

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

Vistaprint Limited)
Contact Information Redacted)

Claimant)

v.)

INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)

Respondent)
_____)

ICDR Case No. 01-14-0000-6505

**SECOND ADDITIONAL SUBMISSION
IN ACCORDANCE WITH PROCEDURAL ORDER No. 2**

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1. With this additional submission, Vistaprint uses the opportunity granted by the IRP Panel to discuss the *Booking.com IRP Declaration* (**RM 38**) and the post-hearing material and communications in that matter. The post-hearing material and communications are attached as **RM 34-37**. Vistaprint is surprised that ICANN did not publish these materials *proprio motu*, and that ICANN asserted that it “*does not post IRP email correspondence on its website*”. In other matters, ICANN did post IRP email and other correspondence on its website.¹ ICANN appears to be selective about the information it publishes, and about when it publishes that information. This creates unbalanced access to information.

2. In the *Booking.com* case, the IRP Panel decided that ICANN’s process to identify confusing similarity between two strings was neither transparent nor fair. The Panel decided that the process “*lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness*” (**RM 38**, para. 117). The process to which Vistaprint’s applications for .webs were subjected is a different one, but it raises the same transparency and fairness concerns as the process that is discussed in the *Booking.com IRP Declaration*. As is pointed out in a series of other cases, the lack of transparency and fairness in the implementation of the New gTLD Program is a recurrent issue.²

¹ On ICANN’s IRP webpage, accessible through <https://www.icann.org/resources/pages/accountability/irp-en>, ICANN posted the following correspondence: Chain of emails of 21 November 2014 in the IRP proceedings initiated by Donuts, Inc. (<https://www.icann.org/en/system/files/files/donuts-resolution-request-21nov14-en.pdf>); Letter of 21 November 2014 by SportAccord to the Emergency Arbitrator in the IRP proceedings initiated by Donuts, Inc. (<https://www.icann.org/en/system/files/correspondence/omahoney-et-al-to-klitgaard-21nov14-en.pdf>); Letter by counsel to ICANN of 14 October 2009 in the IRP proceedings initiated by ICM Registry, on <https://www.icann.org/en/system/files/files/icann-letter-to-panel-re-icm-post-hearing-submission-14oct09-en.pdf>; Joint letters in the IRP proceedings initiated by Manwin Licensing International, accessible through <https://www.icann.org/resources/pages/manwin-v-icann-2012-02-25-en>; Letter by counsel to DCA Trust of 29 May 2014 (<https://www.icann.org/en/system/files/files/dca-response-on-partial-reconsideration-29may14-en.pdf>) and 5 March 2015 (<https://www.icann.org/en/system/files/files/dca-response-rehear-proceedings-05mar15-en.pdf>); Letters by counsel to ICANN of 2 June 2014 (<https://www.icann.org/en/system/files/files/icann-supplemental-brief-02jun14-en.pdf>) and 26 February 2015 (<https://www.icann.org/en/system/files/files/icann-to-irp-26feb15-en.pdf>) in the IRP proceedings initiated by DCA Trust.

² See e.g., Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC v. ICANN (<https://www.icann.org/resources/pages/various-v-icann-2015-03-16-en>); Little Birch LLC and Minds + Machines Group Limited v. ICANN ([https://www.icann.org/resources/pages/birch-mmx-v-icann-2015-03-27-\(Continued...\)](https://www.icann.org/resources/pages/birch-mmx-v-icann-2015-03-27-(Continued...)))

3. The Panel acknowledged that Booking.com’s submissions were of “public interest”. For this reason, it felt compelled to depart from the standard position set out in Article IV, Section 3(18) of ICANN’s Bylaws, that provides that the: “*party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider.*” Rather, the Panel declared that ICANN should bear one half of the IRP related costs.

4. The Panel in the *Booking.com IRP Declaration* felt compelled to:

“encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, [...] to consider whether, notwithstanding the result of the string similarity review of .hotels and .hotels, approval of both of [the] proposed strings would be in the best interest of the Internet community” (RM 38, para. 154).

