International Centre for Dispute Resolution

New gTLD String Confusion Panel

Re: 50 504 00274 13

CHARLESTON ROAD REGISTRY INC, OBJECTOR

and

JOHN ISLAND, LLC, APPLICANT

String: <.pets >

EXPERT DETERMINATION

The parties

The Objector is Charleston Road Registry Inc. ("Objector") located in Mountain View, California, United States of America and is represented by Steptoe & Johnson LLP, 1330 Connecticut Avenue N.W., Washington D.C. 20036 United States of America.

The Applicant is John Island, LLC ("Applicant") located at 10500 N.E. 8th Street, Suite 350, Bellevue, Washington 98004 United States of America and is constituted as a limited liability company in the State of Delaware, United States of America. Applicant is represented by the IP & Technology Legal Group, P.C. located at 15260 Ventura Boulevard, Suite 1810, Sherman Oaks, California 91403 United States of America.

The New gTLD String Objected To

The new gTLD string applied for and objected to is: **<.pets>** (the "Applied-for gTLD).

Prevailing Party

The Objector has prevailed and the Objection is sustained.

The New gTLD String Confusion Process

Module 3 of the ICANN gTLD Applicant Guidebook (the "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 ["DRP"], 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 is "String Confusion," as described in DRP 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."**

Section 1.1.2.10 of the Guidebook entitled "String Contention" offers the following definition: "String Contention" refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In the 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.

Section 2.2 of the Guidebook, "Initial Evaluation" is defined as: "whether the applied–for gTLD string is so similar to other strings that it would create a probability of user confusion."

In Section 2.2.1.1 of the Guidebook, "String Similarity" is defined as: "This review involves a preliminary comparison of each applied-for gTLD string against existing gTLDs, Reserved Names and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS (domain name system) resulting from delegation of many similar strings."

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

Procedural History of this Case

The Objection was filed with the ICDR on March 13, 2013 pursuant to the Procedure.

In accordance with Article 9 of the Procedure, the ICDR completed its review of the Objection and determined that the Objection complies with the requirements of the Procedure and the International Centre for Dispute Resolution Rules for New gTLD Dispute Resolution for String Confusion Objections (the "ICDR Rules").

In accordance with Article 11(a) of the Procedure, the ICDR formally notified the Applicant of the Objection, and the proceedings commenced. In accordance with Article 11(b) and relevant communication provisions of the Procedure, the Response was timely filed with the ICDR.

The ICDR appointed Richard W. Page as the Sole Panel Expert (the "Expert") in this matter on July 10, 2013. The Expert finds that he was properly appointed. The Expert has submitted his Expert's Oath and Conflicts Check, as required by the ICDR to ensure compliance with Article 13(c) of the ICDR Rules.

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

This Objection is based on String Confusion, meaning that "the string comprising the potential gTLD is confusingly similar to ...another string applied for in the same round of application." Procedure, Article 2(e), 8(a)(iii)(aa).

Pursuant to the Guidebook, Section 3.2.2.1, there are two bases for standing to bring a String Confusion Objection, including: "[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."

The Objector is an applicant for the <.pet> string in this new gTLD program round. On February 26, 2013, ICANN released New gTLD string similarity contention sets identified by the string similarity review for applications submitted as part of the New gTLD program.

The Objector's <.pet> application was not placed into a string similarity contention set with the Applicant's <.pets> string as a result of ICANN's string similarity review. For the purposes of this Objection, the Expert finds that the Objector has established it has standing to bring this Objection.

Factual Background

The Objector is an American company, wholly owned by Google Inc. ("Google") and it was established to provide registry services to the Internet public. Google is an American multinational public corporation and global technology leader focused on improving the ways its hundreds of millions of Internet users connect with information. Since its formation, Google has been developing technology that helps people use the Internet. Google provides a variety of services and tools for Internet users and advertisers of all sizes, from simple search features and local advertisement to enterprise-scale business applications and global advertising solutions. These tools make it easier for people to make use of the World's information and enable entrepreneurs and publishers around the world to grow their businesses.

