International Centre for Dispute Resolution

New gTLD String Confusion Panel

In the Matter Between:

Re: 50 504 T 00258 13

Commercial Connect, LLC, OBJECTOR

and

Top Level Domain Holdings Limited, APPLICANT

String: <.购物>

EXPERT DETERMINATION

1. The Parties

The Objector is Commercial Connect, LLC ("Objector" or "Commercial Connect"), located at 1418 South 3rd Street, Louisville, Kentucky, United States of America.

The Applicant is Top Level Domain Holdings Limited ("Applicant" or "Top Level Domain Holdings"), located at Cragmuir Chambers Road Town, Tortola, 1110 VG, British Virgin Islands, and is represented by Reg Levy, United States of America.

2. The Opposed New gTLD String

The new gTLD string applied for and objected to is: <.购物>, which is an Internationalized Domain Name ("IDN") consisting of the simplified Chinese characters for "shop" ("gòuwù" in the pinyin system of romanization).

3. Prevailing Party

The Applicant has prevailed and the Objection is dismissed.

4. The New gTLD String Confusion Process

This Expert Determination arises from a string confusion objection to an application for a new generic top-level domain ("gTLD") as a part of the New gTLD Program (the "Program") of the Internet Corporation for Assigned Names and Numbers ("ICANN"). To put this objection in context, an understanding of the overall procedures for the Program and for resolving string confusion objections is helpful.

The ICANN gTLD Applicant Guidebook (the "Guidebook") established several phases for obtaining a new gTLD. The first phase is the application submission period, which opened on January 12, 2012 and closed on April 12, 2012, with no limit on the overall number of gTLD applications.

Second, after a gTLD application passes the Administrative Completeness Check, an Initial Evaluation of the application is conducted by independent evaluation panels in various categories, including string similarity and technical and operational capability. If the String Similarity Panel finds the applied-for gTLD string to be confusingly similar to the gTLD string in another application, the two strings will be placed in a contention set. Section 2.2.1.1.2 of the Guidebook states that, during this Initial Evaluation, "[s]tring confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion."

Third, even if an application is not placed in a contention set during the Initial Evaluation, a third party may object to the application on several grounds, one of which is string confusion. Module 3 of the Guidebook contains Objection Procedures and the New gTLD Dispute Resolution Procedure (the "Procedure"). Article 1(b) of the Procedure states that "[t]he 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."

Article 1(c) of the Procedure states that "[d]ispute resolution proceedings shall be administered by a Dispute Resolution Service Provider ('DRSP') in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b)." Pursuant to Article 3(a) of the Procedure, string confusion objections shall be administered by the International Centre for Dispute Resolution ("ICDR"). The ICDR has duly adopted "Supplementary Procedures for ICANN's New gTLD Program" ("ICDR Supplementary Procedures"), which govern this proceeding pursuant to Article 4(b)(i) of the Procedure. The ruling on a string confusion objection is called an "Expert Determination," pursuant to Articles 2(d) and 4(a) of the Procedure.

Pursuant to Section 3.2.2.1 of the Guidebook, if a gTLD applicant successfully asserts a string confusion objection against another applicant, the two applied-for strings will be considered to be in direct contention. Both applications will be placed in a contention set; the contention resolution procedure described in Module 4 of the Guidebook results in only one application from the contention set moving forward in the process. On the other hand, if a string confusion objection is rejected, both applications may move forward in the process without being considered in direct contention with one another.

5. Procedural History of this Case

The Objection was filed with the ICDR on March 13, 2013, in the form of a "Dispute Resolution Objection" (the "Objection), and an "Online Filing Demand for Arbitration/Mediation Form" ("Online Filing Demand"). The ICDR notified the parties of its receipt of the Objection on March 18, 2013, and proceeded to conduct an administrative review of the Objection.

On April 4, 2013, ICDR notified the parties that the Objection did not comply with Articles 5-8 of the Procedure and the applicable DRSP Rules. ICDR requested that the Objector, within five days from the date of the notification, provide proof or statement that copies of the Objection had been sent to the Applicant.

