

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case Number: 01-15-0003-3822

VeriSign, Inc., Objector

-and-

United TLD Holdco Ltd., Applicant

REPORT OF THE FINAL REVIEW PANEL

Final Review Panel:

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Table of Abbreviations

SCO	String Confusion Objection
OEP	Original Expert Panel
OPED	Original Expert Panel Determination
FRP	Final Review Panel
RSCO	Related String Confusion Objection (WebConnect and dot Agency)
EPD	Expert Panel Determination in RSCO Cases
ICDR	International Centre for Dispute Resolution
AGB	Applicant Guidebook
Applicant	United TLD Holdco, Ltd.
Objector	VeriSign, Inc.
gTLD	generic Top Level Domain
NGPC	ICANN New gTLD Program Committee
BGC	ICANN Board Governance Committee
Objection	VeriSign, Inc. v. United TLD Holdco, Ltd., String Confusion Objection to .CAM string, dated 13 March 2013
Response	Response dated 24 May 2013 of United TLD Holdco, Ltd. to the Objection

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I. Introduction

The Final Review Panel (“FRP”) issues this Report pursuant to the International Centre for Dispute Resolution’s (“ICDR”) *Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Objection Expert Determinations* (“Final Review Procedures.”) The Final Review Procedures implement the 2014 decision of the Internet Corporation for Names and Numbers (“ICANN”) to create a new final review mechanism in relation to its New gTLD Program.

At issue before the FRP is a String Confusion Objection (“SCO”) lodged by VeriSign, Inc. (“Objector”), against the application of United TLD Holdco Ltd. (“Applicant”) to register .CAM as a new gTLD. For the reasons stated below, the FRP has determined to reverse the Original Expert Panel’s Determination (“OEPD”), which upheld the SCO. The FRP concurrently is issuing a New Final Determination on the SCO.

II. Background

A. Parties

1. Objector, a Delaware Corporation, is the existing operator of the “.COM” generic Top Level Domain or gTLD.¹ The .COM gTLD was established in 1985 and was one of six original gTLDs. Today, it has over 100 million registered names and is the largest and best known of all gTLDs. Objector operates the .COM gTLD as an “open registry,” i.e., one that is globally available to all registrants.² It is uncontested that Objector has operated the .COM registry with an excellent record of security and stability for more than 20 years.
2. Applicant United TLD Holdco, Ltd. (“Applicant”) is incorporated in the Cayman Islands. It has applied to register .CAM as a gTLD pursuant to ICANN’s New gTLD Program. Applicant has stated its intention to operate .CAM as an open registry.

B. ICANN’s New gTLD Program

1. In 2011, after several years of policy development work, ICANN’s board took action to create a New gTLD Program which would provide an application and evaluation process for the purpose of significantly increasing the number of registered gTLD’s available to

¹ Generic Top Level Domains (“gTLDs”) are the string of letters following the rightmost dot in domain names.

² Restricted gTLDs (versus open gTLD’s) are those that require registrants to meet certain defined criteria to register a domain name within their registry.

the public. The Preamble to ICANN's New gTLD Applicant Guidebook ("AGB"), first issued in 2011, noted that:

"New gTLDs have been in the forefront of ICANN's agenda since its creation. The 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 [Domain Name System]."

2. ICANN's Board delegated authority to its New gTLD Program Committee ("NGPC") to manage "any and all issues that may arise relating to the New gTLD Program," including the administration of applications to register New gTLDs. The AGB is a detailed handbook, which sets out policies and procedures to guide applicants seeking to register new gTLDs.

C. String Similarity

1. ICANN Initial Evaluation

Applying procedures set out in Module 2, Section 2 of the AGB, ICANN conducts an Initial Evaluation of all applied-for gTLD's for several potential issues. Included in the Initial Evaluation is a review to test "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion." This "String Similarity Review" "involves cross-checking between each applied-for string and the lists of existing gTLD strings and Reserved Names to determine whether two strings are so similar to one another that they create a probability of user confusion." The String Similarity Review is informed in part by application of ICANN's "SWORD" algorithm, which scores applied-for strings against other existing and applied-for TLDs and reserved names. SWORD scores increase with the algorithm's prediction of increasing likelihood of visual confusion between two strings.

2. Standard For String Confusion

The standard of review for String Confusion is set forth in *AGB* 3.5.1:

"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."