In keeping with Google's general mission, Objector's mission is to help make information universally accessible by extending the utility of the DNS while enhancing the performance, security and stability of the Internet for users worldwide. Objector aspires to create unique web spaces where Internet users can learn about products, services and information in a targeted manner and in ways never before seen on the Internet. Its business objective is to manage Google's gTLD portfolio and Google's registry operator business.

The Applicant is a newly formed subsidiary of Donuts, Inc., created for the purposes of being the Applicant for the <.pets> gTLD.

Donuts, Inc. "was founded by long-standing industry executives with experience in registry and registrar operations and industry regulation" and "has applied for more than 300 TLDs..." See http://www.donuts.com.

Parties' Contentions

Objector

As set forth in the Guidebook, the Expert is to consider whether the Applied-for gTLD <.pets> string is confusingly similar to the Objector's <.pet> gTLD string. Specifically:

> A DSRP 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 a likelihood of confusion. Guidebook, Section 3.5.1.

In addressing these factors, the Objector relies upon relevant United States judicial authority and arbitration panel decisions under the Uniform Domain Name Dispute Resolution Policy ("UDRP") administered by the World Intellectual Property Organization ("WIPO") and the National Arbitration Forum ("NAF"). Objector acknowledges that such decisions are not binding authority on the Expert, but argues they should deemed as strongly persuasive, especially given that there is no other legal precedent upon which to rely in this novel objection proceeding.

Objector contends that, when the following factors are considered, it is evident that <.pets> so nearly resembles <.pet> that it is likely to deceive or cause confusion in the mind of the average, reasonable Internet user.

Similarity in Visual Appearance

First, the Applied-for GTLd <.pets> is nearly identical visually and orthographically to Objector's <.pet> gTLD. The words are identical, but for the mere addition of the letter "s" and resultant pluralization. Objector states that this fact is sufficient to establish that the <.pets> gTLD is likely to result in string confusion, and thus likely to deceive or cause confusion about the gTLDs in the mind of the average, reasonable Internet user.

There is nothing to differentiate the two gTLDs <.pet> and <.pets> in their appearance other than the final "s." Indeed, the <.pet> and <.pets> strings share a seventy-two percent (72%) visual similarity according to the ICANN string similarity assessment algorithm. This tool is not determinative, but "is intended to provide an open, objective

and predictable mechanism of assessing the degree of visual similarity between gTLD strings." Objector asserts that when the words "pet" and "pets" are juxtaposed and considered, it is clear that there are no material differences in their visual appearance, hence there is a likelihood of confusion.

Objector's position is that it is probable, not merely possible, that Internet users and consumers viewing the <.pet> versus <.pets> gTLDs will be confused. It is probable that Internet users and consumers will glance at email addresses, such as seller@foot.pet and seller@food.pets and confuse the two TLDs. Such confusion will only invite spoofing and other phishing attacks. It is also probable that Internet users and consumers will see advertisement in print, television or other media, such as "Buy toys for your pet at TOYS.PET," and "Adopt toy-sized pets at TOYS.PETS," only to confuse the two TLDs.

Similarity in Aural or Phonetic Sound

Objector contends that the word "pets" is essentially phonetically equivalent to the word "pet." The term "pet" is pronounced as it is spelled, "pet." See Dicitonary.com definition. The term "pets" is likewise pronounced as "pets" in essentially a phonetically equivalent fashion. The terms each have only one syllable, and they have the same stress pattern, with primary accent on the initial "pe" portion of the words.

This fact is sufficient to establish that the <.pets> gTLD is likely to result in string confusion, and thus likely to deceive or cause confusion about the gTLDs in the mind of the average, reasonable Internet user.

In addition, similarity of sound is particularly important when goods or services are the type frequently purchase by verbal order – such as pet food, pet toys, pet training and other pet-related goods and services that are often advertised over the radio or television and purchased over the Internet. It is probable, not merely possible, that Internet users and consumers hearing use of the <.pet> versus <.pets> gTLDs in advertising or every-day conversation will be confused. It is probable that internet users and consumers will be informed of an email address, such as adoption@dog.pet and adopt@dog.pets, and will confuse the two TLDs. It is also probable that Internet users and consumer will hear advertisements on radio, television and other media, such as "Buy toys for your pet at TOYS.PET," and "Adopt toy-sized pets at TOYS.PETS," only to confuse the two TLDs.

