

Report of Public Comments

Title:																	
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Prepared By:	Christine Willett																
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td colspan="2">Comment Period:</td> </tr> <tr> <td>Comment Open Date:</td> <td>11 February 2014</td> </tr> <tr> <td>Comment Close Date:</td> <td>12 March 2014</td> </tr> <tr> <td>Reply Close Date:</td> <td>3 April 2014</td> </tr> <tr> <td>Time (UTC):</td> <td>23:59 UTC</td> </tr> </table>		Comment Period:		Comment Open Date:	11 February 2014	Comment Close Date:	12 March 2014	Reply Close Date:	3 April 2014	Time (UTC):	23:59 UTC	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">Important Information Links</td> </tr> <tr> <td style="text-align: center;">Announcement</td> </tr> <tr> <td style="text-align: center;">Public Comment Box</td> </tr> <tr> <td style="text-align: center;">View Comments Submitted</td> </tr> <tr> <td style="text-align: center;">Report of Public Comments</td> </tr> </table>	Important Information Links	Announcement	Public Comment Box	View Comments Submitted	Report of Public Comments
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Staff Contact:	Christine Willett	Email: christine.willett@icann.org															
Section I: General Overview and Next Steps																	
<p>At the direction of the ICANN Board New gTLD Program Committee (NGPC), ICANN solicited public comment on a proposed review mechanism to address the perceived inconsistent Expert Determinations in certain New gTLD Program String Confusion Objection proceedings. If adopted, the proposed review mechanism will be limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM.</p>																	
Section II: Contributors																	
<p><i>At the time this report was prepared, a total of thirty-five (35) community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.</i></p>																	
Organizations and Groups:																	
Name	Submitted by	Initials															
Commercial Connect LLC	Patrick D. McPherson/ Jeff Smith	COMCON															
DERCars LLC	David E. Weslow	DCARS															
Domain Venture Partners	Charles Melvin	DVP															
Donuts Inc.	Jonathon Nevett	DONUTS															
Famous Four Media Limited (representing dot Agency Limited)	Peter Young	FFM															
Google	Andy Abrams	GOOG															
HOTEL Top-Level-Domain GmbH	Dirk Krischenowski	HTLD															
ICANN At-Large Advisory Committee	Olivier MJ Crépin-Leblond	ALAC															
ICANN Business Constituency	Steve DelBianco	BC															
Intellectual Property Constituency	Brian J. Winterfeldt	IPC															
MarkMonitor	Kiran Malancharuvil	MM															
Neustar	Justyna Burr	NEU															
Radix Registry	Shweta Sahjwani	RADIX															

Uniregistry, Corp.	Bret Fausett	UNI
United TLD Holdco Ltd.	Statton Hammock	UNITED
Universal Postal Union	Paul Donohoe	UPU
Valideus Ltd	Brian Beckham	VAL
VeriSign, Inc.	Thomas Indelicarto	VSIGN

Individuals:

Name	Affiliation (if provided)	Initials
Rudi Fras		RF
Mike Gailer		MG
Jean Guillon		JG
Noreply		NO
Chris Penn		CP
s s		SS

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

The comments submitted during the public comment period generally fall into the following categories and themes, each of which is explained in more detail below:

- Do not adopt the Proposed Review Mechanism. (8 commenters)
- Adopt the Proposed Review Mechanism. (2 commenters)
- Adopt a Review Mechanism with an expanded scope. (5 commenters)
- Do not adopt the Proposed Review Mechanism or expand the scope. (3 commenters)
- Adopt some form of review, but not necessarily the Proposed Review Mechanism. (2 commenters)
- Recommended modifications to the framework principles of the Proposed Review Mechanism, if a review mechanism is adopted.

Do Not the Adopt Proposed Review Mechanism.

Eight commenters suggest that the NGPC should not create a review mechanism to address perceived inconsistent String Confusion Objection Expert Determinations in this round of the New gTLD Program. These commenters argue that changing the rules after the fact would be unfair, would constitute a breach of contract, and may be creating top-down policy changes outside of the GNSO policy development process. These commenters suggest that applicants agreed to the process included in the Applicant Guidebook, which did not include this review mechanism, and applicants relied on these rules. Some commenters also expressed concern that adopting such a review mechanism may be a breach of ICANN's Bylaws. Additionally, commenters suggest that adopting the

review mechanism at this time would call into question all other objection/contention sets, which would serve to undermine many other parts of the New gTLD Program. Also, some commenters suggest that future rounds should include a review mechanism, although such a review mechanism may not be appropriate for this round.

