Submission to the public comment forum for the annual review of the ICANN IDN ccTLD Fast Track Process

18 February 2015

We are pleased to offer this response to ICANN's request for public comment for the annual review of the IDN ccTLD Fast Track Process. Our comments relate to the current version of the Final Implementation Plan of the IDN ccTLD Fast Track Process. We have been directly affected by the Implementation Plan, having applied under the EPSRP for a re-evaluation of the string .ευ (Greek script), and offer this feedback.

To summarise the points we like to address:

- The purpose of evaluating string similarity is to prevent consumer confusion.
- It is essential that ICANN documents describing evaluation processes on string similarity are internally consistent and that evaluators follow the evaluation processes as described throughout the TLD environment.
- Confusion requires a comparison between two things in the same environment. Confusion cannot exist between an application for an IDN, and strings that are neither existing nor applied for TLDs.
- ICANN's processes should focus on lowercase presentations of relevant strings.
- Consideration should be also given to context, including registry policies when evaluating potential confusion. The current Fast Track process fails to address the evaluation of any applied string in their context.
- Eventually ICANN should not evaluate confusing similarity at all. "Confusing similarity" is and will always be based on a subjective assessment that is influenced and impacted by multiple factors, including social and cultural elements of those who are requested to evaluate confusing similarity matters. By taking the responsibility of evaluating it, ICANN takes the full risk of allowing a string in the root that it might have not been deemed confusingly similar to another existing one, but once delegated it may generate confusingly similarity issues at consumers level because the consumer behaviour might be affected by patterns that were unknown to ICANN at the time of the "confusing similarity" assessment.

Purpose of the evaluation is lost in the detail

The purpose of string confusion should be to avoid the risk of confusion between two TLD strings. This overriding consideration seems to have got lost in the complexity of the process, and should be the single, guiding principle for the evaluators. This has resulted in the perverse outcome that a string has been found to be confusingly similar with the upper-case version of two ISO codes that are not at present and might never be TLD strings in the future.

Therefore, we request the Fast Track guidelines to be amended and foresee the confusing similarity evaluation only against EXISTING delegated TLD strings. The current procedure sets that "review and comparison of the requested string against the ISO 646-BV two letter (a-z) codes and/or existing TLD strings and/or reserved names that, according to the DNS Stability Panel findings, are considered to be confusingly similar." The requested amendment will make the procedure not only consistent with the "first come, first serve" principle that has been guiding a large part of the DNS since its early years, but also with the international consumer protection standards.

Conflicting standards

The Implementation plan quotes the standard for string similarity (section 5.5) as follows:

> *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.*
>
> *String confusion issues can involve two or more strings that are identical or are so confusingly similar that they cannot coexist in the DNS, such as:*
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> - *Requested IDN ccTLD strings against existing TLDs and reserved names;*
> - *Requested IDN ccTLD strings against other requested IDN ccTLD strings; and*
> - *Requested IDN ccTLD strings against applied-for gTLD strings.*

It is expressly stated that the range of relevant strings for comparison are existing TLDs and reserved names, requested IDN ccTLD strings, and applied for gTLD strings.
Unfortunately, the supplementary Guidelines (Methodology and Criteria) introduce different criteria:

> *A selected IDN ccTLD string should not be confusingly similar with:*
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> - *Any combination of two ISO 646 Basic Version (ISO 646-BV) characters 2 (letter [az] codes), nor*

• *Existing TLDs or reserved names.*

The criteria are not consistent across the two documents, and this seems to have confused the evaluators.

When the evaluators came to apply the test, they introduced a third criterion which is not used in either the Implementation Plan or Guidelines: the ISO 3166 list. While inclusion in the ISO 3166 list is a prerequisite for creating a ccTLD in the IANA database, there is not a 1:1 mapping between ISO 3166 entries and existing or applied for ccTLDs. The two strings found to be confusingly similar to ευ (Greek script) in upper case, while included in the ISO 3166 list, might never be ccTLDs. EV or EY are not existing TLDs, reserved strings, a "requested ccTLD" or applied-for gTLD strings.

Had the test been clear and consistent across the documents, and the same as that applied by the evaluators, the two strings would not have been considered by the evaluators, and the application would have succeeded.

