

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

Booking.com B.V.)	
Herengracht 597, Amsterdam,)	
1017 CE, NL)	
Claimant)	
)	
v.)	ICDR Case No. _____
)	
INTERNET CORPORATION FOR)	
ASSIGNED NAMES AND NUMBERS)	
Respondent)	
_____)	

**REQUEST FOR INDEPENDENT REVIEW PROCESS
BY BOOKING.COM B.V.**

Flip Petillion,
Crowell & Moring LLP
Contact Information Redacted

Counsel for Claimant

I. IDENTIFICATION OF THE PARTIES

A. Claimant

1. The Claimant in this dispute is Booking.com B.V. (Booking.com). The Claimant's contact details are as follows:
Contact Information Redacted

2. Booking.com is represented in these proceedings by:

Flip Petillion
Crowell & Moring LLP
Contact Information Redacted

B. Respondent

3. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN). The Respondent's contact details are as follows: 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536.

II. EXECUTIVE SUMMARY

4. Booking.com requests an Independent Review of ICANN's treatment of Booking.com's application for the .hotels gTLD.
5. During ICANN's recent new gTLD application round, Booking.com applied to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders. Another applicant applied for the string .hoteis. Following months of unexplained delay, ICANN adopted the determination of a panel of third-party evaluators, commissioned by ICANN. This panel considered the two strings so similar that they created a probability of user confusion if more than one of the strings were delegated into the Internet root zone.

6. This determination was based on undisclosed criteria, and no rationale or justification for the determination has ever been provided. Booking.com has never been given an opportunity to comment, let alone contest, the undisclosed criteria. As a result of the string similarity determination, Booking.com's application has been needlessly delayed and subjected to additional procedures (Documentary Information Disclosure Policy (DIDP) Request, Request for Reconsideration (RfR), Cooperative Engagement Process (CEP)). ICANN's string similarity determination was an abdication of responsibility and contrary to the evaluation policies ICANN had established for new gTLD applications, especially in view of the fact that applications with equally serious string similarity concerns have advanced.

7. Additionally, TLD strings at least as similar to each other as .hotels is to .hoteis have coexisted for many years. The string similarity determination for .hotels is not justified by any legitimate security or stability concerns. It is baseless and arbitrary. Moreover, the string similarity determination fails to comply with ICANN's obligation to promote consumer choice, innovation and competition.

8. Booking.com repeatedly asked ICANN – including in its DIDP Request and its RfR – to comply with its own policy and remedy the improper treatment of the .hotels application. ICANN has not only declined, but has attempted to evade all responsibility.

9. ICANN's treatment of Booking.com's application is inconsistent not only with the new gTLD policies established in the Guidebook, but also with fundamental ICANN policies requiring good faith, fairness, non-discrimination, transparency, and accountability. By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment. Accordingly, Booking.com requests that ICANN be required to overturn the string similarity determination in relation to

.hotels and .hoteis and allow Booking.com’s application to proceed on its own merits without reference to the application for .hoteis.

III. SUMMARY OF RELEVANT FACTS

A. The parties

1. Booking.com

10. Booking.com is a limited liability company established under the law of the Netherlands. Booking.com is the number one online hotel reservation service in the world, offering over 435,605 hotels and accomodations. Booking.com’s primary focus is on the U.S. and other English-language markets.

2. ICANN

11. ICANN is a non-profit public benefit corporation that was established under the laws of the State of California on 30 September 1998. ICANN is responsible for administering technical aspects of the Internet’s domain name system (DNS). Core to its mission is increasing competition and fostering choice in the DNS. ICANN’s Articles of Incorporation require ICANN to act “*for the benefit of the Internet community as a whole*” and “*in conformity with the relevant principles of international law and local law*” (**RM¹ 1**, Article 4). ICANN’s fundamental principles, which are reiterated numerous times in ICANN’s governance documents and other policies, require ICANN to act in good faith, to ensure fairness, non-discrimination, openness and transparency, accountability, and promotion of competition.

B. ICANN established the new gTLD Program

12. ICANN’s responsibilities include establishing a process for introducing new top-level domains (TLDs) in order to promote consumer choice and competition (**RM 4**, Article 9.3).

¹ Reference Material.

Before the introduction of the new gTLD program, ICANN had, over time, expanded the DNS from the original six generic TLDs (gTLDs) to 22 gTLDs and approximately 250 two-letter country-code TLDs (ccTLDs). These TLDs have coexisted for years without a problem, notwithstanding the similarities between certain of them (such as .gl and .gi; .al and .ai; .lt and .it; and .il and .li) (**RM 6**).

13. In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs (**RM 7-8**). The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet (**RM 2**, Article X). In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with allocation criteria and contractual conditions (**RM 9**). These allocation criteria were set out in the Applicant Guidebook, which is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs. In June 2011, ICANN's Board approved the Guidebook and authorized the launch of the New gTLD Program (**RM 10**). The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains (**RM 11**).

