

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

CASE No. EXP/493/ICANN/110

FAIRSEARCH.ORG

(USA)

vs/

CHARLESTON ROAD REGISTRY INC.

(USA)

This document is an original 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.

# EXPERT DETERMINATION IN

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## EXPERT DETERMINATION IN

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#### INTRODUCTION

1. This Expert Determination arises out of a Community Objection (“Objection”) by FairSearch.org (“Objector”) to the Application of Charleston Road Registry, Inc. (“Applicant”), a wholly-owned subsidiary of Google, Inc., for the generic top level domain (gTLD) “.fly” (Appl. No. 1-1141-48206).

2. Objector’s address is :

The Glover Park Group  
1025 F Street N.W., 9th floor  
Washington, D.C. 20004-1409  
United States of America

3. The Objector is represented by :

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4. The Applicant’s address is :

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Mountain View, California 94043  
United States of America

5. The Applicant is represented by :

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6. The Expert in this case is :

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7. The principal procedural steps in this proceeding are as follows :

The Objector filed its Objection on March 13, 2013.

The Applicant filed its Response on May 14, 2013.

The Expert was appointed on June 12, 2013.

The file was transferred to the Expert on July 17, 2013.

On July 22, 2013, the Expert contacted the parties by email, informing them that he had received the file, did not require additional submissions and did not intend to hold a hearing. The parties did not make additional submissions or request permission to do so.

This Expert Determination was submitted to the Centre for scrutiny on July 29, 2013 and accordingly within the 45-day time limit in accordance with Article 21(a) of the Procedure.

8. This proceeding is conducted subject to :

Module 3 of the gTLD Applicant Guidebook (“Guidebook”)

Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure (“Procedure”)

Rules for Expertise of the ICC (“Rules”)

Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure (“Appendix III”)

ICC Practice Note on the Administration of Cases (“ICC Practice Note”)

9. The language of all submissions and proceedings in this case is English.
10. All communications by the Parties, the Expert and the Centre were submitted electronically, in accordance with Article 6(a) of the Procedure.
11. Abbreviations Used in this Expert Determination :

“Appendix III”	Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure
“Applicant”	Charleston Road Registry, Inc.
“Center”	ICC International Centre for Expertise
“gTLD”	New Generic Top-Level Domain Name
“Guidebook”	Module 3 of the gTLD Applicant Guidebook
“ICC Practice Note”	ICC Practice Note on the Administration of Cases
“Objection”	Objection Form completed by Objector
“Objection Annex”	Annex to Objection
“Objector”	FairSearch.org
“Procedure”	Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure
“Response”	Response Form completed by Applicant
”Response Annex”	Annex to Response Form completed by Applicant
“Rules”	Rules for Expertise of the ICC

## STANDARDS APPLICABLE TO COMMUNITY OBJECTIONS

12. In order for a Community Objection to be successful, the Objector must satisfy four conditions.
13. Two of these conditions may be regarded as relating, in effect, to standing. They are:
  - (a) *that the community invoked by the Objector is a “clearly delineated community”* and
  - (b) *that there is “a strong association” between the community invoked and the gTLD string for which application is made.*
14. According to the Guidebook, to find a “clearly delineated community”, a Panel must first find that the Objector is an established institution. Factors relevant to this particular determination are:
  - (i) the level of global recognition of the institution,
  - (ii) the length of time the institution has been in existence, and
  - (iii) the presence of public historical evidence of the institution’s existence.

In any case, the institution must not have been established solely in conjunction with the gTLD application process.

15. Assuming a Panel finds an Objector to be an established institution, it must then find that the Objector, as an institution, has an ongoing relationship with a clearly delineated community. According to the Guidebook, the existence of a clearly delineated community may be evidenced by:
  - (i) the level of public recognition of the group as a community at a local and/or global level,
  - (ii) the level of formal boundaries around the community and the persons and entities that are considered to form the community,
  - (iii) the length of time the community has been in existence,
  - (iv) the global distribution of the community, and
  - (v) the number of people or entities that comprise the community.

