

ICC INTERNATIONAL CENTRE FOR ADR

CASE No. EXP/600

**INTERNET CORPORATION
FOR ASSIGNED NAMES AND NUMBERS (ICANN)**

Related to the matter EXP/412/ICANN/29

between the following parties:

PROFESSOR ALAIN PELLET (Independent Objector) v. RUBY PIKE, LLC (Applicant)

This document is an original of the Final Expert Determination rendered in conformity with the ICC Rules for the Administration of Expert Proceedings.

**INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL CENTRE FOR ADR**

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following parties:**

**PROFESSOR ALAIN PELLET (Independent Objector) v. RUBY PIKE, LLC
(Applicant)**

FINAL EXPERT DETERMINATION

August 31, 2016

Expert Panel:

Prof. Andrew Christie (Co-expert)

Mr. Bernardo M. Cremades (Chair)

Prof. Jan Kleinheisterkamp (Co-expert)

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Table of Abbreviations

Abbreviation	Meaning
Appendix III	Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure
Applicant	Ruby Pike, LLC (USA)
Centre	International Chamber of Commerce International Centre for Expertise
Dissenting Opinion	Dissenting Opinion of Prof. August Reinisch
Donuts	The Applicant's parent company Donuts, Inc,
Expert Determination	Expert Determination in case no. EXP/412/ICANN/29
Expert Panel	Prof. Andrew Christie (co-expert), Mr. Bernardo M. Cremades (chair), Prof. Jan Kleinheisterkamp (co-expert)
Final Expert Determination	This Final Expert Determination in case no. EXP/600
First Expert Panel	Expert Panel in case no. EXP/412/ICANN/29 comprising Prof. August Reinisch (co-expert), Mr. Ike Ehiribe (co-expert) and Mr. Piotr Nowaczyk (chair)
GAC	Governmental Advisory Committee
gTLD	Generic top level domain
Guidebook	Module 3 of the gTLD Applicant Guidebook
.HOSPITAL	gTLD requested by Applicant
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICC Practice Note	ICC Practice Note on the Administration of Cases
IO	Independent Objector Prof. Alain Pellet
LPI	Limited public interest
Objection	Limited public interest objection filed by IO on March 12, 2013
Procedure	Attachment to Module 3 – New gTLD Dispute Resolution Procedure
Request	Request for the administration of Expert proceedings regarding the Final Review of the Limited Public Interest Objection against Ruby Pike, LLC's application for .HOSPITAL, dated March 30, 2016
Rules	International Chamber of Commerce Rules for the Administration of Expert Proceedings, in force as from February 1, 2015 ¹
WHO	World Health Organization
WHOIS	Domain name search tool

¹ The Expert Determination in EXP/412/ICANN/29 was issued in accordance with the previous version of the International Chamber of Commerce Rules for the Administration of Expert Proceedings.

This Final Expert Determination is issued in accordance with Article 8 of the International Chamber of Commerce Rules for the Administration of Expert Proceedings, in force as from February 1, 2015 (the “**Rules**”):

I. INTRODUCTION

1. This Final Expert Determination arises out of the “Request for the administration of Expert proceedings regarding the Final Review of the Limited Public Interest Objection against Ruby Pike, LLC’s application for .HOSPITAL,” dated March 30, 2016 (the “**Request**”).

A. *The Party*

2. The sole party in these proceedings is the Internet Corporation for Assigned Names and Numbers (“**ICANN**”), with the following details:

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3. ICANN is not represented by outside counsel in this matter.

B. *Related Entities and Persons*

4. This Final Expert Determination relates to the objection to a generic top level domain (“**gTLD**”) and the Expert Determination rendered in EXP/412/ICANN/29 between the following persons and entities, who are not direct parties to the present proceedings:

Professor Alain Pellet (Independent Objector) (“**IO**”)
16, Avenue Alphonse de Neuville
92380, Garches

France

-and-

Ruby Pike LLC (“**Applicant**”)

10500 NE 8th Street, Suite 350

Bellevue, WA 98004

United States of America

5. The IO has been appointed by ICANN to serve for the entire new gTLD program and object to highly objectionable gTLD applications on Limited Public Interest and Community Grounds as is stated in paragraph 3.2.5 of Module 3 of the gTLD Applicant Guidebook (the “**Guidebook**”).
6. The Applicant is an American limited liability company, an affiliate of Donuts, Inc. (“**Donuts**”). Donuts has applied for 307 new gTLDs representing a variety of common dictionary names.²

C. Expert Panel

7. By letter dated June 9, 2016, the International Chamber of Commerce International Centre for ADR (the “**Centre**”) appointed the Experts and transferred the file to the Expert Panel constituted by Prof. Andrew Christie, Prof. Jan Kleinheisterkamp, and Mr. Bernardo M. Cremades.
8. Mr. Christie holds Bachelor degrees in Science and in Law from the University of Melbourne, a Master degree in Law from the University of London, and a PhD in Law from the University of Cambridge. He is admitted to legal practice in Australia and in England and Wales, and practised intellectual property law for many years with firms in Melbourne and London. He is the foundation Chair of Intellectual Property at Melbourne Law School, University of Melbourne, where he researches and teaches all aspects of intellectual property law, with a particular focus on copyright, patents and trademarks in the digital environment. He has extensive

² Response of Applicant, dated May 15, 2013, p. 7.

experience in domain name disputes, having been a member of approximately 200 panels making determinations under various ICANN Policies.

