

ICANN BOARD SUBMISSION NO. 2016.11.08.2b

TITLE: **Consideration of the *Corn Lake, LLC v. ICANN* Independent Review Process Final Declaration**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

On 19 October 2016, the parties received the Independent Review Process (IRP) Panel's (Panel's) Final Declaration in the IRP filed by Corn Lake, LLC (Corn Lake) ([see Final Declaration](#), Attachment A to Reference Materials) (Final Declaration). The IRP challenged: (1) the Expert Determination sustaining the Community Objection against Corn Lake's application for .CHARITY; (2) the Board Governance Committee's (BGC's) denial of Corn Lake's Reconsideration Request 14-3 challenging the Expert Determination; and (3) the Board's decision to not include the Expert Determination in the review mechanism to address perceived inconsistent or unreasonable string confusion objection determinations (Final Review Procedure).

The IRP request was denied in part and granted in part, and the Panel determined Corn Lake to be the prevailing party. (Final Declaration at ¶¶ 7.14, 8.96, 11.1(a).) Specifically, the Panel declared that Corn Lake's challenges to the Expert Determination and the BGC's denial of Reconsideration Request 14-3 were "out of time" and therefore time-barred from consideration in the IRP. (Final Declaration at ¶¶ 7.14, 8.34.) The Panel further declared that "omitting .CHARITY from the [Final Review Procedure] was inconsistent with the Articles of Incorporation and Bylaws." (Final Declaration at ¶ 11.1(b).) The Panel further declared that because "these IRP proceedings involve extraordinary circumstances," "no costs shall be allocated to the prevailing party." (Final Declaration at ¶¶ 9.3-9.5 11.1(e).)

The Panel also declared that: (i) "there is no suggestion that the Board had a conflict of interest, and the IRP Panel finds that the Board acted without conflict." (*id.* at ¶ 8.70); and (ii) "the Board members exercised independent judgment, believed to be in the best

interests of the community” (*id.* at ¶ 8.74). The Panel further stated: “[t]his IRP Panel does not suggest that ICANN lacks discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interest of the Internet community as a whole.” (*Id.* at ¶ 8.98).

In addition, the Panel recommended that: (1) “the Board extend the [Final Review Procedure] to include review of Corn Lake’s .CHARITY Expert Determination”; and (2) “the Board continue to stay any action or decision in relation to [Spring Registry’s] .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel.” (Final Declaration at ¶¶ 11.1(c)-(d).)

In accordance with Article IV, section 3.21, the Board is being asked to consider and adopt the findings of the Panel’s Final Declaration in the Corn Lake IRP. (*See* <https://www.icann.org/resources/pages/governance/bylaws-en/#IV>.)

PROPOSED RESOLUTION:

Whereas, on 19 October 2016, ICANN received the Independent Review Process (IRP) Final Declaration in the IRP filed by Corn Lake, LLC (Corn Lake) against ICANN (Final Declaration).

Whereas, the IRP Panel declared that: (i) Corn Lake’s challenges to the determination rendered by an expert panelist sustaining the Independent Objector’s (IO’s) Community Objection against Corn Lake’s application for .CHARITY (Expert Determination) and the Board Governance Committee’s (BGC’s) denial of Corn Lake’s Reconsideration Request 14-3 challenging the Expert Determination were time-barred; (ii) “the Board acted without conflict [of interest]”; and (iii) “the Board members exercised independent judgment, believed to be in the best interests of the community.” (*See* Final Declaration, ¶¶ 7.14, 8.70, 8.74, <https://www.icann.org/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf>.)

Whereas, the Panel further declared that “the [Board] action of omitting .CHARITY from the [the review mechanism to address perceived inconsistent or unreasonable string confusion objection determinations (Final Review Procedure)] was inconsistent with the Articles of Incorporation and Bylaws.” (Final Declaration at ¶ 11.1(b).)

Whereas, the Panel further declared that “Claimant, Corn Lake, is the prevailing party” and that “no costs shall be allocated to the prevailing party.” (Final Declaration at ¶¶ 11.1(a), (e).)

Whereas, the Panel recommended that: (1) “the Board extend the [Final Review Procedure] to include review of Corn Lake’s .CHARITY Expert Determination”; and (2) “the Board continue to stay any action or decision in relation to [Spring Registry Limited’s] .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel.” (Final Declaration at ¶¶ 11.1(c)-(d).)

Whereas, in accordance with Article IV, section 3.21 of ICANN’s Bylaws, the Board has considered the Final Declaration.

Resolved (2016.11.XX.XX), the Board accepts the following findings of the Final Declaration: (i) Corn Lake is the prevailing party in the *Corn Lake, LLC v. ICANN* IRP; (ii) Corn Lake’s challenges to the Expert Determination and the BGC’s denial of Corn Lake’s Reconsideration Request 14-3 were time-barred; (iii) the Board acted without conflict of interest; (iv) “the Board members exercised independent judgment, believed to be in the best interests of the community”; (v) “the [Board] action of omitting .CHARITY from the [Final Review Procedure] was inconsistent with the Articles of Incorporation and Bylaws”; and (vi) the parties shall each bear their own costs.

