered decision of ICANN’s Board, made after significant public input and comment, that third party experts (and not ICANN) should be resolving these types of issues

⁶⁹Corn Lake’s IRP Request ¶ 58; *see also id.* at 3 (asking the IRP Panel to “direct the Board to reverse the ‘inconsistent and unreasonable’ community objection ruling against Corn Lake’s application for .CHARITY”).

⁷⁰Guidebook, § 3.4.4. ICANN even lacks authority to direct or require the IO to file or not to file any particular objection. *Id.* at § 3.2.5.

⁷¹Indeed, “[a]ctive involvement by the board in day-to-day affairs of the corporation does not accord with the realities of contemporary business practices.... The role of the board ... is the formulation of major management policies rather than direct involvement in day-to-day management.” Cal. Corp. Code § 300, Leg. Comm. Comments.

⁷²American Bar Assoc., Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley 17, 19 (2005).

with respect to the hundreds of gTLD applications that were expected and the 1,930 applications that ICANN in fact received.

49. Corn Lake nonetheless contends that the ICANN Board should have injected itself into the objection process and reversed the Corn Lake Expert Determination. Corn Lake asserts that, because SRL “reserve[d] the right to amend or change” its Public Interest Commitments Specification (“PIC”)⁷³ regarding registration eligibility requirements “once the details of the [new gTLD] Program are finalized,” SRL effectively reserved the right not to implement the proposed eligibility policy that had assuaged the Panel’s concerns regarding SRL’s .CHARITY application.⁷⁴ According to Corn Lake, “because SRL has the unilateral right to change its PIC language,” “no legitimate basis exists ... to distinguish the two applications.”⁷⁵

50. The SRL Expert Panel, however, concluded otherwise. Indeed, the SRL Expert Panel reviewed SRL’s PIC and specifically found that SRL had committed to limit registration “to members of the charity sector as narrowly defined by analogy with the definitions of ‘charity’ and ‘charitable purposes for the public benefit’ found in the UK Charities Act 2011.”⁷⁶ The SRL Expert Panel was persuaded that SRL would implement the proposed eligibility policy. Corn Lake’s disagreement with that determination does not mean that the SRL Expert Panel or the Corn Lake Expert Panel were wrong, much less that the ICANN Board did something wrong by not intervening.

51. Corn Lake argues that its interpretation of SRL’s PIC should override the SRL Expert Panel’s interpretation, and asks this IRP Panel to substantively evaluate the two applications

⁷³Public Interest Commitments Specifications provide new gTLD applicants with the opportunity to make public interest commitments based on statements made in their applications and/or additional public interest commitments which were not included in their applications but to which they intend to commit. These commitments become part of the applicant’s new gTLD registry agreement if the string is delegated to that applicant.

⁷⁴Corn Lake’s IRP Request ¶¶ 22, 26, 27.

⁷⁵*Id.* at ¶ 27.

⁷⁶SRL Expert Determination, C-Ex. 11, ¶ 130.

and reverse the decision of the Corn Lake Expert Panel. However, neither request is within the purview of this IRP. The determinations rendered by third party expert panels do not involve Board action (or any obligation of the Board to act), and thus are not properly subject to an IRP in the first place. Moreover, under ICANN’s Bylaws, an IRP panel does not have the authority to perform a substantive review of third-party expert determinations. An IRP panel is only charged “with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”⁷⁷ The IRP Panel is not tasked with making a substantive determination of whether the ICC Expert Determinations were right or wrong. Despite Corn Lake’s claims to the contrary, the IRP is not a mechanism to re-try the decisions of independent evaluation panels.

II. THE BOARD DID NOT VIOLATE ANY ARTICLE OR BYLAWS PROVISION BY LIMITING THE REVIEW MECHANISM TO SPECIFIC STRING CONFUSION OBJECTION EXPERT DETERMINATIONS.

52. Corn Lake objects to the Board’s exercise of its independent judgment in determining not to implement a review mechanism to address what Corn Lake perceives to be inconsistent expert determinations relating to the .CHARITY Community Objections.⁷⁸ Corn Lake makes two arguments in this regard. First, Corn Lake argues that the expert determinations relating to the .CHARITY applications should have been included in the 12 October 2014 Resolution approving the implementation of a limited review mechanism for expert determinations from specifically identified sets of String Confusion Objections. Second, and somewhat alternatively, Corn Lake argues that the ICANN Board should have expanded the limited review process set forth in the 12 October 2014 Resolution and implemented a similar review mechanism to evaluate the .CHARITY Community Objection expert determinations.

53. The 12 October 2014 Resolution is purposefully narrow and limited. After extensive and careful consideration, the NGPC identified several bases to distinguish the seemingly

⁷⁷Bylaws, Art. IV, § 3.4.