3. The String Confusion Objection (“SCO”) Process

- a. An application that passes the String Similarity Review is still subject to a string confusion objection by an existing gTLD operator or by another gTLD applicant. While the standard to determine string confusion ICANN applies during its Initial Evaluation of new gTLD strings is limited to visual similarity, a string confusion objection lodged by an existing TLD operator or by another gTLD applicant may argue any type of similarity, including visual, aural or similarity of meaning. See *AGB, Module 2, Section 2*.
- b. The Objector bears the burden of proof in each case. *AGB 3.5*. ICANN has elaborated the burden of proof with guidance stating that there is “a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD....” See Comment Summary and Analysis to AGB v3 at 67 (Feb. 15, 2010), <https://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>
- c. The AGB provides for all objections to be referred to a “Panel of Experts,” which issues an Expert Determination resolving the objection. The ICDR administers the SCO resolution process pursuant to its *Supplementary Procedures for ICANN’s New gTLD Program*, effective 8 May 2012. In the case of SCOs, the “Panel of Experts” is comprised of one Expert. *AGB, Attachment to Module 3: New gTLD Dispute Resolution Procedure*.

D. Applications for .CAM as a New gTLD

1. The Applications

ICANN received three applications to register .CAM as a gTLD. Applicant applied to register .CAM as an open gTLD. AC Webconnecting Holding B.V. applied to register .CAM as a restricted registry, limited to camera-related uses. Dot Agency Limited applied to register .CAM to the “niche” market of camera users.³ The Expert Determinations on the AC Webconnecting and Dot Agency gTLD applications are referred to herein and in the Final Review Procedures as the “Related SCO Expert Panel Determinations” or “RSCO EPDs.”

³ The FRP has not had access to the pleadings and evidence filed in the RSCOs and is relying solely on the RSCO EPDs in characterizing the two applications at issue there as providing for a restricted registry or niche marketing.

2. Objections to the Applications for .CAM

The Objector filed objections to all three applications for the .CAM string.⁴ Each Applicant filed a response.⁵ Based on the FRP's review of the Related SCO Expert Determinations, it appears that Objector relied on substantially the same arguments and the same expert evidence in all three objections.

3. The Original Expert Panel Determination

On August 12, 2013, the OEP issued its Expert Determination sustaining the objection. The OEP's reasoning is described in further detail below.

4. The Related SCO Expert Determinations

On August 13, 2013, the Sole Expert Panelist in the RSCO cases on .CAM issued separate Expert Determinations, in both cases dismissing VeriSign's objection. The Sole Expert Panelist's reasoning in the two RSCOs is described below to the extent relevant to this decision.

E. ICANN's Determination to Create a New Review Mechanism

1. In October 2013, ICANN's Board Governance Committee ("BGC") issued a ruling on a reconsideration request in a string confusion objection, unrelated to the SCO at issue here, that also involved two different Expert Panels which had reached different conclusions on "potentially similar objections." The BGC recommended that ICANN's staff provide a report to the NGPC setting out options for dealing with the situation of differing outcomes in similar SCO disputes. *Recommendation of the Board Governance Committee on Reconsideration Request 13-9 (10 October 2013) at <https://www.icann.org/en/system/files/files/recommendation-amazon-10oct13-en.pdf>*
2. In October 2014, the NGPC, having considered the staff report prepared in response to the BGC's recommendation and public comments on a potential review mechanism, took action "to address certain perceived inconsistent or otherwise unreasonable SCO Expert Determinations" which it identified "as not in the best interest of the New gTLD Program and the Internet community." The NGPC directed ICANN's President and CEO to take all steps necessary for the ICDR to provide supplemental rules and create a

⁴ See, e.g., *VeriSign, Inc. v. United TLD Holdco Ltd.*, String Confusion Objection to .CAM String, dated 13 March 2013 ("Objection").

⁵ See, e.g., *Response of United TLD Holdco, Ltd.*, dated 24 May 2013 ("Response").

Review Panel (“the Final Review Panel”) to determine “whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN’s New gTLD Program”<https://www.icann.org/resources/boardmaterial/resolution-ns-new-gtld-2014-10-12-en#2.b> (“the NGPC Resolution”).

3. The NGPC limited application of the new Final Review Panel procedure to only the .CAR/.CARS and .CAM/.COM disputes.⁶ Significantly, the NGPC did not designate for review each of the Expert Panel Determinations relating to the gTLDs disputes at issue. Rather, in each case, the NGPC specifically identified one of the SCO Expert Determinations in each set as “perceived inconsistent or otherwise unreasonable” and “as not in the best interest of the New gTLD Program and the Internet community.” Only the SCO Expert Determinations so-identified were submitted to the new Final Review Panel procedure.
4. It follows that in ICANN’s organization of the new Final Review Panel procedure, the NGPC identified the Expert Panel Determination at issue here “as not in the best interest of the New gTLD Program and the Internet Community.” Thus, the NGPC implicitly endorsed the determinations in the RSCO .CAM cases, both of which were made by a single Expert Panelist different from the OEP.

