



March 11, 2014

Via Electronic Mail

comments-sco-framework-principles-11feb14@icann.org

RE: Public Comment on Framework Principles for a String Confusion Objection Review Mechanism

We Should Strive to Maintain Consistency with the Applicant Guidebook

Google appreciates the opportunity to comment on the proposed framework principles for a review mechanism governing string confusion objection determinations. Google has consistently favored adherence to the Applicant Guidebook given that Internet users and new gTLD applicants have relied upon the policies contained within to guide them through the application and objection process. We continue to believe that *ad hoc* and retroactive modifications to the Guidebook have the potential to erode trust in the process.

Accordingly, we do not believe there is a need for an entirely new review process intended solely to re-litigate two specific instances in which an objection proceeding resulted in a dubious ruling, when other inconsistencies (e.g., with the community objection proceedings) have not merited similar treatment. Without resorting to a new mechanism, there is already existing guidance for dealing with inconsistent string contention scenarios within the language of the Applicant Guidebook. As set forth in the Guidebook (and suggested in our previous public comment on auction rules), a reasonable solution for the .CAR/CARS and .CAM/COM strings would be to simply move all of the relevant applications into a single contention set for the purposes of the auction procedure, whether through direct or indirect contention.¹ Such an approach is the fairest and most predictable manner in which to handle an imperfect situation, and certainly easier for ICANN to administer than a new review mechanism aimed at only two specific contention sets.

With that stated, we recognize that there has been considerable demand from the community for a mechanism to resolve the inconsistency in string confusion objection results. To the extent that a new process is warranted, we believe that significant improvements can be made to better

¹ See Guidebook Module 4 §4.1.1: “[t]wo strings are in indirect contention if they are both in direct contention with a third string, but not with one another.” “A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.” See *also* Guidebook Module 4 §4.3: “Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.”

reflect the concerns raised by the community as well as better fulfilling the purpose of the string confusion objection process, which is to reduce the risk of consumer confusion. If ICANN considers adopting a new procedure, we urge the consideration of our suggested modifications relating to scope, the standard of review, basis for consolidation, and standing to object.

Perceived “Inconsistent” Determinations Are Too Narrow As Currently Defined

Considerable segments from the ICANN community have repeatedly requested a broader appeals mechanism for new gTLD objections, in particular with respect to those involving singular and plural versions of the the same generic TLD strings.²

In response to these community requests, we are disappointed with the extremely limited scope of the review mechanism proposed by ICANN. We believe that a more holistic review is necessary for string confusion objections—beyond just the .CAR/.CARS and .CAM.COM contention sets. Accordingly, if a review process were to be created, Google supports the standing request from the Business Constituency for ICANN to:

1. Publish any evidence considered by expert panels, arbitration providers, and ICANN staff in its evaluation of string confusion determinations; and
2. Publish more specific objective criteria used to judge string similarity, while creating a broader appeal system to allow parties to challenge prior ICDR decisions on singular-plural TLDs.

In support of a broader appeals mechanism for singular/plural objection proceedings, we urge ICANN to consider the two inconsistent decisions as a symptom of an imperfect process, as opposed to mere outliers that can be addressed through discrete reexamination. Indeed, it is not simply the fate of the specific .CAR/.CARS and .CAM.COM strings at stake, but the credibility of ICANN as an organization and its entire new gTLD program. It is also especially important that ICANN work on perfecting the underlying process and standardizing its position on singular/plural generic strings while it has the opportunity to do so, given the potential implications for future

² See e.g. Business Constituency, [Letters from Elisa Cooper to NGPC Regarding Plural and Singular Forms of TLD Strings](#) (December 30, 2013 and October 22, 2013) (“We ask that ICANN publish more specific objective criteria used to judge string similarity, and then allow for an appeal system where applicants can challenge prior ICDR decisions on singular-plural TLDs based on this specific criteria”); The Internet Association, [Letter from Michael Beckerman to Stephen Crocker Regarding Singular and Plural Versions of a String](#) (December 10, 2013) (“[I]mplementation of an appeal system to challenge ICDR decisions will promote transparency in the process and ultimately result in more consistent decisions.”); ICANN, [New gTLD Draft Applicant Guidebook: Analysis of Public Comment](#) (February 18, 2009) (“The guidelines should allow for a procedure to appeal a clearly erroneous DSRP decision,” and “No appeal opportunity is in clear conflict with common legal practice for organizations serving the public such as ICANN.”); Intellectual Property Constituency, [Comments Regarding “Draft Applicant Guidebook” For New gTLDs](#) (December 15, 2008) (“Because the stakes may well be higher than in a UDRP proceeding, ICANN should consider providing an appeal procedure from decisions of the LRO panel” to “promote consistency of decision-making”).

new gTLD rounds.

