

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

Little Birch, LLC)
Minds+Machines Group Limited)
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Claimants)
)
v.)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
)
Respondent)
_____)

ICDR Case No. 011500028906

**ADDITIONAL SUBMISSION
REPLY TO ICANN'S RESPONSE BY LITTLE BIRCH, LLC AND MINDS +
MACHINES GROUP LIMITED**

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I. CONSOLIDATION WITH THE .HOTEL CASE

1. On 12 May 2015, the ICDR confirmed that the present case was merged with ICDR Case No. 011500028061 regarding the application for .hotel (the ‘.hotel 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.

II. PURPOSE OF IRP PROCEEDINGS – EXECUTIVE SUMMARY

2. 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.

3. 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.

4. 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

5. 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

6. 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*, from the following facts: the Economist Intelligence Unit published its final CPE guidelines only on 27 September 2013 (**RM 48**); 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).

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

7. Booking.com raised similar concerns to these (RM 35), 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.

8. 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

9. 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.

10. 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 38**, para. 40; **RM 39**, para. 73).

11. 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.

12. 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.

13. 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 38**, para. 98).

14. 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 38**, para. 101). The Supplementary Procedures supplement the ICDR Rules (Supplementary Procedures, Preamble and Section 2). The preamble of the ICDR Rules provides that “[a] dispute can be submitted to an arbitral tribunal for a final and binding decision”. Article 30 of the ICDR Rules specifies that “[a]wards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties”. No provision in the Supplementary Procedures deviates

from the 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 38**, para. 107).

15. 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 38**, paras. 108-109).

16. 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 50**, 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 50, para. 142).

17. 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. 10). 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 50, 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 37, RM 39 and RM 40).

18. 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

19. 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 37, 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.*”).

20. 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 39**, 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*).

21. 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 40**, 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 37**, 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 39**, para. 149).

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

23. 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 50**, 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 50**, 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 50**, 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 50**, 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 IRP Panels in the *Dot Registry*, *GCC* and *DCA* cases.

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

24. 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 49**, para. 41).

25. 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.

26. 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 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).

27. 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 37, 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)*

28. 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 37, 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 39, para. 105).*

29. 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 39, 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 39**, 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 39**, para. 113), and conduct a meaningful review when reviewing a challenged decision (**RM 39**, para. 107).

30. 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.

31. 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 41**, 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 42**, 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 .eco application? In its evaluation of the .gay application, the CPE Panel neglected information; in its evaluation of the .eco application, the CPE Panel also disregarded relevant information as to the different meanings of the term eco. Why did the BGC allow a re-examination for .gay but not for .eco? There is no reasonable justification to distinguish between these two cases.

32. 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.

33. 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

34. 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 37**, 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 39**, 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 that application on the grounds that the policy conflicts with a more fundamental legal principle.³

35. 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

² See e.g., *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (**RM 51**); *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (**RM 52**).

³ *Weaver v. Federal Motor Carrier Safety Admin.*, 744 F. 3d 142, 145 (D.C. Cir. 2014) (**RM 53**).

“act[s] and make[s] decisions ‘neutrally and objectively with integrity and fairness.’” (RM 39, paras. 95-97).

B. The IRP Panel adopts an objective standard of review

36. 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 36, para. 111; RM 39, para. 75). They must appraise the Board’s conduct “independently, and without any presumption of correctness.” (RM 36, para. 111; RM 39, 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 39, para. 76; see also RM 36, para. 112-114; RM 27, para. 136; RM 50, para. 125).

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

37. 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 39, 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 39, 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 39 para. 96).

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

39. 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.

40. 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 .eco. 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 43**). 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 44-45**). 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 50**).

41. 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.

42. 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 THE DETERMINATION THAT BIG ROOM'S APPLICATION FOR .ECO BE GRANTED COMMUNITY PRIORITY

43. The CPE Panel's assessment of the community-based application for .eco 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. 60).

44. 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 .eco. 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. 47 and following; **RM 46-47**).⁴ However, in the case of .eco, the CPE Panel did allow for Big Room to play the system (**Annex 8**). Big Room was able to achieve community priority only due to the CPE Panel’s application of the very stringent requirements in an unusual and inaccurate manner (Request for IRP, paras. 46-59).

45. 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.

46. Any relief ordered must effectively avoid another unfair, arbitrary and discriminatory decision. Claimants are convinced that Big Room’s application for .eco would not have been given community priority – and that there would have been a different decision on the merits

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.

