

28 December 2016

Members of the ICANN Board
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

UNITED STATES OF AMERICA

By e-mail (reconsideration@icann.org)

Dear Members of the ICANN Board of Directors,

Re: Reconsideration Request 16-11

We refer to our telephone conversation of 16 December 2016 with the BGC and the request by the BGC's chair for a written report on our position in this case.

Below, we first explain why Requesters argued that HTLD's application for .hotel must be cancelled. Second, we explain why the ICANN Board should have considered the impact for .hotel when it proceeded to a review of the Dot Registry case, and how the IRP Declaration in the .charity case supports this argument.

Although the BGC's chair was kind enough to allow us to take as many pages as we needed to report on our position, we will try to keep it short. For the sake of clarity, we can confirm that the arguments contained in Requesters' Reconsideration Request 16-11 and Requesters' letter of 5 September 2016 are repeated here in their entirety.

I. Reasons why HTLD's application for .hotel must be cancelled

1. HTLD's application must be cancelled because allowing the application to proceed and ultimately delegating the .hotel TLD to HTLD would give HTLD an unjustified competitive advantage in the operation of the .hotel TLD in relation to other applicants.

Indeed, HTLD executives had illegally accessed information from competing applicants, and especially from one of the competing applicants for .hotel, namely Despegar. Despegar has already successfully applied for .hoteles. HTLD had illegal and unauthorised access to confidential information and trade secrets of Despegar.

2. During our call of last week, Mr. Cherine Chalaby asked if the request to have HTLD's application cancelled was really appropriate, given that the unauthorized access by HTLD executives was not relevant as regards HTLD's application, which had already been filed. In our view, it remains

appropriate to cancel the application because: (i) the illegal access by HTLD executives would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD; and (ii) HTLD's illegal access to trade secrets amounted to behavior that is unacceptable to the Internet community and it should remain so because it is in violation of the application rules and not in the interest of the Internet community as a whole.

(i) The unfair advantage created by HTLD

The unauthorized access by HTLD's executives was made willfully and with intent; it was not coincidental or accidental. Unauthorized access occurred on more than one occasion and information contained in the applications of direct competitors was targeted. For all these reasons, the access was indisputably unfair, anti-competitive and illegal.

The future registry operator of the .hotel gTLD – whoever that will be – will compete with other registry operators. If HTLD were allowed to operate the .hotel gTLD, HTLD would have an unfair advantage over competing registry operators, because of the access it has had to the sensitive business information of others, including Requesters.

HTLD accessed business plans, pricing information, and confidential information on the technical infrastructure of its competitors. HTLD thus obtained an advantage which is unfair. If allowed to operate a competing registry, HTLD could use this unfair advantage to adapt its commercial strategy, pricing, technical infrastructure, etc., an advantage HTLD would never have obtained, had it not illegally accessed sensitive business information concerning its direct competitors.

One of the applicants targeted by HTLD is Travel Reservations SRL ('TRS', formerly Despegar Online SRL), one of the Requesters in this case. During the latest round of new gTLDs, TRS was awarded the operation of the .hoteles TLD. 'Hoteles' is Spanish for 'hotels', and it is obvious that TRS is a competing registry operator of any prospective registry operator for .hotel.

Although HTLD's illegal access of confidential information in applications by TRS (and others) did not reinforce its actual application for .hotel (which had indeed already been filed) the access to confidential information has created an unfair competitive advantage for HTLD, who would be in a position to abuse it in its capacity as prospective registry operator, if its application were successful. This unfair advantage can only be removed, if HTLD is not allowed as a registry operator. As the access was intentional, it is inexcusable and unforgivable.

(ii) The interests of the Internet community as a whole

The illegal access to ICANN's platform and the collection of information by HTLD executives is unquestionably a violation of the application rules, and should disqualify the applicant, no matter when that access and collection took place and irrespective of who was or became the owner of that applicant.

