

## **DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)**

### **RECONSIDERATION REQUEST 14-5**

**27 FEBRUARY 2014**

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The Requester (Vistaprint Limited) seeks reconsideration of the Expert Determination upholding Web.com Group, Inc.'s string confusion objections to the Requester's applications for .WEBS.

#### **I. Brief Summary.**

The Requester submitted two applications for .WEBS – one as a standard application and one as a community application. The Web.com Group, Inc. applied for .WEB. Web.com Group, Inc. filed two string confusion objections to the Requester's applications, and both Objections were upheld. The Requester claims that the ICDR failed to follow applicable ICDR procedures governing the appointment and conduct of experts. Specifically, the Requester claims that the ICDR violated applicable ICDR procedures concerning: (i) the timely appointment of an expert panel; (ii) the acceptance of additional written submissions ; (iii) the timely issuance of an expert determination; (iv) an expert's duty to remain impartial and independent; and (v) challenges to experts. The Requester also claims that the actions of the Panel were inconsistent with ICANN policies, which influenced the Panel's decision to uphold the Objections. Specifically, the Requester claims that the Panel violated applicable ICANN policies concerning: (i) the Objector's burden of proof; and (ii) the standards governing the evaluation of a string confusion objection.

The Requester asks ICANN to reject the Expert Determination and instruct a new panel to issue an expert determination that applies the standards defined by ICANN. In the event ICANN concludes that the ICDR and the "new" Panel adhered to and correctly applied ICDR

and ICANN processes and policies concerning string confusion objections, the Requester asks that ICANN derogate from its procedure because accepting the Expert Determination would purportedly result in discriminatory application of ICANN's standards, policies and procedures.

With respect to each claim asserted by the Requester concerning the ICDR's alleged violations of applicable ICDR procedures concerning experts, there is no evidence that the ICDR deviated from the standards set forth in the Applicant Guidebook, the New gTLD Dispute Resolution Procedure, or the ICDR's Supplementary Procedures for String Confusion Objections (Rules). The Requester has likewise failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure. Therefore, the BGC<sup>1</sup> concludes that Request 14-5 be denied.

## **II. Facts.**

### **A. Background Facts.**

Vistaprint Limited (the "Requester") applied for .WEBS.<sup>2</sup>

Web.com Group, Inc. (the "Objector") applied for .WEB. Six other applicants also applied for .WEB.

On 13 March 2013, the Objector filed two string confusion objections (the "Objection")<sup>3</sup> with the ICDR<sup>4</sup> to the Requester's applications. The Objector asserted that "the applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications." (Applicant Guidebook ("Guidebook"), § 3.2.1; Procedure, Art.

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<sup>1</sup> Board Governance Committee.

<sup>2</sup> Six other applicants also applied for .WEB.

<sup>3</sup> Because the Objections were consolidated and the Expert Panel issued just one Determination, this Recommendation may reference "Objection" and "Determination" in the singular or the plural; any singular references shall apply to both objections.

<sup>4</sup> International Centre for Dispute Resolution.

2(e).) The Objector was the only .WEB applicant to file a string confusion objection to the .WEBS applications.

On 6 May 2013, the ICDR consolidated Case No. 50 504 T 00221 13 and Case No. 50 504 T 00246 13. (Request, Section 3, Pg. 2.)

On 23 May 2013, the Requester responded to the Objections.

On 28 June 2013, the ICC appointed Mr. Steve Y. Koh, Esq. as the expert to consider the Objections (the “First Expert”).

On 19 July 2013, the Objector submitted a supplemental written statement replying to the Requester’s response.

On 31 July 2013, the Requester objected to the Objector’s supplemental filing, to which the Objector responded on 5 August 2013.

On 8 August 2013, the Panel acknowledged receipt of the Objector’s supplemental written statement and the parties’ respective statements dated 31 July 2013 and 5 August 2013, and granted the Requester leave to submit a sur-reply no later than 6 September 2013.

The Requester filed its sur-reply on 29 August 2013.