14. The Applicant Guidebook was for prospective applicants to make sure they understand what was required of them when applying for a new gTLD and what they could expect at each stage of the evaluation process (**RM 11**, p. 12; **RM 12**). The final version of the Applicant Guidebook was only made available on 4 June 2012 (**RM 5**), *i.e.*, after the application window for new gTLD applicants closed on 30 May 2012 (**RM 13**).

C. Booking.com applied for .hotels

15. Booking.com has filed an application to operate the .hotels gTLD (Application ID 1-1016-75482). As specified in the application, Booking.com intends the .hotels gTLD to be

unambiguous as regards:

- the identity of Booking.com as the Registry Operator;
- the source of the content and services offered via the .hotels gTLD, by Booking.com and/or a third party appointed by the latter;
- the affiliation between the Registry Operator and the .hotels gTLD, as well as the domain names registered in the gTLD; and
- in time, and at the discretion of Booking.com, the affiliation between the Registry Operator and any third party that may become authorized by Booking.com to register and/or use one or more domain name registrations in the .hotels gTLD, to be delegated and/or using such domain name registrations, providing content under such domain names and/or hotel reservations services (**Annex 1**).

16. Booking.com applied for the .hotels gTLD as part of its ongoing efforts of developing a clear, distinctive and differentiated identity that sticks in the minds of consumers and sets it apart from its competitors. Access to new gTLDs is seen by Booking.com as a new and significant opportunity to further raise its profile and offer clearly defined and easy to locate services to consumers in a sector as dynamic and rapidly changing as online hotel booking. The choice for the .hotels gTLD is aligned with Booking.com's primary focus on the U.S. (with its strongly Anglo-Saxon traditions) and other English-language markets.

D. Despegar Online SRL applied for .hoteis

17. Despegar Online SRL (Despegar) is a competitor of Booking.com. Despegar applied for a number of gTLDs related to the hotel sector, including .hoteis gTLD (Application ID 1-1249-87712). Despegar's application for .hoteis is intended to serve as a trusted, hierarchical, secure, and intuitive namespace provided by Despegar for a Portuguese-speaking audience. The primary driving factors of the .hoteis gTLD are differentiation and innovation.

Additionally, Despegar believes that the creation of a specific space dedicated to Portuguese-speaking individuals that are interested in, and businesses that offer, hotel- and travel-related content, will benefit this group of consumers and businesses, as well as general Internet users (**Annex 2**).

E. ICANN established a Policy in relation to String Similarity

18. In giving meaning to the so-called ‘GNSO Recommendation 2’, ICANN developed a policy of reviewing similarity between (i) applied-for gTLD strings and (ii) existing TLDs, 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 the delegation of similar strings into the Internet root zone. If applied-for strings are found confusingly similar to each other, only one of these strings will be delegated. The standard for this string confusion test is as follows:

“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.” (RM 5, Module 2-8)

19. ICANN has indicated that the string confusion test is a high bar:

“[T]he standard indicates that confusion must be probable, not merely possible, in order for this sort of harm to arise. Consumers also benefit from competition. For new gTLDs, the similarity test is a high bar, as indicated by the wording of the standard.” (RM 14, p. 149)

20. Indeed, the string similarity process was not intended to “hobble competition or reserve a broad set of string [sic] for a first mover.”(RM 14, p. 149) This was confirmed when ICANN called for interested string similarity panelists on 31 July 2009. In ICANN’s call for expression of interest for new gTLD String Similarity Examiners, ICANN specified:

“Policy discussions indicate that the most important reason to disallow similar strings as top-level domain names is to protect Internet users from the increased exposure to fraud and other risks that could ensue from confusion of one string for another. This reasoning must be balanced against unreasonable exclusion of top-level labels and

denial of applications where considerable investment has all ready been made. As the top-level grows in number of registrations, drawing too large a circle of “similarity protection” around each existing string will quickly result in the unnecessary depletion of available names. The unnecessary exclusion of names would also tend to stifle the opportunity of community representation at the top-level and innovation.” (**RM 15**, p. 4)

As a result, two strings should only be placed in a contention set to the extent that they are so similar that they would create a probability of user confusion if both were delegated into the root zone and the finding of confusing similarity must be balanced against the risk of unreasonable exclusion of top-level labels and denial of applications.

21. The String Similarity Review process had to embody “Quality Control Objectives”, namely consistency, accountability, improvement, and transparency (**RM 16**, p. 21). Upon completion of the String Similarity Review, ICANN had to publish an independent report (**RM 16**, p. 22).

F. ICANN selected a String Similarity Panel

22. ICANN selected InterConnect Communications (ICC) to act as the String Similarity Panel (SSP). The String Similarity Review was to occur during the Initial Evaluation of applications (**RM 5**, Module 2-30). The Initial Evaluation process was expected to be completed in a period of approximately 5 months (**RM 5**, Module 1-9) and ICANN was supposed to publish the results of the String Similarity Review as soon as the String Similarity Review was completed and prior to the publication of full Initial Evaluation results (**RM 5**, Module 2-6 and Module 2 *in fine*). The SSP had to be able to evaluate the applications within the required timeframe (**RM 5**, Module 2-31).

