

**REFERENCE MATERIALS TO NEW gTLD PROGRAM COMMITTEE
SUBMISSION 2013-10-XX-XX**

TITLE: **Reconsideration Request 13-6**

Summary Background

While the full background can be found in the documentation attached to these Reference Materials, Reconsideration Request 13-6 brought by Hotel Top-Level-Domain S.a.r.l (“dotHotel”) seeks reconsideration of the 8 August 2013 Expert Determination from a dispute resolution panel established by the International Centre for Dispute Resolution dismissing dotHotel’s objection to the new gTLD application for .HOTELS. The BGC evaluated Request 13-6 at its 25 September 2013 meeting and recommended that the Request be denied and that no further action be taken in response to the Request. As detailed in the Recommendation and documents attached to this Reference Materials, the BGC determined that dotHotel has not stated proper grounds for reconsideration because it failed to identify the policy that was allegedly violated by the Staff action.

The New gTLD Program Committee agrees with the BGC and is adopting the BGC Recommendation and Reconsideration Request 13-6.

Document/Background Links

The following attachments are relevant to the BGC’s recommendation regarding Booking.com’s Reconsideration Request 13-6.

Attachment A is [Reconsideration Request 13-6](#), submitted on 23 August 2013.

Attachment B is the [Attachment to Request 13-6](#), submitted on 23 August 2013.

Attachment C is the [Letter from Flip Petillion to Bruce Tonkin](#), submitted on 30 August 2013.

Attachment D is the [Letter from Christopher Klenner, ET TSA, to the BGC](#), submitted on 19 September 2013.

Attachment E is the [Letter from Flip Petillion to Bruce Tonkin](#), submitted on 23 September 2013.

Attachment F is the [BGC's Recommendation on Reconsideration Request 13-6](#), issued on 25 September 2013.

Attachment G is a [Letter from Johannes Lenz-Hawliczek to the BGC](#), submitted on 26 September 2013.

Submitted by:	Amy A. Stathos
Position:	Deputy General Counsel
Date Noted:	21 November 2013
Email:	amy.stathos@icann.org

.HOTEL AND .HOTELS STRING SIMILARITY OBJECTION

Reconsideration Request

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: HOTEL TOP-LEVEL-DOMAIN S.a.r.l

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

The action we are seeking to have reconsidered is the Expert Determination of the New gTLD String Confusion Objection regarding the strings .HOTEL and .HOTELS (HOTEL Top-Level-Domain S.a.r.l, Objector, and BOOKING.COM B.V., Applicant; International Centre for Dispute Resolution, 50 504 T 00237 13, 8 August 2013 (hereinafter the “.HOTEL Determination”). The .HOTEL Determination is attached as Document 1.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

8 August 2013

5. On what date did you become aware of the action or that action would not be taken?

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

8 August 2013

6. Describe how you believe you are materially affected by the action or inaction:

As described in Section 8 below, the failure of the panelist in the present matter to make his determination independently without regard to ICANN’s prior action, and the failure of ICANN staff to incorporate suitable quality control provisions into the String Confusion Objection process, unlike other aspects of

the ICANN new gTLD process, constitute material failures of process. Such failures have led to a flawed decision in the instant case and have further led to inherently inconsistent results among similarity situated applicants. These breaches of process have led to the potential co-existence of .HOTEL and .HOTELS strings in the Root Zone, despite other singular/plural strings which have been placed into the same contention set to minimize this harm. This potential co-existence not only creates user confusion and harms in potential users of the Domain Name System but also negatively impacts the commercial viability of Applicant's business plan.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

Internet users and members of the .HOTEL community will be adversely affected by creating an environment in which similar domain names will lead to confusion as to sources of goods and services and other aspects of the hotel industry.

As noted above, there is a growing divergence in the String Confusion Objection decisions being administered by The International Centre for Dispute Resolution (ICDR) (see also cases .COM/.CAM and .PET/.PETS and .CAR/.CARS and .SPORT and .SPORTS). ICANN Staff's failure to include suitable Quality Control provisions and reconsideration mechanisms into this aspect of the New gTLD program, unlike other aspects (e.g. Initial Evaluation and Community Priority Evaluation), has created the potential for similarly situated singular/plural strings to co-exist in the name space, while others of the same kind would be prohibited. This co-existence would lead to potential consumer confusion, increased defensive registrations, and a total lack of predictability for current and future gTLD applicants. The fact that a coexistence of similar singular and plural gTLDs induces and rewards parasitical defensive registrations of registrants with the obviously confusingly string .HOTELS have been stated at Domainincite.com already in June 2013: "Buying two domains instead of one may not be a huge financial burden to individual registrants, but it's going to lead to situations where gTLDs exist in symbiotic – or parasitic – pairs."

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies).

Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. “Material information” means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

Although the subject String Similarity Objection was determined by a third party vendor, ICANN has determined that the Reconsideration process can properly be invoked for challenges of a third party’s decision where either the third-party vendor failed to follow its process in reaching a decision or ICANN staff fails to follow its process in accepting that decision. [Recommendation of the Board Governance Committee (BCG) Reconsideration Request (hereinafter “Reconsideration Request”) 13-5, 1 August 2013, page 4.]

In the present instance of the .HOTEL Determination, it is evident that the panelist deeply failed to follow the appropriate process in evaluating the merits of the Objection, resulting in a fundamentally flawed decision that should be disregarded by ICANN staff and not accepted as advice.

In his decision, the panelist notes, “I find persuasive the degrees of similarity or dissimilarity between the strings by use of the String Similarity Assessment Tool . . . , that ICANN did not put the applications for .HOTEL and .HOTELS in the same contention set . . .” [Hotel Determination, page 4].

The String Confusion Objection was designed to take a second look at and beyond the results of the ICANN string similarity panel. This is apparent from the fact only after having been found not confusingly similar by ICANN does an applicant have standing in the String Confusion Objection process. [“Any gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation.” Applicant Guidebook, 3.2.2.1, String Confusion Objection.]

The panelist in .HOTEL v. .HOTELS admits that the fact that ICANN did not find the two strings confusingly similar was a material point of persuasion to him in making his decision. However, it was *because* ICANN did not find the two strings confusingly similar that the objection could be brought in the first place. As a point of process, ICANN’s decision on the matter should have had no bearing on the panelist’s decision. The panelist’s consideration of, and reliance in material part upon, the previous action of ICANN marks a serious breach of process within the String Similarity Objection procedure, and should invalidate his determination in this matter.

Further, the failure of ICANN staff to incorporate suitable quality control provisions into the String Confusion Objection process, unlike other aspects of the ICANN new gTLD process, constitutes a material failure of process. Such failure has led to a flawed decision in the instant case and has further led to inherently inconsistent results among similarity situated applicants. This is in contrast to the policy of Quality Assurance that ICANN staff have demonstrated in almost every other part of the New gTLD application process. The reviewing panels in Initial Evaluation were part of a careful testing process before actual evaluations were conducted.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

We request that the .HOTEL Determination be disregarded by ICANN and not accepted as advice. We further request that a different panelist be appointed to rehear the .HOTEL v. .HOTELS objection on a *de novo* basis. This is the only way to ensure that the inappropriate deference toward ICANN’s decision to

not include the two strings in a contention set that was admitted to by the present panelist is removed from the decision making process.

Further, we request the institution of appropriate Quality Control provisions within the String Similarity Objection process to ensure the consistency of decisions of panelists, similar to those approved by ICANN in connection with Initial Evaluation and Community Priority Evaluation. At a minimum, ICANN should work with ICDR to review all String Confusion Objections to make sure that the Panelists were properly trained and to ensure “consistency of approach,” i.e. CPE Pilot Testing Program.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board’s decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

We have invested substantial time, effort, and financial resources to participate in ICANN’s New gTLD program based upon certain commercial representations made by ICANN.

Our participation in the String Similarity Objection process was predicated on our reliance upon the appointment of a panelist that would conduct an impartial, independent and objective assessment of the claims in our objection. The obvious dependence upon, and inappropriate deference to, the prior decision of ICANN with respect to the .HOTEL and .HOTELS strings by the panelist in the instant matter constitutes a material breach of ICANN’s process set forth in the String Similarity Objection process set forth in the New gTLD Guidebook. Objections are entitled to be reviewed precisely because ICANN did not find the strings confusingly similar, not in deference to that decision.

Further, ICANN staff's failure to incorporate suitable Quality Control mechanisms in the objection process has led to inconsistent results among highly analogous fact patterns. Applicant and the community which it represents will be harmed if the .HOTEL and .HOTELS are permitted to co-exist.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Yes, the Panelist's decision in the .HOTEL Determination is attached as Document 1.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Katrin Ohlmer

Signature Ms. Katrin Ohlmer

____23 Aug 2013____

Date

Johannes Lenz-Hawliczek

Signature Mr. Johannes Lenz-Hawliczek

____23 Aug 2013____

Date

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

New gTLD String Confusion Panel

Re: 50 504 T 00237 13

HOTEL TOP-LEVEL-DOMAIN
S.a.r.l, Objector

and

BOOKING.COM B.V., Applicant

String: <.HOTELS>

EXPERT DETERMINATION

The Parties

The Objector is HOTEL Top-Level-Domain S.a.r.l (“Objector”) and is represented by Dirk Krischenowski of Objector.

The Applicant is Booking.com B.V. (“Applicant”) and is represented by Flip Petillion of Crowell & Moring.

The New gTLD String Objected To

The new gTLD applied for and objected to is: <.HOTELS.>

Prevailing Party

The Applicant has prevailed, and the Objection is dismissed.

The New gTLD String Confusion Process

Module 3 of the ICANN Applicant Guidebook (“AGB”) contains Objection Procedures and the new gTLD Dispute Resolution Procedures (“the Procedure”).

Article 1(b) of the Procedure states that “The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person and entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this new gTLD Dispute Resolution Procedure.”

As expressed in the AGB and the Procedure, there are four (4) grounds to object to the registration of new gTLDs. One of these grounds expressed String Confusion, as described in DRP Article 2(e)(i): “(i) ‘String Confusion Objection’ refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.”

Article 3(a) states that “String Confusion Objections shall be determined by the International Centre for Dispute Resolution.”

Procedural History of this Case

Applicant filed its Application for the string .HOTELS. Objector timely filed and served its String Confusion Objection dated March 13, 2013 with attachments Annex A1 through A5 (“Objection”). The Applicant timely filed and served its gTLD Response to String Confusion Objection dated May 16, 2013 with attachments 1 – 63 (“Response”). The International Centre for Dispute Resolution appointed the undersigned as expert (ICDR letter to parties, June 14, 2013).

Basis for Objector’s Standing to Object based on String Confusion

Objector is an applicant for gTLD string .HOTEL. The applications by Applicant (for .HOTELS) and Objector (for .HOTEL) are not in the same contention set.

Parties’ Contentions

The Objector (HOTEL Top-Level-Domain S.a.r.l) contends that registration of the applied-for string .HOTELS and its co-existence with .HOTEL would be confusing on multiple bases and would cause detriment and disruption. (Objection, Pars. 2b1-8, 3, 3a-b and e) It contends that the meaning of “hotel” and “hotels” is and is perceived as essentially identical notwithstanding that “hotels” is plural. It also contends that there is minimal acoustic difference between the words and that if registration were approved there would be potential for deceit and cybersquatting. Objector also states, in support of its objection on string confusion grounds, that others have filed community objections. Objector summarizes that co-existence of the two strings would likely deceive or cause confusion, that confusion would arise in the mind of the average reasonable internet user and consumer and that substantial detriment would arise therefrom. (Id., Par. 5)

The Applicant (Booking.com B.V.) contends that the Objection fails to meet the stringent burden to prove string confusion and asserts grounds beyond those subject to review by a string confusion panel, and that there is no likelihood of confusion between the strings. It contends that the strings are not confusingly similar, citing multiple comparisons including those using the String Similarity Assessment Tool. It also contends that the average internet user is used to small differences between TLDs, and that the strings are visually and aurally different and have different meanings. Applicant also contends that the claim of potential “detriment” as asserted by Objector is irrelevant to whether the strings are confusingly similar to each other. It concludes that “there is no risk of confusion in the mind of the average, reasonable Internet user, nor is such risk probable” and requests that the Objection be declared Unsuccessful.

