

# 3 MARCH 2016 BOARD MEETING

## Board Papers

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## AGENDA – 3 MARCH 2016 REGULAR BOARD Meeting – 60 minutes

Last Updated 25 February

<b>Time, etc.</b>	<b>Agenda Item</b>	<b>Shepherd</b>
<b>Assembly, Roll Call &amp; Consent Agenda Vote</b>	<b>1. Main Agenda</b>	
<b>Discussion &amp; Decision</b>	1.a. .AFRICA Update	Chris Disspain
	1.b. Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination	John Jeffrey Amy Stathos
	1.c. AOB	

**ICANN BOARD SUBMISSION NO. 2016.03.03.1a**

**TITLE:** **Delegation of .AFRICA**

**PROPOSED ACTION:** **For Board Consideration and Approval**

**EXECUTIVE SUMMARY:**

The Board is being asked to authorize the President and CEO, or his designee(s), to proceed with the delegation of .AFRICA to be operated by ZA Central Registry's (ZACR) pursuant to the Registry Agreement ZACR has entered into with ICANN.

During its 16 July 2015 meeting, the Board considered the Independent Review Process (IRP) Final Declaration in the matter of DotConnectAfrica Trust (DCA) v. ICANN. In resolution 2015.07.15.01, the Board accepted relevant portions of the IRP Panel's declaration and resolved that ICANN shall continue to refrain from delegating the .AFRICA gTLD and permit DCA's application to proceed through the remainder of the new gTLD application process. Based on this resolution, ICANN resumed evaluation of DCA's application on 1 September 2015. DCA did not pass Initial Evaluation or Extended Evaluation and has thus completed all remaining relevant application processes. ZACR executed a Registry Agreement with ICANN in March 2014, which has been on-hold pending the conclusion of the IRP and resumed evaluation of DCA's application for .AFRICA.

**STAFF RECOMMENDATION:**

Staff recommends that the Board authorize the President and CEO, or his designee(s), to proceed with the delegation of .AFRICA to be operated by ZACR pursuant to the Registry Agreement ZACR has entered with ICANN.

**PROPOSED RESOLUTION:**

Whereas, in its 11 April 2013 Beijing Communiqué, the Governmental Advisory Committee (GAC) provided consensus advice pursuant to the Applicant Guidebook that DotConnect Africa Trust's (DCA)'s application for .AFRICA should not proceed.

Whereas, on 4 June 2013, the New gTLD Program Committee (NGPC) adopted the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing

Communiqué," which included acceptance of the GAC's advice related to DCA's application for .AFRICA. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a>)

Whereas, staff informed DCA of and published the "Incomplete" Initial Evaluation result and halted evaluation of DCA's application for .AFRICA on 3 July 2013 based on the NGPC resolution of 4 June 2013.

Whereas, on 25 November 2013, DCA initiated an Independent Review Process (IRP) regarding the 4 June 2013 resolution, but did not at that time seek to stay ICANN from moving forward the ZACR's application.

Whereas, on March 24 2014, ZACR executed a Registry Agreement (RA) for .AFRICA.

Whereas, on 13 May 2014 ICANN halted further progress with respect to ZACR's Registry Agreement for .AFRICA following the IRP Panel's interim declaration that ICANN should stop proceeding with ZACR's application for .AFRICA during the pendency of the IRP that DCA had initiated.

Whereas, on 9 July 2015, the IRP Panel issued its Final Declaration and recommended that ICANN continue to refrain from delegating the .AFRICA gTLD in order to permit DCA's application to proceed through the remainder of the new gTLD application process. (See <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>)

Whereas, on 16 July 2015, the Board directed the President and CEO, or his designee(s), to continue to refrain from delegating the .AFRICA gTLD and to take all steps necessary to resume the evaluation of DCA's application for .AFRICA in accordance with the established process(es). (See <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a>)

Whereas, on 1 September 2015, evaluation of DCA's application for .AFRICA resumed.

Whereas, on 13 October 2015, the Initial Evaluation report based on the Geographic Names Panel's review of DCA's application was posted and indicated that DCA's application did not pass Initial Evaluation, but that DCA was therefore eligible for Extended Evaluation; DCA chose to proceed through Extended Evaluation.

Whereas, on 17 February 2016, an Extended Evaluation report was posted and indicated that the resumed evaluation of DCA's application for .AFRICA had concluded, and that DCA had failed to submit information and documentation sufficient to meet the criteria described in AGB Section 2.2.1.4.3, rendering it ineligible for further review or evaluation.

Resolved (2016.03.03.xx), the Board authorizes the President and CEO, or his designee(s), to proceed with the delegation of .AFRICA to be operated by ZACR pursuant to the Registry Agreement that ZACR has entered with ICANN.

**PROPOSED RATIONALE:**

Two applicants, DotConnect Africa Trust (DCA) and ZA Central Registry (ZACR), applied to become the operator for the .AFRICA generic top-level domain (gTLD) in furtherance of ICANN's New gTLD Program. In its 11 April 2013 Beijing Communiqué, ICANN's Governmental Advisory Committee (GAC) provided consensus advice pursuant to the New gTLD Program's Applicant Guidebook (Guidebook) that DCA's application to operate .AFRICA should not proceed. The Board accepted that GAC advice, evaluation of DCA's application was halted, and ICANN proceeded to execute a Registry Agreement with the other applicant that applied to operate .AFRICA.

DCA challenged the GAC advice that DCA's application should not proceed, and the Board's acceptance of that advice, through the Independent Review Process (IRP). IRP is one of the accountability mechanisms set out in ICANN's Bylaws. First, only after ICANN signed a registry agreement to operate .AFRICA with the other .AFRICA applicant, DCA obtained interim relief from an IRP panel recommending that ICANN not proceed further with .AFRICA pending conclusion of the IRP. ICANN adopted that recommendation. Second, DCA prevailed in the IRP and the IRP Panel recommended that ICANN resume evaluation of DCA's application and continue to

refrain from delegating .AFRICA to the party with which ICANN already had executed a Registry Agreement to operate the .AFRICA gTLD.

