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October 12, 2015

VIA EMAIL AND FEDEX

Scott Donahey

Contact Information Redacted

Hon. Charles N. Brower

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Mark Kantor

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Re: Dot Registry and ICANN—ICDR Case No. 01-14-0001-5004

Dear Chairman Donahey and Members of the Panel:

On behalf of ICANN, we provide this response to the questions that the Panel posed in Procedural Order No. 8. The numbering corresponds to the Procedural Order. ICANN also takes this opportunity to attach the Final Declaration of the IRP panel in *Vistaprint Ltd. v. ICANN*, issued on 9 October 2015.

(a) ICANN is a California nonprofit public benefit corporation. As such, the local law to which ICANN is subject is California law. This includes Cal. Corp. Code §§ 5110-6910, which are the California statutes that specifically govern nonprofit public benefit corporations, and which, among other things, impose certain regulatory requirements on nonprofit public benefit corporations.¹ In addition, by virtue of its Articles of Incorporation (“Articles”), ICANN has committed to “carrying out its activities in conformity with relevant principles of international law and applicable international conventions.”² ICANN has interpreted this statement previously as requiring ICANN generally to conform its conduct to relevant principles of international law and international conventions, but certainly not as dictating that ICANN is subject to all international laws and conventions in a literal sense.

¹ See, e.g., Cal. Corp. Code § 5913 (imposing certain regulatory requirements on the sale of a nonprofit public benefit corporation’s assets).

² Articles of Incorporation (“Articles”), ¶ 4 (Ex. C-6).

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We are not aware of any principles of California or international law that are directly relevant to the determination of the sole issues within the scope of this IRP—whether ICANN’s Board acted in conformance with ICANN’s Articles and Bylaws in determining not to intervene in decisions made as part of the normal course of the administration of the New gTLD Program and, specifically: (1) declining to reconsider the CPE Panels’ Reports regarding Dot Registry’s Applications; and (2) declining to take other action with respect to those Reports.³

As for the Panel’s question regarding “due process,” ICANN is a nonprofit corporation, not a government entity or actor, and neither California nor relevant international law imposes any sort of “due process” requirement on ICANN with respect to its determinations regarding the delegation of specific new gTLDs.⁴ In any event, inasmuch as the Bylaws and Articles do not create “due process” rights on behalf of gTLD applicants, it is not within the scope of this IRP to determine whether Dot Registry was accorded “due process” in the processing of its applications.

That said, the design of the New gTLD Program was intended to ensure, insofar as possible, fair and equal treatment of new gTLD applicants. In accordance with ICANN’s Articles and Bylaws, and with considerable community input, ICANN’s Board approved the New gTLD Applicant Guidebook (“Guidebook”), which set forth publicly-available, universally-applicable rules for the evaluation of new gTLD applications. New gTLD applicants specifically affirmed⁵ when they submitted their applications that they understood that they would be subject to the Guidebook’s rules (including the rules for community priority evaluation), and that there was no guarantee that they would ultimately be awarded their applied-for new gTLD (much less be awarded community priority over other applicants for the same new gTLD).

Finally, the Panel also asked whether the language in ICANN’s Articles regarding “relevant principles of international law”⁶ means that “relevant principles of international arbitration” apply to IRPs. The substantive and procedural rules governing IRPs are laid out in ICANN’s Bylaws and the Supplementary Procedures for ICANN Independent Review Process (“Supplementary Procedures”). The Supplementary Procedures provide that IRPs will be governed by the Supplementary Procedures and also the ICDR’s International Arbitration Rules (“ICDR Procedures”). As such, general principles of international dispute resolution apply to IRPs only insofar as those principles are incorporated into the ICDR Procedures. However, to the extent that there is any inconsistency between the (i) ICDR Procedures (and any relevant

³ See, e.g., Cal. Corp. Code § 5210 (“The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.”).

⁴ See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (the Constitution’s due process protections are limited to “state action”).

⁵ Guidebook § 1.2.6 (Ex. C-5); *id.* Module 6.

⁶ Articles ¶ 4 (Ex. C-6).

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principles of international dispute resolution they may incorporate) and (ii) the Supplementary Procedures, the Supplementary Procedures govern.⁷

(b) Article IV, Section 3.4 of the Bylaws establish a defined standard of review for IRP panels to apply in determining whether ICANN's Board acted in conformance with ICANN's Articles and Bylaws.⁸ That standard of review requires IRP panels to focus on three factors:

- 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?⁹

The plain language of this standard restricts the IRP panel's assessment of the Board's "due diligence and care" to an assessment of whether the Board's action was taken in reliance on a "reasonable amount of facts."¹⁰ Neither California nor international law is relevant to either that specific definition or the standard of review more generally.

