

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

CASE No. EXP/491/ICANN/108

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.

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE

FAIRSEARCH.ORG
(USA)

The Objector

vs/

CHARLESTON ROAD REGISTRY INC.
(USA)

The Applicant

EXPERT DETERMINATION

Expert Panel:
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I. DEFINED TERMS

1. **Applicant** – Charleston Road Registry Inc., a company with its registered office at 1600 Amphitheatre Parkway, Mountain View 94043, California, USA.
2. **Additional Written Submissions** – the Applicant's Additional Written Submission and the Objector's Additional Written Submission when referred to together.
3. **Applicant's Additional Written Submission** – response to the Objector's Additional Written Submission submitted by the Applicant to the Centre on 12 August 2013 (13 August 2013 Moscow time).
4. **Application** – application for the Disputed gTLD dated 13 June 2012 (Application No. 1-1417-46480) filed by the Applicant.
5. **Centre** – the International Centre for Expertise of the International Chamber of Commerce with its registered address at 33-43 Avenue du Président Wilson, 75116 Paris, France.
6. **Costs** – has the same meaning as in the Procedure.
7. **Disputed gTLD** – disputed generic¹ top level domain ".MAP".
8. **Expert** or **Expert Panel** – has the same meaning as the Panel.
9. **gTLD** – generic top level domain.
10. **Guidebook** – ICANN gTLD Applicant Guidebook (version 4 June 2012).
11. **Objection** – community objection to the Application submitted by the Objector to the Centre on 13 March 2013.
12. **Objector** – FairSearch.org, a company with its registered office at the Glover Park Group, 1025 F St. NW, 9th Floor, Washington, DC 20004-1409, USA.
13. **Objector's Additional Written Submission** – "FairSearch.org's Written Submission Replying to Charleston Road Registry's Response to FairSearch.org's Objection to Charleston Road Registry's Application for the .MAP Generic Top-Level Domain Name" submitted by the Objector to the Centre on 30 July 2013.
14. **Panel** – one member panel consisting of Mr Vladimir Khvalei, a partner of the Moscow office of Baker & McKenzie – CIS, Ltd. with the office's registered address at 9 Lesnaya Street, Moscow 125047, Russia.
15. **Parties** – the Applicant and the Objector when they are collectively referred to.

¹ Usage of the word "generic" for the purpose of this definition is without prejudice to the Parties' positions on whether the ".MAP" top level domain is generic or not.

16. **Party** – any of the Parties.
17. **Procedure** – the New gTLD Dispute Resolution Procedure, which is an Attachment to Module 3 of the Guidebook.
18. **Registry Agreement** – a draft agreement between ICANN and a successful applicant for a new gTLD (in terms of the Registry Agreement – "Registry Operator") which is attached to and is a part of the Guidebook.
19. **Response** – response to the Objection submitted by the Applicant to the Centre on 14 May 2013.
20. **Rules** – the ICC Rules for Expertise as in force from 1 January 2003.
21. **ToR** – Terms of Reference dated 19 July 2013 introduced by the Panel via procedural order No. 1 and sent out to the Parties by e-mail dated 19 July 2013 at 10:20 p.m. (Moscow time).

II. THE PARTIES

22. The Objector, FairSearch.org, has its registered office at the Glover Park Group, 1025 F St. NW, 9th Floor, Washington, DC 20004-1409, USA. The Objector is represented in this case by Mr Ben Hammer. Names and addresses for communications are set out in para. 27 below.
23. The Applicant, Charleston Road Registry Inc., has its registered office at 1600 Amphitheatre Parkway, Mountain View 94043, California, USA. The Applicant is represented in this case by Ms Sarah Falvey and Mr Brian Winterfeldt. Names and addresses for communications are set out in para. 28 below.

III. DISPUTE RESOLUTION SERVICE PROVIDER

24. As per Article 1(c) and 4(b)(iv) of the Procedure, the Dispute Resolution Service Provider is the Centre. The address of the Centre is as follows:
ICC International Centre for Expertise
33-43 Avenue du Président Wilson
75116 Paris, France
E-mail: expertise@iccwbo.org

IV. EXPERT PANEL

25. As per Article 13(b)(iv) of the Procedure, these proceedings, as concerning a community objection, shall involve the participation of a one member Panel.
26. The Chairman of the Standing Committee of the Centre appointed the following person as Expert:
Mr Vladimir Khvalei
Partner

Baker & McKenzie
9 Lesnaya Street
Moscow 125047, Russia
Phone: +7 495 787 27 00
E-mail: Vladimir.Khvalei@bakermckenzie.com

V. COUNSEL TO THE PARTIES, COMMUNICATIONS

27. Communications to the Objector shall be sent to the following address:

Mr Ben Hammer
FairSearch.org
The Glover Park Group
1025 F St. NW, 9th Floor
Washington, DC 20004-1409, USA
Phone: +1 202 337 0808
E-mail addresses :
bhammer@gpgdc.com and
gtld@gloverparkgroup.com

28. Communications to the Applicant and its representatives should be sent to the following address:

Ms Sarah Falvey
Charleston Road Registry Inc.
1600 Amphitheatre Parkway
Mountain View, CA 94043, USA
Phone: +1 202 346 1230
E-mail: tas-contact7@google.com

The Applicant's representatives:
Ms Sarah Falvey
Google Inc.
1011 New York Ave, Second Floor
Washington, DC 20005, USA
Phone: +1 202 346 1230
E-mail: sarahfalvey@google.com

and

Mr Brian Winterfeldt
Katten Muchin Rosenman LLP
2900 K Street NW, North Tower
Suite 200
Washington, DC 20007-5118, USA
Business Phone: +1 202 625 3562
Business Fax: +1 202 339 8244
E-mail addresses:

brian.winterfeldt@kattenlaw.com and
newgtld@kattenlaw.com

29. Pursuant to Article 6(a) of the Procedure all communications by the Parties with the Centre and the Expert were submitted electronically.

VI. LANGUAGE

30. As per Article 5 of the Procedure, the language of all submissions and proceedings under this Procedure is English language.

