

**International Centre for Dispute Resolution New
gTLD String Confusion Panel**

RE: 0115 0003 3821

Commercial Connect LLC, OBJECTOR

vs

Amazon EU S.à r.l., APPLICANT String:

<.通販>

REPORT OF FINAL REVIEW PANEL

TO: International Centre for Dispute Resolution, Attn: Mr. Thomas Simotas, Supervisor

FROM: Judith Meyer, Esq., Robert O'Brien, Esq. and Stephen S. Strick, Esq. (the "Final Review Panel")

DATE: August 2015

Re: Report of the Final Review Panel Rendered in Accordance with *Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Expert Determinations* ("The Procedures") relating to the Expert Determination Issued on August 21, 2013 and Captioned Above (the "Expert Determination")

WE, the duly appointed undersigned members of the Final Review Panel hereby submit this Report of Final Determination of the Expert Determination.¹

¹ Under paragraphs 3 and 7 of the Procedures, the Final Review Panel was given the authority and tasked to evaluate and render a Final Determination on the Expert Determination pursuant to the NGPC Resolutions as defined in the paragraph 1 of the Procedures.

FINAL DETERMINATION:

The Expert Determination is REVERSED, replaced and superseded by the attached new Final Determination issued by this Final Review Panel.

BASIS AND RATIONALE OF THE FINAL DETERMINATION

The question before this Final Review Panel is whether the Expert Panel² could have reasonably come to the decision reached by it in connection with the underlying String Confusion Objection captioned above, through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN's New gTLD Program.³

After fully reviewing the record in this proceeding,⁴ we find that the Expert Panel could not have reasonably come to the decision it reached. In arriving at our conclusion, we find that the Objector in the underlying String Confusion Objection failed to meet its burden of proving that "通販" (the Japanese symbols for ". online shopping" so nearly resembles ".shop" as to cause probable confusion in the mind of the average, reasonable Internet user. The two strings indisputably have no visual or aural similarity. The two strings are in different languages, written in different scripts that look very different, and have

² The new gTLD program includes a dispute resolution procedure, 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." (See, Model 3 of the ICAAN gTLD Applicant Guidebook containing Objection Procedures and the *New gTLD Dispute Resolution Procedure*.)

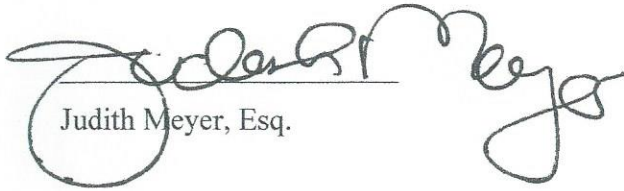
³ The applicable standard for review to be applied by the Expert in the underlying Expert Determination is whether the applied-for gTLD string is likely to result in string confusion. Under the terms of *the New gTLD Dispute Resolution Procedure* String confusion exists where a string so nearly resembles 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 find a likelihood of confusion.

⁴ Pursuant to paragraph 9(d) of the Procedures, the Final Review Panel reviewed the record in this proceeding and finalized it in our email to the ICDR on July 14, 2015. In that email, we confirmed that the record in this proceeding consists of the Objections, Response and Determination in the Commercial Connect, LLC vs Amazon EU S.a.r.l. matter as well as a consideration the Expert Determination in the Commercial Connect, LLC vs Top Level Domain Holdings Limited matter.

different phonetic spellings and pronunciations.

Although the two strings, .shop and <.通販>, have similar meanings or connotations, we conclude that such similarity is not so great that their co-existence on the Internet would be likely or probable to cause the average Internet user to be deceived or confused.

The Final Review Panel



Judith Meyer, Esq.