On April 11, 2013, ICDR notified the parties that the deficiencies had been corrected, so the Objection now complied with Articles 5-8 of the Procedure and the applicable DRSP Rules, and should be registered for processing.

On April 17, 2013, ICDR notified the parties that ICANN had published its Dispute Announcement of all admissible objections filed. ICDR also informed the parties that, in accordance with Article 11 of the Procedure, the Applicant should file a Response to the Objection within 30 days.

The Applicant filed a Response with the ICDR dated May 17, 2013. On May 24, 2013, the ICDR notified the parties that the Response complied with Article 11 of the Procedure and the applicable DRSP Rules.

On June 17, 2013, ICDR notified the parties that Grant L. Kim had been appointed to serve as the Expert, and requested that the parties review the Expert's resume and submit any comments or challenges regarding the appointment by no later than June 20, 2013. The parties did not submit any comments or challenges within this period.

6. Basis for Objector's Standing to Object Based on String Confusion

Section 3.2.2.1 of the Guidebook states that "any 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."

The Objector meets these requirements. The Objector is a gTLD applicant in the current application round, having filed an application for the string ".shop". The Objector asserts string confusion between ".shop" and a string applied for by the Applicant, ".购物". Further, no string confusion between ".shop" and ".购物" was found in the Initial Evaluation. Accordingly, the Objector has standing to object based on string confusion.

7. Factual Background

The Objector Commercial Connect states that it is a company established in 2000. The Objector filed a gTLD application for the string ".shop" on January 13, 2012. As a result of the Initial Evaluation, the Objector's application for ".shop" has been placed into a string contention set with eight other gTLD applications for ".shop". The Initial Evaluation determined that the Objector's application is "Eligible for Extended Evaluation" because the application did not receive a passing score in the category of Technical & Operational Capability.

The Applicant Top Level Doman Holdings filed a gTLD application for the string ".购物" after the application window for the New gTLD Program opened on January 12, 2012. As a result of

the Initial Evaluation, Top Level Domain Holding's application received a passing score, and was not placed in a string contention set with any other application.

8. Parties' Contentions

8.1. Commercial Connect's Objection

The Objector Commercial Connect states that it was established in 2000 for the specific purpose of bringing the ".shop" gTLD to the Internet. The Objector alleges that, when ICANN opened an application round for new gTLDs in 2000, the Objector was the only applicant for the ".shop" gTLD that had made it completely through the approval process. The Objector further alleges that, although it did not receive delegation for the ".shop" gTLD in 2000, ICANN invited the Objector to resubmit its application and stated that ICANN would give preferential consideration to the application.

The Objector alleges that in 2004 ICANN opened another application round for new gTLDs, but made the requirement so strict by concentrating on sponsored domains that the Objector could not apply. The Objector alleges that, as a result, the Objector was instrumental in helping to establish eCWR, which was an eCommerce Trade Union that helped to open communication channels and educate potential new eCommerce merchants.

The Objector alleges that during ICANN's development of the Guidebook in 2008, it was discussed that the Objector should receive preferential treatment as the original applicant for the ".shop" gTLD. Objector maintains that since then it has been active in obtaining supporters for its cause to provide a safe and secure eCommerce experience, and that there are over currently 15,000 supporters for the Objector's application for the ".shop" gTLD.

The Objector proceeds in the Objection to discuss the rules in the Guidebook regarding string confusion, as well as the interpretation of these rules based on the drafting history of the Guidebook. The Objector concludes that "all similar string[s] including visually, aurally, and same meaning should be in the same contention set."

The "Dispute Resolution Objection" submitted by the Objector does not specify ".购物" as the string at issue or make specific arguments as to why ".购物" is confusingly similar to ".shop." Instead, the Objection states:

> The gTLD filed by _____, so nearly resembles the .shop TLD that it is probable that confusion will arise in the mind of the average, reasonable internet user because the _____ gTLD application is similar either visually, aurally, or has a similar meaning.

The blanks in this sentence are presumably intended to refer to Applicant Top Level Domain Holdings and ".购物," but the Objector did not fill in those blanks. The only place where the Objector mentioned the Applicant is its Online Filing Demand, which states that "[t]he gTLD filed by Top Level Domain Holdings, so nearly resembles the .shop TLD that it is probable that confusion will arise in the mind of the average, reasonable internet user because the IDN for shopping gTLD application is similar either visually, aurally, or has a similar meaning."