VII. PROCEDURAL HISTORY

31. On 13 June 2012 the Applicant posted an Application for the Disputed gTLD (Application No. 1-1417-46480).
32. On 13 March 2013, the Objector submitted to the Centre the Objection based on Article 2(e)(iv) of the Procedure (i.e. the community objection).
33. The payment of a non-refundable filing fee of EUR 5,000 was effected by the Objector on 13 March 2013.
34. On 12 April 2013, ICANN published its Dispute Announcement pursuant to Article 10(a) of the Procedure. The Centre also published information regarding the procedure on its website (Article 9(e) of the Procedure).
35. On 14 May 2013 the Applicant filed its Response. The Applicant's filing fee of EUR 5,000 was paid on 30 April 2013.
36. On 12 June 2013 the Chairman of the Standing Committee of the Centre appointed Vladimir Khvalei as the Expert pursuant to Article 3(3) of Appendix I to the Rules, and the Centre informed the Parties of this decision by its letter of 14 June 2013. By the same letter the Centre estimated the total Costs of the proceedings at EUR 58,600 and requested each Party to make payment of EUR 53,600 within 10 days of the receipt of this letter.
37. On 24 June 2013 the Objector filed a request for extension of time limit for the payment of the advance on costs. On 25 June 2013 the Objector submitted evidence of its advance payment of the Costs.
38. Advance payment of the Costs effectuated by both the Objector and the Applicant was credited to the ICC's bank account on 26 June 2013.
39. Following the Parties' advance payment of Costs, the Centre confirmed the full constitution of the Panel, and the file was transferred to the Expert on 11 July 2013.

40. On 16 July 2013, the Expert sent the Parties a draft ToR and gave them an opportunity to provide comments on it by 19 July 2013.
41. By 19 July 2013 the Parties provided comments on the draft ToR.
42. On 19 July 2013, the Expert issued Procedural Order No. 1 approving the ToR. The ToR provided for submission of one additional written statement by each of the Parties within the timeframe established in Provisional Timetable attached to the ToR.
43. On 30 July 2013, the Objector filed its Additional Written Submission in accordance with the Provisional Timetable adopted in the ToR.
44. On 13 August 2013, the Applicant filed its Additional Written Submission in accordance with the Provisional Timetable adopted in the ToR.
45. On 14 August 2013 the Expert issued Procedural Order No. 2 declaring that no additional submissions from the Parties would be allowed, unless the Panel decided otherwise, and that the Panel was starting to prepare the Expert Determination.
46. On 21 August 2013, in accordance with Article 21(a) of the Procedure, the Expert requested the Centre to provide an extension of the time to render the Expert Determination.
47. On 22 August 2013 the Centre allowed the request and granted an extension of the time for rendering the Expert Determination until 14 September 2013.
48. The Expert submitted the draft Expert Determination within the extended time limit granted by the Centre.

VIII. SUMMARY OF THE PARTIES' POSITIONS

49. In accordance with the Provisional Timetable (Annex A to the ToR), in addition to the Objection and Response, each Party filed its Additional Written Submission. This summary of each Party's position covers the arguments of that Party from all its submissions.
50. The Objector and the Applicant use the terms "the Applicant" and "Google" (the Applicant's parent company) interchangeably.² The Panel adopts the same approach.
51. The Objector provided a number of arguments related to the Applicant's applications for other gTLDs (".SEARCH" and ".FLY"). The Panel will not summarise these arguments here, as they are not relevant to the Disputed gTLD. At the same time, the Panel takes into account the fact that the Objector filed Objections with regard to the Applicant's applications for other gTLDs.

² See the Objection, para. 1 and the Response, para. 1.

1. Summary of the Objector's Position

52. The Objector is an entity representing the interests of a group of businesses and organisations.³ Several of the Objector's members are members of the online mapping industry.⁴
53. The Objector states that it satisfies the standing requirements for filing a community objection set forth in *Section 3.2.2.4 of the Guidebook*:
- The Objector is an established institution with a sufficient level of global recognition, length of time the Objector has been in existence, and public historical evidence of its existence⁵; and
 - The Objector maintains an ongoing relationship with a clearly delineated community of "[...] companies that operate online mapping services [...]".⁶
54. The Objector argues that the Objection meets all four requirements of *Section 3.5.4 of the Guidebook* for the reasons listed below.
55. According to the Objector, the online mapping community is a clearly delineated community which is globally distributed; has existed for as long as the Internet itself; and has sufficient formal boundaries around it.⁷
56. A substantial opposition to the Application from the community is confirmed by the Objection itself as several members of the Objector are members of online mapping industry and by six supporting declarations from members of this industry.⁸
57. The Disputed gTLD string is strongly associated with the online mapping community because two large mapping services – "Bing Maps" and "Here! Maps" by Nokia – are operated by the Objector's members, and "[...] other mapping providers around the world rely heavily on the "map" string to indicate to the public that their websites provide mapping services."⁹ According to the Objector, consumers also associate the string "map" with online mapping services.¹⁰
58. The online mapping community will be impaired by the Applicant's administering the Disputed gTLD. The Objector raises six main arguments when arguing such detriment.
59. *First*, the community heavily relies on the Domain Name System for its activities as they provide online mapping services and the Applicant will be able to unfairly view data passing

³ See the Objection, para. 3.

⁴ See the Objector's Additional Written Submission, para. 50.

⁵ See the Objector's Additional Written Submission, paras. 47-51.

⁶ See the Objector's Additional Written Submission, para. 53.

⁷ See *id.*

⁸ See the Objection, para. 13.

⁹ See the Objector's Additional Written Submission, para. 56.

¹⁰ See *id.*

through the Disputed gTLD, which will cause economic damage to the Applicant's competitors.¹¹

60. **Second**, the Applicant will be able to impose anti-competitive restrictions on the registration of domains in the Disputed gTLD and favour its services and limit opportunities for its competitors.¹² These restrictions will harm the companies that will be subjected to the undue scrutiny of their major competitor if they decide to apply for a domain in the Disputed gTLD. As a result, companies will refrain from applying and will lose the competitive advantage of using a domain in the Disputed gTLD.¹³
61. **Third**, the Applicant "[...] has the incentive and ability to exclude competitors [from competition] by placing onerous restrictions on .MAP registrants."¹⁴
62. **Fourth**, there are no reliable safeguards to prevent abuse of the Applicant's control over the Disputed gTLD.¹⁵
63. **Fifth**, as a result of suppressed competition, the "[t]he consumers may never see a vibrant ecosystem of vertical search and mobile competitors [...]"¹⁶
64. **Finally**, as the Registry Agreement to be concluded between ICANN and the Applicant (should the Application be approved) permits "[...] unlimited automatic renewal in ten-year terms [...]"¹⁷ other members of the mapping industry will not be able to apply for the Disputed gTLD, so the harm caused by the Applicant's administration of the Disputed gTLD will be continued without limitation.¹⁸
65. In addition to the requirements for dismissal of the Application set by ICANN in Section 3.5.4 of the Guidebook, the Objector argues that the Applicant does not meet the criteria for applicants set forth in the Guidebook. According to **Section 1.2.1 of the Guidebook**, ICANN conducts a "background screening" of the Applicants and if it finds certain past activity of the Applicant (e.g. convictions of certain crimes, decisions against the Applicant) then the relevant application should be automatically dismissed. The Objector states that the Applicant's past activity calls into question the Applicant's fitness to serve as a gTLD operator.¹⁹
66. In addition to the above arguments, the Objector states that the Panel should apply relevant international trademark and competition law principles to decide on the merits of the Objection because granting the Applicant authority to control a common generic term and the ability to directly harm competition will violate a number of trademark and competition norms.

