

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

MERCK KGaA,) ICDR CASE NO. 01-14-0000-9604
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S RESPONSE TO CLAIMANT MERCK KGaA'S
REQUEST FOR INDEPENDENT REVIEW PROCESS**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Request for Independent Review Process (“IRP Request”) submitted by claimant Merck KGaA (“Merck”) on 24 July 2014.

1. ICANN has been caught in the middle of a nearly century-old battle between two international pharmaceutical companies—Merck and its former affiliate, U.S.-based Merck Sharp & Dohme, Corporation (“MSD”)—that continue to litigate against one another in multiple fora. ICANN has not taken the side of either company. Both Merck and MSD have applied to ICANN for the opportunity to operate a “.MERCK” top-level domain (“TLD”) (like .COM or .ORG). Both Merck and MSD objected to the other’s applications, arguing that the proposed TLDs would infringe upon their respective legal rights. Consistent with ICANN’s procedures, which were accepted by Merck and by MSD, an independent expert was appointed by WIPO, an independent dispute resolution service provider, to decide the merits of the objections. Both Merck and MSD lost their objections. As a result (and as the parties were aware might happen when they chose to apply for the same gTLD), both parties’ applications for .MERCK are proceeding and have been placed in contention.

2. Only Merck has challenged the result of its objection to MSD’s applications. First, Merck asked the independent expert to reconsider his final determinations with respect to MSD’s applications. The independent expert did so, but still dismissed Merck’s objections. Merck then asked ICANN’s Board Governance Committee (“BGC”) to reconsider the expert determinations based on the same procedural and substantive arguments as the ones presented in Merck’s IRP Request. The BGC denied Merck’s request for reconsideration because it did not state a proper basis for reconsideration as defined in ICANN’s Bylaws. While conceding that it is not for ICANN to review the merits of the expert determination, Merck now argues that

ICANN has not acted consistently with the provisions of its Articles of Incorporation (“Articles”) and Bylaws when ICANN “accepted” the expert determination. However, as explained further herein, the ICANN Board has taken no action that violates either the ICANN Articles or Bylaws.

3. Merck continues to refuse to accept the final expert determination, claiming that MSD “plans to willfully violate” Merck’s legal rights.¹ Yet, Merck does not support this statement by any evidence other than its own interpretation of MSD’s intended use. The fact that Merck is dissatisfied because it is concerned that MSD might, in the future, violate Merck’s legal rights, is not a basis to claim that ICANN’s Board has violated its Articles or Bylaws by not taking action in Merck’s favor. Merck’s dissatisfaction with the decision of an independent expert is *not* a proper basis for an Independent Review Proceeding (“IRP”).

4. This IRP is to be conducted pursuant to Article IV, Section 3 of ICANN’s Bylaws, which creates a non-binding method of evaluating certain actions of ICANN’s Board of Directors.² The IRP Panel has one responsibility: to provide its opinion as to “whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”³ Absent Board action, there is nothing for the IRP Panel to evaluate. Here, however, Merck’s IRP Request does not challenge Board action, but rather improperly challenges the determination of an independent expert, designated by an independent third party dispute resolution provider. Merck argues that the Board violated its Bylaws or Articles by not reviewing the provider’s decision on the merits, but ICANN’s Bylaws and Articles do not contain any such requirement. To the contrary, the rules and procedures that govern the ICANN program in which Merck voluntarily participated do not even address the possibility that the Board would engage in

¹ IRP Request ¶ 27.

² ICANN’s Bylaws are available online at <http://www.icann.org/en/about/governance/bylaws> and are attached as Annex 16 to Claimaint’s IRP Request (“Bylaws”).

³ Bylaws, Art. IV, § 3.4.

substantive reviews of independent expert decisions.

5. Merck’s IRP Request relates to competing New gTLD applications for strings incorporating the word “Merck,” including Merck’s application for .MERCK and MSD’s applications for MERCK and .MERCKMSD.⁴ Merck and MSD submitted their applications to ICANN in connection with ICANN’s program to facilitate the creation of hundreds of new generic TLDs (“gTLDs”) to supplement those that have existed for many years, such as .COM, .NET, and .ORG. ICANN is administering this New gTLD Program pursuant to an Applicant Guidebook (“Guidebook”) that ICANN adopted in June 2011 following years of consideration and public input.⁵

6. As is explained in detail in Merck’s IRP Request, MSD was founded as a subsidiary of Merck, but subsequently became an independent American company. Merck and MSD currently exercise their rights in the “Merck” trademark under a reciprocal use agreement, which has been in force (through various versions and revisions) since the 1930s. MSD’s rights are territorially limited to certain countries within North America, whereas Merck retains those rights throughout the rest of the world. The two companies have a long and well-known history of litigating their rights to the “Merck” mark; Merck currently has cases pending against MSD in at least Germany, the United Kingdom, and France, and Merck claims that if MSD obtains the rights to operate the new gTLD of .MERCK, MSD will further infringe on Merck’s rights.

7. After Merck and MSD filed their respective applications for the .MERCK TLD, each used an objection process made available under the Guidebook—the legal rights

⁴ Merck Registry Holdings, Inc. (“MRH”) applied for .MERCK and MSD Registry Holdings, Inc. (“MSDRH”) applied for .MERCKMSD. Both MRH and MSDRH are owned by MSD. *See* IRP Request, Annex 12, § 18(a); *id.*, Annex 14, § 18(a).

