

United TLD Comment on the Proposed Review Mechanism to Address Inconsistent Expert Determinations on String Confusion Objections

United TLD Holdco Ltd. (“United TLD”), trading as Rightside Registry, a registry operator and applicant for new generic top level domain names (gTLDs) is grateful to ICANN for formally acknowledging the extraordinarily difficult position in which two applicants have been placed as a result of the disparate String Confusion Objection (“SCO”) Expert Determinations for .CAM/.COM and .CAR/.CARS. United TLD thanks ICANN for the opportunity to comment on the proposed review mechanism to address these determinations and correct the unfair prejudice caused by these inconsistent determinations. United TLD would like to comment on each of the three Principles for Consideration, in turn, as put forward in ICANN’s proposal.

1. THE RECONSIDERATION PROCESS WILL NOT BE MODIFIED AT THIS TIME

United TLD agrees that the reconsideration process should not be modified at this time to deal with any objection determinations. Requests for reconsideration have all been rejected and applicants whose applications were subject to a filed objection and prevailed have already begun moving through contracting and delegation phases of the gTLD process. Allowing losing objectors to renew their requests for reconsideration would prejudice all applicants that have taken actions in reliance upon these determinations. Changing the reconsideration process introduces further delay and unpredictability into the contracting process resulting in harm to the entire program.

ICANN should, however, carefully evaluate whether changes to the reconsideration process should be made for future gTLD rounds and, at the appropriate time, invite the community to devise rules that provide an appeal mechanism when expert panelists inconsistently apply rules in future objections.

2. PERCEIVED INCONSISTENCIES SHOULD BE ADDRESSED BASED ON A LIMITED STANDARD OF REVIEW

a) United TLD agrees with ICANN that there is a “limited universe” of inconsistent SCO Expert Determinations.

Consistent with ICANN’s proposal, 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. Rather, these cases involve disparate outcomes for the EXACT same string. Although experts may differ on whether singular and plural forms of strings are confusingly similar, experts CANNOT differ on whether the SAME string of letters is identical to the SAME string of letters, which of course, must be the case. To allow different, inconsistent string similarity determinations when you are looking at visual and aural similarities means that .CAM is NOT equal to .CAM or .CARS is NOT equal to .CARS which is illogical. ICANN has correctly identified these two circumstances as the only two truly inconsistent Expert Determinations.

b) United TLD recommends a slight modification to the proposed standard of review.

ICANN has proposed the following standard of review for these two decisions:

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?

This standard of review as written, however, does not provide clear enough guidance, consistent with ICANN's bylaws and the AGB, on the legal basis and rationale for reversing the inconsistent determinations. As stated earlier, two experts otherwise potentially could each apply the standard of review and still reach different decisions. What is missing is a clause that takes into account unequal treatment of the exact same string of letters. To allow the reviewer the proper authority and ability to reverse the previous decisions, 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?

We believe that adding this clause at the end more clearly directs the reviewer to consider the other decisions and, more importantly, the treatment of the STRING ITSELF and the prejudicial effect of allowing a decision on string similarity to stand against one applicant and not all applicants equally.

c) United TLD agrees that a "Panel of Last Resort" should review the Expert Determinations across the set and provide additional guidance.

United TLD agrees with ICANN's proposal that the Panel should review the expert determinations "across the board." However, United TLD disagrees with ICANN's view that only two potential outcomes may occur. The first outcome, "that all Expert Determinations are aligned," cannot be a valid outcome because leaving all determinations in status quo does not solve the inconsistency this review mechanism and process seek to remedy. If ICANN believed these decisions were defensible and could remain, the NGPC would not have initiated this review mechanism. Therefore, the first outcome cannot be an acceptable outcome.

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. If ICANN modifies the standard of review similar to the way United TLD has suggested above, then these two outcomes will be possible.

ICANN has further proposed, however, that the Panel not be authorized to reverse or otherwise amend either of the two other Expert Determinations. United TLD does not believe the other parties who prevailed against their objectors should have their decisions reversed and therefore supports this rule. Consequently, if this rule were adopted, the ONLY outcome is for the decisions against United TLD and DERCars LLC to be reversed which we believe is the only fair and rational outcome.

United wishes to add that, as part of the review process, the Panel should look at all of the decisions rendered related to .CAM and .CARS and that United TLD and DERCARS, LLC be permitted to submit a brief, not to exceed five pages, highlighting the errors in the expert's application of the standards for considering evidence of visual and aural similarity.

3. APPLICABILITY OF A REVIEW MECHANISM MUST BE LIMITED

For the reasons partially explained in United TLD's comment on the First Principle, United TLD reiterates its support for ICANN's proposal that this review mechanism must be limited. Applicants have already acted in reliance on SCO Expert Determinations. Changing these determinations would cause further delay in the new gTLD process and consequently, bring substantial harm to the applicants and to ICANN, and most assuredly jeopardize the success of the new gTLD program. Reversing the two determinations being proposed for this review, however, will not cause substantial harm to any applicant. To the contrary, reversal of the .CAM decision against United TLD and the .CARS decision against DERCARS LLC will alleviate harm and insure equitable treatment of the string itself, irrespective of the applicant.

Furthermore, as explained previously, SCO Expert Determinations regarding singular and plural versions of the same string are not strictly inconsistent, as they are not determinations related to the same strings having different results as with the case of .CAM/.COM and .CAR/.CARS. The NGPC has already determined that it would not interfere in SCO Expert Determinations regarding singular and plural versions of the same string. In fact, ICANN has already entered Registry Agreements for singular and plural versions of the same string (for example, .CAREER and .CAREERS).

CONCLUSION

ICANN is bound by its bylaws and the Applicant Guidebook to act in an equitable manner with respect to the new gTLD program and toward the registry applicants that participate in this historic process. ICANN's multi-stakeholder process is designed to insure that policies, practices, and procedures are applied fairly to all similarly situated parties. While some participants may not agree with certain policies, procedures or practices, none will argue that the policies and procedures developed in the ICANN model should be applied inequitably among parties that find themselves in identical circumstances. The review of these two inconsistent SCO determinations and their reversal will insure that these governing principles of fairness and equal treatment are reflected in the model and upheld by ICANN.

Finally, 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.

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