F. The Final Review Procedures

1. The NGPC provided the ICDR with detailed standards for the organization and operation of the new Final Review Panel procedure. The NGPC standards were incorporated in the ICDR’s Final Review Procedures.
2. The Standard of Review provided in Article 10 of the Final Review Procedures is the same as that set out in the NGPC Resolution:

“Whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN’s New gTLD Program.”

⁶ The NGPC determined not to extend the Final Review Panel mechanism to any other applications in the initial gTLD round, but stated that it might consider establishing such a mechanism to apply more broadly in future rounds.

3. Article 11 (c) of the Final Review Procedures provides that the possible outcomes of the FRP's Final Determination are:
 - a. Adopt the underlying SCO Expert Determination as the Final Determination; or
 - b. Reverse the underlying SCO Expert Determination and draft a new Final Determination that shall replace and supersede the underlying SCO Expert Determination.
4. Article 9 of the Final Review Procedures defines the matter to be included in the Record for Final Review.
5. Article 6 of the Final Review Procedures provides that the Final Review Panel shall include at least one panel member, and, if possible, other members who have familiarity with ICANN or the Domain Name System.

III. The Record for Final Review

- A. The ICDR initially had posted to the Record for Final Review the pleadings and supporting evidence submitted in the RSCO Expert Determinations ("the Related SCO Records"), but withdrew them upon receipt of an objection from the Applicant who contended that Article 9 (a) of the Final Review Procedures required that only the RSCO EPDs and not the Related SCO Records be included in the Record for Final Review.
- B. On July 4, 2015, the FRP issued an Order pursuant to Article 9 (d) of the Final Review Procedures that the Related SCO Records should be included in the Record. Exclusion of the Related SCO Records foreclosed the FRP from any review based on differences in the record before the three Expert Panels that considered the .CAM/.COM objection. The FRP also believed it would be helpful to have access to the pleadings and the expert reports submitted in the RSCOs. The FRP interpreted Article 9 (a) of the Final Review Procedures as precluding the parties from submitting briefs or other new evidence to the FRP, but not as limiting the FRP's access to materials already in the record of the Related SCO objections.
- C. Subsequent to the July 4 Order, the ICDR advised the FRP of ICANN's position that the Related SCO Records were not to be included in the Record and requested that the July 4 Order be modified to finalize the Record without the Related SCO Records.

- D. After due deliberation, the FRP determined to defer to ICANN’s interpretation of the Final Review Procedures.⁷ Accordingly, on July 23, 2015, the FRP issued a Revised Order Finalizing the Record which modified the July 4 Order finalizing the Record to contain only the following materials:
- The OEPD
 - The pleadings and supporting evidence that were before the OEP
 - The two RSCO EPDs, without supporting evidence

IV. The Original Expert Panel’s Determination

A. The OEP’s Determination

The OEP held that:

“The gTLD[s] “CAM” and “COM” are confusingly similar and the use of “CAM” will likely result in string confusion. Objector has met its burden to prove that “CAM” so nearly resembles “COM” that it is probable that confusion will arise in the mind of the average, reasonable Internet user.”

The OEP based this conclusion on the following:

1. Contemporary Internet Usage

Objector contended that the “relevant class of users here consists of casual Internet users, likely to exercise a low degree of care when exposed to or interacting with TLDs, increasing the likelihood of confusion.” Objection at 7. Applicant countered that “today the average Internet user is sophisticated enough to make determinations about the origin of a website based on its content, rather than its domain name.” Response at 8.

The OEP found that Applicant had an “overly optimistic picture of the general audience of Internet users and their willingness to pay attention to technicalities of sorting out roots of top level domain names” and that Applicant also was “overly optimistic about their focused attention to online tasks.”

2. Expert Linguistic Evidence

- a. Objector provided the Affidavit of Gail Stygall (“Stygall”) to bolster its argument that .CAM is likely to be confused with .COM. Stygall is a Professor at the University of Washington in Seattle and an English language linguist. Stygall presented a

⁷ The FRP nonetheless urges that, to the extent ICANN determines to establish a similar final review mechanism in subsequent rounds of the New gTLD Program, it consider including the full record of related SCOs in the record before future Final Review Panels.

diagram of the mouth to show that the vowel sounds in “CAM” and “COM” are both formed in the lower third of the mouth. Stygall went on to discuss selected dictionary meanings of “CAM” and “COM,” noting “they both can have something to do with computers.” Stygall then concluded that the linguistic similarities between “CAM” and “COM” suggest that “Internet users who encounter domain names with .CAM are likely to be confused.”