Discussion and Findings

The parties agree that the standard or relevant criterion for a string objection panel, in ruling on a string objection, is set forth in Section 3.5.1 of the AGB:

“A DRSP panel hearing a string confusion objection will consider whether the applied-for TLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion.. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.”

(Objection, Sec. 2a Standards; Response, Sec. VI A. Relevant Criterion)

The AGB and Procedure provide that in a string confusion objection proceeding the Objector bears the burden of proof. (AGB, Sec. 3.5: “The Objector bears the burden of proof in each case.” Procedure, Article 20(c): “The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.”)

Upon my review and consideration of the Objection, Response and attachments to each, the Objector has not sustained its burden of proof. I find insufficient factual and/or evidentiary, and no expert opinion, support for the Objection required to sustain Objector’s burden of proof.

While it undisputed that the words “hotel” and “hotels” are similar, with only the addition of an “s” differentiating them visually, and one string may bring the other to mind, such “[m]ere association . . . is insufficient to find a likelihood of confusion.” (AGB, Sec. 3.5.1) For a likelihood of confusion to exist, it must be *probable*, not merely possible that confusion will arise in the mind of the average, reasonable Internet user.” (Id., italics added) Objector has not sustained its burden of proof in

establishing the characteristics of the average, reasonable Internet user, nor that it is probable that such user is likely to be misled or confused.

I find persuasive the degrees of similarity or dissimilarity between the strings by use of the String Similarity Assessment Tool (Response, pp. 5-7), that ICANN did not put the applications for .HOTEL and .HOTELS in the same contention set (Id., p. 7), and the analysis and conclusions of the independent expert retained by Applicant. (Id., pp. 9-10). I find the strings, of course while similar as noted above, to be sufficiently visually and aurally different for string confusion purposes.

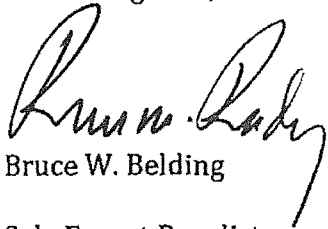
The parties' arguments and contentions regarding alleged business motives and/or attempts to limit competition, alleged detriments that could arise if .HOTELS is approved, and the existence of community objections by others are not addressed herein as they are deemed irrelevant to the task of the expert panel.

Based on the evidence and the parties' submissions, I find no likelihood of string confusion as defined in the AGB and do not find that that it would be probable that confusion would arise in the mind of the average, reasonable Internet user if the applied-for gTLD string is approved.

Determination

The Applicant has prevailed, and the Objection is dismissed.

Dated: August 8, 2013



Bruce W. Belding

Sole Expert Panelist

Our ref FPE/mnc/107646.0000003
Your ref

Flip Petillion
Advocaat

30 August 2013

To the attention of Mr. Bruce Tonkin,
Chair, ICANN Board Governance Committee
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292

USA

By regular mail and by e-mail: reconsideration@icann.org

Dear Sir,

Re: Request for Reconsideration - Request 13-6, Hotel Top Level Domain S.a.r.l.

Reference is made to the Request for Reconsideration 13-6 by Hotel Top Level Domains S.a.r.l. on August 23, 2013.

The Requester alleges :

- 1) That the panelist failed to follow ICANN's process in reaching a decision in that he did not make an independent determination as he regarded ICANN's prior action ; namely, he found persuasive that ICANN did not put the applications for .HOTEL and HOTELS in the same contention set ; and
- 2) That ICANN staff failed to incorporate suitable quality control provisions and failed to follow the process in accepting the panel's decision.

We would like to point out the following :

- 1) As to the first allegation:
 - a. The decision by ICANN not to put the applications in the same contention set was based on a visual analysis only. The panelist was required to perform a more complex analysis, i.e., an analysis on visual, aural and conceptual aspects;

- b. The panelist was sovereign in his decision and it is not because he agreed with the analysis by ICANN on the visual aspects that he did not make his independent determination;
- c. The panelist clearly made his own reasoning where he found the degrees of similarity and dissimilarity persuasive and where he stated, (referring to AGB, Sec. 3.5.1) : *"While it undisputed that the words "hotel" and "hotels" are similar, with only the addition of an "s" differentiating them visually, and one string may bring the other to mind, such "[m]ere association ... is insufficient to find a likelihood of confusion."* This paragraph was omitted in the Requester's statement of the facts.
- d. The panelist also added that he agreed with the analysis and the conclusions of the independent expert Professor Piet Desmet, who had clear views on the overall (dis)similarity of the two extensions. The Requester also failed to mention this.

- 2) As to the second allegation, Requester does not produce any proof of any violation of the process by ICANN's staff.

There is no indication that either the Panelist or ICANN staff violated any established ICANN process in reaching a decision on the non-placement of .hotels and .hotel in a non-exact contention set.

Therefore we request the BGC to conclude, based on the foregoing, that the Requester has not stated proper grounds for reconsideration and we therefore recommend that Hotel Top Level Domain S.a.r.l.'s request be denied without further consideration.

Sincerely yours,



Flip Petillion

ICANN Board Governance Committee
Delivered by email to reconsider@icann.org

Brussels, 19 September 2013

Dear Members of the Board Governance Committee,

Letter of support to Reconsideration Request 13-6 filed by Hotel Top Level Domain S.a.r.l.

On 8 August 2013, the Expert appointed by the International Centre for Dispute Resolution (ICDR) in String Confusion Objection proceedings 50 504 T 00237 13 relating to the strings .HOTEL and .HOTELS (HOTEL Top-Level-Domain S.a.r.l (Objector) v. BOOKING.COM B.V. (Applicant)) dismissed the Objection and decided that there is "no likelihood of string confusion" between the strings .HOTEL and .HOTELS.

The Objector filed a Request for Reconsideration on 23 August 2013 for the case to be re-examined on a *de novo* basis.

We would like to formally express our full support to Reconsideration Request 13-6 and respectfully request that this letter of support be given consideration by the Board Governance Committee of ICANN, for the reasons set out below.

According to ICANN Bylaws (Article IV, Section 2):

"Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

a. one or more staff actions or inactions that contradict established ICANN policy(ies); or

b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information."

We strongly support the Objector in its Request for Reconsideration as the Expert Determination issued on the basis of ICANN processes and policies as set out in the New gTLD Applicant Guidebook, will inevitably lead to user confusion which in turn will adversely affect the Objector as well as the community and interests we represent. Indeed, any detriment suffered by consumers from being misled by the coexistence of the strings .HOTELS and .HOTEL would result in detriment to the Objector and to the regulated hotel / hotels sector. Thus the detriment to the Objector and to the sector we represent and the detriment to consumers are intrinsically intertwined.

1. The String Confusion Objection process was wholly and exclusively designed by ICANN – action of ICANN ex-ante and inaction of ICANN ex-post

We hereby respectfully submit that the Determination of the Expert in proceedings 50 504 T 00237 has its source in an action and an omission of the ICANN Board and Staff.

The Determination of the Expert in proceedings 50 504 T 00237 is the result of a mandate given by ICANN to the ICDR to resolve on its behalf cases of String Confusion Objection.

The String Confusion Objection process and rules for determination have been designed and adopted by ICANN.

The Applicant Guidebook recognises this in many instances, for instance:

Article 20 of Attachment to Module 3 New gTLD Dispute Resolution Procedure states that: (a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.

In addition, the grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook (...) and are based upon the Final Report on the Introduction of New Generic Top-Level Domains, dated 7 August 2007, issued by the ICANN Generic Names Supporting Organization (GNSO).

Only ICANN can modify the String Confusion Objection procedure according to its Bylaws and only ICANN has authority to reject a determination when the expert has not applied the standards defined by ICANN.

It is thus abundantly clear that ICANN alone has designed and adopted the String Confusion Objection process and that the acceptance by ICANN of expert determinations issued in the course of the implementation of said process result from an action of the ICANN Board.

In addition, the Expert Determination was communicated to and accepted by ICANN who alone was in a position to accept it or not accept it. By its inaction and by failing to reject the Expert Determination at its meeting of 22 August 2013, the ICANN Board has validated ex-post the Expert Determination in proceedings 50 504 T 00237 and thus the Request for Reconsideration of the Expert Determination is fully justified.

2. Failure by ICANN to address discrimination between applicants as a result of the severe contradictions in String Confusion Objection expert determinations

ICANN has omitted to take any action to rectify or clarify what can only be described as indisputable inconsistencies in the various determinations issued by the respective experts appointed for String Confusion Objections.

There has been extensive media coverage and widespread criticism of the fact that the various expert determinations issued under the String Confusion Objection process have resulted in complete contradictions and, as a result, discrimination between applicants.

It is particularly telling to see that String Confusion Objection cases involving the singular and plural forms of the same term have resulted in completely opposite determinations. For instance, .PET and .PETS were considered as being confusingly similar whilst .HOTEL and .HOTELS were not. This is interesting, especially when the SWORD algorithm, heavily relied on by certain expert panels, calculates visual similarity between .PET and .PETS at a level of 72% whilst it calculates the similarity level between .HOTEL and .HOTELS to be a lot higher, at 81%.

Even in cases involving the same strings (.COM and .CAM, .COM and .ECOM) the respective expert issued determinations in complete contradiction with each other.

Stating that the delegation of the TLDs .HOTEL and .HOTELS would not result in a likelihood of confusion is nonsensical and the fact that the expert determination came to that conclusion is incomprehensible. The aural, conceptual and visual confusing similarities between the terms HOTEL and HOTELS cannot conceivably be disputed. In fact, these terms are conceptually identical, highly similar visually and aurally and in certain major languages like the French language these terms are aurally identical since the "S" at the end is silent. Thus we respectfully submit that it is hard not to question the conclusion of the expert in proceedings 50 504 T 00237.

These contradictions and the fact that the same issues were decided in completely opposite manners will inevitably result in a completely arbitrary discrimination between applicants and raises serious concerns about the credibility, reliability and integrity of the String Confusion Objection process.

This blatant and undisputable contradiction and lack of consistency in decisions rendered by the various experts appointed by the ICDR is clearly against ICANN Bylaws principle of Non-Discriminatory Treatment (Article II Section 3 of ICANN Bylaws) which states that "ICANN shall not apply its standards, procedures, or practices inequitably".

3. Risk of user confusion and adverse effect on the Objector

The String Confusion Objection mechanism was implemented for a reason, namely the avoidance of string confusion and loss of confidence in the DNS. The avoidance of user confusion and loss of confidence in the DNS resulting from the delegation of similar strings is at the core of ICANN's new gTLD Program and cannot be simply dismissed.

The *rationale* of the mechanism known as String Confusion Objection is thus to ensure that such confusion and such loss of confidence do not arise. If confusion arises then there would clearly be a detriment to users, registries and the DNS.

Any actions that the Applicant for .HOTELS takes under the TLD that fail to meet the hotel regulated industry standards would have a negative impact on public perception of the hotel industry and would cause serious detriment to the reputation of the hotel industry, as well as to consumers themselves. This would thus adversely affect the Objector as well as us.

