Comment on the String Confusion Objection Process

We are a shareholder in the community-based applicant HOTEL Top-Level-Domain Sarl. Therefore the decision in the String Confusion Objection .HOTEL vs .HOTELS has existential consequences for our entire business.
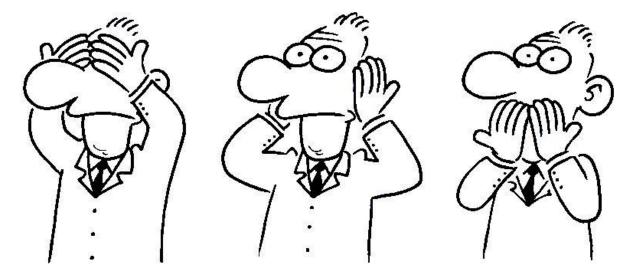
We are seriously concerned about the entire handling of String Confusion Objections, namely

- that a case decision entirely relied on a single expert's decision,
- that a case decision heavily relied on the date of the expert's determination,
- that the case decisions lack consistency in the statement of grounds and even untrue and far-fetched grounds have been accepted as valid,
- that there is no real discernment in ICANN that the String Confusion Objections process has gone wild and the current proposal may only resolve two of the most embarrassing cases, and
- that there are no effective appeal or reconsideration mechanisms. Even if you get a parking ticket you are able to get a facts-based reconsideration of the case and it is the possible to go the highest applicable court.

The Three Monkeys in ICANN

It is a shame for ICANN and the new gTLD program that the obvious discrepancies in the String Confusion Objections have been neglected for such a long time now.

This reminds me on the pictorial maxim of the three wise monkeys. Together they embody the proverbial principle to "see no evil, hear no evil, speak no evil". The three monkeys are Mizaru, covering his eyes, who sees no evil; Kikazaru, covering his ears, who hears no evil; and Iwazaru, covering his mouth, who speaks no evil. Sometimes there is a fourth monkey depicted with the three others; the last one, Shizaru, symbolizes the principle of "do no evil". He may be shown crossing his arms or covering his genitals. The maxim is about the exemplary handling and best practice in impropriety.

ICANN is currently following the three monkeys' maxim by pretending that inconsistencies in the String Confusion Objections do not exist except of the two non-negligible ones.

The unseen String Similarities

We what to highlight another problem: The fact that there are a number of new gTLDs that are very likely to cause user confusion although there have been no String Confusion Objections for these strings. Here are some examples of other visual similarity scores from the sword tool:

- .vermögensberater / .vermögensberatung = 80% similarity
- .allfinanzberater / .allfinanzberatung = 80% similarity
- .photo / .photos = 81% similarity
- .career / .careers = 84% similarity
- .coupon / .coupons = 84% similarity
- .chanel / .channel = 86% similarity
- .accountant / .accountants = 88% similarity
- .theater /.theatre = 93% similarity

Please note that the visual similarity of the strings .unicorn / .unicom was 94% and .sport / .sports was 81%. I'm not a lawyer but if the visual string similarity is already determined high it is difficult to argue that other similarity factors are so different that the visual effect diminishes.

The .HOTEL vs .HOTELS Case

In the case .HOTEL vs. .HOTELS the panelist foreclosed and based his decision based on an utterly false argument:

> "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, …"

This argument has been deconstructed by the recent decision in the case .WEB vs. .WEBS:

> "First, ICANN's String Similarity Assessment Tool, while relevant in the Panel's consideration, is not determinative in resolving a string confusion objection. Second, regarding the relevance of ICANN not placing two applied-for strings in the same contention set, as one panelist in a previous string confusion objection noted, an applicant's gTLD application is not entitled to "an evidentiary presumption of acceptability because it passed through the initial ICANN visual similarity tool tests." Rather, "the Objection process is an independent review process." Third, this Panel has considered, and found not persuasive, the opinions of the Applicant's linguistics expert urging dissimilarity between <.webs> and <.web>."

I don't want to comment on further ignorant handling of this case by ICANN staff and the ICANN board, but at least a fact based reconsideration of the case is indispensable.

What will happen in the next gTLD Round – no good expected?

When ICANN argues that applicants have already acted based on other decisions, so it is too late to change them, it protects all those me-too applicants and speculators who did know that their application will be similar to others. Yet apparently, it is not too late to change the outcome of most String Confusion objections by an appeal mechanism. And arguing that an appeal mechanism is not in the Applicant Guidebook is not valid as we have seen many new mechanisms being introduced and approved by ICANN over the past 2

years of the application process (e.g. PICs, digital archery, the draw, name collisions, and other contractual provisions).

In this round we saw so far that a singular and plural version of a string (especially in short strings) have a very high likelihood that they are not similar. For the next round of new gTLDs we will certainly see a large number of applications that entirely derive from singular and plural versions of strings from this round if ICANN does not implement clear and decision based rules for string similarity.

Our Solution Proposal

The entire String Confusion Objections had significant deficiencies and there have been a number of controversial decisions when looking at all the decisions. Therefore, ICANN together with ICDR and independent experts must review all decisions and define clear rules under which parties concerned may apply for an appeal of their decision.

The rules for an appeal may simply include:

Rule 1 – The 70% threshold

> Strings that have less than 70% visual similarity (determined by the SWORD tool) are generally not similar, except of extraordinary circumstances (e.g. predominant aural similarity). This rule concerns three controversial decisions (see attached chart):

> ➢ .CAM/.COM
> ➢ .SHOP/.SHOPPING
> ➢ .SHOP/.通販

Rule 2 – The 80% threshold

> Strings that have at least 80% visual similarity (determined by the SWORD tool) are generally similar, except of extraordinary circumstances. This rule concerns one controversial decision:

> ➢ .HOTEL/HOTELS

> Also affected are those 16 applications which have been mentioned above. ICANN should pay special attention on these strings and perform a review one year after all strings have been started accepting registrations.

Rule 3 - The Twilight Zone

> Strings that have between 70% and 80% visual similarity (determined by the SWORD tool) could be treated on a case-by-case basis. Alternatively, Rule 3 could be deleted when the threshold for Rule 1 and 2 is 75%.

We think that following these simple rules could lead to a recovery of credibility in the new gTLD process.

Kind regards,

Dirk Krischenowski, CEO of Hotel Top-Level-Domain GmbH, 23 January 2014

>>> Please take a look at the String Confusion Objections overview on the next page <<<

The String Similarity Overview

Visual String Similarity* in comparision to ICDR String Confusion Objections determinations

Dated 31 Jan 2014 (*by ICANN SWORD tool)

Visual Similarity in %

Visual String Similarity of other strings without Objections:
80% .vermögensberater / .vermögensberatung
80% .allfinanzberater / .allfinanzberatung
81% .photo / .photos
84% .career / .careers
84% .coupon / .coupons
86% .chanel / .channel
88% .accountant / . accountants
93% .theater /.theatre

Dissenting decisions in a string pair

Strongest discrepancies:
.SHOP/.通販= SIMILAR
.HOTEL/.HOTELS = NOT SIMILAR

- ● YES, String Similarity determined by ICANN (visual only)
- ● Yes, String Similarity determined in ICDR Case
- ● NO, String Similarity <u>not</u> determined in ICDR Case
- ○ ICDR Case pending
- ○ ICDR Case closed or withdrawn

Chart assembled by Dirk Krischenowski