

Mr. Cherine Chalaby
Chairman New gTLD Program Committee
Internet Corporation for Assigned Names and Numbers
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By E-Mail

9th September 2013

Dear Mr. Chalaby

String Confusion Objections

We understand that the NGPC is meeting on Tuesday 10th September to consider, amongst other matters, an update on string similarity. We understand that this may include recent determinations by expert panellists on String Confusion objections.

As you may be aware, three decisions were recently rendered in the objections raised by Verisign, Inc against the three applicants for the .CAM string (one being dot Agency Limited, an entity to which Famous Four Media provides services). Two separate judgements, handed down by Mr Murray Smith, determined that there was not a likelihood of confusion between .COM and .CAM within the parameters of the Applicant Guidebook and the final judgement, handed down by Mr Urs Lauechli, determined against United TLD Holdco Limited that there was.

We are writing to make the point that the divergence of the decisions is perfectly acceptable, and in the interests of fairness, should not be reopened by the Board for a number of reasons. We thought it would assist to draw the Board's attention to the pertinent factors.

1. *The Applicant Guidebook (AGB) is clear.* Nowhere does it say in the AGB that objection decisions against the same string must be decided in a like manner. It simply states that, if an objection is successful, the application cannot proceed. Neither does it say that the proceedings in respect of certain types of objection in respect of the same string must be consolidated. Even where proceedings are consolidated, a panellist may still determine objections in the consolidated set differently.

The AGB was developed over a period of time with the input of numerous experts, and it would be rather patronising to assume that those drafting had not considered this scenario. Each form of objection, be it Legal Rights, Community, Limited Public Interest or String Confusion, contain factors that the position or intentions of the applicant can influence the result. If external factors were not relevant, then consolidation should have been mandatory. This would not have escaped the attention of those drafting the AGB.

The next step is clear: the application which was the subject of a successful objection cannot proceed (AGB 1.1.2.9 and 3.2.2.1).

2. *The Panellists determinations are clear and final.* The AGB and the New gTLD Dispute Resolution Procedure does not contain an in built right of appeal.

The actual decisions are quite clear. They do diverge, but then there are differences between the applications. In particular all three decisions contemplate the usage of the string and the likely impact this would have on the possibility of user confusion. We have not seen United TLD's response to the objection, but if it was deficient in any regard, that should not affect the result on decisions in separate proceedings. The AGB created an objective standard of the "average, reasonable Internet user" and for this reason usage is relevant. We assume that all applicants gave the relevant panellist some perspective on the usage of the TLD and the likely perception of the "average, reasonable internet user".

3. *The losing Applicant, United TLD rejected the opportunity to consolidate proceedings on the basis that "usage" of the TLD is relevant.* On 14th May 2013, Greenberg Traurig, lawyers acting for United TLD, wrote to the ICDR (the dispute resolution provider) to reject an offer to consolidate proceedings. Their rationale was that:

"Consolidation has the potential to prejudice the Applicants if all Applicants' arguments are evaluated collectively, without regard to each Applicant's unique plan for the .cam gTLD and their arguments articulating why such plans would not cause confusion."

In effect, they are admitting that string confusion as defined in the AGB is not "application agnostic" and that implicitly there could be a differing result as between different panellists. We are aware that, since the recent decisions were rendered, United TLD has in fact been seeking to argue the opposite in public forums

[\(http://www.circleid.com/posts/20130820_icann_must_now_decide_string_similarity_question/\)](http://www.circleid.com/posts/20130820_icann_must_now_decide_string_similarity_question/)

and that string confusion should be application agnostic. To reopen the decisions in the circumstances would appear to allow United TLD to change tack to suit the circumstances and grant it an inequitable benefit.

In the event that the Board does revisit the .COM/.CAM decisions, of course this does set a precedent for all applicants who have been unsuccessful in the Dispute Resolution process to apply to the Board for reconsideration of their decision.

We thank you for your kind consideration of our views in this matter.

Yours sincerely



Peter Young

Chief Legal Officer

cc Fadi Chehadé Esq, President/CEO ICANN