



Our ref : fpe/mne/107646.0000001
Your ref : DIDP Request 20130328-1 and Reconsideration Request

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7 July 2013

To the attention of Mr. Steve Crocker and Mr. Cherine Chalaby
Chair, ICANN Board *resp.* Chair, New gTLD Program Committee

4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292

By regular mail and by e-mail: reconsideration@icann.org

Request for Reconsideration the Decisions of February 26, 2013 Materially Affecting Booking.com B.V.

Dear Sirs,

Please find attached an amended Reconsideration Request relating to the Decisions of February 26, 2013, submitted on behalf of Booking.com B.V. ('Booking.com')

The original Reconsideration Request was submitted to Mr. Crocker in his capacity as Chair of the ICANN Board, within the 30-day window of opportunity to submit such a request. The amended Reconsideration Request is filed within the 30-day window of opportunity granted by ICANN following the posting of the process description of the String Similarity new gTLD Evaluation Panel on 7 June 2013.

Despite the fact that the origin of the decisions is unclear, this Reconsideration Request is being submitted as a reconsideration of a "Staff action." In the event that the decisions referenced above are determined to be a "Board action," this request may be amended.

Reference is also made to our letters of 9 May 2013 and 26 June 2013, in which we had indicated that ICANN had failed to provide additional information or address any of Booking.com's concerns in a way that allows Booking.com to appropriately amend its Request for Reconsideration.

Because our request to publish additional information remains unanswered and because ICANN did not provide any information that the 30-day window following its communication of 7 June 2013 would be extended, Booking.com has decided to file this amended Reconsideration Request.

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Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013.

Yours sincerely,

A handwritten signature in black ink that reads "Flip Petillion". The signature is written in a cursive, slightly slanted style.

Flip Petillion
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BOOKING.COM B.V.

Request for Reconsideration of the Decision of February 26, 2013

1. Requester Information

Name: Booking.com B.V.

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

C/o:

Name: Flip Petillion, Crowell & Moring LLP

Address: Contact Information
Redacted

Email: Contact Information
Redacted

Phone Number (optional): Contact
Information

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action(s) you are seeking to have reconsidered.

Booking.com B.V. (hereinafter, the ‘Requester’) seeks reconsideration of ICANN’s decision to place the gTLD application for ‘.hotels’ (Application ID 1-1016-75482) and the gTLD application for ‘.hoteis’ (Application ID 1-1249-87712) in a non-exact match contention set (**Attachment 1**).

Booking.com B.V. also seeks reconsideration of ICANN’s decision not to provide a detailed analysis or a reasoned basis for its decision to place the gTLD application for ‘.hotels’ (Application ID 1-1016-75482) and the gTLD application for ‘.hoteis’ (Application ID 1-1249-87712) in a non-exact match contention set.

Both decisions are hereinafter collectively referred to as the ‘Decisions’.

4. Date of action/inaction:

The Decisions were published on February 26, 2013 (**Attachment 1**).

5. On what date did you become aware of the action or that action would not be taken?

The Decisions were communicated to the primary contact of the Requester as specified in the Requester's application for the .hotels gTLD ('Primary Contact') on February 26, 2013 (**Attachment 2**). The Requester became aware of the Decisions on February 27, 2013, when the Primary Contact informed the Requester of the Decisions.

6. Describe how you believe you are materially affected by the action or inaction:

The Requester is the applicant for the '.hotels' gTLD. The Decisions will impact the Requester because ICANN has made it clear in the Applicant Guidebook that it "will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings" (Applicant Guidebook, Module 4-2). ICANN refers to a group of applications for contending strings as a contention set. By placing 'hotels' and 'hoteis' in a non-exact match contention set, ICANN's String Similarity Review Panel apparently determined that these strings would result in user confusion. As a result, ICANN will not approve both the application for 'hotels' and the application for 'hoteis'.

This directly impacts the Requester as follows:

- The Requester will not be allowed to operate a '.hotels' gTLD in the event that the '.hoteis' gTLD is recommended for delegation; and
- If the Requester wants to operate the '.hotels' gTLD, and the '.hoteis' application is not rejected by ICANN, it will need to either negotiate with the Applicant for '.hoteis' or participate in an auction with a view to obtaining the delegation of the '.hotels' gTLD. Both may require additional investments that are not justified given the erroneous decision by ICANN's String Similarity Review Panel.