“The ‘framework principles’ proposed are utterly absurd. And by what right are the NGPC involved? ... The NGPC is treading on hallowed ground of policy change. The GNSO have to tell them in no uncertain terms that they should stay off the heart of GNSO terrain.” RF

“The proposed appeal review materially prejudices our investment and we are obtaining formal legal advice on this matter. It is our understanding that a change of process as proposed would open up potential contractual claims around the application process itself based on the contractual terms to which all applicants signed up.... We strongly request that ICANN should reconsider the review proposals and honour the process which all application agreed to and therefore returning to an environment in which all applicants are treated equally and fairly.” DVP

“A right of appeal is a fundamental change to the [New gTLD Dispute Resolution] Procedure – which the Board simply did not have the due competence and authority to make.... Dot Agency Limited fully intends to make a Request for an Independent Review Panel under Article IV, Section 3 of the ICANN Bylaws, should the Framework Review be adopted for implementation by the NGPC....” FFM

“...[W]e do not believe there is a need for an entirely new review process intended solely to re-litigate two specific instances in which an objection proceeding resulted in a dubious ruling, when other inconsistencies (e.g., with the community objection proceedings) have not merited similar treatment. Without resorting to a new mechanism, there is already existing guidance for dealing with inconsistent string contention scenarios within the language of the Applicant Guidebook. As set forth in the Guidebook (and suggested in our previous public comment on auction rules), a reasonable solution for the .CAR/CARS and .CAM/COM strings would be to simply move all of the relevant applications into a single contention set for the purposes of the auction procedure, whether through direct or indirect contention. Such an approach is the fairest and most predictable manner in which to handle an imperfect situation, and certainly easier for ICANN to administer than a new review mechanism aimed at only two specific contention sets.” GOOG

“It is my formal request that ICANN cease these community discussions, which serve only as a point of distraction; and rather adhere to the guidelines discussed to exhaustion in the planning period. ICANN does not need an overhaul of its systems it simply needs to do what it promised initially. Evaluate not just CAM/COM AND CAR/CARS but all TLDs for Visual, Audial and Meaning as per set policies and guidelines.” CP

“In any future gTLD application rounds, MarkMonitor supports a widely applicable and reliable String Confusion Objection appeals mechanism. Consumer protection experts both within the

ICANN community as well as external to the ICANN community should develop objective criteria by which to judge string similarity in future rounds.” MM

“The Applicant Guidebook provided no mechanism for appeals, and all parties applied for their top-level domains under the express promise by ICANN, and the reasonable contractual expectation of the applicants, that decisions by the dispute resolution providers would be final. The proposal to further reconsider these decisions on what appears to be an arbitrary selection basis for such reconsideration is an invitation for all parties dissatisfied with outcomes to lobby for ad-hoc changes to the new TLD process.” UNI

“The Proposed Review, rather than addressing the core problem which has directly caused the inconsistent String Confusion Objections (“SCO”) Determinations, exacerbates the problem by artificially constraining the review to purposefully avoid recognizing the extent of the inconsistent SCO Determinations and its impact on the participations.” COMCON

Adopt the Proposed Review Mechanism.

Two commenters recommended that ICANN adopt the proposed review mechanism. These commenters suggest that ICANN’s Bylaws require it to address the perceived inconsistencies, and to allow the inconsistencies to stand would cause an unfair prejudice.

