

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Dot Sport Limited) ICDR CASE NO. 01-15-0002-9483
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
)

ICANN'S RESPONSE TO CLAIMANT'S SECOND ADDITIONAL SUBMISSION

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Second Additional Submission (“Additional Submission”) of claimant Dot Sport Limited (“Claimant”).

1. Although the IRP Panel permitted Claimant to file its Additional Submission in order to address issues related to the .HOSPITAL expert determination, Claimant uses its Additional Submission to address issues far afield from .HOSPITAL and to reiterate previous arguments that have already been briefed. Nothing in Claimant’s Additional Submission demonstrates that ICANN’s Board failed to act in compliance with ICANN’s Articles of Incorporation (“Articles”) or Bylaws (“Bylaws”). To the contrary, Claimant’s Additional Submission distorts the relevant facts and ignores the pertinent provisions of the Articles, Bylaws and the Applicant Guidebook (“Guidebook”).

2. First, Claimant suggests that because the Board intervened with respect to certain other expert determinations, its decision not to do so with respect to the .SPORT expert determination (“Expert Determination”) constitutes discriminatory treatment and violates ICANN’s foundational documents.¹ Claimant, however, ignores the readily-apparent distinctions between the *single* .SPORT Expert Determination and the *multiple, arguably inconsistent* expert determinations the Board intervened on, which explain why the Board acted in these few instances but not in the hundreds of other expert determinations that have been rendered in connection with the New gTLD Program. Moreover, Claimant ignores the fact that the Guidebook, which was approved in conformance with ICANN’s Articles and Bylaws,

¹ Cl. Second Additional Submission, ¶¶ 1-8.

confers upon the Board the discretion, but *not* the obligation, to intervene with respect to individual applications.²

3. Second, Claimant asserts that the Board afforded “preferential treatment” to the other applicant for .SPORT, but Claimant presents only innuendo to support that accusation.³

4. Third, and even more tenuously, Claimant suggests that the Board has abdicated its obligations by relying on expert panels to evaluate application objections, yet that very procedure has always been part of the Guidebook, is consistent with California corporate law, and has been endorsed by every other IRP panel that has considered the issue.⁴

5. Finally, Claimant concludes its Additional Submission by reiterating its request for broad and affirmative relief, which simply is not permitted in an IRP.⁵

6. Nothing in the Additional Submission provides support for the notion that the ICANN Board violated the Articles or Bylaws with respect to the .SPORT Expert Determination.

ARGUMENT

I. THE BOARD DID NOT DISCRIMINATE AGAINST THE .SPORT APPLICATION BY EXERCISING ITS DISCRETION TO INTERVENE WITH RESPECT TO OTHER EXPERT DETERMINATIONS.

7. Claimant summarizes five instances where the Board has intervened with respect to certain expert determinations,⁶ and Claimant contends that the Board has acted in a discriminatory fashion because the Board did not intervene in the .SPORT Expert Determination. Claimant is correct that the Board has intervened in certain other expert determinations, but Claimant is incorrect that it has been subjected to discriminatory treatment. The reason is simple – the factual circumstances prompting the Board’s intervention in other expert determinations

² See Guidebook, § 5.1 (Cl. Ex. RM-5).

³ Cl. Second Additional Submission, ¶ 9.

⁴ *Id.*, ¶¶ 12-13.

⁵ *Id.*, ¶ 17.

⁶ *Id.*, ¶ 2.

were very different from the factual circumstances specific to the .SPORT Expert Determination. Moreover, the Guidebook confers upon the Board the discretion to intervene with respect to individual applications, which means the Board's decision to intervene in one circumstance does not create an obligation to do the same in each and every other circumstance.⁷

8. As Claimant indicates, the ICANN Board has taken action with respect to five sets of expert determinations: (1) .COM/.CAM, (2) .CAR/.CARS, (3) .SHOP/.通販/网店 (Japanese and Chinese words related to shopping), (4) .MED, and (5) .HOSPITAL. What Claimant does not mention is that each of these expert determinations presented circumstances very different from the Expert Determination for .SPORT.

