

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/490/ICANN/107

FAIRSEARCH.ORG

(USA)

vs/

CHARLESTON ROAD REGISTRY INC.

(USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

**INTERNATIONAL CENTRE FOR EXPERTISE  
INTERNATIONAL CHAMBER OF COMMERCE**

**EXPERT DETERMINATION**

**Case N° EXP/490/ICANN/107**

**Re.: '.search' (Appl. No. 1-1141-50966)**

**FAIRSEARCH.ORG  
(UNITED STATES OF AMERICA)**

**vs/**

**CHARLESTON ROAD REGISTRY INC.  
(UNITED STATES OF AMERICA)**

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**(D) GLOSSARY OF ABBREVIATIONS:**

"Application"	An application for a new gTLD lodged in connection with the terms and conditions of the Applicant Guidebook. An application includes the completed Application Form, any supporting documents, and any other information that may be submitted by the applicant at ICANN's request
"app"	Application software, see: <a href="http://en.wikipedia.org/wiki/Application_software">http://en.wikipedia.org/wiki/Application_software</a>
"Appendix III"	Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure
"Art."	Article
"Centre"	ICC International Centre for Expertise
"CPE"	Community Priority Evaluation (in Guidebook)
"DNS"	Domain Name System
"Guidebook"	Module 3 of the gTLD Applicant Guidebook, i.e. the gTLD Applicant Guidebook currently in effect, describing the requirements of the application and evaluation processes
"gTLD"	Generic Top-Level Domain
"ICC Practice Note"	ICC Practice Note on the Administration of Cases
"IG P"	Implementation Guideline P, Annex C to ICANN Generic Names Supporting Organisation, Final

	Report, Introduction of New Generic Top-Level Domains, 8 August 2007
"mobile apps"	Mobile application, see: <a href="http://en.wikipedia.org/wiki/Mobile_app">http://en.wikipedia.org/wiki/Mobile_app</a>
"NGPC"	ICANN Board New gTLD Program Committee
"Procedure"	Attachment to Module 3 - New gTLD Dispute Resolution Procedure
"Rules"	Rules for Expertise of the ICC
"SSAC"	ICANN Security and Stability Advisory Committee
"SLD"	Second Level Domain
"TLD"	Top-Level-Domain
	Also see: <a href="http://newgtlds.icann.org/en/applicants/glossary">http://newgtlds.icann.org/en/applicants/glossary</a>

**(E) CHRONOLOGY OF THE EXPERT DETERMINATION PROCEDURE:**

March 13, 2013	Objection with Annexes A through P
April 30, 2013	Decision of the Centre not to consolidate EXP/451/ICANN/68 and EXP/490/ICANN/107
May 14, 2013	Answer to the Community Objection with Annexes 1 to 25
June 12, 2013	Appointment of Erik Schäfer as Expert by the Chairman of the Standing Committee of the ICC International Centre for Expertise
July 17, 2013	Confirmation of the full constitution of the Expert Panel; Transmission of the file to the Expert
July 30, 2013	Objector requests leave to submit further arguments
July 30, 2013	Applicant opposes Objector's request for leave to submit further arguments
August 04, 2013	Expert grants leave for one round of further submissions
August 11, 2013	Objector submits Further Submission of Objector with Appendices 1 through 4
August 18, 2013	Applicant submits Additional Written Submission
August 27, 2013	Expert requests a clarifications regarding Applicant's Change Request
August 28, 2013	Objector submits its clarifications
August 30, 2013	Applicant submits Clarification Response
September 6, 2013	Submission of the draft Expert Determination to the Centre in accordance with Art. 21 (a) and (b) of the Procedure

**(F) APPLICABLE RULES AND STANDARDS:**

1. (F.1) The Expert Procedure is governed by the Guidebook (namely, the Procedure), the Rules, and the ICC Practice Note.
2. (F.2) The Applicable Rules and Standards on which the substantive decision of the Expert is based are the Rules of the Guidebook relating to Community Objections and rules or materials to which the relevant sections of the Guidebook refer, notably Art. 20 of the Rules and the ICANN Generic Names Supporting Organisation Final Report to which reference is made in the last paragraph of Section 3.2.1 of the Guidebook with IG P.
3. (F.3) The proceedings took place in English. The place of the proceedings is Paris. All communications including submissions were made electronically between the parties, the Expert and the Centre.

**(G) SUMMARY OF THE PARTIES' POSITIONS:**

4. The following summary of the Parties' submissions is included to satisfy the requirements of the Guidebook and aims to provide an overview of the case to the reader. In preparing and making his decision, the Expert has relied directly on the Parties' sub-missions with their annexes and not the summary.

**(G.1) March 13, 2013 Community Objection:**

5. In its initial Objection dated March 13, 2013, Objector opposed the Applicant's closed '.search' gTLD application because of the detrimental impact on online competition that would result from Google's control. Such control would result from Applicant being a wholly owned subsidiary of Google Inc. The Objector maintained its Objection after Applicant changed its Application from a closed gTLD to an open gTLD. Essentially, Objector argues that Applicant, if successful, would gain an unfair competitive advantage against other members of the search community through the improper grant of a perpetual monopoly of generic industry terms to a single company in contravention of established international legal norms.
6. Regarding its locus standi under the Rules, Objector *inter alia* asserts that it was formed on October 26, 2010 and represents the interests of a well-established coalition of businesses and organizations united to promote economic growth, innovation and choice across the Internet ecosystem by fostering and defending competition in online and mobile search. Objector's membership is an international group of leading members of the Internet search industry. Objector argues that the gTLD '.search' is explicitly and implicitly targeted to the businesses and consumers in the industry, including Objector's members. Objector contends that it has become an interlocutor with a wide range of elected government officials, various government agencies, and international organizations around the world on a number of issues surrounding the preservation of transparency, fairness, consumer choice and innovation in Internet search and that it has an extensive following, not least among consumers who are concerned about choice in the search marketplace.
7. Regarding the merits of its Objection, Objector *inter alia* asserts that the disputed gTLD '.search' is a generic (industry) term often found in dictionaries, not specific to a particular origin, and generally used to identify a particular industry or the products and services within that industry. Pursuant to Objector, Applicant, being a member of a group of companies

that is said to be dominant in internet search and search advertising and dominant provider of algorithmic and paid search services, would obtain and improperly exercise a perpetual monopoly on the common generic industry term "search". Objector submits that the disputed gTLD '.search' would allow Applicant to strengthen its dominance in general search and search advertising by making Google the gatekeeper for user search queries in this area. According to Objector, the search industry exhibits serious barriers to entry for potential entrants and gTLDs can lower barriers to entry for existing and new entrants. Objector asserts that, were Applicant granted the gTLD '.search', Applicant would entrench its monopoly, inextricably linking it to the market category in which Applicant is dominant. Allowing Applicant to serve as the gatekeeper for the '.search' domain would further elevate the high barriers to general and vertical search competition and other competitors would lose out on an important opportunity to develop into significant competitive threats.