“Central to ICANN’s proposed review mechanism is the recognition that, consistent with its Bylaws, ICANN must administer its programs in a manner that is neutral, objective, and does not cause disparate treatment to any party unless justified by ‘substantial and reasonable cause....’ As a policy matter, where two or more expert panels considering the same strings, the same objector arguments, and the same standards reach diametrically different conclusions, it is a clear indication of an untenable outcome resulting in one or more applicants facing ‘disparate treatment’ that cannot be ‘justified by substantial and reasonable cause,’ in direct contravention of Art. II, § 3 of the ICANN Bylaws (Non-Discriminatory Treatment).” DCARS

“United TLD believes that review of inconsistent SCO Expert Determinations should be confined to those involving the EXACT SAME string. The .CAM/.COM decision affecting United TLD and the .CAR/.CARS decision affecting DERCars LLC are exceptional cases that have nothing to do with singular vs. plural confusion. ICANN has correctly identified these two circumstances as the only two truly inconsistent Expert Determinations....United TLD urges ICANN to implement the proposed review mechanism IMMEDIATELY so that the applicants for the exact same string can resolve contention and move forward in the program as all applicants have been substantially delayed as a result of the uncertainty caused by these two .CAR and .CAM SCO Expert Determinations.” UNITED

Adopt a Review Mechanism with an Expanded Scope.

Five of the comments submitted generally support the idea of a review mechanism but urge the NGPC

to expand the scope of the review mechanism beyond the two identified String Confusion Objections (.CAM/.COM and .CAR/.CARS). These commenters suggest that the proposed mechanism is too narrow as currently defined. The commenters express varying degrees to which the scope should be expanded. While some suggest that the scope be expanded to other String Confusion Objections, such as those related to .shop/.shopping, others recommend an even broader scope that would be widened to include “inconsistencies” in Community and Limited Public Interest Objections. Additionally, some commenters suggest that the NGPC to expand the scope of the review mechanism such that “inconsistencies” subject to review should include singular and plural versions of the same string.

“The ALAC supports the details of the process described, but recommends that it be widened to include cases such as the various .shop objections where the objected-to strings were not identical, but the results were just as inconsistent.” ALAC

“We generally are supportive of a limited review process to address inconsistent string confusion objection *outcomes* and not just inconsistent determinations.... [T]his limited review should be extended to include a third contention set where there is an incongruent outcome. In the .SHOP vs. .SHOPPING objection, the same panelist who found .SHOP to be confusion to a Japanese .IDN found in favor of the objector with regard to the Donuts’ .SHOPPING application.... Finally, we urge ICANN to undergo a similar review mechanism in cases of inconsistent outcomes with the Limited Public Interest and Community objections.” DONUTS

“The BC has repeatedly requested a broader appeals mechanism for new gTLD objections, in particular with respect to those involving singular and plural versions of the same generic TLD strings.... In light of this strong community sentiment in favor of a broader appeals process, the BC is disappointed with the limited scope of the present review mechanism proposed by ICANN. We continue to believe that a more comprehensive review is necessary for singular/plural string confusion objections....” BC

“[I]f a review process were to be created, Google supports the standing request from the Business Constituency for ICANN to: (1) Publish any evidence considered by expert panels, arbitration providers, and ICANN staff in its evaluation of string confusion determinations; and (2) Publish more specific objective criteria used to judge string similarity, while creating a broader appeal system to allow parties to challenge prior ICDR decisions on singular-plural TLDs.” GOOG

“The Board should expand their inquiry to ensure that the twin Policy goals of predictability and fairness are met. To do otherwise will impugn the integrity of the new gTLD process and program.... In particular, we recommend that: [t]he scope of inconsistent objections must be expanded and the Board should agree to take up the issue of inconsistencies in Community and Limited public interest objections.” RADIX

“...ICANN’s Proposal misses yet another opportunity to mitigate user confusion about which ICANN has been repeatedly warned but as yet continues to bedevil this program.... There is no

compelling rationale to exclude from appeal Versign's unsuccessful objections. If ICANN believes that the inconsistencies in the com/cam situation cannot stand, then all three decisions should be consolidated and reviewed on appeal and the appeal panel should be required to issue one ruling covering all three objections.... Verisign therefore joins with others such as the BC, the IPC and the GAC in calling on ICANN to revisit and reverse its decision to allow singular and plural versions of the same string to proceed to delegation." VSIGN

Do Not Adopt the Proposed Review Mechanism or Expand the Scope of the Proposed Review.

Three of the comments submitted suggest that the NGPC should either expand the scope of the proposed review mechanism to address other "inconsistencies", or do not adopt a review mechanism at all. These commenters generally seem to recommend an "all or nothing" approach.

