International Centre for Dispute Resolution

New gTLD String Confusion Panel

Re: 50 504 T 00238 13

Charleston Road Registry Inc. OBJECTOR

and

Uniregistry, Corp. APPLICANT

String: <.**cars** >

EXPERT DETERMINATION

The parties

The Objector is Charleston Road Registry Inc., of 1600 Amphitheatre Parkway, Mountain View, California 94043, USA, represented by Brian J Winterfeldt, Katten Munchin Rosenman LLP, 2900 K Street NW, North Tower, Suite 200, Washington, DC 20007-5118

The Applicant is Uniregistry, Corp., 3-110 Governors Square, 361 GT Grand Cayman, KY1-1108, KY, represented by John Berryhill, 204 E Chester Pike, First Floor, Suite 4, Ridley Park, PA, 19078.

The New gTLD String Objected To

The new gTLD string applied for and objected to is: **<.cars>.**

Prevailing Party

The Applicant has prevailed and the Objection is dismissed.

The New gTLD String Confusion Process

Module 3 of the ICANN gTLD Applicant Guidebook contains Objection Procedures and the New gTLD Dispute Resolution Procedure ("the Procedure").

Article 1(b) of the Procedure states that "The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure".

As expressed in the Guidebook, and the Procedure, there are four (4) grounds to object to the registration of new gTLDs. One of these grounds expressed String Confusion, as described in the Procedure Article 2(e)(i): **"(i) 'String Confusion Objection' refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications."**

Article 3(a) states that "String Confusion Objections shall be administered by the International Centre for Dispute Resolution".

Procedural History of this Case

1. On March 13, 2013, pursuant to the Procedure, the Objector filed with the International Centre for Dispute Resolution ("ICDR") an ICANN gTLD String Confusion Objection that is the subject of this proceeding.

2. On March 18, 2013 the ICDR acknowledged receipt of the Objection and advised the parties that pursuant Article 9 of the Procedure it would conduct an administrative review of the Objection .

3. On April 3, 2013 the ICDR advised the Objector that it had conducted the administrative review and that the Objection complied with Articles 5-8 of the Procedure and with the ICDR Supplementary Procedures for String Confusion Objections (Rules) (" the applicable ICDR Rules") and that accordingly the Objection would be registered for processing.

4. On April 17, 2013, the ICDR advised the parties that the Applicant was invited to file a Response to the Objection.

5. On May 17, 2013 the Applicant filed its Response to the Objection.

6. On May 31, 2013, the ICDR advised the parties that it had conducted an administrative review of the Response to the Objection and noted that the Response complied with Article 11 of the new gTLD Dispute Resolution Procedure and with the applicable ICDR Rules.

7. On June 17, 2013 and pursuant to Article 13 of the Procedure, the ICDR appointed The Honourable Neil Anthony Brown QC as an Expert in this matter ("the Expert"). Prior to accepting appointment, the Expert, pursuant to Article 1 of the applicable ICDR Rules and to ensure compliance with Article 13(c) of the Procedure, declared to the ICDR that there were no circumstances likely to give rise to justifiable doubts as to his impartiality and independence. The Expert has satisfied himself that he was properly appointed.

8. Each party has made its advance payment of Costs pursuant to Article 14 of the Procedure.

9. On September 5, 2013 the Objector and the Applicant by their authorized representatives submitted to ICDR a Joint Request under Article 16 (d) of the Procedure for a suspension of the proceeding until the sooner of (a) further notice from the parties or (b) thirty (30) days as provided under Article 16(d). On October 8, 2013, the Objector notified the ICDR that it wished the proceeding to proceed to a panel determination. The Expert will therefore proceed with its determination.

Basis for Objector's Standing to Object based on String Confusion

Section 3.2.2. of Module 3 of the Guidebook provides that objectors must satisfy standing requirements to have their objections considered. Section 3.2.2.1 of that Module provides *inter alia* that in the case of a string confusion objection, "(a)ny gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation. That is, an applicant does not have standing to object to another application with which it is already in a contention set as a result of the Initial Evaluation."