Similarity in Meaning

Another key factor in determining a likelihood of confusion is the commercial meaning of the terms. There is no material difference in commercial meaning between the terms "pet" and "pets" or the <.pet> and <.pets> gTLDs.

Objector intends to use its <.pet> GTLD to be directly associated with pet animal-related content. Objector points out that Applicant fails to describe any specific use of its <.pets> gTLD. However, Applicant generally explains that, "This and other Donuts TLDs represent discrete segments of commerce and human interest, and will give Internet users a better vehicle for reaching audiences," it will offer "a very high level of user utility, precision in content delivery, and ability to contribute positively to economic growth." Given the names and the open-nature of the Applicant's proposed <.pets> gTLD (*i.e.*, anyone can register a second-level domain name therein), it is reasonable to conclude that the <.pets> gTLD will be used for the same or a similar purpose as Objector's <.pet> gTLD – *i.e.*, for pet animal-related content, as there is no otherwise obvious, reasonable, or equally popular use of the term ".pet."

Objector asserts that a high degree of confusing similarity in commercial meaning typically exists in instances involving the mere addition of the letter "s" and resultant pluralization of a word. "In most cases," any difference between singular and plural versions of a word, "will be minimal," meaning that they "will usually be treated as nearly identical or at least having the same overall commercial impression." *See* 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §§ 23:46.25 (4th Ed. 2010).

Objector's position is that there is nothing about the imaginable uses and meanings of Applicant's <.pets> gTLD that might differentiate it from Objector's <.pet> gTLD. Nor can it reasonably be argued there is some dissimilar meaning. The words "pet" and "pets" both relate to the pet animal sector. Applicant provides no explanation as to

the purpose of its <.pets> gTLD, but it can easily be presumed to be intended for pet animal-related content as there is no other obvious, reasonable or equally popular use of the term "pet."

Objector concludes that the <.pet> and <.pets> gTLDs are nearly identical in appearance, phonetic pronunciation and commercial meaning – with only the addition of an immaterial "s" and resultant pluralization. As such, the <.pets> gTLD is likely to deceive or cause confusion in the mind of the average, reasonable Internet user.

Applicant

Applicant argues that Objector seeks to stifle fair competition in the new gTLD program by misusing the ICANN objection process to obstruct the path of those applying for distinct TLD names. The Objection contravenes both the letter and spirit of the new gTLD program, the goals of which included increased choice and competition in the domain name industry. Guidebook Preamble, Guidebook Section1.1.23. Applicant shares these goals, and it and its sister companies have applied for TLDs to accomplish them. Collectively, their economies of scale allow them to offer domains on subjects that otherwise may not have their own fora. So benefitting all Internet users confers significant rights on Applicant.

Applicant further argues that to deprive Internet users of the choice that Applicant and its proposed TLD will bring, Objector must clear a high bar. ICANN expressly place the burden squarely on objectors to prove the elements comprising the objection. Guidebook, Section 3.5.

Objector fails to carry that burden. It simply cannot do so as to a dictionary term that Applicant proposed to offer for non-trademark use. Applicant has the same free speech rights as the general public to conduct its affairs using common words from the English language. To hold otherwise would negate such rights, impede growth and competition, and set dangerous precedent that takes choice away from the many and places control in the hands of a few.

Moreover, ICANN's independent review panel already has performed its initial string similarity review, and did not place <.pets> and <.pet> in the same contention set.

Failure to Prove Substantive Elements

Objector can establish string confusion only by carrying its burden of proving that "a string so nearly resembles another that it is likely to deceive or cause confusion." Procedure, Article 20(c); Guidebook, Sections 3.5, 3.5.1. To do so, Objector must show that it is "probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user." Objector articulated this standard, but provides virtually no tangible evidence to satisfy it. Objector simply states that "the .PET and .PETS TLDs are nearly identical in appearance, phonetic pronunciation and commercial meaning," concluding that they are "likely to deceive or cause confusion in the mind of the average, reasonable Internet user." Objector backs its conclusion with inapposite trademark cases and irrelevant out-of-context "studies."