Regarding ICANN's failure to provide a detailed explanation of its decision and the corresponding analysis, Requester is left without actual knowledge of the basis for ICANN's decision to put .hotels into a non-exact match contention set with .hoteis.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

The Requester considers that the Decisions also adversely affect others:

- The Applicant for the '.hoteis' gTLD is adversely affected as it will equally not be allowed to operate a '.hoteis' gTLD if a '.hotels' gTLD is recommended;
- Internet users are adversely affected as there may be less competition at a TLD level as well as fewer TLDs targeted at non-English speaking communities (see response to Question 11 below); and

- Without a detailed explanation of the non-exact match contention set decision, the ICANN community is deprived of an understanding of ICANN’s reasoning, analysis, and standards when evaluating user confusion.

8. If you are complaining of an action, are you seeking a temporary stay of the action? (Check one)

Yes

No

The Requester does not believe that a temporary stay is required. Instead, Requester asks that ICANN’s decision regarding the non-exact match contention set be reversed. In the alternative, Requester asks that ICANN provide the detailed analysis and reasoning regarding the decision to place .hotels into a non-exact match contention set.

8a. If Yes, you are seeking a temporary stay, do you believe any harm(s) will occur if the action is not stayed? (Check one)

Not applicable

8b. If you answered Yes to 8.a., please describe the harm(s) that you believe will occur if the action is not stayed:

Not applicable

9. Detail of Board or Staff Action – Required Information

At present, it appears that the String Similarity review was likely conducted by a third party, but was then accepted and implemented by ICANN staff. It is unclear whether or not the decision of February 26, 2013 was reviewed by the ICANN Board, although the publicly available information suggests that it was not. In any event, ICANN Staff published the results of the String Similarity review on the ICANN website and communicated the decision to Requester’s Primary Contact (**Attachment 1**). As a result, ICANN (Staff) has communicated that ICANN endorsed the decision to put the ‘hotels’ and ‘hoteis’ strings in a contention set. This is also confirmed by the process description of the String Similarity new gTLD Evaluation Panel (hereinafter, the ‘Process Description’), which ICANN published on 7 June 2013. Indeed, the last step of the process described in this Process Description, which is entitled “Advice to ICANN”, clearly indicating that the Evaluation Panel only provided advice to ICANN and that ICANN made the ultimate decision. This is confirmed by two recent Resolutions of the New gTLD Program Committee (NGPC):

- In Resolution 2013.06.04.NG01 (**Attachment 6**), the NGPC accepted the GAC Advice to consider whether to allow singular and plural versions of the same string;

- In Resolution 2013.06.25.NG07 (**Attachment 7**), the NGPC determined that no changes were needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string.

These Resolutions indicate that ICANN first considered both the advice from the String Similarity new gTLD Evaluation Panel and the advice from the GAC in relation to string similarity and ultimately made the decision to put applied-for strings in a contention set or not.

The decision to put ‘hotels’ and ‘hoteis’ in a contention set is contrary to ICANN’s established policy as set out in the Applicant Guidebook; the failure by ICANN to provide reasoning for the decision is contrary to ICANN’s mandate to act transparently and fairly; and it seems likely that the contention set decision was made without all of the material information.

The Applicant Guidebook states:

“‘similar’ means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

[...]

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review [...] is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in direct contention if they are identical or similar to one another.

[...]

*Two strings are in indirect contention if they are both in direct contention with a third string, but not with one another.” (**Attachment 2**, Module 4-2, 4-3)*

The Applicant Guidebook also states:

*“**Standard for String Confusion** – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.” (**Attachment 2**, Module 2-8)*

As a result, two strings should only be placed in a contention set to the extent that they are so similar that they create a probability of user confusion if both strings are delegated into the root zone.

For the following reasons, there is no probability of user confusion if both ‘hotels’

and ‘hoteis’ were delegated as a gTLD string into the root zone:

- The difference between the letter “i” and the letter “I” clearly distinguishes the ‘hotels’ and ‘hoteis’ strings from each other;
- The intended use of the ‘hotels’ gTLD clearly distinguishes this gTLD from the ‘hoteis’ gTLD; and
- The Internet user will not be confused between ‘hotels’ and ‘hoteis’, irrespective of whether or not the Internet user is requesting information or whether the Internet user is receiving information.

This is further explained below under Question 11.

Because there is no probability of user confusion if both ‘hoteis’ and ‘hotels’ were delegated as a gTLD string into the root zone, it is contrary to ICANN’s policy to put them in a contention set.