¹¹ See the Objector's Additional Written Submission, para. 57.

¹² See the Objection, paras. 28-32.

¹³ See the Objector's Additional Written Submission, para. 58.

¹⁴ See the Objector's Additional Written Submission, para. 59.

¹⁵ See the Objector's Additional Written Submission, para. 60.

¹⁶ See the Objection, para. 33.

¹⁷ See the Objection, para. 34.

¹⁸ See *id.*

¹⁹ See the Objector's Additional Written Submission, paras. 10-14.

67. Thus, the Objector argues that domain names are considered as source indicators under trademark law principles.²⁰ The Disputed gTLD string is a common generic term as was confirmed by the advice²¹ of the Governmental Advisory Counsel²² dated 11 April 2013.²³
68. International law does not allow exclusive ownership of common generic terms.²⁴ Control over a closed gTLD by a single industry player is contrary to the stated goals and policies of ICANN such as promotion of competition in the registration of domain names.²⁵
69. According to the Objector, the Applicant dominates the online mapping market and the Applicant should not be allowed to strengthen its dominant position through administration of the Disputed gTLD.²⁶
70. The Objector argues that taking into account past anticompetitive conduct of the Applicant, supported by competition investigations and decisions against the Applicant, it has an incentive to operate the Disputed gTLD to harm competition. According to the Objector, the Applicant once more proved its disregard for the rules and its competitors when it submitted amendments to the application for other gTLDs after the Objection period was over, while the Guidebook does not provide such an opportunity.
71. As to the issue of Costs, the Objector argues that it did not violate the Procedure, and the late advance payment was accepted by the Centre, the late payment of an advance does not affect validity of the Objection.
72. Regarding the issue of publication of the Expert Determination, in an e-mail dated 19 July 2013 the Objector asked the Panel to publish the Expert Determination in full on the Centre's website.

2. Summary of the Applicant's Position

73. The Applicant requests that the Objection be dismissed.²⁷
74. According to the Applicant, the Objector does not satisfy *the requirements set forth in Section 3.2.2.4* of the Guidebook for filing the Objection for six major reasons.
75. *First*, the Objector does not have standing to meet the "pre-existing and organized community" criteria, because under Section 4.2.3 of the Guidebook only an organization that showed activity prior to September 2007 can claim to represent a community. Furthermore,

²⁰ See the Objection, paras. 39-41.

²¹ See <https://gacweb.icann.org/display/GACADV/2013-04-11-Safeguards-Categories-2>

²² The Governmental Advisory Counsel is an advisory body established to consult and express the position of different states to ICANN regarding questions related to administration of the Internet.

²³ See the Objection, paras. 14-16 and the Objector's Additional Written Submission, paras. 19-21.

²⁴ See the Objection, para. 35-38.

²⁵ See the Objection, paras. 42-47.

²⁶ See the Objector's Additional Written Submission, paras. 27-30.

²⁷ See the Response, para. 43.

such organization must be dedicated to that community.²⁸ The Objector was not conducting activities in 2007, neither is it dedicated to the search, travel or mapping communities.²⁹

76. **Second**, the Objector is "[...] a biased coalition whose primary goal is impeding Google's business practices."³⁰ and no consumers or consumer groups are members of the Objector.³¹
77. **Third**, the existence of a global coalition of the Objector's supporters is deceptive since half of the six companies which comprise this coalition are already members of the Objector, while the other three companies are suing Google, and therefore cannot be deemed as impartial industry commentators.³²
78. **Fourth**, the Objector did not prove any ongoing relationship with the community, as "[e]very example FairSearch provides of interacting with an "online mapping services community" occurred after FairSearch first filed notice of this Objection on 13 March 2013."³³
79. **Fifth**, the Objector claims to represent three communities related to different gTLDs: the Disputed gTLD, ".SEARCH", ".FLY". The Applicant asserts that the Objector cannot legitimately represent all three of these communities since they can have potentially divergent interests.³⁴
80. **Sixth**, the Applicant argues that there is no clear delineated community as required by the Section 3.2.2.4 of the Guidebook. "The alleged mapping 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."³⁵
81. Also, the Objection does not satisfy the requisite *criteria set forth in Section 3.5.4* of the Guidebook for the following reasons:
82. **First**, the Objector did not prove the existence of a clearly delineated community that it represents.³⁶
83. **Second**, there is no substantial opposition within the alleged community. The Objection of members of the Objector and three other companies do not constitute sufficient opposition to the Application as there is a large number of companies which operate in the online mapping industry and did not express any opposition to the Application.³⁷

²⁸ See the Response, para. 4.

²⁹ *Id.*

³⁰ See the Response, para. 5.

³¹ See the Response, para. 6.

³² See the Response, paras. 7-8.

³³ See the Applicant's Additional Written Submission, p. 7.

³⁴ See *id.*

³⁵ *Id.*

³⁶ See *id.*

³⁷ See the Applicant's Additional Written Submission, p. 8.

84. **Third**, the Objector did not provide evidence that there is a strong association between the Disputed gTLD string and the community.³⁸
85. **Fourth**, there is no likelihood of material detriment to the community. The Applicant will not have access to the data which is transferred to or from internet services with domain names in the Disputed gTLD. "The Registry Operator merely provides such services as – in layman's terms – telling a user's Internet Browser where to find the global servers that power google.com, yahoo.com, microsoft.com, etc."³⁹
86. The Applicant should not give advantages to particular registrars, as under Specification 11 of the Registry Agreement the Applicant undertook an obligation to "[...] operate the TLD in a transparent manner consistent with the general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies."⁴⁰ If the Applicant breaches this obligation then affected parties and ICANN can resort to enforcement mechanisms provided by the Registry Agreement.⁴¹
87. The Objector's concerns about restricted access for second level domain registration in the Disputed gTLD are not founded because as of today there is a number of acting top level domains with restricted registration policies and most of them promote trust to the sites registered within them.⁴² Moreover, the Objector's concerns related to second level domain registration in the Disputed gTLD are not germane since the Applicant applied for the Disputed gTLD not with a closed but with a restricted registration policy.⁴³
88. Granting the Applicant administration of the Disputed gTLD will not force its competitors to register domain names there since they have a number of alternative gTLDs and "[m]apping services are currently flourishing on the Internet without a dedicated TLD."⁴⁴
89. If the Disputed gTLD is managed by the Applicant, there will be no harm to consumers. The Internet is fundamentally open and consumers can visit any site either through a search engine or directly. Granting the Application will not hinder the openness of the Internet.⁴⁵
90. The automatic renewal of the Registry Agreement cannot be considered as causing any harm as it is a part of the new gTLD program and could not have been influenced by the Applicant. Raising this argument by the Objector calls into question the whole procedure and, if granted, will deny all applicants the opportunity to manage new gTLDs they applied for.⁴⁶

³⁸ See *id.*

³⁹ See the Applicant's Additional Written Submission, p. 11.