– 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 Big Room’s application for .eco must be rejected by ICANN.

VII. DEVELOPMENTS SINCE THE FILING OF THE REQUEST FOR IRP

47. On 8 October 2015, Big Room made a request to file written submissions. On 11 October 2015, Claimants informed the Panel that they did not oppose Big Room’s request, but desired an opportunity to respond. As Big Room, in its request, has already addressed the issues it wants the Panel to look at, Claimants consider it useful already to comment on Big Room’s allegations.

48. Big Room makes a procedural and a factual argument. The procedural argument amounts to a claim that while Big Room was entitled to due process during the CPE, the Claimants were not. This is an absurd argument. All applicants are entitled to due process, and there is no legal basis – nor can there ever be a legal basis – to arbitrarily decide who receives due process and who does not. Whenever due process is lacking, any parties harmed as a result may enforce compliance with their fundamental due process rights through a meaningful review of the decision in question, offered in accordance with ICANN’s accountability mechanisms. It should be born in mind that Big Room’s unfounded application for community priority for .eco is a veiled attempt to disadvantage rival companies. Being competing applicants for the .eco string, the Claimants’ rights to due process are more in need of protecting during a CPE than those of Big Room. After all, there is a risk that Claimants’ applications would automatically be rejected if Big Room were successful in the CPE. The only risk there is for Big Room is not being granted community priority, which

would result in it remaining in contention with competing applicants. Claimants have never forfeited their right to due process, nor have they waived their right to challenge the unfair, unequitable and erroneous application of ICANN's policies in the context of ICANN's accountability mechanisms.

49. As to the factual argument, Big Room invokes one single argument, alleging that the proposed 'community' would be sufficiently supported by a variety of organizations.

50. Big Room does not address Claimants' argument that Big Room's supposed 'community' was assembled purely for the purpose of applying for a community-based gTLD (Request for IRP, paras. 52-53). The fact that Big Room – according to its own statements – had to assemble more than 1,000 organizations in 2009 shows that there is a lack of pre-existing commonality and that the supposed 'community' is dispersed, disorganized and purely artificial, set up for one topical occasion. The requirement that there be a pre-existing community with an understanding of the community's existence prior to September 2007 has not been established by Big Room. Also, Big Room's statement that it is supported by more than 1,000 organizations with over 10 million members is not substantiated by any evidence. Neither does Big Room establish that the alleged 10 million members can be seen as representative of a community of environmentalists in a world populated by an estimated 7.3 billion people. Can the alleged support of approximately 0.13% of the world's population be considered representative of the global 'community' of environmentalists?

51. Finally, Big Room does not address the fact that many of the other requirements for being granted community priority are not fulfilled. *E.g.*, Big Room does not address the fact that the eco string has several other meanings beyond identifying the alleged community, and therefore should never have been granted a maximum score for the CPE's uniqueness requirement (Request for IRP, para. 56); Neither does Big Room address the fact that, by its own admission, its application does not encompass the entire community, but only "the

majority of the Community” (Request for IRP, para. 49; Annex 4, p. 18). Also for these reasons, Big Room should never have been granted community priority.

VIII. RELIEF REQUESTED

52. 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 Big Room’s application for .eco be granted community priority;
- In any event, 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,

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10 October 2015

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- Annex 1 - Contact details of Claimants
- Annex 2 - Little Birch, LLC (subsidiary of Donuts Inc.)'s application to operate the .eco gTLD (Application ID 1-1434-1370)
- Annex 3 - Minds + Machines Group Limited (formerly known as Top Level Domain Holdings Limited)'s application to operate the .eco gTLD (Application ID 1-1039-91823)
- Annex 4 - Big Room Inc. 's application to operate the .eco gTLD (Application ID 1-912-59314)
- Annex 5 - Community priority evaluation report of Big Room Inc.'s application to operate the .eco gTLD, dated 6 October 2014
- Annex 6 - Claimants' Request for Reconsideration 14-46 of 22 October 2014
- Annex 7 - Claimants' DIDP Request of 22 October 2014
- Annex 8 - ICANN's Response to DIDP Request of 31 October 2014
- Annex 9 - Board Governance Committee determination on Request for Reconsideration 14-46 of 18 November
- Annex 10 - Minutes of the Meeting of the Board Governance Committee on 18 November October 2014, published on 20 January 2015
- Annex 11 - Proof of establishment of Big Room Inc.

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