The test set out at 5.5 of the Implementation Plan must be the correct one, as there have to be two TLDs for consumer confusion to be possible. Confusion requires a comparison *with something else*, as is clear from the wording of trademark laws in the US and EU (for example):

> **15 U.S.C. §1052 Extract**
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> *No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive. . . .*
>
> **EU Directive 89/104, Article 5(1)(b)**
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> *any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.*

Uppercase vs lowercase presentations: the policy should provide guidance for what to do in case of conflicting results

The call for comment specifically highlighted the dilemma of uppercase / lowercase presentations, and asked *whether upper case forms of U-Labels, where such labels are disallowed by IDNA2008 protocol, should be considered relevant for the string similarity review of IDN ccTLD labels. Further, as ASCII TLDs may also be used in upper case or lower case, for*

string similarity purposes, should the applicable form(s) of U-labels be compared with both upper case and lower case forms of labels in ASCII?

In the recent EPSRP evaluation of ευ (Greek script), the string was found to have passed string evaluation in relation to lowercase presentations, but confusing similarity was found in relation to two uppercase strings. The evaluators remarked, "*Given there is no scientific or policy basis as to how to combine these separate results of upper and lower case for IDN ccTLDs the Panel concluded it could only provide separate recommendations for each of these."* The policy should provide guidance on how to resolve such issues, by stating that in any conflict, the lower case result should prevail.

While we believe that in the interests of completeness and rigour, evaluators should consider uppercase forms of U-labels, this should only be a secondary factor in the evaluation. Lowercase should be the primary consideration, and where a conflict occurs between uppercase and lowercase, the lowercase should prevail.

This reflects not only the technical requirements of current IDN standards (IDNA 2008), but also existing practice of using lowercase for the presentation of domain names.

Comments on the effectiveness of the EPSRP

Overall, while making no adverse comment on the professionalism of the individual evaluators, it is EURid's view that the current EPSRP is over-complex, out of step with legal jurisprudence and gTLD evaluations, and that the costs outweigh the benefits.

Concerns over EPSRP process

While EURid appreciates the efforts made by ICANN and the evaluators to arrive at an objective test for confusion, in practice this has been difficult to achieve. The call for comments states that the process took evaluators over 400 hours, and several months, and it is not clear that the results are any more or less accurate than the different process undertaken for the gTLD string similarity evaluations.

Further, EURid has the following procedural concerns arising from our experiences of the process:

- **Sample selection.**

- The sample comprised 20 undergraduates. The Implementation Plan requires "several hundred evaluators" (4.3.1) to perform the tests.
- The Guidelines require that the evaluators are independent of the research team. It is unclear how this requirement was fulfilled.
- The sample is linguistically, socio-economically and geographically homogeneous ("primarily of US origin"), and cannot be a "reasonable population" to make "inference about a general Internet population".

- **Latin script anchor sets should have tested ASCII strings eu, ey and ev:** The evaluators established anchor sets to ensure that IDNs were treated no differently to ASCII strings. The anchor sets should have included eu, ey and ev, as these all are currently permitted to co-exist in the ISO list. Therefore, IDNs are being treated less favourably than ASCII strings.
- **Delayed match-to-sample test potentially skews results against non-Latin scripts.** The sample was unfamiliar with Greek (or possibly "Cyrillic" as unfortunately stated in the evaluation report) script, as required by the policy. The academic literature indicates that familiarity with a language/script assists in timing and accuracy of recall (the essential parameters in the DMTS test, indicating potential confusability). A potential bias is ingrained in the test given evaluators' impaired ability to recall strings in unfamiliar scripts.

Policy concerns

- *The test for visual confusion excludes relevant factors, including context*.
  Case law in the field of trade mark infringement and passing off has made clear that consumer confusion between two branded products or services will depend on numerous factors. According to the European Court of Justice (Case C-251/95 Sabel BV v Puma AG, Rudolf Dassler Sport) a likelihood of confusion must be appreciated globally, taking into account all factors relevant to the circumstances of the case. "*That global appreciation of the visual, aural or conceptual similarity of marks must be based on their overall impression, considering in particular their distinctive and dominant components, to reflect the perception of marks in the mind of the average consumer of the goods or services in question*." For a domain name, the script of the second level string is likely to be a dominant component, which will influence the overall impression in the consumer's mind.
  In the case of the ευ (Greek script) application, the evaluators remarked that they were unable to consider EURid's intended "single alphabet strategy". The evaluators referred back to ICANN on this point, suggesting that they felt it was a relevant factor which may

alter the outcome of the evaluation. There needs to be a way for evaluators to consider any factors that may mitigate possible confusion, such as registry policies.