- b. Applicant supplied the OEP with the Rebuttal Affidavit of Sandra Ferrari Disner, PhD (“Disner”), an Assistant Professor of Linguistics at the University of Southern California in Los Angeles. In her lengthy rebuttal, Disner gave a detailed analysis of (a) the lack of confusion between the vowels of “CAM” and “COM” in published psycholinguistic studies; (b) the distinctly different acoustic characteristics of these vowels; (c) the distinctly different articulatory characteristics of these vowels; (d) dialectic characteristics that heighten the distinction between these words; (e) the somewhat different initial consonants of “CAM” and “COM”; (f) the greater psycholinguistic prominence of sounds at the beginning of a word than sounds at the end; (g) the regularizing effect of spelling rules on the pronunciation of “CAM” and “COM” syllables, even in foreign borrowings; (h) the meaningfulness of “CAM”; and (i) the semantic differentiation of “CAM” and “COM.”
- c. The OEP concluded that the Disner Affidavit did not overcome the Stygall contention that the “o” and “a” sounds are made in the same part of the mouth. The OEP also found that Applicant had not shown that most people take “CAM” as short for camera. The OEP also criticized one of the Disner references because it pertained primarily to American English.

3. Expert Survey Evidence

- a. Objector submitted a survey designed, supervised, and implemented by Hal L. Poret of ORC International in New York (*Report on Survey to Measure Whether the gTLD .CAM is Confusingly Similar to the gTLD .COM*, March 2013, Objection, Annex 3 (the “Poret Survey”). The *Poret Survey* involved 400 American Internet consumers and an additional 400 consumers in two “control” groups of 200 consumers each. The survey purports to find “a net confusion level of 39% that must be attributed to the similarity of the TLDs .CAM and .COM.” (*Poret Survey* at 1.) Objector also submitted and relied upon the *Poret Survey* in each of the RSCOs.

- b. Applicant submitted a critique of the *Poret Survey (Review of a Survey Conducted by Mr. Hal Poret Concerning the Possible Confusion between Proposed “.CAM” Top Level Domain Name with “.COM” TLD*, Response, Annex 4 (the “*Ostberg Critique*”), and an alternative survey (*Survey to Determine Likelihood of Confusion (if any) between the “.COM” and “.CAM” Top Level Domain Names*, (the “*Ostberg Survey*”), by Henry D. Ostberg of The Admar Group, Inc. in Alpine, New Jersey, Response, Annex 5.
- c. The OEP found the *Poret Survey* result convincing and appears to have relied on it heavily in reaching its conclusion sustaining the objection. (OEPD at 6.) The OEP found that the Ostberg survey was “not persuasive.” The OEP stated:

“Applicant relies on the Ostberg Report to rebut the Poret survey, but the Ostberg Report is deficient on several fronts.”

“Ostberg’s rebuttal may only slightly lower the weight accorded an otherwise good piece of evidence that shows probability of confusion.”

“Dr. Ostberg’s survey of 440 average Internet users that led to the conclusion that there is no likelihood of confusion, seems to compare ‘apples with oranges’ and is less convincing than the Poret survey. It is not a strong rebuttal [to Poret].”

OEPD at 6.

4. Length of the Strings

Objector argued that there was an important “similarity of appearance” between the two strings because each included only three letters, and each begins with “c” and ends with “m.” Objection at 8. Applicant responded that the short length of the strings weighs against a finding of visual similarity, because small differences may frequently lead in short words to a different overall impression. Response at 3.

The OEP relied on the short length of the strings and reached its own conclusion as to their visual similarity:

“While one out of 3 letters is indeed only 33 1/3% of the word, Applicant did not adequately discuss how visually close the letters in question, “o” and “a” are. These letters

do not look entirely different such as e.g., “y” and “F”, or “x” and “T”. While this is true in general, it is especially so to a fast reader. No matter what standards and purpose the ICANN SWORD algorithm includes, it has comparative value. ...Since pairs such as “God” and “dog” (85%) reach similarity scores of 84% and higher, how much more similar would “cxm” and “cxm” be (x being replaced with a vowel)!” *OEPD at 5.*

5. Marketing Channels

- a. Citing trademark law, Objector contended that convergent marketing channels increase the likelihood of confusion and it follows that registration of the .CAM string as an “open, accessible namespace” will “significantly increase the likelihood of confusion.” Objection at 7. Applicant responded that the marketing channels for .CAM and .COM were “irrelevant” because the fact that both parties will appear on the Internet will shed little, if any, light on whether confusion is likely. Applicant also argued that although it intends to operate .CAM as an open gTLD, it will likely appeal to groups interested in “a live feed from a web camera.”
- b. The OEP found that .COM and .CAM would use the same marketing channels, comprised of the entire Internet, since Objector operates the .COM gTLD as an open registry and Applicant proposes to operate .CAM on the same basis. The OEP noted that courts evaluating claims of trademark infringement “find that goods marketed in similar channels of trade are more likely to be confused.” The OEP found confusion more likely here because both parties would use “the same channels appealing to a broad audience” and “this would lead to extensive overlap.” *OPED at 7.*

B. The Related SCO Expert Panel Determinations

The principal conclusions in the Related SCO Expert Determinations were:

1. The very reputation of the .COM name limits the potential for confusion.
2. While there are “considerable” visual and aural similarities between .COM and .CAM, it does not follow that confusion would result. Objector’s survey evidence does not form a sufficient foundation for a conclusion that the average, reasonable Internet user would be confused by the string .CAM or be inclined to think that there is some association with the .COM string.