According to the Guidebook, to determine whether an institution has an ongoing relationship with a clearly defined community, the Panel may consider:

- (i) the presence of mechanisms for participation by members of the community in the institution’s activities, membership and leadership,
- (ii) an institutional purpose that is related to the benefit of the community, and
- (iii) performance by the institution of regular activities that benefit the community.

The Guidebook emphasizes that the various listings of factors are not exhaustive and also that it is not necessary that each and every one of these factors is established. Rather, for each of the determinations, the Panel carries out a balancing of all the relevant factors.

16. Once the “clearly delineated community” requirement (which I term condition (a)) is met, it still remains to determine whether there is “a strong association” between this community and the gTLD string for which application is made (an association that I refer to as condition (b)). According to the Guidebook, this association may be established by, among other things:
  - (i) statements in the application,
  - (ii) other public statements by the applicant, and
  - (iii) associations made by the public.
  
17. Assuming standing is established (through a showing that the community invoked by the Objector is “clearly delineated” and has “a strong association” with the gTLD in question), the Objector must then establish two further conditions (which I refer to as conditions (c) and (d)), namely:
  - (c) *that there is “substantial Community opposition” to the application, and*
  - (d) *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.*
  
18. According to the Guidebook, in determining whether there is (c) “substantial Community opposition” to the application, the Panel considers the following factors, including:

- (i) the number of expressions of opposition relative to the size and composition of the community,
  - (ii) the representative nature of the entities expressing opposition,
  - (iii) the level of recognized stature or weight among those expressing opposition,
  - (iv) the distribution or diversity among those expressing opposition,
  - (v) historical defense of the community in other contexts, and
  - (vi) the costs incurred by the Objector in expressing opposition.
19. If substantial opposition is found, the Panel must then determine whether (d) “*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*”. According to the Guidebook, in making this determination, the Panel may consider the following:
- (i) the nature and extent of damage to the reputation of the community that would result from the applicant’s operation of the gTLD for which application is made,
  - (ii) 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,
  - (iii) interference with the community’s core activities that would result from the applicant’s operation of the gTLD for which application is made,
  - (iv) dependence of the community on the domain name space (DNS) for its core activities,
  - (v) nature and extent of concrete or economic damage to the community that would result from the applicant’s operation of the gTLD for which application is made, and
  - (vi) the level of certainty that the alleged detriment will occur.
20. With respect to conditions (a), (b), (c) and (d), described above, the Objector bears the burden of proof.

## **SUMMARY OF THE OBJECTION**

21. In order to establish standing in this case, the Objector identifies itself as a well-established member-organization, consisting of some dozen multinational companies, employing more than 100,000 persons world-wide. According to the



Objector, it was formed as an institution, and its website was launched, in October 2010.

22. The Objector claims that, since its formation, it has gained an important and favorable reputation as a voice for the international internet search community, interacting with a wide range of governmental and non-governmental entities in the interest of transparency, fairness, consumer choice and innovation in Internet search. It states that, as an institution, it provides mechanisms for participation in activities, membership and leadership, and that its purposes relate to the benefit of the internet search community. The Objector thus claims to represent not only its own members, but also what it describes as “a global coalition of similarly-interested organizations and companies” (Objection, para. 13).
23. The Objector claims that there is substantial opposition to the Application in question from a significant portion of the community that has been identified. The opposition in question is said to be driven by the community’s awareness of the detriment to it that would flow from grant of the challenged Application.
24. The Objector claims that the detriment in question would take the form of an impairment of on-line competition resulting from the unfair competitive advantage that the Applicant would gain vis-à-vis its competitors through its identification with a generic term (Objection, paras. 22-23). As defined by the Objector, generic terms are terms that are commonly used to identify, not a particular player within an industry, but rather the industry as a whole and the products and services that the industry offers (Objection, para. 14). According to the Objector, the disputed gTLD “.fly” is precisely such a common generic term for the community that the Objector represents (Objection, para. 16).
25. The Objector asserts that the Applicant is currently the dominant provider of algorithmic and paid search services, accounting for 90% of all search queries in Europe and 70% of all search queries in the United States, and that it is set as the default search engine for most mobile devices (Objection, para. 18). The search industry is also said to exhibit serious barriers to new entrants, due in part to the cost of maintaining a search engine capable of providing quality search results (Objection, para. 19). According to the Objector, under these circumstances, grant