⁵ The Guidebook is available online at <http://newgtlds.icann.org/en/applicants/agb> and attached as Annex 21 to Claimant’s IRP Request (“Guidebook”).

objection—to challenge the other’s gTLD applications as infringing on their existing legal rights to the “Merck” mark. Those challenges were heard by an independent expert panel (“Expert Panel”) selected by the World Intellectual Property Organization (“WIPO”). Pursuant to the Guidebook, if the Expert Panel had determined that an application did in fact infringe on the existing legal rights of the objector, that application would not have proceeded. However, in each of the legal rights objections involving Merck’s and MSD’s applications, the Expert Panel determined that the applications did not infringe on the existing legal rights of the objector. As a result, all of the relevant applications, including Merck’s for .MERCK, are still in the running, and the parties’ respective applications for .MERCK are in contention with each other.

8. Merck sought to overturn the Expert Panel’s determinations ruling in favor of MSD on Merck’s legal rights objections (“Expert Determinations”) by filing a “Reconsideration Request” with ICANN. The Reconsideration Request is an ICANN accountability mechanism by which ICANN’s Board Governance Committee (“BGC”) evaluates whether ICANN properly followed its policies and procedures in taking a challenged action. The BGC found that neither the Expert Panel nor ICANN failed to follow the required policies and procedures in finding against Merck, and therefore properly denied Merck’s Reconsideration Request.

9. Merck devotes the vast majority of its IRP Request to its contention that the Expert Panel was wrong. Merck claims that ICANN’s Board violated its Articles and Bylaws by “accepting” the “erroneous” Expert Determinations. However, neither the Bylaws, nor the Articles, nor the Guidebook require the ICANN Board to conduct any analysis of the decisions of expert panels that were retained for the purpose of having third party experts evaluate the legal challenges submitted against gTLD applications—they do not even suggest the Board would do so. To the contrary, ICANN’s Board is not intended to “accept” or “review” each expert

determination (and doing so would insert the Board into every dispute resolution process provided for in the Guidebook). Instead, the Guidebook provides that the “findings of the panel will be considered an expert determination and advice that ICANN *will accept* within the dispute resolution process.”⁶ As such, there simply is no Board action for the IRP Panel to review.

10. Merck also argues that independent review is warranted because of the Board’s decision that there would not be any substantive appeals of expert determinations. But Merck does not demonstrate that the Board violated any Articles or Bylaws provision by adopting the Guidebook developed by the ICANN community, which did not include an “appellate process” for reviewing expert determinations. Merck’s argument also ignores the fact that nothing deprives Merck of the option of pursuing legal remedies against MSD if MSD is given the opportunity to operate. MERCK and Merck believes that MSD is infringing on Merck’s rights.

11. Merck also claims that ICANN breached its Articles and Bylaws when ICANN’s BGC denied Merck’s Reconsideration Request. Merck makes various arguments in this regard, including that the BGC was “incompetent” to review its Reconsideration Request, despite the fact that the Bylaws specifically designate the BGC to review Reconsideration Requests. In the end, Merck’s real argument is that the BGC did not rule in Merck’s favor and find that the Expert Panel made the wrong decision. However, the BGC did precisely what it was supposed to do—review the Expert Panel’s and ICANN staff’s compliance with policies and procedures.

12. In sum, IRPs are not a vehicle by which an expert panel’s determination may be challenged because neither the determination, nor ICANN’s acceptance of the determination, constitutes an ICANN Board action. Nor is an IRP the appropriate forum to challenge a BGC ruling on a Reconsideration Request absent some violation by the BGC of ICANN’s Articles or

⁶ Guidebook, § 3.4.6 (emphasis added).

Bylaws in its conduct in reviewing that request. Here, ICANN followed its policies and processes at every turn with respect to Merck.

BACKGROUND FACTS

Background Information On ICANN

13. 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.”⁷

14. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors, approximately 300 staff members, and an Ombudsman. However, ICANN is much more than just the corporation—it is a community of participants. In addition to the Board, the staff, and the Ombudsman,⁸ the ICANN community includes an independent Nominating Committee,⁹ three Supporting Organizations (“SOs”),¹⁰ four Advisory Committees (“ACs”),¹¹ a group of technical expert advisors,¹² and a large, globally distributed group of community members who participate in ICANN’s processes.

15. 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. ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs. In 2000, ICANN approved a few new gTLDs in a “proof of concept” phase that was designed to confirm that adding additional gTLDs would not adversely affect the stability and

⁷ Bylaws, Art. I, § 1.

⁸ *Id.*, Art. V.

⁹ *Id.*, Art. VII.

¹⁰ *Id.*, Arts. VIII-X.

¹¹ *Id.*, Art. XI.

¹² *Id.*, Art. XI-A, § 2.

security of the Internet. In 2004 and 2005, ICANN approved a few more TLDs.

Background Information On The New gTLD Program

16. The New gTLD 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, including both new ASCII and non-ASCII internationalized domain name (IDN) gTLDs.¹³ In developing the Program with the ICANN community, numerous versions of the Guidebook were drafted. The version of the Guidebook published on 4 June 2012 provides instructions to gTLD applicants and forms the basis for ICANN's evaluation of new gTLD applications.

17. Within the New gTLD Program, section 3.2.1 of the Guidebook enumerates grounds upon which objections to gTLD applications may be filed.¹⁴ If an objection is filed on the grounds that an applied-for string infringes the existing legal rights of the objector, Section 3.2.3 provides that WIPO will administer the dispute resolution process.¹⁵ Section 3.5.2 of the Guidebook provides that an objection will be upheld according to the following standard:

[A] DRSP panel of experts presiding over a legal rights objection will determine whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trademark or service mark ("mark") or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector's mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector's mark or IGO name or acronym.¹⁶

18. Where a legal rights objection is based on trademark rights, Section 3.5.2 the Guidebook specifies that in applying that standard, the panel will consider the following eight

¹³ IDN gTLDs are gTLDs that include characters not within the US-ASCII (American Standard Code for Information Exchange) or Latin alphabets.

