

Flip Petillion  
fpetillion@crowell.com  
Personal Contact Information Redacted

8 March 2016

Members of the ICANN Board, and  
Mr Akram Atallah,  
President, Global Domains Division

Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

UNITED STATES OF AMERICA

**By e-mail**

Dear Members of the ICANN Board of Directors and Mr. Atallah,

**Re: .hotel data exposure issue**

I am writing to you on behalf of Travel Reservations SRL ("TRS", formerly Despegar Online SRL), Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds+Machines Group Limited (formerly, Top Level Domain Holdings Limited), Donuts Inc. (and its subsidiary applicants Spring McCook, LLC and Little Birch, LLC), and Radix FZC (and its subsidiary applicant DotHotel Inc.).

My clients are all applicants for the .hotel and/or .eco gTLD and have expressed their concerns about the data exposure issue that occurred in the New gTLD Applicant and GDD portals. My clients expressed their concerns *inter alia* in a letter of 5 June 2015 and within the IRP proceedings in ICDR Case No. 01-15-002-8061 to which ICANN was a party. Unfortunately however, the Board has so far not addressed this issue.

In its Declaration of 11 February 2016, the IRP Panel denied my clients' requests. However, the IRP Panel considered that my clients had raised legitimate concerns that should be tackled by ICANN. With the present letter, I urge you to address my clients' concerns appropriately, with due respect for the Articles of Incorporation and Bylaws.

On 5 June 2015 my clients asked that there be full transparency and that ICANN adopt appropriate measures regarding the data exposure issue. On 11 February 2016 the IRP Panel ruled that “[t]he approach taken by the ICANN Board so far in relation to this issue does not, in the view of the Panel, comply with [Article III(1) of ICANN’s] Bylaw[s].”<sup>1</sup> According to the Panel, it was not clear if ICANN had properly investigated the allegation of association between HOTEL Top-Level-Domain s.a.r.l. (“HTLD”) and Mr. Dirk Krischenowski and, if it had, what conclusions ICANN had reached. The Panel added that ICANN is required to investigate the issue properly and to make public the fact of the investigation and the result thereof. The Panel added that appropriate action should have been taken by the date of the IRP Declaration, the failure of which could well amount to an inexcusable inaction by the Board.

At the hearing of 7 December 2015, counsel to ICANN, in the presence of senior ICANN staff and ICANN’s Deputy General Counsel, assured the panel that the issue was still under consideration by the ICANN Board.<sup>2</sup> However, although the Board was first contacted about this on 5 June 2015, there are no indications that the Board ever gave consideration to this matter, either before or after the 7 December hearing. My clients’ request was never put on the agenda of the Board, although there have been numerous Board meetings since.

In addition, it is apparent that ICANN has not investigated the issue properly. On 10 November 2015, ICANN asserted that there is no evidence to show that HTLD is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials.<sup>3</sup> However, the affiliation between Mr. Dirk Krischenowski and HTLD is apparent from public information that is available on the ICANN website. As a matter of fact Mr. Dirk Krischenowski of HTLD represented HTLD in three string confusion objections against applications by Despegar Online SRL and Booking.com (Annexes 1 to 3). ICANN’s own evidence thus shows that Mr. Dirk Krischenowski is part of HTLD and that he has authority to represent HTLD. To paraphrase the IRP Panel<sup>4</sup>, ICANN’s argument – that the affiliation between Mr. Dirk Krischenowski and HTLD is unsupported – represents, at best, that ICANN’s investigations had not yet revealed this obvious link and, at worst, an attempt to mislead the IRP Panel about the Board’s intent to avoid dealing with what is clearly a serious and sensitive issue that relates to the integrity of the application process for the .hotel gTLD.

The integrity of the application process for the .hotel gTLD is at risk if ICANN allows HTLD’s application to proceed. Allowing HTLD’s application to proceed would go against everything that ICANN stands for. It would amount to an acquiescence in criminal acts that were committed with the obvious intent to obtain an unfair advantage over direct competitors. Such acquiescence would be contrary to ICANN’s obligations under its Articles of Incorporation and Bylaws, and to ICANN’s mandate to operate for the benefit of the Internet community as a whole by carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law, and through open and transparent processes that enable competition and open entry in Internet-related markets. When the background screening criteria for new gTLD applicants were introduced, ICANN affirmed the right to deny an otherwise qualified application, recognizing ICANN’s duty “to protect the public interest in the allocation of critical Internet resources”<sup>5</sup>. In this respect, ICANN made clear that “applications from any entity with or including any individual [who] has ever been convicted of any crime involving the use of computers [...] or

<sup>1</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 133-134.

<sup>2</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 137.

<sup>3</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, ICANN’s Sur-Reply re .hotel of 10 November 2015, para. 25.

<sup>4</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 127.

<sup>5</sup> gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24.

*the Internet to facilitate the commission of crimes” were going to be “automatically disqualified from the program”<sup>6</sup>.*

In the case at hand, ICANN caught a representative of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. The situation is even more critical as the crime was committed with the obvious intent of obtaining sensitive business information concerning a competing applicant. It is clearly not in the public interest, and the public interest will not be adequately protected, if critical Internet resources are allocated to HTLD. Allocating the .hotel TLD to HTLD is not in accordance with any of the core values that should guide the decisions and actions of ICANN. It would go against ICANN's mandate to act in conformity with, *inter alia*, open and transparent processes that enable competition and open entry in Internet-related markets.

As a result, we see no other solution but for ICANN to cancel HTLD's application for .hotel, and to allow the other applications for .hotel to proceed.

\*

In view of the above, I reiterate my clients' request that ICANN and its Board cancel the application of HTLD for .hotel at its meeting of 10 March 2016; failing this, I have instructions to bring this matter to the attention of an IRP panel.

This letter is not intended to be a complete statement of the elements of facts or law relevant to this matter and is sent without prejudice and reserving all rights.

Yours sincerely,



---

Flip Petillion

---

<sup>6</sup> gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22.

Annexes:

Annex 1: SCO Expert Determination in ICDR Case No. 50-504-T-00237-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1016-75482-en.pdf>

Annex 2: SCO Expert Determination in ICDR Case No. 50-504-T-000211-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1249-1940-en.pdf>

Annex 3: SCO Expert Determination in ICDR Case No. 50-504-T-000212-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1249-87712-en.pdf>