First, the string confusion standard focuses solely on "similarity" of the strings. By contrast, the traditional "likelihood of confusion test" under trademark law also includes other factors, such as the strength of the mark at issue, the junior user's intent, and purchaser sophistication. Panelists making similarity judgments for trademark offices rely on a completely different set of criteria than the Expert in this case using the New gTLD String Similarity standard. Indeed, the term "trademark" does not even appear in the string confusion standard. As such, an objector asserting other trademark- related confusion elements should consider bring a "legal rights objection," which explicitly covers such elements.

Second, even taking trademark law as at least potentially helpful in a string confusion analysis, the Expert should take particular note that "pets" is either itself a generic term or merely describes domain names or websites that present information concerning pets. Trademark law generally does not protect generic terms, since they serve no source-identifying function. In addition, simple modifiers are often treated as part of the generic names, making them also unprotectable.

Third, as part of the Initial Evaluation, ICANN commissioned a panel of independent experts whose work consisted of comparison of each applied-for gTLD string against each of the other applied-for strings to test whether any pair of strings would be so similar that they would create a probability of user confusion if more than one of them is delegated into the root zone. The in-depth assessment process involved the string similarity panel: manually performing a "visual similarity check," reviewing an objective, algorithmic score obtained from ICANN's string visual similarity assessment tool, and analyzing other "various characters, as defined in any relevant language table." That panel affirmatively found in this case that the objected-to <.pets> TLD was not sufficiently similar to the <.pet> TLD to cause probable confusion among Internet users. The paradigm of string confusion is commonly thought to be <.COM> and <.C0M> (with "zero" instead of "o"), or <.unicorn> and <.unicom> (which the panel did place in the same contention set).

As the panel did not find string confusion in this case, Applicant has the right to the presumption in favor of ICANN approving its Application, and Objector must now surmount " a corresponding burden... to show why[<.pets>] should not be granted to [Applicant]. It is perfectly reasonable for the independent string similarity panel to come to the conclusion it did (*i.e.*, finding <.unicorn> and <.unicom> would cause likelihood of confusion, while <.pet> and <.pets> would not). We explain some of these reasons below and, importantly, Objector has not provided the requisite proof to upset that conclusion.

Similarity in Appearance

While an objector may cite visual similarity at least in partial support of the probable confusion, even the most cursory glance readily shows "pet" and "pets" to be different: the word "pets" consists of the additional letter "s" at the end. The difference between the two is more pronounced for a short word such as "pet." An Internet user would have to purposely type the letter "s" after the common letters "P-E-T" in order to reach a <.pets> URL. The "t" and "s" are located far apart on different rows of the keyboard and typed using different fingers. And, adding even one letter to an already short word makes a significant visual difference.

But more importantly, as discuss above, ICANN's string similarity panel did not find confusion "probable" after performing a manual "visual similarity check" of <.pets> and <.pet> and reviewing an objective, algorithmic score obtained from ICANN's string visual similarity assessment tool (which yielded a score of 72%). To illustrate that a score of 78% indicates a lack of similarity, Applicant set forth a table showing score results, using the ICANN algorithm, of pairs of terms so different from each other that an average Internet user could not reasonably confuse them under any circumstances; yet, they all score considerably higher than the score of 72% for "pets" and "pet." Whatever, percentage one would reasonable assign to the statement "probable, not merely possible," the independent and expert string similarity panel has already considered the algorithmic score of <.pets> and <.pet> and determined that it falls short of the mark.

Plurals are Routinely Used and Coexist in the DNS

Further, singular and plural words in existing TLDs commonly resolve to different IP addresses (*e.g.*, pet.net and pets.net) – *i.e.* such domains are not registered in pairs to resolve to the same website. In fact, per Alexa, a prominent provider of commercial web traffic data, of the one million domains receiving the most traffic, 50,886 singular/plural string pairs currently exist that do not point to the same IP address, compared to only 1,300 pairs that do.