8. Furthermore, according to Objector, Applicant would be able to prevent TLDs substantially similar to '.search' from being delegated in the future, thereby exacerbating steep barriers to entry for would-be competitors. This would harm general search engines and nascent vertical service providers that provide targeted results in shopping, local search, mobile and other areas where access to TLDs may serve as a source of competitive differentiation. The Objector states that the fact that most gTLDs will be 'open' may very well mislead consumers into thinking that websites associated with the TLD '.search' are from a single entity. As a result, according to Objector, consumers may find Applicant's competitors less credible if they cannot avail themselves of the TLD '.search'. Allocating this gTLD to Applicant would make Google even more of a bottleneck for Internet search queries, as it will solidly marry the domain name, which describes the core function of Google's services, to its brand name.
9. Objector also contends that ceding the TLD '.search' to Applicant alone would create confusion, leading consumers to believe Applicant has been endorsed as the chief, or even worse, the sole provider of Internet search services. Actual or nascent competitors seeking to gain credibility would find themselves less able to compete if Google is in effect certified as the official provider of any search functionality.
10. Even if Applicant would provision second-level domain names to competing search engines and search advertising platforms, non-discriminatory access would still not mitigate the harm. This would be insufficient to counteract the anticompetitive effects. Even non-discriminatory access would be symbolic given the unacceptable business risk of allowing Applicant access to competitors' user data, web traffic, and whatever other information Applicant collects during the second-level domain provisions process. This would cement Applicant's search dominance even further.
11. According to Objector, Applicant already has engaged in efforts to foreclose entry in horizontal and vertical search services by excluding competitors. Granting it the disputed gTLD would, pursuant to the Objector, hasten further loss of competition. Objector claims a grant of the gTLD '.search' to Applicant would harm consumers by 'elevating' a company that - according to Objector - is already a monopolist. For the Objector, giving Applicant exclusive rights to this gTLD may result in Google siphoning traffic away from competitors who otherwise could better reach consumers through high-quality competing sites.
12. Objector asserts that the inherent exclusionary effect of granting Applicant the disputed gTLD would virtually assure Applicant's continued '*monopolization*' of search and search advertising.

13. Objector also contends that, under well-established International Commercial Law, common generic industry terms are not entitled to exclusive ownership and control by a single member of that industry because doing so would hinder competition. Objector submits that these rules are not limited to registered trademarks, but extend to all terms and signs used in commerce. According to Objector, new TLDs are subject to the same legal principles that apply to other terms and signs and not mere addresses with no source identifying function.
14. Objector explains in detail its assertion that a closed Generic TLD controlled by a single industry player would be contrary to ICANN's stated goals and policies.
15. Objector concludes with the assertion that Applicant seeks to use ICANN to improperly monopolize a common generic industry term for its market sector. Permitting its Application to proceed would result in a violation of international legal norms prohibiting exclusive control of a common generic industry term by a single member of the industry providing search services.
16. Objector stresses that for the above-mentioned reasons there is substantial opposition to the Application from a significant portion of the community to which it is targeted, including the members of Objector's association, as well as the communities represented by the other persons and entities that oppose the Application.
17. Objector requests that the application for generic top-level domain '.search' filed by Applicant be rejected.

#### **(G.2) The May 14, 2013 Response to the Community Objection**

18. Applicant submits in its May 14, 2013 Response to the Objection that the main concern raised by Objector against the Application for '.search' as a closed registry of Google is based on perceived competition issues. However, in the meantime Applicant publicly filed comments and a Change Request with ICANN stating its commitment to modify the Application for '.search' to allow third party registrations. Therefore, Applicant would no longer be the sole registrant and would no longer have complete control of the '.search' domain.
19. According to Applicant, Objector is not "an established coalition". Applicant argues that, since Objector was only founded in October 2010, it has no standing because it does not meet the criteria that would enable it to represent a "pre-existing and organized" community. Moreover, Objector allegedly does not represent the search community because it incorrectly claims that it represents the search community at-large.
20. Applicant states that Objector is formed only of companies which compete with Google.
21. Applicant submits that Objector's Objection does not conform to the four community objection elements or balancing factors supplied by Guidebook sections 3.2.2.4 (Standing to Object) or 3.5.4 (Dispute Resolution Principles), all of which it must meet. Specifically, Applicant states the following: Objector offers no evidence to prove that the community expressing opposition can be regarded as clearly delineated. Objector fails to offer any proof of the group's public recognition as a community, its formal boundaries, sufficient length of its existence, or its global distribution or size. Objector offers no evidence of strong association between the represented community and applied-for string. Objector fails to offer any proof in the form of statements by the Applicant or in the Application, or in the form of evidence showing associations by the public. Pursuant to the Applicant, Objector also offers no evidence to prove substantial opposition within the represented community. Applicant also asserts that Objector fails to offer any proof of the relative number the entities that oppose the



Application, their representative nature, their recognized stature or weight; their distribution or diversity. Applicant submits that Objector fails to offer any proof of the community's historical defense, costs incurred or channels used in conveying opposition. Finally, according to Applicant, Objector offers no evidence of likelihood of material detriment to the targeted community resulting from Applicant's operation of the applied-for gTLD. Applicant adds that Objector also fails to offer any proof of reputational, concrete, or economic damage to the community. In Applicant's opinion, Objector has also failed to show that Applicant does or will not act according to community and user interests, or that Applicant will interfere with the community's core activities. Applicant denies that community core activities depend on the DNS and any certainty that detrimental outcomes would occur. Applicant concludes that, considering all the above, the Objection should be dismissed.

22. According to Applicant, the definition provided by Objector for the term "generic" is incorrect, because words are generally only meaningful or generic in a specific language and there is considerable overlap between what many people think of as brands and so-called "generic" terms. Many famous brands are "generic" terms in other industries; amongst the current crop of "brand" TLD applications, examples are terms such as "boots", "brother", and "live", all of which represent brands that also contain significant and unrelated meanings in the English language. Strings like .live, .windows, .office, .docs, .azure, .java, and .oracle, are closed generic terms that have been repurposed as product and brand names but that also have real and significant meaning in other industries. Applicant submits that all of this together makes it impossible to justify community delineation.
23. Furthermore, Applicant contends that Objector misleadingly states that Google is "the dominant provider of algorithmic and paid search services" because, according to Applicant, the Internet and the advertising space are incredibly competitive and Google competes with a vast array of companies for users. Applicant denies that Google is a gatekeeper to the Internet because consumers have many ways of finding content online.
24. Applicant submits that new gTLDs do not convey a competitive advantage to applicants and are not per se "serious barriers to entry for potential entrants." According to Applicant, it is well documented in the U.S. that several start-ups recently launched search engines to directly compete with larger players like Google, Bing, and Yahoo. Applicant relies on this fact to argue that Objector's claims about the existence of significant barriers to entry are inaccurate. Furthermore, Applicant asserts that it is untrue that gTLDs as specific strings have an inherent value from which applicants can somehow create competitive advantage. Previous expansion rounds have shown that this is not so, and that there is a spotty record over the past decade for new gTLDs. If these gTLDs are successful, it will not necessarily be due to the inherent value of a generic term, but rather because users are persuaded to make use of these domains. Finally, it is stressed that Google would not obtain total control over '.search' since it has revised its application to reflect that it will operate the gTLD as a registry that is open to all firms that provide search functionality.
25. According to Applicant, opening '.search' removes any possibility of alleged harm as Google has made a public commitment to allow third-party registrations within the '.search' domain.
26. Applicant rejects Objector's contention " ... that Google cannot be trusted to serve as the registry for '.search' because there is an 'unacceptable business risk' of allowing [Google] access to competitors' user data, web traffic and whatever other information [Google] collects during the second-level domain provisions process. Applicant argues that by its nature, every registry could potentially access competitors' user data and other information

*during the SLD provision process. ...*" (Response, p. 11, N° 27) Allegedly, this is no legitimate argument to single out Google, because under this sort of logic, no registry applicant could be trusted to serve as a registry. This objection ignores that Google has adopted a privacy policy and follows other industry best practices to safeguard user data.