3. The evidence of Objector's linguistics expert was not persuasive that the similarity of sound of the two terms would lead to confusion amongst consumers.
4. The RSCO Expert Panel also found that the survey evidence submitted in opposition to the Poret Survey was more persuasive:

“I prefer the survey conducted by Dr. Wright which is more pertinent to the question at hand and belies the danger raised in the report of Mr. Poret in the context of a global Internet. The Wright survey was broader both in terms of respondents and in terms of countries surveyed.” RSCO EPD (AC Webconnecting) at 8.

“The Poret Survey tendered by VeriSign is limited in its reach. It does not form a sufficient foundation for a conclusion that the average Internet user would be confused by the string .CAM or be inclined to think that there is some association with the .COM string.” ... “I accept much of the critique of the Poret Survey as detailed in the rebuttal report of Michael Barone.” RSCO EPD (dot Agency) at 7-8.

V. Analysis

A. Issue To Be Determined

As provided in the NGPC Resolution and the Final Review Procedures, the sole issue before the Final Review Panel is:

“Whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN's New gTLD program.”

B. Scope of Review

The FRP has before it the same record that was available to the OEP. As such, the FRP is in a position to review the OEP's analysis and determination on a plenary basis and to reach an independent conclusion as to whether the applied-for gTLD string is “likely to result in string confusion.”

C. Summary

1. The FRP's Principal Findings

The FRP finds that the OEP erred primarily in its conclusions regarding the knowledge and experience of the average, reasonable Internet user. The FRP also had a different assessment of the expert evidence offered by the parties. We disagree as well with the OEP's conclusion that confusion is likely to arise from any combination of "c" and "m" with a vowel in between. The FRP's disagreement with these cornerstones of the OEP's analysis substantially informs the FRP's conclusion that the OEP could not reasonably have come to the decision reached on the underlying SCO through an appropriate application of the standard of review.

2. The FRP's Finding in Regard to Marketing Channels

The FRP agrees in part with the OEP's analysis regarding overlapping marketing channels. The FRP finds that Applicant's intention to operate the .CAM TLD as an open registry weighs in favor of the objection. The FRP takes note that the RSCOs both involved a limited registry or niche-marketed registry related to cameras. The FRP finds that there is a greater chance for confusion if the ultimate delegation of the new string .CAM is not restricted to camera-related uses, and is allowed to be operated as an open gTLD, as in the .COM gTLD. We find this factor important, but not sufficient, standing alone, to uphold the OEP's determination.

D. Discussion

1. Contemporary Internet Usage

- a. The FRP disagrees with the OEP's view regarding the knowledge and experience level of the average, reasonable Internet user.⁸ The FRP believes that more than four decades after the inception of the Internet, in an era where many Internet users are "digital natives," the average, reasonable Internet user is well-aware of the importance of precision in Internet searches and, in particular, that a difference of one letter in a domain name likely will lead to a destination other than the one intended or an error.

⁸ While acknowledging Applicant and Objector's agreement that confusion is to be measured in reference to the average, reasonable Internet *user*, the OEP nonetheless appears to have given some weight to potential confusion of *registrants* of domain names. OEPD at 7. Moreover, the OEP appears to have erred by reversing the burden of proof, noting that *Applicant* "had failed to disprove" potential registrant confusion. The FRP finds that registrant confusion is unlikely and, in any event, the possibility of registrant confusion is not relevant to the stated standard, which refers to the average, reasonable Internet user.

- b. The average, reasonable Internet user is likely to have experienced the impact of small errors by arriving at a landing page other than the one intended, or through ubiquitous search engine prompts such as “showing results for...” or “did you mean...” The OEP’s conclusion that “Google and other search engines would have to develop a gigantic algorithm to correct psychologically or otherwise induced confusion among its users” is at odds with the actual existence of such prompts and their effectiveness. Applicant submitted evidence that 92% of adult Internet users employ search engines to find information on the Internet.
- c. Based on the average, reasonable Internet user’s experience and the importance of search engines, in the FRP’s view, confusion, if any, between .COM and .CAM is highly likely to be fleeting. While a fleeting association may create some “possibility of confusion” or evoke an “association in the sense that the string brings another string to mind,” both such reactions are insufficient under the ICANN SCO standard to support a finding that confusion is probable.