¹⁴ Guidebook, § 3.2.1.

¹⁵ *Id.*, § 3.2.3.

¹⁶ *Id.*, § 3.5.2.

“non-exclusive” factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to the objector’s existing mark.
 2. Whether the objector’s acquisition and use of rights in the mark has been bona fide.
 3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of the objector, of the applicant or of a third party.
 4. Applicant’s intent in applying for the gTLD, including whether the applicant, at the time of application for the gTLD, had knowledge of the objector’s mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.
 5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.
 6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by the applicant is consistent with such acquisition or use.
 7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide.
 8. Whether the applicant’s intended use of the gTLD would create a likelihood of confusion with the objector’s mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.¹⁷
19. Per the Guidebook, the dispute resolution provider selects the expert panel that renders a final determination on an objection.¹⁸ ICANN’s Board played no role in selecting the Expert Panel or issuing the Determination; Merck does not claim otherwise. And, as noted

¹⁷ *Id.*

¹⁸ *Id.* §§ 3.4.4, 3.4.6.

above, the Guidebook does not provide for any procedure by which ICANN (or anyone else) is to conduct a substantive review of the expert panel determinations.¹⁹

Relevant Facts Regarding Merck's and MSD's New gTLD Applications

20. MSD filed one community and one standard application for .MERCK, one standard application for .MERCKMSD, and one standard application for .MSD.²⁰ Merck filed a community application for .MERCK and a standard application for .EMERCK.

21. On 12 March 2013, Merck filed legal rights objections to MSD's applications for .MERCK and .MERCKMSD, arguing that "the string[s] comprising the potential new gTLD[s] infringe[] the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law."²¹ On 13 March 2013, MSD filed legal rights objections to Merck's applications, making the same argument.²²

22. On 14 June 2013, WIPO appointed Willem J.H. Leppink as the Expert Panel to consider both Merck's objections and MSD's objections. On 30 July 2013 and 31 July 2013, the Expert Panel rendered its determinations on MSD's objections, finding Merck the prevailing party and dismissing the objections.²³ The Expert Panel determined that MSD had failed to demonstrate that Merck's applied-for gTLDs would infringe on MSD's existing legal rights.

¹⁹ *Id.* § 3.4.6.

²⁰ A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. An applicant designating its application as community-based must be prepared to substantiate its status as representative of the community it names in the application. A standard application is one that has not been designated as community-based. See <http://newgtlds.icann.org/en/applicants/glossary>.

²¹ See Determinations on WIPO Case Nos. LRO2013-2009, LRO2013-2010, LRO2013-2011, available online at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1702-28003-en.pdf>, <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1702-73085-en.pdf>, <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1704-28482-en.pdf>, and attached to Claimant's IRP Request as Annex 33 (collectively, "Expert Determinations").

²² See Determinations on WIPO Case Nos. LRO2013-0068 and LRO2013-0069, available online at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-980-60636-en.pdf>, <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-980-7217-en.pdf>, and attached to Claimant's IRP Request as Annex 32.

²³ See Determinations on WIPO Case Nos. LRO2013-0068 and LRO2013-0069.

MSD did not submit a Request for Reconsideration with respect to this ruling and has not submitted a Request for Independent Review.

23. On 6 September 2013, the Expert Panel rendered its determinations on Merck's objections, finding MSD the prevailing party and dismissing the objections.²⁴ The Expert Panel determined that the Merck had failed to demonstrate that MSD's applied-for gTLDs would infringe on Merck's existing legal rights.

24. In its IRP Request, Merck repeatedly references an alleged factual error made by the Expert Panel in rendering the Expert Determinations. Merck previously raised that issue with the Expert Panel. Specifically, on 23 September 2013, Merck sent a letter to WIPO, challenging, among other things, the following statement in the Determinations:

Applicant has made it clear that it will take all necessary measures, including geo-targeting, to avoid that Internet users in the territories in which Objector has trademark rights[] will be able to visit websites that use the Disputed gTLD String.²⁵

Merck's letter noted that while Merck's "commitment to using geo-targeting was made clear from the exhibits in the case [a]t no time has [MSD] indicated that it would consider using geo-targeting, or taking any other affirmative measures to prevent infringement or confusion."²⁶

Merck claimed that this misstatement was material to the Expert Panel's denial of the Objections.

25. On 24 September 2013, in response to Merck's correspondence, the Expert Panel issued an addendum to its determinations ("Addendum").²⁷ In the Addendum, the Expert Panel clarified that the inclusion in the determinations of the statement regarding MSD's commitment to geo-targeting was "inadvertent," but that the Expert Panel "was in fact aware of the

²⁴ *See id.*

²⁵ Geo-targeting is a method of determining the location of a website visitor and, based on that location, targeting unique content to that visitor.

²⁶ IRP Request, Annex 34, p. 2.

²⁷ *Id.*, Annex 33.

distinction in this regard, as is reflected in the pleadings as cited and summarized in the Expert Determinations.”²⁸ The Addendum also stated that the misstatement was not material to the Expert Determinations and explained the basis for the Expert Determinations.