of the disputed gTLD would allow the Applicant to further strengthen its dominance in general search and search advertising and, for purposes of the present Objection, its dominance in flight-booking search-related services in particular.

26. The Objector characterizes the grant to the Applicant of the gTLD it seeks to obtain as reserving to Google alone control over search-related gTLDs. This is due to Google's asserted intention "to exclude all others in the Industry from using common generic industry terms for its business" (Objection, para. 21). The Objector bases this assertion on the Applicant's statement in its initial Application of an intention "to operate the gTLD as a closed registry with Google as the sole registrar and registrant" (Objection, para. 21). This result, it is argued, would continue in perpetuity because the registry agreements permit unlimited automatic renewal in ten-year terms. In the Objector's terms, grant of the Application in this case would confer on the Applicant a "perpetual monopoly of generic industry terms." (Objection, paras. 2, 34).
  
27. The Objector acknowledges that the Applicant now proposes to set up the gTLD ".fly" as an "open" rather than "closed" gTLD (Response, para. 28), and that its Application might therefore appear to be "benign." But it describes this impression as deceptive (Objection, paras. 24, 28) because the Applicant nevertheless "would be well-positioned to foreclose vertical search competition" (Objection, para. 28). The Objector says this is due to the fact that the Applicant, by its own admission in its Application, would retain the right to determine which businesses are "verified airlines, travel agencies, and travel re-sellers" (Objection, para. 30) – albeit subject to a non-discrimination guarantee (i.e. a guarantee not to offer preferential treatment to its own sites) and to an undertaking both to publish verification criteria and to conduct audits only in the interest of preserving the integrity of the gTLD. The Objector states that the Applicant will thus become the "gatekeeper" for the domain in question (Objection, para. 22) and predicts that its brand would then become inextricably linked to the market category in which it operates as dominant actor. In sum, the Objector urges that the Applicant not be allowed broad discretion to decide which enterprises are eligible to be part of the ".fly" domain and to, in effect, self-police (Objection, para. 31).

28. In the view of the Objector, grant of the Application at issue would harm members of the community by siphoning traffic away from the Applicant's competitors and toward the Applicant, while in the process harming consumers. In this regard, the Objector invokes general ICANN policy, describing it as ensuring that "gTLDs operat[e] in a fair, orderly fashion across one global Internet, while promoting innovation and competition."

#### **SUMMARY OF THE APPLICANT'S RESPONSE**

29. Responding to the Objection, the Applicant disputes both the Objector's standing to object and its position on the merits of the Objection.
30. The Applicant contends that the Objector lacks standing, for multiple reasons, namely (Response, paras. 3-8):
- (a) that the Objector does not represent the travel community,
  - (b) that the Objector is not "an established coalition,"
  - (c) that the Objector is biased,
  - (d) that the objecting institution has no consumers or consumer groups as members, and
  - (e) that the Objector's claim to having a coalition of supporters is deceptive.
31. As regards the merits, the Applicant maintains that the Objection fails to meet the standards for a successful Community Objection. Thus, according to the Applicant (Response, paras. 9-11), the Objector has not established the following:
- (a) that the community whose interests are invoked is "clearly delineated,"
  - (b) that the asserted community has received public recognition as a community,
  - (c) that the asserted community has ascertainable formal boundaries,
  - (d) that the asserted community has had a lengthy existence,
  - (d) that the asserted community is global in distribution or size,