2. Linguistic Evidence

- a. The FRP found Applicant’s evidence rebutting Stygall convincing, much as the RSCO EP found in the two RSCOs. Specifically, the FRP notes Disner’s use of a well-known experiment by Peterson and Barney to demonstrate that the vowel sounds in “CAM” and “.COM” are confused only .02% of the time. Disner states that even her phone persona Siri recognizes the difference in sound. Disner refers to diagrams showing different tongue positions in the pronunciation of “CAM” and “.COM.”
- b. Disner also effectively rebuts the notion held by Stygall and Walsh (another Objector Affiant) that “CAM” and “COM” are mere sequences of letters, devoid of meaning. Disner offers various meanings of “cam,” concluding that an Internet user is far more likely to associate “CAM” with a camera than a computer, dispelling Stygall’s semantic comparison. Disner specifically references the Corpus of Contemporary American English (“COCA”), in which “CAM” appears 3150 times. She notes that, of those 3150 mentions, 46% of them are related to photography/cameras, with 31% referring to proper names.
- c. The FRP finds Professor Disner’s evidence on the issue of whether .CAM is associated with a particular meaning to be

convincing. Moreover, the OEP appears to have improperly shifted the burden of proof to the Applicant in respect to the meaning of .CAM, finding that Applicant “never showed” that .CAM might be taken to designate camera-related uses. The FRP finds that the letters “CAM” already are associated substantially with camera-related uses, as terms such as nanny-cam, mini-cam and camcorder have entered the lexicon. These associations have the potential to dispel any confusion between .COM and .CAM in the mind of the average, reasonable Internet user. Moreover, the association of the .CAM gTLD string with camera-related usages is likely to grow over time, as the average, reasonable Internet user becomes aware of the New gTLD program in general and potentially encounters camera-related sites that use the .CAM gTLD.

- d. The OEP also criticizes one of the Disner references because it pertains primarily to the American English, and at the same time ignores that fact that the Stygall Affidavit is devoid of any mention of different dialects, or of non-English Internet users.

3. Survey Evidence

- a. In his criticism of the *Poret Survey*, Ostberg focused on the undue length of the second level domain names used for the critical portion of the survey, noting that they “involved three full words” and that the use of such lengthy second level domain names might *overshadow* and might *distract* the focus from the TLDs that came after them.” (*Ostberg Critique* at 8,11, emphasis in original.)
- b. The FRP’s own review of the *Poret Survey*’s methodology finds it unfairly skewed to produce results supportive of Objector’s position. The FRP agrees with Ostberg that the survey’s choice of unnaturally long second level domain names to pair with the gTLDs being tested for confusion is a significant flaw in the survey design. Specifically, the *Poret Survey* showed the subjects, at different times, the following domain names:

www.snapshotphotovideo.com
www.snapshotphotovideo.cam

and after the second viewing asked them to state whether the domain name then shown was the same as, or different from, one of the domain names they had seen earlier. The use of such a long second level domain name (the portion to the left of the dot), combining three separate words, appears highly likely to distort the results in favor of confusion. First, the undue length of the second level domain name, longer than Internet users typically encounter, attracts more than normal attention and focus on the material to the left of the gTLD. Second, the need to parse the three words to determine the similarity of the second level domain name requires more focus on that material. Taken together, these factors appear to have given the survey subject an unnaturally short time to evaluate the similarity of the gTLDs. This likely tended to foster mistakes, guessing and wrong answers and support a misleading survey result of confusion.

- c. The FRP also finds problematic the *Poret Survey*'s initial choice of sample domain names to introduce the subject matter of the survey. At the start of the online survey, the subjects were provided with the following introduction to domain names:

“A domain name is the address of a specific website. The following are examples of five different domain names:

www.movies.com
www.autoinsurance.com
www.autoinsurance.net
www.socialsecurity.gov
www.literature.org”

All of the sample gTLDs chosen have been in use for many years and are quite familiar to all Internet users. This gives the subjects no inkling that new and unfamiliar gTLDs may be encountered later in the survey and increases the chances that the subjects will overlook them when they appear, or assume they are the gTLDs with which they are most familiar. An unbiased survey concerning new gTLDs should have introduced the concept of new gTLDs early on by using some unfamiliar gTLDs in the initial examples and mentioning that new gTLDs are on the way and Internet users will have to get used to encountering them. This would have much better simulated the way users will be encountering the new gTLDs in actual experience. As more and more new gTLDs are rolled out there will undoubtedly be significant publicity and “buzz” about their presence so

that typical Internet users will be cognizant that they may be encountered.

- d. The distortion flowing from the unnaturally long and unnaturally constructed test second level domain names, and the introductory use of familiar gTLDs to the exclusion of new ones, should not have been lost on an experienced survey designer such as Mr. Poret. He has “personally designed, supervised, and implemented over 450 consumer surveys concerning consumer perception, opinion, and behavior.” (*Poret Survey* at 2.)

