

December 26, 2013

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**VIA E-MAIL – RECONSIDERATION@ICANN.ORG**

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Chair, New gTLD Program Committee

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Bill Graham, Ms. Olga Madruga-Forti, Ms.  
Erika Mann, Mr. Gonzalo Navarro, Mr.  
Raymond A. Plzak, Mr. George Sadowsky,  
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Heather Dryden, Mr. Francisco da Silva, Mr.  
Jonne Soininen  
Members, New gTLD Program Committee

12025 Waterfront Drive, Suite 300  
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Re: BGC Recommendation of October 29, 2013 on Reconsideration Request 13-12

Dear Members of the New gTLD Program Committee (“NGPC”):

I am writing to you on behalf of Tencent Holdings Limited (“Tencent”). On October 29, 2013, the Board Governance Committee (“BGC”) published its recommendation on Tencent’s Reconsideration Request 13-12 (the “BGC Recommendation”). This BGC Recommendation related to the erroneous decisions by the World Intellectual Property Organization (“WIPO”) Arbitration and Mediation Center (the “WIPO Center”) against Tencent’s .微博 and .weibo top level domain (TLD”) objections (“Objections”).

The BGC recommended that Tencent’s Reconsideration Request 13-12 be denied without further consideration. We ask you to critically review and reject that recommendation,

because the BGC Recommendation is based on flawed grounds. Acceptance of the BGC's Recommendation by the NGPC therefore would be in violation of ICANN's bylaws, specifically, Article IV, Section 2.2(a).<sup>1</sup> As explained below, 1) the objector Sina Corporation did not have standing to file the LRO objection against Tencent as Sina Corporation does not own the Legal Rights asserted; and 2) the BGC Recommendation also defended the erroneous determinations by the panels in the Objections, which failed to follow established principles of Chinese law – as further documented in the law suit Tencent recently filed in China against Sina.com.

**I) The BGC failed to recognize a violation of the ICANN guidelines in the Applicant Guide Book (“AGB”) and its attached Procedure.**

**A) The Objector in the Objections did not meet the standing requirement set forth in the AGB.**

The BGC Recommendation suggests that “Tencent has not established that the Panel ‘failed to follow ICANN guidelines for assessing legal rights objections (‘LROs’).” (BGC Recommendation at P. 6). However, the BGC failed to give Tencent's correspondence to the BGC dated October 9, 2013 adequate consideration. The October 9 letter clearly showed that dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or the attached Procedure, were not followed by the WIPO Center.

In the present case, sections 1.1.2.6 and 3.2.2 of the AGB provide that “objections to applications can be filed ... by **parties with standing to object,**” and “[o]bjectors **must satisfy standing requirements to have their objections considered.**” (Emphasis added). For an LRO, **only** a “rightsholder has standing to file.” (AGB § 3.2.2.2, emphasis added). The

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<sup>1</sup> Article IV, Section 2.2(a) of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by: (a) one or more staff actions or inactions that contradict established ICANN policy(ies)....”

AGB further requires that “[t]he source and **documentation of the existing legal rights the objector is claiming** (which may include either registered or unregistered trademarks) are infringed by the applied-for gTLD **must be included in the filing.**” (AGB § 3.2.2.2, emphasis added). Thus, ICANN guidelines set forth in the AGB clearly require an objector to meet the standing requirements before the objector can bring an objection against a new gTLD applicant.

Here, the Objector listed in the Objections is “Sina Corporation.”<sup>2</sup> Sina Corporation refers to several Chinese Trademarks (“Trademarks”) in the Objections, including Chinese Trademark Registration No. 7649615 (“Trademark No. 7649615”), as its basis for standing.<sup>3</sup> However, **documents submitted to the WIPO Center by Sina Corporation** identify the Trademark registrants and owners as Sina.com Technology (China) Co. Ltd. (“Sina.com”) or Sina.com Online, and not Sina Corporation.<sup>4</sup> Sina.com and Sina.com Online are wholly-owned subsidiaries of Sina Corporation.<sup>5</sup> Thus, Sina Corporation lacks standing.