5. The Panel found in the *Booking.com IRP Declaration* that it could not grant the specific relief that Booking.com sought (RM 38, para. 153) on the basis of two central observations. First, it determined that Booking.com should have raised its concerns regarding the process at the time of the ICANN Board’s adoption of the Guidebook. Second, the Panel felt bound to defer to the wide discretion that constitutional documents afford ICANN, finding 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 [...] 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.” (RM 38, para. 108)

6. Vistaprint will demonstrate below that:

- the Panel’s reasoning in relation to the timing of Booking.com’s action is wrong;
- the ICANN Board’s discretion is limited;
- the ICANN Board’s exercise of its discretion is subject to review by the IRP Panel;
- the IRP panel has the authority to order the ICANN Board to take specific action;
- the IRP Panel makes decisions which are binding upon ICANN.

en); dot Sport Limited v. ICANN (<https://www.icann.org/resources/pages/dot-sport-v-icann-2015-03-27-en>); Gulf Cooperation Council (GCC) v. ICANN (<https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en>).

7. Vistaprint will demonstrate that an IRP panel can do more than merely encourage ICANN to take action. In the case at hand, the IRP Panel can and must order ICANN to take specific action.

I. VISTAPRINT'S ACTION IS TIMELY

8. Vistaprint raised its objections to the erroneous expert determination at the appropriate stage in the process. ICANN goes to great lengths to argue that the time for Vistaprint to object to the string confusion objection procedures has long passed. ICANN relies on the reasoning of the Panel in the *Booking.com IRP Declaration* (the “Booking.com Panel”) that Booking.com should have objected to the string similarity review process at the time the Guidebook was first implemented.³

9. ICANN 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 string confusion objection procedures had been established and implemented in their entirety at the time the Guidebook was adopted. At that time, neither Booking.com nor Vistaprint nor any other interested party could effectively challenge these, as yet unfinalized, processes. ICANN still had every opportunity to correctly implement the string confusion objection procedure in accordance with both the Guidebook and the fundamental principles in ICANN’s Articles of Incorporation (“AoI”) and Bylaws. The opportunity for Vistaprint to challenge the erroneous application of the Guidebook in violation of ICANN’s fundamental principles only arose when the flaws in ICANN’s implementation of the Guidebook became apparent. At the time of the adoption of the Guidebook, Vistaprint was effectively barred from challenging the Guidebook by the fact that it could not – at that time – show any harm.

10. Further, to raise an issue at that time would have required Vistaprint to reveal that it was contemplating making an application for a new gTLD, which would have encouraged

³ ICANN’s Sur-Reply of 3 April 2015, para. 28-29.

opportunistic applications seeking to extract monetary value from an application by Vistaprint by applying for a TLD corresponding to the name of a product or business entity of Vistaprint or an affiliate, like ‘.webs’.⁴

11. Booking.com raised similar concerns (**RM 37**), but the Booking.com Panel simply did not draw the 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 the implementation of the Guidebook, asserting that the ICANN Board has ultimate discretion whether or not to intervene.

12. Other panels disagree (*infra*). The ICANN Board’s discretion is limited (II below) and an IRP panel’s review goes beyond the question as to whether or not the ICANN Board’s actions are in contradiction with the high-level procedural framework of the Guidebook (III, IV, V below).

II. THE ICANN BOARD’S DISCRETION IS LIMITED

13. As explained in earlier submissions, ICANN only acts through its Board, and the ICANN Board has ultimate responsibility for the New gTLD Program. In its Sur-Reply ICANN confirms 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.⁵

14. 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 mean that no Californian corporation could be held accountable in court or be subject to binding (international) arbitration.

15. 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

⁴ Webs, Inc. is a subsidiary of Vistaprint.

⁵ ICANN’s Sur-Reply of 3 April 2015, para. 41.

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 21**, para. 140).

16. 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 39**, para. 76). The limitation to the ICANN Board's discretion is explicitly mentioned in the ICANN Bylaws:

"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)

17. 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. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgement*" (**RM 39**, para. 77).

III. THE IRP PANEL CONTROLS THE ICANN BOARD'S EXERCISE OF ITS DISCRETION

18. 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. Indeed, 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 39**, para. 79).

19. Interventions of the ICANN Board in some cases (.cars/.car, .cam/.com and .通販/.shop) show that an expert determination on a string confusion objection (SCO) is not a final decision. The SCO expert determination only becomes final when the parties have accepted the SCO expert determination or when the ICANN Board has expressed itself on it. Any other reasoning would be impossible according to ICANN's own logic: that all activities and affairs of ICANN must be managed and that all corporate powers must be exercised under the ultimate direction of the Board.