On 1 October 2013, the ICDR removed the First Expert due to a new conflict that arose.

On 14 October 2013, the ICDR appointed Bruce W. Belding, Esq. as the new expert (the “Second Expert”).

On 24 October 2013, the Objector challenged the appointment of the Second Expert, to which the Requester responded on 30 October 2013.

On 4 November 2013, the ICDR removed the Second Expert in response to the Objector’s challenge.

On 20 November 2013, the ICDR appointed Professor Ilhyung Lee to serve as the expert (“Expert” or “Panel”) to consider the Objector’s Objection (the “Third Expert”). No party objected to this Expert.

On 24 January 2014, the Panel issued an Expert Determination in favor of the Objector and deemed the Objector the prevailing party. (Determination, Pg. 18.)

On 27 January 2014, the ICDR notified the parties of the Expert Determination.

On 6 February 2014, the Requester filed Request 14-5.

**B. The Requester’s Claims.**

The Requester claims that the ICDR failed to adhere to the following:

- Article 13(a) of the New gTLD Dispute Resolution Procedure (“Procedure”), in particular the standards for the timely appointment of an Expert Panel;
- Article 17 of the Procedure, in particular the standards governing the submission of additional written statements;
- Article 21 of the Procedure, in particular the standards for the timely issuance of an Expert Determination;
- Article 13(c) of the Procedure, in particular the standards governing an expert’s duty to maintain his or her impartiality and independence; and
- Article 2 of the ICDR’s Supplementary Procedures for String Confusion Objections (Rules), in particular the standards governing challenges to experts.

The Requester claims that the Panel’s decision to uphold the Objection violates the following:

- Section 3.5 of the Guidebook and Article 20(c) of the Procedure, which together place the burden on the objector to prove “that its Objection should be sustained in accordance with applicable standards”; and
- Section 3.5.1 of the Guidebook, in particular the standards governing the evaluation of a string confusion objection.

(Request, Section 10, Pgs. 7-23.) Specifically, the Requester makes the following claims:

1. The ICDR first appointed an expert six days after the date on which an expert had to be appointed in accordance with Article 13(a) of the Procedure;
2. The Expert Panel improperly accepted and considered unsolicited supplementary filings in violation of Article 17 of the Procedure;
3. The ICDR informed the parties that the First Expert would render his determination on 4 October 2013, which the Requester claims would have been untimely under Article 21 of the Procedure;
4. The removal of the First Expert “due to a new conflict” demonstrates that the First Expert failed to maintain his impartiality and independence in accordance with Article 13(c) of the Procedure;
5. The ICDR improperly accepted the Objector’s challenge to the Second Expert and improperly denied the Requester’s request to reconsider its decision;
6. The Expert Panel that ultimately considered the Objection failed to render a determination in a timely manner under Article 21 of the Procedure;
7. The Expert improperly concluded that the Objector had met the burden of proof without sufficiently analyzing or articulating the basis for this conclusion; and
8. The Expert Panel incorrectly applied the standards governing string confusion objections by failing to define the “average, reasonable Internet user.”

(*Id.*)

### **C. Relief Requested.**

The Requester asks ICANN to reject the Expert Determination and instruct a new panel to issue an expert determination that applies the standards defined by ICANN. In the event ICANN concludes that the ICDR and the Panel adhered to and correctly applied ICDR and ICANN processes and policies concerning string confusion objections, the Requester asks that ICANN derogate from its procedure because accepting the Expert Determination would purportedly result in discriminatory application of ICANN’s standards, policies and procedures.

(Request, Section 9, Pg. 7.)