As Alexa calculates traffic using the numbers of daily visitors to and page views on a site, this strongly suggests that plural websites function as businesses or other sites independently of their singular counterparts and are likely operated by different registrants. This data indicates that numerous Internet users have visited these very popular plural sites over the years without confusing them with their corresponding singulars. Plurals are part of natural language, convey different meanings, and Internet users can make easy distinctions. They have learned over time to spell second level domain names correctly to ensure that they get to the desired website (*e.g.* prettypet.com and prettypets.com). Users will do the same on the top level (*e.g.*, pretty.pet and pretty.pets). ICANN must have recognized this when (after long public discussion) it agreed to permit applicants to apply for either the singular and/or plural versions of a word. An arbitrary rule prohibiting "singular" and "plural" string versions would unnecessarily limit the expressive potential of domains and the Internet, as well as restrict competition and choice for Internet users.

It should be noted that 2,054 out of 351,812 unique word marks currently have plural matches in the USPTO. Having granted a meaningful number of trademarks for singular/plural pairs in the same classification of goods and services to different owners, the USPTO has not found such pairs sufficiently similar to cause confusion. The cases cited in the Objection do not assist Objector because likelihood of confusion under a trademark or cybersquatting analysis differs substantially from the string confusion standard. The cited cases found likelihood of confusion based on similarity and other elements that make up an infringement test. (It should be further noted that the respondent defaulted in a majority of the cases, so the UDRP panel considered only complainant's materials.)

Also rather than basing its analysis on the applicable Guidebook string confusion standard, Objector raises the specter of increased cybersquatting if plural names are delegated. Even if some UDRP panels have viewed "pluarlization" as cybersquatting, it does not pose a risk at the top-level, with new gTLDs. Objector cites UDRP cases relating to second-level names such as prettypet.com. Those who acquire names for cybersquatting purposes typically do so anonymously and cheaply, and quickly abandon them when discovered. Top-level names such as <.pets> require investors to expend hundreds of thousands of dollars, to clearly identify themselves and to subject themselves to background checks. In addition, ICANN has imposed strong protections for new gTLDs on the second level that it never did and still does not require for previously existing gTLDs. There are a series of safeguards against cybersquatting for new gTLDs, including one in which a new gTLD operator faces potential liability in certain cases for abuse occurring in its domain. Thus, the second-level cases that Objector cites simply do not apply.

The Expert should not consider Objector's cases or its foreboding prophecies. Objector has not satisfied its burden to prove visual similarity making confusion probable among typical Internet users action reasonably.

Similarity in Sound

Similarly, Objector fails to prove such similarity of "pets" and "pet" in sound as to result in confusion. While an objector may cite aural similarity at least in partial support of likelihood of confusion, the two words differ meaningfully in sound, as "pets" has a final "s" sound. The end "s" sound in "pets" is very distinguishable from the strong, final "t" sound in "pet," especially because it is the only "s" sound in the word "pets" (compared to, for example, the end "s" sound in "tosses").

In any case, aural similarity could not practically cause confusion when one considers Internet usage. The Internet – Internet searches, in particular – depends on visual and typographic effects. Aural similarity seems unlikely to confuse users. For example, would the Expert consider excluding one of the TLDs <.cite> and <.sights>, or <.burrow> and <.boroughs>? In this light, Objector's conclusions – *e.g.* that is "probable, not merely possible, that Internet users and consumers hearing the use of the <.pet> versus <.pets> TLDs in advertising or every-day conversation will be confused" – not only lack support, they also have little significance.

Applicant has the evidentiary presumption in favor of maintaining its Application. Objector has not presented evidence to overcome that presumption, and thus fails to carry its burden to prove sufficient similarity of "pets" and "pet" in sound.