27. Pursuant to Applicant, Objector's assertion that Google has engaged in efforts to foreclose entry in horizontal and vertical search services by excluding competitors is without merit and not a proper basis for an objection. Google would at all times remain subject to all anti-trust laws.
28. Applicant contends that Google's application for '.search' does not pose harm to consumers and Objector has not provided any proof of such harm. Applicant stresses that Google does not have a monopoly in Internet search services or advertising related to searches by users on the Internet (e.g. World Wide Web) and is not a gatekeeper between consumers and the content of the Internet, which - unlike technologies of the past - is fundamentally open, and consumers have always had the ability to navigate anywhere they want to go online.
29. Applicant argues that Google will not favor its TLDs in search results, since whether Google manages a new domain will not be a factor in how Google ranks those sites in search results. According to Applicant their goal in '.search' is to deliver the most useful answer - regardless of where it exists on the web.
30. In Applicant's view, Objector's concerns about the presumptive right of registry agreement renewal should not be a part of this objection.
31. Applicant also contends that Objector's attempt to apply trademark law to the '.search' gTLD is misguided because obtaining the right to operate a new gTLD confers no trademark or other enforcement rights regarding that term. Thus, any use of the term "search" in the context of a gTLD would not constitute 'trademark use' and using a TLD for registry services is a generic use which cannot enjoy trademark protection. Applicant states that Google recognizes that the public policy concept of prohibiting trademark rights for generic terms is intended to prevent one competitor from barring another from using a term which is necessary to describe its particular good or service. Applicant submits that Google's operation of the '.search' registry would not prevent its competitors from using the term "search" to describe or refer to their search-related services, since Google intends to operate '.search' as an "...open restricted registry which will allow all search engine providers to register second-level domains ..." (Response, p. 13, N° 40). Because top level domains are not source indicators (e.g. trade designations in the sense of the laws governing trademarks and commercial names) and use of a term for an open registry does not constitute use in commerce, under trademark law, gTLDs are not protectable in and of themselves as trademarks, and Google will not have the ability to exclude its competitors from using the term as necessary to describe or refer to their search-related services. According to Applicant, the possibility of anticompetitive injury caused by the overextension of trademark rights does not exist.
32. According to Applicant, Objector is incorrect in stating that restricted or generic terms are against the goals of the new gTLD program. Whether closed generics should or should not be allowed is a question for the ICANN community and the ICANN Board to decide and should, according to Applicant, not be adjudicated through the Objection process. The grounds for objection as outlined by the Guidebook do not pertain to concerns raised about closed generic applications and therefore should not be dealt with in this forum.

33. Applicant concludes that, because Google (i.e. Applicant) now intends to operate '.search' as an open gTLD most of the arguments posed by Objector no longer apply. Accordingly, Applicant asks the panel to dismiss this objection.

**(G.3) August 11, 2013 Second Submission by Objector**

34. In its August 11, 2013 submission, Objector submits additional arguments:
35. Objector asserts that Applicant's argument that Objector lacks standing and that its Objection does not meet the Guidebook's requirements fail.
36. Objector contends that it has standing to file a Community Objection because it is an established institution that maintains an ongoing relationship with a clearly delineated community with which it has an ongoing relationship.
37. Objector insists that its Objection fulfills the criteria for a Community Objection under Section 3.5.4 of the Guidebook and that there is substantial opposition within the search community to the amended Application, to which the ".search" string remains strongly associated. According to Objector, a restricted '.search' gTLD in the hands of Applicant poses a high risk of material detriment to the legitimate interests of the search community.
38. Objector underscores that there are formal boundaries around the search community, since only companies that operate general and vertical search services are considered to be part of the search community, and particular companies, including Objector's members, are publicly recognized as members of this community, which is said to have existed for nearly as long as the Internet itself. The search community is said to be strongly associated with the ".search" string. Even today and where English is not the primary language, search providers rely on the ".search" string to indicate to the public that websites provide search – so that consumers can and do associate the string with the providers' services. According to Objector, search community members strongly oppose the Application for the '.search' gTLD.
39. Objector reiterates that Applicant's argument that the Objection does not meet the Guidebook's requirements also fails.
40. Objector submits that the European Commission's ("EC") conclusion that Applicant dominates search should prevent Applicant from controlling the '.search' gTLD. Pursuant to Objector, the new gTLD program's purpose is to "open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS." Assigning the '.search' gTLD to Applicant would do the opposite: It would reduce the DNS to a promotional tool that further ossifies Applicant's alleged search monopoly.
41. Pursuant to Objector, Applicant's arguments that it is not dominant and that its search advertising services compete with other forms of advertising conflict with the findings of prominent antitrust regulators, including the EC's recent pronouncement. The Objector submits that by trying to broaden the definition of the relevant 'search market' Applicant misconstrues and ignores the findings of the mentioned antitrust authorities'.
42. Objector also contends that Applicant's "*post-objection amended*" Application to operate a 'dotless' gTLD calls into question whether Applicant should be assigned the '.search' gTLD. Both the substance of the 6 April 2013 amendment and Applicant's conduct in making the amendment provide grounds for rejecting the amended Application.