ICANN’s Articles of Incorporation require it to act “through open and transparent processes,” and its Bylaws further provide that ICANN must “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” (Articles of Incorporation, Art. 4; Bylaws, Art. III. sec. 1) The Bylaws also require that ICANN “mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness.” (Bylaws, Art. I, Sec. 2.8). ICANN’s Bylaws also prohibit discriminatory treatment, “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment . . . ” (Bylaws, Art. II., Sec. 3).

ICANN’s failure to provide any reasoned decision or analysis in support of putting ‘hotels’ and ‘hoteis’ in a contention set is contrary to ICANN’s mandate to act transparently, and prevents the Requester and the ICANN community from determining whether the decision was made fairly and in a non-arbitrary and non-discriminatory fashion.

Additionally, given the lack of a reasoned decision or other public information regarding ICANN’s string contention analysis and decision, it is impossible to know what information ICANN considered in establishing the contention set (or approving the contention set proposed by an independent contractor). In an attempt to determine what information ICANN Staff considered in making the contention set decision, the Requester had separately submitted a request for information under ICANN’s Documentary Information Disclosure Policy. It seems likely that ICANN failed to consider, for example, the information presented in this Request, which is materially related to the contention set decision. At a minimum, the Requester was never given an opportunity to provide information that would refute the mistaken contention that there is likely to be consumer confusion between ‘.hotels’ and ‘.hoteis’.

In 27 April 2013, ICANN issued a response to the Requester’s DIDP request. ICANN stated that an independent String Similarity Panel (SSP) performed the string similarity review and that the SSP was responsible for the development of its own

process documentation and methodology for performing the string similarity review. ICANN declared that many of the items that are sought from ICANN in the DIDP Request are not in existence within ICANN and cannot be provided in response to the DIDP Request. Nonetheless, ICANN indicated that it would be posting the SSP's String Similarity Process and Workflow shortly.

On 9 May 2013, the Requester wrote to ICANN noting that it had failed to provide any additional information or address any of the Requester's concerns as conveyed in its DIDP Request or Request for Reconsideration. Indeed, as demonstrated above, ICANN received the advice from the SSP on which it based its decision to put '.hotels' and '.hoteis' in a contention set. Stating that ICANN does not have many of the items sought within the DIDP request is not a reason for ICANN to disregard its obligations under ICANN's Articles of Incorporation and Bylaws and to disregard its obligation to provide a reasoned decision or analysis for putting '.hotels' and '.hoteis' in a contention set.

On 14 May 2013, ICANN responded that it intended to post the String Similarity Process and Workflow by 17 May 2013. On 7 June 2013, ICANN finally posted a process description of the String Similarity new gTLD Evaluation Panel (**Attachment 5**, hereinafter, the "Process Description"). ICANN also indicated that, as from the posting of the Process Description, the Requester had a 30-day period to amend its Request for Reconsideration.

On 26 June 2013, the Requester wrote to ICANN that the Process Description did not satisfy its request. On 3 July 2013, ICANN informed the Requester that it received this letter and that it is preparing a response. The Requester has not yet received an answer to its request, as formulated in its letter of 26 June 2013.

As indicated in the Requester's letter of 26 June 2013, the Process Description only gives a general overview of the process of the String Similarity Review Panel. Even through today, ICANN has not given *any* information on how the string similarity review between the .hotels string and other strings was assessed, using this Process (e.g., What visual assessment did the operations manager make in its initial assessment?, How did ICC/UCL evaluators evaluate the .hotels string?, etc.). In other words, ICANN has not provided any particularized rationale or analysis for putting .hotels and .hoteis in a contention set.

The Requester does not understand why it took ICANN so long to publish a Process Description that merely outlines the general workflow and that does not include any string specific information. This is all the more bizarre given the fact that the Process Description itself indicates that the string similarity evaluation has been documented in so-called evaluation workbooks. Was the string similarity evaluation process designed as specified by the Process Description before the start of the evaluation or has it been adapted over time? If this process was adapted, why was it adapted, how was it adapted and how did it influence the evaluation results? And why was the publication of the Process Description delayed?

The Requester requested an answer to these questions along with a detailed overview of how the .hotels string has been evaluated and including a response to the following questions – a request that remains pending – :

- How has the .hotels string been evaluated, according to which criteria (e.g.,

what was included in the standard checklist to ensure consistency) and by whom specifically?