Prof. Andrew Christie (Co-Expert)

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9. Mr. Kleinheisterkamp holds a PhD in Law (*iuris doctor*) of the University of Hamburg and is admitted to legal practice in Düsseldorf (Germany). He is an associate professor at the Law Department of the London School of Economics, where his research and teaching focuses on international commercial contracts, arbitration, investment law and their intersections with international law and EU law. He has extensive experience as a commercial arbitrator and is a member of the Governing Body for Dispute Resolution of the International Chamber of Commerce as well of the Advisory Group for International Arbitration of the UK Government. He has previously sat on another expert panel regarding a gTLD Limited Public Interest Objection (ICC Case No. EXP/458/ICANN/75).

Prof. Jan Kleinheisterkamp (Co-Expert)

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10. Mr. Cremades is the founding partner of *B. Cremades & Asociados*, where he regularly acts as an arbitrator in domestic and international disputes, including both commercial arbitration and investment protection. He holds degrees in Law from

the University of Seville and the University of Cologne, including a PhD. He has published a number of articles and papers on issues relating to international arbitration and dispute resolution. He has previously acted as an expert in gTLD string determinations.

Mr. Bernardo M. Cremades (Chair)

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D. Background

11. This Final Expert Determination arises out of the Request made by ICANN on March 30, 2016. The Request states that “[t]he task of the Panel will be to review (Final Review) and possibly render a decision (Final Expert Determination) in accordance with the instructions provided herewith. The Final Expert Determination will be used by ICANN as part of the evaluation process for the new gTLD application for the .HOSPITAL string.”³
12. ICANN explains that “[i]n the framework of the New Generic Top Level Domain (New gTLD) Program, ICANN invited applications for the new registries of the top level domain names. In order to protect certain existing interests and rights, ICANN put in place a dispute resolution procedure. The procedure provided a path for formal objections during the application evaluation process and allowed a party with standing to have its objection considered before a panel of qualified experts. This procedure is governed by the New gTLD Applicant Guidebook, Module 3 (**Guidebook**), and its attachment, New gTLD Dispute Resolution Procedure

³ Request by ICANN, dated March 30, 2016, p. 1.

(**Procedure**), as well as by the relevant rules of the dispute resolution service providers.”⁴

13. ICANN has further appointed the figure of the IO “in order to ensure that the best interest of the public using the global Internet is preserved. The IO’s role was to file objections on behalf of the Internet community independently from ICANN.”⁵
14. The IO filed nine limited public interest objections against health-related applications, in accordance with Article 2(e) of the Procedure. This included an objection against the Applicant’s application for the .HOSPITAL string. The objection was filed on March 12, 2013. The Applicant submitted its Reply on May 16, 2013. Additional filings by the Applicant and the IO were permitted.
15. On June 14, 2013, the ICC appointed a three-member expert panel (the “**First Expert Panel**”). The First Expert Panel was comprised of Prof. August Reinisch (Co-Expert), Mr. Ike Ehiribe (Co-Expert) and Mr. Piotr Nowaczyk (Chair). In accordance with Article 21 of the Procedure the First Expert Panel issued The Expert Determination, dated December 11, 2013 (the “**Expert Determination**”). Prof. August Reinisch issued a Dissenting Opinion dated December 12, 2013 (the “**Dissenting Opinion**”).
16. Following the issuance of the Expert Determination, the Applicant challenged the reasonableness of the Expert Determination as part of the application process. The Applicant argues that “the .HOSPITAL Expert Determination deviates from all other health-related limited public interest (“**LPI**”) expert determinations and that the result is inconsistent and unreasonable...”⁶ The Applicant argues that the First Expert Panel “was the only health related LPI objection expert panel that evaluated the sufficiency of certain protections and safeguards while other expert panels deferred to ICANN to implement and enforce such safeguards as necessary.”⁷

⁴ *Id.*, pp. 2-3.

⁵ *Id.*, p. 3.

⁶ *Id.*

⁷ *Id.*, pp. 3-4.

17. Following its challenge to ICANN regarding the Expert Determination, ICANN concluded in a Board Resolution dated February 3, 2016 (the “**Board Resolution**”) “that the underlying .HOSPITAL Expert Determination is seemingly inconsistent with the expert determination resulting from all other health related LPI objections thereby rendering it potentially unreasonable, and [that it] thus warranted re-evaluation.”⁸
18. The Board Resolution resolved that “the .HOSPITAL Expert Determination [was] not...in the best interest of the New gTLD Program and the Internet community...[and] the Board direct[ed] the President and CEO, or his designee(s), to take all steps necessary to address the perceived inconsistency and unreasonableness of the .HOSPITAL Expert Determination by sending all of the materials for the relevant objection proceeding back to the International Centre of Expertise of the International Chamber of Commerce (ICC)...”⁹ The Board Resolution further provides that the Expert Panel should review, as background, the following “Related LPI Expert Determinations”:

Related LPI Expert Determinations	String
Independent Objector v. DotHealth, LLC, Case No. EXP/416/ICANN/33	.HEALTH
Independent Objector v. Goose Fest, LLC, Case No. EXP/417/ICANN/34	.HEALTH
Independent Objector v. Afilias Limited, Case No. EXP/409/ICANN/26	.HEALTH
Independent Objector v. Silver Glen, LLC, Case No. EXP/411/ICANN/28	.HEALTHCARE
Independent Objector v. HEXAP SAS, Case No. EXP/410/ICANN/27	.MED
Independent Objector v. Medistry LLC, Case No. EXP/414/ICANN/31	.MED

⁸ *Id.*, p. 4.

⁹ Available at <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.c>.