Thus we fully support Request for Reconsideration 13-6 and respectfully submit that the Expert Determination in proceedings 50 504 T 00237 13 relating to the strings .HOTEL and .HOTELS should be cancelled and subject to a *de novo* examination.

4. Actions of the ICANN Board taken as a result of the Board's reliance on false or inaccurate material information

The actions of ICANN ex-ante and ex-post are the result of the Board's reliance on false material information. By accepting the Expert Determination in proceedings 50 504 T 00237 13, ICANN has relied on inaccurate information and has omitted to take into consideration authoritative information which makes it abundantly clear that the likelihood of confusion between the singular and plural of the same word is not merely possible but, at a minimum, highly likely. This was widely echoed, *inter alia*, by the Governmental Advisory Committee.

Given the fact that the String Confusion Objection process has been set up as an *ad hoc* mechanism by ICANN in the context of its new gTLD Program, there were no precedents. In light of the absence of precedents, it was necessary to draw a parallel with existing and comprehensive sets of rules where such an assessment of confusing similarity exists, namely trade mark law. Given that the assessment of similarity between TLDs is inherently global and international, as is the Internet, pertinent precedents could have been used from a number of jurisdictions, including the European Union and the United States and other jurisdictions.

The principle according to which the singular and plural forms of the same word are **visually** confusingly similar or almost identical is a well-established principle in many jurisdictions, including but not limited to, the United States and the European Union (see for instance "*the marks are similar to the extent that they both share the expression "eTool". They differ in the additional "s" of the contested sign and also as regards the colours depicted. They are, nevertheless, regarded as highly similar.*" (OHIM, *Hoffmann GmbH Qualitätswerkzeuge v. eTOOLS s.r.o* (Case No. B 1 671 935, 19 April 2011)) and "*The only difference between the trade marks is the extra letter "S" in the CTM applied for. This additional letter, which is placed*

at the end of the word, is clearly insufficient to make the signs look or sound dissimilar. The Office concludes that the signs are visually and phonetically very similar." (OHIM, *Pauline M. Kroese v. Lip-Ink International*, Case No. 105/2004, 27 January 2004). See also in the UK, "Visually on a side by side analysis of the two trade marks I have no hesitation in finding that there are clear similarities between the two trade marks. The opponents' and applicants' trade marks contain the same first five letters. The applicants' trade mark is contained within the opponents' trade mark and differs only in that it does not end with the letter S. **The opponents' trade mark is the English word digits, the applicants' trade mark is the singular form of that word. (...) As such, I find that there is a clear visual similarity between the two trade marks.**" (UKIPO, *IDG Communications Limited v. Deutsche Telekom AG*, Application No. 2 160 132, 29 June 2001).

The principle according to which the singular and plural forms of the same word are **aurally** confusingly similar or almost identical is a well-established principle in many jurisdictions, including but not limited to, the United States and the European Union. (See for instance "*the marks [ETOOL / ETOOLS] will be pronounced almost identically in the different languages of the relevant territory, the only difference being the final letter 'S' of the application. This difference is considered a minor difference. The marks are aurally highly similar.*" (OHIM, *Hoffmann GmbH Qualitätswerkzeuge v. eTOOLS s.r.o.*, Case No. B 1 671 935, 19 April 2011)).

The principle according to which the singular and plural forms of the same word are **conceptually** confusingly similar or even identical is also a well-established principle including but not limited to, the United States and the European Union (see for instance, "*the addition of the letter 'S', which is in the earlier mark, will most likely be perceived as the plural form of the word PIRATE; thus the conceptual meaning of the two trade marks is identical*" (OHIM, *Major League Baseball Properties, Inc v. Merteks Tekstil Sanayi*, Case No. 1538/2000, 6 July 2000). See also for the U.S. "*it is difficult to conceive of any reason to distinguish*" between trademarks that, among other things, "*are merely the singular and plural forms of the same word*" (439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979) and "*As for the marks except for the pluralization of applicant's mark which is almost totally insignificant in terms of the likelihood of confusion of purchasers, the marks are essentially identical in sound, appearance and commercial impression.*" United States Patent and Trademark Office Trademark Trial and Appeal Board (*Newport v. Newports*, 225 U.S.P.Q. 691, 15 March 1985).

Likewise, under the UDRP, the singular and plural forms of the same word are invariably considered as being confusingly similar ("*it is trite law and basic common sense that the mere change from singular to plural or vice versa is not sufficient to avoid confusion for trade mark purposes or passing off purposes.*" (WIPO Arbitration and Mediation Center, *i2 Technologies Inc v. Richard Alexander Smith*, Case No. D2001-0164, 4 June 2001).

These principles were thankfully applied by some of the experts appointed by the ICDR for String Confusion Objections but they were disregarded by others, such as in proceedings 50 504 T 00237 13, leading to wholly contradictory decisions and discrimination between applicants. ICANN alone was in a position not to accept decisions that were in complete contradiction with

existing, authoritative, publicly available and universally recognised sets of principles, but it did not. ICANN should have rejected the Expert Determination in proceedings 50 504 T 00237 13 relating to the strings .HOTEL and .HOTELS as it failed to apply the standards defined by ICANN.

For all the aforementioned reasons, we respectfully support the Objector's Request for Reconsideration.

Yours faithfully,



Christoph Klenner
Secretary General
ET TSA

Our ref FPE/mne/107646.0000003
Your ref

Flip Petition
Advocaat

23 September 2013

To the attention of Mr. Bruce Tonkin,
Chair, ICANN Board Governance Committee
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292

USA

By regular mail and by e-mail: reconsideration@icann.org

Dear Sir,

Re: Request for Reconsideration - Request 13-6, Hotel Top Level Domain S.a.r.l.

Reference is made to the abovementioned matter and our letter of August 30, 2013. On September 19, 2013, Mr Christoph Klenner has sent you a letter to express the support of the European Technology & Travel Services Association to Reconsideration Request 13-6 (hereinafter, 'Letter of Support').

This Letter of Support does not remedy the deficiencies of the Reconsideration Request 13-6, as identified in our letter of August 30, 2013.

In addition, we wish to remind you of NGPC Resolution 2013.06.25.NG07, determining that *"no changes are needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string."* Indeed, the mere possibility of user confusion is insufficient to find a likelihood of confusion. As explained in the rationale to NGPC Resolution 2013.06.25.NG07, "similar" in the Applicant Guidebook means strings *"so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone. During the policy development and implementation design phases of the New gTLD Program, aural and conceptual string similarities were considered. These types of similarity were discussed at length, yet ultimately not agreed to be used as a basis for the analysis of the string similarity panels' consideration because on balance, this could have unanticipated results in limiting the expansion of the DNS as well as the reach and utility of the Internet."*

The fact that certain plural versions of gTLDs have been found confusingly similar does not contradict a finding of the absence of confusing similarity between Hotel Top-Level-Domain

S.à.r.l.'s application for .HOTEL and Booking.com B.V.'s application for .HOTELS. Each string confusion objection had to be addressed on its own merits. It is worth mentioning that string confusion objection expert panels have ruled that the following gTLD strings are not confusingly similar:

- .CARS and .CAR
- .TVS and .TV

In addition, only a small number of applicants/registry operators filed a string confusion objection to applications for a string which is the same as their string, plus *c.q.* minus 's'. This indicates that most applicants/registry operators consider that there is no likelihood of confusion between such strings and that they accept co-existence. These applicants include the other 6 applicants for .HOTELS, the registry operator for .EU (who did not object to the application for .EUS), the applicants for .NEWS and .NEW, for .ACCOUNTANTS and .ACCOUNTANT, .AUTOS and .AUTO, for .DEALS and .DEAL, .WORKS and .WORK, etc.

Accepting both the applications for .HOTELS and .HOTEL would not contradict any policy established by ICANN.

Therefore we reiterate our request for the BGC to conclude that the Requester has not stated proper grounds for reconsideration and to recommend that Hotel Top Level Domain S.a.r.l.'s request be denied without further consideration.

Sincerely yours,



Flip Petillion

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-6

25 SEPTEMBER 2013

On 23 August 2013, Hotel Top-Level-Domain S.a.r.l (“dotHotel”) submitted a reconsideration request (“Request”). The Request asked the Board to reconsider the 8 August 2013 Expert Determination from a dispute resolution panel established by the International Centre for Dispute Resolution (“ICDR”) regarding an objection to a new gTLD application for .HOTELS. Specifically, the Request seeks reconsideration of the Panel’s dismissal of dotHotel’s objection to the .HOTELS. gTLD.

I. Relevant Bylaws

Article IV, Section 2.2 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); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

To properly initiate a request for reconsideration, the requesting party must review and follow the Reconsideration Request Form posted on the ICANN website

(<http://www.icann.org/en/groups/board/governance/reconsideration/request-form-11apr13->

en.doc). The requesting party must also acknowledge and agree to the terms and conditions set forth in the form when filing.

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee (“BGC”) recommends, and in this case the New gTLD Program Committee agrees, that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees. The reconsideration process is for situations where the staff acted in contravention of established policies (when the Request is based on staff action or inaction).

The Request was received on 23 August 2013, which makes it timely under the Bylaws. Bylaws, Art. IV, § 2.5.

II. Background

A. The New gTLD Objection Procedure

The New gTLD Program includes an objection procedure pursuant to which objections to applications for new gTLDs are submitted to an independent dispute resolution service provider (“DRSP”). The objection procedures are set out in Module 3 of the Applicant Guidebook (<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) and the New gTLD Dispute Resolution Procedure (the “Procedure”) attached thereto.

There are four (4) grounds upon which an objection to a new gTLD application may be filed:

- (i) “String Confusion Objection” – the applied-for string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications.

(ii) “Legal Rights Objection” – the applied-for gTLD string infringes the existing legal rights of the objector.

(iii) “Limited Public Interest Objection” – the applied for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

(iv) “Community Objection” – there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

(Applicant Guidebook, Section 3.3.2.1; Procedure, Art. 2(e).)

On the issue of string similarity and potential confusion between applied-for strings, as part of the initial evaluation process, ICANN subjected all applied-for strings in the New gTLD Program to an evaluation that included the String Similarity Review set out at Section 2.2.1.1. of the Applicant Guidebook. An independent panel reviewed applied-for strings against each other, as well as existing TLDs and reserved names, among others, to determine if there was a risk of visual similarity between the strings that could create a probability of user confusion. (Applicant Guidebook, Section 2.2.1.1.1.)

The string similarity panel performing this review then recommended “contention sets,” or groups of at least two applied-for strings identical or similar to one another. (Applicant Guidebook, Section 2.2.1.1.1.) All strings within contention sets would then be subject to the String Contention Procedures set out at Module 4 of the Applicant Guidebook, which describes methods to be used to resolve the contention. (Applicant Guidebook, Section 2.2.1.1.1.)

Applied-for strings that are not placed into a contention set by the string similarity panel may still be subject to an objection on similarity grounds in accordance with the objection procedures set out in Module 3 of the Applicant Guidebook. A string confusion objection is not limited to a review of the visual similarity of strings, as in the string similarity review. Rather, a

string confusion objection may be based on any type of similarity, including visual, aural, or similarity of meaning. (Applicant Guidebook, Section 2.2.1.1.3.)¹

As part of the dispute resolution proceedings, properly stated objections for which a response has been submitted will be considered by a panel of appropriately qualified expert(s) appointed by the designated DRSP. (Applicant Guidebook, Section 3.4.4.)

Each panel will determine whether the objector has standing to object and will use appropriate general principles/standards to evaluate the merits of each objection. The panel must apply the standards that have been defined in Section 3.5 of the Applicant Guidebook for each type of objection. The panel may also refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable. The objector bears the burden of proof in each case. (Applicant Guidebook, Section 3.5; Procedure, Art. 20.)

