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Your ref :

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28 March 2013

To the attention of Mr. Steve Crocker
Chair, ICANN Board
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292
By regular mail and by e-mail: reconsideration@icann.org

Request for Reconsideration the Decisions of February 26, 2013 Materially Affecting Booking.com B.V.

Dear Sir,

Please find attached a Reconsideration Request relating to the Decisions of February 26, 2013, submitted on behalf of Booking.com B.V.

This Reconsideration Request is submitted to you in your capacity of chair of the ICANN Board, within the 30-day window of opportunity to submit such a request.

Despite the fact that the origin of the decisions is somewhat unclear, this Reconsideration Request is being submitted as a reconsideration of a "Staff action." In the event that the decisions referenced above are determined to be a "Board action," this request may be amended.

Yours sincerely,

Flip Petillion
Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels (Belgium)
fpetillion@crowell.com

BOOKING.COM B.V.

Request for Reconsideration of the Decision of February 26, 2013

1. Requester Information

Name: Booking.com B.V.

Address: Contact Information Redacted

Email:

Phone Number (optional):

C/o:

Name: Flip Petillion, Crowell & Moring LLP

Address: 7, rue Joseph Stevens

Email: fpetillion@crowell.com

Phone Number (optional): +32(2)2142886

2. Request for Reconsideration of (check one only):

___ Board action/inaction

_X_ Staff action/inaction

3. Description of specific action(s) you are seeking to have reconsidered.

Booking.com B.V. (hereinafter, the 'Requester'") seeks reconsideration of ICANN's decision to place the gTLD application for '.hotels' (Application ID 1-1016-75482) and the gTLD application for '.hoteis' (Application ID 1-1249-87712) in a non-exact match contention set (**Attachment 1**).

Booking.com B.V. also seeks reconsideration of ICANN's decision not to provide a detailed analysis or a reasoned basis for its decision to place the gTLD application for '.hotels' (Application ID 1-1016-75482) and the gTLD application for '.hoteis' (Application ID 1-1249-87712) in a non-exact match contention set.

Both decisions are hereinafter collectively referred to as the 'Decisions'.

4. Date of action/inaction:

The Decisions were published on February 26, 2013 (**Attachment 1**).

5.   On what date did you became aware of the action or that action would not be taken?

The Decisions were communicated to the primary contact of the Requester as specified in the Requester's application for the .hotels gTLD ('Primary Contact') on February 26, 2013 (**Attachment 2**). The Requester became aware of the Decisions on February 27, 2013, when the Primary Contact informed the Requester of the Decisions.

6.   Describe how you believe you are materially affected by the action or inaction:

The Requester is the applicant for the '.hotels' gTLD. The Decisions will impact the Requester because ICANN has made it clear in the Applicant Guidebook that it "will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings" (Applicant Guidebook, Module 4-2). ICANN refers to a group of applications for contending strings as a contention set. By placing 'hotels' and 'hoteis' in a non-exact match contention set, ICANN's String Similarity Review Panel apparently determined that these strings would result in user confusion. As a result, ICANN will not approve both the application for 'hotels' and the application for 'hoteis'.

This directly impacts the Requester as follows:

-    The Requester will not be allowed to operate a '.hotels' gTLD in the event that the '.hoteis' gTLD is recommended for delegation; and

-    If the Requester wants to operate the '.hotels' gTLD, and the '.hoteis' application is not rejected by ICANN, it will need to either negotiate with the Applicant for '.hoteis' or participate at an auction with a view to obtaining the delegation of the '.hoteis' gTLD. Both may require additional investments which are not justified given the reasons why the consideration by ICANN's String Similarity Review Panel is erroneous.

Regarding ICANN's failure to provide a detailed explanation of its decision and the corresponding analysis, Requester is left without actual knowledge about the basis for ICANN's decision to put .hotels into a non-exact match contention set with .hoteis.

7.   Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

The Requester considers that the Decisions also adversely affect others:

-    The Applicant for the '.hoteis' gTLD is adversely affected as it will equally not be allowed to operate a '.hoteis' gTLD if a '.hotels' gTLD is recommended;

-    Internet users are adversely affected as there may be less competition at a TLD level as well as fewer TLDs targeted at non-English speaking communities (see response to Question 11 below); and

- Without a detailed explanation of the non-exact match contention set decision, the ICANN community is deprived of an understanding of ICANN's reasoning, analysis, and standards when evaluating user confusion.

8.   If you are complaining of an action, are you seeking a temporary stay of the action? (Check one)

_____ Yes

_x__ No

The Requester does not believe that a temporary stay is required. Instead, Requester asks that ICANN's decision regarding the non-exact match contention set be reversed. In the alternative, Requester asks that ICANN provide the detailed analysis and reasoning regarding the decision to place .hotels into a non-exact match contention set.