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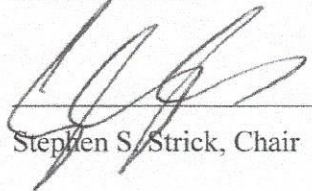
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International Centre for Dispute Resolution
New gTLD String Confusion Final Review Panel

RE: 0115 0003 3821

Commercial Connect LLC, OBJECTOR

vs

Amazon EU S.à r.l., APPLICANT String: <.通販>

FINAL REVIEW PANEL DETERMINATION

The Parties:

The Objector is Commercial Connect LLC, 1418 South 3rd Street, Louisville, Kentucky 40208 USA and is represented by Jeffrey S. Smith.

The Applicant is Amazon EU S.à r.l., 5 Rue Plaetis L-2338 Luxembourg, and is represented by Flip Petillion, Crowell & Moring, rue Joseph Stevens 7, Brussels 1000 Belgium.

The New gTLD String Objected To:

The new gTLD string applied for and objected to is: <.通販> based on alleged confusion with Objector's string ".shop."

Prevailing Party:

On August 21, 2013, the Expert Panel issued its Expert Determination with respect to the String Confusion Objection captioned above. Finding that the Objector had prevailed, the Expert Panel sustained the Objection and concluded that the Objector was the prevailing party.

However, the undersigned Final Review Panel, having been duly appointed,¹ and having reviewed the record and reported its findings to the ICDR in accordance with *Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Expert Determination*, has concluded that the Expert Panel could not have reasonably come to the decision reached by it in connection with the underlying String Confusion Objection captioned above, through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the

¹ See, June 24, 2015 letter from ICDR's Thomas Simotas to parties confirming the panel's appointment.

connection with the underlying String Confusion Objection captioned above, through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN's New gTLD Program.²

Consequently, the Expert Determination is **reversed, replaced and superseded** by the within Final Determination issued by this Final Review Panel.

Background:

Article 1(b) of the Module 3 of the ICANN gTLD Applicant Guidebook ("Guidebook") contains Objection Procedures and the New gTLD Dispute Resolution Procedure ("the Procedure") states that "[t]he new gTLD program includes a dispute resolution procedure, 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."

Section 3.1 of the Guidebook provides: "The independent dispute resolution process is designed to protect certain limited interests and rights. The process provides a path for objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts."

Article 3(a) of the Procedure states that "String Confusion Objections shall be administered by the International Centre for Dispute Resolution."

A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of the gTLD dispute resolution process. Similarly, an objector accepts the applicability of the gTLD dispute resolution process by filing its objection.

Article 4(b)(i) of the Procedure provides that the applicable Dispute Resolution Service Provider ("DRSP") Rules are the ICDR Supplementary Procedures for ICANN's New gTLD Program.

A formal objection can be filed on four enumerated grounds, only one of which is relevant here. Specifically, as expressed in the Guidebook, and the Procedure, one of the grounds expressed is "String Confusion." Article 2(e)(i) of the Procedure provides: "(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."

A 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

² The applicable standard for review to be applied by the Expert in the underlying Expert Determination is whether the applied-for gTLD string is likely to result in string confusion. Under the terms of *the New gTLD Dispute Resolution Procedure* 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 find a likelihood of confusion.

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 find a likelihood of confusion. (Guidebook, Section 3.4.1.)

Standing and Other Procedural Matters:

An Objector must satisfy standing requirements to have its objections considered. Standing requirements for objections on the grounds of string confusion require that the Objector be existing TLD operators or TLD applicants in the current round.

An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that the Objector currently operates.

Any gTLD applicant in the same 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. That is, an applicant does not have standing to object to another application with which it is already in a contention set.

Here, Objector has applied for the gTLD string <.shop>. Applicant has applied for the gTLD string <.通販(Online Shopping)> aka <.xn--gk3at1e (Online Shopping)>. Accordingly, Objector has standing to file this string confusion objection.

In the case where an existing TLD operator successfully asserts string confusion with an applicant, the application will be rejected.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD applicant is unsuccessful, the applicants may both move forward in the process without being considered in contention with one another.

Article 21(d) of the Procedure provides: “The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.”

