

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

DONUTS INC.	)	ICDR Case No. 01-14-0001-6263
Claimant,	)	
v.	)	
	)	
INTERNET CORPORATION FOR ASSIGNED	)	
NAMES AND NUMBERS,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

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**POST-HEARING MEMORANDUM OF CLAIMANT DONUTS INC.  
IN FURTHER SUPPORT OF REQUEST FOR INDEPENDENT REVIEW PROCESS  
RE NEW gTLD APPLICATIONS FOR .SPORTS and .RUGBY  
(Pursuant to Panel's Order of 14 October 2015)**

	THE IP & TECHNOLOGY LEGAL GROUP, P.C.
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<http://newgtlddisputes.com>

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## I. INTRODUCTION

1. By its Order of October 14, 2015, the Panel has given each party the opportunity to “consolidate, clarify, and refine its positions, with a view to assisting the Tribunal in composing its Declaration in this case” concerning the ICANN Board’s conduct regarding the .SPORTS and .RUGBY objection determinations. The Panel also invited discussion as to the impact, if any, of the recent IRP decision in *Vistaprint v. ICANN*.<sup>1</sup>

2. This Panel has received and heard substantial evidence of ICANN Board action and inaction contrary to ICANN’s Bylaws, Articles and other governing documents, including the Guidebook. While ICANN attempted at the hearing to portray Donuts’ election not to seek reconsideration of those rulings as somehow dispositive of this proceeding, this effort ignores the ample other evidence of Board action and inaction in the record, and the reality, which ICANN admits, that the Bylaws expressly do ***not*** condition IRP on filing a reconsideration.

3. The *Vistaprint* case differs significantly from this matter. Unlike in *Vistaprint*, here the Board had knowledge of events that violated ICANN’s Core Values and other precepts, giving it an obligation to avoid or correct such violations, as the *DCA* decision makes clear.

## II. DONUTS HAS SHOWN ENTITLEMENT TO IRP RELIEF.

4. As IRP decisions uniformly have held, the IRP standard of review accords no deference to ICANN. Rather, a Panel is “charged” with “comparing” contested actions and inactions with the Bylaws and Articles and “declaring” whether these governing charters have been violated, objectively and independently, with no presumption of correctness.<sup>2</sup>

5. Donuts has presented evidence that the .SPORTS community objection panelist failed to disclose a potentially disqualifying conflict of interest,<sup>3</sup> and that the ruling on that objection and on the .RUGBY community objection reflects a failure to apply policies documented in the Guidebook for the fair treatment of all new gTLD applicants,<sup>4</sup> contrary to

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<sup>1</sup> <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf>.

<sup>2</sup> See *Vistaprint* ¶¶ 123-126, citing *ICM Registry* ¶ 136, *Booking.com* ¶ 111, *DCA* ¶ 76.

<sup>3</sup> See Sarvarian Stmt. ¶¶ 32, 33; Edelman Stmt. ¶ 30; Opening Brief at 18.

<sup>4</sup> See Pritz Stmt. ¶¶ 16-24; Opening Brief at 20-21.

Bylaws Art. IV § 3.4.a and Art. I § 2.8, respectively. ICANN does not contest the merits of these issues. Instead, it simply argues that the Board had no *obligation* to act.

6. “ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program” in its entirety.<sup>5</sup> Donuts has laid out the sweeping range of the Board’s authority at length in its initial IRP request.<sup>6</sup> Such pervasive involvement makes the Board responsible for the transgressions raised in this case. Its obligations do not exist merely in the abstract. The Board has failed to act upon specific information of which it had express notice regarding the .SPORTS panelist’s conflict of interest and the “documented policies” violations attending both the .SPORTS and .RUGBY decisions.