"While the IPC appreciates the work ICANN has dedicated in proposing a review mechanism, we identify serious fairness concerns since only two contention sets would potentially be reviewed. Further, assuming *arguendo* that some form of appeal mechanism does move forward, we feel that key changes are necessary." IPC

"Whilst no one would deny that the objection process has given rise to some laughable results (shop and 通販 are confusingly similar?), how can they single out just two sets of strings for review? ICANN already absolved themselves of responsibility by asking third parties to make these sorts of determinations for them. Some may say that was a smart move. So why now are they doing exactly the opposite, by selecting just a couple of string confusion decisions for review, when panellists have made much worse decisions and been more inconsistent? Surely any review must be all or nothing?" JG

"A limited review which allows relief to only randomly-selected members of the ICANN community makes no sense. The Guidebook did not provide for a review process, we should all have a right of redress, or none at all." NO

Adopt Some Form of a Review, But Not Necessarily the Review Mechanism Proposed.

Two commenters suggest that some form of a review mechanism is needed, but these commenters do not necessarily advocate for the adoption of the review mechanism proposed. One of the comments outlines alternative review mechanisms that could be adopted by the NGPC.

"The entire String Confusion Objections had significant deficiencies and there have been a number of controversial decisions when looking at all the decisions. Therefore, ICANN together with ICDR and independent experts must review all decisions and define clear rules under which parties concerned may apply for an appeal of their decision." The commenter provides rules for an appeal based on the percentage of visual similarity as determined by the SWORD tool. HTLD

"I would like to voice my opinion that the .CAM gTLD will be confusing with the existing .COM

gTLD and therefore I hope that ICANN will do the right thing (for once) and refuse the application for .CAM.” MG

Suggested Modifications to the Proposed Review Mechanism, If Adopted.

Various comments submitted during the public comment forum suggest that the NGPC modify the framework principles of the Proposed Review Mechanism, if the NGPC decides to move forward with adopting a review mechanism. Some of the commenters note that they are not advocating for approval of the review mechanism, but merely suggesting improvements if the NGPC is inclined to take action to adopt the Proposed Review Mechanism. The suggestions for modifications to the framework principles generally focus on the following: (1) the scope of the Proposed Review Mechanism, (2) the applicable standard of review, (3) the parties who have standing to use the Proposed Review Mechanism, and (4) the composition of the Panel of Last Resort.

Scope

Comments on expanding the scope of the framework principles included in the Proposed Review Mechanism are addressed above.

Applicable Standard of Review

The proposed standard of appellate review is flawed in that it focuses on the subjective reasonableness of the underlying decision as determined by application of the Applicant Guidebook and procedural rules.... we believe strongly that the clearly erroneous standard of appellate review is more appropriate.” GOOG

“United TLD proposes adding the following language to the standard of review:

Could the Expert Panel have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and procedural rules and not unfairly prejudice any applicant by being inconsistent with other SCO determinations for the exact same string? UNITED

“The appropriate common law standard of appellate review for such factual determinations is the clearly erroneous standard—a highly deferential standard.... Conversely, the standard proposed by ICANN appears to subjectively dissect the reasonableness of the determination, and it seemingly lacks any real deference to the initial panel.” IPC

“Members of the Intellectual Property Constituency (IPC) suggested that ICANN’s proposed standard of review be changed and a “clearly erroneous” standard be adopted for the review by the Panel of Last Resort. Applying such a standard is wholly misplaced given that review is not an appeal process but ultimately, a review of ICANN’s compliance with its bylaws and the Applicant Guidebook.” UNITED

“...the standard of review should not be merely whether it was reasonable for a panelist to have reached that decision. Rather, the standard should include whether it is reasonable to have inconsistent outcomes in the same contention set.... If any one .CAM applicant is permitted to proceed, both .CAM and .COM will be active TLDs. Hence, any confusion on the part of the public between .CAM and .COM will exist. As such, the review should look at the reasonableness of the outcome in light of the other outcomes and the end result.” DONUTS

Standing

“We further join with the comments of the BC and the IPC insofar as they request that ICANN’s Proposal be modified at least to permit the objectors an equal right to appellate review as the applicants.” VSIGN