⁷⁸Corn Lake’s IRP Request ¶ 47.

inconsistent String Confusion Objection expert determinations concerning .COM/.CAM and .SHOP/.通販 from the expert determinations concerning Community Objections (such as those filed against the .CHARITY and .慈善 applications). Accordingly, the language of the 12 October 2014 Resolution and the review mechanism approved therein is specifically limited only to the String Confusion Objection expert determinations concerning .COM/.CAM and .SHOP/.通販.⁷⁹ There is nothing inappropriate about the ICANN Board’s decision to intervene with respect to the .COM/.CAM and .SHOP/.通販 expert determinations and its decision to not intervene with respect to the .CHARITY expert determinations.

54. While the NGPC specifically found the expert determinations concerning String Confusion Objections related to .COM/.CAM and .SHOP/.通販 to be “inconsistent or otherwise unreasonable,” it expressly distinguished the objection decisions rendered in the context of other objections proceedings, such as those relating to Community Objections. Specifically, in passing the 12 October 2014 Resolution, the NGPC carefully “considered whether there was a reasonable basis for certain perceived inconsistent Expert Determinations to exist, and particularly why the identified Expert Determinations [on .COM/.CAM and .SHOP/.通販] should be sent back to the ICDR while other Expert Determinations [such as the expert determinations on .CHARITY] should not.”⁸⁰ The NGPC found that “there are reasonable explanations for these seeming discrepancies [concerning expert determinations on Community Objections], both procedurally and substantively.”⁸¹

55. The NGPC’s rationale explains why, contrary to what Corn Lake asserts, the expert determinations rendered in Community Objection proceedings such as those related to .CHARITY,

⁷⁹The expert determinations reached with respect to .CAR/.CARS were not at issue because two of the applicants for .CARS had withdrawn their applications and the contention set was resolved.

⁸⁰NGPC Resolution 2014.10.12.NG02, C-Ex. 16, at 10-11.

⁸¹*Id.* at 11.

are not at all comparable to the expert determinations rendered in the .COM/.CAM and .SHOP/.通販 String Confusion Objection proceedings, and thus were appropriately excluded from the 12 October 2014 Resolution.

56. Corn Lake asserts that the NGPC’s procedural rationale that “[t]wo panels confronting identical issues could – and if appropriate should – reach different determinations, based on the strength of the materials presented”⁸² is not applicable to .CHARITY because, according to Corn Lake, “each case [here] presented the same information in support of the same objection to the same string.”⁸³ While it is true that the IO objected to Corn Lake’s and SRL’s .CHARITY applications on similar grounds—namely the lack of eligibility criteria limiting registration in .CHARITY to reputable charitable organizations—it is *not* true that the materials presented to the expert panels in those two proceedings were the same. To the contrary, SRL presented evidence demonstrating its commitment to limit registration in .CHARITY to members of the charity sector, while Corn Lake did not and instead maintained that .CHARITY would be “open to all consumers.”⁸⁴

57. Based upon the strength of the materials presented in connection with the IO’s Community Objections to Corn Lake’s and SRL’s .CHARITY applications, it was reasonable (and not at all inconsistent) for one Expert Panel to uphold the objection against Corn Lake and another Expert Panel to deny the objection as to SRL.

58. On a substantive level, the NGPC stated:

[C]ertain Expert Determinations highlighted by the community that purportedly resulted in ‘inconsistent’ or ‘unreasonable’ results, presented nuanced distinctions relevant to the particular objection.

⁸²*Id.*

⁸³Corn Lake’s IRP Request ¶ 44.

⁸⁴Corn Lake’s 6 June 2013 Response to IO’s Community Objection, C-Ex. 3, at 6.

These nuances should not be ignored simply because a party to the dispute disagrees with the end result.⁸⁵

59. The “nuanced distinction” between Corn Lake’s application for .CHARITY and that of SRL is in fact readily apparent; SRL agreed to limit registration to members of the charity sector and Corn Lake did not.⁸⁶ Indeed, the Corn Lake Expert Panel was struck by the “absence of any limitation in the Application ... to not-for-profit or charitable organizations.”⁸⁷ As noted in the 12 October 2014 Resolution, the differences between Corn Lake’s and SRL’s applications “should not be ignored simply because [Corn Lake] disagrees with the end result.”⁸⁸

60. The NGPC determined that these differences provided “reasonable explanations” for seemingly inconsistent expert determinations in Community Objection proceedings (or in any other type of authorized objection proceeding), such as those relating to .CHARITY. As a result, after carefully considering whether to “expand the scope of the proposed review mechanism” to include expert determinations in other types of objection proceedings, such as Community Objection proceedings, the NGPC ultimately concluded that such an expanded review was not appropriate.⁸⁹ However, with respect to the .COM/.CAM and .SHOP/.通販 String Confusion Objection expert determinations, the NGPC found that “a reasonable explanation for the seeming discrepancies is not as apparent.... To allow these Expert Determinations to stand would not be in the best interest of the Internet community.”⁹⁰ In so finding, the Board clearly “exercise[d] its independent judgment

⁸⁵NGPC Resolution 2014.10.12.NG02, C-Ex. 16, at 11.

⁸⁶SRL Expert Determination, C-Ex. 11, ¶ 130.