23. On 9 August 2012, ICANN staff confirmed that the results of the SSP were scheduled to be published within “*four-and-a-half months from June 13th, 2012*” (**RM 17**, p. 24), *i.e.* end September 2012.

G. The appointed String Similarity Panel failed to apply ICANN's Policies in arbitrarily determining that .hotels is confusingly similar to .hoteis

24. On 6 September 2012, ICANN reported on the progress of the SSP (**RM 18**), announcing that it expected to receive the results only in October 2012 and would need about 2 to 3 weeks thereafter to perform an analysis and publish the results (**RM 19**). The results were thereafter expected to be made public by late October 2012 or beginning November 2012. Subsequently, in an information paper dated 8 October 2012 for ICANN's Webinar of 15 October 2012, ICANN announced that the SSP was targeting a completion date of 1 November 2012 (**RM 20**, p. 4). A second evaluator was then expected to review any decisions to put TLDs in contention sets. On 14 November 2012, ICANN reported that the String Similarity Review had been completed, but did not publish the results (**RM 21**, p. 2):

The string similarity review has been completed. The secondary review will commence soon. After the secondary review completes, ICANN will require some time to process and post the results.

25. In initiating a second review following the completion of the String Similarity Review, ICANN did not comply with the policy requiring ICANN to notify applicants who are part of a contention set as soon as the String Similarity Review was completed (**RM 5**, Module 2-6). While the results of the String Similarity Review were originally scheduled to be published before the end of September 2012, the outcome of the String Similarity Review was only published on 26 February 2013. ICANN has never explained the reasons for the significant delay, nor why it took almost 4 months after the SSP completed its review to publish the results.

26. Moreover, neither ICANN nor the SSP has ever published a reasoned report. ICANN merely published the outcome of the String Similarity Review and notified Booking.com that .hotels and .hoteis had been put in a non-exact match contention set. No reasons were given for the outcome of the String Similarity Review.

27. Moreover, as demonstrated in detail by Booking.com on various occasions, there is no probability of user confusion if both .hotels and .hoteis are delegated as gTLD strings in the Internet root zone. Expert evidence confirms that the difference between the letter ‘l’ and the letter ‘i’ clearly distinguishes the .hotels and .hoteis strings from each other. Indeed, strings which are at least as similar as .hotels and .hoteis currently co-exist without any instances of user confusion (**Annex 20**).

H. ICANN accepted the String Similarity Determination despite the Panel’s failure to apply the policies in the Applicant Guidebook

28. ICANN merely accepted the String Similarity Determination. ICANN informed Booking.com’s service provider about this decision on 26 February 2013 without giving any rationale (**Annex 3**).

I. Booking.com asked additional information on the String Similarity Determination

29. The reasons that .hotels and .hoteis were put in a contention set remain unclear. ICANN has failed to provide any rationale and indeed Booking.com has not been given any information as to why the SSP made its determination.

30. On 28 March 2013, in an attempt to determine what information ICANN Staff took into account in making the decision, Booking.com has submitted a request for information under ICANN’s Documentary Information Disclosure Policy (DIDP Request) (**Annex 4**). Booking.com requested that ICANN produce all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that hotels and hoteis are confusingly similar. Booking.com specified that it was only seeking information and documents that relate to the establishment and implementation of a standard, what deliberations occurred, and the end result.

On 27 April 2013, ICANN replied announcing that it would shortly be posting a document containing the SSP’s String Similarity Process and Workflow (**Annex 5**). However, ICANN

refused to publish any document giving a rationale for ICANN’s decision to put .hotels and .hoteis in a contention set (*infra*).

On 9 May 2013, Booking.com responded that ICANN had failed to provide any additional information or address any of Booking.com’s concerns regarding the lack of transparency (**Annex 6**).

On 14 May 2013, ICANN responded that it intended to post the String Similarity Process and Workflow by 17 May 2013 (**Annex 7**). On 7 June 2013, ICANN finally posted a process description of the String Similarity new gTLD Evaluation Panel (Process Description) (**Annex 8**). However, ICANN still failed to provide any particularized rationale or analysis for putting .hotels and .hoteis in a contention set.

On 26 June 2013 Booking.com requested an explanation from ICANN as to why it took ICANN so long to publish a Process Description that merely outlines the general workflow and does not include any string-specific information. Booking.com observed that this was all the more bizarre given that the Process Description itself indicates that the string similarity evaluation was documented in so-called evaluation workbooks. It was (and still is) unclear whether the Process Description had been adopted prior to the start of the string similarity evaluation process or whether it had been adapted over time (**Annexes 8 and 9**).

