

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

CORN LAKE, LLC,) ICDR CASE NO. 01-15-0002-9938
)
)
 Claimant,)
)
 v.)
)
 INTERNET CORPORATION FOR ASSIGNED)
 NAMES AND NUMBERS,)
)
)
 Respondent.)
_____)

**ICANN'S BRIEF CONCERNING THE FINAL DECLARATION
ISSUED IN THE *DONUTS, INC. v. ICANN* IRP PROCEEDING**

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For Assigned Names and Numbers

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this brief regarding the final declaration issued in the *Donuts, Inc. v. ICANN* IRP proceeding (“*Donuts* Final Declaration”) in support of its response to the request for Independent Review Process (“IRP Request”) submitted by claimant Corn Lake, LLC (“Corn Lake”).

1. The *Donuts* Final Declaration, which enjoys “precedential value,”¹ confirms that Corn Lake’s arguments do not support independent review. Accordingly, ICANN urges this IRP Panel to declare ICANN the prevailing party, as the *Donuts* Final Declaration did,² because neither claimant has demonstrated any Board conduct in violation of ICANN’s Articles of Incorporation (“Articles”) or Bylaws.

I. THE FACTS ASSOCIATED WITH THE *DONUTS* AND *CORN LAKE* IRP REQUESTS ARE ANALOGOUS.

2. Corn Lake applied to operate the new generic top level domain (“gTLD”) .CHARITY (the “Application”). Spring Registry Limited (“SRL”) also submitted an application for .CHARITY, and Excellent First Limited (“EFL”) submitted an application for .慈善 (the Chinese translation of “charity”). The Independent Objector (“IO”) filed community objections against all three applications.³ The expert panel established by the International Chamber of Commerce (“ICC”) to preside over the IO’s community objection to Corn Lake’s Application rendered a determination in favor of the IO.⁴ The very same ICC expert panel overruled the IO’s community objections to SRL’s application and EFL’s application.⁵

¹ Bylaws, Art. IV, § 3.21.

² One of the panelists on the *Donuts* IRP panel dissented in part from the Final Declaration and would have deemed ICANN to be the prevailing party only for one of the two gTLDs that were the subject of *Donuts*’ claims. However, the dissent does not constitute part of the Final Declaration, pursuant to Section 9 of the ICDR’s Supplementary Procedures applicable to IRP proceedings: “Where there is a three-member IRP PANEL, any DECLARATION of the IRP PANEL shall be made by a majority of the IRP PANEL members.”

³ C-Ex. 2; <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/charity-cty-spring-registry-limited/>; <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/慈善-cty-excellent-first-limited/>.

⁴ C-Ex. 8.

⁵ C-Ex. 11; Excellent First Limited Expert Determination, §§ 129, 131, 132, *available at*

3. Similarly, Donuts submitted applications for the .SPORTS and .RUGBY gTLDs, and ICC expert panels upheld community objections brought against those applications.⁶ In its IRP Request, Donuts challenged the ICC’s protocols for appointing and vetting expert panelists and the manner in which the ICC expert panelists applied the standards relevant to deciding the community objections submitted against Donuts’ applications. Donuts claimed the Board violated the Articles and Bylaws by not reversing the ICC expert panel’s determinations.⁷

II. THE *DONUTS* FINAL DECLARATION CONFIRMS THAT CORN LAKE’S IRP REQUEST SHOULD BE DENIED.

4. The *Donuts* Final Declaration supports ICANN’s position for at least five reasons. First, both Corn Lake and Donuts attempt to conflate conduct of the ICC and its experts with that of ICANN Board. The *Donuts* Final Declaration confirms that Corn Lake’s and Donuts’ position is incorrect: “the relationship between ICANN and the ICC” precludes an IRP panel from reviewing the ICC’s actions because “administering institutions such as the ICC, are third-party service providers, and not ‘constituent entities’ of ICANN generally or alter egos of the ICANN Board.”⁸ To be sure, Corn Lake belatedly attempts to challenge the Board Governance Committee’s (“BGC’s”) denial of Corn Lake’s reconsideration request (“Request 14-3”), whereas Donuts did not submit a reconsideration request. Aside from the fact that any challenge to Request 14-3 is time barred,⁹ the BGC denied Request 14-3 because it found “no indication that the [Expert] Panel violated any policy or process in reaching ... the [Corn Lake community objection] Determination.”¹⁰ The BGC fulfilled its duties under the Bylaws in addressing Request 14-3,¹¹ and

<http://newgtlds.icann.org/en/program-status/odr/determination>.