Independent Objector v. Charleston Road Registry Inc., Case No. EXP/415/ICANN/32	.MED
Independent Objector v. Steel Hill, LLC, Case No. EXP/415/ICANN/30	.MEDICAL

19. The Board Resolution states that the Board is “uniquely swayed...by [the Applicant’s] assertions that the .HOSPITAL Expert Determination is inconsistent with the other eight health-related LPI Expert Determinations, thereby rendering it potentially unreasonable, and thereby warranting re-evaluation.”
20. The Request states that the Expert Panel “shall render a written and reasoned decision...to establish whether the underlying expert determination rendered in the [Expert Determination] was reasonable through an appropriate application of the standard of review as set forth in Module 3 of the Applicant Guidebook.”¹⁰ The Request establishes that the Expert Panel is to either:
 - 20.1. “Conclude that the [Expert Determination] is supported by the standard of review and reference to the Related LPI Expert Determinations and adopt the [Expert Determination] as the Final Expert Determination”; or
 - 20.2. “Reverse the [Expert Determination] and render a new Final Expert Determination that shall replace and supersede the [Expert Determination].”¹¹
21. The Expert Panel shall determine whether the First Expert Panel could have reasonably come to the decision reached in the Expert Determination through an appropriate application of the standard of review as set forth in the Guidebook.
22. Should the Expert Panel determine that the Expert Determination was not reasonable, the Expert Panel shall render a Final Expert Determination upon the

¹⁰ Request by ICANN, dated March 30, 2016, p. 5.

¹¹ *Id.*

merits of the IO's objection applying the standards as identified by ICANN in the Guidebook, as relevant to the LPI objection.

E. Procedural Matters

1. Expert's Mission and Procedural Timetable

23. ICANN waives the obligation of the Expert Panel to prepare an Expert's Mission in accordance with Article 6 of the Rules, as well as the Procedural Timetable in accordance with Article 7 of the Rules.

2. Procedural Issues During the Proceedings

24. The Expert Panel shall not contact ICANN, the IO, or the Applicant. All guidance on procedural questions is taken by either the Expert Panel or the Centre on the basis of the Rules.
25. The Expert Panel has not contacted ICANN, the IO, or the Applicant.

3. Costs

26. ICANN shall bear the total costs of the proceedings, as stipulated in the Request.

4. Place of the Proceedings

27. The place of the proceedings is Paris, France, as stipulated in the Request.

5. Language of the Proceedings

28. The language of the proceedings is English, as stipulated in the Request.

6. Publication of the Final Expert Determination

29. The Centre shall publish the Final Expert Determination on its website dedicated to ICANN procedures, as stipulated in the Request,

II. REVIEW OF EXPERT DETERMINATION

30. The Expert Panel has examined all of the documents provided by the Centre, including, and not limited to, the Applicant and the IO's submissions, the Expert Determination, and the Related LPI Expert Determinations.

A. *Parties' Positions*

31. The Applicant's and the IO's submissions have been summarized accurately and sufficiently in the Expert Determination. However, in making its findings the Expert Panel relies on the written arguments of the Applicant and the IO, and not on the First Expert Panel's summary of the arguments. The below summary is further not intended to be a comprehensive and exhaustive summary of the arguments that have been presented, but rather an instructive overview of the issues in contention.

1. The IO

32. The IO had stated that he is not affiliated with any of the gTLD applicants and remained impartial and independent as required under the Guidebook. The IO argued that he did not favor any special interests, including medical interests, and that he had not targeted the Applicant's Application. In this regard he stated that he has filed further objections against gTLD strings that are completely unrelated to healthcare matters, including .Amazon and .Indians. The IO stated that he was entitled to bring the present objection in accordance with paragraph 3.2.5 of the Guidebook, which provides that "[i]n light of the public interest goal...the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere." The IO asserted that such criterion has been satisfied.
33. In objection to the Applicant's Application, the IO brought a Limited Public Interest Objection (pursuant to paragraph 3.5.3 of the Guidebook), arguing that the .HOSPITAL string "is contrary to general principles of international law for morality and public order." Specifically, the IO argued that, pursuant to paragraph

3.5.3 of the Guidebook, the .HOSPITAL string “would be contrary to specific principles of international law as reflected in relevant international law instruments.”

34. The IO argued that his objection is against the gTLD string itself, but it should further be considered in the context of the stated intended purpose as it may be derived from the description of the Applicant’s position provided for in the section titled “Mission/Purpose” of the Application. The IO stated that the .HOSPITAL string is not objectionable *per se*, but that the .HOSPITAL string and its intended operation would be objectionable from the perspective of specific principles of international law for morality and public order. The IO argued that the modalities specified in the Application do not guarantee the use of the .HOSPITAL string in full respect of these general principles of international law for morality and public order.
35. The IO stated that LPI Objections are not solely objections against the word, or the gTLD string itself, and that regard may be had to the intended use of the gTLD as well as its confiscation for purely commercial purposes. The IO makes reference to paragraph 3.5.3 of the Guidebook which provides that “[t]he panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the gTLD as stated in the application.” The IO argues that regard may therefore be had to the intended use of the gTLD string.
36. While recognizing the importance of freedom of expression, which the IO regards as a general principle of international law, the IO states that this is not unlimited. The IO refers to paragraph 3.5.3 of the Guidebook which states that the right to freedom of expression “carries with it special duties and responsibilities...[and] certain limited restrictions may apply.”
37. The essence of the IO’s objection is that the term “hospital” is inextricably connected to health, and health is commonly deemed to be a fundamental human right under international law instruments. A state that provides misleading health-

related information would be in violation of its international obligations under the International Covenant on Economic, Social and Cultural Rights. The IO further relied on a large number of international legal instruments in highlighting the significance of health as an international human right, encompassing the right to health-related information.