J. ICANN improperly refused to disclose the reasons for the String Similarity Determination

31. On 25 July 2013, ICANN replied, but still failed to provide a rationale for the decision (**Annex 10**).

32. Much later, on 9 January 2014, ICANN published a letter of 18 December 2013 by Mr. Mark McFadden, the String Similarity Panel Manager to Mr. Russ Weinstein of ICANN. The letter is said to “*provide a summary of the process, quality control mechanisms and some considerations surrounding non-exact contention sets for the string similarity evaluation as requested by ICANN*” (**Annex 11**). However, this letter still did not explain why .hotels and

.hotels were put in a contention set. The letter merely gave a short explanation of the methodology that was used to perform the String Similarity Review, without indicating the background of the panelists and their degree of familiarity with English or other relevant languages. There are no signs that the evaluators who found .hotels and .hoteis similar constitute a representative sample. In addition, it is not clear what the training referred to in the letter comprised or how the successful completion of training was measured.

The very fact that ICANN asked for further information about the considerations surrounding non-exact contention sets shows that ICANN itself considered that no sufficient rationale or transparency was given in relation to the string similarity evaluation.

K. Booking.com filed a Request for Reconsideration to have ICANN's decision reversed

33. ICANN's Board ultimately has responsibility to ensure that ICANN policies are respected. Booking.com asked the Board to fulfill this obligation in its Request for Reconsideration (RfR). In conjunction with Booking.com's DIDP request, Booking.com filed the RfR with ICANN on 28 March 2013, seeking reconsideration of (i) ICANN's decision to place .hotels and .hoteis in a non-exact match contention set, and of (ii) ICANN's decision not to provide a detailed analysis or a reasoned basis for this decision (**Annex 12**). The RfR proceedings were put on hold by ICANN, pending the DIDP Request. After posting the Process Description – and although ICANN still failed to provide a rationale for the challenged decision – the RfR proceedings resumed. An amended RfR request was filed on 7 July 2013 (**Annex 13**). On 1 August 2013, ICANN's Board Governance Committee (BGC) issued a recommendation to ICANN's Board, which was published on 21 August 2013 (**Annex 14**).

L. ICANN improperly rejected Booking.com's Request for Reconsideration

34. On 10 September 2013, ICANN's Board concluded that the RfR mechanism cannot

be used to re-try the decisions of the evaluation panels and rejected Booking.com's RfR ([Annex 15](#)).

35. Several Board members considered that the decision to accept the String Similarity Review was not fair or correct despite failing to convince the Board to accept Booking.com's Request for Reconsideration. Mr. George Sadowsky, ICANN Board member and member of the New gTLD Program Committee (NGPC), stated that he was "*persuaded by the argument made by [Booking.com] that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate*" ([Annex 16](#)). Mr. Sadowsky stated that he thought that the end result – namely putting .hotels and .hoteis in contention set – "*was **contrary to ICANN's and the user's best interests***" ([Annex 16](#)). ICANN's lack of fairness in adopting Resolution 2013.09.10.NG02 was also recognized by Mr. Ray Plzak, Mr. Kuo-Wei Wu and Mrs. Olga Madruga-Forti, all board members, who abstained from voting and expressed clear voting statements. Mrs. Olga Madruga-Forti noted that the BGC's application in assessing Booking.com's Request for Reconsideration of a "*limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is **not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to establish a better record of the rationale of the string similarity review panel in circumstances such as this***" ([Annex 16](#)). Despite serious concerns expressed by several ICANN Board members, Mr. Mike Silber, who had previously abstained from voting when the BGC recommended to reject Booking.com's RfR ([Annex 21](#)), subsequently voted in favor of the resolution rejecting the RfR ([Annex 16](#)). His sudden change of mind is not explained in any of the meeting minutes. This is all the more bizarre, as the ICANN

Board would not have had a majority in the event Mr. Mike Silber acted consistently with his previous decision and had abstained from voting on 10 September 2013.

36. It is unclear which of ICANN's core values could possibly have led either to putting .hotels and .hoteis in a contention set or to declining Booking.com's Reconsideration Request. ICANN has clearly acted unfairly and contrary to its obligations (*infra*).

ICANN's denial to reconsider its decision to put .hotels and .hoteis in a contention set is therefore contrary to ICANN's Articles of Incorporation and Bylaws.

M. Booking.com entered into a Cooperative Engagement Process with ICANN

37. On 25 September 2013, Booking.com filed a request for a Cooperative Engagement Process (CEP) with ICANN (Annex 17). The CEP did not lead to a satisfactory result. However, there are compelling reasons to reverse the erroneous decision without incurring any risk (Annex 22).

N. Booking.com had no choice but to initiate a request for an Independent Review Process

38. As ICANN had failed to voluntarily remedy the errors made in the String Similarity Review and in ICANN's refusal to reconsider the String Similarity Determination, Booking.com had no choice but to initiate this request for an Independent Review Process. The challenged decisions and actions are attributable to the ICANN Board only and materially affect Booking.com. As a result, Booking.com has standing to file this request.