On 16 July 2015 the Board passed the following resolution:

Resolved (2015.07.15.01), the Board has considered the entire Declaration, and has determined to take the following actions based on that consideration:

1. ICANN shall continue to refrain from delegating the .AFRICA gTLD;
2. ICANN shall permit [DotConnectAfrica Trust] DCA's application to proceed through the remainder of the new gTLD application process as set out below; and
3. ICANN shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

(See

When the Board passed the above resolution, the only remaining evaluation process for DCA's application for .AFRICA during the Initial Evaluation (IE) period was the Geographic Names Panel review, as DCA had successfully completed the other stages of IE. Accordingly, at staff's request, in August 2015, the Geographic Names Panel resumed its evaluation of DCA's application to operate .AFRICA. The Geographic Names Panel determined that .AFRICA is a geographic name as defined in Guidebook Section 2.2.1.4, but that the DCA's application to operate .AFRICA has not sufficiently met the requisite criteria of possessing evidence of support or non-opposition from 60% of the relevant public authorities in the geographic region of Africa, as described in AGB Section 2.2.1.4.3.

Per the Guidebook, having failed to pass IE, DCA was eligible and chose to proceed to Extended Evaluation (EE), which provided DCA with an additional 90 days to obtain the requisite documentation needed to pass the Geographic Names Panel review. On 17 February 2016, EE results were posted showing that DCA again did not satisfy the necessary criteria to pass the Geographic Names Panel review, rendering, DCA's application ineligible for any further review.

Now that both IE and EE have been completed for DCA's application to operate .AFRICA, and both have resulted in DCA not passing the Geographic Names Panel review, ICANN is prepared to move forward toward delegation of .AFRICA and with

the party that has signed a Registry Agreement to operate .AFRICA. The party that has signed the Registry Agreement to operate .AFRICA is eager to move forward so that members of the African community can begin utilizing this gTLD. Further, as there are no remaining avenues available to DCA to proceed in the New gTLD Program, there is no reason within defined Guidebook processes to delay any further.

Accordingly, the Board today is authorizing the President and CEO or his designee(s), to resume delegating the .AFRICA gTLD, and all that entails, which it has previously directed ICANN to refrain from doing.

Taking this action is beneficial to ICANN and the overall Internet community, as it will allow delegation of the .AFRICA gTLD into the authoritative root zone. There likely will be a positive fiscal impact by taking this action in that there will be another operational gTLD. This action will not have a direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

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**ICANN BOARD SUBMISSION NO. 2016.03.03.1b**

**TITLE:** **Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination**

**PROPOSED ACTION:** **For Board Approval**

**EXECUTIVE SUMMARY:**

On 9 October 2015, the Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint) declaring ICANN to be the prevailing party. In the IRP, Vistaprint claimed that ICANN’s Board violated ICANN’s Articles of Incorporation (Articles) and Bylaws by “accepting” the Expert Determination that found Vistaprint’s applications for .WEBS to be confusingly similar to Web.com’s application for .WEB (Expert Determination).

In a unanimous decision, the Panel determined that the Board did not violate the Articles, Bylaws, or Applicant Guidebook (Guidebook). While ruling in ICANN’s favor and denying Vistaprint’s IRP, the Panel recommended that

the Board exercise its judgment on the questions of whether an additional review mechanism is appropriate to re-evaluate the [expert] determination in the [string confusion objection (SCO) proceedings related to Vistaprint’s applications for .WEBS (*Vistaprint SCO*)], in view of ICANN’s Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint’s .WEBS applications; (ii) the Board’s (and NGPC’s) resolutions on singular and plural gTLDs, and (iii) the Board’s decisions to delegate numerous other singular/plural versions of the same gTLD strings.

(*Id.* at ¶ 196.)

On 22 October 2015, this Board considered and adopted relevant portions of the IRP Panel’s Final Declaration and, committed to follow the foregoing recommendation and again exercise its judgment on whether an additional review mechanism is appropriate to



re-evaluate the expert determination in the Vistaprint string confusion objection (SCO) proceedings. (See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d>.) This paper and the related Reference materials paper address the issues relevant to the Board's consideration of the Panel's recommendation, including the issues raised at the 2 December 2015 Board meeting.

**PROPOSED RESOLUTION:**

Whereas, on 9 October 2015, an Independent Review Process (IRP) Panel issued its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint) against ICANN wherein the Panel declared ICANN to be the prevailing party and that the Board's actions did not violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook).

Whereas, Vistaprint specifically challenged the String Confusion Objection (SCO) Expert Determination (Expert Determination) in which the Panel found that Vistaprint's applications for .WEBS were confusingly similar to Web.com's application for .WEB (Vistaprint SCO).

Whereas, while the IRP Panel found that ICANN did not discriminate against Vistaprint in not directing a re-evaluation of the Expert Determination, the Panel recommended that the Board exercise its judgment on the question of whether it is appropriate to establish an additional review mechanism to re-evaluate the Vistaprint SCO.

Whereas, in Resolutions 2014.10.12.NG02-2015.10.12.NG03, the NGPC exercised its discretion to address a certain limited number of perceived inconsistent and unreasonable SCO expert determinations that were identified as not being in the best interest of the New gTLD Program and the Internet community (the "SCO Final Review Mechanism").

Whereas, the NGPC has already considered the Vistaprint SCO Expert Determination, among other expert determinations, in evaluating whether to expand the scope of the SCO Final Review Mechanism and determined that those other expert determinations, including the Vistaprint SCO Expert Determination, did not warrant re-evaluation.

Whereas, pursuant to the recommendations of the IRP Panel in the Final Declaration, the Board has again evaluated whether an additional review mechanism is appropriate to re-evaluate the Vistaprint SCO and resulting Expert Determination.

Resolved (2016.03.03.xx), the Board concludes that the Vistaprint SCO Expert Determination is not sufficiently “inconsistent” or “unreasonable” such that the underlying objection proceedings resulting in the Expert Determination warrants re-evaluation.

Resolved (2016.03.03.xx), the Board finds, as it has previously found, that ICANN’s Bylaws concerning core values and non-discriminatory treatment and the particular circumstances and developments noted in Final Declaration do not support re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination.