- (e) that there is a strong association between the asserted community and the string applied for,
- (f) that there is substantial opposition within the asserted community,
- (g) that the opposing entities are numerous or representative, enjoy recognized stature or weight, reflect wide distribution or diversity, have a history of defending the interests of the asserted community, or have incurred costs in conveying their opposition,
- (h) that there is a likelihood of material detriment to the asserted community resulting from the Applicant's operation of the gTLD applied for,
- (i) that the asserted community would suffer reputational, concrete or economic injury,
- (j) that the Applicant does not or will not act in the interest of the asserted community or users,
- (k) that the Applicant would interfere with the asserted community's core activities,
- (l) that the asserted community's activities depend on the domain name space (DNS), and
- (m) that the stated detrimental outcomes would certainly occur.

32. In addition, the Applicant seeks to refute many of the Objector's other specific assertions. Thus, the Applicant maintains that, contrary to the Objector's assertions:

- (a) generic terms are not easily identified (Response, paras. 13-16),
- (b) Google is not a monopolist in the search industry or in search advertising, but rather competes with a wide variety of enterprises (Response, paras. 17-21)
- (c) Google does not function as a gatekeeper to the Internet (Response, paras. 22-23),
- (d) barriers to entry do not deter new firms from entering the search space (Response, paras. 24-25),
- (e) expanding gTLDs does not necessarily promote competition (Response, para. 26),
- (f) Google will not operate the TLD as a closed registry, but rather as an open one (Response, para. 28),

- (g) domains with restricted registries are common and serve a positive purpose (such as building trust within the Internet user community) (Response, para. 25),
- (h) Google's competitors have options other than registering a second-level domain within the ".fly" TLD (Response, para. 28),
- (i) consumers may find any site they wish through search engines or by navigating directly to a site (Response, para. 30), and
- (j) the Objector has not indicated the nature of economic damages that could be attributed to Google, or offered an estimate of them (Response, para. 31).

## **FINDINGS OF THE EXPERT**

33. Based on the Objection filed by the Objector and the Response filed by the Applicant, together with the Annexes appended to both submissions, the Expert makes the findings that follow.

### **Standing of the Objector**

34. Whether an Objector has standing to challenge the grant of a gTLD depends on a series of determinations, notably: the nature of the Objector as institution; the relationship between the Objector as institution and the community whose interests the Objector invokes; and the association between the community and the gTLD string for which application has been made.

#### *The Objector as Institution*

35. In order to establish standing, the Objector must first demonstrate that it is an established institution. The factors relevant to this particular determination are the level of global recognition of the institution, the length of time the institution has been in existence, and the presence of public historical evidence of the institution's existence.
36. As to the factors on which this determination is to be based, the record in this case is mixed. On the one hand, the Objector provides indications to suggest that it has received some global recognition. It at least asserts that it interacts with a wide range of governmental and non-governmental entities in the interest of transparency, fairness, consumer choice and innovation in Internet searches, and

that it is part of a “global coalition of similarly interested organizations and companies” (Objection, paras. 8, 13; Objections Annex B, O). The Applicant denies these assertions (Response, para. 4), but does not effectively refute them. Regarding the length of time that the institution has been in existence, the question is a close one, since the Objector was only established in October 2010 (Response, para. 4). But while that is relatively recent, the pace of change in the Internet and its technology is such as to render a period of close to three years non-negligible. On the other hand, the Objector has failed to adduce any public historical evidence of its existence as an institution, this being among the factors stated to be relevant to this issue (Response, para. 9).

37. The Applicant goes to some length to portray the Objector as biased. Technically speaking this, even if true, is irrelevant to whether the Objector is an established institution. Still, a showing of bias could affect an Expert’s assessment of claims addressed later in this Expert Determination, namely whether the substantial opposition and the material detriment that need to be established have in fact been established. That being said, the Expert is unpersuaded, on the basis of the documents relied upon by the Applicant (Response Annexes 3-7), that the Objector is biased. The Annexes cited appear to be largely polemical and, at best, editorial, in nature and their objectivity cannot reliably be determined.
38. In sum, while the Expert entertains doubt as to whether the Objector constitutes an established institution for present purposes, he considers that on balance a sufficient showing to that effect has been made.