**A. The Board Failed to Act on a Conflict Disclosed to It but Not to Donuts in Connection with the .SPORTS Community Objection.**

7. Donuts’ IRP request goes into great detail regarding the .SPORTS panelist’s conflict of interest. To summarize:

a. Jonathan Peter Taylor failed to provide a full disclosure in connection with the .SPORTS community objection.<sup>7</sup>

b. Not having full disclosure from Mr. Taylor, Donuts did not object to his appointment to the .SPORTS panel.<sup>8</sup>

c. Meanwhile, the ICC appointed Mr. Taylor to hear a separate community objection by SportAccord – this one against dot Sport, Ltd., applicant for a .SPORT gTLD. Dot Sport uncovered information regarding potential conflicts of interest that Mr. Taylor had failed to disclose, and challenged his appointment to the .SPORT panel.

d. The ICC removed Mr. Taylor from the .SPORT panel and replaced him with another expert. Despite having information regarding Mr. Taylor’s conflict, the ICC did not apprise Donuts of the conflict or remove him from Donuts’ .SPORTS case.<sup>9</sup>

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<sup>5</sup> AGB (App. C) § 5.1.

<sup>6</sup> IRP Req. ¶¶ 25-30.

<sup>7</sup> Opening Brief at 17-18.

<sup>8</sup> *Id.* at 18; *see also* Nevett Stmt. at ¶ 18.

<sup>9</sup> Opening Brief at 18.

8. This egregious set of circumstances, which at minimum required disclosure that Mr. Taylor did not provide,<sup>10</sup> did not go unnoticed by ICANN. Though the ICC did not provide other applicants with information regarding Mr. Taylor's potential conflicts, it certainly brought the dot Sport request to disqualify Mr. Taylor to ICANN's attention.<sup>11</sup> In turn, ICANN made detailed inquiries of the ICC regarding dot Sport's conflict allegations. Dot Sport began to include ICANN Board members Fadi Chehadé and Cherine Chalaby,<sup>12</sup> as well as Chris LaHatte, ICANN's Ombudsman, on its communications, after which ICANN staff made further inquiries of the ICC.<sup>13</sup> Under the *DCA* case, discussed *infra* § III, the Board cannot ignore such problems.

**B. The Board Failed, Despite Specific Requests, to Ensure Proper Application by Community Objection Panels, Including for .SPORTS and .RUGBY, of Standards Documented for Such Objections in the Guidebook.**

9. ICANN created the new gTLD program to promote free competition and expression in the namespace.<sup>14</sup> The Board approved the Guidebook in furtherance of those goals.<sup>15</sup> The Guidebook sets forth detailed standards for applicants as well as those who would challenge their applications. Applicants such as Donuts invested substantially in reliance on the employment of standards documented in the Guidebook in a predictable manner.

10. Community objections posed a particular threat, as explained at the hearing,<sup>16</sup> by providing a way to exclude others from competition that parties may not have had by more recognized means such as trademark. Because a successful objection disables the losing party from going forward with its application,<sup>17</sup> it creates an incentive to construe a community in an effort to eliminate competitors – an outcome that ICANN did not foresee.<sup>18</sup>

11. ICANN did implement procedures to guard against abuses and create uniformity and predictability in the new gTLD program. These existed, for example, in the Initial Evaluation

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<sup>10</sup> Sarvarian Stmt. ¶¶ 32, 33.

<sup>11</sup> Ex. 67 at 000079 *et seq.*

<sup>12</sup> See <https://www.icann.org/resources/pages/board-of-directors-2014-03-19-en>.

<sup>13</sup> Ex. 67 at 000071-72.

<sup>14</sup> AGB (App. C) Preamble, § 1.1.2.3, Mod. 2 Attmt. at A-1.

<sup>15</sup> *Id.* Preamble, § 1.2.11.

<sup>16</sup> Transcr. at 28-31.

<sup>17</sup> See AGB (App. C) Module 3.

<sup>18</sup> See Pritz Stmt. ¶¶ 16-18.