Resolved (2016.03.03.xx), the Board directs the President and CEO, or his designee(s), to move forward with processing of the .WEB/.WEBS contention set.

**PROPOSED RATIONALE:**

The Board is taking action today to address the recommendation of the Independent Review Process (IRP) Panel (Panel) set forth in its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint). Specifically, the IRP Panel recommended that the Board exercise its judgment on the question of whether an additional review is appropriate to re-evaluate the Vistaprint String Confusion Objection (SCO) leading to the “Vistaprint SCO Expert Determination.”

I. Background

A. Vistaprint SCO Expert Determination

The background on the Vistaprint SCO Expert Determination is discussed in detail in the Reference Materials and IRP Final Declaration, which is attached as Attachment A to the Reference Materials. The Reference Materials are incorporated by reference into this resolution and rationale as though fully set forth here.

B. Vistaprint IRP

Vistaprint filed an IRP request challenging ICANN's acceptance of the Vistaprint SCO Expert Determination. In doing so, among other things, Vistaprint challenged procedures, implementation of procedures, and ICANN's purported failure to correct the allegedly improperly issued Expert Determination.

On 9 October 2015, a three-member IRP Panel issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN Bylaws, the Board adopted the findings of the Panel. (See Resolutions 2015.10.22.17 – 2015.10.22.18, available at <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d>; see also, IRP Final Declaration, available at <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf>.)

In the Final Declaration, the Panel found, among other things, that it did not have the authority to require ICANN to reject the Expert Determination and to allow Vistaprint's applications to proceed on their merits, or in the alternative, to require a three-member re-evaluation of the Vistaprint SCO objections. However, the Panel did recommend that

the Board exercise its judgment on the questions of whether an additional review mechanism is appropriate to re-evaluate the [expert] determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications; (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings.

(Final Declaration at ¶ 196, available at <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf>.) The Board acknowledged and accepted this recommendation in Resolution 2015.10.22.18. (See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d>.)

C. Confusing Similarity

1. The Generic Names Supporting Organization's (GNSO) Recommendation on confusing similarity.

In August 2007, the GNSO issued a set of recommendations (approved by the ICANN Board in June 2008) regarding the introduction of new generic top-level domains (gTLDs). The policy recommendations did not include a specific recommendation regarding singular and plural versions of the same string. Instead, the GNSO included a recommendation (Recommendation 2) that new gTLD strings must not be confusingly similar to an existing top-level domain or a reserved name. (See GNSO Final Report: Introduction of New Generic Top-Level Domains, <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.)

2. The issue of confusing similarity was agreed as part of the Applicant Guidebook and is addressed in the evaluation processes.

As discussed in detail in Reference Materials document related to this paper, and which is incorporated by reference as though fully set forth here, the issue of confusing similarity is addressed in two manners in the evaluation processes – through the String Similarity Review (SSR) process and through the String Confusion Objection process. The objective of this preliminary review was to prevent user confusion and loss of confidence in the DNS resulting from delegation of similar strings. (See Module 2.2.1.1, available at <https://newgtlds.icann.org/en/applicants/agb/evaluation-procedures-04jun12-en.pdf>, and Module 3.2.1, available at <https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>.) The SSR Panel did not find any plural version of a word to be visually similar to the singular version of that same word, or vice versa. (<http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-01mar13-en.pdf>; <http://newgtlds.icann.org/en/announcements-and-media/announcement-01mar13-en>.)

3. The Board previously addressed the issue of confusing similarity as it relates to singular and plural versions of the same string in response to Governmental Advisory Committee (GAC) advice.

On 25 June 2013, the Board, through the New gTLD Program Committee (NGPC), considered the issue of singular and plural versions of the same strings being in the root in response to the GAC's advice from the Beijing Communiqué. (<https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.) The

NGPC determined that no changes are needed to the existing mechanisms in the Guidebook to address the GAC advice relating to singular and plural versions of the same string. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d>.) As noted in the Rationale for Resolution 2013.06.25.NG07, the NGPC considered several significant factors as part of its deliberations, including the following factors: (i) whether the SSR evaluation process would be undermined if it were to exert its own non-expert opinion and override the determination of the expert panel; (ii) whether taking an action to make program changes would cause a ripple effect and re-open the decisions of all expert panels; (iii) the existing nature of strings in the DNS and any positive and negative impacts resulting therefrom; (iv) whether there were alternative methods to address potential user confusion if singular and plural versions of the same string are allowed to proceed; (iv) the SCO process as set forth in Module 3 of the Guidebook. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en - 2.d>.)

The NGPC determined that the mechanisms established by the Guidebook (SSR and SCO) should be unchanged and should remain as the mechanisms used to address whether or not the likelihood potential user confusion may result from singular and plural versions of the same strings.

#### D. SCO Final Review Mechanism

As discussed in full in the Reference Materials and incorporated herein by reference, the SCO Final Review Mechanism was established by the NGPC on 12 October 2014, after consultation with the community, to address a very limited set of perceived inconsistent and unreasonable SCO expert determinations. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.) The SCO Final Review Mechanism was not a procedure to address the likelihood of confusion of singular and plural versions of the same string in the root. Rather, it was a mechanism crafted to address two SCO expert determinations (.CAM/.COM and .SHOPPING/.通販 expert determinations) that had conflicting expert determinations about the same strings issued by different expert panels, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation.

(NGPC Resolution 2014.10.12.NG03, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.) The NGPC also identified the SCO Expert Determinations for .CAR/.CARS as not in the best interest of the New gTLD Program and the Internet community, which also resulted in opposite determinations by different expert panels on objections to the exact same strings. Because the .CAR/.CARS contention set resolved prior to the approval of the SCO Final Review Mechanism, it was not part of the final review. (*See id.*)

As part of its deliberations, the NGPC considered and determined that it was not appropriate to expand the scope of the proposed SCO Final Review Mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the Vistaprint SCO Expert Determination. With respect to its consideration of whether all SCO expert determinations relating to singular and plurals of the same string should be re-evaluated, the NGPC noted that it had previously addressed the singular/plurals issue in Resolutions 2013.06.25.NG07, and had determined “that no changes [were] needed to the existing mechanisms in the Applicant Guidebook . . . .” (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.)