The panel's final determination will include a summary of the dispute and findings, identify the prevailing party, and provide the reasoning upon which the expert determination is based. (Applicant Guidebook, Section 3.4.6.; Procedure, Art. 21.) The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process. (Applicant Guidebook, Section 3.4.6.)

B. DotHotel's Objection to Booking.com's Application for .HOTELS

Booking.com B.V. ("Booking.com") is an applicant for the .HOTELS string. dotHotel timely filed a string confusion objection with the ICDR, which is the DRSP assigned to administer string confusion objections (the "Objection"). Booking.com timely filed a response

¹ Where a new gTLD applicant successfully asserts string confusion with another applicant, the two applied-for strings will be placed in a contention set and be referred to the String Contention Procedures in Module 4 of the Applicant Guidebook. (Applicant Guidebook, Section 3.2.2.1.)

to the dotHotel's objection (the "Response"). The ICDR's appointed panelist (the "Panel") rendered its expert determination on 8 August 2013 ("Expert Determination"). The Panel determined that dotHotel had standing to object based on string confusion because dotHotel is an applicant for the .HOTEL string and the two applied-for strings (.HOTEL and .HOTELS) are not in the same contention set. (Expert Determination, Page 2.) Based on the evidence and the parties' submissions, the Panel dismissed dotHotel's objection on the grounds that .HOTELS is not likely to result in string confusion as defined in the Applicant Guidebook with .HOTEL. (Expert Determination, Page 4.)

Although the string confusion objection was determined by a third-party DRSP, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third-party DRSP's decisions where it can be stated that either the DRSP failed to follow the established policies or processes in reaching the decision, or that ICANN staff failed to follow its policies or processes in accepting that decision. See BGC Recommendation on Reconsideration Request 13.5 at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>.

III. Analysis of dotHotel’s Request for Reconsideration²

dotHotel seeks reconsideration of the Panel’s dismissal of its objection to .HOTELS. More specifically, dotHotel requests that ICANN disregard the Panel’s expert determination and requests that a different panel be appointed to “rehear” dotHotel’s objection on a *de novo* basis. dotHotel also requests that ICANN institute “appropriate Quality Control provisions within the String Similarity Objection process to ensure the consistency of decisions of panelists.” (Request, Section 9.)

A. Reliance on ICANN’s String Similarity Review Does Not Demonstrate A Process Violation

DotHotel primarily claims that, in determining that .HOTEL and .HOTELS were are not confusingly similar, the Panel improperly relied on the fact that the two strings had not been placed in a contention set as a result of the earlier String Similarity Review. DotHotel states that the Panel “admits” that ICANN’s previous determination regarding the two strings was a “material point of persuasion” in making its decision, while dotHotel stresses that it was only because ICANN did not place the two strings into a contention set that dotHotel was permitted to bring the string confusion objection in the first place. (Request, Section 8.) DotHotel suggests that its participation in the dispute resolution process was predicated on its reliance that the appointed panel would conduct “an impartial, independent and objective assessment” of

² A letter from Flip Petillion, asserting that dotHotel has failed to state proper grounds for reconsideration, was received on 30 August 2013. See <http://www.icann.org/en/groups/board/governance/reconsideration/petillion-to-tonkin-30aug13-en.pdf>. A letter from Christoph Klenner, the Secretary General of the European Technology & Travel Services Association or ET TSA, expressing support of DotHotel’s Request, was received on 19 September 2013. See <http://www.icann.org/en/groups/board/governance/reconsideration/klenner-to-bgc-19sep13-en.pdf>. Both letters have been reviewed and given appropriate consideration in connection with this Recommendation.

dotHotel's objection. (Request, Section 10.) DotHotel further claims that the objection process is designed to "take a second look at" the ICANN string similarity panel (Request, Section 8), and concludes that the Panel's dependence upon, and alleged inappropriate deference to, prior decisions of ICANN with respect to .HOTEL and .HOTELS constitutes a material breach of ICANN's process set forth in the Applicant Guidebook (Request, Section 10).

As an initial matter, contrary to dotHotel's suggestion, there does not appear to be anything in the Applicant Guidebook or the Procedure that restricts the Panel's ability to refer to or rely upon previously conducted reviews or evaluations of the strings at issue. DotHotel does not cite to or otherwise reference any such provision to support its assertions.

The relevant standard for evaluating a string confusion objection is set out in Section 3.5.1 of the Applicant Guidebook:

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

The Procedure makes clear that, in addition to applying the standards that have been defined by ICANN, the panel "may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable." (Procedure, Art. 20(b).)

The Panel indicates that, in the Response to dotHotel's Objection, Booking.com contends, among other things, that the .HOTEL and .HOTELS strings are not confusingly similar and cites to multiple comparisons of the two strings including those using the String Similarity

Assessment Tool used in ICANN’s String Similarity Review.³ (Expert Determination, Page 3.)

The similarity score obtained from the String Similarity Assessment Tool was therefore put before the Panel by Booking.com as evidence that the two strings are not visually similar. The Expert Determination makes clear that the Panel was presented with evidence that is likely similar to that used within the string similarity review process, such as the SWORD algorithm scores that indicated a low probability of visual similarity between the .HOTEL and .HOTELS strings. There is nothing in the Applicant Guidebook or the Procedure that would preclude a panel from referencing or relying upon evidence presented, even when that evidence may have also been supportive of the results of the earlier String Similarity Review.⁴

Moreover, dotHotel’s contention that the dispute resolution proceedings are designed to “take a second look at” the results of the String Similarity Review is unsupported. To the contrary, the String Similarity Review that occurs at the outset of the evaluation process “is intended to augment the objection and dispute resolution process . . . that addresses all types of similarity.” (Applicant Guidebook, Section 2.2.1.1.1.)

³ The String Similarity Assessment Tool, developed by SWORD, is an algorithm that is intended to provide an open, objective, and predictable mechanism for assessing the degree of visual similarity between TLD strings. See <https://icann.sword-group.com/algorithm/>.

⁴ The Panel acted no differently than other ICDR panels in evaluating the degrees of visual similarity. Indeed, there are multiple examples of where other panels referenced and/or considered the similarity score of the String Similarity Assessment Tool in reaching their conclusions. See, e.g., Expert Determination regarding .CARS at http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B78481d34-ab3e-40f8-bb34-108fa1e6d57c%7D_50_504_T_00233_13_determination.pdf; Expert Determination regarding .MEME at http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B325aac83-a1ed-439f-a12f-476b460caf4d%7D_50_504_T_00292_13_determination.pdf; Expert Determination for .COMPANY at http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7Bfc6a0c51-78f9-43ae-8c73-8b445094825c%7D_50_504_T_00231_13_determination.pdf.

.HOTEL and .HOTELS were not put into a contention set with each other through the String Similarity Review. The fact that dotHotel (or any other applicant for the string .HOTEL) could use the lack of a contention set to establish standing to bring a confusion objection against the .HOTELS string, does not in any way limit or dictate how the contention set creation should be used within the objection process. Specifically, there is no requirement that the earlier outcomes of the String Similarity Review should somehow be disregarded when determining a subsequent string confusion objection.

dotHotel also misstates the Panel's basis for reaching its Expert Determination and the scope of the alleged reliance on the String Similarity Assessment Tool. The Panel concluded that dotHotel was unable to meet its burden of proving that a likelihood of confusion was probable, and not merely possible, in the mind of the average, reasonable Internet user. (Expert Determination, Page 3-4.). The Panel noted:

Upon my review and consideration of the Objection, Response and attachments to each, the Objector has not sustained its burden of proof. I find insufficient factual and/or evidentiary, and no expert opinion, support for the Objection required to sustain Objector's burden of proof.

(Expert Determination, Page 3.) The Panel further stated:

I find persuasive the degrees of similarity or dissimilarity between the strings by use of the String Similarity Assessment Tool, that ICANN did not put the applications for .HOTEL and .HOTELS in the same contention set, and the analysis and conclusions of the independent expert retained by Applicant.

(Expert Determination, Page 4 (citations omitted).) Based on the above, it appears that the Panel found the similarity score obtained from the String Similarity Assessment Tool, the fact that the two strings were not put in the same contention set, and the conclusions of Booking.com's

independent expert persuasive because dotHotel failed to refute this evidence or otherwise establish a likelihood of confusion between the two strings.⁵

Further, in the context of the New gTLD Program, the Reconsideration process is not intended for the BGC to perform a substantive review of DRSP panel decisions, but it is for the consideration of failure of process- or policy-related complaints. DotHotel’s claim that the Panel improperly relied on ICANN’s String Similarity Review in reaching its determination does not demonstrate a policy or process violation. There is no policy or process that prohibits the Panel from reviewing and/or relying on the similarity score obtained from the String Similarity Assessment Tool, and, in fact, the Applicant Guidebook makes clear that the String Similarity Review is intended to augment the entire dispute resolution procedure. (Applicant Guidebook, Section 2.2.1.1.1.) While dotHotel may disagree with the Panel’s findings, Reconsideration is not available as a mechanism to re-try the determinations of DRSP panels.

B. ICANN’s Purported Failure to Incorporate “Quality Control” Mechanisms in the New gTLD Dispute Resolution Procedures Do Not Support Reconsideration

In its Request, dotHotel contends that ICANN’s failure to incorporate suitable “quality control” provisions into the objection and dispute resolution process, unlike other aspects of the New gTLD Application Process, constitutes a material failure of process. dotHotel further contends such failures have led to flawed DRSP panel decisions and “inherently inconsistent results among similarly situated applicants.” (Request, Sections 6-8 & 10.)

⁵ Any claim that the Panel lacked independence or was not impartial or objective also lacks merit. The Applicant Guidebook provides only that “[e]xperts must be independent of the parties to a dispute resolution proceeding.” (Applicant Guidebook, Section 3.4.4.) dotHotel has not asserted that the Panel lacked independence as defined by the Applicant Guidebook.

DotHotel does not appear to be suggesting here that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or the attached Procedure, were not followed. DotHotel, instead, appears to be seeking reconsideration of an alleged inaction – *i.e.*, ICANN’s purported failure to act to implement appropriate quality controls. But DotHotel does not identify any established policy or process that required ICANN to take action. DotHotel suggests only that because other aspects of the New gTLD Program include quality control mechanisms, the objection and dispute resolution process should also include such mechanisms. (Request, Section 8.) Perceived differences between various parts of the New gTLD Program do not demonstrate a violation of any ICANN policy or process.

ICANN’s decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation with the Internet community, including end users, business groups and governments. ICANN’s work to implement the New gTLD Program – including the creation of an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation – is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into the rationale behind some of the conclusions reached on specific topics. Meaningful community input from participants around the globe has led to numerous and significant revisions of each the draft version of the applicant guidebook, resulting in the Applicant Guidebook that is used in the current application round.

The fact that ICANN, following years of inclusive policy development and implementation planning, ultimately included certain quality control mechanisms in some parts of the New gTLD Program but did not include similar mechanisms in the objection and dispute resolution process, does not mean that ICANN acted inconsistent with any policy or process.

Indeed, there is no established ICANN policy or process that requires ICANN to take such action. While parties to a dispute resolution proceeding may not always be satisfied with the determinations of the DRSP panels, the Reconsideration process is not intended to reexamine the entire process established in the Applicant Guidebook. DotHotel's belief that the objection and dispute resolution procedures should have included certain quality controls does not constitute a policy or process violation that supports reconsideration.

IV. Recommendation and Conclusion

Based on the foregoing, the BGC concludes that dotHotel has not stated proper grounds for reconsideration, and we therefore recommend that dotHotel's Request be denied without further consideration.