38. The IO argued that the responsibilities regarding the protection of health, as a human right, extend to the private sector as well as the public sector. The IO took the view that the Applicant should demonstrate how the policies and decision-making of the Applicant will be properly connected to the public authorities. Furthermore, the IO argued that the Applicant has not proposed sufficient and adequate safeguard mechanisms to ensure that these international obligations are met.
39. The IO referred to the Safeguard Advice issued by ICANN's Governmental Advisory Committee ("GAC") on April 11, 2013, which stated that extensive additional safeguards should be put in place for a range of gTLDs including .HOSPITAL. The IO argued that the safeguards suggested by the Applicant, including four additional safeguards for the protection of .HOSPITAL, actually demonstrate that the Applicant does not truly appreciate the extent of its duties and obligations under international law relating to the right to health.
40. The IO therefore submitted that his objection to the Applicant's application should be upheld.

2. The Applicant

41. The Applicant questioned the independence of the IO and argued that the IO had filed very few objections, and that his objections against Donuts represent a significant proportion of the IO's objections. The Applicant also highlighted that the IO has brought objections against only health-related applications, as well as the IO's background working in healthcare and policy.

42. The Applicant sought the dismissal of the IO's objection based on the Quick Look Procedure, as set forth in paragraph 3.2.2.3 of the Guidebook. Such procedure provided that "[a]n objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time." The Applicant argued that the IO objects to the Applicant's activity and intended usage of the gTLD string, whereas ICANN's standards focus on the string itself. The Applicant argued that this amounts to an "abuse of the right to object."
43. The Applicant argued that the gTLD string .HOSPITAL is a generic term which can be used in a variety of perfectly legitimate ways, none of which are contrary to morality and public order. The Applicant highlighted how the term "hospital" is used in a number of second level domain names. The Applicant stated that the IO's objection focuses solely upon a conventional treatment of the word "hospital" and that even widely accepted meanings should not serve as a means of discriminating against other perfectly lawful, legitimate uses.
44. Considerable weight was placed by the Applicant on the wording in the Guidebook which the Applicant argued should be interpreted to mean that the Expert Panel should not look at anything past the string itself other than the Application. Furthermore, the Applicant stated that the fourth ground of the LPI objection cannot be interpreted so broadly. The Applicant referred to the *ejusdem generis* rules of interpretation ("of the same kinds, class, or nature"), and argued that the norms of international law quoted by the IO do not belong to the same category of topics as genocide, torture, slavery, violence against women, racism, and child pornography/sexual abuse, which are included in the first three grounds.
45. In any event, the Applicant argued that the .HOSPITAL gTLD string would not operate contrary to general principles of international law for morality and public order. The Applicant criticized the IO's reliance on the gTLD string's purely commercial use and supposed confiscation.
46. The Applicant submitted that its own right, as well as the public's right, to freedom of expression would be infringed if the IO's objection were upheld. The Applicant

noted that it is the only applicant for the .HOSPITAL gTLD string, and therefore the gTLD would not be available to any members of the public. While the Applicant recognized that there may be some level of costs, the net benefit to the worldwide community should be recognized instead of closing off sections of opportunity due to perceived, though unlikely, harm.

47. With regard to the GAC's Safeguard Advice, the Applicant argued that this is actually supportive of the Applicant's Application for the .HOSPITAL gTLD string. The Applicant highlighted the GAC's recommendation to restrict registration for only "some" of the listed strings. The Applicant noted that the GAC advice may take one of three forms: (1) that a particular application should not proceed; (2) that the GAC has concerns about a string, as to which the ICANN board may enter into dialogue with the GAC to understand the scope of concerns; or (3) that an application should not proceed unless remediated. The Applicant emphasized that the GAC placed .HOSPITAL into the second category. This classification would call for neither the rejection of the string nor for a strong presumption that such a result should occur in any context. The Applicant therefore argued that the GAC's advice has no relevance to the present analysis.

B. Standard of Review

48. The Expert Panel must decide whether the First Expert Panel could have reasonably come to the decision reached in the Expert Determination on the underlying LPI objection through an appropriate application of the standard of review as set forth in the Guidebook. The Expert Panel must further review the Related LPI Expert Determinations as background in coming to its determination.
49. The Expert Panel therefore relies on the provisions of the Guidebook in deciding whether the Expert Determination is reasonable. Regarding LPI objections, the Expert Panel has regard to paragraph 3.5.3 of the Guidebook which provides that "[a]n expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order." Paragraph 3.5.3 of the Guidebook provides a non-

exhaustive list of instruments containing such general principles. It then goes on to state that “[u]nder these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.”

50. Paragraph 3.5.3 of the Guidebook also sets out “[t]he grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law...”. Of relevance to this case, as contained in the IO’s Objection, is the ground that “...an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.” Lastly in relation to this same paragraph it is stated that “[t]he panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.”

C. Analysis of Expert Determination

51. The Expert Panel will assess all relevant sections of the Expert Determination on the basis of whether the findings therein are reasonable, in light of the provisions of the Guidebook and the Related LPI Expert Determinations. Should the Expert Panel decide that a finding is not reasonable it will state the reasons why, and will render a final finding replacing the finding of the First Expert Panel.