Otherwise, the next gTLD round will be afflicted with the same embarrassing inconsistencies and the same hodgepodge of *ad hoc* remedies, including legal recourse outside of the ICANN structure (e.g., *Del Monte, Int'l GmbH v. Del Monte Corp.*, CV 13-5912 RSWL (C.D. Cal., Feb. 5, 2014)), complaints to the ICANN Ombudsman ([Dispute Resolution Providers and Decisions](#) (December 12, 2013)), and possibly further “band-aid” review mechanisms such as the one at issue here. ICANN presently has a golden opportunity to avoid these pitfalls by broadening the scope of the proposed mechanism to create a formal and uniform system to deal with singular/plural TLDs. Such a system could be modeled after the precedent set by the Extended Process Similarity Review Panel (EPSRP) for IDN ccTLDs,³ and need not prejudice registry operators whose strings were not the subject of a string confusion objection (e.g., the .CAREER/.CAREERS strings).

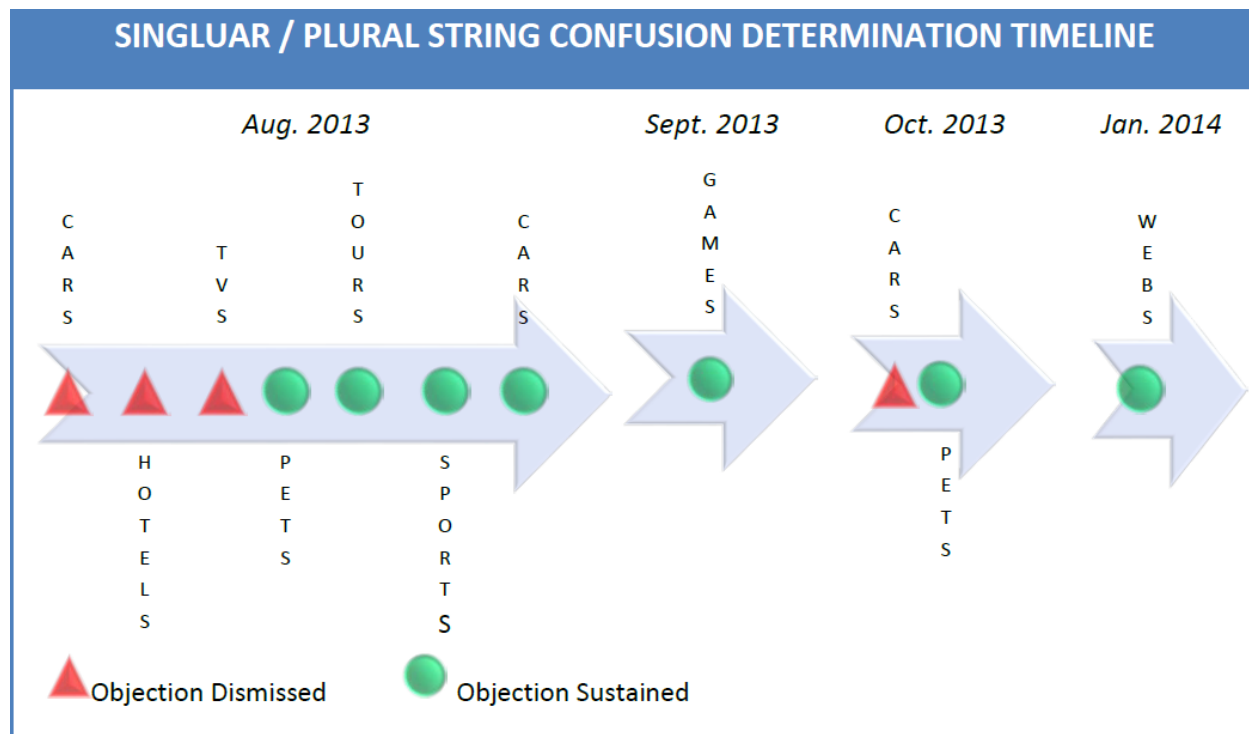
Both Losing Objectors and Applicants Must Have The Right To An Appeal

Fundamental principles of fairness dictate that either party in a dispute have the right to appeal an unfavorable determination. Vesting appellate discretion solely with “Losing Applicant[s]” creates an impermissible presumption that only cases where objectors were successful were wrongly decided and are somehow problematic. Rather, convention and equity dictate that both losing objectors *and* applicants have the right to appeal unfavorable decisions.