43. Objector states that Applicant's Application proposes that Applicant will operate the ".search" gTLD as a 'dotless' domain despite serious operational and security risks.
44. According to Objector, Applicant's conduct in these ICANN/ICC proceedings provides evidence of Applicant's abuse of rules and processes, casting doubt on Applicant's fitness to register the '.search' string. By submitting amendments with significant substantive changes after the close of the objection period, Objector claims that Applicant has frustrated the ICC dispute resolution process. According to Objector, third-party objectors with meaningful criticisms to Applicant's amended applications did not have the opportunity to object to the new content, such as Applicant's proposal to operate a 'dotless' domain.
45. Objector states that, although in its Application Applicant commits not to favor Applicant's own services at the expense of others, Applicant has shown a propensity to disregard norms such as procedural requirements. ICANN should not assign the '.search' gTLD to an operator that requires constant monitoring and oversight for potential antitrust abuse.
46. Objector reiterates that "search" is a generic industry term and as such should not be assigned to dominant industry participants and that, contrary to Applicant's contention, TLDs are source indicators capable of conveying information about the quality and reliability of their subdomain names, such as whether a site possesses a positive or negative reputation. According to Objector, international norms against exclusive ownership of common generic industry terms govern the issuance of new gTLDs.
47. Moreover, Objector reiterates that its Objection meets the Guidebook's requirements for Community Objections. According to Objector, the Applicant (often referred to by Applicant in its submissions as 'Google', Applicant's parent company) proposes to operate and control the '.search' gTLD in a manner that will materially impair the legitimate interests of a significant portion of the search community by inserting itself as the essential intermediary for the '.search' gTLD a common resource which will probably be critical to competition, if operated by a non-dominant or neutral party. Applicant is said to have the incentive and ability to foreclose access to the '.search' gTLD and to stifle innovation. Furthermore, Objector asserts that control of the '.search' gTLD would allow Applicant (Google) to 'view' data passing through the '.search' gTLD and, thereby, unfairly give it an advantage also in relation to data that can be '*mined*' over rivals.
48. Objector also alleges that Applicant's (Google's) exclusive control would place the competitive capacity and reputations of search community members at the mercy of an already dominant rival.
49. Objector states that Applicant (Google) is unfit to operate the '.search' gTLD because it does not meet the Guidebook's criteria for evaluating a gTLD applicant's fitness to operate a gTLD. Objector submits that absent exceptional circumstances, any applicant that falls under the enumerated categories in Section 1.2.1 "*will be automatically disqualified from the program.*" Objector notes that Google has engaged in conduct targeted by Section 1.2.1 of the Guidebook. Objector submits that in 2011 Google forfeited \$500 million to the DOJ (i.e. the US Department of Justice), acknowledging that it improperly assisted Canadian online pharmacy advertisers to illegally target the United States through Google's AdWords program. Further, Objector asserts that on April 13, 2012, the FCC (i.e. the US Federal Communications Commission) fined Google \$25,000 for obstructing an investigation into Google's Street View service.

**(G.4) August 18, 2013 Second Submission by Applicant**

50. According to Applicant, the Objector is not a proper party to file a Community Objection because it does not qualify as an *"established institution."* In Applicant's view, the CPE criteria provide a reasonable standard for the Expert Panel to consider in determining the standing of Objectors, rather than simply inventing some alternative standard. Therefore, this standard should apply here and Objector does not meet any of the criteria.
51. Applicant also asserts that Objector cannot prove an ongoing relationship with the search community.
52. Applicant asserts that the content of the Objection does not satisfy the objection criteria as outlined in the Guidebook. According to Applicant, the Objector does not prove that "online search services" are a clearly delineated community because the alleged search community lacks any local or global cohesion or formal boundaries, and no accurate determination can be made with respect to age, global distribution, or number of entities comprising the alleged community. In Applicant's submission, Objector also does not prove that there is "substantial opposition" to the Application, since of the roughly 12,200 public comments on ICANN's website, only six relate to Applicant's '.search' application. Applicant also denies that there is a "strong association" between the alleged community and '.search'. Applicant reiterates that Objector cannot prove that there is no "likelihood of material detriment" to the community.
53. Applicant contends that Objector still has not demonstrated any of the factors necessary to sustain a Community Objection and relies on factually incorrect allegations about legal proceedings before competition authorities. Applicant argues that the proper place for dealing with competition concerns is through the relevant competition authorities and that Objector's misuse of material relating to legal proceedings before competition authorities should be rejected.
54. Furthermore, Applicant requests that evidence submitted only now (i.e. on August 11, 2013), but available before March 13, 2013, should be disregarded.
55. Applicant reiterates that Objector has not proven the existence of a well defined "search community"; that Objector is a proper community representative for any search community; or that this claimed community would be injured if the Application is successful. According to Applicant, Objector is merely an "anti-Google lobbying group".
56. Objector's objection is, in Applicant's opinion, not genuine since, while wholly ignoring Amazon's closed '.search' application, Objector shifted its arguments so that it could maintain Google as its target. Furthermore, according to Applicant, Objector raised no objection to three other '.search' applications, or to generic-term, closed registry applications allegedly filed by Objector's own members.
57. Applicant asserts that Objector mischaracterizes the Application because there is no '*likelihood of material detriment*' to, or "*targeting*" of, a community. Applicant underscores that Objector has not even attempted to sufficiently substantiate the required facts with proof and that Objector has not explained how any community will be "*targeted*". For Applicant Objector rather relies on effects or potential abuse of data which, according to Applicant, are hypothetical and speculative.
58. Applicant states that it will not selectively control access to the gTLD, nor will management of a '.search' registry equate to control of search-related industries. Applicant notes that Ob-

jector's claim of harm depends on speculation about the way Applicant will operate the '.search' gTLD and that this speculation is at odds with the facts because Applicant would adhere to ICANN requirements and the final Registry Agreement would prohibit such conduct. According to Applicant, there is no reason why its Application '.search' should be rejected on the basis of mere speculation.

59. Applicant asserts that granting the '.search' gTLD to Applicant will in no way foreclose search providers — including Google's competitors — from operating search-related domain names and websites on the Internet. There are many other options for those that do not wish to be a part of the '.search' gTLD, including second-level domains within the existing gTLDs, such as *.com*, *.biz*, and *.info*. Potential registrants for specific gTLDs happily co-exist in other gTLDs even when they satisfy all eligibility requirements with no discernible disadvantage.
60. Applicant denies that it (Google) would "control" search through '.search' and become dominant in search as a matter of competition law because Objector does not explain how all search services and users will become dependent on '.search'. Applicant submits that gTLDs are becoming less unique and less individually powerful due to the current gTLD process that will integrate many new gTLDs and to the revolution in software applications ('apps').
61. According to Applicant, accepting Objector's argument would result in rejecting the entire concept of ICANN's current gTLD process by suggesting that no company should manage a registry involving any dictionary word, lest that management confer control of an entire industry related to the word. There is no limiting principle or reason why this type of sweeping claim should be raised in an objection to a single application for '.search', as opposed to raising it with ICANN more broadly.
62. Applicant contends that Objector's competition law arguments are far beyond the scope of this proceeding and meritless. For Applicant, this line of argument is outside the scope of the Guidebook's objection process and should be rejected because only competition authorities can evaluate the actual impact on competitors and consumers. Applicant alleges that Objector relies on speculation. Applicant stresses that ICANN has built into its other processes explicit mechanisms to deal with competition issues, all of which rely on referrals to competition authorities rather than attempting to have these complex issues adjudicated within ICANN's own internal processes.
63. Applicant reiterates that Google is neither a monopolist in search or search advertising nor a gatekeeper to the Internet and that new TLDs do not confer a competitive advantage to applicants over the services associated with those domains.
64. Applicant also reiterates that irrespective of whether "search" is a generic term, it is fully eligible for registration as a TLD and that Objector's trademark-based arguments are irrelevant because this is not a trademark application -- it is merely an application to manage a domain.
65. Applicant underscores that it is committed to protecting the security and stability of the Internet and properly amended its application under the New gTLD Application Change Request Process after careful thought and consideration to mitigate some of the well-known concerns regarding 'dotless' domains, as highlighted in the SSAC's SAC053 (see at: <http://www.icann.org/en/groups/ssac/documents>) recommendations.