⁴⁰ Specification 11 to the Registry Agreement as provided by the Applicant in Annex 34 to the Applicant's Additional Written Submission.

⁴¹ See the Applicant's Additional Written Submission, p. 9.

⁴² See the Response, paras. 25-27.

⁴³ See the Response, para. 42.

⁴⁴ See the Applicant's Additional Written Submission, p. 9.

⁴⁵ See the Response, paras. 29-31.

⁴⁶ See the Response, para. 33.

91. The Applicant argues that issues of trademark and competition law are irrelevant to the proceedings. The Disputed gTLD string is not a generic term and generic terms in general cannot be easily defined.⁴⁷ Moreover, top level domains are not considered as "source indicators" under trademark law.⁴⁸
92. Regardless of whether the Disputed gTLD string is a generic term, the Applicant will not receive control over a generic term. The Applicant will not be an exclusive registrant of the Disputed gTLD. Every person that satisfies certain open criteria will be able to register a domain name in the Disputed gTLD.⁴⁹
93. The Applicant is not a monopolist in search or search advertising. The Applicant has a number of competitors in the search and advertising markets.⁵⁰ The Applicant is not a gatekeeper to the Internet.⁵¹
94. Administration of the Disputed gTLD does not convey a competitive advantage to the Applicant. The Applicant will not be able to harm competition or its competitors by administering the Disputed gTLD. Instead, in order to promote raise awareness of the Disputed gTLD and overcome users' initial mistrust of a new gTLD the Applicant will have to make significant investments.⁵² The Applicant states that it will not favour its gTLDs in search results.⁵³
95. Since "[...] almost all of today's gTLDs [...] offer identical technical and functional models, which have not changed dramatically in almost 30 years [...],"⁵⁴ granting the Application and similar applications will only increase competition in the Internet as it may lead to creation of new business models used by registries and cause competition for registrants.⁵⁵
96. As to the issue of Costs, the Applicant argued that the Objector did not comply with the requirement to make the advance payment within 10 days of the request of the Centre. Also the Objector did not send a copy of its request for extension of the payment period to the Applicant.⁵⁶
97. Regarding the issue of publication of the Expert Determination, in the e-mail dated 18 July 2013 (Eastern time) the Applicant requested the Panel to decide that the Expert Determination shall not be published on the Centre's website.

⁴⁷ See the Response, paras. 13-16.

⁴⁸ See the Response, paras. 35-37.

⁴⁹ See the Applicant's Additional Written Submission, p. 11.

⁵⁰ See the Response, paras. 17-21.

⁵¹ See the Response, paras. 22-23.

⁵² See the Response, paras. 24-28.

⁵³ See the Response, para. 32.

⁵⁴ See the Response, para. 39.

⁵⁵ See the Response, paras. 40-41.

⁵⁶ See the Applicant's Additional Written Submission, p. 5.

IX. FINDINGS

1. Issues to Be Determined

98. The mission of the Expert in this dispute is to determine whether the Objection should prevail or be dismissed.

99. In order to resolve this dispute, the Expert in the ToR, after considering the Parties' arguments, preliminarily identified the following issues to be determined:

- 1) Legal rules applicable to this dispute;
- 2) Timeline of the payments by the parties to ICC and its impact on validity of the Objection;
- 3) Whether the arguments (other than related to the points listed in Section 23(4) of the ToR – or Section IX(5) of this Expert Determination) raised in the Objection are admissible in the current proceedings? If yes, then:
 - a. What are the criteria for assigning a new gTLD?
 - b. Whether pre-requisites (if any) for assigning of the .MAP string were met? If yes, then:
 - i. Does international commercial law and/or national laws applicable to the case (with references to particular provisions) allow exclusive ownership or control of common generic terms?
 - ii. Is the .MAP string a common generic term?
 - iii. Does the Applicant have a dominant position which prevents it from registering the .MAP string on its name?
- 4) Whether the Objector meets the test established by the Section 3.2.2.4. of the Guidebook:
 - a. the Objector is an established institution; and
 - b. there is an ongoing relationship with a clearly delineated community.
- 5) Whether the Objection meets the following test (Section 3.5.4. of the Guidebook):
 - a. the community invoked by the Objector is a clearly delineated community;
 - b. there is a substantial opposition from the community to the Application;

- c. there is a strong association between the community invoked by the Objector and the .MAP string; and
- d. there is a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the .MAP string may be explicitly or implicitly targeted.

2. Legal Rules Applicable to This Dispute

100. The procedure of application for new gTLDs is extensively governed by the Guidebook.

101. The dispute resolution procedure regarding disputes related to new gTLDs is governed by the Procedure, which is an attachment to Module 3 of the Guidebook.

102. Subject to Article 1(c) of the Procedure, it is supplemented by the Rules which are, in turn, supplemented by the Centre with the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure, as well as with Appendix III to the Rules – Schedule of Expertise Costs for Proceedings under the New gTLD Dispute Resolution Procedure.

103. According to Article 4(c) of the Procedure, in the event of any discrepancy between the Procedure and the Rules, the Procedure shall prevail.

104. At the same time, under Article 20(a) of the Procedure, the Panel shall apply the standards that have been defined by ICANN. Under Article 20(b) of the Procedure, the Panel may base its findings on any rules or principles that it determines to be applicable.

105. No rules of particular national substantive law were invoked by the Parties or found by the Panel to be applicable to resolve this dispute, as this dispute is to be resolved mainly on the basis of the provisions referred above.