The Parties' Positions:

Applicant asks that the Objection be denied because Objector allegedly did not properly serve the objection on Applicant in accord with applicable rules set out in the Procedure. However, Applicant acknowledges that it previously has been provided with a copy of Objector’s application for the <.shop> gTLD string, the Objector’s Demand for Arbitration and other materials.

Applicant's counsel also has submitted a detailed brief in support of its application, and the panel has reviewed and considered all of Applicant's submissions, arguments and contentions. Thus, it appears that Applicant received actual notice of the Objection, and has been accorded a full and fair opportunity to be heard on its application. Applicant also has not shown that it was prejudiced by any alleged defects in the filing of the Objection. As the procedures for String Confusion Objections were relatively new at the time when the Objection was made, in the absence of a showing of actual prejudice to the Applicant, the panel is of the view that the Objection should be evaluated on the merits. Consequently, Applicant's procedural objections are denied.

Objector asserts that confusing similarity exists because the Applicant's proposed string has a similar meaning to the Objector's string. The Objection further asserts that visual or aural similarity is not required, if the two strings have the same meaning, even if in different languages using different characters.

Applicant responds by contending that the objection should be denied because its application will promote innovation and competition among domain name registries. Applicant asserts that such competition advances the program's goals, to expand consumer choice in the gTLD space.

Applicant also asserts that the string it has applied for will not create confusion. Applicant argues that the strings have a different meaning, because the word "shop" means "commercial establishment" or "store" and is a noun, while "online shopping" refers either to an action of purchasing something online or to order something for delivery via mail.

Lastly, Applicant asserts that the likelihood of confusion is merely possible, not probable, because the two strings are in different languages and the characters used by the two languages for the two strings have no visual similarity.

Jurisdiction:

The Expert was properly appointed pursuant to the Procedure and the ICDR Supplementary Procedures, and had jurisdiction to decide this dispute. The Applicant accepted the applicability of the Procedure and the ICDR Supplementary Procedures by applying for a new gTLD pursuant to Article 1(d) of the Procedure. The Objector has likewise accepted the applicability of the Procedure and the ICDR Supplementary Procedures by filing an objection to a new gTLD pursuant to Article 1(d) of the Procedure.

As noted above, Section 3.5.1 of the Guidebook explains the string confusion standard as follows:

A DRSP panel hearing a string confusion case 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 find a likelihood of confusion.

Section 2.2.1.1 of the Guidebook refers to visual similarity. However, that provision explains that "[t]he visual similarity check that occurs during the Initial Evaluation is intended to augment the objection and dispute resolution process ... that addresses all types of similarity." Similarly, Section 2.2.1.1.3 of the Guidebook clarifies that a third party string confusion objection "is not limited to visual similarity"; rather, confusion "may be based on any type of similarity (including visual, aural, or similarity of meaning)."

Section 3.5 of the Guidebook states that "[t]he objector has the burden of proof." Section 3.5 further states that the panel "will use appropriate general principles (standards) to evaluate the merits of each objection" and "may also refer to other relevant rules of international law in connection with the standards."

The plain language of Section 3.5.1 makes clear that string confusion is a high standard. In addition to requiring "a likelihood of confusion," Section 3.5.1 emphasizes that "mere association" is insufficient, and that confusion must be "probable, not merely possible."

Section 3.5.1 also refers to "so nearly resembles," indicating that the resemblance between the two strings should be quite close.

Imposing a high standard for string confusion is consistent with the purpose of the new gTLD program. As explained in the Preamble of the Guidebook, "[t]he new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS" [Domain Name System]. While there are currently 22 gTLDs (as well as over 250 country code top-level domains), "[t]he new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market." To this end, ICANN did not limit the number of gTLD applications in the current application round, because this would "severely limit the anticipated benefits of the Program: innovation, choice, and competition." New gTLDs Applicant Guidebook April 2011 Discussion Draft Public Comment Summary and Analysis, page 5, <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv6-30may11-en.pdf> (hereafter "Draft Summary and Analysis").