66. Applicant notes that ICANN has already deemed Applicant fit to operate a registry and that the discussion in regard to its fitness for the purpose is irrelevant to the Community Objection, especially since ICANN has already followed Section 2.1.1 of the Guidebook and deemed Applicant a respectable entity capable of running a registry.
67. Applicant concludes that Objector's additional submission essentially attempts to repeat arguments it previously made. Applicant reiterates that, Objector lacks standing and fails to submit the required evidence. Applicant summarizes its assertion that it has shown a proper intended use of the '.search' gTLD and presented evidence that its interests in operating this gTLD are in line with the goals and policies of the New gTLD Program and will in no way harm its competitors or Internet users. Accordingly, Applicant urges the Panel to dismiss the Objection.

#### **(G.4) August 18, 2013 Second Submission by Applicant**

68. In the additional clarifications, which were requested by the Expert Panel on August 27, 2013, the Parties have respectively clarified (Objector on August 28, 2013; Applicant on August 29, 2013) that the dotless '.search' variant of the Change Request will, with nearly complete likelihood, not be allowed and that the remaining portion of the Application as defined in the Change Request should be accepted at this stage.

#### **(H) REASONING UNDERLYING THE EXPERT'S FINDING**

##### **(H.1) General Considerations**

69. Prior to providing the reasoning on which the Expert Determination *strictu sensu* is based in accordance with Section 3.4.6 of the Guidebook, the nature and scope of the Expert's mission need to be described. The mission and powers of the Expert Panel and the effect of the Expert Determination are governed by the Guidebook and any rules which apply according to the Guidebook. This general rule is spelled out in Section 3.5 Dispute Resolution Principles (Standards) of the Guidebook as follows:

*"Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards. The Objector bears the burden of proof in each case."*

70. Art. 20 (a) of the Procedure states:

*"Standards (a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN."*

71. Nowhere in the Guidebook's relevant sections there is wording that could be construed as requiring or even inciting an Expert Panel to enforce anti-trust law or competition law standards which such Panel would need to distill as smallest common denominator (tronc commun / common trunk) from national laws, the only inroad for such national laws could be Section 3.5.4 "Detriment", where reference is made to 'rights and legitimate interests' of community members (see discussion below at N° 95 – 103).
72. Accordingly, the criteria (e.g. principles, standards, factors) for making the Expert Determination are conclusively specified in the rules contained or referred to as being applicable in the Guidebook and / or in relevant international law. Basically, this implies that these princi-

ples and standards are intended to be autonomous and independent of national laws, which include consumer protection laws, competition / anti-trust laws, and other laws. However, the fact that the Expert Panel does not have to apply other rules, regulations, or laws that are otherwise applicable does not imply that these are not to be applied by the respective competent authorities, such as competent national courts or anti-trust authorities. In other words, the Expert Panel has no jurisdictional function and the application of national law, rules and regulations is beyond the scope of the Expert Panel's mission. The Expert Panel mission is to deal with issues that are referred to it by the Guidebook and the Rules and must leave any other problem in the context of a new gTLD or its subsequent use to the institutions with the requisite authority to address such issues.

## **(H.2) General Considerations Concerning The Community Objection**

73. The Objector initially filed a Community Objection against Applicant's closed ".search" (dot search) gTLD Application. Applicant subsequently filed a Change Request, which – as such this is not contested by Opponent – changed the nature of the Application from 'closed' to 'open', and the domain applied for from 'dot' .search to 'dot-less' search. At the time the last submission by a Party was made and the contradictory stage of the matter was completed, it remained somehow undecided whether and, if the answer is positive, to which extent this Change Request would be allowed. On August 30, 2013 ICANN issued a press release stating that the NGPC had adopted a resolution affirming that dot-less domain names are prohibited (<http://www.icann.org/en/news/announcements/announcement-30aug13-en.htm>; <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1>).
74. Neither the Procedure nor the Guidebook provide guidance as to how the Expert Panel should proceed under such circumstances. However, neither the Procedure nor the Guidebook give the Expert Panel the power to decide whether a Change Request does not affect an application for a new gTLD or whether the proposed changes are so substantial that the one may no longer qualify the applied for gTLD as being identical to the previous one. However, neither Party has contended that after the Change Request the Application must be deemed to be a new application. Furthermore, the Parties seem to agree that the Change Request from a closed to an open gTLD decreases or modifies the number of contentious issues. It simply would result in making names in the ".search" gTLD available to a larger number of registrants, without changing the system-inherent nature of the gTLD as such. The Change Request to a 'dotless' domain, however, is more problematic for several reasons. The Parties have mainly argued in regard to system and stability issues only (However, one could imagine, that the general public being used to gTLD with a 'dot' may perceive and use dot-less domains consisting of known meaningful terms in a fundamentally different manner. Thus, manifestly there is not only a technical side to a dot-less gTLD). Applicant and Objector have informed the Expert Panel that this part of the Change Request may not be allowed.
75. Facing this situation the Expert Panel notes that it was seized with the Objection against '.search' ('dot search'), which is the application filed prior to the 2012 deadline specified in Module 1, Section 1.1, of the gTLD Applicant Guidebook. As long as the Change Request to the 'dotless' domain is not allowed and this fact is made known by the Parties to the Expert Panel, the Expert Panel shall decide on the Objection against '.search' (dot search) Application. The Expert Panel finds, that basing the decision under on the still not allowed 'dotless' domain name is not appropriate. Accordingly, the Expert Panel will make his Determination



regarding the '.search' domain based on the assumption that this domain would in all events be operated as open gTLD.

### **(H.3) Considerations Concerning Objector's Standing In Regard To The Community Objection**

76. Based on the arguments summarized above, Applicant contests Objector's standing to bring its Community Objection.
77. Pursuant to Section 3.2.1 (Grounds for Objection) of the Guidelines, a formal objection may be *inter alia* filed if *"there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted"*. Section 3.2.2 (Standing to Object) of the Guidelines requires that *"Objectors must satisfy standing requirements to have their objections considered"*. According to Section 3.2.2.4 (Community Objection), only *"established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the Objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection"*.
78. Section 3.2.2.4 further requires that, to qualify for standing for a Community Objection, the Objector prove that it is an established institution. *"Factors that may be considered in making this determination include, but are not limited to:*
  - *Level of global recognition of the institution;*
  - *Length of time the institution has been in existence; and*
  - *Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process."*
79. Additionally, Objector must prove that it has an ongoing relationship with a clearly delineated community. *"Factors that may be considered in making this determination include, but are not limited to: The presence of mechanisms for participation in activities, membership, and leadership; Institutional purpose related to the benefit of the associated community; Performance of regular activities that benefit the associated community; and The level of formal boundaries around the community."*
80. Furthermore, the Guidebook provides the following guidance to the Expert Panel: *"The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an Objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements."*
81. Is Objector "FairSearch.org" an established institution as required in the Guidebook? If one would strictly apply the above mentioned factors as construed on the basis of IG P in the ICANN Generic Names Supporting Organisation Final Report, the answer would probably be 'no', because Objector does only exist less than 5 years (IG P [f]) and as a coalition or group of member companies does not appear to have a 'formal existence' in the sense referred to in IG P [g]). However, on the basis of the materials submitted, the Expert Panel is satisfied that Objector has existed since at least September 2010 as coalition of legally existing companies or groups of companies that pursue business models which rely in one way or the other on the Internet (see e.g. <http://en.wikipedia.org/wiki/Internet>), particularly the World Wide Web (see e.g. [http://en.wikipedia.org/wiki/World\\_wide\\_web](http://en.wikipedia.org/wiki/World_wide_web)). The Expert Panel notes