1. The IO’s Alleged Bias

52. Regarding the Applicant’s submissions relating to the alleged bias of the IO, the First Expert Panel decided that there was no basis for these allegations. The First Expert Panel was satisfied that “the IO is acting in the best interest of the public who use the Internet and has filed this Objection in the public interest.”¹²
53. The First Expert Panel determined that there was no verifiable evidence to substantiate the allegations made against the IO concerning the IO’s alleged bias

¹² The Expert Determination, dated December 11, 2013, ¶ 56.

favoring healthcare or medical interests. Furthermore, there was nothing to substantiate the alleged bias arising from the IO's relationships with the World Health Organization (“WHO”).

54. Paragraph 3.2.5 of the Guidebook provides that the IO “acts solely in the best interests of the public who use the global internet.” The Applicant’s submissions do not put forward any compelling evidence to suggest that the IO’s Objection is motivated in any way by bias. The IO’s relationship, past or present, with the WHO, as well as the connections of the IO’s staff, by themselves cannot rise to a level sufficient to demonstrate actual, or even implicit, bias. The Expert Panel is convinced that, as required by the Guidebook, “[t]he IO [did] not act on behalf of any particular persons or entities, but act[ed] solely in the best interest of the public who use the global internet.”¹³
55. Thus, the Expert Panel finds that the Expert Determination’s finding that the IO had not filed the objection for reasons of bias is reasonable.

2. The IO’s Standing

56. Paragraph 3.2.5 of the Guidebook further sets out the IO’s standing to bring objections. The IO may not bring an objection “unless at least one comment in opposition to the application is made in the public sphere.” Furthermore, the IO “may file objections against ‘highly objectionable’ gTLD applications to which no objection has been filed.”
57. The First Expert Panel found that these conditions as to standing were satisfied by the IO. The First Expert Panel noted that there were no other LPI objections against .HOSPITAL, and “[s]ince the importance of hospitals’ role for the safety and health of a society cannot be overrated, the instant Application can be deemed to be highly objectionable.” The First Expert Panel then examined some of the comments that had been made regarding the Application for .HOSPITAL, and determined that the IO had sufficient standing to make the Objection.

¹³ Module 3 of the gTLD Applicant Guidebook, ¶ 3.2.5.

58. The Expert Panel considers the finding that the IO has fulfilled the requirements of Paragraph 3.2.5 of the Guidebook to be reasonable. It is clear that there were comments made in opposition to the Application. Regarding the issue of whether the Application is “highly objectionable,” the Expert Panel believes that the vagueness of this guidance makes a determination on this point difficult to make without examining the merits in light of other provisions in the Guidebook and other relevant sources. However, the Expert Panel questions the automatic assumption of the First Expert Panel that “[s]ince the importance of hospitals’ role for the safety and health of a society cannot be overrated, the instant Application can be deemed to be highly objectionable.” While hospitals and health-related topics are undoubtedly important for society, this cannot mean that any gTLD string application touching on these issues becomes “highly objectionable” on this basis alone. Notwithstanding this, the Expert Panel can agree that because of the strong comments made in opposition to the Application, particularly by the WHO, it was not unreasonable for the First Expert Panel to conclude that the Application was “highly objectionable.” Therefore, the First Expert Panel reasonably found that the IO had satisfied the criteria of “Mandate and Scope,” as set out in paragraph 3.2.5 of the Guidebook.

3. The Quick Look Procedure

59. The First Expert Panel decided not to dismiss the Objection in accordance with the Quick Look Procedure outlined in paragraph 3.2.2.3 of the Guidebook. This provides that “objectors are subject to a ‘quick look’ procedure designed to identify and eliminate frivolous and/or abusive objections. An objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time.”

60. Paragraph 3.2.2.3 explains that “[a] Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as the grounds for such an objection.” The First Expert Panel explained that the Objection falls within the fourth ground, which is “[a] determination that an applied-for gTLD string would be contrary to specific principles of international

law as reflected in relevant international instruments of law.” While this is subject to further discussion below, from a quick look perspective, the Expert Panel agrees that given the broad wording used, the Objection does not fall squarely outside of this ground, and thus, is not manifestly unfounded. Therefore, the Expert Panel finds this decision at the outset to have been reasonable.

61. Paragraph 3.2.2.3 further states that “[a] Limited Public Interest objection that is manifestly unfounded may also be an abuse of the right to object. An objection may be framed to fall within one of the accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive. For example, multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law.” The First Expert Panel concluded that the Objection was an attack on the applied for gTLD string, and not an attack on the Applicant itself. Further, the First Expert Panel stated that “[t]aking into consideration that the Applicant’s parent company Donuts, has applied for multiple gTLDs, it is not surprising that a significant portion of the IO’s objections were filed against Donuts’ applications.”¹⁴ The First Expert Panel therefore rejected the Applicant’s claim that the Objection was an abuse of the right to object, and refused to dismiss the Objection under the Quick Look procedure.
62. The Expert Panel agrees that the IO’s Objection is not an attack on the Applicant itself, or the Applicant’s parent company, Donuts. Given the large number of gTLD strings applied for by the Applicant’s parent company, it cannot rise to the level of making the Objection “manifestly unfounded” that the IO has objected to a number of these applied-for gTLD strings. For these reasons, the Expert Panel finds that the First Expert Panel’s decision to not dismiss the Objection under the Quick Look procedure is reasonable.

¹⁴ The Expert Determination, dated December 11, 2013, ¶ 70.

4. The First Expert Panel's Analysis of the LPI Objection

63. In examining the First Expert Panel's analysis of the Objection, the Expert Panel has been instructed to consider all necessary and relevant materials to deliver this Final Expert Determination, including the Guidebook, the Application, and Related LPI Expert Determinations. The Expert Panel has considered all of these materials in coming to its determination.