IV. APPLICABLE LAW, APPLICABLE RULES AND NATURE OF THE PROCEEDINGS

39. The applicable law of these proceedings is ICANN's own Articles of Incorporation and Bylaws. All of the provisions of these documents must also be interpreted in light of Article IV of ICANN's Articles of Incorporation, which provides that ICANN is subject to both local and international law (RM 1). In particular, Article IV charges ICANN "*with*

acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law” (RM 22, para. 140).² General principles of international law – and in particular the obligation of good faith – thus serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted.

40. Pursuant to these Bylaws, these proceedings are established to ensure that,

“[i]n carrying out its mission as set out in [the] Bylaws, ICANN [is] accountable to the community for operating in a manner that is consistent with [the] Bylaws, and with due regard for the core values set forth in Article I of [the] Bylaws.” (RM 2, Art. IV, §1)

To achieve the required accountability, the Panel is

“charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.” (RM 2, Art. IV, §3(4))³

41. The IRP Panel’s fulfillment of this core obligation is crucial to ICANN’s commitment to accountability. The IRP is the only method established by ICANN for holding itself accountable through third-party review of its decisions. Not only do the Bylaws and Articles of Incorporation clearly require the establishment of robust accountability mechanisms, but the Affirmation of Commitments also explicitly requires ICANN to strengthen and improve its accountability mechanisms (RM 4, Articles 3 and 9.1). The IRP only fulfills these obligations if the Panel analyzes whether ICANN’s actions comply with the Bylaws. In addition, the Panel is also charged with reviewing whether the ICANN Board was free from conflicts of interest, exercised an appropriate level of due diligence, and used its independent

² Reasoning that the intention behind the inclusion of international law in Art. 4 of the Articles of Incorporation was “to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.”

³ Notably, this standard did not change when the Bylaws were revised (See RM 23, Art. IV, §3(3)).

judgment in making decisions relating to Booking.com’s application. Nothing within that analysis alters the Panel’s core obligation as part of an Independent Review: declaring whether or not ICANN acted consistent with its Articles and Bylaws.

42. Because ICANN’s Bylaws require ICANN to apply established policies neutrally and fairly, the IRP Panel must consider other ICANN policies relevant to the dispute. In this dispute, the relevant policies are also established in ICANN’s New gTLD Applicant Guidebook, in particular the policies in Module 2 regarding ICANN’s evaluation of new gTLD applications (**RM 5**).

V. SUMMARY OF ICANN’S OBLIGATIONS

A. Act in good faith

43. Many of the guiding substantive and procedural rules in ICANN’s Articles and Bylaws – including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is because they arise from the general principle of good faith, which is considered to be the foundation of all law and all conventions. As stated by the ICJ, the principle of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations.”⁴

44. The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action, and recognizing legitimate expectations.⁵ ICANN’s core values require ICANN to obtain

⁴ Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits); *see also* Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June) (good faith is a “well established principle of international law”).

⁵ U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.

informed input from those entities most affected by ICANN's decisions (RM 2, Art. I, §2(9)).

B. Apply policies neutrally, fairly and without discrimination

45. ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Not only does this obligation arise from general principles of international law, it is also repeatedly in ICANN's governing documents. Article 2(3) of ICANN's Bylaws provides that:

"ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any party for disparate treatment unless justified by substantial and reasonable cause . . ."

46. The above obligation is further elaborated upon in ICANN's Core Values, which require ICANN to make *"decisions by applying documented policies neutrally and objectively, with integrity and fairness."*(RM 2, Art. I, §2)⁶

C. Remain transparent

47. Article 4 of ICANN's Articles of Incorporation sets forth that ICANN:

"shall operate for the benefit of the Internet community as a whole, carrying out its activities ... to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets."

48. Similarly, Article III of ICANN's Bylaws states that:

"ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

49. These provisions are supplemented by the 'Core Values' set forth in ICANN's Bylaws, which are to *"guide the decisions and actions of ICANN"* in the performance of its mission (RM 2, Art. I, §2). The Core Values include:

⁶ This requirement is also found in applicable California law, which requires that decisions be made according to procedures that are 'fair and applied uniformly', and not in an 'arbitrary and capricious manner.'

*“Employing **open and transparent** policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.”*(**RM 2**, Art. I, §2(7))

50. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting space that ICANN occupies. The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken. The coupling of the terms ‘*open*’ and ‘*transparent*’, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to also denote the most developed dimension of transparency, namely openness in decision-making.