(“IE”) phase of the application process. ICANN also maintained tight control over a process known as “community priority evaluation” (“CPE”), an area similar to but separate from community objections, including by reviewing individual CPE determinations.<sup>19</sup>

12. While the Board has the same power over new gTLD *objections*,<sup>20</sup> it admits to having chosen consciously not to use it. ICANN made that choice discriminatorily and despite specific and sustained exhortations to take action from a broad constituency including Donuts.

13. Specifically, Donuts joined with a number of other applicants, large and small, in a November 2013 letter urging the Board to act to correct and prevent community objection rulings exceeding or failing to apply documented Guidebook standards. The letter suggested, among other things, a review mechanism and panelist training.<sup>21</sup> The Board did not respond.

14. The Board did propose in February 2014 an avenue to review certain perceived inconsistent “string confusion” objection results.<sup>22</sup> Donuts commented in support of the proposal and urged its extension to inconsistent community objection determinations.<sup>23</sup>

15. The Board refused to act on such requests. Instead, it adopted in October 2014 the limited review mechanism it had proposed eight months earlier.<sup>24</sup> The Board cited its “ultimate responsibility” for the new gTLD program as authority for its action.

16. The Board knew how to act when presented with an inequity. It had acted in other contexts, such as IE and CPE, by establishing advance procedures or participating in decision-making to maintain predictability for applicants. It did nothing to protect against or rectify the failure to apply the Guidebook’s documented policies in the case of .SPORTS and .RUGBY, despite having notice of such failures and inconsistencies from Donuts and others.

**C. Donuts Need Not Have Sought Reconsideration Before Filing for IRP.**

17. Notwithstanding the foregoing, ICANN contended at hearing that the Board had no duty to act. Among other things, ICANN’s counsel noted that Donuts did move for

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<sup>19</sup> See Hearing Exh. 62 at 117, 119.

<sup>20</sup> AGB (App. C) §§ 3.1, 5.1.

<sup>21</sup> Ex. 52 at 5.

<sup>22</sup> <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>.

<sup>23</sup> Ex. 51 at 2.

<sup>24</sup> <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en>.

reconsideration of the objection rulings, which would have resulted in a determination to which it could point as Board action or refusal to act.<sup>25</sup> This position ignores the Bylaws and reality.

18. First, the Bylaws do not make reconsideration a prerequisite to IRP.<sup>26</sup> ICANN concedes this, yet contends it would be “appropriate” nonetheless to saddle Donuts *ex post facto* with that obligation.<sup>27</sup> ICANN’s subjective position directly opposes the Bylaws, which make reconsideration and IRP separate, independent accountability methods.<sup>28</sup>

19. Second, Donuts *had* sought reconsideration in prior other objection cases.<sup>29</sup> It met the same fate as all but one of over a hundred requestors whose cases the BGC had rejected by that time.<sup>30</sup> In both decisions, the Board committee ruling on Donuts’ requests ended up simply “punting” to the Ombudsman stating that it would not consider reconsideration of an objection result.<sup>31</sup> Neither the Bylaws nor common sense required Donuts to keep traveling the “dead-end” reconsideration road.

20. Third, Donuts *did* take ICANN up on its invitation to explore Ombudsman investigation and invoked that additional accountability procedure. The Bylaws establish an Ombudsman appointed by, and who reports to, the Board.<sup>32</sup> Shortly after the .SPORTS and .RUGBY rulings, Donuts lodged a complaint with the Ombudsman,<sup>33</sup> who in a report to Donuts and the Board determined that he did not have jurisdiction. Donuts then invoked the “cooperative engagement process” provided under the Bylaws prior to instigating this IRP.<sup>34</sup>

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<sup>25</sup> Transcript at 79:21-80:22.

<sup>26</sup> See Bylaws (App. A) at Art. IV, Sections 2 and 3.

<sup>27</sup> See Transcr. at 140: “And then finally a question of whether it's a prerequisite to file a reconsideration motion. Mr. Genga is absolutely correct. There's nothing that requires an applicant to file a reconsideration request. But if you have a problem with a procedure that wasn't followed, that's the appropriate thing to do, it's the logical thing to do.”