- e. The FRP also agrees with Ostberg’s criticism of the *Poret Survey*’s failure to explicitly instruct the subjects “not to guess when answering and to feel free to give a “don’t know” response where appropriate.” (*Ostberg Critique* at 8.) Although the *Poret Survey* included a “don’t know” choice for subjects, no effort was made to assure them that “don’t know” was an acceptable choice they should feel free to use and that they should not guess. As Ostberg points out, citing the *Reference Manual on Scientific Evidence*, prepared by the Federal Judicial Center as a guide to judges evaluating the validity of a survey, it is not sufficient merely to give a “don’t know” choice. “Many respondents require assurance that a ‘don’t know’ response answer is acceptable, where appropriate, before they are willing to give such an answer.” (*Ostberg Critique* at 12.) Poret, in fact, has elsewhere stated, “It is well-settled that trademark survey instructions and questions should . . . instruct respondents not to guess and that they are free to answer ‘don’t know’ if they have no opinion. Surveys that do not comply with th[is] criteri[on] have been viewed with less reliability by the courts and TTAB. H. Poret, PLI Course Handbook, *Advanced Seminar on Trademark Law 2009*, Hot Topics in Trademark Surveys, at 8-9, available online at http://www.pli.edu/emktg/all_star/Trademark_Surveys21.DOC. To correct for this issue, the Ostberg Survey explicitly advised subjects, “We don’t want you to guess when giving an answer. If you ‘don’t know’ or ‘don’t recall,’ please indicate this as your answer.” This correction adds to the reliability of the *Ostberg Survey* in the FRP’s view.

- f. Ostberg also criticizes the *Poret Survey* for relying only on visual observation of the domain names being surveyed. He notes that, “Respondents could react hastily, doing so without the thought or the effort involved when someone accesses a website on the internet.” (*Ostberg Critique* at 13.) To simulate the experience an actual Internet user would have, and reflect what occurs in the marketplace, the *Ostberg Survey* asked the subjects to type the .CAM domain name into the computer before responding to the question concerning whether this domain name was included in the group of domain names shown to the subject previously. In the Panel’s view, requiring this typing step does better simulate actual market conditions than the *Poret Survey*’s reliance on visual observation alone. It lends further credence to the *Ostberg Survey* over the *Poret Survey* results.

- g. Because the underlying submissions from Dr. Wright and Prof. Barone in the RSCOs were not part of the record in this proceeding and not available to the FRP, the FRP cannot fully evaluate their criticism of the *Poret Survey*. It has to suffice to say that the RSCO EP found in both its determinations that the rebuttal experts persuasively countered the *Poret Survey*.

- h. The FRP finds the OEP’s determination to credit the *Poret Survey* result and reject the *Ostberg Survey* result to be outside the range of reasonable views of the survey evidence that an expert could reach. The FRP can discern no basis for the OEP’s comment that the Ostberg survey compares “apples with oranges.” The FRP concludes that the *Ostberg Survey* is better designed to test for possible confusion between .COM and .CAM than the *Poret Survey* and its conclusion that confusion is unlikely is entitled to significantly more weight than Poret’s conclusion that confusion is probable.

4. Length of the String and Impact of Second Level Domain Names

- a. The FRP does not concur with the OEP’s conclusion that any three letter string beginning with “c” and ending with “m”, with a vowel in between, is likely to be confusing. *OEPD* at 5. The OEP observes that the ICANN SWORD algorithm score of visual similarity on the pair “God” and “dog” is

85%,” and finds that any combination of “c” and “m” with a vowel in between must be “much more similar.” This ignores that the actual SWORD algorithm score ICANN obtained in its initial evaluation of the proposed .CAM gTLD was 63%. Applicant in the dot Agency RSCO contended that ICANN already has registered more than 790 gTLD’s with higher SWORD scores than .CAM. RSCO EPD (dot Agency) at 6. On that basis, it would appear that strings with relatively high levels of visual similarity, as measured by the SWORD algorithm, can coexist on the Internet without causing unacceptable levels of confusion.

- b. The FRP also finds persuasive the European Union Trade Mark Office guidance that the shorter a name, the more easily the public is able to perceive all its single elements and that small differences in short words may frequently lead to a different overall impression. Response at Annex 1, p. 35. The FRP finds that the short length of a gTLD string, coupled with the average, reasonable Internet user’s general awareness of the importance of precision in web searches, are substantial factors in dispelling possible confusion between .COM and .CAM.
- c. The OEP notes evidence that Internet users focus primarily on the second level domain name, but concludes, “this will increase, not decrease the potential for confusion.” OEPD at 7. The FRP disagrees. The FRP finds that the average, reasonable Internet user almost always will see the gTLD in combination with a second level domain name. The second level domain name, by adding further identifying information, should act to mitigate, not increase, string confusion. To the extent that the second level domain name increases confusion by being confusingly similar to another second level domain name, injured parties will have recourse to ICANN’s accessible, streamlined UDRP process.