(a) *The intended purpose of the gTLD string*

64. In Part E of the Expert Determination, the First Expert Panel decides that the Application should be reviewed in light of its purpose. The First Expert Panel explains that "Paragraph 3.5.3 also authorizes the [First] Expert Panel to use as additional context the intended purpose of the gTLD as stated in the Application to conduct its analysis on the basis of the applied-for gTLD string itself."¹⁵

65. The First Expert Panel then turns to the Application, quoting the Applicant's response to Question 18 therein, stating that the Applicant "intends to increase competition and consumer choice at the top level [...] In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN's new TLD program."¹⁶ The First Expert Panel states that it "considers all the elements" in coming to its determination because "the procedure is designed to serve the best interest of the public who use the global Internet, [so] the review cannot be limited only to the applied-for string that is just a signboard for the tremendous amount of information."¹⁷ The First Expert Panel states that "[w]hich information finally is going to be available for users depends on the intended purpose of the Applicant who stands for .Hospital and its acts. Therefore, in the [First] Expert Panel's view, limiting the scope of procedure only to the name of gTLD may render the entire objection procedure pointless."¹⁸ The First Expert Panel then highlights that the Application is for purely commercial

¹⁵ *Id.*, ¶ 71.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

purposes and “[i]t presents simply a ‘market approach’ whereas morality and public order require a ‘social approach’...”¹⁹

66. At the outset the Expert Panel refers back to the wording of paragraph 3.5.3 which provides that “[t]he panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.” The Expert Panel is of the view that the First Expert Panel overstates the significance of the intended use of the applied-for gTLD string to the determination of the Objection. The wording of paragraph 3.5.3 is clear that the analysis is conducted on the basis of the gTLD string itself. The intended purpose is referred to “if needed,” and only as “additional context.” Thus, on the basis of the wording of the Guidebook, the gTLD string itself and its intended purpose are not given equal weight or footing. Thus, the Expert Panel believes that the First Expert Panel misinterpreted the relevant section of paragraph 3.5.3 of the Guidebook by giving undue weight, from the outset, to the intended purpose of .HOSPITAL. The Expert Panel disagrees with the First Expert Panel’s view that “limiting the scope of procedure only to the name of gTLD may render the entire objection procedure pointless.”²⁰ The wording of paragraph 3.5.3 highlights that the primary and predominant consideration in the determination is whether the gTLD string itself, rather than any speculative possible uses of it, is contrary to the relevant principles of international law. The reference to the “intended purpose” as “additional context” means that it is relevant to consider how the gTLD string may be used so as to give context to whether the applied-for string may be contrary to principles of international law. However, it does not mean that the focus of an expert panel’s deliberations should be on assessing the adequacy of the safeguards against potential misuse contained in the applicant’s application. The Expert Panel agrees with the statement of the dissenting Expert, who states that “this construction of the subsidiary relevance of the intended purpose of an applied-for string exceeds the powers” of the First Expert Panel.²¹

¹⁹ *Id.*, ¶ 72.

²⁰ *Id.*, ¶ 71.

²¹ Dissenting Opinion, ¶ 16.

67. The Expert Panel turns to the Related LPI Expert Determinations for further guidance. In Case No. EXP/409/ICANN/26, the expert panel stated that in “deciding a ‘Limited Public Interest’ objection [it] cannot properly assess the compatibility of a proposed string with public order and morality without taking into account the context of its application, including the likely effects of the operation of the string on the Internet community.”²² The expert panel goes on to state that it “does not look merely at the simple wording of the proposed string, but also at its probable use and operation. Without doing so, an expert panel could not possibly come to any determination as to whether the gTLD that has been applied for would impair interests protected by any fundamental norm of international law – and making such a determination is precisely an expert panel’s mandate.”²³
68. In Case No. EXP/413/ICANN/30 the expert panel stated that “the starting point...must be whether the string .medical is contrary to general principles of international law for morality and public order, not whether the internet content potentially available under that string conforms to such principles. The subject matter for the determination of the Panel, in other words, is the applied-for gTLD string .medical itself, not the way Applicant intends to manage that string.”²⁴ This represents a view on the other side of the spectrum to that stated in Case No. EXP/409/ICANN/26.
69. The Expert Panel agrees that the intended purpose can be looked at in certain circumstances, however, this should not be the sole or the principal consideration. The Expert Panel believes that the First Expert Panel placed too much emphasis on the intended usage of the .HOSPITAL string, as well as the safeguards in place, when the analysis should be primarily centered “on the basis of the applied-for gTLD string itself.” It may be appropriate to turn to the intended usage if the applied-for gTLD string can have multiple meanings and further context is needed to understand its meaning. The Expert Panel believes that the First Expert Panel, in paragraph 71 of the Expert Determination, effectively reverses the order of priority

²² Case No. EXP/409/ICANN/26, ¶ 57.

²³ *Id.*, ¶ 61.

²⁴ Case No. EXP/413/ICANN/30, ¶ 49.

that is to be given to the considerations in paragraph 3.5.3 of the Guidebook. The wording therein leaves no doubt that the intended purpose may be used as “additional context,” and not as the primary motivating factor in a decision. Hence, the Expert Panel finds that the First Expert Panels application of the Guidebook on this point was not reasonable. The Expert Panel will therefore proceed by focusing on the basis of the “applied-for gTLD string itself,” and only “if needed, use as additional context the intended purpose” of .HOSPITAL in deciding whether to uphold the IO’s Objection.

(b) Is .HOSPITAL contrary to principles of international law as reflected in international instruments of law relating to public order and morality?