<sup>28</sup> Indeed, as noted in Donuts’ Opening Brief, the Board amended the Bylaws (including IRP provisions in Art. IV) after the *ICM* decision, but for whatever reason chose ***not*** to tie Reconsideration to IRP. See Opening Brief at 5.

<sup>29</sup> See <https://www.icann.org/resources/pages/14-3-2014-01-30-en> (re: .CHARITY) and <https://www.icann.org/resources/pages/13-23-2014-02-14-en> (re: .HOSPITAL).

<sup>30</sup> See IRP Req. ¶ 20.

<sup>31</sup> See, e.g., <https://www.icann.org/en/system/files/files/determination-ruby-pike-05feb14-en.pdf> at 15: “If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.”

<sup>32</sup> Bylaws (App. A) Art. V §§ 1.2, 1.4, 2, 3.1, 4.4.

<sup>33</sup> Nevett Stmt. ¶18.

<sup>34</sup> *Id.* ¶19; Transcript at 56.

21. ICANN appears to assert that all aggrieved parties are bound to have requested the futile reconsideration process before initiating an IRP. In this case, lack of a reconsideration request is a complete non-issue. Donuts has demonstrated ample notice to the Board, which provided it with the opportunity to act, as with:

- a. ICANN's notice of and inquiry into the .SPORT panel conflict issue;
- b. Calls for training and review of panelists both before and after the .SPORTS and .RUGBY objection determinations;
- c. Establishment of analogous protective measures in other new gTLD contexts, such as with IE and CPE;
- d. The Board's proposal for and adoption of review of certain inconsistent objection results;
- e. The demonstrated pointlessness of reconsideration; and
- f. Donuts' invocation of other accountability mechanisms, such as Ombudsman review and CEP.

The foregoing demonstrates sufficient Board inaction. Donuts does not need, and the Bylaws do not require it have, a denial of a reconsideration request in order to show Board action and inaction; therefore, Donuts is entitled to IRP relief.

22. As recognized by other IRP panels, ICANN is not an ordinary organization, even for a nonprofit. It is specifically charged with managing a public resource, the global domain name system ("DNS"), for the benefit of its worldwide users. *DCA* ¶167, 94; Bylaws Article IV. Such a charter mandates that ICANN act, through its Board,<sup>35</sup> accountably and transparently, with fairness and without conflict of interest. This is particularly true as it transitions away from oversight by the United States government, which, along with other wide constituencies, has publicly criticized ICANN's lack of accountability during this especially crucial period.<sup>36</sup>

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<sup>35</sup> "[T]he powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board." Bylaws (App. A) Art. II § 1.

<sup>36</sup> See Oct. 15, 2015 Letter from U.S. Senate Committee on Commerce, Science & Transportation concerning ICANN accountability issues, *copy available at: <https://www.icann.org/en/system/files/correspondence/thune-schatz-to-crocker-15oct15-en.pdf>*; see also IRP Req. ¶ 22 and n.3.

23. This IRP represents the sole remaining means for Donuts to obtain redress for the irreparable injury of having no ability to compete for the .SPORTS and .RUGBY domains. This Panel can hold ICANN accountable and grant relief to Donuts as set forth below.

### III. IRP PRECEDENT SUPPORTS THE RELIEF DONUTS SEEKS.

24. The *DCA* case continues to present the closest analogy to the instant dispute. There, requestor DCA claimed that the ICANN Board, among other things, failed to investigate information suggesting that the GAC had a conflict of interest when “advising” the Board not to proceed with DCA’s application for .AFRICA.<sup>37</sup> ICANN argued that the Guidebook, sec. 3.1, required the Board to adopt the GAC’s position unless the Board could supply a “reasoned and well-supported rationale for not accepting” it, which ICANN said it had no obligation to do.