## II. Analysis

### A. Confusing Similarity as it Relates to Singular/Plurals of the Same String Has Already Been Addressed By The Board.

As discussed above, the NGPC first considered the issue of singular and plural versions of same strings in the root in June 2013 in consideration of the GAC’s advice from the Beijing Communiqué regarding singular and plural versions of the same strings. Then, the NGPC determined that no changes were needed to the existing mechanisms in the Guidebook to address the issue. (<https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.) As part of its evaluation, the NGPC considered applicant responses to the GAC advice. The NGPC noted that most were against changing the existing policy, indicating that this topic was agreed as part of the Guidebook and is addressed in the evaluation processes. (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d>.)

The NGPC also considered existing string similarity in the DNS at the second level and any positive and negative impacts resulting therefrom. At the time, no new gTLD had been delegated, and therefore, there was no evidence of singular and plurals of the same string in the DNS at the top level. To date, seventeen singular/plural pairs have been delegated. The Board is not aware of any evidence of any impact (positive or negative) from having singular and plurals of the same string in the DNS. As such, the evidence of the existence of singular and plural versions of the same string, while it did not exist in June 2015, should not impact the NGPC's previous consideration of this matter.

As the NGPC acknowledged in Resolution 2013.06.25.NG07, the existing mechanisms (SSR and SCO) in the Guidebook to address the issue of potential consumer confusion resulting from allowing singular and plural versions of the same string are adequate. (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d>.) These mechanisms are intended to address the issue of confusing similarity at the outset of the application process. A decision to send the Vistaprint SCO Expert Determination back for re-evaluation because there is now evidence of singular and plural versions of the same string in the DNS would effectively strip away the objective function of the evaluation processes that have been set in place, which in the case of a SCO is to evaluate the likelihood of confusion at the outset of the application process, not some time after there has been evidence of delegation of singular and plural versions of the same string. (See Guidebook, Module 3.5.1.) To do so would be to treat Vistaprint differently and arguably more favorably than other applicants, which could be argued to be contradictory to ICANN's Bylaws.

B. The SCO Final Review Mechanism Does Not Apply to the Vistaprint Expert Determination.

The Board notes that Vistaprint argued in the IRP that the Vistaprint SCO Expert Determination is as equally unreasonable as the .CAM/.COM, .通販/.SHOP, .CARS/CAR Expert Determinations and therefore should be sent back for re-evaluation pursuant to the Final Review Mechanism. (See Final Declaration, ¶¶ 93, 94.) However, the Vistaprint SCO Expert Determination is plainly distinguishable from the .CAM/.COM, .通販/.SHOP, .CARS/.CAR expert determinations, and therefore, the

reasons warranting re-evaluation as determined by the NGPC in those decisions do not apply to the Vistaprint Expert Determination.

The CAM/.COM, .通販/.SHOP, .CARS/.CAR Expert Determinations were ripe for re-evaluation because those expert determinations involved *multiple conflicting SCO determinations issued by different experts on the same strings*, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. Moreover, the NGPC discussion of the .CARS/.CAR expert determinations in the scope of the SCO Final Review Mechanism was not based on the singular/plural issue, but rather, due to conflicting SCO expert determinations (two expert determinations finding .CARS/.CAR not to be confusingly similar and one finding .CARS/.CAR to be confusingly similar. (See Charleston Road Registry, Inc. v. Koko Castle, LLC SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1377-8759-en.pdf> (finding no likelihood of confusion between .CARS/.CAR); Charleston Road Registry, Inc. v. Uniregistry, Corp. SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-845-37810-en.pdf> (finding no likelihood of confusion between .CARS/.CAR); and Charleston Road Registry, Inc. v. DERCars, LLC SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/14oct13/determination-1-1-909-45636-en.pdf> (finding likelihood of confusion between .CARS/.CAR).)

Here, none of the factors significant to the NGPC's decision to send the CAM/.COM, .通販/.SHOP, expert determinations back for re-evaluation exist for the Vistaprint Expert Determination. The Vistaprint SCO proceedings resulted in one Expert Determination, in favor of Web.com on both objections. There were no other conflicting SCO expert determinations on the same strings issued by different expert panels ending in a different result. One expert panel had all of the arguments in front of it and considered both objections in concert, and made a conscious and fully informed decision in reaching the same decision on both objections. In this regard, Vistaprint already had the same benefit of consideration of the evidence submitted in both objection proceedings by one expert panel that the CAM/.COM, .通販/.SHOP objections received on re-evaluation. Thus, a



re-evaluation of the objections leading to the Vistaprint SCO Expert Determination is not warranted because it would only achieve what has already been achieved by having the same expert panel review all of the relevant proceedings in the first instance. Further, as discussed above, the NGPC has already considered the Vistaprint SCO Expert Determination as part of its deliberations on the scope of the SCO Final Review Mechanism, and determined that the objection proceedings leading to the Expert Determination did not warrant re-evaluation. Thus, while Vistaprint may substantively disagree with the Expert Determination, there is no evidence that it is “inconsistent” or “unreasonable” such that it warrants re-evaluation.

The Board’s evaluation is guided by the criteria applied by the NGPC in reaching its determination on the scope of the Final Review Mechanism, the NGPC’s consideration and determination on the existence of singular and plurals of the same word as TLD as set forth in Resolution 2013.06.25.NG07, the GNSO Final Report Introduction of New Generic Top-Level Domains, the Applicant Guidebook, including the mechanisms therein to address potential consumer confusion, the circumstances and developments noted in the Final Declaration, and the core values set forth in Article I, Section 2 of the Bylaws. Applying these factors, for the reasons stated below, the Board concludes that a re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination is not appropriate because the Expert Determination is not “inconsistent” or “unreasonable” as previously defined by the NGPC or in any other way to warrant re-evaluation.

The Board considered the following criteria, among others, employed by the NGPC in adopting Resolutions 2014.10.12.NG02 – 2014.10.12.NG03:

- Whether it was appropriate to change the Guidebook at this time to implement a review mechanism.
- Whether there was a reasonable basis for certain perceived inconsistent expert determinations to exist, and particularly why the identified expert determinations should be sent back to the ICDR while other expert determinations should not.