26. On 27 February 2014, ICANN published the Addendum on its New gTLD microsite. On 13 March 2014, Merck filed a Reconsideration Request. Merck’s Reconsideration Request asked ICANN to reject the Expert Determinations and instruct a new Expert to issue new determinations.²⁹ On 29 April 2014, the BGC denied Merck’s Reconsideration Request, finding “no indication that the Panel violated any policy or process in reaching . . . the [Expert] Determinations.”³⁰ In response, Merck filed this IRP.³¹

27. MSD’s applications for .MERCK and .MERCKMSD, as well as Merck’s application for .MERCK, are currently on hold due to this IRP.³² Absent this IRP, because both Merck’s and MSD’s objections were overruled, both parties’ applications for .MERCK would proceed. Because both Merck and MSD each filed a community application for .MERCK, their applications would be invited to Community Priority Evaluation (“CEP”). If only one party’s application prevails in CEP, that application will be the one that moves forward while the others will not. If neither application prevails in CEP, or if both applications do, both applications will proceed and their contention will have to be resolved. That contention can be resolved by

²⁸ *Id.*, p. 1. In a section summarizing the Requester’s arguments in support of its legal rights objection, the Determinations note that Requester argued that “[c]ontrary to [MSD], [Merck] uses geo-targeting tools to ensure that visitors from North America cannot access website content in which [Merck] is identified as ‘Merck.’ Internet users in North America that enter ‘www.merck.de’ into a browser will be redirected to ‘www.emdgroup.com.’” *See* Determination on WIPO Case Nos. LRO2013-2009, p. 4.

²⁹ *See* IRP Request, Annex 39 (“Request 14-9”).

³⁰ *See id.*, Annex 45.

³¹ *See id.* Prior to initiating an independent review, parties are urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues in dispute. Bylaws, Art. IV, § 3.14. The parties engaged in the cooperative engagement process before commencing the independent review at issue here but were not able to resolve the dispute.

³² Merck is the sole applicant for .EMERCK and MSD is the sole applicant for .MSD. Those applications are not implicated by this IRP.

“voluntary agreement” between Merck and MSD.³³ If such voluntary agreement does not occur, the Guidebook provides that .MERCCK will proceed to auction, the last resort “tie-breaker method for resolving string contention among the applications within a contention set.”³⁴

STANDARD OF REVIEW

28. 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. Those persons or entities may submit a request for independent third party review of that Board decision or action, explaining why they believe it was inconsistent with ICANN’s Article or Bylaws.³⁵ The IRP Panel is tasked with providing its opinion as to whether the Board’s actions violated ICANN’s Articles and Bylaws.³⁶ ICANN’s Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?³⁷

The IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.³⁸

29. ICANN has appointed the ICDR as ICANN’s IRP Provider. ICANN’s Bylaws and the Supplementary Procedures that the ICDR has adopted specially for ICANN IRP

³³ Guidebook, § 4.3.

³⁴ *Id.*

³⁵ Bylaws, Art. IV, §§ 3.1, 3.2.

³⁶ *See id.* Art. IV, §§ 3.2, 3.4.

³⁷ *Id.*, Art. IV, § 3.4.

³⁸ *See id.*

proceedings apply here.³⁹ The Bylaws provide that the IRP be conducted via “email and otherwise via the Internet to the maximum extent feasible.”⁴⁰ 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.”⁴¹

30. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written declaration designating, among other things, the prevailing party.⁴² The Board will, of course, give serious consideration to the IRP Panel’s opinion and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.⁴³

ARGUMENT

31. Merck and MSD have a long history and a complicated relationship. ICANN is not unsympathetic to the possibility that either Merck or MSD might violate the other’s rights in the event either becomes the registry operator for .MERCK. But if such alleged violations occur after the delegation of .MERCK, both Merck and MSD are fully capable of attempting to protect their rights, as they have done and continue to do in jurisdictions around the world.

32. Following years of discussion, policy development, and policy implementation, the ICANN community established a process for independent experts to review claims that a party’s rights might be impaired by another party’s operation of a particular gTLD. In this

³⁹ Absent a governing provision in ICANN’s Bylaws or the ICDR’s Supplemental Procedures, the ICDR Rules apply. But in the event of any inconsistency between the Supplementary Procedures and the ICDR’s Rules, the Supplementary Procedures shall govern. *Id.*, Art. IV, § 3.8; *see also* Ex. C-R-1, ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process (“Supplementary Procedures”), § 2, also available online at <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

⁴⁰ Bylaws, Art. IV, § 3.12

⁴¹ *Id.*, Art. IV, § 3.12; Supplementary Procedures, ¶ 10..

⁴² *Id.*, Art. IV, § 3.18.

⁴³ *Id.*, Art. IV, § 3.21.

instance, that Expert determined – after a careful review of the parties’ respective claims – that he would not sustain the objection of Merck to MSD’s applications based on the possibility that MSD might, if it becomes the registry operator, violate Merck’s rights by not using “geo-targeting.”⁴⁴ ICANN appreciates that Merck disagrees with the Expert’s determination, but for the reasons set forth herein, that disagreement does not constitute a basis for an IRP under ICANN’s Bylaws.

I. ICANN’S BOARD DID NOT “ACCEPT” THE EXPERT DETERMINATIONS AND DID NOT UNDERTAKE ANY ACTION THAT IS REVIEWABLE IN THIS PROCEEDING.

33. An IRP is available only to persons “materially affected by a decision or action of the [ICANN] *Board* that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”⁴⁵ An IRP is thus limited to challenging ICANN Board conduct and cannot be used as a means to challenge the conduct of third parties or even the conduct of ICANN staff.

34. Merck argues that ICANN breached its Bylaws by “accepting” the Expert Determinations without “exercis[ing] due diligence and care.”⁴⁶ However, the Board did not in fact “accept” the relevant Expert Determinations or take any other actions with respect to those determinations, and there is no Article or Bylaws provision that requires the Board to do so.