⁶ *Donuts* Final Declaration ¶ 12.

⁷ See generally *id.*

⁸ *Donuts* Final Declaration ¶ 159; see also *id.* ¶ 142 (“No doubt the architects of the IR mechanism could have made the Board directly accountable for designated acts or omissions committed by the ICC and the experts it appoints, either by equating them to Board action or by opening the process to “staff” conduct”)

⁹ See *id.* ¶¶ 38-40.

¹⁰ BGC Determination on Reconsideration Request 14-3 at Pg. 14, available at <https://www.icann.org/resources/pages/14-3-2014-01-30-en>.

the fact that Corn Lake submitted a reconsideration request where Donuts did not is of no moment.

5. Second, the crux of Corn Lake’s argument is that the differing results at issue in the .CHARITY objection proceedings were inconsistent and therefore unreasonable.¹² The *Donuts* Final Declaration rejected this proposition: “[I]t would be surprising if among the corpus of reasoned objections [determinations] to have been issued thus far that a somewhat diverse marketplace of ideas had not developed; some variation is to be expected.”¹³ Moreover, the variation between the ICC expert panel’s determinations on the .CHARITY applications was entirely reasonable,¹⁴ particularly since the *same* expert panelist decided all three .CHARITY determinations. He therefore had access to all relevant arguments and evidence, and he made a fully informed determination that there was a rational basis to reach different conclusions with respect to Corn Lake’s Application as compared to the applications submitted by SRL and EFL. Other scenarios where the Board has determined that a limited review mechanism is warranted (discussed in more detail below) involved *different* expert panelists reaching different conclusions when considering substantially similar issues, which gives rise to more substantial consistency concerns.¹⁵

6. Third, the *Donuts* Final Declaration determined that neither the Articles nor the Bylaws requires the Board to institute an appellate mechanism for community objection determinations.¹⁶ By contrast, Corn Lake argues that an IRP is warranted because “the Board should provide for review” of the issues that led the Corn Lake expert panelist to sustain the community objection against its Application.¹⁷ The *Donuts* Final Declaration forecloses this line of reasoning: “absent compelling facts to the contrary, the Board need not rush into adding another

¹¹ See Bylaws, Art. IV, § 2(a).

¹² See, e.g., Corn Lake’s 16 February 2016 Post-Hearing Submission at Pg. 3.

¹³ *Donuts* Final Declaration ¶ 176.

¹⁴ ICANN’s Response to Corn Lake’s IRP Request ¶¶ 46-51; ICANN’s Sur-Reply To Corn Lake’s Reply ¶¶ 31-35.

¹⁵ See ICANN’s 16 February 2016 Post-Hearing Submission at Pg. 2.

¹⁶ *Donuts* Final Declaration ¶¶ 180-83.

¹⁷ Corn Lake’s IRP Request ¶ 27.

layer of adjudication or review, whether or not urged to do so by Donuts and others.”¹⁸

7. Fourth, Corn Lake argued that the Board is obligated to institute a review mechanism for community objections on account of its 12 October 2014 resolution approving a limited review mechanism for expert determinations from specifically identified string confusion objections.¹⁹ ICANN has explained why nothing about the limited review mechanism the Board has approved support Corn Lake’s IRP Request.²⁰ The *Donuts* Final Declaration agreed: “absent jurisprudential disarray so urgently in need of a top-down remedy that the Board would not be entitled to establish other priorities, it may indeed refrain from exercising the power it has already exercised in connection with certain string similarity cases.”²¹

8. Fifth, the *Donuts* Final Declaration awarded all costs to ICANN as the prevailing party, noting that “any contribution to the public interest Donuts might have made . . . has been counterbalanced by the tenuousness of some of Donuts’ positions.”²² Corn Lake took many of the same positions here as its “parent company” Donuts did in that IRP,²³ and the same reasoning should lead this IRP Panel to award ICANN its full costs in this matter.²⁴

Respectfully submitted,

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¹⁸ *Donuts* Final Declaration ¶ 183.

¹⁹ See Corn Lake’s IRP Request ¶¶ 28-31.

²⁰ See ICANN’s Sur-Reply to Corn Lake’s Reply ¶¶ 45-52; see generally ICANN’s 16 February 2016 Post-Hearing Submission.

²¹ *Id.* ¶ 182; see also *id.* ¶¶ 184-86.

²² *Id.* ¶ 234.

²³ See Corn Lake’s IRP Request ¶ 15.

²⁴ See Bylaws, Art. IV, § 3.18.