25. The *DCA* panel rejected this attempt by the Board to escape responsibility. It held ICANN “bound by its Bylaws to conduct adequate diligence to ensure that it was applying its procedures fairly” – *i.e.*, that the Board properly *could* follow the GAC advice. Once apprised of a potential conflict, the Board could not do so without investigating the claim; the failure to investigate violates the Board’s duty under the Bylaws to act fairly, objectively and without conflict of interest.<sup>38</sup>

26. Here, similarly, ICANN contends that Guidebook section 3.4.6 compels it to accept expert objection determinations. As in *DCA*, however, the Board has ultimate decision-making authority under the Guidebook and, under that case, no discretion not to use it when confronted with information or processes that contravene the Bylaws or Articles.<sup>39</sup>

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<sup>37</sup> Requestor DCA introduced evidence that a member who influenced the GAC advice stood to gain personally by obtaining a position with the applicant who would obtain the string once the Board rejected the DCA application. These facts are analogous to the hypothetical, posed by Mr. Boesch at the hearing, of whether the Board’s duty to act (or opportunity for IRP panel review) arises in the extreme situation where a “bagman” provided someone a “hundred grand under the table to make his decision.” Transcr. at 89-90. In response, Counsel for ICANN surprisingly maintained the position that – absent Reconsideration – there would be no “Board Action,” no duty to conduct even *reasonable diligence* into what happened, and an IRP Panel lacks authority to get involved. *Id.* at 90. This contravenes the ruling in *DCA*. See *DCA* at 54.

<sup>38</sup> *Id.* at 45-46.

<sup>39</sup> *Id.* at 46; see also *Vistaprint* at 67: “The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as ‘defensible’, that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an



27. *Vistaprint* does not vitiate the precedential effect of *DCA* on this case. That IRP involved a “string confusion” objection ruling holding *Vistaprint*’s proposed .WEBS gTLD confusingly similar to .WEB. *Vistaprint* alleged five grounds for review that did little more than express dissatisfaction with the objection result. The panel found no evidence that the Board did or failed to do anything relating to any of those grounds, and rejected them outright.<sup>40</sup> Indeed, it concluded that, absent a reconsideration request that represented the sole means by which *Vistaprint* made the Board aware of its claims, an IRP would have had nothing upon which to base any ruling. The panel did use broad language, ruling, on the scant facts of that case, “that in the absence of a party’s recourse to an accountability mechanism ..., the ICANN Board has no affirmative duty to review the result in any particular SCO case.”

28. The panel found no other facts triggering a duty on the part of the Board, whereas here the Board had abundant notice of facts that gave it a duty to act. Indeed, Donuts utilized an accountability resource, the Ombudsman, as *Vistaprint* held critical. *Vistaprint* also concluded that the Board had discharged its duty of accountability in reconsideration, considering and carefully analyzing *Vistaprint*’s claims in a 19-page ruling. Here, by contrast, the Board *chose* consciously *not* to act so as to discharge its duty.

29. ICANN may seek to characterize *Vistaprint* as not holding the Board accountable for conflicts of objection panelists. However, the decision does not go nearly so far, limited to an unusual set of facts that differs completely from those in this case. In essence, *Vistaprint* urged that an alleged conflict of one panelist did not suffice to discharge him, and that the new expert demonstrated bias simply by an errant decision.<sup>41</sup> Here, by contrast, Donuts has revealed conflicts that the appointee should have disclosed and which should have disqualified him;<sup>42</sup> did lead to his removal in a nearly identical case;<sup>43</sup> and were disclosed to the Board. The Panel will find *DCA* controlling and *Vistaprint* and *Booking.com* inapposite.

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arbitrary exercise of discretion.” (quoting GCC Interim IRP Declaration at ¶¶ 76-77, available at <https://www.icann.org/en/system/files/files/interim-declaration-emergency-protection-redacted-12feb15-en.pdf>).

<sup>40</sup> *Vistaprint* at 58-60.

<sup>41</sup> *Vistaprint* at 54-57.

