68, Avenue de la Liberté
L-1930 Luxembourg
Luxembourg
Tel. +352 62 170 8 170
johannes@dothotel.info
www.dothotel.info

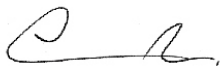HOTEL Top-Level-Domain Sàrl | 68, Avenue de la Liberté | L-1930 Luxembourg | Luxembourg

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 patent[2] 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 latent[3] 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 "prettypet.com" and "prettypets.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 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 disproportionally 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." lends further weight to its position" .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.