

Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections: Framework Principles

On 5 February 2014, the ICANN Board New gTLD Program Committee (NGPC) directed the ICANN President and CEO, or his designee, to initiate a public comment period on the framework principles of a potential review mechanism to address the perceived inconsistent String Confusion Objection (SCO) Expert Determinations. The framework principles, outlined below, address the two cases where SCOs were raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ – namely, the SCO Expert Determinations for .CAR/.CARS and .CAM/.COM.

After receiving feedback from the public comment forum, the NGPC will consider whether or not to adopt the proposed review mechanism outlined in the framework principles below.

Principles for Consideration

- 1. THE RECONSIDERATION PROCESS WILL NOT BE MODIFIED AT THIS TIME, FOR THIS PURPOSE**
- 2. PERCEIVED INCONSISTENCIES SHOULD BE ADDRESSED BASED ON A LIMITED STANDARD OF REVIEW**
 - A) DEFINITION OF INCONSISTENT SCO EXPERT DETERMINATIONS
 - B) STANDARD OF REVIEW
 - C) DEFINITION OF REVIEW MECHANISM/CREATION OF NEW PANEL
- 3. APPLICABILITY OF A REVIEW MECHANISM MUST BE LIMITED**
 - A) ICANN AND APPLICANTS HAVE ALREADY ACTED IN RELIANCE ON PRIOR NGPC RESOLUTION ON SINGULAR/PLURALS
 - B) ICANN AND APPLICANTS HAVE ALREADY ACTED IN RELIANCE ON SCO EXPERT DETERMINATIONS

Discussion of Principles

1. The Reconsideration Process Will Not Be Modified at This Time, For This Purpose

- Discussion within the NGPC has made clear that the Reconsideration Process is not the avenue to address the substantive challenges to SCO Expert Determinations.
- While broader discussion on the scope of the Reconsideration Process or some other type of review mechanism may be considered at a later date for a future round of applications, modifying the Reconsideration Process (requiring expert inputs, community review, Bylaws changes, etc.) is not a solution to resolving the issue of the perceived inconsistent SCO Expert Determinations.

2. Perceived Inconsistencies Should Be Addressed Based On A Limited Standard of Review

a) Definition of Inconsistent SCO Expert Determinations

- There is a limited universe of “Inconsistent” SCO Expert Determinations.
- “Inconsistent SCO Expert Determinations” have been defined as objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ.
 - This situation is limited to two circumstances:
 - (i) the results of the .COM/.CAM objections, where three SCOs were filed by the same objector against separate applications for the .CAM string, each on the basis of confusion with .COM. In two of the SCOs, the applicant prevailed; in the third, the objector prevailed; and
 - (ii) the results of the .CAR/.CARS objections, where one applicant for the .CAR string, filed SCOs against three applications for the .CARS string. Two of the SCOs were determined in favor of the applicants; the third was in favor of the objector.
 - Diagrams are provided at Appendix A to help illustrate these situations.

b) Standard of Review

- Could the Expert Panel have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and procedural rules?

c) Definition of Review Mechanism/Creation of New Panel

- ICANN would ask the International Centre for Dispute Resolution (ICDR), to constitute a three-member expert “Panel of Last Resort” for which

these two sets of inconsistent rulings (.COM/.CAM and .CAR/.CARS) would each be brought for consolidated consideration.

- Following the standard of review set out above, the Panel of Last Resort would be tasked with reviewing the Expert Determinations across a set to provide additional guidance. ICANN would then accept the Panel of Last Resort's determination.
- There are two potential outcomes to the Panel of Last Resort: either all Expert Determinations are aligned as noted below, or all of the initial Expert Determinations stand as is.
- ICANN would fund the ICDR administrative costs as well as the panel fees throughout the review so as to not impose additional costs on parties subject to these perceived inconsistent Expert Determinations.
- Some anticipated process details include:
 - ICANN would provide notice to all of the parties to objections for each of the two sets that the Expert Determinations will be subject to review by the "Panel of Last Resort."
 - Only the applicant for the application that was objected to in the underlying SCO and lost ("Losing Applicant") would have the option of whether to have the Expert Determination from that SCO reviewed.
 - If the Losing Applicant wishes to not have the Expert Determination reviewed, the Expert Determination in the proceeding described immediately above will stand as is and the Panel of Last Resort will not proceed.
 - If the Losing Applicant wishes to have the review performed, the Panel of Last Resort will evaluate the Expert Determination in the Losing Applicant's SCO, in light of the other Expert Determinations issued in the set, to determine whether or not the Expert Determination in the Losing Applicant's SCO can reasonably stand as is.
- The possible outcomes of the review by the Panel of Last Resort include:
 - The Expert Determination in the Losing Applicant's SCO is supported by the standard of review and reference to the other Expert Determinations, and will stand as is.
 - The Expert Determination in the Losing Applicant's SCO cannot reasonably be supported based on the standard of review and reference to the other Expert Determinations, and will be reversed. The objector will therefore be deemed the non-prevailing party to the SCO.

The Panel of Last Resort is not authorized to reverse or otherwise amend either of the two other Expert Determinations within the set.

3. Applicability of a Review Mechanism Must Be Limited

The use of a strict definition for Inconsistent SCO Expert Determinations conversely means that all other SCO Expert Determinations are *not inconsistent*. As a result, the review mechanism, or Panel of Last Resort, shall not be applicable to those other determinations. Further, there are reasons why the Panel of Last Resort should not be open to all objections. Some of those reasons are as follows:

a) ICANN and Applicants have already acted in reliance on prior NGPC resolution on Singular/Plurals

- SCO Expert Determinations regarding singular and plural versions of the same string are not inconsistent Expert Determinations, as they are not Determinations on the same strings with different results.
- The NGPC has already determined that it would not interfere in SCO Expert Determinations regarding singular and plural versions of the same string. See <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm - 2.d> (“Resolved (2013.06.25.NG07), the NGPC has determined that no changes are needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string.”)
- ICANN has already entered Registry Agreements for singular and plural versions of the same string (see, e.g., .CAREER and .CAREERS).
- The NGPC has not modified Resolution 2013.06.25.NG07, which ICANN and Applicants have relied and acted upon.

b) ICANN and Applicants have already acted in reliance on SCO Expert Determinations

- Without limiting the applicability of the review mechanism, or Panel of Last Resort, the opening up of *all* SCO Expert Determinations to further review would be contrary to processes established through the Applicant Guidebook, which is not appropriate at this stage. It is important to recognize that a party’s dissatisfaction with an SCO Expert Determination is, in general, not a sign of an inconsistent determination.
- Applicants have already taken action in reliance on SCO Expert Determinations, such as resolving new contention or withdrawing their application for a refund.
- ICANN and Applicants have already entered into Registry Agreements for strings that were subject to SCO determinations.
- Allowing these actions to be undone now would not only delay the consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

Appendix A – Diagram of Inconsistent SCO Sets