The Objector is an applicant in the current round of applications for the gTLD <**.car**> and string confusion between the Objector and the Applicant has not been found in the Initial Evaluation. The Objector therefore has standing to make the present objection.

Factual Background

1. This is a proceeding to determine whether the proposed generic Top Level Domain <**.cars**> is confusingly similar to the applied for generic Top Level Domain (gTLD) <**.car**>. It is brought pursuant to Module 3 of the gTLD Applicant Guidebook ("the Guidebook") approved on June 20, 2011 and as updated on June 4, 2012 by the Internet Corporation For Assigned Names and Numbers ("ICANN"), the Procedure and the applicable ICDR Rules.

2. The Parties are Charleston Road Registry Inc., a United States company ("Charleston Road" or "the Objector") which is the Objector and Uniregistry, Corp. , a United States company ("Uniregistry" or "the Applicant") which is the Applicant for the new gTLD <**.cars**> and hence the Respondent in this proceeding.

3. Charleston Road is the Objector as it is the applicant in the current round of applications for the proposed gTLD <**.car**>. It argues that the string of the proposed < **.cars**> TLD applied for by Uniregistry is confusingly similar to the string of the applied for TLD <**.car**>. Uniregistry maintains that the string of the proposed <**.cars**> TLD is not confusingly similar to the string <**.car**>.

Parties' Contentions

Objector

The Objector makes the following contentions.

1. This Objection is based on string confusion as defined.

2. The Objector has standing because it is an Applicant for the <**.car**> string. On 26 February 2013 ICANN published its list of contention sets and the Objector's <**.car**> application was not placed in a contention set with the Applicant'/Respondent's <**.cars**> string.

3. The Objection is valid and should be upheld as it is likely that impermissible confusion will result if both the <**.car**> and the <**.cars**> gTLDs are delegated.

4. The Objector is owned by Google Inc., the prominent provider of internet services and a company that wishes to extend the utility of the domain name system.

5. The Applicant/Respondent claims that it seeks to utilize in the internet's "best top-level domain alternatives."

6. The Panel's function is to consider if the applied for gTLD is likely to result in string confusion in the meaning set out in the Guidebook, Section 3.5.1. On the analysis here presented, <**.cars**> so nearly resembles <**.car**> that it is likely to deceive or cause confusion in the mind of the average, reasonable internet user.

7. The strings are virtually identical in appearance, as they are identical apart from the additional "s" making a plural and that is enough to establish confusing similarity by itself.

8. A high degree of confusing similarity in appearance comes from the mere addition of an "s" and pluralization and many UDRP panels have found confusing similarity between singular and plural domain names and trademarks. In fact there is nothing to differentiate the two TLDs other than pluralization.

9. There is a 72% visibility between the two strings on the ICANN similarity assessment algorithms.

10. "(T)here are no material differences in their appearance such that there is a likelihood of confusion (*sic*)".

11. The confusion will be probable and not merely possible.

12. Consumers and internet users will glance at email addresses and confuse the two TLDs which will lead to spoofing and phishing. They will also be confused with advertisements.

13. The two strings are virtually identical in phonetic sound and this shows confusing similarity by itself. Phonetic sound has been regarded as an important consideration in UDRP cases. This is particularly significant when goods and services are advertised orally.

14. The two strings are virtually identical in meaning, a situation exacerbated in the case of singular and plural spellings and where, as in the present case, the proposed uses of the two TLDs are the same. Commercial meaning has been accepted as a determinant in cases of

confusing similarity under the UDRP. It is probable and not merely possible that internet users and consumers will glance at email addresses and confuse the two TLDs.

15. In previous rounds of applications for new gTLDs, confusing similarity arising from the singular and plural issue has been regarded as a relevant consideration.

16. The addition or deletion of the plural "s" poses difficulties in human recollection and also for non-English speakers.

17. Thus, practical concerns as well as legal and factual precedent, weigh in favour of a finding of likely confusion to the average internet user if <**.car**> and <**.cars**> are delegated.

18. The Objection should be upheld and both TLDs be placed in a contention set.

Applicant

The Applicant makes the following contentions.

1. Claimant has not discharged its burden of producing relevant evidence of the alleged confusing similarity; see gTLD Applicant Guidebook Module 3, Section 3.5.