that in the final version of the Guidebook the term '*formal*' - which was included in the older final report - is not maintained, wherefore a coalition or group of members may apparently qualify as institution if it has a stable presence, even if its legal nature remains unclear. Whilst the presence of a formal charter or national or international registration or validation by a government, inter-governmental organization, or treaty recognizing the Objector was not submitted, it has been undisputedly present since 2010 in the WWW with a website promoting "Fair Search" and visibly preponderantly targeting the activities of the Google-Group. There is no indication that Objector was formed solely in conjunction with the gTLD application process.

82. Evaluated together, the above considerations result in a case in which Objector's standing as submitted by it to the Expert Panel is not clear-cut under Guidebook Module 3 standards. However, considering that well established companies, such as *inter alia* Microsoft Corp. which offers some competing web-based services (e.g. the search "platform" "bing.com"), are members of Objector, the Expert finds that Objector has proven the required minimum of lasting institutional stability for concluding that it is an *established institution*.
83. Objector must also prove that it has an ongoing relationship with a clearly delineated community. Applicant contests that Objector meets this requirement. Module 3 of the Guidebook does not provide many criteria or a definition allowing to establish what the notion 'clearly delineated community' means in practice. Module 4 (String Contention), Criterion 1 'Definitions', provides rather precise guidance in regard to that meaning of the term 'community', albeit in a different functional context. However, IG P in the ICANN Generic Names Supporting Organisation Final Report states in relation to the functional context of the kind of Community Objection at hand that the term 'community' should be interpreted broadly to include for example, an economic sector, a cultural community, or a linguistic community and could even refer to a closely related community which believes it is implicated.
84. The Expert Panel finds that, due to the functional differences, the definition factors (criteria) contained in the mentioned Module 4 may not be directly transposed for the purposes of defining a community in the context of a Community Objection, since Module 4 deals with a different kind of dispute, namely String Contentions that have different characteristics.
85. In any event, Module 4 states what should be obvious: The term 'community' refers to a plurality of natural or legal persons or groups of such persons which all have certain things in common which other persons or groups do not have in common. The members of this group or somebody else, who is ascribed the required authority within the social reference system, must decide that the common characteristic feature(s) of the (potential) members actually makes them a community. By stating that a community, in order to be qualified as such, needs more cohesion than a mere commonality of interest, a highly problematic and qualitative element is being introduced. Sportfishers, triathlon-amateurs, Germans, Frenchmen, native tribes of all kinds, are often referred to as communities, as can easily be seen on the internet of reference manuals such as Collins Thesaurus. However, based on his personal experience this Expert Panel cannot imagine that the individual members of any of these groups share all or even only a preponderant part of their interests. So what could the requirement that there must be more than a commonality of interest actually mean in the context of a Community Objection? Since this requirement contained in Module 4 but not Module 3 is so difficult to apply and such a high threshold does not seem to be as crucial as Filter for Community Objections, the Expert Panel finds that the guidance given for the construction of the term 'community' in IG P is more appropriate and helpful in the context at

hand - especially because it indicates that an economic sector may qualify as delineated group.

86. Therefore, the term 'community' is construed based on the explanations given in the IG P.
87. Objector's identified 'search-community' is mostly legal persons/entities that pursue business goals which are based on business models that at least partially rely or depend on search services for retrieving information on the Internet, namely the World-Wide-Web. Applicant itself has 'delineated' this community in the new wording inserted in its Change Request (Applicant's Annex 2, cover letter, 1st bullet point, Change Request p 1 [Reasons for Change], p 1, 3-6, 13).
88. The Expert Panel finds that in order to form part of the search community it is sufficient that the prospective community member provides or has provided a search service, the use of which by users generates data, and that this service and / or data are needed to implement the community member's business model and / or that entity's community member develops and deploys search related applications('apps') .It is not necessary that the members of this community all understand themselves as members thereof, for example, because they view the others as direct adversaries or direct competitors competing for the same customers. Applicant itself defines the concerned community in its changed Application at N° 18.b.ii.1. by stating that "... '.search' will provide a new online structure for the aggregation of websites with search functionality ..." Thus, the Application targets as potential registrants entities 'running' websites with search functionality, which generally may be referred to as "search-engines". As may for example be seen from an entry in Wikipedia "List of search engines" the (better known) members of this group have been identified and listed by the informed Wikipedia community ([http://en.wikipedia.org/wiki/List\\_of\\_search\\_engines](http://en.wikipedia.org/wiki/List_of_search_engines)). Based on these considerations the Expert Panel finds that the community thereby defined is just sufficiently clearly delineated.
89. Is Objector 'associated' with the above described 'search' community? Put shortly, Applicant submits that the activities of Objector are aimed against its activities and not related to any other interest common goal which the search community may have. The Objector's own web site at first glance seems to support this argument, which could lead to the conclusion that Objector is only associated to its membership but not to a different clearly delineated community, such as the search community defined above. However, of the various meanings (synonyms) ascribed to the word "associate(d)", the Expert Panel find that the terms "connect(ed)", "link(ed)" best describe what is required here: There must be a link between Objector and the search Community that is not arbitrary, but exists for the general public as understood by the Expert Panel. Even if a look at Objector's website reveals to the public that they are *prima facie* partisan and not neutral, Objector's activities generally relate to practices in trade that concern the implementation of business models which in turn concern in one way or the other searches for content on the World Wide Web by users. This linkage to the search community does, in the opinion of the Expert Panel, suffice for the purposes of Section 3.2.2 of the Guidebook, which is primarily aimed at preventing the filing of manifestly unsubstantiated or abusive objections or any member of the public.
90. Accordingly, the Expert Panel finds that Objector has the standing for filing and maintaining the Community Objection.