35. The Guidebook states that the designated dispute resolution provider (here, WIPO), not ICANN, will appoint “one expert, or, if all parties agree, three experts with relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection.”⁴⁷ The “findings of the [ICDR] panel will be considered an expert

⁴⁴ The Expert similarly determined that he could not sustain the objection of MSD to Merck’s application.

⁴⁵ *Id.*, Art. IV, § 3.2 (emphasis added).

⁴⁶ IRP Request ¶ 48.

⁴⁷ Guidebook, § 3.4.4.

determination and advice that ICANN will accept within the dispute resolution process.”⁴⁸

36. Accordingly, Merck’s claim that the ICANN Board “accepted” the Expert Determinations is wrong. The ICANN Board took *no action* with respect to evaluating or accepting the Expert Determinations and Merck has not shown otherwise. Nor is any such action required by any Articles or Bylaws provision. Because there is no Board action or decision associated with the Expert Determinations, there is nothing for this IRP Panel to review.

II. LIKEWISE, THE BGC DID NOT VIOLATE ANY ICANN ARTICLE OR BYLAWS PROVISION IN DENYING MERCK’S RECONSIDERATION REQUEST.

37. Merck is also incorrect in arguing that the BGC violated ICANN’s Articles and Bylaws in denying Merck’s Reconsideration Request. Article IV, Section 2 of ICANN’s Bylaws permits an entity that has been adversely and materially affected by an ICANN staff or Board action or inaction to request that the Board reconsider that action or inaction.⁴⁹ In order to present a proper Reconsideration Request based on staff action or inaction, a requester must provide a detailed explanation of the facts as presented to the staff and the reasons why “one or more staff actions or inactions . . . contradict established ICANN policy(ies).”⁵⁰ As the BGC made clear in its Determination—as well as on a number of occasions with respect to

⁴⁸ *Id.* § 3.4.6. As is discussed below, the decision not to provide for substantive appeals of expert determinations on objections reflects a considered decision of ICANN’s Board, made after significant public input and comment, that the experts (and not ICANN) should be resolving these types of objections.

⁴⁹ Article IV, Section 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

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

⁵⁰ Bylaws, Art. IV, §2.2.

Reconsideration Requests involving expert determinations like the one at issue in this matter⁵¹—the reconsideration process does not allow for a full-scale, substantive review of expert determinations. The BGC is not tasked with second-guessing expert determinations of ICANN’s dispute resolution providers. Its focus instead is whether the expert complied with the dispute resolution providers’ own and ICANN’s *policies and procedures*.⁵²

38. Merck filed a Reconsideration Request seeking a review of the Expert Determinations that MSD’s applications did not infringe Merck’s legal rights.⁵³ In that Request, Merck argued that the Expert violated established policies and procedures by: (i) failing to apply the proper standard and instead “rel[ying] on the wholly inapplicable reasoning” of the UDRP standards, and (ii) failing to “take reasonable care in evaluating the parties’ respective evidence.”⁵⁴ The BGC denied the Reconsideration Request because it found “no indication that the ICDR or the Expert violated any policy or process in reaching the Determination.”⁵⁵

39. Merck argues that, despite the fact that the Bylaws expressly authorize the BGC to issue determinations on Reconsideration Requests, the BGC was not a “competent” body to issue a determination on its Reconsideration Request. Merck then speculates, without proffering any evidence to support its claims, that the BGC has a financial interest in denying its Reconsideration Request. Next, Merck argues that the BGC improperly failed to recommend that the Board take further action on its Reconsideration Request. Finally, Merck claims that the BGC’s determination was substantively flawed. Each of these claims fails to support an IRP.

⁵¹ See IRP Request, Annex 45 (“14-9 Determination”), p. 6; Ex. C-R-2, BGC Determination on Reconsideration Request 14-5, p. 7, also available online at <https://www.icann.org/en/system/files/files/determination-vistaprint-27feb14-en.pdf>; see also Bylaws, Art. IV, § 2.2(a).

⁵² See 14-9 Determination, p. 6.

⁵³ See Request 14-9, p. 18.

⁵⁴ See *id.*, p. 10, 13-14.

⁵⁵ See 14-9 Determination, p. 14.

A. THE BGC WAS THE “COMPETENT” BODY TO REVIEW MERCK’S RECONSIDERATION REQUEST, BUT IT IS NOT AUTHORIZED TO, AND DID NOT, ENGAGE IN ANY SUBSTANTIVE ANALYSIS OF THE EXPERT DETERMINATIONS.

40. Pursuant to ICANN’s Bylaws, the BGC is designated with the authority to “review and consider” reconsideration requests.⁵⁶ For reconsideration requests regarding staff action, such as Merck’s Request, the BGC has the authority to “make a final determination . . . without reference to the Board of Directors.”⁵⁷ Merck argues that the BGC was “not competent” to review its Reconsideration Request because determining whether the Expert Panel correctly applied the standard for legal rights objections “necessarily also involve[d] a legal, substantive analysis of the Panel’s argument.”⁵⁸ Insofar as Merck is arguing that the BGC was required to conduct a substantive review of the Expert Determinations, that argument is wrong. As Merck itself acknowledges, the Bylaws provide that reconsideration of staff (or DRSP) action is appropriate only where that action “contradict[ed] established ICANN policy(ies),” and do not provide for a substantive review of expert determinations.⁵⁹ The fact that Merck views the expert as having made the wrong decision does not somehow vest the BGC with authority that it otherwise does not have to engage in a substantive legal analysis.⁶⁰

41. Insofar as Merck is making the opposite argument—that the BGC “embarked on

⁵⁶ Bylaws, Art. IV, § 2.3.