ICANN was not required to establish any internal corporate accountability mechanism, but it chose to do so voluntarily. California non-profit public benefit corporations, such as ICANN, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.¹¹ Pursuant to this explicit authority, ICANN established the Independent Review process, as well as the procedures and standard of review, that would govern that process.

This prescribed standard of review is not inconsistent with other provisions of ICANN's Bylaws, including those provisions requiring ICANN to operate "to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."¹² ICANN has previously quoted to this Panel the holding of the IRP panel in *Booking.com*, which expressed the same view:

⁷ Supplementary Procedures ¶ 2 ("In the event there is any inconsistency between these Supplementary Procedures and the [ICDR Rules], these Supplementary Procedures will govern.") (Ex. C-3).

⁸ Bylaws Art. IV, § 3.4 (Ex. C-1).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

¹² Bylaws Art. III, § 1 (Ex. C-1).

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[T]here can be no question that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care it is entitled—indeed required—to exercise its independent judgment in acting in what it believes to be the best interest of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws—or, the parties agree, with the Guidebook.¹³

This defined standard review reflects the fact that IRP panels are not intended to substitute their judgment for the independent judgment of ICANN’s Board in determining whether ICANN’s Board acted in conformity with ICANN’s Articles and Bylaws.

The Panel asks whether any relevant legal principles would prevent ICANN’s Board from delegating certain authority to ICANN staff or to third-party experts such as the EIU. As an initial matter, ICANN notes that any challenges to the Board’s delegation of authority via the Guidebook are long since time-barred because the Guidebook was published in 2012, and IRP challenges to Board decisions must be filed within 30 days of the posting of the minutes of the Board meeting reflecting the challenged Board action or inaction.¹⁴ In any event, there are no relevant legal principles preventing such delegation. To the contrary, California law expressly provides for corporate boards to delegate managerial functions.¹⁵ Here, ICANN’s Board properly exercised its independent judgment in determining that the day-to-day management of the New gTLD Program should be delegated to ICANN staff (which amounts to nearly 340 staff members), and that the thousands of expert evaluations required as part of the New gTLD Program should be delegated to third parties with the requisite expertise and resources to properly conduct those evaluations, expertise that the Board knew it did not have.

¹³ *Booking.com* Final Declaration ¶ 108 (Ex. R-5); *see also Vistaprint* Final Declaration (“[T]he Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”) (Ex. R-8).

¹⁴ Bylaws, Art. IV, § 3.3; *Booking.com* Final Declaration (“[T]he time has long since passed for *Booking.com* or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of [a Guidebook procedure] . . . [I]f *Booking.com* believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.”) (Ex. R-5); *Vistaprint* Final Declaration ¶ 172 (“[T]he Panel does agree with ICANN that the time for challenging the Guidebook’s [procedures]—which w[ere] developed in an open process and with extensive input—has passed.”) (Ex. R-8).

¹⁵ Cal. Corp. Code § 5210 (“The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.”)

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For example, one of the evaluations performed on each of the 1,930 New gTLD Applications was a string similarity review, which used an algorithm, among many other things, to test whether applied-for new gTLDs were visually similar to either existing TLDs or other applied-for new gTLDs.¹⁶ It was plainly reasonable for ICANN's Board to determine that this extremely technical task was properly delegated to a third-party with expertise to conduct such tasks. The same, equally justifiable, determination was made with respect to a number of other application review processes, including, among others, financial reviews and community priority evaluations.

(c) California law does not discuss the legal effect of a "declaration" as the term is used in ICANN's Bylaws; indeed, we are not aware of any other corporation in the United States (or elsewhere) that has adopted such a unique process. Instead, the term is defined by the context of the Bylaws, which make clear that ICANN's Board is required to "review[]" and "consider" the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration.¹⁷ This is precisely what happened in the only three IRPs that have gone to a final declaration prior to *Vistaprint*: in the *ICM*, *Booking.com*, and *DotConnectAfrica* IRPs, the Board promptly reviewed and ultimately determined to adopt the relevant portions of the panels' declarations.¹⁸ The IRP Panel's declaration in *Vistaprint* was issued last Friday. ICANN's Board will promptly review and consider that declaration.