ICANN must operate in the interests of the Internet community as a whole. As registry operators control a critical part of the Internet, ICANN has affirmed its right to deny an application in order "to protect the public interest in the allocation of critical Internet resources."¹ As explained in the Reconsideration Request, applications from any entity or including any individual who has ever

¹ gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24.

been convicted of any crime involving the use of computers or the Internet to facilitate the commission of crimes should be automatically disqualified from the new gTLD Program.²

If such an entity or individual is to be disqualified because of a conviction of a past crime, it should also be disqualified because of such crime committed during the application process.

It is only logical, therefore, to apply the same sanction when ICANN catches not one, but multiple representatives of HTLD stealing the trade secrets of competing applicants via the use of computers and the Internet. The integrity of the new gTLD Program and its processes would be jeopardized if ICANN were to neglect to correct these wrongs and allow the infringer to pursue its application to operate a critical part of the Internet. Such a course of action would not be in the best interests of the Internet community as a whole.

To use the words of the IRP Panel in the .charity case, “[i]t is plainly in the best interests of the Internet community as a whole that ICANN maintains a procedurally fair system with the highest levels of consistency and integrity.”³ Accepting applications by entities which showed to be anything other than entirely honest, would not be in the best interests of the Internet community.

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That is why HTLD’s application must be denied and cancelled.

II. The IRP Declaration in the .charity case supports the argument that the ICANN Board should have considered the impact of a review of the Dot Registry case for the .hotel applications

1. In our request for reconsideration, we argued that the ICANN Board should have reconsidered its handling of the CPE process regarding .hotel when it accepted the findings of the *Dot Registry* IRP Panel and decided to review the Dot Registry’s reconsideration request. We refer to our request for reconsideration in which we explained our argument in detail.

A similar situation occurred in the .charity case, when a review process required a reconsideration of the .charity case.

In the .charity case, there were three applicants for .charity (two for .charity and one for an IDN version of .charity). All applications were the subject of a community objection by the Independent Objector that resulted in an expert determination. The cases were consolidated, but the results differed. Two applications were upheld, as the community objections against these two applications were denied. The community objection against the third application (filed by Corn Lake) was upheld. As a consequence, ICANN denied the third application.

The reason proffered for the different outcome was that one applicant had a vague reference in its application that the TLD would be limited to registrants with a charitable purpose, but such reference would not be binding on the applicant because it did not agree to a voluntary Public Interest Commitment (“PIC”). Another applicant offered a PIC in the middle of objection proceeding that said that the TLD would be limited, but that it reserved the right to eliminate the

² gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22.

³ Corn Lake IRP Declaration, § 8.83.

PIC at its discretion. Corn Lake did not offer a specific PIC on eligibility, but would adopt any eligibility requirements required by the NGPC.

However, ICANN made mandatory certain PICs for all .charity applicants, so all three applicants would be required to adopt the same eligibility requirements. The PICs were made mandatory in the course of the then pending objection procedure but the expert determinant who handled the case against Corn Lake's application did not allow Corn Lake to raise this point or to develop an additional brief on this essential subject. That is why this issue was not discussed in the expert determination denying Corn Lake's application.

On 12 October 2014 and on 3 February 2016, the ICANN Board introduced review mechanisms for some expert determinations, as it considered some expert determinations to be inconsistent or otherwise unreasonable.⁴ This review mechanism was not envisioned for .charity related cases.

Corn Lake filed a request for reconsideration which the ICANN Board denied. Corn Lake subsequently initiated an IRP. The IRP Panel in the .charity case found that the ICANN Board's failure to include .charity in the review mechanism was discriminatory. It also found that all three applicants were similarly situated and the underlying panel was incorrect in treating them differently.⁵

Following the IRP declaration, the Board reconsidered the handling of Corn Lake's .charity application. As was concluded by the .charity IRP panel,⁶ the ICANN Board accepted that it should have considered the impact of performing reviews which were not previously envisioned on earlier decisions.⁷ On 8 November 2016, the ICANN Board decided to extend its final review procedure to include review of Corn Lake's .charity expert determination.⁸

2. This outcome is immediately relevant to the present case. The ICANN Board should have considered the impact of a review of the Dot Registry case for the .hotel applications. A review of the .hotel case was more than appropriate. As explained in the request for reconsideration, the IRP panel in the .hotel case had noticed inconsistencies in the application of the CPE criteria by the EIU on .hotel.⁹ However, the IRP panel in the .hotel case had not noticed the discrepancies found by the IRP panel in the Dot Registry case. The IRP panel in the .hotel case would also have found these discrepancies, had it been given complete and accurate information regarding the involvement of ICANN staff and the decisive role of the ICANN Board. Instead, the panel was made to believe that the ICANN staff was not involved in the CPE and that the EIU (not the ICANN Board) had taken the ultimate CPE decision. Both happened to be untrue: ICANN staff played an active role in the CPE and the ICANN Board took the ultimate decision.