⁵⁷ *Id.*, Art. IV, § 2.3(f).

⁵⁸ *Id.* ¶ 80.

⁵⁹ *Id.*; Bylaws, Art. IV, § 2.2.

⁶⁰ Merck also argues that the BGC should have “s[ought] the advice of an independent legal advisor” to help it address the issues raised by Merck’s Reconsideration Request. (IRP Request ¶ 82.) But the BGC is not tasked with performing substantive reviews of expert determinations. The one instance Merck cites in which a Board committee sought independent legal advice was when the New gTLD Program Committee (“NGPC”) – not the BGC – sought legal advice regarding specific advice that the NGPC had received from ICANN’s Governmental Advisory Committee. (*Id.*) The NGPC did so pursuant to Module 3.1 of the Guidebook, which provides that “the Board may consult with independent experts . . . in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.” (Guidebook, § 3.1.) This provision has no application with respect to Merck’s Reconsideration Request.

an *impermissible* substantive review of the [Expert Determinations] decision and analysis under the LRO Standards and non-exclusive factors”—that argument too is without merit.⁶¹ The BGC engaged in no substantive legal analysis in rendering its determination on Merck’s Reconsideration Request. Instead, the BGC determined whether, as Merck had argued, the Expert Panel had failed to apply the proper standard in rendering its determinations. The BGC determined that the Expert Panel had applied the proper standard, noting that the Expert Panel had “correctly referenced and considered the eight non-exhaustive factors listed in the Guidebook and explained how those factors supported the Expert Panel’s Determinations.”⁶² The fact that Merck did not like the Expert Panel’s conclusions is not a basis for reconsideration and, in conformance with the Bylaws, the BGC made no determination regarding the Expert’s substantive application of those factors.

42. In its Reconsideration Request, Merck also argued that the Expert Panel failed to apply the proper standard because it “relied on the wholly inapplicable reasoning” of the UDRP standards.⁶³ The BGC determined that no policy or procedure prevented the Expert Panel from “consider[ing] the UDRP as a means to provide further context” in assessing the Guidebook factors, and that the New gTLD Dispute Resolution Procedure makes clear that “in addition to apply the standards that have been identified by ICANN, the Expert Panel may ‘refer to and base its findings upon . . . any rules or principles that it determines to be applicable.’”⁶⁴ Again, in conformance with the Bylaws, the BGC made no legal or substantive conclusions regarding the UDRP standards, or regarding the Expert Panel’s consideration of those standards.

⁶¹ IRP Request ¶ 44.

⁶² 14-9 Determination, p. 8.

⁶³ Request 14-9, p. 14.

⁶⁴ 14-9 Determination, p. 9 (quoting New gTLD Dispute Resolution Procedure, Art. 20(b)).

B. MERCK HAS NO BASIS TO ARGUE THAT THE BGC WAS BIASED OR FINANCIALLY MOTIVATED.

43. Because both Merck’s and MSD’s objections to the other’s applications for .MERCK were denied, both of those applications are still in contention. As noted above, because Merck and MSD each filed a community application for .MERCK, those applications will be invited to CPE. Therefore, assuming each will participate in CPE, .MERCK will proceed to auction only in the event that: (i) both community applications prevail in CPE or neither prevails in CPE, *and* (ii) Merck and MSD cannot reach a resolution among themselves. As the Guidebook makes clear, auction is a “last resort” means of contention resolution; and ICANN expects most parties to settle contention by mutual agreement.⁶⁵ While Merck speculates that ICANN is trying to encourage auctions so that it can collect funds for its own benefit, giving the BGC a financial incentive to deny Merck’s Reconsideration Request (and, presumably, all other requests that might result in auctions), Merck does not offer *any* evidence to support its unfounded speculation.⁶⁶

44. In any event, the proceeds of such an auction would not, as Merck claims, proceed “directly” to ICANN. Rather, as the Guidebook states, those proceeds “will be reserved and earmarked until the uses of [the] funds are determined,” and must be used in a way that “allows ICANN to maintain its not for profit status.”⁶⁷ As such, Merck’s claim does not support independent review.

C. THE BGC DID NOT VIOLATE THE BYLAWS BY DECLINING TO RECOMMEND FURTHER ACTION BY THE BOARD.

⁶⁵ Guidebook, § 4.3.

⁶⁶ IRP Request ¶ 88.

⁶⁷ Guidebook, § 4.3. Possible uses contemplated by the Guidebook include the “formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater internet community” or the “establishment of a security fund to expand [the] use of secure [internet] protocols, conduct research, and support standards development organizations.” *Id.*

45. Merck argues that the BGC improperly failed to “recommend[] that the ICANN Board take appropriate measures that the BGC is incompetent to make.”⁶⁸ Merck does not cite to any Article or Bylaws provision that would require the BGC to recommend further action on Merck’s Reconsideration Request. To the contrary, as noted above, the Bylaws provide that the BGC may “make a final determination on Reconsideration Requests regarding staff action or inaction, [including DSRPs and related expert panels,] without reference to the [Board].”⁶⁹

D. MERCK’S ARGUMENT THAT THE BGC RENDERED AN INCORRECT DETERMINATION ON ITS RECONSIDERATION REQUEST HAS NO PLACE IN AN IRP, AND IS IN ANY EVENT WITHOUT MERIT.

