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
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> (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
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> (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

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[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 Reconsideration[2]

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

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[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 ETTSA, 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 unsupportable. 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.)

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[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.)

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[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.

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