Similarity in Meaning

Objector speculates that nothing about the imaginable uses and meanings of Applicant's <.pets> gTLD... might differentiate it from Objector's <.pet> gTLD, and posits that the words 'pet' and 'pets' both relate to the animal sector. This assumes, Anglo-centrically, that adding the letter "s" to the word "pet" results in a pluralized noun, and thus the difference in meaning "will be minimal."

Yet, "pets" and "pet" can differ completely from each other in meaning. "Pets" is a plural noun or the third-person singular of the present tense verb "to pet." On the other hand, "pet" is a singular noun; the first-person singular or plural, second-person singular or plural, or third-person plural of the present tense of the verb "to pet;" or it could be an adjective (*e.g.* pet name). Unlike "pets," "pet" could mean "a fit of peevishness, sulkiness, or anger," "fart" in French, or "cap" in Dutch. In addition, "pets" and "pet" could be dissimilar abbreviations (*e.g.* PETS could refer to Pet Travel Scheme while PET could refer to petroleum).

Next, even accepting some similarity in meaning for purposes of the instant analysis, such similarity alone does not suffice to find likelihood of confusion. Many applicants have applied for synonyms. For example, applications have been submitted for <.car>, <.cars>, <.auto>, and <.autos>. Numerous applicants also have applied for similar-meaning strings in different languages or character scripts. For example, Verisign – the registry for <.com> and<.net> - has applied for transliterations of dot com in Chinese, Korean, Japanese, Hindi, Thai, Russian, Hebrew and Arabic, and dot net in Chinese, Korean and Hindi. All of these have already passed ICANN's string similarity review, meaning that the panel knew about the similarity in meaning, yet it still found no sufficient likelihood of confusion to place them into contention sets together.

Finally, while it may argue that "pets" may bring the term "pet" to mind, such assertion does not help Objector. ICANN has expressly provided that mere association, in the sense of one string "bring[ing] to mind" another, will not suffice to establish probability of confusion. Although the Objector often relies on trademark cases, they provide no help on this issue.

High Level of Similarity

As detailed above, Objector fails to meet the heavy burden needed to prove that "pets" and "pet" are so similar such that confusion is not only possible, but probable among average, reasonable Internet users. Objector attempts to rely on three irrelevant "studies" to presume that the addition or subtraction of an "s" will pose difficulties for all Internet users due to the limits of human recollection, as well as additional difficulties for non-English speakers.

Objector offers nothing regarding the statistical significant of these "studies" - how they were conducted, how many subjects, what questions were asked, what control measurements were used. Nor do the "studies" fit the issue at hand, as none discusses the similarity of words and their likelihood of confusion. One study focuses on how people recall user passwords. The second hypothesizes that Korean learners of English often omit the plural "s" in their speech, writing, and pronunciation because Koran nouns usually have no plural form. And the last speculates about Francophone speakers of English often omitting the plurals in spoken English. As such, these "studies" have no relevance here. In any event, they can at most support speculation that confusion is possible, but certainly not probable, among average, reasonable Internet users.

Even though Objector bears the burden of proof, Applicant has separately demonstrated that the two TLDs in question do not possess the visual, aural or meaning similarity sufficient to result in probable user confusion. It also has demonstrated that the likelihood of confusion does not appear when considering the three factors as combinations. Singulars and plurals exist in the DNS because similarity of any type or combinations does not affect their usefulness.

ICANN has made clear that, for string confusion to exist, two TLDs must exhibit such a high degree of similarity that they will cause confusion so significant that a "loss of confidence in the DNS" will result. We have little doubt that the DNS will continue to deliver reliable service to users with both a <.pets> and a <.pet> string in the root zone, as users are more than competent enough to know how to find one and distinguish it from the other. Further, the sheer variety of TLDs already in the DNS has made Internet users aware of what appears to the "right of the dot." The country code TLD <.co> for Colombia has co-existed with the generic <.com> for over twenty years, virtually the entire lifespan of the modern Internet.