46. The crux of Merck’s argument is that the BGC substantively erred in denying Merck’s Reconsideration Request. However, Merck fails to identify any Article or Bylaws provision that the BGC allegedly violated in taking action on Merck’s Reconsideration Request. Instead, just as it did in its Request, Merck seeks to use the IRP to challenge the substantive decision of the Expert Panel, which is not appropriate for an IRP for several reasons, not the least of which is that this is not an ICANN *Board* action. Even so, ICANN briefly responds below.

47. In its Reconsideration Request, Merck argued that the Expert violated established policies and procedures by: (i) failing to apply the legal rights objection standard and instead “rel[ying] on the wholly inapplicable reasoning” of the UDRP standards, and (ii) failing to “take reasonable care in evaluating the parties’ respective evidence.”⁷⁰ The BGC denied the request,

⁶⁸ IRP Request ¶ 82.

⁶⁹ Bylaws, Art. IV, § 2.3(f). Merck argues that the BGC recommended further action in its determinations on Reconsideration Requests 13-9 and 13-10, presumably suggesting that if the BGC has recommended further action in other cases, it must do so here. This argument is without merit. As set out in the Bylaws, it is wholly within the BGC’s discretion to determine if a recommendation for further Board action is warranted.

⁷⁰ Request 14-9, p. 10, 13-14. Merck does not appear to dispute the BGC’s finding that the Panel did not base its determinations on an incorrect finding of fact. And as discussed above, the Panel itself addressed that argument, noting that its error was inadvertent, did not represent a misunderstanding of the evidentiary record, and in any event involved a fact immaterial to the Panel’s determinations.

finding that the Expert Panel: (i) correctly referenced and considered the factors required by the Guidebook, and (ii) did not base its determinations on an incorrect finding of fact.⁷¹

48. Merck argues that the BGC failed to address the Expert Panel’s alleged failure to apply the correct standard in evaluating Merck’s Objections.⁷² But the BGC’s determination explicitly addresses Merck’s claim, noting that the Expert Panel “correctly referenced and considered the eight non-exhaustive factors listed in the Guidebook and explained how those factors supported [its] Determinations.”⁷³ Disagreeing with the BGC’s determination in this regard is not a proper basis for independent review.⁷⁴

49. Merck also argues that the Expert Panel failed to apply the correct legal rights objection standard by failing to determine “whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of . . . or unjustifiably impairs the distinctive character or the reputation of [Merck]’s mark . . . or otherwise creates a likelihood of confusion between the applied-for gTLD and [Merck’s mark].”⁷⁵ Merck is wrong: the Expert Panel found that “the potential use of [.MERCK and .MERCKMSD] by [MSD] [did] not” take unfair advantage of, unjustifiably impair, or otherwise create a likelihood of confusion with Merck’s mark. In making that determination, the Expert Panel, as it was required to do, considered and applied the eight required Guidebook factors (and, again, this is not a matter for independent review).⁷⁶

50. Merck’s real complaint is with the Expert Panel’s substantive (and logical)

⁷¹ 14-9 Determination, p. 8-12.

⁷² IRP Request ¶ 92.

⁷³ 14-9 Determination, p. 8. In considering and applying those eight factors, the Expert Panel was applying the correct legal rights objection standard—the Guidebook provides that those are the factors experts are to consider in determining whether the “potential use of the applied for gTLD by the applicant” infringes on the existing legal rights of the objector. Guidebook, § 3.5.2.

⁷⁴ Merck also argues that the Expert Panel did not give enough weight to the “potential use of the applied-for gTLD” (as set forth in Section 3.5.2 of the Guidebook) in making its decision, but again, this is a challenge to the Expert Panel’s findings, not a question of whether the Expert Panel applied the correct criteria.

⁷⁵ IRP Request ¶ 52, *Id.*, § 3.5.2.

⁷⁶ Expert Determinations, p. 6-8.

conclusion that:

The question [raised by Merck’s Objections] is whether a *bona fide* trademark owner that owns trademark rights in certain countries but does not have rights to a certain trademark in all countries of the world, should for that reason be prevented from obtaining a gTLD. In the view of the Panel, such a proposition does not make sense. . . .

. . . .

Of course a rejection of the Objection[s] does not preclude the Objector from taking regular legal action should the use of the Disputed gTLD String[s] by Applicant be infringing. It is not, however, for this Panel to anticipate all the possible types of use [MSD] could make of the Disputed gTLD String.⁷⁷

Merck disagrees because it believes that MSD’s Applications reflect that MSD has the intent to, sometime in the future, violate Merck’s intellectual property rights in countries located outside of North America.⁷⁸ But Merck’s substantive disagreement with the Expert Panel’s determination does not relate to any ICANN Board action and thus cannot be a basis for independent review.

51. Merck apparently wanted the Expert Panel to assume, based on a lack of affirmative assurances in MSD’s Applications, that MSD was going to infringe on Merck’s marks.⁷⁹ The Expert Panel declined to do so, finding that it was not the Expert Panel’s place to “anticipate all the possible types of use [MSD] could make” of its applied-for gTLDs” and noting that, if MSD did in fact infringe on Merck’s marks, Merck was not precluded from enforcing its rights by taking legal action.⁸⁰ Merck’s disagreement with that conclusion does not indicate that the Expert Panel failed to assess the “potential use of the applied-for gTLDs.” More importantly, none of this suggests that the BGC erred in denying Merck’s Request or should

⁷⁷ *Id.*, p. 6.

⁷⁸ IRP Request ¶ 22.

⁷⁹ For example, it is unclear how MSD’s statement that it intends to use “geographical indicators as second-level domain names” constitutes MSD “admit[ting] its intention to use the gTLDs in an unrestricted and impermissible manner.” *Id.* (quoting MSD’s Applications, § 22).