8a.   If Yes, you are seeking a temporary stay, do you believe any harm(s) will occur if the action is not stayed? (Check one)

Not applicable

8b.   If you answered Yes to 8.a., please describe the harm(s) that you believe will occur if the action is not stayed:

Not applicable

9.   Detail of Board or Staff Action – Required Information

At present, it appears that the String Similarity review was likely conducted by a third party, but was then accepted and implemented by ICANN staff. It is unclear whether or not the decision of February 26, 2013 was reviewed by the ICANN Board, although the publicly available information suggests that it was not. In any event, ICANN Staff published the results of the String Similarity review on the ICANN website and communicated the decision to Requester's Primary Contact (**Attachment 1**). As a result, ICANN (Staff) has communicated that ICANN endorsed the decision to put the 'hotels' and 'hoteis' strings in a contention set.

The decision to put 'hotels' and 'hoteis' in a contention set is contrary to ICANN's established policy as set out in the Applicant Guidebook; the failure by ICANN to provide reasoning for the decision is contrary to ICANN's mandate to act transparently and fairly; and it seems likely that the contention set decision was made without all of the material information.

The Applicant Guidebook states:

> "'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.

[...]

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review [...] is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in direct contention if they are identical or similar to one another.

[...]

Two strings are in indirect contention if they are both in direct contention with a third string, but not with one another." (**Attachment 2**, Module 4-2, 4-3)

The Applicant Guidebook also states:

*"**Standard for String Confusion** – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the 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."* (**Attachment 2**, Module 2-8)

As a result, two strings should only be placed in a contention set to the extent that they are so similar that they create a probability of user confusion if both strings are delegated into the root zone.

For the following reasons, there is no probability of user confusion if both 'hotels' and 'hoteis' were delegated as a gTLD string into the root zone:

- The difference between the letter "i" and the letter "l" clearly distinguishes the 'hotels' and 'hoteis' strings from each other;

- The intended use of the 'hotels' gTLD clearly distinguishes this gTLD from the 'hoteis' gTLD; and

- The Internet user will not be confused between 'hotels' and 'hoteis', irrespective of whether or not the Internet user is requesting information or whether the Internet user is receiving information.

This is further explained below under Question 11.

Because there is no probability of user confusion if both 'hoteis' and 'hotels' were delegated as a gTLD string into the root zone, it is contrary to ICANN's policy to put them in a contention set.

ICANN's Articles of Incorporation require it to act "through open and transparent processes," and its Bylaws further provide that ICANN must "operate to the maximum extent feasible in an open and transparent manner and consistent with

procedures designed to ensure fairness." (Articles of Incorporation, Art. 4; Bylaws, Art. III. sec. 1) The Bylaws also require that ICANN "mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness." (Bylaws, Art. I, Sec. 2.8)

ICANN's failure to provide any reasoned decision or analysis in support of putting 'hotels' and 'hoteis' in a contention set is contrary to ICANN's mandate to act transparently, and prevents the Requester and the ICANN community from determining whether the decision was made fairly and in a non-arbitary fashion.

Additionally, given the lack of a reasoned decision or other public information regarding ICANN's string contention analysis and decision, it is impossible to know what information ICANN considered in establishing the contention set (or approving the contention set proposed by an independent contractor). In an attempt to determine what information ICANN Staff considered in making the contention set decision, the Requester has separately submitted a request for information under ICANN's Documentary Information Disclosure Policy. It seems likely that ICANN failed to consider, for example, the information presented in this Request, which is materially related to the contention set decision. At a minimum, the Requester was never given an opportunity to provide information that would refute the mistaken contention that there is likely to be consumer confusion between '.hotels' and '.hoteis'.

10.   What are you asking ICANN to do now?

The Requester asks ICANN to reverse the decision in which 'hotels' (Application ID 1-1016-75482) and 'hoteis' (Application ID 1-1249-87712) were put in a non-exact match contention set.

ICANN is requested to decide that the 'hotels' gTLD as applied for in the Application with ID 1-1016-75482 can co-exist with the 'hoteis' gTLD as applied for in the Application with ID 1-1249-87712.

In the event that ICANN will not immediately reverse its decision, the Requester asks that ICANN provide its detailed analysis for the decision to include .hotels into a non-exact match contention set.

11.   What grounds or justification support your request?

a) The difference between the letter "i" and the letter "l" clearly distinguishes the 'hotels' and 'hoteis' strings from each other

The difference between the 'hotels' and 'hoteis' strings is grounded in the distinction between the character 'i' and the character 'l'. In linguistic terms, the characters 'i' and 'l' are manifestly distinct.

The Requester asked an independent expert to provide his views on the following questions:

1) Regardless of the ICANN framework, would you consider the 'hotels' and 'hoteis' strings to be confusing?
2) Given the ICANN framework, would you consider both strings visually similar to each other creating a probability of user confusion?

The Requester reserves the right to issue requests to additional experts.