### **III. Issues.**

In view of the claims set forth in Request 14-5, the issues for reconsideration are:

- A. Whether the ICDR violated its processes or procedures governing the appointment and conduct of the experts, including whether:
1. The ICDR's appointment of the First Expert was untimely;
  2. The Expert Panel improperly accepted and considered unsolicited supplementary filings;
  3. The ICDR violated established procedure when it informed the parties that an expert determination would be issued on 4 October 2013;
  4. The First Expert failed to maintain his impartiality and independence;
  5. The ICDR improperly accepted the Objector's challenge to the Second Expert; and
  6. The Expert Determination was untimely;

and

- B. Whether the Expert Panel applied the wrong standards in contravention of established policies or processes, including whether:
1. The Expert Panel improperly concluded that the Objector had met its burden of proof without sufficient analysis; and
  2. Whether the Expert Panel improperly failed to define the "average, reasonable Internet user" for purposes of evaluating the string confusion objection.

#### **IV. The Relevant Standards for Evaluating Reconsideration Requests and String Confusion Objections.**

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>5</sup> (Bylaws, Art. IV, § 2.) Dismissal of a request for

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<sup>5</sup> 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

reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC<sup>6</sup> agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws.<sup>7</sup>

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that the Requester's applications for .WEBS are confusingly similar to the Requester's application for .WEB. Rather, the BGC's review is limited to whether the Panel violated any established policy or process in reaching that Determination.

The standards for evaluating string confusion objections are set forth in Section 3.5.1 of the Applicant Guidebook (the "Guidebook"). Pursuant to Section 3.5.1 of the Guidebook, the expert panel hearing a string confusion objection will "consider whether the applied-for gTLD string is likely to result in string confusion." The Guidebook provides:

String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

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- (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.

<sup>6</sup> New gTLD Program Committee.

<sup>7</sup> ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICDR, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination. *See* <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

(Guidebook, § 3.5.1.).

Also relevant to the Requester's claims are the ICDR's Supplementary Procedures for String Confusion Objections ("Rules"). The Rules relevant to the Requester's claims are discussed below.

## **V. Analysis and Rationale.**

### **A. The Requester Failed To Demonstrate That The ICDR Violated Its Processes Or Procedures Governing The Appointment And Conduct Of Experts.**

The Requester claims that the ICDR failed to follow applicable ICDR procedures concerning: (i) the timely appointment of an expert panel; (ii) the acceptance of additional written submissions; (iii) the timely issuance of an expert determination; (iv) an expert's duty to remain impartial and independent; and (v) challenges to experts. As discussed in detail below, the Requester provided no support for its contention that the ICDR incorrectly applied any ICDR process or procedure.

#### **1. The ICDR's Purported Failure To Appoint The First Expert In A Timely Manner Does Not Support Reconsideration.**

The Requester claims that the ICDR's appointment of the First Expert was untimely. Specifically, the Requester claims that its response was submitted on May 23, 2013, such that the expert "had to be appointed by June 22, 2013." (Request, Section 10, Pg. 9.) Because it "took the ICDR until June 28, 2013 to appoint Steve Y. Koh, Esq.," the Requester contends that the expert's appointment was in violation of Article 13(a) of the Procedure, which provides: "The DRSP shall select and appoint the Panel of Expert(s) within thirty (30) days after receiving the Response." (Procedure, Art. 13(a).)

First, the Requester has failed to provide any evidence that it contemporaneously challenged the timeliness of the ICDR's appointment of the First Expert. Had the Requester



submitted a challenge or other objection to the ICDR when the First Expert was appointed, the ICDR could have addressed that challenge in an appropriate fashion. A Reconsideration Request is not the appropriate mechanism to raise the issue for the first time.

Furthermore, and more importantly, the Requester has not shown, because it cannot show, that it was “materially” and “adversely” affected by the purported brief delay in appointing the First Expert. Absent evidence that the Requester has been materially and adversely affected by the brief delay, reconsideration is not appropriate. (Bylaws, Art. IV, §2.2.)

**2. The First Expert Did Not Incorrectly Accept Additional Submissions.**

On 19 July 2013, the Objector submitted a supplementary filing to the First Expert. The Requester claims that the First Expert’s acceptance of this supplementary filing violated Article 17 of the Procedure. The Requester’s claim must be rejected.