- Whether it was appropriate to expand the scope of the proposed review mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the Vistaprint SCO Expert Determination.
- Community correspondence on this issue in addition to comments from the community expressed at the ICANN meetings.

(See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en>.) In addition, the Board also reviewed and took into consideration the NGPC’s action on the existence of singular and plurals of the same string as a TLD in Resolution 2013.06.25.NG07.

As part of this decision, the Board considered and balanced the eleven core values set forth in Article I, Section 2 of the Bylaws. Article I, Section 2 of the Bylaws states that “situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.” (Bylaws, Art. I, § 2, <https://www.icann.org/resources/pages/governance/bylaws-en/#I>.) Among the eleven core values, the Board finds that value numbers 1, 4, 7, 8, 9, and 10 to be most relevant to the circumstances at hand. Applying these values, the Board concludes that re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination is not warranted.

This action will have no direct financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system. This is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 25 February 2016  
Email: amy.stathos@icann.org



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## 1. Main Agenda

### a. .AFRICA Update

Whereas, in its 11 April 2013 Beijing Communiqué, the Governmental Advisory Committee (GAC) provided consensus advice pursuant to the Applicant Guidebook that DotConnect Africa Trust's (DCA)'s application for .AFRICA should not proceed.

Whereas, on 4 June 2013, the New gTLD Program Committee (NGPC) adopted the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué," which included acceptance of the GAC's advice related to DCA's application for .AFRICA. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a>)

Whereas, staff informed DCA of and published the "Incomplete" Initial Evaluation result and halted evaluation of DCA's application for .AFRICA on 3 July 2013 based on the NGPC resolution of 4 June 2013.

Whereas, on 25 November 2013, DCA initiated an Independent Review Process (IRP) regarding the 4 June 2013 resolution, but did not at that time seek to stay ICANN from moving forward the ZACR's application.

Whereas, on March 24 2014, ZACR executed a Registry Agreement (RA) for .AFRICA.

Whereas, on 13 May 2014 ICANN halted further progress with respect to ZACR's Registry Agreement for .AFRICA following the IRP Panel's interim declaration that ICANN should stop proceeding with ZACR's application for .AFRICA during the pendency of the IRP that DCA had initiated.

Whereas, on 9 July 2015, the IRP Panel issued its Final Declaration and recommended that ICANN continue to refrain from delegating the .AFRICA gTLD in order to permit DCA's application to proceed through the remainder of the new gTLD application process. (See <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>)

Whereas, on 16 July 2015, the Board directed the President and CEO, or his designee(s), to continue to refrain from delegating the .AFRICA gTLD and to take all steps necessary to resume the evaluation of DCA's application for .AFRICA in accordance with the established process(es). (See <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a>)

Whereas, on 1 September 2015, evaluation of DCA's application for .AFRICA resumed.

Whereas, on 13 October 2015, the Initial Evaluation report based on the Geographic Names Panel's review of DCA's application was posted and indicated that DCA's application did not pass Initial Evaluation, but that DCA was therefore eligible for Extended Evaluation; DCA chose to proceed through Extended Evaluation.

Whereas, on 17 February 2016, an Extended Evaluation report was posted and indicated that the resumed evaluation of DCA's application for .AFRICA had concluded, and that DCA had failed to submit information and documentation sufficient to meet the criteria described in AGB Section 2.2.1.4.3, rendering it ineligible for further review or evaluation.

Resolved (2016.03.03.xx), the Board authorizes the President and CEO, or his designee(s), to proceed with the delegation of .AFRICA to be operated by ZACR pursuant to the Registry Agreement that ZACR has entered with ICANN.

***Rationale for Resolution 2016.03.03.xx***

Two applicants, DotConnect Africa Trust (DCA) and ZA Central Registry (ZACR), applied to become the operator for the .AFRICA generic top-level domain (gTLD) in furtherance of ICANN's New gTLD Program. In its 11 April 2013 Beijing Communiqué, ICANN's Governmental Advisory Committee (GAC) provided consensus advice pursuant to the New gTLD Program's Applicant Guidebook (Guidebook) that DCA's application to operate .AFRICA should not proceed. The Board accepted that GAC advice, evaluation of DCA's application was halted, and ICANN proceeded to execute a Registry Agreement with the other applicant that applied to operate .AFRICA.

DCA challenged the GAC advice that DCA's application should not proceed, and the Board's acceptance of that advice, through the Independent Review Process (IRP). IRP is one of the accountability mechanisms set out in ICANN's Bylaws. First, only after ICANN signed a registry agreement to operate .AFRICA with the other .AFRICA applicant, DCA obtained interim relief from an IRP panel recommending that ICANN not proceed further with .AFRICA pending conclusion of the IRP. ICANN adopted that recommendation. Second, DCA prevailed in the IRP and the IRP Panel recommended that ICANN resume evaluation of DCA's application and continue to refrain from delegating .AFRICA to the party with which ICANN already had executed a Registry Agreement to operate the .AFRICA gTLD.

On 16 July 2015 the Board passed the following resolution:

Resolved (2015.07.15.01), the Board has considered the entire Declaration, and has determined to take the following actions based on that consideration:

1. ICANN shall continue to refrain from delegating the .AFRICA gTLD;

2. ICANN shall permit [DotConnectAfrica Trust] DCA's application to proceed through the remainder of the new gTLD application process as set out below; and
3. ICANN shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

See

When the Board passed the above resolution, the only remaining evaluation process for DCA's application for .AFRICA during the Initial Evaluation (IE) period was the Geographic Names Panel review, as DCA had successfully completed the other stages of IE. Accordingly, at staff's request, in August 2015, the Geographic Names Panel resumed its evaluation of DCA's application to operate .AFRICA. The Geographic Names Panel determined that .AFRICA is a geographic name as defined in Guidebook Section 2.2.1.4, but that the DCA's application to operate .AFRICA has not sufficiently met the requisite criteria of possessing evidence of support or non-opposition from 60% of the relevant public authorities in the geographic region of Africa, as described in AGB Section 2.2.1.4.3.