D. Remain accountable

51. As already noted, ICANN is required to ensure that it is accountable. Again, one of ICANN’s Core Values provides that it must “[*r*]emain[] *accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.*” (**RM 2**, Art. I, §2(10)) This is reiterated in Art. IV, § 1 of ICANN’s Bylaws, which requires ICANN to “*be accountable to the community for operating in a manner that is consistent with the [...] Bylaws, and with due regard for the core values set forth in Article 1 of the [...] Bylaws.*”

E. Promote competition and innovation

52. In performing its mission, ICANN must depend to the largest possible extent on market mechanisms to promote and sustain a competitive environment. ICANN must be as non-interventionist as possible and its activities are limited to matters requiring, or significantly benefiting from, global coordination. This follows clearly from ICANN’s Core Values, which include:

“2. Respecting the creativity, innovation, and flow of information made possible by the Internet by **limiting ICANN's activities** to those matters within ICANN's mission requiring or significantly benefiting from global coordination. [...]

5. Where feasible and appropriate, **depending on market mechanisms to promote and sustain a competitive environment.**

6. Introducing and **promoting competition** in the registration of domain names where practicable and beneficial in the public interest.”(RM 2, Art. I, §2)

VI. SUMMARY OF ICANN'S BREACHES

A. ICANN failed to comply with its obligation to act in good faith by failing to provide due process to Booking.com's application

53. As noted above, the international law standard of good faith encompasses an obligation to ensure procedural fairness and due process. Obvious general principles of 'international due process' include equal and fair treatment of the parties, fair notice, and a fair opportunity to present one's case. These requirements are basic principles that inform transnational procedural public policy. These are more than just formalistic procedural requirements. The opportunity must be meaningful: the party must be given adequate notice of the relevant rules and be given a full and fair opportunity to present its case. And the mechanisms for redress must be both timely and effective.

54. In the instant case, Booking.com had no notice, and absolutely no opportunity to present its case. Booking.com was deprived of procedural fairness and the opportunity to be heard through ICANN's failure to provide notice of the applicable standards, failure to allow any opportunity to contest those standards, and failure to provide any means of remedy or redress. Put simply, Booking.com was not offered any opportunity to be heard on its own case.

55. As ICANN never provided any information on the standards to be used by the String Similarity Panel, or the manner in which they were applied in this case, there was never an opportunity for Booking.com to present any arguments regarding the application of those standards to the contention set of .hotels and .hoteis. Instead, Booking.com was faced with an adverse decision without any explanation of the standards used in reaching that decision.

56. Nor was Booking.com given any opportunity for remedy or redress once the decision was made. Although Booking.com challenged the decision through ICANN's Reconsideration process, ICANN explicitly refused to reconsider the substance of the challenged decision.

57. Booking.com was never given any meaningful opportunity to be heard on the substance of the string similarity decision (by either the SSP itself, or by ICANN upon receiving the Panel's decision), nor any opportunity to seek redress for the erroneous decision. Accordingly, the string similarity determination was made without due process, and ICANN's acceptance of the determination, and repeated failure to remedy the wrongful determination through the Reconsideration process or otherwise, is a failure to act with due diligence and independent judgment, and a failure to act in good faith as required by ICANN's Bylaws and Articles of Incorporation.

B. ICANN failed to act neutrally, fairly and without discrimination

1. ICANN failed to comply with its obligation to neutrally and fairly apply the Policy established in the Applicant Guidebook and Bylaws by accepting the Determination that .hotels is confusingly similar to .hoteis

58. There is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone. Expert evidence confirms that the difference between the letter 'l' and the letter 'i' clearly distinguishes the .hotels and .hoteis strings from each other, such that there is no risk that Internet users will be confused. The SSP could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings. The average reasonable Internet user is well used to distinguishing clearly between words (and non-words) differing by the letters 'l' and 'i' (**Annex 20**).

59. Since .hotels and .hoteis are not confusingly similar, the determination that they are is contradictory to ICANN policy as established in the Applicant Guidebook. Acceptance of the determination, and repeated failure to remedy the wrongful determination, is a failure to act

with due diligence and independent judgment, and a failure to neutrally and fairly apply established policies as required by Bylaws and Articles of Incorporation.

2. **ICANN failed to comply with its obligation to act fairly by arbitrarily delaying Booking.com's application for reasons not justified by stability or security concerns**

60. Not only did it take almost 9 months from the close of the application window to the publication of the string similarity results; more than a year has passed since the publication of the string similarity results on 26 February 2013. Despite numerous reasoned appeals by Booking.com to reverse the arbitrary decision to put .hotels and .hoteis in a contention set and numerous requests by Booking.com to be given a rationale about ICANN's decision, ICANN has continuously failed to remedy this situation. Despite the fact that there are absolutely no stability or security concerns if both strings were delegated, ICANN has arbitrarily prevented the delegation of the strings .hotels and .hoteis.

61. In the meantime, ICANN has continued processing other applications. More than 100 gTLD strings have already been delegated.

62. Thus, the arbitrary and unfair determination by the SSP and ICANN's acceptance of this determination and its repeated failure to remedy the wrongful determination, while allowing other gTLD strings to proceed is a failure to act with due diligence and independent judgment, and a failure to act fairly and predictably as required by Bylaws and Articles of Incorporation.