- *Conservatism (ccTLDs) vs Permissiveness (gTLDs)*

  One of ICANN's core functions is policy coordination. A consistent approach towards string confusion across gTLD and ccTLD spaces is necessary to ensure the stable and secure operation of the Internet's unique identifier systems, and to prevent distortion of competition as between gTLDs and ccTLDs. As a matter of fact, possible consumers of ccTLDs and gTLDs are THE SAME around the globe.

  The new gTLD programme attracted more than 1900 applications, each of which went through a test for string confusion.

  The results of the gTLD evaluations for string confusion show that a **permissive approach was taken**. Out of 1900 strings, only 2 non-identical strings were placed in contention sets (Unicom/unicorn; hoteis/hotels). No strings were failed for similarity with existing TLDs or reserved names. **The evaluators for gTLD strings decided that singulars and plurals of the same words were not confusingly similar, for example car/cars, sport/sports, pet/pets, game/games**.

  The permissive approach towards string confusability in the new gTLD context has attracted controversy, and has given rise to numerous cases under the formal Objection phase of the new gTLD Programme (with conflicting results). In April 2013, the Governmental Advisory Committee advised the Board to "reconsider its decision to allow singular and plural versions of the same strings". The Board, having considered the GAC advice and community feedback, confirmed the decisions of the evaluation panel, and resolved that "no changes are 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."

  The Board decision indicates that it was satisfied with the execution of the string similarity evaluations, and saw no need to change the "existing mechanisms in the Applicant Guidebook". This indicates that the test for string confusion is likely to continue unchanged in future gTLD application rounds.

  The wording of the string confusion test in the gTLD Applicant Guidebook is identical to that in the ccTLD IDN Implementation Plan. In the absence of any other wording, the same permissive approach would apply in the IDN ccTLD context as well as new gTLDs. However, the ccTLD IDN Implementation Plan states:

> *A **conservative approach** for potential IDN ccTLD strings has been adopted because of the Fast Track Process' limited introductory nature and to safeguard against pre-empting the outcome of the ongoing IDN ccNSO Policy Development Process. Limitations in this module are focused on criteria and requirements set for the TLD string.[i]* (emphasis added)

Independent evaluators can only rely on the Implementation Plan and EPSRP Guidelines to guide them on the intentions of the policy makers. The impact of adopting a conservative approach is illustrated in the outcome of the previous evaluation of the .ευ Greek script application:

> *"We therefore apply **a very conservative standard** in our assessment of applied-for strings that consist of two Greek, Cyrillic, or Latin characters, including a **default presumption of confusability** to which exceptions may be made in specific cases."* [ii] (emphasis added).

The inconsistent overall approach across IDN ccTLDs and new gTLDs has yielded inconsistent results on the same issue. It is likely to cause potential distortion of the competitive market. While we appreciate that ccTLDs and gTLDs have different policy development programs, **ICANN's coordination role** requires the Board to ensure a consistent approach especially where the same issues are being evaluated according to identical criteria.

- *Inconsistent standards for string confusion within the ccTLD documents.*

  The Implementation Plan and the EPSRP Guidelines set out inconsistent standards (ie criteria) for evaluating string confusion. Neither document references the standard from the other document, nor is it stated which standard for string confusion should take precedence in the event of a conflict. In other words, it is not clear which test for string confusion should be applied by the EPSRP evaluators.

  The standard set out at paragraph 5.5 of the ccTLD IDN Implementation Plan is identical to the standard for string confusability in Module 2 of the gTLD Applicant Guidebook:

  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.