As there is no indication that either the Panel or ICANN violated any policy or process in reaching or accepting the determination of dismissal of dotHotel's objection, this Request should not proceed. If dotHotel thinks that it has somehow been treated unfairly in the process, and the Board (through the New gTLD Program Committee) adopts this Recommendation, dotHotel is free to ask the Ombudsman to review this matter.

68, Avenue de la Liberté
L-1930 Luxembourg
Luxembourg
Tel. +352 62 170 8 170

HOTEL Top-Level-Domain Sàrl | 68, Avenue de la Liberté | L-1930 Luxembourg | Luxembourg

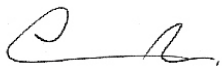
ICANN Board Governance Committee
Delivered by email to reconsider@icann.org

Luxembourg, September 26, 2013

Dear Members of the Board Governance Committee,

we respectfully submit the attached Survey of String Confusion Objections with an analysis of conflicting principles for your consideration.

Sincerely



Johannes Lenz-Hawliczek
Managing Director

Survey of String Confusion Objections

Analysis of conflicting principles

Introduction

This memo will present a survey of the String Confusion Objections for New gTLDs published by the International Center for Dispute Resolution (ICDR) as of August 29.¹ Many journalistic articles have been written about the outcome of these objections and how the decisions are confusingly *dis*-similar. This memo is not an objection to any single finding or determination. Instead, it is a collection of the considerations relied on or rejected by the panelists in reaching their decisions.

This survey categorizes the considerations in each case as 1) **standards** and 2) **principles**. Every panelist must ultimately make a single determination: confusingly similar or not. It is an either/or decision; either the strings are placed in the same contention set or they are not. The final decision is to be based on a well-established process of judicial reasoning. The panelist must make findings, to which standards are applied. (Applicant Guidebook, Expert Determination, Section 3.4.6)

Before deciding that two strings are confusingly similar in a String Contention Objection, the panelist must first find, at the very least, that the two strings are similar. The Applicant Guidebook suggests finding in which way they are similar (i.e. visually, aurally, in meaning, etc.). The panelist must then apply a **standard** in judging whether the *similarity* rises to the level of *confusion*. An important standard in String Confusion Objections is that confusion must be probable, not simply possible. (Applicant Guidebook, String Confusion Objection, Section 3.5.1) Another standard explicit in the Guidebook is that the confusion of the *average* Internet user—not just *any* Internet user—is the danger to be avoided. Id. Applying appropriate standards to intermediate findings is the essence of adjudication and should be expected in every case.

In addition to pre-defined standards, an arbitrator is able to draw on other **principles**. The Applicant Guidebook calls for this:

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to *other relevant rules of international law* in connection with the standards.

(Applicant Guidebook, Dispute Resolution Principles (Standards), Section 3.5) (emphasis added) Both Objectors and Applicants took full advantage of this liberty in presenting a wide range of arguments referring to principles of law and reasoning not specified in the Guidebook. All quotes from cases in this memo are taken from sections presenting the reasoning or principles of law adopted by the *panelist*, and not from sections that presented the arguments of the *parties*.

¹ Published decisions available at <http://go.adr.org/ICANNgTLD>. The PDF located at this URL contains hypertext links to individual decisions. There were 31 decisions available at the time of this survey, listed in Table 1.

Conflicting Principles

The String Contention Objection opinions, as a group, apply many principles beyond the core standards, as the Guidebook prescribes. Most of these general principles were discussed in several Objections by more than one panelist. However, many panelists expressed conflicting positions on the relevance of a non-core principle or how it should be applied in a String Contention Objection. This survey identifies a large group of principles that were applied in a conflicting manner. For example, there is significant disagreement about the consideration of UDRP decisions as precedent. Some panelists considered UDRP decisions, other panelists ignored them, and some panelists refuted them as inappropriate and irrelevant. Inconsistency between how a relevant principle is applied—or whether it should be applied at all—destroys the precedential value of any decision on which that principle was based.

More than 12 principles beyond the Applicant Guidebook standards were discussed by the String Contention Objection panelists in a manner that reveals substantial disagreement. The principles fit broadly into 3 categories, which will be labeled (for organization in this memo) as Precedent, Context, and String Analysis. Principles used as precedent on which panelists disagree about the value or application of are: trademark law and UDRP decisions, the ICANN String Similarity Panel, expert opinions, and second-level names (both general trends and the co-existence of specific strings at the second level). The principles relevant to user or market context are: the marketing intentions of the Applicant, the likelihood of abusive names, the relevance of competition, Internet searches, and the capitalization of the string. String analysis principles on which there appears to be clear disagreement are pluralization, and the number of letters in the string or the number of letters changed.

Approach

Not every consideration can be cleanly broken into these categories, but most of these principles do fall primarily under a single label. For example, a clear mention of an international trademark decision can easily be classified as precedent. Further, panelists considered the marketing plans of the Applicant, which will affect the context in which the string may be seen by Internet users. Finally, some principles were used in an attempt to objectively analyze the string itself, such as a comparison of the number of letters in the competing strings. One notable exception to schema used in this survey is the consideration of language. Language is an inherent part of the string analysis as well as a dominant factor in the context in which it will be used.

The level of conflict between panelists' positions can be viewed as occurring on two levels. On some principles, such as the application of trademark law, some panelists have made statements that directly contradict statements made by other panelists. This is patent² disagreement. On other principles, one panelist may have expressed a clear position while another panelist, not explicitly disagreeing, applied the principle in a contradictory manner. This is latent³ disagreement. Latent conflicts are naturally less significant because they can likely be reconciled in the future. Therefore, this survey will focus on those principles on which the panelists' opinions are in direct conflict with each other. Nevertheless, the entire spectrum of contradiction will be presented for every principle.

² In the sense of “obvious or clear” (<http://www.merriam-webster.com/dictionary/patent>).

³ In the sense of “capable of emerging or developing but not now visible, obvious” (<http://www.merriam-webster.com/dictionary/latent>).

Precedent

Trademark law and UDRP decisions

The application of trademark law or UDRP decisions to the String Confusion Objections is probably the most controversial issue that has emerged from this survey. Several cases applied trademark law directly, other cases found trademark law very helpful, others considered it reluctantly, and more than one case clearly implied that it is inappropriate as precedent.

The .TVS case adopted the thirteen factors from the well-known DuPont trademark case. “Given the analysis of the thirteen factors cited by Applicant derived from the DuPont case cited above, I find that Objector has failed to meet its burden of proof regarding the probability of such confusion.” .TVS This seems appropriate for a case involving a well-known trademark.

However, trademark cases were cited and their rulings applied in .COMPANY, and .BOM, neither of which involved a trademark in the string.

Objector concedes that in trademark law visual similarity is not a binary factor but is a matter of degree (In re Coors Brewing Co., 343 F.3d 1340, 1344 [Fed. Cir. 2003]), and that a “spelling variation will not prevent a finding of confusing similarity” (McCarthy).

.COMPANY

[T]he Panel must not overlook the fact that, if no one factor can be said to be decisive, it must take into account all factors relevant to the circumstances (Sabel BB v Puma AG 1998 RPG 199, 1998 ETMR 1 (1997); Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc [1998] ECR 1-5507 paragraph 16). In so doing, and where appropriate, the Panel may have to evaluate the importance to be attached to each of those different factors or elements (Lloyd Schushfabrik Meyer & Co GmbH supra paragraph 27).

.BOM

Two other examples of direct application of trademark precedent are .PETS (AFILIAS) and .CAM (UNITED). In the .PETS (AFILIAS) case, the panelist was clearly persuaded by a set of trademark case precedent. “Objector’s use of examples from various jurisdictions has demonstrated with overwhelming evidence that the plural “s” does not avoid confusing similarity.” PETS (AFILIAS) In the .CAM (UNITED) case, the panelist directly applied the trademark law principles that were not in dispute by the arguments of the two parties: “the parties are correct in assessing the lack of protection for generic terms: this would apply to both ‘cam’ and ‘com’.” .CAM (UNITED) and “Applicant shares the same general view that courts evaluating trademark infringement find that goods marketed in similar channels of trade are more likely to be confused.” .CAM (UNITED)

Many cases considered trademark law precedent as presented by the parties. The opinions on this, as expressed by the panelists, ranged from acceptance to reluctance. Contrast .GBIZ, .PET (GOOGLE), .VET “Since both parties are from the United States, it would not be inappropriate to consider U.S. law, particularly trademark law, as a point of legal reference.” with .CAM (UNITED), .COMPANY, .ECOM (VERISIGN) “Objector treats trademark law as applicable law. This is incorrect. The correct standard is

the one mentioned above and below stemming from the ICANN rules. The panel allows trademark law as analogous only; it is not controlling.”

A helpful distinction would be between trademark law principles and trademark law cases. For example, The .PETS (AFILIAS) panelist was highly persuaded by a body of decisions that addressed the factual issue at hand. On the other hand, the panelist’s stated opinion about the underlying legal principles leading to those decisions was that “Trademark law, including in re E.I. du Pont de Nemours & Co, may be cited analogously.” .PETS (AFILIAS) The distinction between the legal principles and the case decisions, which can be culled from the .PETS (AFILIAS) case, is not apparent in other String Confusion Objections discussing trademark law.

The argument that trademark principles of law are relevant is easily made. See .BOM “the definition of String Confusion...is clearly an adoption virtually verbatim of the general principles applicable in trademark law.” On the other hand, whether trademark principles are persuasive or not is a point of contention within the growing body of String Confusion Objections.

The standards articulated in the ICANN Dispute Resolution Procedures reflect and parallel long-established standards governing likelihood of confusion that have developed under U.S. trademark law and trademark law more broadly...The well-established trademark law tests for determining similarity and likelihood of confusion are persuasive in assessing string confusion.

.TVS

In deciding this case I am not assisted in any measurable way by references to United States trademark jurisprudence. This is not a case in which I am asked to consider the difference for example between Col. Sanders and Col. Saunders.

.MEME

The opinions about the proper weight to give trademark precedent could be not have a more striking contrast. One panelist believes that it is persuasive. Another panelist claims that it is not helpful at all.

The arguments against the relevance of trademark law to a Sting Confusion Objection have been articulated more than once. First, UDRP cases should not be allowed because the element of bad faith has been omitted from the String Confusion Objection. “UDRP cases involve rights of trademark holders and also contain obligatory elements of bad faith by domain name registrant respondents. None of these aspects are present in New gTLD String Confusion cases.” .CARS, .PET (GOOGLE), .VET, .GBIZ Second, how should a panelist deal with generic strings, when trademark law offers no protection for generic terms? “Trademark law standards do not entirely fit here either, because the Objector’s string [] is generic and hence ineligible for trademark protection.” .CARS, .PET (GOOGLE), .VET, .GBIZ And third, the “burden of proof,” so to speak, is higher for a String Confusion Objection than for a trademark infringement case. “Without knowledge of how stringent were the standards for determining name confusing in the precedents cited by Objector, such precedents are not persuasive in deciding this case, particularly in light of the Probability Standard that is applicable to this case.” .EMERCK

For these reasons, and others, some panelists clearly dismissed trademark and UDRP precedent in arriving at their findings. “It should be noted that there is nothing in the record to suggest that any trademark is involved in this case. Thus, since the WIPO cases cited by the Objector all involved well-established trademarks and the <.com> top-level domain name, they are of little relevance in this case.” .HOTEIS, .HOTELES These decisions take the position that one of the strings at issue must be a trademark before trademark precedent be considered at all. An even stronger position was taken by .TOURS. “Similarly, the existence of numerous concurrent trademarks and/or domain names based on the same root word should not be determinative of the outcome in this case. Similar trademarks can be granted in difference classes of use.” TOURS This statement implies more than that trademark precedent is not useful; it can have a misleading effect. Clearly, some String Confusion Objection cases stand for a position strongly against the application of trademark law entirely.