#### **(H.4) Considerations Concerning The Merits Of Objector's Community Objection**

91. According to Sections 3.5 and 3.5.4 of the Guidebook, for a Community Objection to succeed it must pass muster in regard to four tests. Only if the four tests are passed, the Expert Panel may conclude that the Objector has proved that there is substantial opposition from a significant portion of the community to which the string may be targeted, namely: *"The invoked community must be a clearly delineated community; and the opposition to the application by this community must be substantial; and there must be a strong association between said community and the concerned gTLD; and the application must create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted."*
92. Since the Expert Panel has found above that the search-community invoked by Objector is a sufficiently clearly delineated community and the string 'search' - being a common English word - refers in the context of the Internet to the activity carried out by users through using online structures for the aggregation of websites and/or applications with search functionality offered by community members, it is necessary to establish whether a strong association between the applied-for gTLD string and the community invoked by the Objector does exist, as is required by the non-conclusive factors (criteria) set forth under '*Targeting*' in Section 3.5.4 of the Guidebook.
93. (*Targeting*;) For the purposes of its Change Request, Applicant summarizes its revised plans for '.search' as follows (April 6, 2013 letter to Ms C. Willet, N° 18.b.i.1. of the Change Request document): "The goal of the proposed gTLD is to provide a space dedicated to internet search offerings, and to make it easier for users to access the search functionality of their choice." The English word search also describes broadly what users do when using the functionalities made available by entities making internet search offerings. Based on the above, the Expert Panel finds that entities providing search functionality and/or apps with related functions are *targeted* by "search".
94. (*Substantial Opposition*;) Whether Objector has established that the opposition to the Application within the community is substantial, is – especially if one considers the '*wooly*' factors given as non-conclusive examples in the Guidebook – open to debate, since these factors are a '*mix*' of qualitative and quantitative factors. The Expert Panel is of the view that this requirement may, in a case like the instant one, where it is not obvious to which extent Objector is indeed representative of the complete invoked community, be decided by considering the required minimum threshold along with the likelihood of material detriment. If such detriment is very likely and the likely negative impact on the community great, any weakness in the degree of representativeness of the targeted delineated community may be compensated up to a certain point. The reason is that the weight (substantiality) of opposition also depends on how great the detriment is. Consequently, the Expert Panel finds that, to the extent that Objector fails to establish the required likelihood of material detriment, it would also fail on the requirement that there must be "substantial opposition". Accordingly, the Expert Panel will examine and determine first the '*likelihood of material detriment*'.
95. (*Likelihood of Material Detriment*;) The Guidebook further requires a likelihood of an adverse effect on the .search community, should the .search gTLD be awarded to the Applicant. The relevant part of Section 3.5.4 of the Guidebook reads: "*Detriment – The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted, Factors that could be used by a panel in making this determination include but are not limited to:*

- *Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;*
- *Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;*
- *Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;*
- *Dependence of the community represented by the objector on the DNS for its core activities;*
- *Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and*
- *Level of certainty that alleged detrimental outcomes would occur.*

*An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment."*

96. To demonstrate that assigning '.search' to Applicant creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community, Objector relies on several assertions which shall first be analyzed one by one below and then be evaluated together.
97. Insofar as Objector asserts that '.search' as gTLD is a source indicator capable of conveying information about the quality and reliability of the sub-domain names, that '.search' is capable of indicating a common source, wherefore it should be subject to an exclusion of the possibility of 'monopolization', its views may be subject to a misunderstanding. It is true that - simply stated - a word ('string') may not be registered as a trademark under virtually all trademark acts known by the Expert Panel in regard to goods or services of which it is descriptive, because descriptive (generic) words are not considered as being distinctive. Distinctiveness is an inherent condition of any legally protected trade designation. It is also true that words which are needed in the relevant trade for describing properties and other relevant circumstances concerning the goods or services in question are usually excluded from registration as trademark in a similar manner.
98. However, a gTLD as such has essentially only technical function (very remotely comparable to a so called 'vanity' telephone number). That a given gTLD may be a trade designation or trademark under national law(s) depends on other factors which are basically unconnected to the registration and function of the gTLD within a (technical) name space on the Internet. Institutions like ICANN, for technical purposes, only require the uniqueness of domain names within each gTLD, but no distinctive or other (legal) characteristics. For the Internet as technical infrastructure, the meaning of a domain name in the 'real world' or to natural persons (e.g. consumers) who are using the Internet, is irrelevant. For users, meaning is relevant, but for reasons that are not inherent to the way the World Wide Web as such is set up. To date only sub-domain names within the namespace of existing gTLDs have occasionally encountered interference with protected rights to trade designations or trademarks because any domain name may only exist once within the name space defined by the next-higher domain name level (e.g. *search.com*, *search.de*, *search.co.uk*, *search.mx*, etc. could

all coexist on the World Wide Web, but not *search.de* or *search.com*). In the world of protected trademarks, which generally are subject to the principle of territoriality, the older trade designation prevails over the younger trade designation that is identical or similar. Similarity does also depends on the goods or services for which the trade designations are protected or used. If one leaves aside famous or well-known trademarks, a string may normally coexist with another string of the goods or services for which it is used/registered as trade designations are totally different. From a trademark and name law perspective, the difficulty is that even if the rights can legally coexist, they cannot coexist as domain names of a lower level for technical reasons. A dash or dot, however, could make a difference. Furthermore, a registered trademark gives the right owner a monopoly against infringing use of younger trademarks or trade designations that are identical and similar in any social context including the Internet. A gTLD or sub-domain only affords a factual exclusivity to use it in the Internet in the identical name space level.

99. However, for an open gTLD that always appears in combination with (sub-) domain names, this monopoly is not *per se* significant in the same way. Currently, Internet users are accustomed that the origin of goods or services and any notion associated with the origin (source) is indicated by the domain name that comes before the 'dot' and that gTLD like '.com' '.net', '.edu', '.gov' have no or lesser importance for ascertaining the specific origin. Some of them may refer to categories of domain name registrants (e.g. '.gov' or '.edu') in a broad manner. This situation concerning the connotations of gTLD for consumers and other users may evolve due to the new gTLD scheme. However, even when considering Objector's assertions in the instant proceedings, it remains uncertain and unclear whether this evolution will have the great relevance as argued by Objector. Moreover, if the gTLD '.search' is operated as 'open' domain without discriminating potential registrants or other inequitable treatments, it is difficult to perceive a '*monopolization*' of the term within the specific context of the provision of search related services. All the preceding considerations result in that, irrespective of the potential interference of trademark/name law with sub-domain names, there is no general analogy to be drawn between either insofar as 'generic' terms are concerned.
100. Notwithstanding the above, if Applicant - a wholly owned subsidiary of Google - were to be awarded the '.search' domain, it would become the 'gatekeeper' for all sub-domains within the '.search' gTLD, albeit subject to the rules and other terms and conditions imposed by ICANN or through ICANN approved processes. In this very limited sense, Applicant would obtain a monopoly of control. Since Objector does not object to the '.search' gTLD as such, but to it being awarded to Applicant, the objection is based on the alleged likely usage by Applicant of the '.search' gTLD and the contention of likely detriment caused thereby to the relevant community. The contentions put forward in this regard by Objector rest on the assumption that the new generic '.search' domain will noticeably change the way users use internet search offerings by search facility providers. To be correct, this assumption would require that users will prefer using such search offerings with a substantially higher likelihood only or preponderantly because the sub-domain names 'pointing' to the servers with the search pages/facilities are in the '.search' domain. Under the existing DNS, one may not find examples that do *prima facie* corroborate the correctness of such a hypothesis. Users are accustomed that the sub-domain before the dot is what matters (for example: one may find the sub-domain names 'google', or 'bing' or 'wikipedia' etc. registered under a large variety of different gTLD). Thus, the question is whether the English meaning of "search" ultimately does make the difference, by impacting user's behavioral patterns in new ways. Applicant's argument that this is not the case because English is only one of many relevant languages worldwide is not persuasive, because English is the dominant language in IT and the World

Wide Web. It is also the linguistic 'smallest common ground', because it is preponderant as second language worldwide. That the English verb 'to search' describes what users do when they use the services of members of the search community or otherwise look somehow for something is hard to deny. However, concluding that the search habits of Internet users will change in a way that a 'presence' under the '.search' domain becomes a sort of 'must have' for entities offering search services appears to be very speculative.