Under trademark laws, a parent corporation cannot assert rights in trademark registrations owned by its subsidiary. *See Hertz Corp. v. Knickerbocker*, 206 F. Supp. 305, 306 (S.D.N.Y. 1962). The lack of standing to assert the LROs is a fatal flaw. In *Old Republic Home Protection Co., Inc. v. Direct Privacy ID 7F9AB*, D2012-2366 (WIPO Jan 11, 2013), a WIPO panelist dismissed a Uniform Domain Name Dispute Resolution Policy (“UDRP”) complaint as “moot... [b]ecause the Complainant has failed to prove on the provided record in these proceedings that it owns [the trademark]..., or that the owner of the [trademark] has consented

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<sup>2</sup> Request 13-12 at <http://www.icann.org/en/groups/board/governance/reconsideration>, Ex. 1 at p. 1.

<sup>3</sup> Letter from Zhou Ligu to the Board Governance Committee at <http://www.icann.org/en/groups/board/governance/reconsideration>, Attachment A, Annex 10 - Sina's LRO against IDN; Request 13-12, Ex. A at p.

<sup>4</sup> Letter from Zhou Ligu to the Board Governance Committee, Annexes 9 and 10.

<sup>5</sup> *Id.* at Annex 9

to its use of the mark.” *See also Cyro Industries v. Contemporary Design*, D2000-0336 (WIPO June 19, 2000) (the Panel found that the Claimant had supplied insufficient proof of its rights to the trademarks at issue, because the Claimant had submitted “no affidavit, no copy of any underlying assignment(s) of the trademarks, nor any other evidence proving Complainant’s rights in the trademarks”).

As in those cases, Sina Corporation failed to provide proof that it owns the trademarks on which the Objections were based. Sina.com and Sina.com Online, the record owners of those trademark registrations, were not listed as objectors in these Objections. Nor did they file the Objections. Sina Corporation therefore did not have standing to bring the Objections. The WIPO Center clearly failed to verify that the Objector had standing during the administrative review of the Objections. If the WIPO Center had complied with the AGB, the Objections should have been dismissed at the onset for lack of standing. The panelists’ ruling on the Objections also failed to verify that Sina Corporation had met its standing requirements under the AGB and Article 8 of the Procedure. Therefore, the WIPO Center should not have allowed these Objections to proceed.

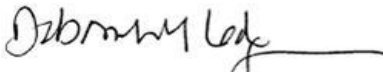
**B) Tencent recently filed a lawsuit in China against the owner of the Trademark No. 7649615, which is not the Objector, Sina Corporation.**

On October 22, 2013, Tencent filed a declaratory action in the People’s Court of Nanshan District against the owner of Trademark No. 7649615, Sina.com Technology (China) Co., Ltd. On December 16, 2013, the Nanshan District People’s Court accepted this litigation, case no. (2013) SNFZMCZ NO. 1186. We have attached copies of the litigation documents and their English translations for your review. Sina Corporation is not a defendant or party to the suit, because it does not own Trademark No. 7649615.

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Based on the above and Tencent's Request for Reconsideration, the WIPO Center should not have allowed the Objections to proceed due to Sina Corporation's lack of standing as defined in the AGB. That lack of standing is a fatal flaw. By allowing the Objections to proceed to determination in violation of the AGB, the WIPO Center treated Tencent unfairly. ICANN's acceptance of the WIPO Center panel determinations or failure to dismiss these flawed Objections would compound this unfair treatment of Tencent, in violation of ICANN's Bylaws. Tencent respectfully requests that the NGPC reject the BGC recommendation, accept Tencent's Reconsideration Request and dismiss the Objections for lack of standing per ICANN's established policies in the AGB.

Sincerely,

  
Deborah M. Lodge

cc: Tencent Holdings Limited

Attachments