The panelist in .ECOM (VERISIGN) took a different approach by distinguishing the trademark cases cited, rather than broad statements about trademark precedent in general. For example, “The pre-Internet Sleekcraft case is not helpful to Applicant; the criteria that prompted the 9th Circuit to allow both ‘Slickcraft’ and ‘Sleekcraft’ for boats may not survive in light of the mentioned ICANN rules.” .ECOM (VERISIGN) This implies that the relevance of any particular trademark precedent may depend on where it falls on the timeline of Internet development. As a further example, the panelist dismissed certain “[d]efunct” cases from the National Arbitration Forum. .ECOM (VERISIGN)

Should it matter whether the strings are generic or that one has trademark rights? Should trademark or UDRP decisions be persuasive at all? Unfortunately, these cases do not provide the answer. A clear majority or minority view cannot be discerned. As stated in the .GBIZ case: “The legal arguments [] cover both sides of the fence.”

Unfortunately, this creates—rather than resolves—confusion, especially for a party filing an Objection in the future. Within the limited space of an Objection filing, should a party focus on trademark precedent or discard it completely. The choice may lead to a completely different outcome, depending only on which of these two positions the panelist has adopted. Yet, the parties do not know at the time of filing who their panelist will be.

ICANN String Similarity Panel

Another important area of disagreement is how to consider the precedent of the ICANN String Similarity Panel. Before any String Confusion Objections were able to be filed, ICANN took a first “quick look” for any pairs of strings that had a high probability of visual confusion. The String Contention Objection was then available for other parties, such as Applicants or existing TLDs, to claim confusing similarity between strings based on visual or any other type of similarity. How much weight should the String Contention Objection panelist should give the precedential fact that ICANN’s panel had not found visual similarity?

More than one String Contention Objection panelist considered ICANN’s first look to be very persuasive. One statement seems to indicate that ICANN’s panel had already done the majority of the work for the Objection panelist. “I find persuasive...that ICANN did not put the applications...in the same contention set...” .HOTELS Another panelist found the ICANN panel’s determination sufficient for an intermediate conclusion of no visual similarity. “The visual similarity of the [strings] was not sufficient to raise any concerns when the ICANN algorithm was applied.” .NUMBERONESTORE (CHINESE IDN)

In contrast, other panelists gave ICANN's panel very little weight. "Only small comfort can be taken from the point put forward by Applicant that ICANN did not initially put [] applicants in the same string contention set..." .BUY "Applicant mentions the 'visual similarity check' of ICANN, but the fact that '.company' passed that threshold is not sufficient in itself to overcome the present objection." .COMPANY These panelists apparently felt the need to revisit the issue of similarity, including visual similarity, *de novo*. In one extreme case, the panelist ignored the ICANN panel completely. "[T]he Expert finds that it is not necessary to address...the String Similarity Panel's finding of no similarity or the Similarity Assessment Tool." .SHOP (CHINESE IDN)

The Similarity Assessment Tool, or SWORD algorithm, created a percentage score of visual similarity. Because the ICANN panel set a very high percentage threshold for visual similarity, panelists were also confused about what to do with scores below that threshold. This was clearly true for scores in the 70's. Compare "since algorithms designed to focus only on 'visual similarity' found the two gTLDs to be '75% similar,' the average, reasonable Internet user would perceive a significant difference" .EPOST with "The SWORD algorithm score between the two strings in question here, 72%, is high." .PETS (AFILIAS) Therefore, 72% is high while 75% means a significant difference. A third case that discussed the SWORD score chose to remain agnostic. "[T]he Panel is not satisfied that the mere rating alone suffices." .BOM Indifference to the SWORD score is a reasonable approach in the face of conflicting precedent. However, some Objectors and Applicants have already received a determination that was influenced by it, even though it is unclear how the percentage score relates to a finding of visual confusion.

The precedential relevance of ICANN's first look at string similarity remains in question. The cases that review visual similarity independently from it contrast with those that find it persuasive. Or should the results of ICANN's String Similarity panel be ignored when deciding a String Confusion Objection? If not, how persuasive should the score from the Similarity Assessment Tool be? Or should it be considered precedent at all? The current body of String Confusion Objections cannot settle these questions.

Expert Opinions

The clear majority view is that outside experts are helpful. Of course this is not surprising. However, there is clear disagreement about how much weight to give the opinion of an outside expert. One opinion went as far as saying that the String Confusion Objection panelist cannot break the tie between two outside experts whose opinions differ. In .BOM, the panelist "cannot prefer one above the other." This contrasts with the approach that the panelist should choose which outside study was more persuasive. "I prefer the survey conducted by..." .CAM (AC)

The issue of weight or persuasiveness has an important effect on the process a panelist follows in reaching the decision. In one case, the opinion of a hired expert was sufficient to shift the burden to the Applicant respondent. "Analysis of the two opposite experts (Walsh, Butters) shows that Butters has not successfully rebutted Walsh's report." .ECOM (Verisign) And "However, neither they [the utterances of 45 men, 48 women, 46 children, and acoustic frequencies articulated by 76 speakers and 140 speakers] nor figure 5 and accompanying text manage to rebut the Stygall evidence." .CAM (UNITED) When an objector's expert is able to establish a prima facie probability, the Applicant must overcome the shifted burden, presumably with an equal or superior outside expert.

The ability of an outside expert to shift the burden to the Applicant is surprising. And in one of these opinions, the same panelist recognized the care that must be taken when accepting a hired opinion.

Applicant labeled its expert review and expert survey as "independent" and Objector's expert report as "biased" and methodologically flawed. The expert surveys and reports of both sides seem to have been commissioned—there were no truly neutral expert reports submitted. Hence, all the reports and annexes shall be taken with the proper grain of salt.

.CAM (UNITED) This panelist's reasoning implies that expert opinions should not be given much weight. At the other extreme, however, is the .BOM position, in which outside expert opinions are so persuasive that they essentially cancel each other.

The Panel is also aware that when dealing with expert evidence, experts very often differ, and, even though one may be considered to be an expert whose views are supported by the majority in the field, there can still be a respectable minority to which the other expert belongs. In the absence of sufficient reasoning in favour of one view and negating or weakening the logic and reasoning of the other, the Panel is left in the situation that it cannot prefer one above the other.

.BOM In other words, if the Objector's expert has a reasonable argument, and the Applicant replies with a reasonable argument from its expert, the panelist will need to decide the case on other grounds. The majority of cases, however, approached the opinions of the experts carefully and weighed them against each other. No burden-shifting from Objector to Applicant was involved. "[H]is survey indeed does reveal a level of confusion that raises some concern but I prefer the survey conducted by..." .CAM (AC)

Although most accepted the value that outside experts bring to the proceeding, panelists were sometimes unclear on what the outside expert is expected to comment on: intermediate issues or the determination of the case. Compare "Stygall's representations...are too thin and not sufficiently founded. Her argument that the linguistic similarities lead to probable confusion, appears conclusionary." .COMPANY with "Objector's Expert IGail Stygall found linguistic similarities between .pet and .net in appearance and sound, but not conceptual similarities but concluded that based on her experience, internet users who encounter .pet would probably be confused." .PET (AFILIAS) One panelist seemed to accept the idea that the outside expert can do the work for the expert panelist. "I find persuasive...the analysis and conclusions of the independent expert retained by Applicant." .HOTELS

Can a panelist accept without question both "analysis and conclusions" from an expert, .HOTELS, or should the panelist review the expert's data "with the proper grain of salt." .CAM (UNITED) The only settled precedent is that Objection parties will invest in outside experts to review their strings for the expert panelist. Whether the investment is worth making will depend simply on which panelist is chosen.

Second Level Names

Panelists in String Confusion Objections occasionally applied not only the reasoning of others but also examples from the second-level environment. At first glance, this appears to be a reasonable analogy, but there is—as usual—differing opinions on whether it should apply.

Applying the precedent from second-level domain names was obviously an important consideration in the cases of .GBIZ and .EPOST. See .GBIZ "this Panel finds that the prefix letter "g" may impart the

suggestion of Google applications when used in an online context because addresses such as someone@gmail.com are very well-known.” And .EPOST “the average, reasonable Internet user would see the same difference that he or she would notice between <.mail> and <.email>.” Because the average internet user can distinguish between mail and gmail, it can distinguish between biz and gbiz. Because the average internet user can distinguish between mail and email, it can distinguish between post and epost.

What is interesting about this position is that the panelists are not referring to the specific TLD strings at hand but rather to pairs of words believed to be analogous. In sum, since the word “mail” and one-letter prefixes with it exist at the second level, any word and one letter prefix variations can exist at the top-level. The disagreement with this reasoning is apparent in at least one decision, in which com and ecom were found confusingly. “Applicant ignores the substantial difference between a top level and a second level domain.” .ECOM (VERISIGN)

Another panelist chose to heighten the scrutiny against confusion on the top-level when compared to the second-level.

Applicant aptly emphasizes that users look primarily to the left of the "dot" and not to the TLD. (quoting Ostberg and *Advertise.com v. AOL Advertising, Inc.*, 616 F.3d 974, 981 [9th Cir. 2010]). This lessens the attention paid to one vowel within a 3-letter string on the right; this will increase, not decrease the potential for confusion.

.CAM (UNITED) This panelist is arguing that names that co-exist comfortably at the second-level could easily be found confusing at the top level. In .TOURS, the panelist clearly adopted this view.

Similarly, the existence of numerous concurrent trademarks and/or domain names based on the same root word should not be determinative of the outcome in this case...This is a different purpose and accordingly calls for a different standard from what is used in reviewing...the allocation of standard internet domain names.

.TOURS These panelists imply that, as a starting point, second-level names could almost be ignored. Evidence from the second level is almost irrelevant as a category.

A slightly different approach would be to consider the second level names presented and question whether the specific names were relevant. However, one panelist who considered closely-related second-level strings also dismissed them as irrelevant. “Particularly unhelpful to Respondent are “pretypet.com” and “pretypets.com”, etc. as they concern second level domain names which are a truly different animal (pun unintended).” .PETS (AFILIAS) Opinions on the precedential value of the second-level, therefore, range from considering it convincing to humorously dismissing it as unhelpful.

Context

Just as precedent is a consideration external to the case at hand, so is the environment in which Internet users may be confused. Many panelists considered how external variables should affect their findings, and disagreement resulted over a few of these principles as well. “Context” is the label for these considerations in the organization of this memo. They are not about the string itself, and they do not relate to analogous situations.

There are two different types of context referenced by panelists in the String Confusion Objections: 1) market context, and 2) user context. Market context refers to the general environment in which the top-level domain will be used. For example, a closed business model will affect the context in which the string may be encountered generally. Another example could be a TLD that is expected to be marketed to a particular area of the world (although language issues will be discussed in a separate section). As one should now expect, the panelists disagree on several issues regarding how the top-level domain market should influence the Objection decisions. On the other hand, Internet users have some control over the environment in which they will encounter a TLD. The Internet user context is another external factor on which panelists have some disagreement.

Abusive Names

An important market context for the strings in a String Confusion Objection is the likelihood that second level names in one TLD will be intentionally identical to the same second level name in a different TLD. Indeed, this is obviously the primary purpose for having the String Confusion Objection. It is not hard to imagine, given the amount of phishing and fraud attempted already across existing TLDs, that the similarity of two new TLDs could increase the likelihood of fraud within their domains. Whether this should impact the decision in an Objection is a point on which there is dramatic inconsistency.