Also, TLDs have even been used interchangeable on both the "left" and the "right" sides of the "dot" as second-level extensions at numerous ccTLDs for many years. For example Australia uses ".com" for <domain.com.au>, while the U.K., India and New Zealand all use ".co" for <domain.co.uk,>, <domain.co.in> and <domain.co.nz> respectively. Each of these countries uses English as their primary language for email communication. Colombia uses both the <.co> or <.com> string in <domain.co> and <domain.com.co>. Lithuania uses the <.lt> ccTLD, while Italy uses the <.It> and<.it> ccTLDs. The DNS abounds with additional examples from a host of other countries (some predominately English-speaking and some not). ICANN has even allowed "biz" into the root zone despite the fact that Belize already had the ccTLD <.bz>.

These extensions have all coexisted peacefully for many years and no "loss of confidence in the DNS" has resulted. Quite the opposite in fact, the popularity and use of domain names for navigation had continued to skyrocket, with over 252 million domains registered worldwide as of December 31, 2012.

Modern Internet users likely have much more sophistication than Objector acknowledges. 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. Similarly, the Expert cannot find confusion so "probable" that Internet users will suddenly experience a "loss of confidence" in the DNS that has been managed in the same for over two decades.

Irrelevant Objections

The Expert has as its sole task the analysis of the foregoing issues in accordance with the standards described. Objector, however, raises matters wholly irrelevant to that inquiry. It matters not that Google supposedly is a "multinational public corporation... focused on improving the ways... users connect with information;" that "Google provides... from simple search... to global advertising solutions... mak[ing] it easier for people ... to grow their businesses;" or that CRR claims "to help make information universally accessible." In addition to being wholly unsupported, these points have no bearing whatsoever on a string confusion objection and merit no consideration at all by the Expert. Even if they did, Applicant has more than enough experience and capability to run its applied-for domain in a high quality, secure and productive manner for the benefit of Internet users throughout the world. Indeed ICANN clearly has so found by its approval of several applications of Donuts for various TLDs.

Other irrelevant and incorrect assertions by Objector include the suggestions that Name.Space, Inc.'s applications thirteen years ago for the <.film> and <.films> TLDs, along with MuseDomas's application for <.museums>, were denied for delegation because of public comments that they were "confusingly similar." First, in that limited round. ICANN approved the "best" of seven applications for over 200 TLDs. Indeed, one can infer that ICANN, in granting <.museum> and not <.museums>, would not let MuseDoma cover the field, and instead left the door open to competition in this part of the namespace.

The standard in this "open round" differs significantly from the previous round. First, all who meet the qualification criteria have the presumptive right to the TLDs for which they apply. Second, Objector misuses the term "confusing similarity." As there is a test for likelihood of confusion and a separate test for similarity under trademark law; however, as discussed, the string confusion objection standard only takes into account similarity of the two strings. Third, the document from the prior round to which Objector points does not make clear which strings the public complained were "confusing": Name.Space had 118 applications total, including <.fund>, <.funds>, <.mad>, <.mag>, <.aids>, <.ads>, <.dtv>, and <.dvd>, all of which and others, could have been what the public referred to in its general statement that "some of the proposed TLD names were confusing." Fourth, in the same document, the public and numerous other complaints about Name.Space and MuseDoma, nothing mentioned which public comments, if any, swayed ICANN. Lastly, again in the same document, ICANN stated that it evaluated and found that Name.Space lacked in planned marketing, financing and human resources to meet demand. Hence, these likely constituted the reasons, not string similarity, behind the denial of Name.Space's application for delegation.

Conclusion

The Objection falls short of its heavy burden to prove "probable" confusion among "average, reasonable Internet users" that would undermine confidence in the DNS itself. Objector offers no evidence supporting its assertions, even though it bears the burden of proof. Rather, most of the Objection raises issues wholly irrelevant to a string confusion determination. After discounting the irrelevant information, and for the reasons set forth in this Response, this Expert should reject the Objection and refuse to place the string for which Applicant has applied into a content set with Objector's readily distinguishable string.

Discussion and Findings

The fundamental issue in this string confusion objection is whether the English noun "pet" and its plural "pets" can both be delegated into the root zone without creating unreasonable confusion among Internet users and consumers.