3. **ICANN failed to comply with its obligation to provide non-discriminatory treatment by delaying Booking.com's Application but allowing other applications with at least equally serious string similarity concerns to proceed**

63. The gTLD strings .parts is one of the applied-for strings that have already been delegated into the Internet root zone ([Annex 18](#)). The applied-for gTLD string .paris has been allowed for pre-delegation testing by ICANN ([Annex 19](#)).

64. The difference between the .parts and .paris gTLD strings is the difference between t and i. Expert evidence shows that the alternation t/i is more likely to cause confusion than the alternation l/i (**Annex 20**). The distinguishing factor between .parts and .paris – the alternation t/i – occurs before the end letter s; the distinguishing factor between .hotels and .hoteis – the less similar alternation l/i – also occurs before the end letter s. As the distinguishing factor in .hotels and .hoteis is less similar than the distinguishing factor in .parts and .paris, the .parts and .paris gTLD strings are at least as similar to each other as the .hotels and .hoteis gTLD strings.

65. Nevertheless .parts and .paris were not put in a contention set and even proceeded to delegation. This differential treatment is discriminatory and unfair. Also for this reason, ICANN's acceptance of the SSP's determination, and ICANN's repeated failure to remedy the wrongful determination is a failure to act with due diligence and independent judgment, and a failure to act fairly and without discrimination as required by Bylaws and Articles of Incorporation.

4. **ICANN failed to comply with its obligation to provide non-discriminatory treatment by putting Booking.com's Application in a contention set while other TLDs with at least equally serious string similarity concerns have been delegated**

66. In the past, ICANN has delegated strings that only consist of the alternation l/i, namely .il and .li. Many strings that only differ from each other through the alternation l/i exist today, *e.g.* .gl and .gi; .al and .ai; .lt and .it (**RM 6**). As these strings have no linguistic meaning, whereas .hotels and .hoteis have in their respective language, these strings are more likely to generate user confusion than .hotels and .hoteis. In rejecting the possible co-existence between .hotels and .hoteis, ICANN is treating them differently from existing TLDs with at least equally serious string similarity concerns. This further evidences ICANN's failure to act with due diligence and independent judgment, and a failure to act fairly and without discrimination as required by Bylaws and Articles of Incorporation.

C. ICANN failed to comply with its obligations to act transparently by failing to disclose the standards used to evaluate String Similarity

67. Whatever the non-disclosed standards the outside evaluator used, these were not the standards described in the Guidebook. The expert report clearly shows that .hotels and .hoteis cannot be considered confusingly similar according to ICANN's methodology. On 27 April 2013, ICANN stated that an independent SSP performed the string similarity review and that the SSP was responsible for the development of its own process documentation and methodology for performing the string similarity review (**Annex 5**). The methodology for testing whether or not string confusion existed in accordance with ICANN's defined standard has never been disclosed. Despite numerous requests by Booking.com, it is not clear on what basis ICANN made the decision to accept the SSP's advice. In any event, the SSP's advice could not have taken account of actual human performance in discriminating words and characters in ordinary circumstances, as evidenced by the expert report (**Annex 20**).

68. Thus, the SSP's determination as well as ICANN's acceptance of the determination were made without transparency. ICANN's repeated failure to remedy the wrongful determination, is a further failure to act with due diligence and independent judgment, and a failure to provide transparency as required by Bylaws and Articles of Incorporation.

D. ICANN failed to comply with its obligation to remain accountable by failing to provide any remedy for its mistreatment of Booking.com's Application

69. Because of ICANN's unique history, role and responsibilities – exercising plenary authority over a global resource – ICANN's constituent documents require that ICANN operate with complete accountability. In contrast to this obligation, throughout its treatment of Booking.com's application for .hotels, ICANN has acted as if it, and its vendor, can act with complete impunity.

70. First, to be accountable to a party for actions taken against it, that party needs to understand the case against it, *i.e.*, what were the standards used to make the determination,

how were the standards used to make the determination, and what was the analysis that formed the basis for the determination. In short, a party must have the minimal amount of information necessary to assess whether it was treated appropriately. Here, ICANN refused to articulate (or order the articulation of) any information concerning the panel's determination, and, consequently, expects to escape any responsibility for the determination. This is exactly the opposite of what the Bylaws require. Additionally, ICANN has not created *any* process for challenging the substance of the SSP's determination (even if the SSP had provided a reasoned basis for its determination, *quod non*). Parties could not present their case to the SSP, nor could they challenge the SSP's determination after it was made. Even after ICANN had summarily accepted the SSP's determination, without any of its own investigation or analysis, ICANN refused to review the determination. Rather, ICANN specifically said that its Request for Reconsideration process was not available for substantive review of the decision. Instead of taking its obligation to remain accountable seriously, it brashly flouted any such notion.