8.2. Top Level Domain Holding's Response

The Applicant Top Level Domain Holdings contends that the Objection should be dismissed because "no part of either string is similar to the other." The Applicant asserts that whether two strings are "so similar that they create a probability of user confusion" depends on visual similarity, citing Section 2.2.1.1 of the Guidebook. The Applicant notes that ".shop" and ".购物" have no visual similarity, since they are written in two different languages with completely different characters.

The Applicant further contends that the strings have no similar sounds, citing the International Phonetic Alphabet ("IPA") for the two strings: kou u for 购物, and ʃap for shop.

The Applicant concedes that the strings may have comparable meanings, but notes that the strings are in different languages, so ".shop" would be meaningless to a person who does not know English, and ".购物" would be meaningless to a person who does not know Chinese. The Applicant asserts that a person who knows both English and Chinese would "be easily able to tell the difference" between the strings based on their visual and aural differences.

The Applicant further asserts that the two strings are aimed at distinct markets, as evidenced by the descriptions in the two applications. According to the Objector's application, ".shop" will be marketed to "the global ecosystem of e-commerce," with "a strict verification process where Commercial Connect researches the identity of that applicant and [the] business." In contrast, ". 购物" is directed to "Chinese-language vendors," and requires no such pre-verification. The Applicant notes that these markets may overlap to some extent, but that one is global and restricted, while the other is language-specific and open.

The Applicant also notes that the String Similarity Panel found no similarity between ".购物" and ".shop" as it did not place them together in a string contention set. Additionally, the String Similarity Assessment Tool found a 0% similarity between ".购物" and ".shop." Applicant notes that while this is not determinative, the Panel's findings tend to show that there is no similarity between ".购物" and ".shop." Applicant alleges that the String Similarity Assessment Tool found forty-eight (48) strings with a 30% to 50% similarity to Objector's string.

Finally, Applicant states that the Objection is deficient because it does not provide concrete evidence that there is a likelihood of confusion between ".购物" and ".shop."

9. Discussion and Findings

9.1. Jurisdiction

The Expert finds that he has been properly appointed pursuant to the Procedure and the ICDR Supplementary Procedures, and has jurisdiction to decide this dispute. The Applicant has accepted the applicability of the Procedure and the ICDR Supplementary Procedures by applying for a new gTLD pursuant to Article 1(d) of the Procedure. The Objector has likewise accepted the applicability of the Procedure and the ICDR Supplementary Procedures by filing an objection to a new gTLD pursuant to Article 1(d) of the Procedure.

9.2. Legal Standard for String Confusion

Article 2(e)(i) of the Procedure defines a string confusion objection as referring to an 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 2(e) notes that the grounds for this objection are "set out in full" in Module 3 of the Guidebook.

Section 3.5.1 of the Guidebook explains the string confusion standard as follows:

> A DRSP panel hearing a string confusion case 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.

As the Applicant has noted, Section 2.2.1.1 of the Guidebook refers to visual similarity. However, that provision explains that "[t]he visual similarity check that occurs during the Initial Evaluation is intended to augment the objection and dispute resolution process ... that addresses all types of similarity." Similarly, Section 2.2.1.1.3 of the Guidebook clarifies that a third party string confusion objection "is not limited to visual similarity"; rather, confusion "may be based on any type of similarity (including visual, aural, or similarity of meaning)."

Section 3.5 of the Guidebook states that "[t]he objector has the burden of proof." Section 3.5 further states that the panel "will use appropriate general principles (standards) to evaluate the merits of each objection" and "may also refer to other relevant rules of international law in connection with the standards."

The plain language of Section 3.5.1 makes clear that string confusion is a high standard. In addition to requiring "a likelihood of confusion," Section 3.5.1 emphasizes that "mere association" is insufficient, and that confusion must be "probable, not merely possible." Section 3.5.1 also refers to "so nearly resembles," indicating that the resemblance between the two strings should be quite close.