As a result of these inconsistencies, a review of the .hotel CPE is appropriate, and not including .hotel in a review mechanism (despite this having been seen as acceptable for Dot Registry and

⁴ ICANN, *NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03*, <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>; ICANN, *Board Resolutions 2016.02.03.12 – 2016.02.03.13*, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.c>.

⁵ "For the same reasons, any 'reasonable explanations' for perceived inconsistencies between the .CHARITY Expert Determinations based on the different eligibility requirement undertakings prior to October 2013 were eliminated by the ICANN Board's announcement that it would adopt the GAC Beijing Communiqué recommendations. The effect of that decision, coupled with all applicants' undertakings to follow any GAC Beijing Communiqué recommendations adopted by ICANN, was to render the applicants' eligibility requirements criteria identical across all three applications." (Corn Lake IRP Declaration, § 8.62).

⁶ See *inter alia* Corn Lake IRP Declaration, §§ 8.53 and following, 8.68, 8.73.

⁷ ICANN, *Board Resolutions 2016.11.08.16 – 2016.11.08.18*, <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>.

⁸ ICANN, *Board Resolutions 2016.11.08.16 – 2016.11.08.18*, <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>.

⁹ See Despegar et al. IRP Declaration, §§ 146 and following.

for inconsistent or unreasonable decisions impacting Ruby Pike, Corn Lake, Amazon and United TLD Holdco¹⁰) would amount to discrimination.

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ICANN must act fairly and without discrimination, meaning that a party may not be treated differently from others in its situation without “substantial and reasonable” justification. The ICANN Board has intervened in many cases, where perceived inconsistencies were found or where a violation of its transparency obligations occurred. In those cases, ICANN has offered a review, which is capable of undoing the inconsistency. In the case of .hotel, inconsistencies have been found, and a violation of the ICANN’s transparency obligations is apparent. There is no substantial and reasonable justification to exclude the .hotel CPE from a review mechanism, which is capable of undoing the inconsistency.

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In view of the above, Requesters reiterate the request for ICANN to reverse the Decision and to declare that HTLD’s application for .hotel should be cancelled and that whatever punitive steps towards HTLD it may deem necessary should be taken. The ICANN Board is also requested to take all necessary steps to ensure that Requesters’ applications for .hotel remain in contention until Requesters have themselves resolved the contention set, or until Requesters have resolved the contention set in an auction, organized by ICANN.

In the event that ICANN does not immediately reverse its Decision, ICANN is requested to refrain from executing the registry agreement with HTLD, and to provide full transparency regarding all communications between ICANN, the ICANN Board, HTLD, the EIU and third parties (including but not limited to individuals and entities supporting HTLD’s application) regarding HTLD’s application for .hotel.

In the unlikely event that the ICANN Board does not decide to cancel HTLD’s application immediately, Requesters request that the ICANN Board take the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of other cases such as the Dot Registry, the Corn Lake and the Ruby Pike cases.

We remain at your disposal, should you request further clarification.

Yours sincerely,



Flip Petillion

¹⁰ ICANN, *Board Resolution 2016.09.15.15*, <https://www.icann.org/resources/board-material/resolutions-2016-09-15-en#2.e>; ICANN, *Board Resolution 2016.09.17.01*, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>; ICANN, *Board Resolutions 2016.02.03.12 – 2016.02.03.13*, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.c>; ICANN, *Board Resolutions 2016.11.08.16 – 2016.11.08.18*, <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>; ICANN, *NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03*, <https://www.icann.org/resources/board-material/resolutions-new-qtld-2014-10-12-en#2.b>.