106. The Objector stated that "[i]n general, competition and trademark law principles and norms should inform the Panel's Expert Determination,"⁵⁷ as "[...] international competition and trademark norms may serve as a persuasive authority in assessing whether assigning the .MAP gTLD to the Applicant is likely to create competitive harm."⁵⁸

107. The Panel agrees with the Objector that international competition and trademark principles and norms may be generally applicable to this dispute, as well as any other generally recognized international principles and norms. However, application of concrete principles and norms (if any) to the current dispute shall be examined when analysing particular arguments raised by the Parties.

⁵⁷ See the Objector's Additional Written Submission, p. 3.

⁵⁸ *Id.*

3. Timeline of the Payments by the Parties to ICC and Its Impact on Validity of the Objection

108. Under Article 14(b) of the Procedure, "[e]ach party shall make its advance payment of Costs within ten (10) days of receiving the DRSP's [Dispute Resolution Service Provider's] request for payment and submit to the DRSP evidence of such payment."
109. By its letter of 14 June 2013 the Centre informed the Parties that ICC estimated the total Costs for these proceedings at EUR 58,600, subject to later readjustments, and requested each Party to make a payment of EUR 53,600 (EUR 58,600 – EUR 5,000 filing fee already paid by each Party) within 10 days of receipt of this letter. The letter was forwarded to the Parties on the same day.
110. On 24 June 2013, i.e. within the original time limit provided for by the Centre, the Objector filed a request for extension of the time for payment of the Costs.
111. On 25 June 2013 the Objector submitted evidence of its advance payment of the Costs.
112. Advance payment of the Costs effectuated by both the Objector and the Applicant was credited to ICC's bank account on 26 June 2013.
113. By its letter of 28 June 2013, the Objector explained the reasons for payment of the Costs on 25 June 2013, which are basically the need for time to accumulate the funds necessary for payment of the Costs for .MAP, .SEARCH and .FLY string Objections.
114. The Applicant by the e-mail of Mr. Winterfeldt of 4 July 2013 requested the Centre to deny the Objector's request for extension of the time for payment of the Costs mainly because, he argued, there were no exceptional circumstances justifying such extension.
115. The Applicant argued that the Objector did not comply with the requirement to make the advance payment within 10 days of the request of the Centre. Also the Objector did not send a copy of its request for extension of the payment period to the Applicant.⁵⁹ Therefore, according to the Applicant, the Objection should be dismissed on this ground.
116. The issue of whether the Costs were paid in a timely fashion was resolved by the Centre in its letter of 11 July 2013 where it concluded that the estimated Costs had been paid in full by each Party and proceeded with the transfer of the file to the Panel.
117. Therefore, the Panel does not have authority to revise this decision, as under Article 14 of the Procedure it is the Centre and not the Panel that may decide on Cost-related issues. The scope of the Panel's mandate is defined in Section 3.5.4 of the Guidebook and does not include rulings on administrative decisions taken by the Centre.
118. The Panel also takes into account the Resolution of the New gTLD Program Committee dated 13 June 2013 (2013.07.13.NG04). According to this resolution, "[...] in the interests

⁵⁹ See the Applicant's Additional Written Submission, p. 5.

of fairness and reasonableness, notwithstanding the deadlines set out in the Guidebook, in the future the DRSPs are permitted and encouraged to use their discretion, in light of the facts and circumstances of each matter, and in cases where it is shown that the affected party is making a good faith effort to comply with the deadlines, as to whether to grant extensions or deviate from the deadlines set forth in the Applicant Guidebook."⁶⁰

119. This Resolution confirms the authority of the Centre to decide on Cost-related issues, and in particular to grant extensions to the deadlines set forth in the Guidebook. As already mentioned, the scope of the Panel's mandate is defined in Section 3.5.4 of the Guidebook and does not include rulings on administrative decisions taken by the Centre.

120. Consequently, the Panel finds itself incompetent to decide on issues related to the late payment of Costs.

4. Whether the Arguments (Other Than Those Related to the Points Listed in Sections IX(5) and IX(6) of this Expert Determination) Raised in the Objection are Admissible in the Current Proceedings ?

121. The Objector asserted that there existed questions as to whether the Applicant met the criteria for assignment of the Disputed gTLD.⁶¹ The Objector cites several decisions against the Applicant and argues that the Applicant may be unfit to serve as an operator of the Disputed gTLD.

122. According to Section 1.2.1 of the Guidebook, "[i]n absence of exceptional circumstances, application from any entity with or including any individual with convictions or decisions of the types listed in (a) – (m) below will be automatically disqualified from the program." The Objector referred to several points of the list arguing that the decisions against the Applicant cited by the Objector were covered by those points.

123. However, the Panel finds itself incompetent to disqualify the Application on these grounds.

124. *First*, subject to Section 1.2.1 of the Guidebook, ICANN checks whether there are grounds for automatic dismissal of the Application during background screening. Background screening is a part of the eligibility verification in the early stages of the application procedure which is conducted by ICANN.

125. Therefore, according to the Guidebook, only ICANN and not the Panel is competent to disqualify the Application on these grounds and as the Application was allowed to proceed, the Panel cannot revise this decision of ICANN.

126. *Second*, Article 20 of the Procedure and Section 3.5.4 of the Guidebook define the scope of the community objection procedure, which is limited to determination of whether the Objection meets the requirements of the standards developed by ICANN. Eligibility of the

⁶⁰ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13jul13-en.htm>

⁶¹ See the Objector's Additional Written Submission, paras. 10-14.

Applicant to get a new gTLD is not to be considered during the community objection procedure.

127. Consequently, the Panel finds that the issue whether the Application can be disqualified on the basis of Section 1.2.1 of the Guidebook is outside of the scope of the community objection procedure and competence of the Panel.

128. Because of this finding the Panel does not need to analyse the issues:

- a. What are the criteria for assigning a new gTLD?
- b. Whether pre-requisites (if any) for assigning of the .MAP string were met? In particular:
 - i. Does international commercial law and/or national laws applicable to the case (with references to particular provisions) allow exclusive ownership or control of common generic terms?
 - ii. Is the .MAP string a common generic term?
 - iii. Does the Applicant have a dominant position which prevents it from registering the .MAP string on its name?

5. Whether the Objector Meets the Test of Section 3.2.2.4 of the Guidebook

129. According to Section 3.2.2.4 of the Guidebook, these are established institutions associated with clearly delineated communities that are eligible to file a community objection. To qualify for standing for a community objection, the Objector must prove both of the following:

- A. It is an established institution; and
- B. It has an ongoing relationship with a clearly delineated community.

