

.HOTEL AND .HOTELS STRING SIMILARITY OBJECTION

Reconsideration Request

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: HOTEL TOP-LEVEL-DOMAIN S.a.r.l

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

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

Board action/inaction

Staff action/inaction

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

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

The action we are seeking to have reconsidered is the Expert Determination of the New gTLD String Confusion Objection regarding the strings .HOTEL and .HOTELS (HOTEL Top-Level-Domain S.a.r.l, Objector, and BOOKING.COM B.V., Applicant; International Centre for Dispute Resolution, 50 504 T 00237 13, 8 August 2013 (hereinafter the “.HOTEL Determination”). The .HOTEL Determination is attached as Document 1.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

8 August 2013

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

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

8 August 2013

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

As described in Section 8 below, the failure of the panelist in the present matter to make his determination independently without regard to ICANN’s prior action, and the failure of ICANN staff to incorporate suitable quality control provisions into the String Confusion Objection process, unlike other aspects of

the ICANN new gTLD process, constitute material failures of process. Such failures have led to a flawed decision in the instant case and have further led to inherently inconsistent results among similarity situated applicants. These breaches of process have led to the potential co-existence of .HOTEL and .HOTELS strings in the Root Zone, despite other singular/plural strings which have been placed into the same contention set to minimize this harm. This potential co-existence not only creates user confusion and harms in potential users of the Domain Name System but also negatively impacts the commercial viability of Applicant's business plan.

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

Internet users and members of the .HOTEL community will be adversely affected by creating an environment in which similar domain names will lead to confusion as to sources of goods and services and other aspects of the hotel industry.

As noted above, there is a growing divergence in the String Confusion Objection decisions being administered by The International Centre for Dispute Resolution (ICDR) (see also cases .COM/.CAM and .PET/.PETS and .CAR/.CARS and .SPORT and .SPORTS). ICANN Staff's failure to include suitable Quality Control provisions and reconsideration mechanisms into this aspect of the New gTLD program, unlike other aspects (e.g. Initial Evaluation and Community Priority Evaluation), has created the potential for similarly situated singular/plural strings to co-exist in the name space, while others of the same kind would be prohibited. This co-existence would lead to potential consumer confusion, increased defensive registrations, and a total lack of predictability for current and future gTLD applicants. The fact that a coexistence of similar singular and plural gTLDs induces and rewards parasitical defensive registrations of registrants with the obviously confusingly string .HOTELS have been stated at Domainincite.com already in June 2013: "Buying two domains instead of one may not be a huge financial burden to individual registrants, but it's going to lead to situations where gTLDs exist in symbiotic – or parasitic – pairs."

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies).

Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. “Material information” means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

Although the subject String Similarity Objection was determined by a third party vendor, ICANN has determined that the Reconsideration process can properly be invoked for challenges of a third party’s decision where either the third-party vendor failed to follow its process in reaching a decision or ICANN staff fails to follow its process in accepting that decision. [Recommendation of the Board Governance Committee (BCG) Reconsideration Request (hereinafter “Reconsideration Request”) 13-5, 1 August 2013, page 4.]

In the present instance of the .HOTEL Determination, it is evident that the panelist deeply failed to follow the appropriate process in evaluating the merits of the Objection, resulting in a fundamentally flawed decision that should be disregarded by ICANN staff and not accepted as advice.

In his decision, the panelist notes, “I find persuasive the degrees of similarity or dissimilarity between the strings by use of the String Similarity Assessment Tool . . . , that ICANN did not put the applications for .HOTEL and .HOTELS in the same contention set . . .” [.Hotel Determination, page 4].

The String Confusion Objection was designed to take a second look at and beyond the results of the ICANN string similarity panel. This is apparent from the fact only after having been found not confusingly similar by ICANN does an applicant have standing in the String Confusion Objection process. [“Any gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation.” Applicant Guidebook, 3.2.2.1, String Confusion Objection.]

The panelist in .HOTEL v. .HOTELS admits that the fact that ICANN did not find the two strings confusingly similar was a material point of persuasion to him in making his decision. However, it was *because* ICANN did not find the two strings confusingly similar that the objection could be brought in the first place. As a point of process, ICANN’s decision on the matter should have had no bearing on the panelist’s decision. The panelist’s consideration of, and reliance in material part upon, the previous action of ICANN marks a serious breach of process within the String Similarity Objection procedure, and should invalidate his determination in this matter.

Further, the failure of ICANN staff to incorporate suitable quality control provisions into the String Confusion Objection process, unlike other aspects of the ICANN new gTLD process, constitutes a material failure of process. Such failure has led to a flawed decision in the instant case and has further led to inherently inconsistent results among similarity situated applicants. This is in contrast to the policy of Quality Assurance that ICANN staff have demonstrated in almost every other part of the New gTLD application process. The reviewing panels in Initial Evaluation were part of a careful testing process before actual evaluations were conducted.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

We request that the .HOTEL Determination be disregarded by ICANN and not accepted as advice. We further request that a different panelist be appointed to rehear the .HOTEL v. .HOTELS objection on a *de novo* basis. This is the only way to ensure that the inappropriate deference toward ICANN’s decision to

not include the two strings in a contention set that was admitted to by the present panelist is removed from the decision making process.

Further, we request the institution of appropriate Quality Control provisions within the String Similarity Objection process to ensure the consistency of decisions of panelists, similar to those approved by ICANN in connection with Initial Evaluation and Community Priority Evaluation. At a minimum, ICANN should work with ICDR to review all String Confusion Objections to make sure that the Panelists were properly trained and to ensure “consistency of approach,” i.e. CPE Pilot Testing Program.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board’s decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

We have invested substantial time, effort, and financial resources to participate in ICANN’s New gTLD program based upon certain commercial representations made by ICANN.

Our participation in the String Similarity Objection process was predicated on our reliance upon the appointment of a panelist that would conduct an impartial, independent and objective assessment of the claims in our objection. The obvious dependence upon, and inappropriate deference to, the prior decision of ICANN with respect to the .HOTEL and .HOTELS strings by the panelist in the instant matter constitutes a material breach of ICANN’s process set forth in the String Similarity Objection process set forth in the New gTLD Guidebook. Objections are entitled to be reviewed precisely because ICANN did not find the strings confusingly similar, not in deference to that decision.

Further, ICANN staff's failure to incorporate suitable Quality Control mechanisms in the objection process has led to inconsistent results among highly analogous fact patterns. Applicant and the community which it represents will be harmed if the .HOTEL and .HOTELS are permitted to co-exist.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

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>.

Yes, the Panelist's decision in the .HOTEL Determination is attached as Document 1.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Katrin Ohlmer

Signature Ms. Katrin Ohlmer

____23 Aug 2013____

Date

Johannes Lenz-Hawliczek

Signature Mr. Johannes Lenz-Hawliczek

____23 Aug 2013____

Date