101. Moreover, since according to the Applicant's Change Request the '.search'-domain will be operated as open domain, the nature of the allegedly unfair advantages for Applicant (e.g. the Google Group) is not established by Objector with the required degree of likelihood. There are no applicable international or ICANN rules providing that managing the gTLD and being a registry and being a registrant and (direct) competitor vis-à-vis other registrants is incompatible or a fatal obstacle to being awarded the gTLD. Objector has failed to identify a rule of international law or a rule that could be considered as being equivalent, which would prohibit, what is not prohibited by ICANN. Competition/Anti-Trust Laws are limited to certain territories, albeit sometimes with extraterritorial effects. They are part of national law - in the case of EU competition law of several countries. They are not part of international law as referred to in the last sentence of the first paragraph of Section 3.5 of the Guidebook. Competition Laws also substantially differ.
102. Even if one were to admit that, due to the pivotal role of the World Wide Web for a vast number of commercial activities, there is a general requirement for entities operating a gTLD and registries or registrars to treat registrants with equality and not to discriminate against any registrant, the Objector's factual arguments and the material submitted may only give rise to certain initial suspicions that such a discriminative behavior may not be completely ruled out for the future. These suspicions are, for example, nurtured by the wording of the relevant sections of the Change Request (e. g. [i] the imposition of a protocol with one consistent common query interface is peculiar for an Applicant and future registrar; [ii] that a direct competitor of at least some of the other '.search'-community members does indirectly, through an affiliated company, become Applicant and future registrar who defines the registration rules and prices within the '.search' domain; [iii] that Applicant will use a competitor of other industry members [Google] as provider of the relevant technical services for running the '.search' domain; [iv] that at N° 18.b.ii.1, 4th para. of the Change Request Applicant only states that it shall treat "all registrars" equally but does not mention registrants, who at least indirectly may be affected by the contracting registrars behavior; [v] do the words "*search functionality of their [the users] choice* refer to the search functionalities of the different competing entities / companies which users chose or do they refer to the search functionality that today is – if one believes unverified information on the web – globally the choice of more than 85% of users using such search facilities, i.e. Google's facility?, etc.). The way Applicant has chosen to tackle the 'dominance' argument - by simply denying it - is not reassuring. Finally, Applicant's/Google's access to 'transient' search data of users intending to make queries with competing search services also could trigger initial suspicions, if this data was not readily technically available by other means. However, the implications thereof and the probability that Applicant/Google will commercially exploit such data were not sufficiently substantiated to enable the Expert Panel to make a ruling on probabilities of detriment. However, the precise implications thereof and the probability that Applicant/Google might commercially exploit its position to the detriment of the search community were not sufficiently substantiated by the Objector to enable the Expert Panel to make a positive ruling on the actual probability (i.e. not merely hypothetical possibility) of detriment.

103. Finally, one may note that within the 'search community', as understood above, there is a great variety of existing and possible future business models and interests. The impact of a success of the Application on each different sub-group of stakeholders within the (sub-) search communities and their rights under national laws has not been established with sufficient depth of detail by Objector, a future detriment of rights or legitimate interests by the way Applicant would run the '.search' domain has not been sufficiently substantiated to conclude that such detriment is sufficiently likely and will affect a sufficiently big group within the search community.
104. The Expert Panel concludes that Objector's arguments just fall short of establishing with the required degree of likelihood, which detriment to the search community as described above will occur.
105. Because the relevant Section 3.5.4 of the Guidebook states that *"...the Objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Factors that could be used by a panel in making this determination include but are not limited to: ..."*, the Expert Panel summarizes below its conclusions regarding these factors:
106. Factor: *"Nature and extent of damage to the reputation of the community represented by the Objector that would result from the applicant's operation of the applied-for gTLD string."*
107. Finding: A reputational damage was not argued and its likelihood is not implied by the argued facts.
108. Factor: *"Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests."*
109. Finding: Based on the understanding that (i) the '.search'-domain will not be a dot-less domain, (ii) it would be an open domain accessible to registrants who consider themselves to be direct or indirect competitors of Google and (iii) assuming that it will be administered without any discrimination and equitably in accordance with ICANN requirements and, as the case may be, any mandatorily applicable national rule of laws may be understood from the Application in the latest version of a Change Request, there is no other submitted information or evidence that would allow the Expert Panel to conclude that there is a sufficiently high degree of likelihood that Applicant does or will act in the described negative manner.
110. Factor: *"Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string."*
111. Finding: Facts from which such likelihood could be derived have not been sufficiently established to the degree of probability required by the Guidebook.
112. Factor: *"Dependence of the community represented by the Objector on the DNS for its core activities."*
113. Finding: It is obvious that the members of the search community as described above depend on the DNS system for implementing their business models. However, based




on the information and evidence submitted in these proceedings it remains speculative how a '.search'-domain as described in the changed Application may adversely or positively impact all, some, or a substantial number of the diverse community membership.

114. Factor: "*Nature and extent of concrete or economic damage to the community represented by the Objector that would result from the applicant's operation of the applied-for gTLD string.*"
115. Finding: Due to the uncertainties resulting from the preceding findings and based on what was submitted as argument and evidence to the Expert Panel, concrete or economic damage to the community was not established with the required level degree and likelihood.
116. Weighing the above findings together, the Expert Panel finds that Objector has not dissipated the uncertainties regarding a future adverse impact of awarding '.search' as - except for the "dot-less" feature - described in the Change Request. Consequently, in its submissions to the Expert Panel Objector has not met all four tests in the standard for the objection to prevail. Accordingly, the Objector's Community Objection does not prevail (Section 3.5.4 Guidebook, last paragraph).
117. The Findings of the Expert Panel are made in accordance with the Guidebook and Article 21 (d), (e) of the Procedure. The decision on costs is made in accordance with Art. 14(e) of the Procedure.

**(I) EXPERT DETERMINATION**

121. Based on the above considerations and in accordance with Art. 21(d) of the Procedure, I hereby render the following Expert Determination:
- (a) Objector FairSearch's Objection is dismissed.**
  - (b) The Applicant, Charleston Road Registry Inc. prevails in this proceeding.**
  - (b) The Applicant is thus entitled to a refund of its advance payment of costs by the ICC International Centre for Expertise.**
122. This Expert Determination shall be published in full in accordance with Article 21(g) of the Procedure.

05. February 2014

  
Erik G. Schäfer  
Expert

Place of Proceedings: Paris (France)