- What were the qualifications of the project manager, evaluator(s) and core team members that evaluated the .hotels string?
- What did the “evaluation workbook” contain for the .hotels string? Who had access to the “evaluation workbook” for .hotels during the evaluation process?
- What was the advice that the Operations Manager provided to ICANN re .hotels? Did that advice ever change throughout the evaluation process? How and when did ICANN check that the .hotels string evaluation was performed in accordance with the process described in the Process Description?
- The document titled the “String Similarity new gTLD Evaluation Panel -- Process Description” included the heading: “New gTLD Program Evaluation Panels: Geographic Names”. Is this the description of the String Similarity Evaluation, or the Geographic Names Evaluation? Is this a mistake, or, were the evaluations combined?

Considering ICANN’s obligations of transparency and accountability, there cannot be any “compelling reason for confidentiality.” And, as mentioned above, there are numerous compelling reasons for publication of this information.

As indicated in the Requester’s letter of 26 June 2013, the Requester cannot appropriately amend its filings until it gains a better understanding of what was decided, why it was decided, by whom it was decided, and in what particular fashion it was decided.

As ICANN has not yet replied to this request and given the imposed deadline to amend the Request for Reconsideration within 30 days following the posting of the Process Description, the Requester decided filing an amended Request for Reconsideration within this deadline. However, the Requester still urges ICANN to publish the requested information and reserves the right to amend its Request for Reconsideration upon receipt of the requested information.

10. What are you asking ICANN to do now?

The Requester asks ICANN to reverse the decision in which ‘hotels’ (Application ID 1-1016-75482) and ‘hoteis’ (Application ID 1-1249-87712) were put in a non-exact match contention set.

ICANN is requested to decide that the ‘hotels’ gTLD as applied for in the Application with ID 1-1016-75482 can co-exist with the ‘hoteis’ gTLD as applied for in the Application with ID 1-1249-87712.

In the event that ICANN will not immediately reverse its decision, the Requester asks that ICANN provide its detailed analysis for the decision to include .hotels into a non-exact match contention set and to give the Requester the opportunity to respond to this, before taking a final decision.

11. What grounds or justification support your request?

a) The difference between the letter “i” and the letter “l” clearly distinguishes the ‘hotels’ and ‘hoteis’ strings from each other

The difference between the ‘hotels’ and ‘hoteis’ strings is grounded in the distinction between the character ‘i’ and the character ‘l’. In linguistic terms, the characters ‘i’ and ‘l’ are manifestly distinct.

The Requester asked an independent expert to provide his views on the following questions:

- 1) Regardless of the ICANN framework, would you consider the ‘hotels’ and ‘hoteis’ strings to be confusing?
- 2) Given the ICANN framework, would you consider both strings visually similar to each other creating a probability of user confusion?

The Requester reserves the right to issue requests to additional experts.

The expert to whom this request was addressed, Professor Piet Desmet, is full professor at the University of Leuven in linguistics and language teaching methodology.

Professor Piet Desmet from the University of Leuven has found that the difference between ‘hotels’ and ‘hoteis’ can be reduced to the difference between l and i, which distinguishes both words. The opposition between l and i is clearly distinctive. There are a considerable number of “minimal pairs” in which the l and i alternate, i.e. pairs of words which differ from each other only in the alternation of l and i. These are minimal pairs like candies/candles, eider/elder, fails/falls, mail/mall or wail/wall. So the alternation of l and i in English is distinctive enough to keep words apart solely on the basis of this opposition.

This implies that words that only differ in the alternation of l and i do not confuse the language users visually, as they perfectly distinguish both characters. If this were not the case, the alternation would already have evolved to an alternative that speakers find more distinctive.

Professor Desmet points out that every language consists of a fixed set of phonemes (sounds) and graphemes (letters) that can be combined without limitations. This linguistic reality poses no problems for the language user, who is used to being confronted with words that differ from each other in only one character. This does not prevent the language user from visually distinguishing these words so as to see them as different meaningful entities.

Professor Desmet considers the elements above sufficient to dismiss the idea of string confusion in dealing with minimal pairs that only differ in the alternation of l and i.

Accordingly, ‘.hotels’ and ‘.hoteis’ are not confusingly similar, and the Decision that they should be placed in a contention set is therefore contrary to established ICANN policy. Requester’s questions and Professor Desmet’s answers are submitted as

Attachment 3 and Attachment 4, respectively.

b) The intended use of the ‘hotels’ gTLD clearly distinguishes this gTLD from the ‘hoteis’ gTLD

Both the Applicant for the ‘hotels’ gTLD and the Applicant for the ‘.hoteis’ gTLD intend to use the applied-for gTLD in a very controlled and restricted way. Both gTLDs will be operated as single-registrant gTLDs. The Applicant for ‘hotels’ targets different language communities than the Applicant for ‘hoteis’. The ‘hotels’ gTLD is targeted to English-speaking, Dutch-speaking and/or French-speaking communities, whereas the ‘hoteis’ gTLD is targeted to the Portuguese language community.