ICANN recognizes that the IRP panel in the *DotConnectAfrica* matter issued a finding that its declaration would be legally binding, in contrast to the finding made by the panel in the *Vistaprint* and *ICM* matters that their declarations were not legally binding.¹⁹ As ICANN has emphasized repeatedly to all IRP panels, the ICANN Board has announced that it will take (and is required by the Bylaws to take) any declarations of IRP panels seriously and to date has adopted the recommendations of all IRP declarations. Accordingly, we believe that further discussion of this issue would not be particularly useful.

¹⁶ Guidebook § 2.2.1.1 (Ex. C-5).

¹⁷ Bylaws Art. IV, § 3.11.d (Ex. C-1).

¹⁸ NGPC Resolutions 2015.04.26.14-2015.04.26.16, available at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en#2.b> (*Booking.com*); NGPC Resolutions 2015.07.16.01 – 2015.07.16.05, available at <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en> (*DotConnectAfrica*); Board Resolutions 2010.03.12.39-41 (*ICM*).

¹⁹ *DotConnect Africa Trust v. ICANN*, Declaration of the IRP Procedure ¶¶ 98-115 (Ex. CLA-9D); *Vistaprint* Final Declaration ¶ 149 (An IRP panel's declaration is a "'non-binding declaration' when it comes to recommending that the Board take or refrain from taking any action or decision . . .") (Ex. R-8); *ICM v. ICANN*, Declaration of the Independent Review Panel ¶¶ 131-134 (Ex. CLA-1). There was an extensive amount of briefing to both panels on the subject, which we could provide to this Panel if you believed it would be helpful, although it is quite voluminous and involved interpretations of two different sets of Bylaws. The *Booking.com* Panel did not address the issue of whether its declaration was binding.

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(d) ICANN agrees with the statements in Paragraph 53 of the *Booking.com* IRP Panel's Declaration that: (1) the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board, and (2) the "rules" at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook. However, the notion of Board "inaction" leading to a decision that is reviewable by an IRP Panel must involve a situation where the Board was required to, but did not, act.

For example, ICANN receives complaints from various types of Internet stakeholders regarding a myriad of issues, ranging from spam to cybersquatting, and so forth. These matters are almost never brought to the attention of the ICANN Board, meaning that the Board's "inaction" in addressing such matters would not warrant independent review. By contrast, if the Board were specifically presented with a decision—i.e., to decide to adopt a new policy recommended by one of ICANN's supporting organizations—but the Board elected not to consider that policy, that type of "inaction" could support independent review.

Here, as explained in ICANN's briefs, ICANN's Board acted in full accordance with ICANN's Articles, Bylaws, and the relevant provisions of the Guidebook in: (i) not independently evaluating the CPE Reports regarding Dot Registry's Applications; and (ii) not taking further action with respect to those Reports. The Board had no obligation to consider either of these matters, which is why ICANN has argued that independent review of those Board "inactions" is not appropriate under the terms of the Bylaws.

(e) ICANN's Bylaws and the Supplementary Procedures governing this IRP do not prohibit the holding of an in-person hearing. However, the Bylaws do strongly encourage IRP panels to "conduct [] proceedings by electronic means to the extent feasible" and contemplate that "in-person hearings" will be necessary only in "extraordinary" circumstances.²⁰

As to live witness, testimony, Paragraph 4 of the Supplementary Procedures and Article IV, Section 3.12 of the Bylaws are dispositive and expressly prohibit live witness testimony: "the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."²¹ IRP panels do not have the discretion to modify or ignore such express provisions of the Supplementary Procedures, and that it would be contrary to both the Bylaws and the Supplementary Procedures for an IRP Panel to order that any of the potential witnesses be subjected to live examination.²²

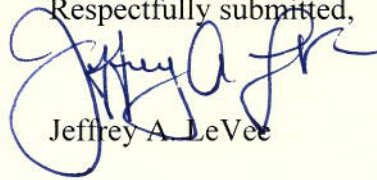
²⁰ Bylaws Art. IV, § 3.12 (Ex. C-1), Supplementary Procedures ¶ 4 (Ex. C-3).

²¹ *Id.*

²² ICANN anticipates that Dot Registry will note that the Panel in the *DCA* matter insisted on live testimony, over ICANN's vehement objection and in contravention of the express language of ICANN's Bylaws, and ICANN wound up bringing its declarants to the hearing. ICANN did not submit any declarations on the merits

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Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Jeffrey A. LeVee". The signature is stylized and cursive, with a large initial "J" and "L".

Jeffrey A. LeVee

cc: Counsel for Dot Registry

Enclosure

(continued...)

in conjunction with this matter and does not believe it would be necessary or useful to be able to cross-examine Dot Registry's declarants.