Resolved (2016.11.XX.XX), the Board directs the President and CEO, or his designee(s), to take all steps necessary to implement the Panel’s recommendation that “the Board extend the [Final Review Procedure] to include review of Corn Lake’s .CHARITY Expert Determination.”

Resolved (2016.11.XX.XX), the Board directs the President and CEO, or his designee(s), to refrain from taking any further action or decision in relation to Spring Registry Limited's .CHARITY application until after the results of the Final Review Procedure are known, and then to proceed pursuant to established processes with the processing of both Corn Lake's and Spring Registry Limited's applications in accordance with the results of Final Review Procedure.

PROPOSED RATIONALE:

Corn Lake, LLC (Corn Lake) initiated Independent Review Process (IRP) proceedings challenging: (1) the determination rendered by an expert panelist sustaining the Independent Objector's (IO's) community objection against Corn Lake's application for .CHARITY (Expert Determination); (2) the Board Governance Committee's (BGC's) denial of Corn Lake's Reconsideration Request 14-3 challenging the Expert Determination; and (3) the Board's decision to not include the Expert Determination in the review mechanism to address perceived inconsistent or unreasonable string confusion objection determinations (Final Review Procedure).

Corn Lake applied to ICANN for the opportunity to operate the .CHARITY new gTLD. Spring Registry Limited ("SRL") also submitted an application for .CHARITY, and Excellent First Limited (Excellent First) submitted an application for .慈善 (the Chinese translation of "charity"). ICANN's Independent Objector (IO) filed Community Objections against the two .CHARITY applications, as well as the application for .慈善, meaning charity. The IO was concerned that, among other things, the lack of any policy restricting registrations in these gTLDs to charitable or not-for-profit organizations created a likelihood of detriment to the rights or legitimate interests of the charity community, to users, and to the general public. (See IO's Community Objection at Para. 46, pgs. 16-17, <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/charity-cty-corn-lake-llc/>.)

The International Centre for Expertise of the International Chamber of Commerce (ICC) expert panel evaluating the IO's Community Objection to Corn Lake's application

rendered a determination (Expert Determination) in favor of the IO, finding that, because Corn Lake's .CHARITY application did not include registration restrictions to charitable organizations, "there is a likelihood of material detriment to the charity sector community were the Application to proceed." The same ICC expert panel also evaluated the IO's Community Objections to SRL's application and Excellent First's application, rendering determinations in favor of SRL and Excellent First Limited. Specifically, the expert panel found that SRL's and Excellent First's commitments set out in their applications to restrict registrations in the applied-for string to charitable organizations was sufficient to negate any concern of material detriment to the targeted community.

On 24 January 2014, Corn Lake filed Reconsideration Request 14-3 (Request 14-3) seeking reversal of the Expert Determination. On 27 February 2014, the Board Governance Committee (BGC) denied Request 14-3, finding no evidence that the expert panel violated any process or policy in reaching its determination.

Separately, in April 2013, the Governmental Advisory Committee (GAC) recommended in the Beijing Communiqué that the Board adopt eligibility restrictions for "sensitive strings," including .CHARITY. (See Beijing Communiqué at <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.)

The New gTLD Program Committee (NGPC) adopted the GAC's recommendation by a 5 February 2014 resolution (see <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>), which, according to the Panel, effectively required that whichever applicant ultimately operated the .CHARITY gTLD would need to restrict registrations to charitable organizations. Also at that 5 February 2014 meeting, the NGPC adopted a resolution that authorized the ICANN President and CEO to initiate a public comment period with respect to a proposed review mechanism to address perceived inconsistent string confusion objection determinations (Final Review Procedure). At its creation, the Final Review Procedure was limited to the review of certain string confusion expert determinations for .CAR/.CARS, .CAM/.COM, and .SHOP/.ONLINESHOPPING (in Japanese characters). In March 2014, via the public comment process, Corn Lake's parent company (Donuts, Inc.) asked the Board to extend the Final Review Procedure to perceived inconsistent determinations of community

objection, such as that concerning .CHARITY. The Board did not do so when the procedure was implemented in a 12 October 2014 Board resolution (“12 October 2014 Resolution”). (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en>.)

Corn Lake’s IRP Request, submitted on 24 March 2015, sought a declaration that the ICANN Board’s decision not to include the .CHARITY determination in the 12 October 2014 Resolution violates ICANN’s Articles and Bylaws, and also asked the Panel to review the Expert Determination and the BGC’s denial of Request 14-3.

On 17 October 2016, the three-member IRP Panel (Panel) issued its Final Declaration, which was circulated to the parties on 19 October 2016. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN Bylaws, the Board adopts the findings of the Panel, which are summarized below, and can be found in full at <https://www.icann.org/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf>.