Per the Guidebook, having failed to pass IE, DCA was eligible and chose to proceed to Extended Evaluation (EE), which provided DCA with an additional 90 days to obtain the requisite documentation needed to pass the Geographic Names Panel review. On 17 February 2016, EE results were posted showing that DCA again did not satisfy the necessary criteria to pass the Geographic Names Panel review, rendering, DCA's application ineligible for any further review.

Now that both IE and EE have been completed for DCA's application to operate .AFRICA, and both have resulted in DCA not passing the Geographic Names Panel review, ICANN is prepared to move forward toward delegation of .AFRICA and with the party that has signed a

Registry Agreement to operate .AFRICA. The party that has signed the Registry Agreement to operate .AFRICA is eager to move forward so that members of the African community can begin utilizing this gTLD. Further, as there are no remaining avenues available to DCA to proceed in the New gTLD Program, there is no reason within defined Guidebook processes to delay any further.

Accordingly, the Board today is authorizing the President and CEO or his designee(s), to resume delegating the .AFRICA gTLD, and all that entails, which it has previously directed ICANN to refrain from doing.

Taking this action is beneficial to ICANN and the overall Internet community, as it will allow delegation of the .AFRICA gTLD into the authoritative root zone. There likely will be a positive fiscal impact by taking this action in that there will be another operational gTLD. This action will not have a direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

**b. Consideration of Re-evaluation of the Vistaprint  
Limited String Confusion Objection Expert  
Determination**

Whereas, on 9 October 2015, an Independent Review Process (IRP) Panel issued its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint) against ICANN wherein the Panel declared ICANN to be the prevailing party and that the Board's actions did not violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook).

Whereas, Vistaprint specifically challenged the String Confusion Objection (SCO) Expert Determination (Expert Determination) in



which the Panel found that Vistaprint's applications for .WEBS were confusingly similar to Web.com's application for .WEB (Vistaprint SCO).

Whereas, while the IRP Panel found that ICANN did not discriminate against Vistaprint in not directing a re-evaluation of the Expert Determination, the Panel recommended that the Board exercise its judgment on the question of whether it is appropriate to establish an additional review mechanism to re-evaluate the Vistaprint SCO.

Whereas, in Resolutions 2014.10.12.NG02-2015.10.12.NG03, the NGPC exercised its discretion to address a certain limited number of perceived inconsistent and unreasonable SCO expert determinations that were identified as not being in the best interest of the New gTLD Program and the Internet community (the "SCO Final Review Mechanism").

Whereas, the NGPC has already considered the Vistaprint SCO Expert Determination, among other expert determinations, in evaluating whether to expand the scope of the SCO Final Review Mechanism and determined that those other expert determinations, including the Vistaprint SCO Expert Determination, did not warrant re-evaluation.

Whereas, pursuant to the recommendations of the IRP Panel in the Final Declaration, the Board has again evaluated whether an additional review mechanism is appropriate to re-evaluate the Vistaprint SCO and resulting Expert Determination.

Resolved (2016.03.03.xx), the Board concludes that the Vistaprint SCO Expert Determination is not sufficiently "inconsistent" or "unreasonable" such that the underlying objection proceedings resulting in the Expert Determination warrants re-evaluation.

Resolved (2016.03.03.xx), the Board finds, as it has previously found, that ICANN's Bylaws concerning core values and non-discriminatory treatment and the particular circumstances and developments noted in Final Declaration do not support re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination.

Resolved (2016.03.03.xx), the Board directs the President and CEO, or his designee(s), to move forward with processing of the .WEB/.WEBS contention set.

***Rationale for Resolutions 2016.03.03.xx – 2016.03.03.xx***

The Board is taking action today to address the recommendation of the Independent Review Process (IRP) Panel (Panel) set forth in its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint). Specifically, the IRP Panel recommended that the Board exercise its judgment on the question of whether an additional review is appropriate to re-evaluate the Vistaprint String Confusion Objection (SCO) leading to the "Vistaprint SCO Expert Determination."

I. Background

A. Vistaprint SCO Expert Determination

The background on the Vistaprint SCO Expert Determination is discussed in detail in the Reference Materials and IRP Final Declaration, which is attached as Attachment A to the Reference Materials. The Reference Materials are incorporated by reference into this resolution and rationale as though fully set forth here.

B. Vistaprint IRP

Vistaprint filed an IRP request challenging ICANN's acceptance of the Vistaprint SCO Expert Determination. In doing so, among other things, Vistaprint challenged procedures, implementation of

procedures, and ICANN's purported failure to correct the allegedly improperly issued Expert Determination.

On 9 October 2015, a three-member IRP Panel issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN Bylaws, the Board adopted the findings of the Panel. (See Resolutions 2015.10.22.17 – 2015.10.22.18, available at <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d>; see also, IRP Final Declaration, available at <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf>.)

In the Final Declaration, the Panel found, among other things, that it did not have the authority to require ICANN to reject the Expert Determination and to allow Vistaprint's applications to proceed on their merits, or in the alternative, to require a three-member re-evaluation of the Vistaprint SCO objections. However, the Panel did recommend that

the Board exercise its judgment on the questions of whether an additional review mechanism is appropriate to re-evaluate the [expert] determination in the Vistaprint SCO, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the Vistaprint SCO determination involving Vistaprint's .WEBS applications; (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings.

(Final Declaration at ¶ 196, available at <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final->

[declaration-09oct15-en.pdf](#).) The Board acknowledged and accepted this recommendation in Resolution 2015.10.22.18. (See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d>.)

### C. Confusing Similarity

#### 1. The Generic Names Supporting Organization's (GNSO) Recommendation on confusing similarity.

In August 2007, the GNSO issued a set of recommendations (approved by the ICANN Board in June 2008) regarding the introduction of new generic top-level domains (gTLDs). The policy recommendations did not include a specific recommendation regarding singular and plural versions of the same string. Instead, the GNSO included a recommendation (Recommendation 2) that new gTLD strings must not be confusingly similar to an existing top-level domain or a reserved name. (See GNSO Final Report: Introduction of New Generic Top-Level Domains, <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.)