2. The standard of proof on the Objector is higher than under trademark law and has not been met by the Objector.

3. Neither the <**.car**> TLD nor the <**.cars**> TLD is a trademark.

4. A generic TLD is incapable of serving as a trademark. Neither of the two TLDs is a trademark and both are generic words with no distinctiveness.

5. It is the ICANN Guidebook that determines the applicable rules: 3.5.1.

6. The Complainant's various conclusions, premised on situations involving highly distinctive marks, are thus built upon having skipped the necessary preliminary step of first determining the degree of distinctiveness in the things to be compared.

7. The differences between <**.car**> and <**.cars**> are at least as great as those among existing TLDs, e.g. <**.ca**>. There are also country codes that differ from each other by a single letter. These abundant "single letter" similarities are an accepted feature of the Internet name system. These two TLDs are generic words and small differences between generic words are accepted as part of the domain name system; as with <**lawyers.com**> and <**lawyer .com**> and also with <**car.com** and <**cars.com**>.

8. The two TLDs are not trademarks but generic words.

9. Internet users are sophisticated enough to select the TLD in which they want to register their domain name. ICANN has clearly decided that singular and plural pairs are not confusingly similar. This is particularly so where the decision to register a domain name will be by a sophisticated person in the industry.

10. The cases cited by the Objector are cases where there was a distinctive mark, but in the present case there is less distinctiveness as it concerns 2 generic words.

11. There is no evidence of actual confusion.

12. It is widely known that singular and plural words are different and that they mean different things. ICANN understood that fact. That is because if determined now, there will be inconsistent results and no one will know what is singular and what is plural. In reality people will adapt to the new gTLDs and recognize the differences between one and the other.

13. Accordingly the Objector has not made out the confusing similarity ground.

14. If competition is the touchstone of the new regime as ICANN says it is, we should not eliminate choice from competing entities which would happen in the case of generic words if the Objector succeeds.

Discussion and Findings

Preliminary Issue: Request for Notice of New Authority

In the course of the Expert's deliberations, the Applicant filed and served a notice entitled Request for Notice of New Authority. The purpose of that notice was to draw to the Expert's attention two authorities decided after the Response of the Applicant had been filed with the ICDR. The first of those two decisions is *Charleston Road Registry Inc. v. Koko Castle, LLC,* ICDR Proceeding 50 504 233 13 - .CAR/.CARS. In that matter, the Expert held that the new gTLD string applied for and objected to, namely <.cars>, was not confusingly similar to the gTLD <.car> applied for in the same application round by the Objector, who is also the Objector in the instant proceeding. The second decision is *Hotel Top-Level-Domain S.a.r.l.v. Booking.com B.V.* ICDR Proceeding 50 504 237 133 .HOTEL/.HOTELS. In that matter, the Expert held that the new gTLD string applied for and objected to, namely <.hotels>, was not confusingly similar to the gTLD <.hotel> applied for in the same application round by the Objector. The use to which the Applicant invited the Expert to make of these decisions was that if a decision were made in the instant proceeding that was different from the decision in *Charleston Road Registry Inc. v. Koko Castle, LLC, (supra),* untoward practical consequences would flow. It was submitted that those consequences were that there would be "two contention sets – (a) one set for .CARS applications only, and (b) one set for a mix of .CAR and .CARS applications. The result of the ICANN auction in that circumstance could produce the paradoxical result of two prevailing .CARS TLD applications from the ICANN contention auctions in those two sets, and there is no provision in the ICANN TLD process to address that circumstance. Conflicting results from string contention panels would further bring the consistency and legitimacy of the policy into question." The second decision was presumably relied on as a similar fact situation. The implication of the submission was therefore that the Expert should not make a determination different from that in *Charleston Road Registry Inc. v. Koko Castle, LLC, (supra).*

The Objector replied to this submission by contending that the Expert should issue an independent determination based on the particular merits of the string confusion objection i.e. that the Expert should not simply determine the matter by following the decision in *Charleston Road Registry Inc. v. Koko Castle, LLC, (supra).*The first reason advanced for that submission was that the ICDR had already issued "independent, yet technically conflicting results among string

contentions regarding singular and plural versions of strings in *Charleston Road Registry Inc. v. John Island, LLC*, ICDR PROCEEDING 50-504-00274-13; .PET / .PETS." The second reason advanced was that the Applicant Guidebook and the President of the ICANN Generic Domains Division "already acknowledge that separately filed objections necessitate independent, yet potentially inconsistent determinations."