9. To be clear, the string confusion objections for the .COM/.CAM, .CAR/.CARS, and .SHOP/.通販/网店 strings resulted in ***multiple and seemingly-inconsistent*** expert determinations by different expert panels reviewing similar arguments and evidence, which prompted the ICANN Board to act. For example, in .COM/.CAM, two expert panels considered string confusion objections contending that .COM was confusingly similar to .CAM: One expert panel determined that these strings were confusingly similar and the other expert panel concluded that they were not.⁸ Likewise, in multiple .SHOP string confusion objections, one expert panel found that .SHOP was confusingly similar to .通販 (Japanese for “online shopping”), while a different panel determined that .SHOP was not confusingly similar to .网店 (Chinese word related to shopping).⁹ .CAR/.CARS presented a similar quandary of different conclusions reached on similar string confusion objections.¹⁰

⁷ Guidebook, § 5.1 (Cl. Ex. RM-5).

⁸ See NGPC Resolution 2014.10.12.NG02 (Cl. Ex. RM-43), also available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.

⁹ Compare ICDR New gTLD String Confusion Panel Expert Determination for .通販(Resp. Ex. 15), available at <https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1318-15593-en.pdf> with ICDR New

10. Given what were viewed by some as seemingly inconsistent determinations on the same strings, the ICANN Board requested that ICANN staff draft a report for the ICANN Board’s New gTLD Program Committee (“NGPC”) “setting out options for dealing . . . [with] differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes. . . .”¹¹ The NGPC subsequently considered potential approaches to addressing perceived inconsistent determinations on string confusion objections, including possibly implementing a new review mechanism.¹² ICANN initiated a public comment period regarding framework principles of such a potential review mechanism.¹³ Ultimately, having considered the report drafted by ICANN staff, the public comments received, and the string confusion objection process set forth in the Guidebook, the NGPC determined that inconsistent expert determinations regarding .COM/.CAM and .SHOP/.通販/.网店 were “not [] in the best interest of the New gTLD Program and the Internet community” and directed ICANN staff to establish a process whereby the ICDR would appoint a three-member panel to re-evaluate those expert determinations.¹⁴

11. In contrast to these scenarios, there was only *one* .SPORT Expert Determination and it was not inconsistent with another expert determination on the same or similar string. Thus, the ICANN Board did not have the same justification to act with respect to the .SPORT Expert Determination as it had with the few expert determinations mentioned above. Accordingly, there is no mystery as to why the Board intervened with respect to the .COM/.CAM, .CAR/.CARS,

gTLD String Confusion Panel Expert Determination for .网店 (Resp. Ex. 16), available at <https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-858-36255-en.pdf>.

¹⁰ *Id.*

¹¹ See BGC Recommendation on Reconsideration Request 13-10 at 11 (Resp. Ex. 17).

¹² See Rationale for NGPC Resolution 2014.02.05.NG02 (Cl. Ex. RM-49).

¹³ See Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections (Resp. Ex. 18), available at <https://www.icann.org/public-comments/sco-framework-principles-2014-02-11-en>.

¹⁴ NGPC Resolution 2014.10.12.NG02 (Cl. Ex. RM-43). The expert determinations reached with respect to .CAR / .CARS were not at issue by this time, because two of the applicants for .CARS had withdrawn their applications and the contention set was resolved.

and .SHOP/.通販/.网店 expert determinations but did not intervene with respect to the .SPORT Expert Determination. Nor has there been any disparate treatment among these applications, namely because they were differently situated and therefore factually distinguishable.

12. Likewise, the Board’s action on .MED arose from a set of facts completely different from the .SPORT Expert Determination. In connection with the .MED application, an expert panel upheld a community objection filed by ICANN’s Independent Objector (“IO”).¹⁵ Section 3.2.5 of the Guidebook prohibits the IO from objecting to an application unless there is at least one public comment in opposition to an application.¹⁶ The IO’s .MED objection relied upon public comments from two organizations that appeared to object to the .MED application, but the organizations later clarified that their public comments were advisory, and that they had no objection to the .MED application proceeding.¹⁷ Given these clarifications, it was made clear that the IO’s objection did not satisfy Section 3.2.5 of the Guidebook. Therefore, the Board intervened and allowed the .MED application to proceed.¹⁸ There is no similar revelatory event that undercuts the procedural propriety of the .SPORT Expert Determination. Thus, again, the .SPORT Expert Determination was treated differently from .MED because it was indeed factually different.

13. Finally, the Board’s intervention with respect to .HOSPITAL represents another situation where the Board responded to circumstances not present in the .SPORT Expert Determination. On 12 March 2013, the IO filed a limited public interest (“LPI”) objection to

¹⁵ Determination of the BGC Reconsideration Request 14-1, at 3 (Cl. Ex. RM-52), *also available at* <https://www.icann.org/en/system/files/files/determination-ruby-pike-05feb14-en.pdf>. *See also* Role of the Independent Objector, *available at* <http://www.independent-objector-newgtlds.org/home/introducing-the-independent-objector/role-of-the-independent-objector/> (Resp. Ex. 19) (“The IO is impartial and is unaffiliated with any particular Internet community. Acting solely in the best interests of the public who use the global Internet, he will object to highly objectionable gTLD applications that would be contrary to their interests”).