71. In sum, ICANN ignored its obligations to ensure accountability by failing to provide a minimum amount of information regarding the determination, by failing to establish any process to challenge the substance of the decision, and by approving the decision of its vendor while refusing to substantively review the decision itself. This further evidences ICANN's failure to act accountably and exercise independent judgment.

E. ICANN failed to promote competition and innovation by accepting the String Similarity Determination

72. Given the current competitive environment in the online hotel reservation sector, both Booking.com and Despegar will have every incentive to use their gTLDs as a differentiating competitive factor. Booking.com and Despegar have every incentive to maintain their strong and distinctive brand identities and therefore to operate the .hotels and .hoteis gTLDs in a way that ensures competition as well as the continued differentiation of their brands.

73. In light of the demand for online travel services and customer's preference for comparing the prices of multiple online travel agents, Booking.com and Despegar may be expected to develop their gTLDs as distinct and reliable platforms for online travel search and reservation services. This will spur competition to the benefit of Internet users across the globe.

74. ICANN's decision to put the .hotels and .hoteis gTLDs in a contention set prevents the existence of separate .hotels and .hoteis gTLDs, which is contrary to the interests of both competition and consumers. For this reason too, ICANN's erroneous and unfair application of its policies by putting .hotels and .hoteis in a contention set is contrary to ICANN's Bylaws.

VII. PROCEDURAL MATTERS

75. Pursuant to Article IV, Section 3(9) of the Bylaws, the Claimant hereby requests that the Panel be composed of three (3) members, each of whom shall be impartial and independent of the parties.⁷

76. It does not appear that ICANN has established the omnibus standing panel described in Art. IV, Section (6) of the Bylaws. As a result, pursuant to Art. 6 of the ICDR Rules, the Claimant suggests that the parties agree to the following method for appointing the IRP Panel: each party shall appoint one panelist, after which the two panelists so appointed, and in consultation with the parties, shall jointly select the third panelist, who shall serve as the Chairman of the Panel.

77. The Claimant proposes that it makes its panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. ICANN shall

⁷ See also Supplementary Procedures, Rule 3.

make its panelist appointment within twenty (20) days of being notified of the Claimant's panelist appointment. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of ICANN's panelist appointment. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

VIII. RELIEF REQUESTED

78. Based on the foregoing, and reserving all rights to rebut ICANN's response in further briefs and during a hearing, Booking.com respectfully requests that the Panel issue a declaration:

- Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;
- Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;
- Awarding Booking.com its costs in this proceeding; and
- Awarding such other relief as the Panel may find appropriate or Booking.com may request.

Respectfully submitted,

Flip Petillion
18 March 2014

Flip Petillion,
Crowell & Moring LLP

Contact Information Redacted

Counsel for Claimant

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- Annex 2 - Despegar's application to operate the .hoteis gTLD (Application ID 1-1249-87712)
- Annex 3 - ICANN's communication of 26 February 2013
- Annex 4 - Booking.com's DIDP request of 28 March 2013
- Annex 5 - ICANN's response of 27 April 2013 to Booking.com's DIDP request
- Annex 6 - Email from Booking.com to ICANN of 9 May 2013, expressing its concerns about ICANN's response
- Annex 7 - Email from ICANN to Booking.com of 14 May 2013
- Annex 8 - Process description of the String Similarity new gTLD Evaluation Panel as posted by ICANN on 7 June 2013
- Annex 9 - Booking.com's follow-up request of 26 June 2013 to DIDP request
- Annex 10 - ICANN's response of 25 July 2013 to Booking.com's follow-up request
- Annex 11 - Letter by Mr. Mark McFadden to Mr. Russ Weinstein of 18 December 2013, as published by ICANN on 9 January 2014
- Annex 12 - Request for Reconsideration 13-5 as filed on 28 March 2013
- Annex 13 - Request for Reconsideration 13-5 as amended on 7 July 2013
- Annex 14 - Board Governance Committee recommendation on Request for Reconsideration 13-5
- Annex 15 - Resolution 2013.09.10.NG02 of the New gTLD Program Committee
- Annex 16 - Minutes of the Meeting of the New gTLD Program Committee on 10 September 2013, published on 30 September 2013
- Annex 17 - Booking.com's request for a Cooperative Engagement Process of 25 September 2013
- Annex 18 - Application status of the application for .PARTS on 26 February 2014
- Annex 19 - Application status of the application for .PARIS on 26 February 2014
- Annex 20 - Expert report showing that .hotels and .hoteis cannot be considered confusingly similar
- Annex 21 - Minutes of the Meeting of the Board Governance Committee on 1 August 2013, published on 5 November 2013
- Annex 22 - Memorandum from Booking.com re absence of risks in delegating both the .hotels and .hoteis gTLDs and benefits to ICANN's mission and purpose

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2. ICANN's Bylaws of 11 April 2013
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19. Applicant Update Webinar: Application Evaluation Progress of 6 September 2012 (recording), unofficial transcript of 00:48:10 to 00:48:57
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