A. Whether the Objector Is an Established Institution

130. ICANN prepared a list of factors which can be used by the Panel to determine whether the Objector meets the criteria of "established institution":

- i. "level of global recognition of the institution;
- ii. length of time the institution has been in existence; and
- iii. 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."⁶²

i. Level of Global Recognition of the Institution

131. The Objector claimed that it met these criteria. In particular, the Objector stated that it had a level of global recognition because (a) it had engaged with a number of government agencies and international organizations in the world, (b) more than 1,600 individuals had signed up for its newsletter, (c) international nature of its activities, as such activities were connected with the Internet, and (d) multinational nature of its members that employed more than one hundred thousand people worldwide.⁶³

132. The Applicant, in its turn, stated that the Objector is "a biased coalition whose primary goal [was] impeding Google's business practices"⁶⁴ and that no consumers or consumer groups were members of the Objector.

133. It is undisputable that the Objector's members include well-known and respected global companies. At the same time, the Objector is not the same as its members. The Objector as an institution does not have similar recognition as its members do. Obviously, it has received a certain level of recognition since its establishment, but in view of the Panel this level is not enough to be considered as a global recognition as required by the Procedure.

134. From the evidence submitted it follows that the Objector is more concentrated on pursuing Google for its alleged misconduct than acting for the mapping community (should such community exist).

135. The Objector filed the Objection with regard to the Application made by the Applicant only. At the same time the Objector did not object against other applications for the Disputed gTLD.

136. Thus, Amazon EU S.a.r.l. applied to operate the Disputed gTLD as a *closed* registry. Assigning the Disputed gTLD in such situation could be more detrimental to the interest of the mapping community and should have compelled the Objector to bring an Objection. However, the Objector did not make any Objection to this application.

137. Further, the number of individual subscribers to the Objector's newsletter is clearly not enough to make it a global institution (as required by the Procedure).

138. Equally, it does not follow from the submissions that "engagement" with government agencies and international organizations reached the level when the Objector received recognition from those entities with regard to the Disputed gTLD.

⁶² The Guidebook, Section 3.2.2.4.

⁶³ See the Objection, paras. 8-13.

⁶⁴ See the Response, para. 5.

139. Moreover, even in the view of the Objector itself, it "has established a reputation as a highly regarded voice for Internet search community [...]"⁶⁵ (emphasis added). Therefore, even the Objector itself considers itself as a voice for the Internet *search* and not *mapping* community.

140. Taking into account all arguments and evidence provided by the Parties, the Panel finds that the Objector did not provide sufficient evidence to establish its global recognition with regard to the Disputed gTLD as required by the Procedure.

ii. Length of Time the Institution Has Been in Existence

141. The Objector was formed in October 2010.⁶⁶

142. The Applicant claimed that in order to determine whether the Objector met the "time in existence" criteria, the Panel should apply the criteria set forth for the Community Priority Evaluation procedure under Section 4.2.3 of the Guidebook which defined a "pre-existing" community as a community active before the new gTLD policy recommendations were completed in September 2007.⁶⁷

143. The Objector, in its turn, argued that Section 4.2.3 of the Guidebook "[did] not apply to *institutions* objecting to gTLD applications."⁶⁸

144. The Panel agrees with the Objector and finds that the criteria from Section 4.2.3 of the Guidebook cannot be applied so as to deprive a party established after September 2007 of the right to file the Objection if it represents the community established before this date.

145. **First**, it is clear from the wording of the Section 4.2.3 of the Guidebook that these criteria apply to *communities*, and not to *objectors*.

146. **Second**, the purpose of Section 4.2.3 is to review and score community-based applications in order to find out which community-based application has priority for a particular gTLD. The criteria mentioned in Section 4.2.3 are to determine which of the communities that applied for the same gTLD string is better suited to administer it. Section 4.2.3 does not have the purpose of characterizing the objectors.

147. **Third**, application of the "pre-existing" criteria in the manner proposed by the Applicant to the institutions filing community objections will deprive all institutions established after

⁶⁵ See the Objection, para. 8.

⁶⁶ See the Objection, para. 7.

⁶⁷ See para. 4 of the Response which reads as follows:

"As FairSearch was only founded in October 2010, they have no standing to meet reasonable criteria for representing a "pre-existing and organized" community. ICANN's own criteria in Section 4.2.3 of the AGB for establishment as a "pre-existing" organization that can claim representation of a community asks that the entity show activity within the community prior to the gTLD policy recommendations completed in September 2007. To be "organized", implies that there are entities mainly dedicated to the community, with documented evidence of community activities. Since FairSearch was not conducting activities in 2007, nor is it dedicated solely to the search, travel or mapping communities, it does not merit being recognized as a representative of these communities, or .MAP in particular."

⁶⁸ See the Objector's Additional Written Submission, para. 48.

September 2007 of the right to file a community objection. This does not conform with the goals and nature of ICANN's work in general and community objection procedure in particular.

148. At this point in time the Objector has been active for almost three years. Taking into account the rapidity of Internet development, the Panel finds that this period is formally enough to satisfy the "time in existence" criteria.

iii. Public Historical Evidence of the Institution's Existence

149. It seems to the Panel that this criteria was mentioned in order to establish whether the Objector was not created with the sole or the main purpose of filing Objection.

150. While the Objector did not provide a formal charter or any other instrument by which it was created (such as national or international registration, or validation by a government, inter-governmental organization, or treaty), on the basis of evidence presented the Panel did not come to the conclusion that the Objector was established with the sole or main purpose of making the Objection.

151. Notwithstanding that the Objector met criteria of "length of time" and "public historical evidence of its existence", it still does not meet the level of public recognition required by the Procedure. Therefore, the Panel finds that the Objector does not meet the standing requirement of being an established institution.

B. Whether There Is an Ongoing Relationship with a Clearly Delineated Community

152. After the Panel came to the conclusion that the Objector did not meet criteria for "established institution," there is no need to analyse other issues, as this conclusion alone is sufficient to dismiss the Objection. Nevertheless, for the sake of good order, the Panel will analyse other issues raised by the Parties which are relevant to the Objection.

153. Section 3.2.2.4 of the Guidebook suggests the Panel use the following non-binding list of factors when determining whether there is an ongoing relationship with a clearly delineated community:

- i. the presence of mechanisms for participation in activities, membership, and leadership;
- ii. institutional purpose related to benefit of the associated community;
- iii. performance of regular activities that benefit the associated community; and
- iv. the level of formal boundaries around the community.⁶⁹

⁶⁹ See Section 3.2.2.4 of the Guidebook.