The Expert rejects the Request for Notice of New Authority, declines to dispose of the instant proceeding by automatically following the determination in *Charleston Road Registry Inc. v. Koko Castle, LLC, (supra)* and will proceed to make an independent determination on the merits in the instant string confusion objection. The reasons for that decision are substantially the above two reasons advanced by the Objector in its reply, with which the Expert agrees. In elaboration, it is difficult for the Expert to decide how ICANN might deal with the potential conflicts that the Applicant contends will arise, but the process is ICANN's, it has control over the entirety of the process, it seems to have contemplated that some such problem may arise during the process and it is ICANN's role to manage the remainder of the process. Indeed, the parties are bound by ICANN's process, they have agreed to it by virtue of taking part in it and it would be inappropriate for the Expert to intervene by not making the independent determination that the Applicant Guidebook requires and which the Expert has agreed to give. In addition, the Objector has followed the process that entitles it to an independent decision and it would be a denial of its rights, without justification, in effect to abandon that process and not make an independent determination. The Expert will therefore proceed to deal with the proceeding in the usual manner on its merits.

Substantive Issues

1. **Burden of proof**. The first matter to be considered is which party bears the burden of proof. In this matter the burden of proof is on the Objector. That would be so as a matter of general principle even without any specific provision in the ICANN documents governing this proceeding; the proceeding concerns an attempt by the Objector to dislodge the Applicant/ Respondent from its prospective entitlements and rights under the application for a new gTLD under the new TLD arrangements and the burden of making out a case for doing so must rest on the party who wishes to achieve it.

2. But even apart from general principles, the relevant provision in the ICANN Guidebook makes it clear beyond doubt that the burden of proof is on the Objector. That conclusion is drawn from Section 3.5 of Module 3 in the Guidebook, which provides, among other things, that "The objector bears the burden of proof in each case". The onus is therefore on the Objector to prove its case.

3. The same proposition is stated again in the section of the Guidebook devoted to procedures, namely the Attachment to Module 3. That procedure provides as follows:

Article 20. Standards
(a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.
(b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.

(c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards."

4. But the question instantly arises: if the burden of proof is on the Objector, what does the Objector have to prove? The answer to that question is contained in the provisions in the Guidebook relating to certain standards that must be applied in these proceedings. That requirement comes about because, first, Article 20 of the Procedure requires the Panel to apply the standards defined by ICANN. Secondly, Section 3.5 of Module 3 of the Guidebook provides for certain "Dispute Resolution Principles (Standards)" and Section 3.5.1 of the Module contains the standards to be applied in cases of String Confusion Objections. Those standards are as follows:

"3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a 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."

5. Thus, in the present case, to comply with the standards, Charleston Road must prove that the applied for <**.cars**> TLD is likely to result in string confusion with the gTLD for which it has applied, namely <**.car**> and within the meaning articulated in the standard. In particular, the standard requires the Objector to prove that string confusion is "likely to result." This does not weaken the burden on an Objector, but strengthens it.

6. The provisions of the Guidebook just referred to and dealing with standards then gives an indication of when it is likely that a string confusion has arisen. Module 3, Section 3.5.1 provides that:

"For a 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."

7. Thus, a mere possibility of string confusion is not enough and the time-honored criterion of "probably" must be satisfied; moreover, the probability of confusion must have arisen in the mind of the average, reasonable Internet user.

8. The notion of probability is not confined to Section 3.5.1 of Module 3. It has previously been invoked in the definition of "similar" which appears on two occasions in the Guidebook. The first occasion is in Module 1, Section 1.1.2.10 where it is said:

"In this Applicant Guidebook, 'similar' means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone." (Module 1, Section 1.1.2.10).

The second occasion is in Module 2, Section 2.2.1.1 where the same definition appears:

"In this Applicant Guidebook, 'similar' means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone."