The New gTLD Program expressly contemplates the establishment of new Internationalized Domain Names ("IDNs") that are written in a script other than the standard ASCII Roman characters and Arabic numbers. The Preamble of the Guidebook states that "ICANN expects a diverse set of applications for new gTLDs, *including IDNs*, creating significant potential for new uses and benefit to Internet users across the globe" (emphasis added). Consistent with this expectation, Section 1.3 of the Guidebook sets forth special requirements for Internationalized Domain Name applications String Confusion.

Findings On String Confusion Objection:

The Expert found that the Objector had met its burden of proving that Applicant's string (.通販) so nearly resembles ".shop" as to cause probable confusion in the mind of the average, reasonable Internet user. However, as noted, we find to the contrary. The two strings indisputably have no visual or aural similarity, are in different languages, written in different scripts that look very different, and have different phonetic spellings and pronunciations.

The only sense in which ".shop" and (.通販) are similar is their meaning. However, this similarity in meaning is apparent only to individuals who read and understand both Japanese and English. Moreover, a person who can read both languages would understand that ".shop" is directed at English-speaking users, while (.通販) is directed at Japanese-speaking users. While there is some potential overlap between these two markets, they are largely distinct. Therefore, there is little likelihood that a bilingual user would be deceived or confused.

Furthermore, as noted above, the New gTLD Program expressly contemplated the creation of new Internationalized Domain Names written in non-Roman scripts. If similarity in meaning between gTLDs written in two different scripts were deemed sufficient, by itself, to result in confusing similarity, then all Internationalized Domain Name applications with the same meaning would need to be put in the same contention set with each other and with any Roman gTLD applications with the same meaning. This would mean that only one application in any script could be registered, which would conflict with the basic purpose of encouraging "a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe." (Preamble to the Guidebook.)

For the above reasons, this Final Review Panel concludes that (.通販) and ".shop" are not confusingly similar to the average, reasonable Internet user under the standard set forth in the Procedure and the Guidebook. We note, that under Section 2.2.1.1.3 of the Guidebook, a third party string confusion objection "is not limited to visual similarity," but "may be based on any type of similarity (including visual, aural, or similarity of meaning)".

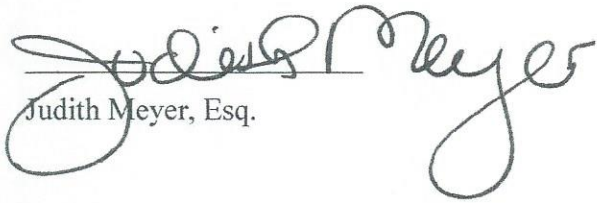
Other Issues:

The Objector has alleged that ICANN agreed to give it preferential treatment as the initial applicant for the ".shop" gTLD. The Objector has not argued, however, that this alleged preference has any bearing on the merits of its Objection. In any event, we find that the Objector's alleged discussions with ICANN are irrelevant to the determination in this case. Whether the Objection has merit depends on whether it meets the criteria set forth in the Procedure and the Guidebook. Moreover, ICANN has stated that "[t]here should be a level playing field for the introduction of new gTLDs, with no privileged treatment for potential applicants." New gTLD Draft Applicant Guidebook Version 4 Public Comment Summary and Analysis, page 90, http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov_10-en.pdf.

For the forgoing reasons, this Final Review Panel reverses the Expert Determination and finds that the Applicant has prevailed and the Objection is dismissed.

DATE: August 18, 2015

The Final Review Panel



Judith Meyer, Esq.

Robert O'Brien

Stephen S. Strick, Chair

For the forgoing reasons, this Final Review Panel reverses the Expert Determination and finds that the Applicant has prevailed and the Objection is dismissed.

DATE: August 18, 2015

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Judith Meyer, Esq.

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Robert O'Brien

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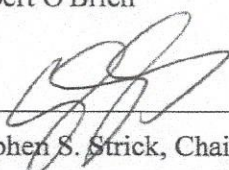
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