Under the UDRP decisions cited by Objector, the answer appears to be that pluralization creates confusing similarity. Under United States trademark law, the answer appears to be that the confusing similarity may be sufficient to deny a trademark application by the USPTO or trademark rights by a Court, but not necessarily. The Expert is declining the invitation of the Objector to look to American trademark or UDRP panel decisions to determine confusing similarity under the New gTLD Procedure.

The Expert has determined for purposes of this Sting Confusion Objection, the decisions of the UDRP and of American trademark law involved different standards and will not be applied. The Expert acknowledges that the String Confusion Objection program has only been recently initiated and therefore there are not many precedential decisions to be considered.

ICANN has initiated a second round of open application for generic top-level domain names ("gTLDs"). Applicants are able to make application for a desired gTLD and pay a significant application fee. Because of public comments in earlier conceptual testing rounds, ICANN has devised four bases upon which to object to an application for a gTLD. The basis for the present Objection is string confusion. The standards to be applied by the Expert are defined in the ICANN Guidebook and Procedure and ICDR Rules.

The Objection filed in this proceeding is based on String Confusion. As described in DRP 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."** There are three types of similarity which are to be considered by the Expert: visual, aural and meaning. In order to grant an Objection, the Expert needs to find a probability (not a mere possibility) that inclusion of the objected-to gTLD will cause confusion to a the average, reasonable Internet user or consumer.

As part of the ICANN review of applied-for gTLDs, an Initial Evaluation is performed in which each applied-for gTLD string is compared against existing gTLDs, Reserved Names and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings. ICANN has developed an algorithm which gives a numerical score in the form of a percentage to measure the confusing similarity for visual comparison between applied-for gTLDs. The algorithm score and the determination by ICANN whether to deny delegation of a gTLD into the root zone based on visual confusion is not binding upon the Expert, but can be considered.

In this proceeding the visual algorithmic score between <.pet> and <.pets> was seventy-two percent (72%). This score was deemed insufficient by ICANN to deny the Applied-for gTLD on the basis of string similarity. Nevertheless, the visual algorithmic score is high.

One consequence of ICANN's failure to deny the application is that the Objector in this proceeding bears the burden of proof. The burden is to show by a preponderance of the evidence that the Applied-for gTLD will cause a probability of confusion.

Objector has come forward with the following evidence for visual, aural and meaning similarity. Visually, the words are identical, but for the mere addition of the letter "s." Aurally, the word "pets" is essentially phonetically equivalent to the word "pet." The term "pet" is pronounced as it is spelled, "pet." The term "pets" is likewise pronounced as "pets" in essentially a phonetically equivalent fashion. The terms each have only one syllable, and they have the same stress pattern, with primary accent on the initial "pe" portion of the words. In commercial meaning, the terms show no material difference. As English nouns, "pets" is the pluralization of "pet."

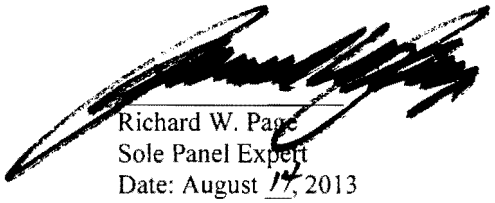
The visual similarity and algorithmic score are high, the aural similarity is high, the meaning similarity is high. Objector has met its burden of proof. The cumulative impact of these factors is such that the Expert determines that delegation of <.pet> gTLD and the <.pets> gTLD into the root zone will cause a probability of confusion.

The rapid historical development of the Internet and the proliferation of domain names over the past two decades has taken place without the application of the string confusion standard now established for gTLDs. Therefore, the Expert has not considered the current coexistence of pluralized second-level TLDs or similarities between country code TLDs and existing gTLDs in the application of the string confusion standard in this proceeding.

Determination

The Objector has prevailed and the Objection is sustained.

This Objection is valid and should be upheld because it is likely that impermissible confusion will result if both the <.pet> and the <.pets> gTLDs are delegated into the root zone. Guidebook, Article 3.5.1; Procedure, Article 8(a)(iii)(bb).



Richard W. Page
Sole Panel Expert
Date: August 17, 2013