*Relationship between Objector as Institution and a Clearly Delineated Community*

39. The Expert must then find that the Objector, as an institution, has an ongoing relationship with a clearly delineated community. Before assessing the institution’s relationship with the community, the Expert first considers whether the community in question can be characterized as “clearly delineated.”
40. In fact, the Objection does not do a very effective job of defining the affected community. It refers to the community that it purports to represent as “the global

internet search community” (Objection, para. 1).<sup>1</sup> This is problematic because the Objection in this case is not – and cannot be – directed to the full range of the Applicant’s proposed Internet search activity, but only to the activity associated with the specific gTLD “.fly” (Response, paras. 2, 29). Consideration of the Applicant’s other Applications, including notably its Application for the gTLD “.search”, but also its Application for the gTLP “.map”, lies beyond the scope of this Expert Determination. To the extent that only the gTLD “.fly” is in issue, the affected community, as pointed out by the Applicant (Response, para. 9), has not been defined with particularity.

41. That being said, the Expert finds that the Objector must of necessity have been contemplating a narrower community than the community of Internet searchers to which it refers, and more particularly a community limited to search engines relating to the travel industry.
42. Looking then at this narrower community, it seems fair to conclude that it enjoys public recognition on both a global and local scale, as the Objector asserts (Objection, para. 8).<sup>2</sup> Moreover, this community has doubtless been in existence for many years and the number of persons and entities comprising it is obviously very large. It is true that the Objector has failed to state, much less show, that the community is subject to any formal boundaries. However, it is not necessary to any particular finding that each and every relevant factor point in its direction. More troubling is the fact that the Expert found it necessary to narrow the definition of the community as presented by the Objector, so as to reach only search engines relating to the travel industry. But, once having done that, the Expert concludes, based on the relevant factors, that there does exist an adequately delineated community for standing purposes.
43. It is not sufficient, however, that the Objector identifies a relevant community that is clearly delineated. It is also necessary to establish that the Objector, as an

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<sup>1</sup> According to the Objector, it “represents the interests of a group 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” (Objection, para. 3).

<sup>2</sup> The Objector reports that it is an interlocutor “with a wide range of elected officials, various government agencies, and international organisations around the world on a number of issues surrounding the preservation of transparency, fairness, consumer choice and innovation in Internet search.” Objection, para. 8, citing the European Commission, the South Korean Fair Trade Commission, the French regulator CNIL, the Brazilian Ministry of Justice, the Argentinian Competition Commission, as well as the Competition Commission of India.

institution, has an ongoing relationship with that community. Here again the record is mixed. On the one hand, there would seem to be no doubt that the Objector has an institutional purpose that is related to the benefit of the community, as the Objector alleges (Objection, para. 6) and as the Applicant cannot deny. The Objection also furnishes some evidence that the Objector engages in regular activities of benefit to the community.<sup>3</sup> Where the Objection falls short, however, is in regard to the presence of mechanisms for participation by members of the community in the institution's activities, membership and leadership. The Objection asserts, in rather conclusory fashion, that such mechanisms exist (Objection, para. 12), but fails to identify them. Once again, however, it is not necessary that each and every relevant factor support the conclusion reached. Balancing all the relevant factors, the Expert considers that the record, while mixed, tilts in favor of finding a meaningful ongoing relationship between the Objector as institution and the community in question, as redefined.

#### *Association between Community and gTLD String*

44. The next determination that needs to be made in order to establish standing is whether there exists "a strong association" between the community in question and the gTLD string for which application has been made. This determination is said to depend largely on statements made, not by the Objector, but by the Applicant itself. Even without consulting the Application as such, the Expert finds in the Applicant's response to the Objection recognition of a strong association between the community the Objector purports to represent and the gTLD for which the Applicant has applied. For example, the Applicant observes that restricted TLDs are favorable to the interests of the community (Response, paras. 25-27).<sup>4</sup>

#### *Conclusion on Standing*

45. Standing in a Community Objection requires that the Objector satisfy a series of conditions having to do with the nature of the Objector as institution; the relationship between the Objector as institution and the community whose

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<sup>3</sup> See note 2 supra.