Imposing a high standard for string confusion is consistent with the purpose of the new gTLD program. As explained the Preamble of the Guidebook, "[t]he new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS" [Domain Name System]. While there are currently 22 gTLDs (as well as over 250 country code top-level domains), "[t]he new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market." To this end, ICANN did not limit the number of gTLDs applications in the current application round, because this would "severely limit the anticipated benefits of the Program: innovation, choice, and competition." New gTLDs Applicant Guidebook April 2011 Discussion Draft Public Comment Summary and Analysis, page 5, http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv6-30may11-en.pdf (hereafter "Draft Summary and Analysis").

The New gTLD Program expressly contemplates the establishment of new Internationalized Domain Names ("IDNs") that are written in a script other than the standard ASCII Roman characters and Arabic numbers. The Preamble of the Guidebook states that "ICANN expects a diverse set of applications for new gTLDs, *including IDNs*, creating significant potential for new uses and benefit to Internet users across the globe" (emphasis added). Consistent with this expectation, Section 1.3 of the Guidebook sets forth special requirements for Internationalized Domain Name applications.

9.3. Findings

9.3.1. String Confusion

The Expert finds that the Objector has failed to meet its burden of proving that ".购物" so nearly resembles ".shop" as to cause probable confusion in the mind of the average, reasonable Internet user. The two strings indisputably have no visual or aural similarity. The two strings are in different languages, written in different scripts that look very different, and have different phonetic spellings and pronunciations.

The only sense in which ".shop" and ".购物" are similar is their meaning. However, this similarity in meaning is apparent only to individuals who read and understand both Chinese and English. Moreover, a person who can read both languages would understand that ".shop" is directed at English-speaking users, while ".购物" is directed at Chinese-speaking users. While there is some potential overlap between these two markets, they are largely distinct. Therefore, there is little likelihood that a bilingual user would be deceived or confused.

Furthermore, as noted above, the New gTLD Program expressly contemplated the creation of new Internationalized Domain Names written in non-Roman scripts. If similarity in meaning between gTLDs written in two different scripts were deemed sufficient, by itself, to result in confusing similarity, then all Internationalized Domain Name applications with the same meaning would need to be put in the same contention set with each other and with any Roman gTLD applications with the same meaning. This would mean that only one application in any script could be registered, which would conflict with the basic purpose of encouraging "a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe." Preamble to the Guidebook.

For the above reasons, the Expert concludes that ".购物" and ".shop" are not confusingly similar to the average, reasonable Internet user under the standard set forth in the Procedure and the Guidebook. In view of this conclusion, the Expert finds that it is not necessary to address the Applicant's arguments regarding the String Similarity Panel's finding of no similarity or the Similarity Assessment Tool. The Expert notes, however, that the String Similarity Panel's finding at the Initial Evaluation phase is not dispositive, since Section 2.2.1.1.2 of the Guidebook limited the String Similarity Panel's review to visual similarity. In contrast, under Section 2.2.1.1.3 of the Guidebook, a third party string confusion objection "is not limited to visual similarity," but "may be based on any type of similarity (including visual, aural, or similarity of meaning)."

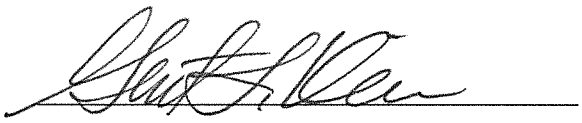
9.3.2. Other Issues

As noted above, the Objector has alleged that ICANN agreed to give it preferential treatment as the initial applicant for the ".shop" gTLD. The Objector has not argued, however, that this alleged preference has any bearing on the merits of its Objection. In any event, the Expert finds that the Objector's alleged discussions with ICANN are irrelevant to this case. Whether the Objection has merit depends on whether it meets the criteria set forth in the Procedure and the Guidebook. Moreover, ICANN has stated that "[t]here should be a level playing field for the introduction of new gTLDs, with no privileged treatment for potential applicants." New gTLD Draft Applicant Guidebook Version 4 Public Comment Summary and Analysis, page 90, http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf.

Determination

For the following reasons, the Expert finds that the Applicant has prevailed and the Objection is dismissed.

Dated: August 8, 2013



Grant L. Kim

Sole Expert Panelist