20. When the Board intervenes (or elects not to intervene) on an SCO expert determination, that action of the Board is subject to review by the IRP Panel. As explained in detail in Vistaprint's Reply, the IRP Panel must review and determine whether the contested actions of the ICANN 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 principles of international law. The IRP Panel's mandate includes a review as to whether or not ICANN's Board discriminates in its interventions on SCO expert determinations.

21. Discriminating between applicants in its interventions on SCO expert determinations is exactly what the Board has done with respect to Vistaprint's applications.

22. ICANN's attempt to justify its disparate treatment of Vistaprint's applications is without merit. ICANN argues that its Board only intervened with respect to specific expert determinations because there had been several expert determinations regarding the same strings that were seemingly inconsistent.⁶ Vistaprint recognizes that the ICANN Board intervened to address "*perceived inconsistent or otherwise unreasonable SCO Expert Determinations*" (**RM 22**).

⁶ ICANN's Sur-Reply of 3 April 2015, para. 5.

However, ICANN fails to explain why the SCO Expert Determination on Vistaprint's .webs applications was not just as unreasonable as the SCO Expert Determinations involving .cars/.car, .cam/.com and .通販/.shop. Indeed, the determination concerning Vistaprint's .webs applications expressly relies on the determination concerning .cars/.car, that was considered inconsistent or otherwise unreasonable by the ICANN Board that rejected the reasoning applied in the two other .cars/.car expert determinations (**Annex 24**, pp. 16-18).

23. Therefore, Vistaprint requests the IRP Panel to exercise its control over the ICANN Board and to declare that ICANN discriminated Vistaprint's applications.

IV. THE IRP PANEL HAS THE AUTHORITY TO ORDER THAT THE ICANN BOARD REJECT THE CHALLENGED EXPERT DETERMINATION

24. 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 39**, para. 59). The IRP Panel's authority is not limited to declare that ICANN breached its obligations under its AoI, Bylaws and the Applicant Guidebook. To offer effective redress to applicants, the IRP Panel may indicate what action ICANN must take to cease violating these obligations. The point is all the stronger here, as ICANN conceived the IRP to be the sole dispute resolution mechanism available to new gTLD applicants (*infra*).

25. In the case at hand, the only way in which ICANN can act in accordance with its AoI and Bylaws is to reject the determination that .webs and .web are confusingly similar. ICANN must also disregard the resulting contention set, failing which ICANN continues to be in breach.

26. In the alternative, ICANN must reject the determination that .webs and .web are confusingly similar and organize a new and independent and impartial SCO procedure, as specified in Vistaprint's request for IRP. However, being an ICDR panel, there is no reason why this IRP Panel could not serve as the panel in said SCO procedure.

V. THE IRP PANEL RENDERS DECISIONS THAT ARE BINDING UPON ICANN

27. 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 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.

28. Within its New gTLD Program, ICANN conceived the IRP as an alternative to dispute resolution by courts. To submit a new gTLD application, Vistaprint had to agree to eight pages of terms and conditions (**RM 5**, Module 6). The terms and conditions include a waiver of all of Vistaprint's rights to challenge ICANN's decisions on Vistaprint's applications in court, or in any other judicial forum, provided that, as an applicant, Vistaprint may utilize any accountability mechanism set forth in ICANN's Bylaws (**RM5**, Module 6-4). "*[A]ssuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate 'accountability' remedy for [Vistaprint] is the IRP*" (**RM 32**, para. 40).

29. 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 (**RM 5**, Module 6-4), who are by definition third parties.

30. The IRP cannot be an effective and robust mechanism for accountability – as required under ICANN's Affirmation of Commitments (**RM 4**, Article 9.1) and ICANN's Bylaws (**RM2-3**, Article I(2)(10) – unless it is binding upon ICANN. Otherwise, the ICANN Board's discretion would indeed be unfettered and ICANN's AoI and Bylaws would be moot.

31. As mentioned in Vistaprint's Reply, 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 32, para. 98).

32. 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 32, 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 rule 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 brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the IRP Panel would not be considered advisory (RM 32, para. 107).

