12 March 2014

On behalf of Donuts Inc. ("Donuts"), I offer the following comments regarding ICANN's Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections.

We generally are supportive of a limited review process to address inconsistent string confusion objection *outcomes* and not just inconsistent determinations.

The ICANN Bylaws provide that:

"ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of competition." See Article II, Section 3. Non-Discriminatory Treatment.

By having a limited review process to deal with inconsistent outcomes, ICANN would be complying with its Bylaws and helping to administer the new gTLD process in a fair, transparent, and orderly manner as required in the Applicant Guidebook ("AGB") – the contract between ICANN and new gTLD applicants.

We also support ICANN's view that only the "losing" applicant should have the ability to seek redress under the limited review process. Applicants agreed in the AGB to one round of objections only. They did not agree to a review process that includes a second bite at the apple for objectors in cases where the applicant prevailed. To do otherwise would be to change the AGB in a way that materially harms the applicants. Such harm would invoke the protections afforded to applicants under AGB Module 6, Section 14. Objectors – those filing objections – are not party to the AGB contract for purposes of their objections (even if they might be applicants as well). As such, they are not subject to Section 14 of the AGB and the AGB offers no protection from changes to the process that may not be in an objector's favor.

As a matter of fundamental fairness, ICANN should provide a review mechanism for applicants that lost string confusion objections in cases where there is an inconsistent outcome, such as .CAM and .COM and .CAR and .CARS. In the latter case, Charleston Road Registry filed string confusion objections against all three applicants for .CARS. Might it help Donuts that DERCars, LLC lost that string confusion objection and Donuts (and Uniregistry) won? Perhaps. But, would such disparate treatment of two applications in the same set be a fair outcome? No.

As such, this 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 confusing to a Japanese .IDN found in favor of the objector with regard to the Donuts' .SHOPPING application. For some reason, however, the objector

failed to file an objection to the other .SHOPPING applicant. Therefore, there currently exists an inconsistent outcome of the string confusion objection result in the .SHOPPING contention set due to the objector's omission, thereby causing disparate treatment to Donuts' detriment. The net result is the same as the .CAR and .CARS set. We have a complicated indirect contention set due to a determination related to one .SHOPPING applicant, but not the other one.

String confusion is a binary concept – it exists or it doesn't. There should not be string confusion in the eyes of the public for one applicant and not the other in the same string. Please see **Exhibit A** for a diagram of the .SHOP and .SHOPPING contention sets.

While .SHOPPING should be included with the other two in the limited review proposal, we are unaware of other instances of such an inconsistent outcomes of string confusion objections. Indeed, Donuts lost six string confusion objections and is seeking to include in this limited review only the .SHOPPING application.

In order for ICANN to adequately address the disparate treatment caused by inconsistent outcomes, however, 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. The purpose of the string similarly objection determination is completely frustrated if not all TLDs in that contention set are treated consistently. For example, in the .CAM and .COM situation, even if the panelists in all three cases acted reasonably in holding that either .CAM and .COM should be treated as confusingly similar or not, it doesn't matter if there is an inconsistent outcome. 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. If there will be a .CAM and resulting consumer confusion, is it reasonable to permit two of the .CAM applicants to proceed and not a third? Obviously not. Therefore, the standard should be changed to take this into account.

Finally, we urge ICANN to undergo a similar review mechanism in cases of inconsistent outcomes with the Limited Public Interest and Community objections.

Sincerely,

Jonathon L. Nevett
Co-Founder and EVP

Exhibit A

.SHOP
Amazon

.SHOP
Google

.SHOP
Donuts Inc.

.SHOP
Dot Shop Limited

.SHOP
Commercial Connect LLC

.SHOP
GMO
[community]

.SHOP
GMO
[non-community]

.SHOP
Beijing Jindong

.SHOP
DotShop Inc.

.SHOPPING
Donuts Inc.

Objector Prevailed

Applicant Prevailed
(failure to file objection)

.SHOPPING
Uniregistry, Corp.