5. Marketing Channels

The FRP notes that the RSCOs both would be restricted gTLDs limited to camera-related uses, or niche-marketed to such users. The FRP finds that Applicant’s plan to operate .CAM as an open gTLD, while stating an expectation that .CAM will appeal to a niche audience, is more likely to cause confusion than operation of .CAM as a restricted gTLD would be. Operation of .CAM as an open gTLD also may present opportunities for unscrupulous operators to attempt registration of second level domain names that are similar or identical to existing .COM domains. The FRP finds that the Applicant’s application for .CAM as an open registry,

rather than a restricted (or niche-marketed) registry, weighs in favor of the Objector. Ultimately, however, the FRP finds that this factor, standing alone, is insufficient to support a finding that confusion is probable.

6. Fame of .COM TLD

- a. Objector argued that .COM is analogous to a “famous” trademark and that by analogy to trademark law, “newcomers” should be required to “stay far afield.” *Walsh Aff’t at 6-7*. Applicant disagreed, contending that even if trademark law principles could provide helpful guidance, Objector is not entitled to trademark protection of .COM because it is a generic top level domain, not protected by trademark law. Response at 9. The OEP held that trademark law is “analogous only; it is not controlling.” The FRP finds the “famous mark” doctrine inapplicable in the SCO context where the standard is probability of confusion and not the protection of any vested property right in a gTLD.
- b. The FRP agrees with the RSCO Expert Panelist that the “fame” of the string weighs against the objection. The .COM gTLD is truly a unique identifier. It is used more broadly, and is better known, than any other gTLD. The ubiquity and prominence of the .COM TLD is likely to operate to reduce the likelihood that the average, reasonable Internet user would confuse .COM and .CAM.

7. The NGPC’s Finding In Regard to the Best Interests of the New gTLD Program and the Internet Community

The FRP considered the NGPC’s finding that the OEP Determination was “not in the best interest of the New gTLD Program and the Internet Community” and “outside normal standards of what is perceived to be reasonable and just.” However, the FRP was charged with making, and has made, an independent determination in this matter. The NGPC’s views are noted, but were not given weight in reaching the FRP’s Determination.

E. Conclusion

1. After carefully weighing the evidence in the record and considering the OEP’s analysis, the FRP finds that the OEP could not have “reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR

Supplementary Procedures for ICANN's New gTLD Program." The FRP's determination to reverse the underlying SCO determination does not require that the FRP disagree with each and every finding in the OEP's analysis.

2. This Report of the Final Review Panel shall constitute the report called for in Article 11 of the Final Review Procedures.
3. Based on the foregoing, the FRP reverses the OEP's Determination and is issuing concurrently a new Final Determination overruling the objection.

Dated: August 26, 2015


Sandra J. Franklin
Date: August 26, 2015

L. Donald Prutzman
Date: August 26, 2015


Mark C. Morril
Chair of the Final Review Panel
Date: August 26, 2015

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INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case Number: 01-15-0003-3822

VeriSign, Inc., Objector

-and-

United TLD Holdco Ltd., Applicant

FINAL REVIEW PANEL DETERMINATION

Final Review Panel:

Sandra J. Franklin, Esq.
Mark C. Morril, Esq. (Chair)
L. Donald Prutzman, Esq.

August 26, 2015

FOR THE REASONS SET FORTH IN THE FINAL REVIEW PANEL'S REPORT ISSUED CONCURRENTLY HEREWITH, THE FINAL REVIEW PANEL HEREBY DECLARES:

1. It is not probable that the average, reasonable Internet user would confuse the applied-for new gTLD .CAM with the existing gTLD .COM.
2. The underlying String Confusion Objection Expert Panel Determination is reversed and henceforth shall be superseded and replaced by this New Final Determination.
3. The fees and expenses of this Final Review Process shall be borne by ICANN, as provided in Attachment 2 to the *ICDR Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Objection Expert Determinations*, effective 15 March 2015.
4. This New Final Determination may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the New Final Determination in this Final Review Process.

Dated: August 26, 2015



Sandra J. Franklin
Date: August 26, 2015

L. Donald Prutzman
Date: August 26, 2015

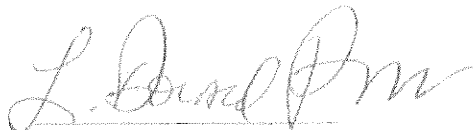
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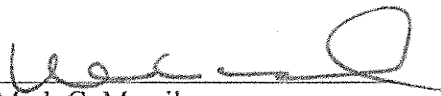
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