9. But the test of whether it is probable that confusion will arise in the mind of the average, reasonable Internet user must be applied judicially and it is not enough to conclude that some-one, somewhere will probably be confused by the string. The test is made more specific than that by requiring that the probable confusion must be in the mind of "the average, reasonable internet user." The task of the Expert in the present proceeding is therefore to place itself in the position of the average, reasonable internet user and to assess whether such a person would probably be confused by the proposed string.

10. Then, in this analysis of principles, the question arises: what is string confusion? To that question the answer is given, as has been noted, in Section 3.5.1 of Module 3, namely that "(s)tring Confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion."

11. Finally, the standards add another cautionary rule in interpreting the Module and in assisting Experts to decide whether in a given case, a likelihood of confusion has been established. This is achieved by reminding the Expert that just because an object reminds one of something else, does not mean that the observer is confused between the two. It does this by providing: "Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion." Logically, that is a correct statement and a timely reminder, as is well illustrated by the observation of the court in *In re Ferrero,* 479 F.2d 1395, 1397 (CCPA 1973) that:

"Seeing a yellow traffic light immediately 'calls to mind' the green that has gone and the red that is to come, or vice versa; that does *not* mean that confusion is being caused. As we are conditioned, it means exactly the opposite."

12. Putting all of these criteria together clarifies the task of the Expert and shows the obligations of an Objector in these proceedings. Those obligations are that the Objector:

(a) must prove its case;
(b) must do so on the balance of probabilities and must therefore show that string confusion will probably occur; noting that
(c) it is not enough to show that string confusion is a possibility; and
(d) what the Objector has to prove is that string confusion is likely to result; and
(e) it must prove that the string confusion is likely to arise in the mind of an average, reasonable Internet user;
(f) the state of string confusion that must exist for the Objector to succeed is where "a string so nearly resembles another that it is likely to deceive or cause confusion";
(g) finally, that task will not be assisted by showing that the string brings another string to mind.

13. The starting point in this inquiry consists of the terms of the objection itself.

The Objection is:

"String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string in the same round of applications."

As has been noted, "similar" has in effect been defined in two provision in the Guidebook ,Module 1, Section 1.1.2.10 and Module 2, Section 2.2.1.1, namely : "In this Applicant Guidebook, 'similar' means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone."

14. The applied for string is **<.cars>**. The TLD applied for by the Objector is <.**car**>. The question is therefore whether the string **<.cars>** is confusingly similar to the string <.**car**>. The Determination of this Expert is that the string **<.cars>** is not confusingly similar to the string <.**car**>. That is so for the following reasons.

15. There are essentially two questions which, to some extent overlap, but they are nevertheless two questions. The first question that arises is whether the two strings are similar, as defined in the Guidebook. The second question is whether, if the two strings are similar, are they confusingly so? As to the first question, the two strings clearly have a common feature, namely the word "car". But it is equally clearly ICANN's intention that in interpreting whether that fact makes the two strings similar, the Expert should use the definition that has been mandated in the Guidebook and repeated. The question is therefore whether the two strings are so similar that they create the probability of user confusion. The Expert's view on that question is that they are not similar, as they will not probably give rise to user confusion. Users will recognize that one of the strings is singular and one of them is plural and that that difference means that they should regard the two strings as different, as they are. Internet users are now very well aware that, on the internet, small differences in spelling and meaning are significant and that they mean different things, will lead to different destinations such as websites and email destinations and will carry consequences, such as whether communications are genuine and reach their correct destinations. Internet users have become increasingly aware of such differences and are now mature and sophisticated enough to realize it, when they are being presented with such differences; indeed, internet users are so astute to such matters that they now look for them to ensure as best they can that they are not being mislead or deceived. There will therefore, in the opinion of the Expert, be no probability of user confusion if the two strings are delegated into the root zone.

17. The second question is whether, if the two strings are similar, are they confusingly similar? This is by far the more significant question. The Expert finds that the string **<.cars>** is not confusingly similar to the string <.**car**>. In particular, the opinion of the Expert is that the Objector has not discharged its burden and its Objection therefore fails.