Given this clear distinction in target groups and the restricted and controlled use in both gTLDs, the ‘hotels’ and ‘hoteis’ gTLDs even become more distinct from each other. As a result, there is no likelihood that the Internet user will be confused, and ICANN’s decision to place them in a contention set is contrary to established ICANN policy.

c) The Internet user will not be confused

As seen above, ‘hotels’ and ‘hoteis’ are clearly distinct from each other. As a result, an Internet user searching for information on hotels in English, French or Dutch would not mix up the search term ‘hotels’ with the Portuguese term ‘hoteis’ because the word ‘hoteis’ does not exist in the English language. The same is true for an Internet user searching for information on hotels in Portuguese. The user would not mix up the search term ‘hoteis’ with the English term ‘hotels’, the word ‘hotels’ being non-existent in Portuguese.

As indicated above, the difference between the ‘hotels’ and ‘hoteis’ strings is grounded in the distinction between the character ‘i’ and the character ‘l’, which are manifestly different from a linguistic point of view.

The Internet user has experience with the difference between the characters ‘i’ and ‘l’, also at a TLD level. Indeed, many TLDs that only differ by the substitution of the character ‘i’ by the character ‘l’ currently coexist, without any problem:

- ‘.gi’ coexists with ‘.gl’
- ‘.ai’ coexists with ‘.al’
- ‘.lt’ coexists with ‘.it’ (**Attachment 8**).

The Internet user also has experience with the coexistence between the TLDs ‘.il’ and ‘.li’, where the characters ‘i’ and ‘l’ are interchanged. There is no reason to assume that the Internet user would be confused by ‘.hotels’ and ‘.hoteis’, especially given the fact that the Internet user is already used to the difference between the characters ‘i’ and ‘l’ at a TLD level for many years.

It is also extremely unlikely that the Internet user would make a typographical error when searching for ‘hotels’, which would replace ‘hotels’ by ‘hoteis’, or *vice versa*.

The letter ‘l’ and the letter ‘i’ are located on a completely different location on a computer keyboard, whether qwerty, azerty or qwertz. Even in the very unlikely event that such error is made by an Internet user searching in English, such Internet user will immediately notice that an error has occurred because the information on ‘hoteis’ would be in Portuguese.

The same would be true for an Internet user looking for ‘hoteis’. First, the word ‘hotels’ is non-existent in the Portuguese language. As a result, an Internet user looking for information on hotels in Portuguese would not confuse ‘hoteis’ with the English word. Second, the Internet user would not make a typographical error when searching for ‘hoteis’, which would replace ‘hoteis’ by ‘hotels’. Finally, in the unlikely event that this typographical error is made, a Portuguese-speaking Internet user would also immediately notice that an error has occurred because the information on ‘hotels’ would not be in Portuguese.

As a result, the Internet user would not be confused; all of the above analysis demonstrates that ICANN’s decision to place ‘.hoteis’ and ‘.hotels’ in contention is contrary to established policy. Nor is it clear whether ICANN considered any of the above material in determining whether ‘.hotels’ and ‘.hoteis’ were confusingly similar. As a result, Requester asks that ICANN reverse the decision to place .hotels in a non-exact match contention set.

12. Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

The Requester wishes to submit the following documents in support of its request:

- Attachment 1: Decision to place ‘hotels’ (Application ID 1-1016-75482) and ‘hoteis’ (Application ID 1-1249-87712) in a non-exact match contention set.
- Attachment 2: Applicant Guidebook (Version 2012-06-04).
- Attachment 3: Mail from Flip Petillion to Prof. Dr. Piet Desmet of March 21, 2013.
- Attachment 4: Mail from Prof. Dr. Piet Desmet to Flip Petillion of March 22, 2013.
- Attachment 5: Process description of the String Similarity new gTLD Evaluation Panel as published on June 7, 2013.
- Attachment 6: ICANN Resolution 2013.06.04 NG01, inclusive of its Annex
- Attachment 7: ICANN Resolution 2013.06.25 NG07
- Attachment 8: List of all currently existing TLDs, as delegated by IANA

The Requester also may submit additional documents not yet available, such as other

expert reports and analyses, in relation to the rationale that ICANN is requested to provide concerning its decision to put '.hotels' and '.hoteis' in a contention set. The Requester therefore requests that ICANN allow the submission of these documents when they become available.

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