

Our ref: fpe/mne: Vistaprint / ICANN

Flip Petillion
Advocaat

Contact Information Redacted

30 April 2015

Via email

Prof. Christopher Gibson
Geert Glas
Prof. Dr. Siegfried H. Elsing

Cc: counsel to ICANN
Cc: International Center for Dispute Resolution

Dear Mr Chairman,
Dear Members of the Panel,
Dear Colleagues,

Re: Vistaprint Limited v. ICANN, ICDR Case No. 01-14-0000-6505
Petition to determine a new hearing date

Yesterday we found out about two events that are directly relevant to this case and which cause us great concern:

- First, we are dismayed by ICANN's delay in the publication of an IRP Declaration in the case between DCA Trust and ICANN (the 'DCA IRP Declaration'). The DCA IRP Declaration was issued on 20 April 2015. However ICANN waited until 28 April 2015 to publish the DCA IRP Declaration.
- Second, we are also severely disappointed with the decision of 26 April 2015 of the ICANN Board with respect to the Booking.com IRP Declaration, also published on 28 April 2015.

1. The DCA IRP Declaration is available at <https://www.icann.org/en/system/files/files/irp-procedure-declaration-20apr15-en.pdf>.

The DCA IRP Declaration is relevant in view of the overall debate concerning how ICANN is dealing with its transparency and fairness obligations. It demonstrates, once again how prepared ICANN is to attempt to circumvent its fundamental obligations. The decision of the ICANN Board following the Booking.com IRP Declaration is available at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en>.

The decision of the ICANN Board following the Booking.com IRP Declaration is relevant in view of the issues being debated in the current Vistaprint case. ICANN's position in both matters is illustrative of its intention to frustrate its accountability mechanisms.

We have not yet had the opportunity to analyze both decisions in detail and still need to discuss them with Vistaprint and other clients, who are also engaged in IRPs with ICANN. (As ICANN's

counsel informed you, we are representing 10 of 18 IRP complainants and are handling about 50% of the cases).

2. With respect to the DCA IRP Declaration, we can already inform the Panel that the DCA IRP Panel took the unanimous view that *“any attempt by ICANN [...] to prevent [the Panel] from carrying out its independent review of ICANN Board’s actions in the manner that the Panel considers appropriate under the circumstances deprives the accountability and review process set out in the Bylaws of any meaning”*. Provisions to the contrary were disregarded by the Panel.

The DCA IRP Panel made a Declaration, requiring witnesses to be present at a hearing, failing which the Panel shall, at its sole discretion, draw the necessary inferences. The Panel left no doubt about the binding nature of its Declaration. Despite this Declaration, I understand that ICANN took the position not to have the witnesses attend the hearing scheduled in the DCA matter.

On a side note, the DCA IRP Declaration makes reference to a petition in a letter by ICANN of 8 April 2015. Although the ICANN Bylaws mandate ICANN to post all petitions in an IRP on ICANN’s website when they become available, this letter has not been posted.

3. With respect to the ICANN Board decision following the Booking.com IRP Declaration, we are concerned that the ICANN Board may not have been fully informed.

The ICANN Board did not address the fact that the IRP Panel encouraged the Board to consider whether approval of both of the .hotels and .hoteis strings would be in the best interest of the Internet community. The ICANN Board only addressed the issue in the context of future rounds of new gTLD applications by directing ICANN’s president and CEO to ensure that the issues of the Booking.com IRP Panel regarding transparency and fairness be considered for future rounds. The Board recognized the problematic nature of the fact that applicants were not given an opportunity to be heard fully on the substantive question of the similarity between their applied-for gTLD strings and other gTLD strings. However, the ICANN Board took no action to correct the obvious lack of due process with respect to Booking.com. The ICANN Board recognized the seriousness of Booking.com’s concerns, but only took action for future rounds. In doing so, the ICANN Board maintains the unfair and nontransparent treatment of Booking.com and allowed disparate treatment of Booking.com as compared to other applicants, both in the current and future gTLD rounds.

The Board also incorrectly accepted the reasoning of the Booking.com IRP Panel with respect to the timing of a challenge to the implementation of specific elements of the New gTLD Program. In its second additional submission, Vistaprint has demonstrated that this reasoning on timing is flawed. The implementation took place in different stages and the defects in implementation only became apparent during its execution. There is no indication that the Board considered any of the arguments showing these flaws in the reasoning of the Booking.com IRP Panel. There is also no indication that the ICANN Board was aware that different IRP Panels have been invited to independently rule on the timing issue.

4. ICANN is very well aware that this new information in the DCA and Booking.com cases is relevant to all IRP panels. One would expect ICANN to inform the IRP Panel in this case about the most recent developments in other ongoing IRPs as these developments take place.

Vistaprint requests to be given the opportunity to comment on the most recent developments. Had ICANN immediately published the DCA IRP Declaration – as it has done with the Booking.com IRP Declaration only minutes after its release – then Vistaprint would have had the opportunity to consider the issue when preparing its latest submission. If need be, Vistaprint

could have asked for an extension of the deadline to submit its second additional submission in order to discuss the issue.

Instead, ICANN did not publish the DCA IRP Declaration until after Vistaprint had filed its second additional submission. In view of our debate in the current case, we have grave concerns that this is no coincidence. The fact that ICANN delayed the publication of the DCA IRP Declaration now makes it necessary to organize an additional round of submissions.

ICANN was aware of the DCA IRP Declaration and the ICANN Board Decision on Booking.com well before the deadline to file its reply to Vistaprint's second additional submission. If, as it claims, ICANN is truly concerned about a speedy process, we would expect that ICANN fully addresses both the DCA IRP Declaration and the Board decision in its reply and agrees to a supplemental round of submissions in which only Vistaprint is invited to give its views on the Declaration and the Decision.

5. We wish to reiterate our firm belief that both ICANN and the Internet community would benefit from an IRP declaration handed down by a panel that has been given the opportunity to consider all arguments.

The need for an expedient process does not change this position. In this respect, Vistaprint would respectfully remind the Panel that the first ever IRP was initiated on 6 June 2008 and lasted until 19 February 2010. The request for IRP in the DCA matter was initiated on 24 October 2013. An intermediary hearing is scheduled on 22 and 23 May 2015.

6. ICANN's intention to have IRPs handled more quickly and efficiently must be seen in conjunction with the requirement made by ICANN itself that a specialized standing panel be established with expertise in IRP jurisprudence. Such a panel is not yet in place and may never be established.

In the meantime, the Booking.com IRP Declaration shows how important it is for a panel that was appointed on an *ad hoc* basis to be afforded the necessary time to fully grasp the debate. As shown in Vistaprint's second additional submission, the Booking.com IRP Panel missed out on essential points.

We therefore request that this IRP Panel allows parties to have a mature debate in which they can fully present their entire case consistent with the principle of equality of arms.

7. We are prepared to keep the scheduled call of 13 May 2015 to address the further stages of the proceedings. However, in view of the recent developments of which I believe the IRP Panel should be informed, I will not be in a position to fully present our case by 13 May 2015. Prior client engagements, including meetings abroad between 1 and 11 May, mean I will unfortunately have insufficient time to prepare to address the new developments which are directly relevant to Vistaprint's case.

Therefore, we respectfully request to determine a new hearing date.

Yours sincerely,



Flip Petillion