154. Based on materials provided by the Parties, the Panel finds that the Objector did not provide sufficient evidence to prove that it has an ongoing relationship with a clearly delineated community.

i. The Presence of Mechanisms for Participation in Activities, Membership, and Leadership

155. The Objector plainly stated that it "ha[d] a presence of mechanisms for participation in activities, membership and leadership"⁷⁰ without provision of any evidence of such mechanisms.

156. The Panel does not consider this statement itself a sufficient proof of the existence of the mechanisms in question and therefore is not convinced that such mechanisms indeed exist.

ii. Institutional Purpose Related to Benefit of the Associated Community

157. As follows from the Objector's submissions, the purpose of the Objector is "to promote economic growth, innovation and choice across the Internet ecosystem by fostering and defending competition in online and mobile search."⁷¹

158. The Objector stated that this purpose was related to the benefit of the Internet search community.⁷²

159. The Applicant, in its turn, argued that the Objector was a "biased coalition whose primary goal [wa]s impeding Google's business practice."⁷³ It went further and stated that "[...] the only identified goal on [the Objector's] website – [was] to allege that 'Google is abusing its search monopoly.'"⁷⁴

160. As has been mentioned above, the Panel finds that the Objector is mainly concentrating on pursuing Google rather than presenting interests of the mapping community (should such community exist).⁷⁵

161. Besides, the Objector also failed to prove that it has any institutional purpose beneficial for the alleged mapping community. Moreover, the Objector itself mentions the Internet *search* community, and not the mapping community, for the benefit of which it has an institutional purpose.

162. Based on the above, the Panel finds that the Objector does not meet the institutional purpose criterion.

⁷⁰ See the Objection, para. 12.

⁷¹ See the Objection, para. 3.

⁷² See the Objection, para. 12.

⁷³ See the Response, paras. 3-5.

⁷⁴ See the Applicant's Additional Written Submission, p. 7.

⁷⁵ See Annexes 2-7 to the Response.

iii. Performance of Regular Activities that Benefit the Associated Community

163. The Objector gave a number of references to its website where it advocated for its members and other mapping companies with concerns about Google's dominance in online mapping services.⁷⁶ Most of these examples are related to making competition complaints against Google.
164. The Applicant denied the alleged relationship with the community and stated, in particular, that "[e]very example [the Objector] provides of interacting with an "online mapping services community" occurred *after* [the Objector] first filed notice of this Objection on 13 March 2013."⁷⁷
165. Indeed, as follows from evidence, there is only one reference provided by the Objector that is dated before the Objection was filed on 13 March 2013. This is not enough to find that the Objector performs *regular* activities that benefit the associated community or has any ongoing relationships with the community.
166. Moreover, leaving aside the question of whether these activities are beneficial, the question remains open as to whether these activities relate to the alleged *mapping*, and not the *search* community. The Panel believes that the Objector has not proven this.
167. Therefore, the criterion of performance of regular activities that benefit the associated community has not been satisfied.

iv. The Level of Formal Boundaries Around the Community

168. The question of whether the Objector proved the existence of a clearly delineated community and, therefore, whether there are formal boundaries around the community will be analysed in more detail in Section IX(6)(A) of this Expert Determination below (see paras. 185-189) .
169. In addition to these factors, the Objector claims to represent three distinct communities, related to three different top level domains: the Disputed gTLD, and also the .search and .fly domains.⁷⁸
170. The Applicant raised certain doubts whether the Objector can legitimately represent three distinct communities simultaneously, as the interests of these three communities (should such communities exist) are potentially divergent.⁷⁹
171. The Panel does not find impossible, in theory, that one objector could represent three different communities, especially when the purpose of establishing the objector was to protect interests of these communities.

⁷⁶ See the Objector's Additional Written Submission, para. 50, footnotes 82, 92.

⁷⁷ See the Applicant's Additional Written Submission, p. 7.

⁷⁸ See the Objection, para. 6.

⁷⁹ See the Applicant's Additional Written Submission, p. 7.

172. At the same time the Objector failed to provide sufficient evidence that the alleged community interested in the Disputed gTLD exists and it is clearly delineated.

173. To summarize – the Objector failed to demonstrate, that:

- i. there are mechanisms for participation in activities, membership, and leadership of the community interested in Disputed gTLD;
- ii. its institutional purpose is related to benefit of the associated community;
- iii. there were regular activities that benefit the associated community; and
- iv. the community has a sufficient level of formal boundaries.⁸⁰

6. Whether the Objection Meets the Test of Section 3.5.4 of the Guidebook

174. Subject to *Section 3.5.4 of the Guidebook*, the Objection must meet four tests in order to succeed. The Objector must prove that:

- A. The community invoked by the Objector is a clearly delineated community;
- B. There is a substantial opposition from the community to the Application;
- C. There is a strong association between the community invoked by the Objector and the Disputed gTLD; and
- D. There is a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the Disputed gTLD may be explicitly or implicitly targeted.

175. Further the Panel will consider whether the Objection meets all four tests. If any of these tests is not met, the Objection will be dismissed.

A. Whether the Community Invoked by the Objector is a Clearly Delineated Community

176. The burden of proof that the community expressing opposition can be regarded as a clearly delineated community to which the Disputed gTLD may be targeted rests with the Objector.

177. Section 3.5.4 of the Guidebook provides a non-binding and open list of factors for the Panel to consider in this regard:

- 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 what persons or entities are considered to form the community;

⁸⁰ See Section 3.2.2.4 of the Guidebook.

- iii. the length of time the community has been in existence;
- iv. the global distribution of the community (this may not apply if the community is territorial); and
- v. the number of people or entities that make up the community.

178. Having examined all arguments and evidence provided by the Objector and the Applicant, the Panel finds that the Objector failed to provide sufficient evidence that there exists a clearly delineated community to which the Disputed gTLD may be targeted.

179. The Objector asserts that it represents the "online mapping community". It states, in particular, that "only companies that operate online mapping services are considered to be part of that community."⁸¹ However, for the reasons described below in more detail, the Panel is not convinced by such a definition of the community.

i. The Level of Public Recognition of the Group as a Community at a Local and/or Global Level

180. In its submissions the Objector provided no proof that companies that operate online mapping services (i.e. allegedly constituting the mapping community) have received public recognition as a group at a local and/or global level. Instead, the Objector refers to its own global recognition.⁸²

181. In its turn, the Applicant argues that there is no such community, as "[...] there is diversity and conflict of goals, and controversy or uncertainty as to what persons or entities are considered to form the community [...]."⁸³

182. It is not disputed that the Objector has several companies engaged in the mapping business among its members. However, the Objector did not demonstrate that these companies constitute a community in a general sense⁸⁴, i.e. that they associated with the common interest in their activity related to mapping services.