33. Finally, even if ICANN’s Bylaws and Supplementary Procedures are ambiguous – *quod non* – on the question of whether or not an IRP Declaration is binding, this ambiguity would weigh against ICANN. The relationship between ICANN and Vistaprint is clearly an adhesive one. 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 32, paras. 108-109).

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

VI. RELIEF REQUESTED

35. In light of the foregoing, Vistaprint's request for IRP and Vistaprint's Reply, Vistaprint respectfully requests that the IRP Panel issue a declaration:

- Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;
- Requiring that ICANN reject the determination that .webs and .web are confusingly similar and disregard the resulting contention set;
- In the alternative, requiring that ICANN reject the determination that .webs and .web are confusingly similar and organize a new independent and impartial string confusion objection procedure, during which a three-member panel re-evaluate the Expert Determination in the matter before the ICDR with case numbers 50 504 T 00221 13 and 50 504 T 00246 13, taking into account (i) the ICANN Board's resolutions on singular and plural gTLDs, on the DERCars Determination, on the United TLD Determination, and on the Onlineshopping Determination, and (ii) ICANN's decisions to delegate the .car and .cars gTLDs, the .auto and .autos gTLDs, the .accountant and .accountants gTLDs, the .fan and .fans gTLDs, the .gift and .gifts gTLDs, the .loan and .loans gTLDs, the .new and .news gTLDs and the .work and .works gTLDs;
- In any event, awarding Vistaprint its costs in this proceeding; and
- In any event, awarding such other relief as the Panel may find appropriate or Vistaprint may request.

Respectfully submitted,

Flip Petillion
April 24, 2015

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List of annexes

- Annex 1 - Vistaprint's applications to operate the .webs gTLD (Application ID 1-1033-22687 and 1-1033-73917)
- Annex 2 - Overview of US and non-US members of the Webs community
- Annex 3 - Web.com, Inc.'s application to operate the .web gTLD (Application ID 1-1009-97005)
- Annex 4 - Application for gTLD '.web' by DotWeb Inc. (AE)
- Annex 5 - Application for gTLD '.web' by Charleston Road Registry Inc., (US)
- Annex 6 - Application for gTLD '.web' by Afilias Domains No. 3 Limited (IE)
- Annex 7 - Application for gTLD '.web' by Ruby Glen, LLC (US)
- Annex 8 - Application for gTLD '.web' by Schlund Technologies GmbH (DE)
- Annex 9 - Application for gTLD '.web' by NU DOT CO LLC (US)
- Annex 10 - Vistaprint's Response to the Objection, as filed on May 22, 2013
- Annex 11 - Communication by the ICDR of May 31, 2013
- Annex 12 - Communication by the ICDR of June 28, 2013
- Annex 13 - Communication by Mr. Koh of August 8, 2013
- Annex 14 - Communication by the ICDR of September 18, 2013
- Annex 15 - Communication by the ICDR of October 1, 2013
- Annex 16 - Communication by the ICDR of October 14, 2013
- Annex 17 - Communication by Web.com of October 24, 2013
- Annex 18 - Communication by Vistaprint of October 30, 2013
- Annex 19 - Communication of the ICDR of November 4, 2013
- Annex 20 - Communication by Vistaprint of November 5, 2013
- Annex 21 - Communication by the ICDR of On November 8, 2013
- Annex 22 - Communication by the ICDR of November 20, 2013
- Annex 23 - Communication by Vistaprint of On 31 July 2013
- Annex 24 - Expert Determination in the matter before the ICDR with case numbers 50 504 T 00221 13 and 50 504 T 00246 13
- Annex 25 - Request for Reconsideration 14-5 as filed on February 6, 2014
- Annex 26 - Board Governance Committee determination on Request for Reconsideration 14-5
- Annex 27 - Vistaprint's request for a Cooperative Engagement Process on March 17, 2014
- Annex 28 - Minutes of the Meeting of the Board Governance Committee on February 27, 2014 published on March 13, 2014
- Annex 29 - Printout of the website where the String Similarity Assessment Tool is used to compare .ACCOUNTANTS and .ACCOUNTANT
- Annex 30 - Printout of the website where the String Similarity Assessment Tool is used to compare .COUPONS and .COUPON
- Annex 31 - Printout of the website where the String Similarity Assessment Tool is used to compare .IO and .JO
- Annex 32 - Independent Expert Report by Professor Piet Desmet
- Annex 33 - Supplemental Consent to Registration of Web.com with Verio
- Annex 34 - Whois records of <webs.com>
- Annex 35 - Whois records of <web.com>
- Annex 36 - Application status of the application for .car and .car Registry Agreement
- Annex 37 - Application status of the application for .cars and .cars Registry Agreement
- Annex 38 - Application status of the application for .auto and .auto Registry Agreement
- Annex 39 - Application status of the application for .autos and .autos Registry Agreement
- Annex 40 - Application status of the application for .accountant and .accountant Registry Agreement