As the Requester points out, Article 17 of the Procedure provides that:

*The Panel may decide* whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.

(Procedure, Art. 17(a) (emphasis added).) It is thus entirely within the expert’s discretion to determine whether to accept additional written statements. Here, in exercising that discretion, the First Expert deemed it appropriate to accept the Objector’s supplemental filing. It is not the BGC’s role to second-guess any expert panel in this regard. Moreover, the First Expert allowed the Requester to respond to the Objector’s supplemental filing, which the Requester did on 29 August 2013. (Request, Section 10, Pg. 13-14; Determination, Pg. 2.)<sup>8</sup>

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<sup>8</sup> Citing Article 18 of the Procedure, the Requester claims that “there were no exceptional circumstances” warranting the acceptance of the Objector’s supplementary filings and that the expert’s acceptance of the Objector’s filing “created unreasonable additional costs for the Requester.” (Request, Section 10, Pg. 13.) Article 18 of the Procedure does not apply here. Article 18 states that “[i]n exceptional cases, the Panel

The Requester also contends that the Expert who ultimately issued the Determination in the instant proceeding (the Third Expert) should have made “an independent assessment whether or not to require additional submissions and evidence.” (Request, Section 10, Pg. 14.) In support, the Requester states only that “[w]hen a Panel needs to be replaced, decisions by a previous Panel cease to exist.” (*Id.*) There is no support for the Requester’s summary conclusion. Indeed, the Requester fails to cite any provision in the Guidebook, the Procedure, the Rules or elsewhere that somehow voids a decision of a previous panel concerning the submission of additional materials.

**3. The ICDR’s Purported Representation That An Expert Determination Would Be Issued By 4 October 2013 Does Not Support Reconsideration.**

The Requester claims that “[o]n September 18, 2013 (*i.e.* 82 days after the appointment of Mr. Koh as Panel) ... the ICDR informed the parties that the expert determination was going to be issued on or about October 4, 2013 (*i.e.* 98 days after the appointment of Mr. Koh as Panel).” (Request, Section 10, Pg. 9.) The Requester contends that this would have resulted in the issuance of an untimely Expert Determination because Article 21(a) of the Procedure provides that “[t]he DSRP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel.” The Requester’s claims do not support reconsideration.

First, the Requester presents only a hypothetical alleged violation of one provision of the Procedure. On 1 October 2013, *before* the expert determination was purportedly to be issued,

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may require a party to provide additional evidence.” (Procedure, Art. 18.) Here, no party was “required” to provide any additional evidence. The parties submitted supplementary filings on their own volition and it was within the expert’s discretion to accept the additional materials. (*See* Procedure, Art. 17(a).)

the ICDR removed the First Expert. The action (or inaction) that Requester seeks to challenge (i.e. the failure to timely issue an Expert Determination) never occurred. The BGC therefore cannot evaluate whether the First Expert rendered an untimely determination in violation the Procedure because he was removed before an Expert Determination could be issued. As such, no established policy or process was violated.

Second, the 45-day timeline set out in the Procedure cited by the Requester applies to the Expert's submission of the Expert Determination "in draft form to the DRSP's scrutiny as to form before it is signed." (Procedure, Art. 21(a)-(b).) Moreover, pursuant to Article 21(a) of the Procedure, the ICDR and the Expert are to exercise "*reasonable efforts*" to issue a determination within forty-five (45) days of the constitution of the Panel. (Procedure, Art. 21(a) (emphasis added).) The Requester has not presented any evidence that the DRSP or the Expert failed to make such "reasonable efforts." On the contrary, as the Requester acknowledges, the First Expert was considering consolidated cases, and "additional submissions that were authorized by Mr. Koh" were submitted, including the Objector's reply brief with twenty-five (25) annexes of additional evidence and the Requester's sur-reply. (Request, Section 10, Pg. 9.) The Requester has not presented any evidence demonstrating that the First Expert did anything other than consider these supplementary materials and make reasonable efforts to issue its determination in a timely fashion.