18. We have already seen from the Guidebook and the standards that must be applied that the Objector must show:

(a) that the new gTLD **<.cars>** is likely to result in string confusion;
(b) that the confusion must arise in the mind of the average, reasonable internet user ; that
(c) string confusion will be said to have arisen where a string so nearly resembles another that it is likely to deceive or cause confusion; bearing in mind that mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

19. Taking each of these requirements in turn and applying the standards specified in Section 3.5.1 of Module 3:

(a) In the opinion of the Expert, the proposed new gTLD is not likely to result in string confusion. It is of course possible that some internet user will be confused by the two strings. That does not mean that it is likely and the Expert is of the opinion that it is not likely. It must be borne in mind that the Guidebook admonishes against finding that there is a mere possibility and then drawing from that finding the conclusion that a possibility makes something likely or probable, as it clearly does not. The possibility identified will, at most, exist only in very few cases and the applied for gTLD <**.cars**> will not give rise to string confusion with the < **.car**> TLD. That is so because the reader and the user will appreciate the fact that the two words that constitute the strings, "cars" and "car", are separate words, with distinct meanings, with each of them being capable of being given their own function, namely that the former invokes cars in general and as a group, while the latter clearly invokes the concept of a single entity and that there is no reason why they should be understood as regarded as being used, in the internet context, in anything other than those distinct meanings.

(b) Moreover, it must be remembered that when the standard provides that the Objection can succeed only when the new TLD is "likely to result in string confusion" it means "string confusion" as defined. Section 3.5.1 defines string confusion as such a state of resemblance between the two strings "that it is likely to deceive or cause confusion." The opinion of the Expert is that the resemblance between the two strings in question will not deceive or cause confusion among users. That is so because internet users will appreciate that the words are different, that they have their own meanings, that they are being used as separate TLDs which by necessity must be different and they will also draw on their own experiences of using the internet. That experience tells them that differences in spelling, let alone differences in spelling that constitute different words, have immense consequences when it comes to website addresses, domain names, email addresses, passwords and elsewhere and that a change of one letter, a change in punctuation or even in the case in which a word is typed will mean the difference between using the internet successfully or not. Because of that experience and because of the times when they have been frustrated in the use of the internet, users are now permanently on the look out for such differences and will be particularly astute to take notice of them. There is therefore an air of unreality in the argument that internet users will think that two proposed new TLDs with resemblances in spelling, but where one of them relates to a singular concept and the other relates to a plural concept, are actually the same as or associated with each other or that there is some connection such that they will be deceived or confused between the one and the other.

(c) The Expert also holds that it is unlikely that string confusion will result in the present case in the mind of the average, reasonable internet user. Indeed, the average, reasonable internet user is less likely to be confused in the way claimed by the Objector than other candidates, because he or she is astute to the basic workings of the internet and knows in particular that even small spelling

differences in words often have great significance. Thus the objection does not give average, reasonable internet users the credit that they deserve, as it should not be assumed that if they see the two words, one singular and one plural, they will not appreciate immediately that they are separate words with their own meanings and uses. It is also one of the characteristics of average, reasonable internet users that they are now, probably more than ever, on their guard and likely to be curious about similarities in spelling and what they signify. Many average, reasonable internet users who have registered a domain name have also had to make a choice about the top level domain in which they register their domain name and are thus aware of differences between the various top level domains and what they signify and are unlikely to be confused between two domains that have respectively a singular and a plural connotation. Moreover, the average, reasonable internet user is by definition familiar with the internet and the suggestion that internet users cannot tell one TLD from another, even if the spelling is similar, sells their knowledge short and is unjustified. Accordingly, no confusion will arise in the present case in the mind of the average, reasonable internet user between <**.cars**> and < **.car**>.

(d) The string <**.cars**> does not so nearly resemble another that it is likely to deceive or cause confusion. As has been noted above, each string is a separate word and readily recognized as such; each word has a meaning sufficiently different from the other word to give it a unique character. All of these factors support the notion that average, reasonable internet users will appreciate the difference between the two TLDs and accordingly, they will not be deceived or confused.