#### 2. The issue of confusing similarity was agreed as part of the Applicant Guidebook and is addressed in the evaluation processes.

As discussed in detail in Reference Materials document related to this paper, and which is incorporated by reference as though fully set forth here, the issue of confusing similarity is addressed in two manners in the evaluation processes – through the String Similarity Review (SSR) process and through the String Confusion Objection process. The objective of this preliminary review was to prevent user confusion and loss of confidence in the DNS resulting from delegation of similar strings. (See *Module 2.2.1.1*, available at <https://newgtlds.icann.org/en/applicants/agb/evaluation-procedures->

[04jun12-en.pdf](#), and Module 3.2.1, available at <https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>.) The SSR Panel did not find any plural version of a word to be visually similar to the singular version of that same word, or vice versa. (<http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-01mar13-en.pdf>; <http://newgtlds.icann.org/en/announcements-and-media/announcement-01mar13-en>.)

3. The Board previously addressed the issue of confusing similarity as it relates to singular and plural versions of the same string in response to Governmental Advisory Committee (GAC) advice.

On 25 June 2013, the Board, through the New gTLD Program Committee (NGPC), considered the issue of singular and plural versions of the same strings being in the root in response to the GAC's advice from the Beijing Communiqué.

(<https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.) The NGPC determined that no changes are needed to the existing mechanisms in the Guidebook to address the GAC advice relating to singular and plural versions of the same string. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d>.) As noted in the Rationale for Resolution 2013.06.25.NG07, the NGPC considered several significant factors as part of its deliberations, including the following factors: (i) whether the SSR evaluation process would be undermined if it were to exert its own non-expert opinion and override the determination of the expert panel; (ii) whether taking an action to make program changes would cause a ripple effect and re-open the decisions of all expert panels; (iii) the existing nature of strings in the DNS and any positive and negative impacts resulting therefrom; (iv) whether there were alternative methods to address potential user confusion if singular and plural versions of the same string are allowed to proceed; (iv) the

SCO process as set forth in Module 3 of the Guidebook. (See [https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en - 2.d.](https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en-2.d))

The NGPC determined that the mechanisms established by the Guidebook (SSR and SCO) should be unchanged and should remain as the mechanisms used to address whether or not the likelihood potential user confusion may result from singular and plural versions of the same strings.

#### D. SCO Final Review Mechanism

As discussed in full in the Reference Materials and incorporated herein by reference, the SCO Final Review Mechanism was established by the NGPC on 12 October 2014, after consultation with the community, to address a very limited set of perceived inconsistent and unreasonable SCO expert determinations. (See [https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.](https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b)) The SCO Final Review Mechanism was not a procedure to address the likelihood of confusion of singular and plural versions of the same string in the root. Rather, it was a mechanism crafted to address two SCO expert determinations (.CAM/.COM and .SHOPPING/.通販 expert determinations) that had conflicting expert determinations about the same strings issued by different expert panels, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. (NGPC Resolution 2014.10.12.NG03, *available at* [https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.](https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b)) The NGPC also identified the SCO Expert Determinations for .CAR/.CARS as not in the best interest of the New gTLD Program and the Internet community, which also resulted in opposite determinations by different expert panels on objections to the exact same strings. Because the .CAR/.CARS contention set resolved prior to the approval of the SCO Final Review Mechanism, it was not part of the final review. (See *id.*)

As part of its deliberations, the NGPC considered and determined that it was not appropriate to expand the scope of the proposed SCO Final Review Mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the Vistaprint SCO Expert Determination. With respect to its consideration of whether all SCO expert determinations relating to singular and plurals of the same string should be re-evaluated, the NGPC noted that it had previously addressed the singular/plurals issue in Resolutions 2013.06.25.NG07, and had determined “that no changes [were] needed to the existing mechanisms in the Applicant Guidebook . . . .”

(<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.>)

## II. Analysis

### A. Confusing Similarity as it Relates to Singular/Plurals of the Same String Has Already Been Addressed By The Board.

As discussed above, the NGPC first considered the issue of singular and plural versions of same strings in the root in June 2013 in consideration of the GAC’s advice from the Beijing Communiqué regarding singular and plural versions of the same strings. Then, the NGPC determined that no changes were needed to the existing mechanisms in the Guidebook to address the issue.

(<https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.) As part of its evaluation, the NGPC considered applicant responses to the GAC advice. The NGPC noted that most were against changing the existing policy, indicating that this topic was agreed as part of the Guidebook and is addressed in the evaluation processes. (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d.>)

The NGPC also considered existing string similarity in the DNS at the second level and any positive and negative impacts resulting therefrom. At the time, no new gTLD had been delegated, and therefore, there was no evidence of singular and plurals of the same string in the DNS at the top level. To date, seventeen singular/plural pairs have been delegated. The Board is not aware of any evidence of any impact (positive or negative) from having singular and plurals of the same string in the DNS. As such, the evidence of the existence of singular and plural versions of the same string, while it did not exist in June 2015, should not impact the NGPC's previous consideration of this matter.

As the NGPC acknowledged in Resolution 2013.06.25.NG07, the existing mechanisms (SSR and SCO) in the Guidebook to address the issue of potential consumer confusion resulting from allowing singular and plural versions of the same string are adequate.

(<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d>.) These mechanisms are intended to address the issue of confusing similarity at the outset of the application process. A decision to send the Vistaprint SCO Expert Determination back for re-evaluation because there is now evidence of singular and plural versions of the same string in the DNS would effectively strip away the objective function of the evaluation processes that have been set in place, which in the case of a SCO is to evaluate the likelihood of confusion at the outset of the application process, not some time after there has been evidence of delegation of singular and plural versions of the same string. (See Guidebook, Module 3.5.1.) To do so would be to treat Vistaprint differently and arguably more favorably than other applicants, which could be argued to be contradictory to ICANN's Bylaws.