“Fundamental principles of fairness and due process dictate that both parties in a dispute have an equal right to appeal an unfavorable determination.... [T]he BC urges ICANN to allow both losing objectors and the applicants to have standing to appeal the results of an inconsistent ICDR decision.” BC

“United TLD supports the recommendation made by Donuts that only losing applicants be allowed to seek redress under the review mechanism. To allow objectors to file for review would amount to allowing a second round of objections and effectively change the AGB in a way that materially harms the applicants.” UNITED

“Fundamental principles of fairness dictate that either party in a dispute have the right to appeal an unfavorable determination. Vesting appellate discretion solely with ‘Losing Applicant[s]’ creates an impermissible presumption that only cases where objectors were successful were wrongly decided and are somehow problematic. Rather, convention and equity dictate that both losing objectors and applicants have the right to appeal unfavorable decisions.” GOOG

“If the Board decides to add an appeal mechanism not contemplated by the Applicant Guidebook, the principle that makes the appeal available only to the ‘applicant for the application that was objected to in the underlying SCO and lost’ should be adopted subject to appropriate opportunity for comment, and not decided as a ‘process detail.’” UNI

Panel of Last Resort

“[A] ny Panel of Last Resort should be composed entirely of arbitrators with demonstrated experience in new gTLD program string confusion objections—and ideally, arbitrators who also have some degree of experience in the relevant target industries, such as the automotive or hospitality industries.” GOOG

“[T]he BC proposes that any review or appeals panel be comprised entirely of arbitrators with specific demonstrated experience in the new gTLD program string confusion objections. To the

extent that any arbitrators also have some degree of experience in the relevant target industries, such as the automotive (e.g., for .CAR/.CARS) or hospitality industries (e.g., for .HOTEL/.HOTELS), such qualifications would also be preferable.

“United TLD disagrees with ICANN’s view that only two potential outcomes may occur.... It seems clear that the only two potential outcomes should be these: 1) that the Panel determines that the strings at issue are confusingly similar in all three applications or, 2) the strings are not similar, for all three applications. These are the only outcomes for a review if ICANN wishes to avoid prejudicing any one applicant.” UNITED

“...[T]here will have to be clear guidelines offered on what standards of evidence and burden of proof apply - there will have to be a review of the case law to date and a serious critical effort made to analyse the decisions, draw out the common themes and to agree on the correct judicial approach. This is a task which should clearly not be entrusted to the existing dispute resolution service providers, but to an independently convened panel of academics who understand the rules of evidence and how they should be applied in a global context.” NO

Other Comments.

“ICANN’s recognition of community concern over what it has characterized as a ‘limited universe ...limited to two circumstances’ of so-called inconsistent Objection determinations, coupled with its own proposal for a Review Mechanism, highlights the need for a formal appeals process for future new gTLD application rounds (if nothing more than to avoid situations such as the present where a makeshift post hoc review process is under consideration).” (A footnote indicates that Valideus does not “mean to suggest that the concerns herein should be seen as inapplicable to the current objection process; [Valideus] is aware however of the complexity of addressing these concerns in the current round.”) VAL

“I want to be clear, however, that ‘consistent’ application of the confusingly similar standard DOES NOT require the ‘same’ outcome for all applications for the exact match for a particular string. If that were the case, then the dispute resolution panels would be required to evaluate the likelihood of confusion without regard to each applicant's unique plan for a gTLD string and their arguments articulating why such plans would not cause confusion. That would be a huge mistake. In fact, the proposed use of a new gTLD is highly relevant to the question of whether or not there is a likelihood of confusion. Indeed, it is to be expected that expert panels might reasonably conclude, as has apparently happened, that the string ".cam" is confusingly similar to ‘.com’ in one case but not in another.... In fact, the complained-of inconsistency in other cases appears to arise from the panel's failure to actually take account of the context in which a proposed gTLD would operate. Examples include translation cases where the different markets were likely not considered.” NEU

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

After reviewing feedback from the public comment forum, the NGPC will consider options to address the perceived inconsistent String Confusion Objection Expert Determinations, including whether to allow the Expert Determinations to stand as is, and whether or not to adopt the proposed review mechanism. The summary of public comments will be included in the briefing materials as part of the NGPC's deliberations on this matter.