

Our ref : fpe/mne/107646.0000001
Your ref :

Flip Petillion
Advocaat
+32 (0)2 282 40 82

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: didp@icann.org

DIDP Request

Dear Sir,

Pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), I hereby request on behalf of Booking.com B.V. the documents described below.

ICANN's Transparency Obligation and DIDP

The Articles of Incorporation establishing ICANN require that it act "through open and transparent processes," and ICANN's Bylaws further reinforce this by establishing that transparency is a core value that should guide the decisions and actions of ICANN. Articles of Incorporation, Art. 4; Bylaws, Art. I, Sec. 2 & Art. III, Sec. 1.

In accordance with this mandate to act transparently, ICANN's DIDP "is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public **unless there is a compelling reason for confidentiality.**" ICANN Documentary Information Disclosure Policy, <http://www.icann.org/en/about/transparency/didp> (emphasis added). ICANN's DIDP therefore provides that, upon request, ICANN must provide certain "information not already publicly available."

Relevant Background

Booking.com is the applicant for the new gTLD ".hotels" (Application ID 1-1016-75482). On February 26, 2013, ICANN informed the applicant's primary contact that "the applied-for string (.hotels) is visually similar[] to another applied-for string (.hoteis), creating a probability of user confusion." Based on this finding of similarity, ".hotels" and ".hoteis" were placed in a contention set.

ICANN has previously made public some information about the String Similarity Review. For instance, the Applicant Guidebook, Module 2, describes in general terms the process by

which the review was conducted, including the fact that the review was to be completed by a String Similarity Panel. However, the previously-published information is incomplete: at no time has ICANN published any information about **the actual standards to be used to determine if strings were confusingly similar**.

Information Requested

Accordingly, Booking.com respectfully requests 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, including but not limited to:

1. The report of the String Similarity Panel detailing its findings with regard to all strings deemed to be confusingly similar, and in particular the findings as they relate to the strings “.hotels” and “.hoteis”;
2. The report or reports of the String Similarity Panel detailing its findings with regard to any and all strings that were considered for inclusion in contention sets, and the analysis or reasons leading to the conclusion that they were sufficiently dissimilar;
3. Any report to the ICANN Board regarding the findings of the String Similarity Panel, and in particular any report relating to “.hotels” and “.hoteis”;
4. Any research reports, studies, surveys, polls, or similar material that were created to evaluate whether gTLD strings, and in particular the strings “.hotels” and “.hoteis”, were likely to create confusion;
5. Documentation of any algorithm created to evaluate similarity between gTLD strings;
6. Any instructions, work plan, scope of work description, or similar material created by ICANN or the String Similarity Panel that includes discussion of the standard to be used in evaluating string similarity or potential consumer confusion;
7. Any report describing the selection criteria and/or the composition for the String Similarity Panel.

The information requested herein is not publicly available, and is therefore a proper subject for a DIDP Request.

The information does not meet any of the defined conditions for nondisclosure:

- The information was not provided by or to a government or international organization.
- The information is not likely to compromise the integrity of ICANN’s deliberative or decision-making process. Booking.com is seeking only information and documents that relate to the establishment and implementation of a standard; whatever deliberations may have occurred, the end result—the established standard and its implementation—cannot be confidential. Because ICANN is required by its Articles of Incorporation and

Bylaws to “operate to the maximum extent feasible in an open and transparent manner,” including by “employing open and transparent policy development mechanisms,” and “making decisions by applying documented policies neutrally and objectively,” there can be no justification for refusing to publish the requested documents.

- The information is not likely to compromise the integrity of the deliberative or decision-making process between ICANN and its constituencies or other entities, for the same reasons as noted above.
- The information is unrelated to any personnel, medical, contractual, remuneration, or similar records.
- The information is not likely to impermissibly prejudice any parties commercial, financial, or competitive interests. Additionally, to the extent that any requested document contains such information, and the information is unrelated to the substance of the String Similarity Review (for example, any financial or contract information related to consulting services), such information can be redacted before the publication of the documents.
- The information is not confidential business information or internal policies or procedures.
- The information will not endanger the life, health, or safety of any individual nor prejudice the administration of justice.
- The information is not subject to attorney-client privilege.
- The information is not drafts of communications.
- The information is not related in any way to the security or stability of the Internet.
- The information is not trade secrets or financial information;
- The information request is reasonable, not excessive or overly burdensome, compliance is feasible, and there is no abuse.

Finally, to the extent any of the information does fall into one of the defined conditions for non-disclosure, ICANN should nonetheless disclose the information, as the public interest in disclosing the information outweighs any harm that might be caused by disclosure. Indeed, there can be no harm from disclosing the information, as the ICANN community is entitled to know the standards by which ICANN (together with any consultants) makes decisions that determine what new gTLDs will be added to the Internet. ICANN’s transparency obligation, described by ICANN’s own Bylaws and Articles of Incorporation, require publication of information related to the standard governing what strings are confusingly similar, and the process, facts, and analysis used to implement that standard.

Moreover, unless the requested information is published, the ICANN community will have no way to evaluate whether ICANN has met its obligations to act fairly, for the benefit of the community, and in accord with its own policies. Additionally, the Expert Panels adjudicating String Confusion Objections will not be able to fairly or consistently apply the standards. And future applicants will have no reliable guidance for determining if a string is confusingly similar to an existing string, which will result in significant waste of money and time in the submission of applications with no chance of success.

Conclusion

In short, because there is no “compelling reason for confidentiality” and numerous compelling reasons for publication, and because publication is required by ICANN’s own Bylaws and Articles of Incorporation, Booking.com urges the publication of the requested information, including in particular the specific documents described above.

Yours sincerely,



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