



November 4, 2013

Mr. Cherine Chalaby
Chair
ICANN New gTLD Program Committee

RE: .CAM Decisions

Dear Mr. Chalaby:

On behalf of United TLD Holdco, Ltd., one of three applicants for the .CAM new gTLD, I write to ask the New gTLD Program Committee (NGPC) that it urgently rectify the disparate decisions issued by the International Center for Dispute Resolution (ICDR) on the objections filed by VeriSign against the three applicants for .CAM. We have previously written ICANN staff regarding this issue but feel this matter needs to be brought to the NGPC's full attention.

On August 13th, the ICDR issued a decision finding that AC Webconnecting's application for .CAM and VeriSign's .COM gTLD were not confusingly similar. On the same day, the ICDR issued a second decision finding that dotAgency's .CAM application was also not confusingly similar to .COM. Because of these decisions, these two applications are permitted to move forward in the new gTLD program and can participate in the ICANN auction process to resolve the string contention.

VeriSign's objection against United TLD's application for .CAM, however, had a different result despite the fact that the general principles and standards that applied in the case were exactly the same. The result of this adverse judgment means that United TLD's application, unlike the other two applications, cannot proceed further in the process and participate as part of a string contention set.

In contrast to other applicants who have lost string confusion objections and have complained about inconsistent panel results related to singular and plurals (for example .CAR and .CARS were not found to be similar but .TOUR and .TOURS were found to be confusingly similar), we are NOT complaining about inconsistent results. Our case and circumstances are different and unique from these others. We acknowledge that some individuals may differ on whether .CAM and .COM are confusingly similar. However, NONE can differ on whether .CAM and .CAM are the same exact identical string and therefore must be treated equally in terms of a decision on whether they are similar to .COM.

ICANN's staff had initially suggested that we seek reconsideration of the ICDR's determination by the Board Governance Committee (BGC) or the Office of Ombudsman but we believe those options are inapplicable to the circumstances in this case as the problem we face does not involve either an ICANN action or misapplication of ICANN policy. The differing decisions in the .CAM /.COM objections point not to any ICANN **policy** flaw but rather to a **process** flaw that resulted in inequitable treatment of applicants for the same string. ICANN has authority to correct process flaws and can do so in this case by declaring that all of the decisions related to .CAM be uniform. There have been situations previously

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where ICANN has stepped in and taken action to address an unforeseen problem in the new gTLD program and this is what we are seeking. Please allow us to explain this position further.

ICANN is bound by its bylaws to act in an equitable manner with respect to the new gTLD program and toward the registry applicants that participate in this historic process. Section 5.2.7 of the Applicant Guidebook (AGB) states:

ICANN's Bylaws require ICANN to act in an open and transparent manner, and to provide equitable treatment among registry operators.

This fundamental obligation is further underscored by language which appears in Section 3.2 of the new Registry Agreement which provides:

ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

If we examine closely the circumstances regarding United TLD's application for .CAM, we see that the problem is NOT one that involves the application of an unfair policy, standard, procedure, or practice. What we see, however, is an inequitable and unfair outcome applying to identically situated applicants because of a process flaw in the objection process; one unintended by ICANN, the ICANN community, the applicants, or even the dispute providers.

Module 3, Section 3.5.1. of the AGB requires that the expert look at the "resemblance" of the strings to one another where resemblance means visual, aural, or meaning similarities. Use, operation, or registration of the string, or identity of the applicant, are wholly irrelevant to the expert's review and have no bearing on a string confusion analysis. Consequently, the only facts and evidence to examine is the string itself, the letters C-A-M, and its meaning (an abbreviation for "webcam" or "camera"). If the letters C, A, and M and the meaning of "CAM" are the only things to review and analyze and an expert finds that .CAM is not similar to .COM, then the decision MUST also apply for all .CAMs. To allow different decisions means that .CAM is NOT equal to .CAM which is an absurd result and one not intended by ICANN, the applicants, nor the ICDR.

To correct this absurd result, ICANN must act to insure equitable treatment of the applicants as required by ICANN's bylaws. A Reconsideration Request is meant to address complaints "that an action or inaction contradicts ICANN policy." Because the issue, however, is not one related to an ICANN policy, this option is not applicable to us. This is borne out by the Reconsideration Request decision recently denied to Amazon where the Board Governance Committee affirmed that reconsideration may be invoked when the panel or ICANN failed to follow its policies. Similarly, the Ombudsman does not have jurisdiction to resolve the disputes between us and the ICDR's expert panelist so this option is also inapplicable to us.



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Module 3, Section 3.4.6 states that findings of the panel will be considered an “expert determination and advice” to ICANN. We are asking ICANN not to reject the advice but rather to accept the advice on condition that all three .CAM applications must continue to avoid the inequitable results for the exact same .CAM string. Again, ICANN does not have to make any policy change to correct a flaw in the objection process. ICANN has, on previous occasions taken actions to ensure that problems never contemplated by the AGB are corrected in order for ICANN to meet the obligations under its bylaws. Recently, for example, ICANN initially decided not to allow certain strings to continue through the contracting process because of issues related to DNS security and stability (i.e. the Interisle Report). Subsequently, ICANN did allow strings to proceed.

An ICANN decision to allow all three applications to proceed is the proper result for three reasons. First, the decision corrects the inequity among the .CAM applicants. Second, the action would not adversely impact the other .CAM applicants because no procedural delay would need to occur. Finally, the action is fair and does not prejudice VeriSign or the other applicants in any way. Because the other two .CAM applicants prevailed in the objections, VeriSign’s .COM string and .CAM will ultimately have to co-exist. Additionally, the other two .CAM applicants will have to proceed to auction to resolve contention. Adding another applicant to the auction process will not prejudice the other applicants.

Whether the three objections should have been consolidated initially should not be a factor in ICANN’s decision or action. Multiple applicants’ reluctance to consent to consolidation was based on an expressed concern about having to share confidential business information with competitors and was not an opposition to having a uniform decision on the .CAM gTLD which we believe is the only proper result.

We sincerely appreciate ICANN staff listening to our concerns and making suggestions on what options we may pursue. Unfortunately those options are unavailable to us and so we ask the NGPC to correct the inequity created as a result of the process flaw in the objection review process.

We greatly appreciate your consideration of this matter and look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Statton Hammock", written in a cursive style.

Statton Hammock
Vice-President, Business & Legal Affairs
United TLD Holdco Ltd.

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