#### **4. The Removal Of The First Expert Does Not Support Reconsideration.**

On 1 October 2013, the ICDR informed the parties that "due to a new conflict, the Expert, Steve Koh ... will no longer be able to serve and has been removed." (Request, Section 10, Pg. 9.) The Requester concludes that this "shows that Mr. Koh failed to maintain his impartiality and independence and thus violated [Article 13(c) of] the Procedure. (Request, Section 10, Pg. 10.) The Requester's claim is unsupported.

Article 13(c) of the Procedure states that “[a]ll Experts acting under this Procedure shall be impartial and independent of the parties.” (Procedure, Art. 13(c).) Section 3.4.4. of the Guidebook provides that the ICDR will “follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.” (Guidebook, Section 3.4.4.)

The Requester provides no evidence demonstrating that the First Expert failed to follow the applicable ICDR procedures for independence and impartiality. The only evidence the Requester cites in support of its argument that Mr. Koh failed to maintain his independence during the proceeding is the ICDR’s statement that it had decided to remove Mr. Koh “due to a new conflict.” (Request, Section 10, Pgs. 9-10.) The ICDR did not provide any further information as to the nature of the conflict. Conflicts can take many forms, such as scheduling or personal conflicts unrelated to the proceedings. There is no evidence that the conflict that inflicted Mr. Koh was related to the instant proceedings or otherwise impacted Mr. Koh’s ability to remain impartial and independent.

Furthermore, the Requester neither claims to have been, nor presents any evidence of being, materially and adversely affected by Mr. Koh’s removal. Indeed, had the Requester successfully challenged Mr. Koh for lack of independence at the time he was removed, the remedy under the applicable ICDR procedures would have been the removal of Mr. Koh, which was the result here.

**5. The ICDR’s Acceptance Of The Objector’s Challenge To The Second Expert Does Not Support Reconsideration.**

On 14 October 2013, the ICDR informed the parties that it had appointed Bruce W. Belding, Esq. as the new expert (Second Expert) to consider the Objection. On 24 October 2013, the Objector timely challenged the appointment of Mr. Belding. On 4 November 2013, the

ICDR accepted the Objector's challenge and indicated its intention to appoint a new (or Third) Expert. On 5 November 2013, the Requester asked the ICDR to reconsider its decision to accept the challenge to the continued service of the Second Expert. On 8 November 2013, the ICDR denied the Requester's request. The Requester claims that the ICDR's acceptance of the Objector's challenge to the Second Expert and the denial of the Requester's request to reconsider this decision constitute a violation of the Procedure. The Requester's claims do not support reconsideration.

The Requester does not state which provision of the Procedure was purportedly violated. The procedure governing challenges to experts is set forth in Article 2 of the ICDR's Supplementary Procedures for String Confusion Objections (Rules). Article 2, Section 3 states as follows:

Upon review of the challenge the DRSP *in its sole discretion* shall make the decision on the challenge and advise the parties of its decision.

(Rules, Art. 2(3).)

While the Requester may disagree with the ICDR's decision to accept the Objector's challenge to the Second Expert, that decision was in the "sole discretion" of the ICDR. (*Id.*) It is not the BGC's role to second guess the ICDR's discretion in this regard.

#### **6. The Panel's Expert Determination Was Not Untimely.**

On 20 November 2013, the ICDR appointed Professor Ilhyung Lee as the Third Expert. The Requester claims that, pursuant to Article 21 of the Procedure, the Expert Determination therefore "should have been rendered by January 4, 2014," which was forty-five (45) days after the Panel was constituted. (Request, Section 10, Pg. 11; *see also* Procedure, Art. 21.) Because "it took this Panel until January 24, 2014 to render the Decision," the Requester contends that the Expert Determination was untimely. The Requester's claims do not support reconsideration.

Article 21 provides in pertinent part as follows:

The DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed.