The panelists can speak for themselves:

Objector's many references to possible fraud, deceit, cybersquatting or other type of abuse through the use of the gTLD proposed by Applicant are in the nature of legal rights objections, are mere speculation, and are unworthy of any consideration by an Expert in a string confusion analysis.

.SPORTS

The effects of typos will be significant. The operators of “.ecom’s” would disproportionately benefit from the confusion resulting from typos. The two strings are so close that this practice would border on a deceptive practice which the law shall not endorse.

.ECOM (VERISIGN)

Abusive registrations are “mere speculation” while the “effects of typos will be significant.” The issue is “unworthy of any consideration,” but the “the law shall not endorse” it. These may be the two most irreconcilable positions observed in the body of cases so far.

A third position on the likelihood of abuse, taken in the .HOTELES and .HOTEIS decisions, is that it may be relevant, but that it depends on the case. “Both parties have addressed the likelihood of misuse...the Panel finds that these considerations are not directly germane to the determination required here.” .HOTELES, .HOTEIS The middle-of-the-road approach seems reasonable. It contrasts, however, with the language of the Applicant Guidebook, which defines string confusion as a string that resembles another string so much “that it is likely to deceive.” How could a TLD be deceptive if not second-level names that intentionally imitate second-level names in another TLD?

Therefore, completely unresolved is the question of whether the panelist should consider the likelihood of abusive registrations. Are abusive names only a speculative concern, or are they the very reason for the Objection in the first place?

Marketing Intent

Whether a String Confusion panelist should consider the business model for a TLD is another controversial, contextual consideration. Whether the string itself should be the only evidence evaluated or whether the marketing intent is critical cannot be resolved by the current body of String Confusion cases.

One panelist believed that how domain names are marketed is an essential part of the decision. “[I]n the absence of some other external information (such as an index or guidebook) would have to guess which of the two strings contains the information the user is looking to view.” .TOURS Another panelist believed this to be tangential. “The fact that two gTLDs are competitive in a certain industry or area of information is not a concern...” .EPOST

Multiple panelists cannot resolve the divide on how the Applicant’s marketing should affect their decision. In .BOM, it was ignored. “overlapping marketing channels [] are not of such a nature as to significantly increase the likelihood of confusion.” .BOM In .CAM (UNITED), it heightened the scrutiny. “[C]ourts evaluating trademark infringement find that goods marketed in similar channels of trade are more likely to be confused.” .CAM (UNITED) And in at least one decision, the marketing channel seemed to be determinative. “.shop’ is directed at English-speaking users, while .购 is directed at Chinese-speaking users. While there is some potential overlap between these two markets, they are largely distinct. .SHOP (CHINESE IDN) Therefore, some decisions stand for the principle that how a TLD will be marketed should not affect whether confusion should be found, while other decisions argue for the opposite.

An even more significant factor might be whether the TLD will be marketed at all. In the .TVS, .ITV, and .NEC decisions, the .brands were found to not be confusingly similar with open TLDs, in part because they would be closed. “I was persuaded, in part, by...the limited nature of the gTLD's intended use.” .TVS “that ITV has represented in its application that “the ITV registry will be stringently controlled and used only by authorized ITV personnel.” .ITV

A small amount of residual confusion from these decisions could be caused by a point made in the .BOM case. The panelist in .NEC was apt to find no aural confusion because the TLD would be closed. “I also find no likelihood of aural confusion in light of NEC's announced intention to operate the .NEC TLD as a closed (as opposed to 'open' like .net) single-registrant model, so that the .NEC TLD will only be used by NEC and its controlled licensees...The record clearly, in my judgment, establishes that the NEC brand is recognized in the marketplace as a three-letter acronym commonly pronounced ‘en ee see,’ and not ‘neck.’” .NEC The .BOM panelist points out, though, that “it may not be possible for a trademark owner to control how purchasers will vocalise the mark...” .BOM The closed nature of a TLD may not be sufficient to avoid aural confusion, although it seems persuasive as to similarity as a whole. Marketing intent is not the same as marketing effect.

Sufficiently similar and open TLDs have a different problem. The likelihood of confusion is a possibility from the outset. However, an open TLD does not necessarily mean that it attracts second level names of all types. The panelist in .CAM (AC) saw less chance for confusion with .COM by assuming the .CAM TLD

would be oriented towards camera-related domains. “a consumer would quickly realize that a .cam website is likely associated with photography or camera use and is different than a .com website in use generally by a myriad of commercial entities.” .CAM (AC) In the .CAM (UNITED) case, the panelist assumed that open TLDs all have inherently the same business model. “While Applicant is invited and welcomed to enter the market with *a truly new and innovative* gTLD, the proposed “.cam” is just too close to the existing “.com”. .CAM (UNITED) (emphasis added)⁴ Confusion as to the target market of the Applicant can cause the panelist to be confused about the level of similarity between the strings.

In conclusion, how distinctly must a TLD be marketed in order to gain distinction in the mind of the average, Internet user is yet another principle for which String Confusion Objections create conflicting precedent. Should the same marketing channel impact the final determination, as it clearly did in .CAM (UNITED), or should it be an incidental consideration, as it was in .BOM?

Competition

Competition between Applicants is another factor considered by panelists in the context of String Confusion. And like most of the general principles applied by String Confusion panelists, there is a range of disagreement. The potential effects that competition should have on a decision, according to a survey of panelists’ statements, include: 1) no impact, 2) a higher threshold, and 3) a lower threshold.

Some panelists considered competition between Applicants to be irrelevant to the issue of whether the strings themselves are confusingly similar. “The parties’ arguments and contentions regarding alleged business motives and/or attempts to limit competition...are not addressed herein as they are deemed irrelevant to the task of the expert panel.” .HOTELS See .EPOST (“The fact that two gTLDs are competitive in a certain industry or area of information is not a concern.”) Some panelists seem to believe that competition should favor a higher threshold for similarity. “It is correct that the law does not support monopoly over domain name uses such that the first-comer takes all. New domain names, including new TLD strings, should be given a chance.” .COMPANY Giving a chance to new TLD strings implies that few strings should be found to be confusing. It is essentially a policy position that interprets the standards for String Confusion according to the overall purpose of the new TLD program.

One panelist argued that competition leads to confusion by itself, which favors a finding of confusion.

The adopters of the applicable standard of review for string confusion hypothetically could have allowed an unlimited number of top level domain names using the same root, and simply differentiate them by numbers, e.g., <.shop1>, <.shop2>, <.shop3>, etc., or other modifiers, including pluralization, or other similar variations of a root word, or other modifiers before or after the root word. While that might allow for increased competition, as argued by Applicant, it would only lead to a greater level of confusion and uncertainty among average, reasonable Internet users. Accordingly, the Applicant’s argument that the concurrent use of a root word and its participle version in a string increases competition is not persuasive in this context, and is rejected.

⁴ In a surprising departure from judicial objectivity, the panelist in .CAM (UNITED) seems to be saying not that the string is too confusing to be allowed but rather that it is not creative enough to be approved.

.ONLINESHOPPING (CHINESE IDN) This is another policy statement, but this policy statement contradicts the policy that String Confusion Objections should stay focused on ICANN's goal of increasing competition. The argument is that if ICANN wanted simply to increase competition, it would not have implemented this Objection at all.

Other panelists chose to consider the effect of competition on the present case with a balanced attitude toward the principle. "A goal of the new gTLD program is to open up and create more markets and competition. However, this has to occur in orderly channels and may not be based on a distortion of the market." .CAM (UNITED) "There is an ICANN policy not to allow confusingly similar gTLDs to be registered. But there is also an ICANN policy to encourage such registrations to widen the scope of internet use." .GBIZ

Yet again, a reader of Objections is left to wonder where consensus could be reached on another principle. As the panelist in .GBIZ stated, "The policy arguments cut both ways." Whether the competition between Applicants is a factor to consider, should heighten the scrutiny in an Objection, or should have no effect at all is not clear from the already released cases.

Capitalization

The capitalization of a string stands out as one of the most unusual considerations in the string similarity objections because the domain name system ("dns") is NOT case-sensitive. However, this consideration is mentioned explicitly in one case and appears by mistake in another.

In the .TVS case, the panelist said, "In considering the parties' arguments, I was persuaded, in part, by...the fact that TVS's brand is associated with capital letters (whereas Objector's .tv is in lower case)..." .TVS The fact that a logo uses capital letters is, at first, an interesting and unique insight into the difficulty of determining the probability that a .brand could be confused with an open TLD. The fact that the panelist used it as a rationale, though, opens a Pandora's box of difficult to answer questions. First, did the panelist know that domain names are not case-sensitive? Second, is the panelist referring to how .TV has been marketed? If so, how much impact does the Registry Operator's capitalization of a TLD have on capitalization by Registrars in their marketing? Also, Registrants may or may not choose to advertise their domain name in upper or lower case letters. Finally (and perhaps most importantly), does capitalization even affect whether one string could be confused with another?

The last question raised by .TVS may have been answered inadvertently in another case. The panelist in an analogous case, .NEC, reached the following conclusion: ".net and .NET [sic] are not confusingly similar." Of course, .net and .NET are not confusingly similar. But it is obvious from the paragraph in which this statement was made that the panelist meant to say ".net and .NEC" are not confusingly similar. The irony is that confusion occurred within the very statement that the two strings are not confusing. It appears that the attempt to capitalize NEC, the brand, led to string confusion with .net, the objecting TLD. The decision was published by the ICDR with the error uncorrected (and likely unnoticed).

In sum, another contextual consideration is how the strings will be written. This is a difficult factor to include in a determination, as evidenced by the two cases that address the issue. The TVS brand is normally capitalized, so the brand owner is more likely to capitalize the TLD in its advertising. However, the lower- or upper-case rendering of an open TLD would tend to be inconsistent and often-changing as registrants use the designation in printed material for their URLs. The use of upper case letters will probably lead to more confusion between two strings. But how this should impact a String Confusion

Objection is an unclear contextual principle that was in fact adopted by a panelist and unknowingly supported by another.

Search Results

A final contextual principle is one that focuses exclusively on the Internet user. Domain names provide a system for direct navigation on the Internet, escalating the need to avoid confusion. On the other hand, most Internet users navigate by search. Does this lessen the need to distinguish between similar strings, thus heightening the standard? Or is this consideration irrelevant because the panelist should focus on the non-search context? String Confusion Objection panelists clearly disagree.

Two decisions that mentioned the context of Internet searches found it irrelevant. “Most adult Internet users may find websites through search engines, however, this does not prevent the confusion at issue here.” .CAM (UNITED) and “In the context of internet searches, confusion can arise if the user is unable to differentiate between top level domain names.” .ONLINESHOPPING (CHINESE IDN) The contrast comes from one panelist in two decisions who decided that Internet searching makes it much less likely that strings could be confused. “the ‘average, responsible Internet user’ uses search engines...and has the opportunity to refine, broaden or narrow the search parameters. Thus, it seems unlikely that somewhat similar but still distinct top-level domain names by themselves will affect Internet use, including searches, to the extent of causing user confusion.” .HOTEIS, .HOTELES Here, the cases present another striking difference of opinion. In the minds of some, Internet searches do not prevent confusion. And another believes that search engines prevent confusion.

In neither HOTEIS nor HOTELES was confusing similarity found, and these were the decisions that expected searching to lessen confusion. In .CAM (UNITED) and .ONLINESHOPPING (CHINESE IDN), the panelists believed confusion could occur during a search and both found the strings confusingly similar. This simple correlation tends to indicate that a panelist’s position on this issue of context has an impact on the final determination.

String Analysis

Little needs to be said regarding a panelist’s discretion regarding the comparison between two new gTLD strings when no precedential or contextual factors are involved. Discussing the properties of the character strings relative to each other is precisely what is imagined by most when they learn about the String Confusion Objection. There are, however, two considerations debated between panelists that seem implicit in an analysis of the strings in dispute: 1) Plurals, and 2) Length of the strings.