¹⁶ Guidebook, § 3.2.5 (Cl. Ex. RM-5).

¹⁷ Determination of the BGC Reconsideration Request 14-1, at 3-4 (Cl. Ex. RM-52).

¹⁸ *Id.* at 11-12.

the .HOSPITAL application.¹⁹ The objection was one of nine LPI objections filed by the IO against health-related applications that resulted in expert determinations. The materials submitted by the IO and the applicants to the expert panels in each instance were very similar and, in some instances, nearly identical. Pursuant to Module 3.5.3 of the Guidebook, an expert panel hearing a LPI objection is to “consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.”²⁰ In a 2-1 decision, an expert panel upheld the IO’s objection to .HOSPITAL.²¹ Importantly, the .HOSPITAL expert determination was the only LPI objection sustained out of the nine health-related LPI objections resulting in expert determinations.²² The other eight were each unanimously denied.

14. The .HOSPITAL applicant instituted the cooperative engagement process (“CEP”), ICANN’s informal dispute resolution process, regarding the .HOSPITAL expert determination. As part of the CEP, the BGC, and eventually the full Board, evaluated the .HOSPITAL expert determination, compared it to the other eight health-related expert determinations, and decided to send the .HOSPITAL objection back for re-evaluation by a new three-member panel.²³

15. As with the other Board actions that Claimant cites to support claims of disparate treatment, reasons exist for the Board’s intervention in .HOSPITAL that are absent with respect to .SPORT. First and foremost, there are no inconsistent decisions at issue with .SPORT. Second, a split panel decided the .HOSPITAL expert determination, with one panelist dissenting,

¹⁹ Determination of the BGC Reconsideration Request 13-23, at 2 (Resp. Ex. 20).

²⁰ Guidebook, § 3.5.3 (Cl. Ex. RM-5).

²¹ Determination of the BGC Reconsideration Request 13-23 at 3 (Resp. Ex. 20).

²² The objected-to strings were .MED, .MEDICAL, .HEALTHCARE, .HOSPITAL and .HEALTH. *See* Limited Public Interest Objections filed by the Independent Objector (Resp. Ex. 21), available at <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/>.

²³ *See* Rationale for Resolutions 2016.02.03.12 – 2016.02.03.13 (Cl. Ex. RM-56), available at <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.c>.

which is not the case here.²⁴ Third, the Claimant’s argument that sports-related strings deserve similar scrutiny as .HOSPITAL because playing sports is “healthy” misses the point;²⁵ there are no analogous concerns present with respect to a sports and leisure website as may exist with respect to a site purporting to offer medical information or treatment options.

16. Finally, in addition to the factual differences identified above, the Board has the **discretion** to act in certain instances but not others. As the Guidebook makes clear:

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board **reserves the right** to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application.²⁶

Indeed, in evaluating similar claims of discrimination based on the Board’s decision to not exercise its discretion to individually evaluate an application, the *Booking.com IRP* Panel declared that “the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean it is bound to exercise it, let alone at the time and in the manner demanded by [an applicant].”²⁷ The *Merck IRP* Panel reached a similar conclusion in its final declaration: “It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it.”²⁸

17. In sum, there is no support for Claimant’s argument that it is being “discriminated” against. The .SPORT Expert Determination is decidedly factually different from the expert determinations that the Board has acted upon. Most notably, unlike instances where the Board

²⁴ Determination of the BGC Reconsideration Request 13-23 at 3 (Resp. Ex. 20).

²⁵ Cl. Second Additional Submission, ¶ 3.

²⁶ Guidebook, § 5.1 (Cl. Ex. RM-5) (emphasis added).

²⁷ See *Booking.com IRP* Final Declaration at ¶ 138 (bullet four) (Cl. Ex. RM-42), available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

²⁸ See *Merck IRP* Final Declaration at Paragraph 61 (Resp. Ex. 13), also available at <https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf>.

has acted, there were ***no other expert determinations*** regarding .SPORT, .SPORTS, or related strings that could be considered inconsistent with the .SPORT Expert Determination. Rather, here, Claimant merely disagrees with the result of the .SPORT Expert Determination.