The expert to whom this request was addressed, Professor Piet Desmet, is full professor at the University of Leuven in linguistics and language teaching methodology.

Professor Piet Desmet from the University of Leuven has found that the difference between 'hotels' and 'hoteis' can be reduced to the difference between l and i, which distinguishes both words. The opposition between l and i is clearly distinctive. There are a considerable number of "minimal pairs" in which the l and i alternate, i.e. pairs of words which differ from each other only in the alternation of l and i. These are minimal pairs like candies/candles, eider/elder, fails/falls, mail/mall or wail/wall. So the alternation of l and i in English is distinctive enough to keep words apart solely on the basis of this opposition.

This implies that words that only differ in the alternation of l and i do not confuse the language users visually, as they perfectly distinguish both characters. If this were not the case, the alternation would already have evolved to an alternative that speakers find more distinctive.

Professor Desmet points out that every language consists of a fixed set of phonemes (sounds) and graphemes (letters) that can be combined without limitations. This linguistic reality poses no problems for the language user, who is used to being confronted with words that differ from each other in only one character. This does not prevent the language user from visually distinguishing these words so as to see them as different meaningful entities.

Professor Desmet considers the elements above sufficient to dismiss the idea of string confusion in dealing with minimal pairs that only differ in the alternation of l and i.

Accordingly, '.hotels' and '.hoteis' are not confusingly similar, and the Decision that they should be placed in a contention set is therefore contrary to established ICANN policy. Requester's questions and Professor Desmet's answers are submitted as

Attachment 3 and Attachment 4, respectively.

b) The intended use of the 'hotels' gTLD clearly distinguishes this gTLD from the 'hoteis' gTLD

Both the Applicant for the 'hotels' gTLD and the Applicant for the '.hoteis' gTLD intend to use the applied-for gTLD in a very controlled and restricted way. Both gTLDs will be operated as single-registrant gTLDs. The Applicant for 'hotels' targets different language communities than the Applicant for 'hoteis'. The 'hotels' gTLD is targeted to English-speaking, Dutch-speaking and/or French-speaking communities, whereas the 'hoteis' gTLD is targeted to the Portuguese language community.

Given this clear distinction in target groups and the restricted and controlled use in both gTLDs, the 'hotels' and 'hoteis' gTLDs even become more distinct from each other. As a result, there is no likelihood that the Internet user will be confused, and ICANN's decision to place them in a contention set is contrary to established ICANN policy.

c) The Internet user will not be confused

As seen above, 'hotels' and 'hoteis' are clearly distinct from each other. As a result, an Internet user searching for information on hotels in English, French or Dutch would not mix up the search term 'hotels' with the Portuguese term 'hoteis' because the word 'hoteis' does not exist in the English language. The same is true for an Internet user searching for information on hotels in Portuguese. The user would not mix up the search term 'hoteis' with the English term 'hotels', the word 'hotels' being non-existent in Portuguese.

It is also extremely unlikely that the Internet user would make a typographical error when searching for 'hotels', which would replace 'hotels' by 'hoteis', or vica versa.

The letter 'l' and the letter 'i' are located on a completely different key of a computer keyboard, whether qwerty, azerty or qwertz. Even in the very unlikely event that such error is made by an Internet user searching in English, such Internet user will immediately notice that an error has occurred because the information on 'hoteis' would be in Portuguese.

The same would be true for an Internet user looking for 'hoteis'. First, the word 'hotels' is non-existent in the Portuguese language. As a result, an Internet user looking for information on hotels in Portuguese would not confuse 'hoteis' with the English word. Second, the Internet user would not make a typographical error when searching for 'hoteis', which would replace 'hoteis' by 'hotels'. Finally, in the unlikely event that this typographical error is made, a Portuguese-speaking Internet user would also immediately notice that an error has occurred because the information on 'hotels' would not be in Portuguese.

As a result, the Internet user would not be confused; all of the above factors demonstrate that ICANN's decision to place '.hoteis' and '.hotels' in contention is contrary to established policy. Nor is it clear whether ICANN considered any of the

above material in determining wheter '.hotels' and '.hoteis' were confusingly similar. As a result, Requester asks that ICANN reverse the decision to place .hotels in a non-exact match contention set.

12.   Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm.

The Requester wishes to submit the following documents in support of its request:

Attachment 1:	Decision to place 'hotels' (Application ID 1-1016-75482) and 'hoteis' (Application ID 1-1249-87712) in a non-exact match contention set.
Attachment 2:	Applicant Guidebook (Version 2012-06-04).
Attachment 3:	Mail from Flip Petillion to Prof. Dr. Piet Desmet of March 21, 2013.
Attachment 4:	Mail from Prof. Dr. Piet Desmet to Flip Petillion of March 22, 2013.

The Requester also may submit additional documents not yet available, such as other expert reports and analyses, in support of its Request. The Requester therefore requests that ICANN allow the submission of these documents when they become available.

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