The Panel shall submit its Expert Determination in draft form to the DRSP's scrutiny as to form before it is signed, unless such scrutiny is specifically excluded by the applicable DRSP rules.... The signed Expert Declaration shall be communicated to the DRSP, which in turn will communicate that Expert Determination to the Parties and ICANN.

(Procedure, Art. 21(a)-(b).)

Thus, according to the Procedure, the Expert must exercise reasonable efforts to ensure that it submits the Expert Determination "in draft form to the DRSP's scrutiny as to form before it is signed" within forty-five (45) days of the Panel being constituted. (*Id.*) There is no evidence that the Expert failed to comply with this Procedure. When the ICDR communicated to the parties and to ICANN the signed Expert Determination on 27 January 2014, this was done in accordance with Article 21(b) of the Procedure. (*See* Procedure, Art. 21(b) ("The signed Expert Determination shall be communicated to the DRSP, which in turn will communicate that Expert Determination to the Parties and ICANN.")). At bottom, because the Requester presented no evidence that the Expert failed to submit its Determination in draft form to the DRSP's scrutiny as to form before it was signed within the forty-five (45) day timeframe, the Requester's claims fail.

**B. The Requester Failed To Demonstrate That The Panel Applied The Wrong Standards In Contravention Of Established Policy or Process.**

The Requester contends that the Panel failed to correctly apply the Procedure and failed to follow the Guidebook's substantive objection standards for evaluating whether the applied-for

gTLD string is likely to result in string confusion. As discussed in detail below, there is no support for the Requester's contention that the Panel incorrectly applied any ICANN standard in contravention of established policy or process.

**1. The Panel Did Not Incorrectly Apply The Burden Of Proof Requirement.**

The Requester claims that the Third Expert contravened ICANN process by “fail[ing] to correctly apply the burden of proof rule.” (Request, Section 10, Pg. 15.) In support, the Requester contends that “the Panel does not give an analysis showing that the Objector had met the burden of proof” and that “[i]t is unclear how the Panel came to [the] conclusion [that the .WEBS string would result in string confusion].” (*Id.*)

The relevant standard for evaluating a String Confusion Objection is set out in Section 3.5.1 of the Guidebook:

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

(Guidebook, § 3.5.1.) As the Third Expert correctly notes, “during the formal string confusion objection stage, the objection is not limited to visual similarity. Rather, confusion based on any type of similarity (including visual, aural, or similarity of meaning) may be claimed by an objector.” (Determination, Pg. 10.)

Contrary to the Requester's contention, the Third Expert extensively detailed the support for its conclusion that the .WEBS string so nearly resembles .WEB – visually, aurally and in

meaning – that it is likely to cause confusion. Specifically, the Expert based its conclusion on the following:

- “The Applicant’s <webs> is visually identical to the Objector’s <web>, except for the letter ‘s’ at the end of ‘.web’”;
- “When read aloud, the words in the two strings also sound the same, again with only the phonetic ‘s’ at the end of ‘web’ distinguishing the two”;
- “Regarding the meaning of ‘web’, the Panel is not entirely unsympathetic to the Applicant’s argument that ‘web’ commonly refers to the world wide web, and as such, it is not normally a word where the plural form would be used. Nevertheless, ‘web’ is also used in the context of, for example, a ‘spider web’, and ‘webs’ is the plural of ‘web’.”

(Determination, Pg. 10.) The Expert considered all of the foregoing “indicia of similarity” and “determine[d] that the resemblance between <.webs> and <.web> is likely to cause confusion.”

(*Id.*) There is no support for the Requester’s claim that “the Panel does not given an analysis showing that the Objector had met the burden of proof.” (Request, Section 10, Pg. 15.) To the contrary, the Expert carefully considered the issues relevant to determining the existence of string confusion. Reconsideration is not warranted on the grounds posited by the Requester.<sup>9</sup>

## **2. The Panel Did Not Incorrectly Apply The Standards Governing String Confusion Objections.**

The Requester claims that the Third Expert violated ICANN processes by incorrectly applying the standards governing string confusion objections. (Request, Section 10, Pgs. 18-23.)