B. The SCO Final Review Mechanism Does Not Apply to the Vistaprint Expert Determination.



The Board notes that Vistaprint argued in the IRP that the Vistaprint SCO Expert Determination is as equally unreasonable as the .CAM/.COM, .通販/.SHOP, .CARS/CAR Expert Determinations and therefore should be sent back for re-evaluation pursuant to the Final Review Mechanism. (See Final Declaration, ¶¶ 93, 94.) However, the Vistaprint SCO Expert Determination is plainly distinguishable from the .CAM/.COM, .通販/.SHOP, .CARS/.CAR expert determinations, and therefore, the reasons warranting re-evaluation as determined by the NGPC in those decisions do not apply to the Vistaprint Expert Determination.

The CAM/.COM, .通販/.SHOP, .CARS/.CAR Expert Determinations were ripe for re-evaluation because those expert determinations involved *multiple conflicting SCO determinations issued by different experts on the same strings*, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. Moreover, the NGPC discussion of the .CARS/.CAR expert determinations in the scope of the SCO Final Review Mechanism was not based on the singular/plural issue, but rather, due to conflicting SCO expert determinations (two expert determinations finding .CARS/.CAR not to be confusingly similar and one finding .CARS/.CAR to be confusingly similar. (See Charleston Road Registry, Inc. v. Koko Castle, LLC SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1377-8759-en.pdf> (finding no likelihood of confusion between .CARS/.CAR); Charleston Road Registry, Inc. v. Uniregistry, Corp. SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-845-37810-en.pdf> (finding no likelihood of confusion between .CARS/.CAR); and Charleston Road Registry, Inc. v. DERCars, LLC SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/14oct13/determination-1-1-909-45636-en.pdf> (finding likelihood of confusion between .CARS/.CAR).)

Here, none of the factors significant to the NGPC's decision to send the CAM/.COM, .通販/.SHOP, expert determinations back for re-evaluation exist for the Vistaprint Expert Determination. The Vistaprint SCO proceedings resulted in one Expert Determination, in favor of Web.com on both objections. There were no other conflicting SCO expert determinations on the same strings issued by different expert panels ending in a different result. One expert panel had all of the arguments in front of it and considered both objections in concert, and made a conscious and fully informed decision in reaching the same decision on both objections. In this regard, Vistaprint already had the same benefit of consideration of the evidence submitted in both objection proceedings by one expert panel that the CAM/.COM, .通販/.SHOP objections received on re-evaluation. Thus, a re-evaluation of the objections leading to the Vistaprint SCO Expert Determination is not warranted because it would only achieve what has already been achieved by having the same expert panel review all of the relevant proceedings in the first instance. Further, as discussed above, the NGPC has already considered the Vistaprint SCO Expert Determination as part of its deliberations on the scope of the SCO Final Review Mechanism, and determined that the objection proceedings leading to the Expert Determination did not warrant re-evaluation. Thus, while Vistaprint may substantively disagree with the Expert Determination, there is no evidence that it is "inconsistent" or "unreasonable" such that it warrants re-evaluation.

The Board's evaluation is guided by the criteria applied by the NGPC in reaching its determination on the scope of the Final Review Mechanism, the NGPC's consideration and determination on the existence of singular and plurals of the same word as TLD as set forth in Resolution 2013.06.25.NG07, the GNSO Final Report Introduction of New Generic Top-Level Domains, the Applicant Guidebook, including the mechanisms therein to address potential consumer confusion, the circumstances and developments noted in the Final

Declaration, and the core values set forth in Article I, Section 2 of the Bylaws. Applying these factors, for the reasons stated below, the Board concludes that a re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination is not appropriate because the Expert Determination is not “inconsistent” or “unreasonable” as previously defined by the NGPC or in any other way to warrant re-evaluation.

The Board considered the following criteria, among others, employed by the NGPC in adopting Resolutions 2014.10.12.NG02 – 2014.10.12.NG03:

- Whether it was appropriate to change the Guidebook at this time to implement a review mechanism.
- Whether there was a reasonable basis for certain perceived inconsistent expert determinations to exist, and particularly why the identified expert determinations should be sent back to the ICDR while other expert determinations should not.
- Whether it was appropriate to expand the scope of the proposed review mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the Vistaprint SCO Expert Determination.
- Community correspondence on this issue in addition to comments from the community expressed at the ICANN meetings.

(See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en>. In addition, the Board also reviewed and took into consideration the NGPC’s action on the existence of singular and plurals of the same string as a TLD in Resolution 2013.06.25.NG07.

As part of this decision, the Board considered and balanced the eleven core values set forth in Article I, Section 2 of the Bylaws. Article I,

Section 2 of the Bylaws states that “situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.” (Bylaws, Art. I, § 2, <https://www.icann.org/resources/pages/governance/bylaws-en/#I.>) Among the eleven core values, the Board finds that value numbers 1, 4, 7, 8, 9, and 10 to be most relevant to the circumstances at hand. Applying these values, the Board concludes that re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination is not warranted.

This action will have no direct financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system. This is an Organizational Administrative Function that does not require public comment.

**c. AOB**

**Directors and Liaisons,**

**Attached below please find Notice of date and time for a Regular Meeting of the ICANN Board of Directors.**

**3 March 2016 – Regular Meeting of the ICANN Board of Directors at 09:00 UTC (9:00am – 10:45am in Marrakech). This Board meeting is estimated to last approximately 1 hour, 45 minutes (if needed).**

*Note: timing of Board Meeting subject to change upon revisions to the overall Board schedule.*

<http://www.timeanddate.com/worldclock/fixetime.html?msg=Regular+Meeting+of+the+ICANN+Board&iso=20160303T09&p1=1996&ah=1&am=45>

**Some other time zones:**

**3 March 2016 – 1:00am PST Los Angeles**

**3 March 2016 – 4:00am EST Washington, D.C.**

**3 March 2016 – 10:00am CET Brussels**

**3 March 2016 – 5:00pm CST Taipei**

**3 March 2016 – 8:00pm AEDT Sydney**

## **REGULAR MEETING OF THE ICANN BOARD**

Main Agenda

- .AFRICA Update
- Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination
- AOB

**MATERIALS –**

If you have trouble with access, please let us know and we will work with you to assure that you can use the BoardVantage Portal for this meeting.

If call information is required, it will be distributed separately.

If you have any questions, or we can be of assistance to you, please let us know.

**John Jeffrey**

**General Counsel & Secretary, ICANN**

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