<sup>4</sup> The Applicant suggests that restrictions on access to TLDs "foster (rather than restrict) innovation because the restrictions are largely intended to create a sense of identity and community" (Response, para. 25) and because they "build trust with the Internet user community" (Response, para. 27).



interests the Objector invokes; and the association between the community and the gTLD string for which application has been made.

46. The Expert concludes that, despite the considerable weaknesses in the Objector's showing, and although the relevant factors do not by any means all point in the same direction, each of the conditions required for standing is, on balance, satisfied. The Objector accordingly has standing to pursue the present challenge.

### **Substantial Community Opposition**

47. Objector's standing having been established, it remains to determine whether there is substantial Community opposition to the Application. This determination turns on numerous factors including, notably, the number of expressions of opposition relative to the size and composition of the community, the representative nature of the entities expressing opposition, the level of recognized stature or weight among those expressing opposition, the distribution or diversity among those expressing opposition, historical defense of the community in other contexts, and the costs incurred by the Objector in expressing opposition.
48. Among these factors, the Objector can be said to have demonstrated a considerable range of entities expressing opposition to the Application (see Objection, paras. 8, 13, Objection Annex B).
49. On the other hand, there is no significant mention in the Objection of the number of expressions of opposition relative to the size and composition of the community. Nor does the Objection document the representative nature of the entities expressing opposition, much less the extent of their recognized stature or weight. Finally, the remaining factors cited in the Guidebook – notably, historical defense of the community in other contexts – do not receive serious attention.
50. A showing of substantial opposition to an application is critical to a successful Objection. Such a showing is absent here. Otherwise put, the Applicant is correct in asserting that, in these respects, the Objection “*does not conform to the [Applicant Guidebook's] community objection principles*” (Response, para. 9).

51. In sum, the Expert concludes that the Objector has not carried its burden of establishing substantial community opposition to the Application.

### **Likelihood of Material Detriment**

52. Although the Objector's failure to demonstrate substantial community opposition requires the Objection to be overruled, the Expert – for the sake of completeness of the analysis – addresses the remaining question, namely whether the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community.
53. There can be no doubt that substantially adverse effects on competition would constitute the kind of material detriment contemplated in the context of Objections to new gTLDs. The Expert is fortified in that view by the evidence that ICANN strives to promote competition in the registry of domain names, thereby promoting consumer choice, market differentiation and diversity (Objection Annexes F-H). It remains to determine whether the Objector has carried its burden of proof on whether grant of the new gTLD at issue in this case would have those effects.
54. Taking into consideration the various factors cited by the Guidebook as relevant to this issue, the Expert concludes that, even if substantial community opposition had been shown, there has not been shown a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community. One factor in favor of such a showing may be assumed, namely “dependence of the community on the domain name space (DNS) for its core activities.” However, the other relevant factors are in the main lacking. I leave aside the factor of “damage to the reputation of the community that would result from the Applicant’s operation of the gTLD,” for the simple reason that there is nothing in the dispute resolution process under which this proceeding is conducted to suggest that the reputation of the community is at all relevant to this particular Objection. But other factors much more pertinent to the Objection in this case have also not been established. The Objector has provided surmise, but has not provided evidence, to the effect that “the [A]pplicant is not acting, or does not intend to act, in accordance with the interests of the community or of users more widely”

(Response, para. 11). The Objector has broadly asserted that – but not indicated with specificity how – the Applicant’s operation of the gTLD in issue would cause “interference with the community’s core activities.” While the Objector complains about likely economic damage to the community – and opines about its nature and extent – it does not characterize the claimed damage in a fashion that could possibly be described as “concrete” (Response, para. 11). Generalized propositions about “barriers to entry” (Objection, paras. 19-20) do not suffice. And the Objector’s assertions that grant of the Application will siphon traffic away from the Applicant’s competitors are speculative and basically unsubstantiated. Beyond all of that, the Objector has not adduced impressive evidence of a “[high] level of certainty that the alleged detriment will occur.”