The Panel held that the IRP request was denied in part and granted in part, and determined Corn Lake to be the prevailing party. (Final Declaration at ¶¶ 7.14, 8.96, 11.1(a).) As a threshold issue, the Panel declared that Corn Lake’s challenges to the Expert Determination and the BGC’s denial of Request 14-3 were “out of time” and therefore time-barred from consideration in this IRP. (Final Declaration at ¶¶ 7.14, 8.34.)

The Panel also declared that: (i) with respect to setting filing deadlines, “ICANN is entitled and indeed required to establish reasonable procedural rules in its Bylaws, including in respect of filing deadline, in order to provide for orderly management of its review processes” (*id.* at ¶ 7.9); (ii) “it is now well established that: ‘...the IRP Panel is charged with ‘objectively’ determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness” (*id.* at ¶ 8.18); (iii) “[t]here is no suggestion that the Board had a conflict of interest, and the IRP Panel finds that the Board acted without conflict.” (*id.* at ¶ 8.70); and (iv) “[t]here is no indication that the Board members were acting in

any way other than in good faith and exercising independent judgment, with the subjective belief that they were acting in the best interests of the community. The IRP Panel finds that the Board members exercised independent judgment, believed to be in the best interests of the community” (*id.* at ¶ 8.74). The Panel further stated: “[t]his IRP Panel does not suggest that ICANN lacks discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interest of the Internet community as a whole.” (*Id.* at ¶ 8.98).

The Panel stated that “[t]he sole issue before this Panel is whether the Board properly or improperly excluded the .Charity Expert Determinations from the [Final Review Procedure] in the first place.” (Final Declaration at ¶ 8.97, fn. 246.) In considering this issue, the Panel noted that the Expert Determination was largely based on the fact that Corn Lake’s application originally had not made clear that it would restrict registrations to charitable organizations. The Panel felt that the NGPC’s acceptance of the Beijing Communiqué created a “levelling effect,” effectively requiring that whichever .CHARITY applicant prevailed, it would be required to implement restricted registration policies. The Panel noted: “We make no finding that the Board’s failure to consider the impact of its adoption of the Beijing Communiqué recommendations was malicious or intentional. We find simply that the levelling effect on the eligibility requirements in the pending applications of the new PIC requirement was a material fact that should have been considered, and apparently it was not.” (Final Declaration at ¶ 8.73.) The Panel therefore declared that that “the action of omitting .CHARITY from the [Final Review Procedure] was inconsistent with the Articles of Incorporation and Bylaws.” (Final Declaration at ¶ 11.1(b).) The Panel noted that its finding “is further supported by the ICANN Board’s [later] decision to include the .HOSPITAL Expert Determinations [in the Final Review Procedure], despite those Determinations appearing to have been less clearly within the criteria tha[n] the .CHARITY Determinations.” (Final Declaration at ¶ 8.101.) The Panel further noted that “this is a unique situation and peculiar to its own unique and unprecedented facts[; and t]his unique set of circumstances created what was

doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process[.]” (Final Declaration at ¶ 8.97.)

The Panel further declared that “these IRP proceedings involve extraordinary circumstances,” and therefore “no costs shall be allocated to the Claimant as the prevailing party,” “each Party shall bear its own costs in respect of this IRP Panel proceeding.” (Final Declaration at ¶¶ 9.3-9.5.)

In addition, the Panel recommended that: (1) “the Board extend the [Final Review Procedure] to include review of Corn Lake’s .CHARITY Expert Determination”; and (2) “the Board continue to stay any action or decision in relation to [Spring Registry’s] .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel.” (Final Declaration at ¶¶ 11.1(c)-(d).) Subsequent to the issuance of the Final Declaration, the Board received a letter on 28 October 2016 (dated 27 October) from Corn Lake’s counsel “urg[ing] the Board to reinstate its .CHARITY application without” “[g]oing through the motions of such review[, which] will cost money to ICANN and Corn Lake, and unnecessary time for all .CHARITY applicants.” Corn Lake requests that the Board “reinstat[e] Corn Lake’s .CHARITY application and allow[] it to compete for the domain without going through the additional time and expense [of the Final Review Procedure].” (See <https://www.icann.org/en/system/files/correspondence/genga-to-icann-board-27oct16-en.pdf>.) The Board had the opportunity to review Corn Lake’s correspondence and has taken it into consideration in reaching its Resolution regarding the Panel’s recommendation.

As required, the Board has considered the Final Declaration. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN’s long-standing accountability mechanisms. Accordingly, and for the reasons set forth in this Resolution and Rationale, the Board has accepted the Panel’s Final Declaration as indicated above.

Adopting the Panel’s Final Declaration and implementing the Panel’s recommendation will have a direct financial impact on the organization, but that impact will not impact the

underlying budget for FY17. Adopting the Panel's Final Declaration will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Date Noted: 21 October 2016
Email: amy.stathos@icann.org