For example, as the proposed framework explains, Google Registry won its string confusion objection against DERCars, LLC, yet lost objections against Koko Castle, LLC and Uniregistry Corp., all involving the same TLD string. We agree with the BGC in principle that “two panels confronting nearly identical issues could rightfully reach different determinations, based on the strength of the materials presented.” [BGC Recommendation on Reconsideration Request 13-10](#), at p. 6 (October 10, 2013). However, we strongly believe that any inconsistencies in this contention lay with the latter two panel decisions, and believe that fairness dictates a right of appeal to a Panel of Last Resort for both losing objectors and applicants. Without fully rehashing the merits, we would note that our position is supported by the clear pattern in rulings pertaining to singular and plural strings. As illustrated by the chart below, 7 of the 8 most recent decisions (and nearly two thirds of all decisions) by the ICDR have favored the objectors’ claims that singular and plural versions of the same generic string are confusingly similar and should be placed in the same contention set.

³ 4.3 Extended Process Similarity Review Panel Function

The Extended Process Similarity Review Panel (EPSRP) can be called on to perform a second and final confusing similarity assessment of the requested IDN ccTLD string if: (1) The DNS Stability Panel, in performing its string similarity review, deems the string to be invalid; and (2) if the requester seeks review by the EPSRP within three months of ICANN’s notification of the DNS Stability Panel’s determination.



Accordingly, it is the .CARS decisions which are the outliers, and the Panel of Last Resort must be authorized to uniformly reverse or otherwise amend all expert determinations in a contention set.

The Appropriate Standard Of Appellate Review Is “Clearly Erroneous.”

The proposed standard of appellate review is flawed in that it focuses on the subjective reasonableness of the underlying decision as determined by application of the Applicant Guidebook and procedural rules. We interpret this as akin to a *de novo* appellate review in that it accords no deference to the original panel determination. Because the original panel findings are primarily all fact-based, attributing credibility to expert opinions for example, we believe strongly that the *clearly erroneous* standard of appellate review is more appropriate. See *U.S. v. U.S. Gypsum Co.*, 33 U.S. 364, 395 (1948) (establishing that findings of fact are not to be disturbed absent a “definite and firm conviction that a mistake has been committed”). Indeed, with an eye toward arbitration covering international disputes, the ICDR has already adopted rules “permit[ing] review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.” ICDR, [Optional Appellate Arbitration Rules](#) (November 1, 2013).

Consolidation Is Inappropriate For Separate Strings And Contention Sets.

The framework principles are presently ambiguous in that they suggest “consolidated consideration” for the .CAR/.CARS and .CAM/.COM contention sets. This language could mean that that all six objections at issue will be considered in unison by the Panel of Last Resort

through a single proceeding. We oppose any such interpretation—the .CAR/.CARS and .CAM/.COM contention sets involve distinct strings, issues, applicants and applications, and accordingly they should be considered separately.

In particular, as addressed above, a body of discretionary precedent and a clear pattern in rulings exists with respect singular and plural TLD strings, including the .CAR/.CARS contention set. Such precedent and pattern does not translate to objections that do not involve singular and plural TLD strings.

Only Arbitrators With Relevant Experience Are Qualified For The Panel of Last Resort.

The use of arbitrators lacking relevant new gTLD program experience has been a perceived weakness in the process, possibly contributing to the inconsistencies in the new gTLD objection determinations. Accordingly, any Panel of Last Resort should be composed entirely of arbitrators with demonstrated experience in new gTLD program string confusion objections—and ideally, arbitrators who also have some degree of experience in the relevant target industries, such as the automotive or hospitality industries.

Reconsideration Requests Are Not A Substantive Appeal Mechanism.

As a final point, we agree with the NGPC that reconsideration requests are not an appropriate avenue to address substantive challenges to new gTLD objection determinations. In particular, we agree that “the standard guiding the panels involves some degree of subjectivity,” and while a party “may disagree with the panel’s finding, reconsideration is not available as a mechanism to re-try the substantive determination of the Panel.” ICANN, [BGC Determination on Reconsideration Request 13-9](#) (October 10, 2013).

Conclusion

We appreciate the work that ICANN has put into developing a string confusion objection review mechanism, and are encouraged that ICANN is committed to maintaining an open dialogue with the community at large in order to explore further modifications. We sincerely hope that ICANN will take into consideration the foregoing suggestions, and look forward to working with ICANN as reviews for new gTLD objections move forward.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andy Abrams', written in a cursive style.

Andy Abrams
Senior Trademark Counsel
Google Inc.