70. In deciding whether the gTLD string .HOSPITAL is contrary to legal norms relating to morality and public order, the First Expert Panel adopts definitions of “morality” and “public order” to assist in its analysis.²⁵ After providing definitions of these terms, the First Expert Panel states that “[m]orality and public order require all members of society, whether public or private entities, to be extremely cautious on issues of human life and health. It is a duty that should be fulfilled in the field of the development of the Internet as well.”²⁶
71. The First Expert Panel then goes on to consider the word “hospital.” It states that this word is commonly associated with healthcare and emergency, and that misuse of this word may cause significant harm to society. The First Expert Panel explains that people seeking healthcare are often vulnerable, and a need for a hospital often occurs in cases of an emergency. Thus, unreliable information about healthcare providers can cause serious harm, and is thus the main reason for the highest standard of requirements for the .HOSPITAL string. For this reason the First Expert Panel takes the view that the proposed safeguards, to avoid the above type situations, which include fourteen safeguards required by ICANN and an additional eight proposed by the Applicant, are not sufficient to provide adequate protection. In conclusion, the First Expert Panel states that “the Applicant has failed to

²⁵ The Expert Determination, dated December 11, 2013, ¶¶ 77-78.

²⁶ *Id.*, ¶ 79.

appreciate the highly sensitive nature of the applied-for string .Hospital as articulated by the IO...”²⁷

72. The First Expert Panel recognizes that the right to health is an important principle of international law. The Universal Declaration of Human Rights, which is one of the non-exhaustive instruments included in paragraph 3.5.3 of the Guidebook, provides in Article 25 that “Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” The First Expert Panel accepts the IO’s argument that having access to reliable and trustworthy health-related information is part of the fundamental right to health, and that private entities are equally bound by this right as much as public ones.
73. In concluding that the Application would be contrary to this right to health-related information, the First Expert Panel recognizes that there must be a balance with the freedom of expression. It states that freedom of expression is connected with special duties and responsibilities, and that “[i]n the case of registering .Hospital those duties include an application of very specific protection and awareness of the importance of the role of hospitals in delivering healthcare objectives. The [First] Expert Panel, in considering this Application, believes that the Applicant failed to avert its mind to these responsibilities.”²⁸
74. This Expert Panel now refers to the determination of whether .HOSPITAL “would be contrary to specific principles of international law as reflected in relevant international instruments of law,” in accordance with paragraph 3.5.3 of the Guidebook. It is undeniable that the right to health is such a principle of international law, as it is reflected in numerous international instruments of law. These include, as the First Expert Panel relies on, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural

²⁷ *Id.*, ¶ 85.

²⁸ *Id.*, ¶ 88.

Rights. Where the Expert Panel diverges from the First Expert Panel is in going so far as to say that “having access to reliable and trustworthy health related information is part of the fundament[al] right to health.”²⁹ The right to access health-related information is not a specific principle of international law. While the right to health is a basic right, it is not so broadly encompassing as to “mandate any particular arrangement of the internet.”³⁰ The Expert Panel takes guidance from the Related LPI Expert Determinations in this regard.

75. The expert panel in Case No. EXP/416/ICANN/33 was unable to see how the instruments of international law relied on by the IO support the proposition that access to health-related information is a “specific principle of international law.”³¹ In Case No. EXP/415/ICANN/32, the expert panel determined that the right to health-related information “does not include the right to be protected from the mere risk of misleading or unreliable information.”³² The Expert Panel agrees with these statements. The right to health is a specific principle of international law that is recognized in international instruments of law. As much as access to accurate information concerning health-related issues may derive from the right to health, there is no evidence that such right to information has grown into a specific principle of international law deserving of similar stringent protection.
76. The provision of health-related information involves a form of expression, which is further a specific principle of international law, and one that the Guidebook makes express reference to. Paragraph 3.5.3 of the Guidebook states that “[u]nder these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain restrictions may apply.” Thus, the right is not entirely unlimited. The First Expert Panel referred to this conflict as the “balancing of different values and rules.”³³ This further ties in with the First Expert Panel’s finding that the use of .HOSPITAL would be “contrary to general principles of international law for morality and public

²⁹ *Id.*, ¶ 87.

³⁰ Case No. EXP/411/ICANN/28, ¶ 40.

³¹ Case No. EXP/416/ICANN/33, ¶ 100.

³² Case No. EXP/415/ICANN/32, ¶ 111.

³³ The Expert Determination, dated December 11, 2013, ¶¶ 89.

order.” The First Expert Panel saw this as a justifiable limited restriction of the freedom of expression. However, as the expert panel in Case No. EXP/410/ICANN/27 noted, the threshold for a permissible restriction is a high one, and “free expression cannot be limited merely on the grounds of policy convenience.”³⁴ The mere possibility that false or misleading information regarding health-related issues, or hospitals, may be disseminated through the Internet is not sufficient reason to outright prohibit all speech through this channel, rather than considering the use of such expression under proper regulation by ICANN. In the view of this Expert Panel, the stand taken by the First Expert Panel is disproportionate since it unreasonably balances the competing interests in favor of a concern that is not a “specific principle of international law.”

77. In considering whether .HOSPITAL would be contrary to “general principles of international law for morality and public order,” the First Expert Panel highlights the importance of health-related information. The First Expert Panel states that the safeguards required by ICANN, and additionally proposed by the Applicant, are not sufficient to safeguard access to accurate health-related information.
78. Furthermore, the First Expert Panel places significant emphasis on the fact that the Applicant would be operating the gTLD string as part of a commercial enterprise. The Expert Panel is in agreement with the expert panel in Case No. EXP/410/ICANN/27 where the IO was unable to show “that the right to health prohibits the dissemination of health-related information, on a commercial basis or otherwise.”³⁵ In Case No. EXP/417/ICANN/34, which related to an application for .HEALTH, the expert panel stated that “none of the [instruments of international law] provide any support for the IO’s argument that the operation of .health gTLD registry by a private entity would inhibit or impair the access to accurate health information unless it was done under the conditions envisaged by the IO.”³⁶ The Expert Panel finds the First Expert Panel’s concerns about the private nature of the Applicant to be unpersuasive. The question ultimately is not whether private bodies

³⁴ Case No. EXP/410/ICANN/27, ¶ 119.