II. SPORTACCORD HAS NOT RECEIVED PREFERENTIAL TREATMENT.

18. Claimant argues that ICANN treated SportAccord preferentially by “working with SportAccord behind closed doors” to investigate Mr. Kirsan Ilyumzhinov’s purported affiliation with SportAccord and his purported inclusion on the “Syria Designations sanctions list by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury.”²⁹ As an initial matter, this IRP has nothing to do with SportAccord’s gTLD application, its executives, Syria or OFAC. The only question before this IRP Panel is whether ICANN’s Board acted contrary to ICANN’s Articles and Bylaws in dealing with Claimant and the .SPORT Expert Determination. Second, far from preferential treatment, ICANN has actively investigated allegations regarding Mr. Ilyumzhinov in accordance with the standards and processes set forth in the New gTLD Program. As a result of this investigation, ICANN understands that Mr. Ilyumzhinov is no longer a member of the SportAccord council.³⁰ As ICANN has already informed Claimant, in the event further action is required, ICANN will work “directly with the applicant” to resolve the matter.³¹ This does not, as Claimant contends, evidence that ICANN is giving “special treatment to SportAccord by working with SportAccord behind closed doors.”³² Rather, it reflects ICANN’s commitment to work directly with an applicant to resolve concerns.³³

²⁹ Cl. Second Additional Submission, ¶ 9.

³⁰ See SportAccord Council, available at <http://www.sportaccord.com/about/council/> (Resp. Ex. 22).

³¹ Email from ICANN to dSL, dated 15 March 2016 (Cl. Ex. Annex 45).

³² Cl. Second Additional Submission, ¶ 9.

³³ See also New gTLD Personal Privacy Statement (Resp. Ex. 23), available at <https://newgtlds.icann.org/en/applicants/agb/program-privacy> (“The Internet Corporation for Assigned Names and Numbers (“ICANN”) respects and is committed to ensuring the protection of personal information collected from the Applicant and New gTLD Program participants, including users of the TLD Application System (“User”), and used in connection with New gTLD Program application process”).

As a matter of public record, ICANN “cannot and will not share information about the processing of specific applications with parties other than the primary contact for the application in question.”³⁴ This is ICANN’s standard operating procedure and a procedure that has been in place for years, as Claimant knows well.

III. ICANN HAS NOT VIOLATED ITS ARTICLES OR BYLAWS BY RELYING ON EXPERT PANELS TO INDEPENDENTLY EVALUATE OBJECTIONS.

19. In its Additional Submission, Claimant argues that ICANN’s Board has “no authority to outsource its decision making power to experts,” and has “rel[ied] completely on the ill-founded advice of a panel with an appearance of bias and no proven expertise in ICANN’s Community Objection criteria.”³⁵ Like other issues raised in Claimant’s Additional Submission, this issue has already been raised and briefed in previous submissions, and there is little need to revisit those arguments here.³⁶

20. In any event, the Guidebook, which has been in place for years, states that the designated dispute resolution provider (here the ICC), not ICANN, will appoint “one Expert in proceedings involving a Community Objection.”³⁷ The “findings …will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”³⁸ That is precisely what happened here. As such, ICANN acted in accordance with its Articles of Incorporation and Bylaws by adhering to the Guidebook.

21. By arguing that “[t]he power to decide whether or not to allocate a new gTLD … is not a power that the ICANN Board intended to, or was entitled to, delegate to third party panels through rulings on expert determinations,”³⁹ the Claimant essentially contends that the

³⁴ Email from ICANN to dSL, dated 29 March 2016 (Cl. Ex. Annex 47).

³⁵ Cl. Second Additional Submission, ¶¶ 12-13.

³⁶ See ICANN’s Response to Claimant Dot Sport’s Request for IRP, ¶¶ 56-58.

³⁷ Guidebook, § 3.4.4 (Cl. Ex. RM-5).

³⁸ *Id.*, § 3.4.6.

³⁹ Cl. Second Additional Submission, ¶ 12.