- Annex 41 - Application status of the application for .accountants and .accountants Registry Agreement
- Annex 42 - Application status of the application for .fan and .fan Registry Agreement
- Annex 43 - Application status of the application for .fans and .fans Registry Agreement
- Annex 44 - Application status of the application for .gift and .gift Registry Agreement
- Annex 45 - Application status of the application for .gifts and .gifts Registry Agreement
- Annex 46 - Application status of the application for .loan and .loan Registry Agreement
- Annex 47 - Application status of the application for .loans and .loans Registry Agreement
- Annex 48 - Application status of the application for .new and .new Registry Agreement
- Annex 49 - Application status of the application for .news and .news Registry Agreement
- Annex 50 - Application status of the application for .work and .work Registry Agreement
- Annex 51 - Application status of the application for .works and .works Registry Agreement

List of Reference Material (RM)

1. ICANN's Articles of Incorporation
2. ICANN's Bylaws of 11 April 2013
3. ICANN's Bylaws as amended on 16 March 2012, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-16mar12-en.htm>
4. Affirmation of Commitments
5. gTLD Applicant Guidebook (v. 2012-06-04)
6. Overview of the Internet Root Zone Database on May 15, 2013
7. Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), <http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR>
8. GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005)
9. ICANN Board Resolution 2008.06.26.02, <http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm>
10. ICANN Board Resolution 2011.06.20.01, <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm>
11. ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, <http://www.icann.org/en/groups/board/documents/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>
12. Information on the Applicant Guidebook as published on <http://newgtlds.icann.org/en/applicants/agb>
13. New gTLD Update (30 May 2012) on the close of the TLD Application system, <http://newgtlds.icann.org/en/announcements-and-media/announcement-3-30may12-en>
14. New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, p. 149, available at <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>
15. ICANN's call for expression of interest for new gTLD String Similarity Examiners, <http://archive.icann.org/en/topics/new-gtlds/eoi-string-sim-31jul09-en.pdf>
16. NGPC Resolution 2013.06.25.NG07
17. ICDR Supplementary Procedures for String Confusion Objections (DRSP Rules)
18. Announcement by the ICDR
19. Memorandum of Understanding between ICANN and the ICDR
20. NGPC Resolution 2014.02.05.NG02
21. Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08
22. NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03
23. Expert Determination in the matter before the ICDR with case number 50 504 229 13
24. Expert Determination in the matter before the ICDR with case number 50 504 224 13
25. Expert Determination in the matter before the ICDR with case number 50 504 226 13
26. Expert Determination in the matter before the ICDR with case number 50 504 261 13
27. Expert Determination in the matter before the ICDR with case number 50 504 258 13
28. ICANN's Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections
29. Overview of SCO determinations
30. ICANN Generic Names Supporting Organization, Final Report - Introduction of New Generic Top-Level Domains, 8 August 2007, Part A: Final Report, <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
31. Witness statement by Kurt Pritz of 8 October 2014
32. Declaration of the Independent Review Panel in ICDR Case No. 50 2013 001083
33. Transmittal Letter from Esther Dyson to Becky Burr of 6 November 1998;
34. New gTLD Draft Applicant Guidebook: Analysis of Public Comment (18 February 2009), <https://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>

35. New gTLD Draft Applicant Guidebook Version 4 Public Comment Summary and Analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf>
36. Public comment on string similarity algorithm by Mr. Davis, <http://forum.icann.org/lists/gtld-guide/msg00021.html>
37. Post-hearing communications in ICDR Case No. 50-20-1400-0247
38. Final Declaration of the Independent Review Process Panel in ICDR Case No. 50-20-1400-0247
39. Interim Declaration on Emergency Request for Interim Measures of Protection in ICDR Case No. 01-14-0002-1065 (12 February 2015)