³⁵ Case No. EXP/410/ICANN/27, ¶ 116.

³⁶ Case No. EXP/417/ICANN/34, ¶ 103.

should be allowed to administer sensitive public interest strings, but under which conditions they should be allowed to do so. Determining these conditions, which may be specific to health-related strings but will derive from broader policy choices framed by the even broader “right to health,” cannot be dependent on an individual case, but instead may require a concerted regulatory solution.

79. The First Expert Panel considered these proposed safeguards for the .HOSPITAL string to be inadequate. They state that “the Applicant has failed to appreciate the highly sensitive nature of the applied-for string .Hospital as articulated by the IO, and the Applicant’s Public Interest Commitments filed on 6 March 2013 does not in any way address the concerns of the IO.”³⁷ While this Expert Panel appreciates the First Expert Panel’s concerns regarding the use or misuse of the .HOSPITAL string, this Expert Panel believes that these policy concerns are for the ICANN Board to address at a different stage of the registration program, in consultation with its GAC. It cannot be for the expert panels to make those determinations of policy in their individual cases as that would lead to inequitable outcomes as compared to other expert determination proceedings, where panelists may consider the same policy issues differently. This is why paragraph 3.5.3 of the Guidebook mandates the expert panel to conduct its analysis on the basis of the “applied-for gTLD string itself.” While the Expert Panel recognizes the potential issues that may arise with a private body administering a gTLD string of significance and importance to the public, this does not provide adequate reason to reach beyond the limits of the rules that are set out in the Guidebook. Therefore, the Expert Panel finds that the First Expert Panel’s determination that .HOSPITAL is “contrary to general principles of international law for morality and public order,” to be unreasonable.

III. FINAL EXPERT DETERMINATION

80. As set out in Part XI of the Request, the Expert Panel will render the Final Expert Determination upon the merits of the IO’s Objection in applying the standards as

³⁷ The Expert Determination, dated December 11, 2013, ¶¶ 85.

set forth in the Guidebook relevant to the LPI Objection. Having extensively set out the reasons why this Expert Panel considers the First Expert Panel's decision to have been unreasonable in Part II, the Expert Panel hereby summarizes its findings and the reasons for why the Expert Determination should be replaced.

81. The Expert Panel's decision to reverse the Expert Determination is made for the following reasons:

81.1. The IO has not demonstrated bias in the making of the Objection.

81.2. In accordance with paragraph 3.2.5 of the Guidebook, the IO has standing to make the Objection.

81.3. The Applicant was not entitled to have the Objection dismissed under the Quick Look procedure.

81.4. The examination of the applied-for gTLD string .HOSPITAL should be conducted "on the basis of the applied-for gTLD string itself," in accordance with paragraph 3.5.3 of the Guidebook. This is the primary consideration undertaken by the Expert Panel following the clear wording of the Guidebook.

81.5. There are no specific principles of international law relating to morality and public order, as reflected in international instruments of law, to which the gTLD string .HOSPITAL would be contrary. In this regard, there is no evidence that a right to access health-related information as framed by the IO would constitute a specific principle of international law as required by paragraph 3.5.3 of the Guidebook.

81.6. An unlimited prohibition on using the gTLD string .HOSPITAL would infringe the Applicant's right to freedom of expression as set out in paragraph 3.5.3 of the Guidebook.

81.7. The wording of the Guidebook does not allow undue consideration to be placed on the fact that the Applicant is a private entity. Whether the Applicant

can adequately manage the use of the applied-for gTLD string through the use of safeguards or other measures is a matter for ICANN to control.

81.8. The IO has not sufficiently shown, in accordance with Article 20(c) of the Procedure, that his Objection should be sustained.

82. For the above reasons, as more thoroughly detailed in Part II of this Final Expert Determination, the Expert Panel finds that the IO's Objection should have been dismissed.

IV. DECISION

83. For the foregoing reasons, in accordance with Article 21(d) of the Procedure, the Expert Panel renders the following Final Expert Determination:

83.1. The First Expert Panel in rendering EXP/412/ICANN/29 did not reasonably come to the decision reached therein on the underlying limited public interest objection through an appropriate application of the standard of review as set forth in the Guidebook.

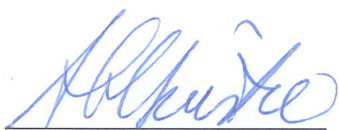
83.2. The Expert Determination rendered in EXP/412/ICANN/29 is reversed, and is replaced by this Final Expert Determination.

83.3. The Independent Objector's Limited Public Interest Objection against Ruby Pike, LLC's Application should be dismissed.

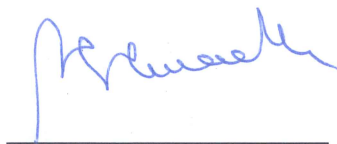
83.4. The Applicant, Ruby Pike, LLC should prevail.

Paris, France

Date: August 31, 2016



Prof. Andrew Christie
Co-Expert



Mr. Bernardo M. Cremades
Chair



Prof. Jan Kleinheisterkamp
Co-Expert