⁸⁷Corn Lake Expert Determination, C-Ex. 8, ¶¶ 150, 151.

⁸⁸NGPC Resolution 2014.10.12.NG02, C-Ex. 16, at 11. Corn Lake concedes that SRL’s commitment to restrict registrations in .CHARITY to charitable organizations was a critical difference between the two applications. Corn Lake IRP Request, at 17, n. 27 (stating that “[i]f that difference means losing its prospect for the TLD, Corn Lake will agree to the same PIC as SRL”). Corn Lake’s time to amend its Application, however, has long since passed.

⁸⁹NGPC Resolution 2014.10.12.NG02, C-Ex. 16, at 12.

⁹⁰*Id.* at 3-4.

in taking the decision, believed to be in the best interests of the company,” as required by the Bylaws.⁹¹

61. Furthermore, permitting review of the .COM/.CAM and .SHOP/.通販 expert determinations is fully consistent with ICANN’s obligations under its Bylaws to preserve the stability and security of the domain name system (DNS). ICANN’s mission 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.”⁹² The delegation of two or more similar TLDs could cause user confusion and instability in the DNS. So, if .COM/.CAM and .SHOP/.通販 are in fact confusingly similar, the delegation of each applied-for string could have an adverse impact on the security and stability of the DNS. Permitting the review of the expert determinations resulting from certain String Confusion Objections is a means to ensure that the delegation of a new gTLD will not impose instability into the DNS. These types of concerns are not at issue in Community Objections, such as those against .CHARITY.

62. Corn Lake further contends that, through the 12 October 2014 Resolution, the NGPC “established a practice to handle ‘inconsistent and unreasonable’ objection decisions” and, therefore, was required to “follow that practice for the .CHARITY determinations [addressing Community Objections].”⁹³ Contrary to Corn Lake’s claims, the NGPC did not establish a new standard by which all seemingly “inconsistent and unreasonable” expert determinations would be reviewed. Instead, the NGPC approved a limited and narrow review of expert determinations resulting from specifically identified sets of String Confusion Objections, and, as described above, carefully explained its rationale for *not* expanding the review to encompass expert determinations in other

⁹¹Bylaws, Art. IV, § 3.4.c.

⁹²*Id.* at Art. I, § 1; *see also id.*, Art. I, § 2 (One of ICANN’s core values, which “should guide the decisions and actions of ICANN,” is “preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.”).

⁹³Corn Lake’s IRP Request ¶ 37.

types of objection proceedings, such as Community Objection proceedings. Nor was the Board under any obligation to establish a review mechanism for all expert determinations. Indeed, as the *Booking.com* IRP Panel found, “the fact that the ICANN Board enjoys [the] 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 [a claimant].”⁹⁴ Neither the Bylaws, nor the Articles, nor the Guidebook requires ICANN to have an appellate or review mechanism for objection proceedings that are conducted as part of the New gTLD Program. As such, the fact that there is no appellate or review mechanism available to Corn Lake could not possibly constitute a violation of any Article or Bylaws provision.

63. In addition, and contrary to Corn Lake’s claims of disparate treatment, the ICANN Board was justified in exercising its discretion to limit a review mechanism to certain expert determinations resulting from String Confusion Objections, which are intended to help ensure that no new gTLD imposes instability into the DNS. That justification simply is not present with respect to Community Objections, such as the .CHARITY expert determinations. Corn Lake was not treated differently than other, similarly-situated applicants; Corn Lake is not “similarly-situated” to the .COM/.CAM and .SHOP/.通販 applicants.

III. RESPONSE TO CORN LAKE’S REQUESTED RELIEF.

64. Corn Lake’s IRP Request should be denied in its entirety, including its request for relief. Corn Lake requests that this IRP Panel issue a declaration that “(i) direct[s] the Board to reverse the .CHARITY objection ruling against Corn Lake; (ii) subject that ruling to the same review as provided in the Resolution for the similarly situated .COM and .CAM decisional conflicts; or (iii) reinstate Corn Lake’s application conditioned upon its acceptance of the PIC agreed to by

⁹⁴*Booking.com* Final Determination, C-App’x I, ¶ 138.

SRL.”⁹⁵ An IRP panel, however, is explicitly limited to stating its opinion as to “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending, if requested, 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 IRP Panel.⁹⁶ Even if there were a basis for some kind of relief here (which there is not), neither this Panel nor any IRP panel has the authority to award affirmative relief.⁹⁷

CONCLUSION

65. For the foregoing reasons, ICANN urges the Panel to declare that the ICANN Board did not act inconsistently with ICANN’s Articles of Incorporation or Bylaws.

Respectfully submitted,

JONES DAY

Dated: May 15, 2015

By: 
Jeffrey A. LeVee
Counsel for Respondent ICANN

⁹⁵Corn Lake IRP Request ¶ 58.

⁹⁶Bylaws, Art. IV, §§ 3.4, 3.11(c-d).

⁹⁷Indeed, the IRP Panel in the first ever IRP found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them....” Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, C-App’x E, ¶ 133.