<sup>42</sup> Sarvarian Stmt. ¶¶ 25-30.

<sup>43</sup> See Exh. 13.

#### IV. DONUTS SHOULD PREVAIL AND OBTAIN RELIEF.

30. The *DCA* case resulted in a “declaration” that the Board violated its Core Values in a number of ways.<sup>44</sup> The panel in that case also made a “recommendation” that ICANN “refrain from delegating the .AFRICA gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.”<sup>45</sup>

31. In *Vistaprint*, the panel did not find, and thus could not “declare,” any specific Bylaw violation. It nonetheless issued a “recommendation” that ICANN give due consideration to Vistaprint’s claim of discrimination,<sup>46</sup> which the panel had found not “ripe” for IRP review because the Board had not considered it.<sup>47</sup> The Board is following that recommendation.<sup>48</sup>

32. Taken together, these cases reflect that an IRP can both “declare” that the Board has acted or failed to act in a manner contrary to the Bylaws or Articles, and “recommend” that the Board do or refrain from doing something. Such “declarations” and “recommendations” have “precedential value” and “bind” ICANN.<sup>49</sup>

33. This Panel may “declare” that two primary Bylaw violations have occurred here. The most glaring, of course, is the Board’s failure to conduct adequate diligence into the handling of Mr. Taylor’s undisclosed conflicts. The Board also allowed documented policies to be applied in an unfair and discriminatory manner by not seeing to the training or oversight of community objection experts in both .SPORTS and .RUGBY. The Panel also may “recommend” that the objection rulings not stand or the proceedings be redone.<sup>50</sup>

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<sup>44</sup> *DCA* ¶¶ 102, 105.

<sup>45</sup> *Id.* ¶ 149.

<sup>46</sup> Vistaprint had claimed discrimination “through the Board’s acceptance of the ... Expert’s determination in the Vistaprint SCO while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation.” *Vistaprint* at 60.

<sup>47</sup> *Id.* ¶ 197.

<sup>48</sup> See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d>.

<sup>49</sup> *Vistaprint* ¶ 126; *DCA* ¶ 24; *Booking.com* ¶ 113.

<sup>50</sup> Using a sports analogy, the Panel should keep in mind that declaring a Bylaw violation here will not necessarily reverse the outcome based solely on a “bad call,” such as a yardage measurement, foul ball or traveling violation. It also will not automatically give an objection victory to a participant who had previously lost. Rather, it would simply allow Donuts to compete on *equal footing* with those who had gained an *unfair advantage* based on ethical violations that affect the integrity of the “game” itself. Whether that equal footing entails a fair evaluation by the Board of technical competency, marketing resources, or even simply who is the highest bidder at auction, the proverbial “level playing field” is all that Donuts has ever

34. In *DCA*, the panel declared two violations, and deemed *DCA* to have “prevailed.” It ordered ICANN to bear all costs (but not attorneys’ fees) of the proceedings.<sup>51</sup> The *Vistaprint* and *Booking.com* cases each deemed ICANN to have prevailed because they found no “violation” to “declare.” In each case, though, the panels still chose to allocate costs to both ICANN and the claimant, due to “public interest” concerns implicated by these proceedings.<sup>52</sup> Assuming that this Panel “declares,” as it should, that at least one Bylaw “violation” has occurred, whether in the context of .SPORTS or .RUGBY, it should find Donuts the “prevailing party” in this case and allocate costs entirely to ICANN.

DATED: October 29, 2015

Respectfully submitted,

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sought. Still, in situations involving these types of serious questions – especially where a sporting organization has, like ICANN, a special public interest mission, such as the NCAA in protecting education – the fact is that game results, individual player awards and even *entire seasons* have been retroactively vacated if the contest was tainted by corruption or dishonesty.

<sup>51</sup> *DCA* ¶ 150.

<sup>52</sup> *Booking.com* ¶ 154 (50%-50% split); *Vistaprint* ¶ 197 (60%-40% split).