(e) For reasons of completeness, the Expert also finds on the balance of probabilities and in the present context, that the string <**.cars**> does not bring the string <**.car**> to mind, but that if it did, it is by virtue of the express words of the standard insufficient to find a likelihood of confusion.

20. The Panel will now deal with a number of other arguments that have been raised during the proceeding, to provide an opportunity to elaborate, where appropriate, on the arguments already advanced. They are as follows.

1. The Objector has argued that the two strings are nearly identical visually and orthographically by virtue of the pluralization created by the additional letter "s". It then argues that <**.cars**> is therefore likely to result in string confusion. That is of course the issue that must be resolved by the Expert. In support, the Objector cites judicial decisions and decisions by UDRP panels. Naturally the Expert gives respect to those decisions, but they are not binding on the Expert who is tasked with performing a unique function that was not before those who decided the cases referred to. The Expert's function is clearly intended to be performed within the context of the decision of ICANN to expand the internet by issuing new gTLDs and within the specific rules on the burden and standard of proof to be applied. For example, the Objector submits that "internet users and consumers", apparently in general, will be confused, whereas ICANN has specified that the question is whether the "average, reasonable internet user" will be confused. It is also wrong, in the opinion of the Expert to approach the task by assuming that internet users will only "glance" at email addresses, as the Objector submits. The Expert has already

noted that the average, reasonable internet user today does far more than glance at email addresses and web addresses, especially if he or she is about to send private communications or money over the internet; most internet users know from hard experience that a mere glance is more likely than not to result in using a wrong email address or website with sometimes serious consequences. These days, with concern about internet security and in the coming era of new gTLDs the average reasonable internet user is very likely to be careful about the precise spelling of email and web addresses and they know that small differences, especially in a generic context, are likely to have immense significance.

Indeed, that very point has been made in judicial and UDRP decisions, as has been noted by the Applicant, in cases such as *Entrepreneur Media, Inc. v. Smith*, 279 F. 3d 1135, 1147 (9th Cir., 2002) concerned with the difference between ENTREPRENEUR and ENTREPRENEUR PR ("[i]n the Internet context, consumers are aware that domain names for different Web sites are quite often similar, because of the need for language economy, and that very small differences matter (;)" and between the singular "Tire Discounter" and the plural "Tire Discounters", a finding of no confusing similarity:*Tire Discounters, Inc. v. TireDiscounter.com*, NAF Claim Number: FA0604000679485 ("[b]ecause the mark is merely descriptive, small differences matter.")

Moreover, ICANN's promotion of the new regime of TLDs has been so prominent and effective that average, reasonable internet users must by now be very aware that there are to be new TLDs and are probably on the lookout for them and the differences in spelling that may accompany them. They are therefore less likely to be confused than might be thought.

2. The Objector has also argued that the two strings are virtually identical in terms of phonetic sound and that consumers, hearing them will be confused. Some consumers may be confused and the ICANN structure contemplates this, which is probably the reason it has built in a standard of proof that will enable new gTLDs to be delegated in appropriate cases but avoid unacceptable degrees of confusion. But it is difficult to imagine widespread confusion coming from hearing the words "car" and "cars" pronounced and the opinion of the Expert is that any such confusion will not be probable or likely.

3. The Objector argues likewise that the two words have virtually identical meanings and that the two TLDs will be used for the same or similar purposes. The Expert is unable to say what uses the disputed TLDs will be put to with any certainty and cannot use a speculative matter like that to determine the outcome of the present Objection.

4. Likewise the submissions of the Objector on the difficulties some people, especially non-English speaking people, have in remembering if they had a singular or plural password and the unique features of some foreign languages are interesting but far too speculative to contribute to the decision that the Expert has to make. This is, again, due to the fact that there are specific rules on the burden and standard of proof that are applicable here and the Expert feels obliged to confine itself to those criteria. This is not a limitation at all, as the ICANN rules provide a workable regime within which the Expert can reach a decision in this matter.

21. For all of the foregoing reasons, the Objector has not discharged its burden in this proceeding.

Determination

Therefore, the Applicant has prevailed and the Objection is dismissed.

October 10, 2013.

The Honourable Neil Anthony Brown QC

Sole Expert Panelist