55. There is obviously considerable disagreement over Google’s effect on competition in the industry. Both sides present documents that, viewed in isolation, would suggest that, as the case may be, Google has or has not abused its dominant position and has or has not had a seriously deleterious effect on competition (see Objection, paras. 17-18, Response Annex 10). Similarly both sides cite to regulatory and judicial decisions in various jurisdictions that support their position on Google’s status and conduct as a market actor (See Objection Annexes E, J-M, citing Australian, Canadian and U.S. determinations, and Response Annexes 12-14, citing Brazilian and U.S. determinations). They also present conflicting and not always objective accounts on such questions as whether there are serious barriers to entry in the industry (See Objection, para. 19, Response Annexes 16-18), whether issuance of new gTLDs will significantly foster competition (See Objection, paras. 20, 22, Response Annexes 19-20), and whether restricted TLDs have a positive or negative effect (Objection, paras. 26, 30, Response Annexes 21-22).
56. The Expert notes, in passing, that the Objector devotes several pages to the proposition that international law does not allow exclusive ownership or control of common generic terms (Objection, paras. 35-41). Strictly speaking, that proposition – even if true – is not relevant. The Procedure states, in Article 20(a) that “[f]or each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN,” although Article 20(b)

goes on to allow the Panel, if it wishes, to refer to and rule on the basis of “any rules or principles that it determines to be applicable.” The standards defined by ICANN, as set forth in the Guidebook and as presented in some detail at the start of this Expert Determination, state independent criteria – namely, a “clearly delineated community,” “a strong association” between the community invoked and the gTLD string for which application is made, “substantial Community opposition” to the application, and 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 – and do not reference international law. This is in contrast with the Limited Public Interest Objection, which requires a panel to determine whether the gTLD applied for “is contrary to general principles of international law for morality and public order.”

57. On the whole, the Applicant’s showing on these various points is more cogent and convincing than the Objector’s. Even if that were not the case, the Objector bears the burden of proof, and in the face of these profoundly contradictory studies and other documents, and the profoundly contradictory assertions they make, the Expert cannot conclude that the Objector has carried that burden.
  
58. It is significant that, though the Applicant initially proposed a “closed” registry, it amended its Application so that the registry would be an “open” one, and it has stated unequivocally that it will make the gTLD available to all entities that objectively represent verified airlines, travel agencies, and travel re-sellers, on a non-discriminatory basis and in accordance with publicly known criteria (Response, para. 41). The Objector characterizes this set of assurances as misleading (Objection, para. 24), but has not shown them to be. As for the undertakings themselves, the Expert cannot of course find with certainty that the Applicant will in the future unfailingly operate the gTLD in all respects in conformity with them. But neither has the Objector offered convincing reasons to believe that the Applicant will not do so, though that is its burden. In short, the Objector reports, but does not substantially evidence, what it refers to as the Applicant’s intention “to exclude all others in the Industry from using common generic industry terms for its business” (Objection, para. 21).

59. The Objector thus has not established a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community.

## **CONCLUSION**

60. The Objector has adequately established in all pertinent respects that it has standing to challenge the grant to the Applicant of the gTLD at issue in this case.
61. However, the Objector has not carried its burden of establishing the fact of substantial community opposition to the Application. Even had the Objector carried that burden, it did not carry the burden of showing that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community.

## **DECISION**

62. Accordingly, in this proceeding the Applicant prevails and the Objection is dismissed.
63. Applicant is therefore entitled to refund of its advance payment of costs by the International Chamber of Commerce pursuant to Article 21(d) of the Procedure.
64. This constitutes the Expert's final and binding findings.

Date 3 September 2013



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Professor George A. Bermann, Expert