Plurals

Whether a string and its plural version should both be allowed to delegate is a controversial issue and one that has been treated differently by different panelists. On the issue of plurals, there is no direct contention between panelists’ positions, but statements made by some lead to confusion about how the issue should be considered in a String Confusion Objection.

First, the idea of a bright line test was rejected in .SPORTS. “It has been argued that there should be a bright line test regarding singular and plural new gTLDs...the NGPC saw no need to make any changes...allowing singular and plural versions of the same strings.” SPORTS This panelist implies that the policy direction given by the New gTLD Program Committee was to not create a special category for plurals. However, a bright line test could be argued by the words of a different panelist, who also interprets policy from the actions of ICANN (although this leads him to a different conclusion).

“The adopters of the applicable standard of review for string confusion hypothetically could have allowed an unlimited number of top level domain names using the same root [word], and simply differentiate them by...pluralization...While that might allow for increased competition, as argued by Applicant, it would only lead to a greater level of confusion.”

.ONLINESHOPPING (CHINESE IDN). The same panelist went on to imply a potential bright line test in a different case by saying, “Here, the concurrent use of ‘tours’, the plural version of the root word ‘tour’, in a gTLD string will result in probable confusion by the average, reasonable Internet user.” TOURS.

While one panelist rejects a bright-line test for confusion between plurals and another implies one, there is also a sense of presumption concerning plurals and confusion created by the findings of two separate cases. In .SPORTS, the panelist states: “it is difficult to imagine many monosyllabic words, at least in the English language, whose plural and singular versions would not be similar visually and aurally.” Visual and aural are two of the three types of similarity mentioned for consideration in the Guidebook. The third type of similarity mentioned is meaning. On this point, a different case finds:

The “pluralization” of a word does not significantly change its meaning. Words with the same meaning, albeit distinct in number are easy to confuse: their signs are conceptually very similar, if not identical. In general, two grammatical versions of a word do not change their meaning nor heighten their distinguishability.

.PETS (AFILIAS) Therefore, it is hard to imagine a plural that is not confusing visually, aurally, and in meaning. The precedential effect of these decisions would be, therefore, that between a string and its plural, confusingly similar is the starting point for the decision. With this method, considering the distinction of plural versus singular to the intermediate findings does not automatically clear up the confusion about the standard that should be applied to plurals. See also .SPORTS “It is true that the two are visually different...The proposed gTLDs are visually similar.” (acknowledging the difficulty of the intermediate determination when the only difference is the letter “s”)

Number of letters

The other point of disagreement between panelists when analyzing the string itself is how the length of the strings affects the likelihood of confusion. This is a principle that has ample precedent in trademark disputes. However, these panelists’ statements will be compared with each other as if the issue of proper precedence has not been settled.

In two cases, the addition of a single letter was considered likely to lead to confusion. “the difference of only one out of 4 letters is slight...The likelihood that the one letter could be overlooked (missed) is great.” .ECOM (VERISIGN) “The likelihood of visual similarity seems high, as “pet” is included in “pets”, it differs only in one more letter, and the first three letters are identical, which is the portion that users most focus on.” .PETS (AFILIAS) In .ITV, the panelist reached the opposite conclusion. “It is quite likely that the average, reasonable internet user will be able to distinguish between a two-letter TLD and a three-letter TLD and therefore will not be confused.” .ITV See also HOTEIS, (finding two strings “sufficiently different...in length” although they differ by only one letter). Does adding one more letter to a short word clearly lead to confusion, or is it clear that adding one more letter is such a change that

no confusion should be expected? Panelists are confused, then, about whether a one-letter addition, as a principle, leads to confusion or prevents it.

When one letter is changed, rather than added, the length of a word also seems to impact the determinations, albeit in opposing directions. One panelist believed that a change of one letter in a short word “lessens the attention paid to one vowel within a 3-letter string on the right” .CAM (UNITED) (finding confusion between .CAM and .COM) And in a different decision between 3 letter strings, “one out of 3 letters is indeed only 33 1/3 % of the word.” .NEW (not finding confusion between .NEW and .NET) But see HOTEIS, HOTELES (speculating that <.hotels> and <.hoteis> were placed in contention by the ICANN String Similarity Panel because the two words “are the same length.”)

The length of the strings in a String Confusion Objection is probably a significant consideration given that all of the original top level domains consisted of three letters. Yet panelists and their cases are divided on whether this increases or decreases the likelihood of confusion.

All things considered, the textual analysis of a string is where there is less confusion between panelists. This is likely because analyzing the words themselves was always an expected part of the determination and precisely why discretion was left to the panelists. More consistency on this level, though, would be helpful, as it has been in trademark cases.

Language

The consideration of language spans all three categories: Precedent, Context, and String Analysis. Language has been considered by numerous trademark cases, although the application of language to confusingly similar may depend on the jurisdiction. A non-English TLD may be marketed primarily in a place in the world where the slightest difference in letters will stand out. Finally, some strings are unique to a specific language, making confusion less likely. This assumes, though, that the average Internet user is familiar with that language. Only considerations colored by language differences where panelists have taken contradictory positions are presented.

Precedent

Issues with multilingual TLDs have not split the panelists in String Confusion Objections, but there is some latent disagreement on which international system is more appropriate for resolving the question. Put simply, should precedent relating to confusion across different languages come from the European Union or the United States? The .BOM decision looked primarily to trademark cases from the European Court where the mark was in a different language than that of the infringer. In .NUMBERONESTORE (CHINESE IDN), the panelist applied the US Doctrine of Foreign Equivalents. Harmonization between the two is likely, but one system on some issues extends further than the other. The Guidebook suggests applying relevant rules of international law, but when two rules from different international systems are both relevant must the panelist decide which rule is more international? String Confusion Objections do not yet bridge the potential divide.

Context

The language that an Internet user speaks (or is familiar with) is a contextual consideration of profound importance. The distinction between panelists in this regard is the amount of importance to give to any one language. In .HOTEIS, the panelist narrowed his focus to the Portuguese-speaking user “or users having a familiarity with Portuguese.” (“common Portuguese word constitutes sufficient independent

status as to render confusion even less likely”). Is the average, reasonable Internet user familiar with Portuguese? The panelist assumed without deciding.

The approach in .HOTEIS subtly differs from the .SPORT decision. In .SPORT, the panelist determined that French has significance because “for many people around the globe French is their primary written or spoken language.” If French should be considered because it is a common language around the globe, can languages less global be used to find a similarity that leads to confusion? The .HOTEIS panelist found no such justification, but he considered the impact that a lesser-known language could have anyway. Therefore, the language context appropriate for String Confusion Objections remains a latent point of contention between opinions.

String Analysis

By far the most confusing of differences on the principle of language is whether one string in the different script eliminates the possibility of confusion. The .SHOP (CHINESE IDN) case relied on the fact that “The two strings are in different languages, written in different scripts that look very different...” .SHOP (CHINESE IDN). The two strings at issue were .SHOP, in Latin script and .SHOP, translated into Chinese script. While this panelist relied on the difference in script, another panelist chose to ignore it:

Finally, the Applicant has not persuaded the panel that simply using a foreign language or foreign characters in a gTLD string is a sufficient basis to differentiate two strings with essentially the same meaning when the string is translated from one language to the other. Many Internet users speak more than one language, including English. The use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet user.

.ONLINESHOPPING (CHINESE IDN) The difference between the cases is about the starting point for the decision. A String Confusion panelist must find similarity before confusing similarity could be decided. Can two strings in completely different scripts be considered similar? Yes, but in the .SHOP (CHINESE IDN) case the burden that must be overcome by the Objector is significantly higher than in .ONLINESHOPPING (CHINESE IDN).

Variance from Standards

The guidebook left open a very wide door regarding outside principles. On the other hand, it did spell out explicit standards that must be applied. Departure from these standards is unacceptable. Fortunately, there are very limited number of instances of this. On the whole, panelists were careful to quote the appropriate standard and apply it. In other words, where guidance was given, it was followed. There are two exceptions.

Internet user

In the HOTEIS and HOTELES decisions, the panelist changed the type of average Internet user for which confusion must be avoided. “Similarly, while there may be some aural similarity and similarity of meaning in a general sense with the words ‘hotel’ and ‘hoteis,’ [or ‘hoteles’] neither seems likely to be the basis for confusion for an ‘average, **responsible** Internet user.’ .HOTEIS (emphasis added) Switching the word to “responsible” from “reasonable” in the .HOTEIS and the .HOTELES decision is a change to the standard.

Weight to factors

The guidebook standard outlines various types of similarity that could rise to the level of confusion. Some panelists have speculated—and in some cases relied on—that different weight should be given to certain types of similarity. Other panelists sharply disagree. Specifically, should visual similarity receive more attention in a String Confusion Objection, or should all types of similarity be granted equal opportunity?

In .EPOST, .IMMOBILIEN, .SPORTS, “The test is primarily a visual one...” This position was also taken in another pair of cases:

[W]hile the limitation to "visual" confusion is removed in the DRSP appeal process, nevertheless, unlike an objection based on legal rights, the Panel is of the opinion that *the primary area* for likely string confusion for a gTLD string *is visual confusion*.

.HOTELES, .HOTEIS (emphasis added) The panelist here is inferring that additional weight should be given to one type of similarity listed in the Guidebook. Other panelists disagree. In .VET, .CARS, .GBIZ, .PET (GOOGLE), the panelist explained that “it does not logically follow that any one of these grounds of similarity alone would automatically result in having such an objection granted.” See also .CAM (AC) (“The visual similarity of the two strings does not allow a conclusion that confusion would result.”) Whether one type of similarity should receive greater weight than the other types mentioned in the Guidebook is an obvious difference of opinion on the standard itself.

Conclusion

The Applicant Guidebook mandated certain standards to be applied in a String Confusion Objection. (Applicant Guidebook, String Confusion Objection, Section 3.5.1) The Guidebook also allows additional relevant principles of international law to be applied. (Applicant Guidebook, Dispute Resolution Principles (Standards), Section 3.5) While the Guidebook standards were followed in almost all cases, String Confusion Objection panelists have taken divergent positions on many general principles in reaching their determinations on whether two TLD strings are confusingly similar or not. There are more than twelve general principles applied to String Confusion Objections on which panelists have spoken and on which the panelists do not necessarily agree with one another. For many of these principles, the division of opinion is patently clear. Other principles create latent confusion that may need harmonization before consistent decisions could be reached.

Opinion

The conflicting positions taken by panelists could be dismissed as the natural level of disagreement present in case law. However, on the whole, there is a surprising level of contradiction. These contradictions about which considerations should be permitted and how they should be applied seem to exceed an acceptable level of disagreement that is common in the development of a new area of law.

The lack of consistency among String Confusion Objections is unique to this type of Objection. For example, many Legal Rights Objection decisions contain quotes from other Legal Rights Objections. The judicial reasoning of other panelists is often referenced in the body of decisions in Legal Rights

Objection. In the String Confusion Objections, though, there is no such effect. Identical wording in two cases is always the effect of a panelist quoting him or herself in another case.

The panelists, as a group, appear to disagree with each other so much on so many key issues that the precedential value of String Confusion Objections is severely impaired. Comparing String Confusion Objections to Federal Court litigation in the United States, a Circuit split on a single issue is not unusual. It would be unusual, however, to have an overwhelming number of splits within the same area of law left unresolved. The String Confusion Objections released so far present this unusual situation. This survey concludes that reconciliation between the wide range of conflicting positions and inconsistent application on the questions of permissible precedent, appropriate context, and presumptive string analysis is desperately needed.