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<sup>9</sup> The Requester also claims that “[i]t is unclear whether the Objector would have met the burden of proof according to the Panel without the acceptance of [the] additional submission.” (Request, Section 10, Pg. 15.) As set forth above, the acceptance of additional written submissions by both parties did not contravene ICANN process or policy. The acceptance of the supplementary filings therefore does not impact the BGC’s conclusion concerning the application of the burden of proof.



Specifically, the Requester contends that the Expert “failed to provide a description of the average, reasonable Internet user.” (Request, Section 10, Pgs. 21-22.) In support, the Requester relies on the following Expert statement:

The Guidebook does not define “average, reasonable Internet user”. It appears to be ICANN’s intention to allow individual panelists to determine the likely perceptions of such Internet user.

(Request, Section 10, Pgs. 18-19.) The Requester contends that “[n]othing could be further from the truth. It was never ICANN’s intention to allow individual panelists to determine the likely perceptions of the average, reasonable Internet user.” (Request, Section 10, Pg. 19.)

The standards governing string confusion objections are set forth in Section 3.5.1 of the Guidebook:

For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user.

(Guidebook, § 3.5.1.) The Requester does not cite, because it cannot cite, any provision in the Guidebook or otherwise that requires the Expert to “provide a description of the average, reasonable Internet user” in the Expert Determination. (Request, Section 10, Pgs. 21-22.) Absent an articulation of what process the Requester claims was violated in this regard, reconsideration is not appropriate.

Moreover, as the Requester recognizes, the Third Expert considered and rejected the descriptions and perceptions of Internet users as articulated by other panels. (Determination, Pgs. 17-18; Request, Section 10, Pgs. 21-22.) The Requester has not identified any provision in the Guidebook or otherwise that this Determination purportedly contravenes. The Requester’s disagreement as to whether the standards should have resulted in a finding in favor of Requester’s application does not mean that the panel violated any policy or process in reaching the decision.

The Requester also claims that the Panel “failed to apply the burden of proof and the standards imposed by ICANN” because the Expert “questions whether the co-existence between the Requester’s <webs.com> and the Objector’s <web.com> for many years without (any evidence of) actual confusion is relevant to his determination.” (Request, Section 10, Pgs. 22-23.)

As set forth in Section 3.5.1 of the Guidebook:

A DRSP panel hearing a string confusion case objection will consider whether *the applied-for gTLD string* is likely to result in string confusion.

(Guidebook, § 3.5.1 (emphasis added).) The relevant consideration for the Expert is therefore whether the applied-for gTLD string is likely to result in string confusion. The issue is not, as the Requester urges, whether there will be confusion between second level domain names. (Request, Section 10, Pgs. 22-23.) The Requester does not cite any provision of the Guidebook, the Procedure, or the Rules that have been contravened in this regard.

At bottom, it appears that the Requester simply disagrees with the Expert Determination and it is not the role of the BGC to evaluate the Expert’s substantive determination.<sup>10</sup>

## **VI. Decision**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Vistaprint Limited’s Reconsideration Request. As there is no indication that the ICDR or the Expert violated any policy or process in reaching the Determination, this Request should not proceed. If the Requester believes that it has

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<sup>10</sup> The Requester concludes with the following claim: “The cursory nature of the Decision and the arbitrary and selective discussion of the parties’ arguments by the Panel show the lack of either the Panel’s independence and impartiality or the Panel’s appropriate qualifications.” (Request, Section 10, Pg. 23.) The Requester’s assertion is not accompanied by any discussion or further explanation for how ICANN processes were purportedly violated. The Requester’s summary conclusions are without merit and insufficient to warrant reconsideration. Furthermore, the Requester’s claim that the Determination was “cursory” and only contained “selective discussion of the parties’ arguments” is unsupported. The Determination was eighteen pages long and contained more than six pages of discussion of the parties’ arguments and evidence.

somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 14-5 shall be final and does not require Board (or NGPC) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-5 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.