Board should have independently evaluated each and every expert determination. This is plainly contrary to Guidebook procedures, and also entirely impracticable. As California’s legislature explained, “[a]ctive involvement by the board in day-to-day affairs of the corporation does not accord with the realities of contemporary business practices, other than perhaps in a relatively closely held corporation. The role of the board in this context is the formulation of major management policies rather than direct involvement in day-to-day management.”⁴⁰ The fact that the ICANN Board **may** intervene with respect to expert determinations⁴¹ does not mean that the Board must exercise that power on every occasion. This is even more true with respect to the New gTLD Program, which involved over 1,900 applications and thousands of evaluation decisions. The Board has not “outsource[d] its decision-making power” as Claimant contends.⁴² Rather, the Board has taken steps to allow for the processing of 1,900 applications, while at the same time protecting the rights and interests of each applicant.

IV. IRP PANELS CANNOT GRANT AFFIRMATIVE RELIEF.

22. Claimant asks this IRP Panel to grant several forms of affirmative relief, including issuing a binding declaration “that ICANN must reject the expert determination granting SportAccord’s Community Objection,” and “that ICANN must reject SportAccord’s application for .sport.”⁴³ As ICANN has already explained at length,⁴⁴ IRP panels have no authority to grant affirmative relief or issue binding declarations.

23. ICANN’s Bylaws limit an IRP panel to stating its opinion as to “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws”

⁴⁰ See Cal. Corp. Code § 300, Legislative Comm. Comments (Resp. Ex. 24).

⁴¹ Booking.com Final Determination, ¶ 138 (Cl. Ex. RM-42).

⁴² Cl. Second Additional Submission, ¶ 12.

⁴³ *Id.*, ¶ 17.

⁴⁴ These issues were discussed in ICANN’s Sur-Reply to the Reply of Claimant Dot Sport Limited, dated 21 December 2015, available at <https://www.icann.org/en/system/files/files/irp-dot-sport-icann-sur-reply-21dec15-en.pdf>.

and recommending, if requested, that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the *opinion* of the IRP panel.⁴⁵ As the *Vistaprint* IRP Panel confirmed, an IRP panel: “[D]oes not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.”⁴⁶

24. Furthermore, the Claimant now seeks affirmative relief not mentioned in its initial Request for IRP. Indeed, in addition to the Claimant’s initial requests, Claimant now asks the panel to “[d]eclare that ICANN is continuing to act in breach of its Articles of Incorporation, its Bylaws, and/or the gTLD Applicant Guidebook, by: [u]pholding the expert determination granting SportAccord’s Community Objection” and “[u]pholding SportAccord’s application for .sport,” and “declare that ICANN must reject SportAccord’s application for .sport.”⁴⁷ While the authority vested in this IRP Panel is important and integral to ICANN’s dedication to accountability, this IRP Panel cannot grant Claimant the relief it seeks, even if such relief were warranted, and it is not.

25. Finally, the Claimant asks that this IRP Panel order ICANN to “produce all documents related to the discussions with the IOC and SportAccord” and to “draw adverse inferences from the fact that ICANN did not submit these documents of its own volition.”⁴⁸ Under the ICDR Rules, an IRP panel “may order the parties to produce documents...it deems necessary or appropriate.”⁴⁹ The ICDR Rules also require parties to “exchange all documents upon which each intends to rely.”⁵⁰ Neither rule is relevant here: this IRP Panel has not asked

⁴⁵ Bylaws, Art. IV, §§ 3.4, 3.11(c-d) (Cl. Ex. RM-2). Indeed, the IRP panel in the first ever IRP found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, ¶ 133 (Cl. Ex. RM-27).

⁴⁶ *Vistaprint* Final Declaration ¶ 149 (Cl. Ex. RM-34).

⁴⁷ Cl. Second Additional Submission, ¶ 17.

⁴⁸ *Id.*, ¶ 10.

⁴⁹ ICDR Rules, Art. 20, §4.

⁵⁰ *Id.*, Art. 21, §3.

ICANN to produce documents related to discussions with the IOC and SportAccord, and ICANN does not rely upon any such documents in this IRP. Therefore, under the ICDR Rules, ICANN is not required to produce these documents, and there are certainly no grounds for this IRP Panel to draw an adverse inference from ICANN's failure to do so. Furthermore, the Claimant's request for new documents, *less than two weeks* before the hearing, is simply too little, too late. This IRP commenced over one year ago, and it would unduly prejudice ICANN to delay these proceedings to accommodate the Claimant's last-minute fishing expedition.

CONCLUSION

26. Claimant's Additional Submission does not demonstrate that ICANN's Board failed to act in conformance with its Articles and Bylaws. For the reasons discussed above, ICANN urges the IRP Panel to declare that Claimant has not identified any basis for independent review and to declare that ICANN is the prevailing party.

Respectfully submitted,

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Dated: 29 April 2016

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