  The EPSRP Guidelines make no reference to the Implementation Plan's standard for string confusion, and appear to set out a competing standard for string confusion[i]:

*The EPSRP procedure is based on the **proposed IDN ccTLD policy** and the rule for confusing similarity contained in this proposed policy. **The rule is** that if the appearance of the selected string, in upper or lower case, in common fonts in small sizes at typical screen resolutions, is sufficiently close to one or more other strings, it is probable that a reasonable Internet user who is **unfamiliar with the script** perceives the strings to be the same or confuses one for the other.* (emphasis added).

It is not clear what the "IDN ccTLD policy" is (the Implementation Plan, EPSRP Guidelines, another document?). The lack of reference to the Implementation Plan's standard, combined with the words "The rule is…" seems to give precedence to the EPSRP Guidelines standard, whereas ICANN in correspondence with EURid seems to indicate that the Implementation Plan takes precedence.

The EPSRP Guidelines defines the "reasonable internet user" as being "unfamiliar with the script". In so doing, they introduce a new policy concept which is absent from the standard set out in the Implementation Plan and the gTLD Applicant Guidebook. **Working Group members and observers noted that the perception of users who are familiar with a script or language is likely to be different from that of users who are not familiar** [ii]. Furthermore, the same members and observers noted that the string to be evaluated will always be used in a broader context and very unlikely detached from a second level domain.

The standard for string confusion set out at 5.5 of the Implementation Plan appears to be excluded from the EPSRP's consideration, as the instruction at 4.3 refers exclusively to the EPSRP Guidelines: the "EPSRP shall review the requested string(s**) on the basis of the framework described in the 'Guidelines for the Extended Process** Similarity Review Panel". This gives the impression that the EPSRP Guidelines take precedence over the Implementation Plan.

Clarification is needed in the ultimate interest of those consumers who should be protected by those rules.

- *Same issue, different panels, different criteria, different methodology*

  The methodology mandated for the EPSRP is different to that undertaken for new gTLD evaluations [iii]. The EPSRP requires a study to be undertaken by an "*external and independent research team*" to provide "*behavioural metrics derived from three different measuring methods (tests) to assess similarity…performed by multiple participants/volunteers".*

  The necessity for a consistent approach on string confusability across the gTLD and ccTLD spaces was acknowledged within the policy development process. For example, the Chair of the ccNSO policy development process IDN Working Group stated that it

would be "*a recipe for disaster*" to have different panels dealing with the same issue, because "*you could end up with a situation where a panel in the ccTLD process finds that something is confusingly similar but the different panel in the gTLD process finds there is not. At that's ludicrous*"[iv].]

Conclusion

EURid firmly believes that:

- ICANN should review the IDN ccTLD Fast Track Implementation Plan and related documents to ensure process consistency, clarity and transparency against those consumers to whom these rules are meant to provide safeguards;
- ICANN needs to review its entire string similarity criteria and documentation, bearing in mind that the objective is to prevent user confusion. All policy and process documentation should eliminate the current inconsistencies in the essential test, making it clear that only strings for existing TLDs - and not ISO codes – are to be considered. The documentation should make provision for resolving conflicts between upper and lower case outcomes for an applied-for string: the lower case result should prevail. The processes and outcomes between gTLDs and ccTLDs are inconsistent, and with increasing overlap between the two markets, and competition for the same consumer, ICANN should ensure that the separate policies do not lead to potential market distortions. It is artificial to restrict the test to visual similarity only, and to test from the point of view of a user "unfamiliar with the script". Furthermore, where the same issue is being determined by different panels according to possibly different criteria and different methodologies, perverse outcomes are bound to arise.

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[i] EPSRP Guidelines, "Methodology and Criteria", page 1

[ii] See remarks of Manal Ismail and others in transcript of policy development process Working Group meeting of 15 March 2012: "The perception of someone who knows this script is different from someone who doesn't". This point appeared to be accepted by the ICANN staff lead, who promised to "update this one based on the comments from today". However, the wording remained unchanged.

[i] Implementation Plan, Module 3 (TLD string criteria and requirements)

[ii] DNS Stability Panel Report for EU 28 February 2012, p 2.

[iii] The gTLD string similarity evaluation published process document indicates that a different methodology was used compared with that proposed in the IDN ccTLD context,

http://newgtlds.icann.org/en/program-status/evaluation-panels/geo-names-similarity-process-07jun13-en.pdf

[iv] IDN policy development process Working Group call, 28 February 2012, page 8