

Subject: [reconsideration request] Reconsideration Request 14-5
Date: Monday, February 24, 2014 4:46:19 PM Pacific Standard Time
From: Steve Sereboff Contact Information Redacted
To: reconsider@icann.org <reconsider@icann.org>, reconsideration@icann.org
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Dear Members of the BGC,

I write briefly to you on behalf of Web.com in rebuttal of Request 14-5. I represented Web.com Group, Inc. (Web.com) in its consolidated string confusion objections to two applications for .webs by Vistaprint, Ltd. (Vistaprint). In Request 14-5 to the BGC, Vistaprint requests reconsideration of the panelist's decision sustaining Web.com's objections.

First, Web.com appreciates the excellent work of the NGPC and the BGC in handling the process of creating new gTLDs in a fair and rational manner. Something this complex is not easy, especially with the need to balance the interests of so many diverse parties and interests.

Turning to the substance of Vistaprint's request, Web.com disagrees with nearly all of Vistaprint's arguments. Many of those arguments request reconsideration of matters decided months ago, even though reconsideration must be requested within 15 days of the action or inaction upon which the request is based. ICANN By-Laws, Article IV, Section 2, Para 5.b.

Vistaprint's arguments, and Web.com's rebuttals, are summarized as follows:

Vistaprint's argument	Web.com rebuttal
Appointment of the first panelist, Mr. Koh, was too slow by 6 days.	In other requests for consideration, e.g., Request 13-21 and 13-23, the BGC has found this kind of argument to be without merit in view of ICANN's heavy workload, and this is the case here. Furthermore, the appointment of Mr. Koh was made in June 2013 – much more than 15 days before Request 14-5 was made, so Vistaprint's request for reconsideration on this point is untimely by more than 6 months.
The first panelist, Mr. Koh, failed to maintain his impartiality and independence.	This argument makes no sense. When Mr. Koh determined that he had a conflict, he promptly withdrew.
The second panelist, Mr. Belding, should not have been disqualified.	ICDR followed its procedures for maintaining impartiality. Furthermore, the disqualification decision was made in November 2013 – much more than 15 days before Request 14-5 was made, so Vistaprint's request for reconsideration on this point is untimely by more than two months.
The decision of the panelist, Professor Lee, was too slow.	Quality work takes time. The 45-day <i>target</i> for a decision cited by Vistaprint is not guaranteed. The delays in this case were justified. Professor Lee made a thorough review of the lengthy record. He also thoroughly reviewed all prior similar cases. He then prepared a high quality, comprehensive and well-reasoned opinion.
Professor Lee should not have considered the additional submissions.	This argument is baseless, for reasons set forth in Professor Lee's opinion. Furthermore, the last of the additional submissions were accepted in August 2013 – much more than 15 days before Request 14-5 was made, so Vistaprint's request for reconsideration on this point is untimely by more than 5

	months.
Professor Lee applied the wrong burden of proof.	Vistaprint’s counsel made a similar argument in Request 13-9, and the BGC was not swayed. Professor Lee’s opinion provided a sufficient discussion of the burden of proof and he reasonably reached his decision through an appropriate application of the standard of review as set forth in the Applicant Guidebook and procedural rules.
Professor Lee arrived at the wrong conclusion.	As stated by Vistaprint’s counsel Mr. Petillion in rebuttal to Request 13-6, “The panelist was sovereign in his decision ... The panelist also added that he agreed with the analysis and the conclusions of the independent expert ... who had clear views ...” Web.com agrees with Mr. Petillion’s defense of the sovereignty of the panelist and his reliance upon the opinion of an independent expert.

In sum, Vistaprint’s arguments are meritless. As recently explained by the NGPC, “the Reconsideration Process is not the avenue to address the substantive challenges to SCO Expert Determinations.” ICANN, *Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections: Framework Principles* (February 14, 2014). Moreover, as the BGC has already explained in prior determinations, “the standard guiding the Panels involves some degree of subjectivity,” and while a party “may disagree with the Panel’s finding, Reconsideration is not available as a mechanism to re-try the substantive determination of the Panel.” ICANN, *BGC Determination on Reconsideration Request 13-9* (October 10, 2013). As in such prior determinations, Vistaprint’s claims are unsupported and therefore, they simply do not support reconsideration.

Perhaps more importantly, is the issue of fairness. First, though Vistaprint complains in its request about late action by ICANN, Vistaprint says nothing about its own far worse late action in requesting reconsideration. Second, Vistaprint complains here about principles of decision that its counsel defended in rebuttal to a reconsideration request in a different action. Third, Vistaprint’s application for .webs on a community basis reflects its self-serving attitude toward ICANN’s efforts to promote the public benefit of the Internet. In sum, Vistaprint’s request bears some lack of legitimacy which, while not an express requirement, is important in the overall process. The BGC’s denial of Vistaprint’s request would be both proper and fair.

For the foregoing reasons, Web.com respectfully requests that that the BGC deny Reconsideration Request 14-5 filed by Vistaprint.

Sincerely,

/Steven C. Sereboff/

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