⁸⁰ The IRP Request reflects that Merck has been doing just that, bringing suit against MSD in courts in Germany, the United Kingdom, and France. *Id.* ¶ 11.

prevail in this IRP.

III. ICANN’S BYLAWS AND ARTICLES OF INCORPORATION DO NOT REQUIRE THAT ICANN PROVIDE FOR APPEAL AND REVIEW MECHANISMS BEYOND THOSE ALREADY PROVIDED.

52. Merck argues that the fact that the Guidebook provides no mechanism for the substantive review of expert determinations itself violates ICANN’s Bylaws and Articles of Incorporation.⁸¹ Merck apparently is challenging the outcome of the Guidebook development process, a process that was started many years ago and completed over two years ago, and one for which the time for challenge has long since past. As noted above, ICANN adopted the Guidebook following years of consideration and community involvement.⁸² Merck argues that the Board’s failure to provide for a substantive appeals mechanism violates Article I, Section 2.8 of the Bylaws, which requires ICANN to “mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness.”⁸³ But the decision to have no appeals mechanism is applied neutrally, as there is no substantive appeals mechanism for *any* expert determinations.⁸⁴

53. Further, as Merck acknowledges, “[t]he availability of the Legal Rights Objection as an administrative dispute resolution option does not preclude court options which either party may have to submit the dispute to court.”⁸⁵ This is especially important here because Merck’s main concern is that its rights might, one day, be impaired if MSD becomes the registry operator for .MERCCK and then operates the registry in a manner that affects Merck’s rights. The ICANN

⁸¹ See *id.* ¶¶ 99-111.

⁸² Merck points to several public comments suggesting that the Guidebook include a substantive review mechanism. (IRP Request, Annex 56.) However, none of the ten versions of the Guidebook, each of which was discussed and debated by the community, has contained such a mechanism, revealing that the overall community was not in favor of including a substantive review mechanism.

⁸³ Bylaws, Art. I, § 2.8.

⁸⁴ Contrary to what Merck argues, ICANN’s Board has not adopted the “Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections.” IRP Request ¶ 83; *Id.* Annex 55

⁸⁵ Ex. C-R-3, Legal Rights Objections FAQs, also available online at <http://www.wipo.int/amc/en/domains/lro/faq/#19a>; IRP Request ¶ 103.

Board cannot possibly violate its Bylaws or Articles by “declining to address” a theoretical concern about what might happen in the future between two entities that have been dealing with such trademark-related issues for decades.

54. Merck cites to a United States District Court order dismissing a case arising out a legal rights objection to argue that courts “deny jurisdiction” over cases involving legal rights objections and “show prejudice to [] parties who have not exhausted ICANN accountability mechanisms.”⁸⁶ But Merck’s characterization of the Court’s order in *Del Monte Int. v. Del Monte Corp.* is not accurate: the Court decided to exercise jurisdiction over the case even though it had the discretion to decline jurisdiction under the Declaratory Judgment Act.⁸⁷ The Court then dismissed the case not for any failure to exhaust ICANN’s accountability mechanisms, but because the new gTLD at issue *had not been delegated*.⁸⁸ The Court specifically noted that its ruling did not “foreclose application of the [Anti-Cybersquatting Consumer Protection Act] in the context of *successful* gTLD registrations” that infringe on existing legal rights.⁸⁹

IV. RESPONSE TO MERCK’S REQUESTED RELIEF.

55. Merck’s request should be denied in its entirety, including its request for relief. Merck requests that this IRP Panel issue a declaration “[r]equiring that ICANN instruct a DSRP to appoint a new LRO Panel or Panels to decide upon [Merck’s] Legal Rights objections with regard to [MSH’s Applications] . . . and/or provide any such relief as the Panel may find appropriate.”⁹⁰ An IRP Panel is limited to stating its opinion by “declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and *recommending* that the Board stay any action or decision or take any interim action until such

⁸⁶ IRP Request ¶¶ 72, 105.

⁸⁷ *Id.*, Annex 58, p. 17-19.

⁸⁸ *Id.*, Annex 58, p. 36.

⁸⁹ *Id.* Annex 58, p. 34-35.

⁹⁰ *See* IRP Request ¶ 112.

time as the Board reviews and acts upon the opinion of the IRP Panel.⁹¹ Even if there were a basis for some kind of relief here (which there is not), neither this nor any IRP Panel has the authority to award affirmative relief.⁹²

CONCLUSION

56. ICANN's conduct with respect to its evaluation of Merck's Reconsideration Request was fully consistent with ICANN's Articles and Bylaws. ICANN followed the procedures set forth in its Bylaws in evaluating Merck's Reconsideration Request. The fact that Merck disagrees with the Expert Determinations does not properly give rise to an IRP. Merck and MSD may well continue to litigate against one another for years to come, but ICANN's Board did not violate its Articles or Bylaws by declining to inject itself into that dispute. Merck's IRP Request should be denied.

Respectfully submitted,

JONES DAY

Dated: August 29, 2014

By: Jeffrey A. LeVee/RAE
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Counsel for Respondent ICANN

⁹¹ Bylaws, Art. IV, §§ 3.4, 3.11(c-d).

⁹² Indeed, the IRP Panel in the first ever IRP found that "[t]he IRP cannot 'order' interim measures but do no more than 'recommend' them, and this until the Board 'reviews' and 'acts upon the opinion' of the IRP." See Ex. C-R-4, Advisory Declaration of IRP Panel, ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, ¶ 133, also available online at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.