183. Nor was the Objector successful in showing that a publicly recognized "online mapping community" exists at all – at any level, local or global. An example of such existence might include an association with due representation of important entities engaged in map-related businesses at the global and local level – along with "Bing Maps" and "Here! Maps" by Nokia such as Yahoo Maps, MapQuest, AskCity, Yandex Maps, Naver Maps, etc. Such an association, should it exist, might also include off-line mapping services, GPS navigation services, etc.

⁸¹ See the Objector's Additional Written Submission, para. 53.

⁸² See the Objection, paras. 8-13.

⁸³ The Applicant's Additional Written Submission, p. 7.

⁸⁴ Black's Law Dictionary (7th Ed.) defines "community" as follows: "... 3. A collection of common interests that arise from an association."

184. Apart from the Objector's member companies, there are many companies engaged in mapping or mapping-related businesses (whether online or offline) on global and local levels. However the Objector presented no proof that such companies formed a community and that such community (even if formed) has received any significant public recognition.

ii. The Level of Formal Boundaries Around the Community and What Persons or Entities are Considered to Form the Community

185. The Panel also has not been convinced that any formal boundaries around the alleged community exist.

186. The Objector narrows the boundaries around the community to the "companies that operate online mapping services."⁸⁵ Unfortunately, the Objector does not go further in explaining why only such companies should be considered as members of the community. For instance, the Objector does not explain why companies doing business in offline mapping are not a part of the alleged community and thus should not constitute a part of such community. Moreover, it is not clear whether the boundaries around the community embrace companies (or even individuals) engaged in businesses related to mapping (e.g., navigational, geological, geodesic, tourism businesses, as well as hiking or sailing).

187. The Panel tends to agree with an analogy made by the Applicant between the alleged "online mapping community" and "a community which encompasses members of different nature and interests"⁸⁶ – in both cases there is no clearly delineated community, as "[...] stakeholders have varied and potentially competing goals."⁸⁷

188. Therefore, the criteria based on which the Objector refers to the 'online mapping community' as the community to which the Disputed gTLD may be targeted are not clear and have not been substantiated by the Objector in its submissions.

189. Therefore, the Objector has not demonstrated that there are any formal boundaries around the alleged community.

iii. The Length of Time the Community Has Been in Existence

190. The Objector claims that the "online mapping community" has existed for almost as long as the Internet itself.⁸⁸

191. The Panel acknowledges that there have been a number of companies or individuals that have been involved in the mapping business and/or related businesses for a number of years. At the same time, the mere existence of such companies does not *per se* mean that a community emerged.

⁸⁵ The Objector's Additional Written Submission, para. 53.

⁸⁶ See the Applicant's Additional Written Submission, p. 7.

⁸⁷ *Id.*

⁸⁸ See the Objector's Additional Written Submission, para. 53.

192. As has already been mentioned, the Panel believes that the Objector did not prove that existence of several market players automatically constituted a "community" for the purpose of the Procedure to which the Disputed gTLD may be targeted.

iv. The Global Distribution of the Community

193. The Objector did not address this criterion directly.

194. At the same time, the Objector stated that it "[...] had assembled a global coalition of similarly-interested organizations and companies who support this community objection."⁸⁹ The Objector attached a compendium of declarations from the Objector's supporters in Annex B to the Objections.

195. The Applicant, however, stated that among the six companies listed in the Annex B, three of them were already members of the Objector,⁹⁰ while the remaining three were the European mapping companies that were either suing Google or had filed complaints against Google with the European Commission, and therefore these companies were not impartial industry commentators.⁹¹

196. There is no doubt that companies or individuals that have been involved in the mapping business and/or related businesses by the nature of their activities are widely distributed around the world. It is disputed neither by the Applicant nor by the Objector. At the same time, the Panel is not convinced that the "global coalition" mentioned by the Objector represents the "online mapping community", the existence of which has been alleged by the Objector.

197. Taking into account the absence of any formal structure between the companies and/or individuals that might form a community related to the Disputed gTLD, as well as lack of other characters of a community, it could be considered as a global activity rather than the existence of a global community.

v. The Number of People or Entities that Make Up the Community

198. The Objector did not estimate the number of members in the alleged "online mapping community", limiting itself to naming individual companies involved which provide some sort of online mapping services.

199. The Applicant argued that "no accurate determination can be made with respect to age, global distribution, or number of entities comprising alleged community."⁹²

200. The Panel believes that indeed it is not possible to estimate with reasonable accuracy the number of entities which constitute the alleged "online mapping community," as the

⁸⁹ See the Objection, para. 13.

⁹⁰ See the Response, para. 7.

⁹¹ See the Response, para. 8.

⁹² See the Applicant's Additional Written Submission, p. 7.

boundaries of such alleged community are not delineated and it is not clear what persons and/or entities would form this community, should it exist.

201. As a result, the Panel concludes that the Objector did not provide grounds to consider the alleged "online mapping community" as a clearly delineated community, which is necessary for the Objection to be upheld.

B. Whether there Is a Substantial Opposition from the Community to the Application

202. According to the Procedure the Objector must prove the existence of substantial opposition from the community to the Application. Section 3.5.4 of the Guidebook provides a non-binding and open list of factors for the Panel to consider in this regard:

- i. Number of expressions of opposition relative to the composition of the community;
- ii. The representative nature of entities expressing opposition;
- iii. Level of recognized stature or weight among sources of opposition;
- iv. Distribution or diversity among sources of expressions of opposition;
- v. Historical defence of the community in other contexts;
- vi. Costs incurred by the Objector in expressing opposition, including other channels the Objector may have used to convey opposition.

203. Below the Panel will address each of these arguments in more detail.

i. Number of Expressions of Opposition Relative to the Composition of the Community

204. In order to establish that the Objection satisfies this criteria, the Objector must provide two pieces of information: number of expressions of opposition (approximation is allowed) and the approximate number of community members. The Panel cannot assess the relationship between the number of Objections voiced by community members and size of the community without this information.

205. The Objector provided six declarations from its supporters which express their Objection to the Application as proof of the number of opposition expressions⁹³.

206. As the same time, as was pointed out by the Applicant, half of these six companies were already members of the Objector⁹⁴, thereby their opposition cannot by itself be considered substantial. Moreover, there is no evidence that these Objections were provided elsewhere except in the Objection.

⁹³ See the Objection, Annex B.

⁹⁴ See the Response, para. 7.

207. Even if the Panel considers all six declarations as expressions of opposition to the Disputed gTLD within the community, the Panel cannot conclude that there is a sufficient number of expressions of opposition relative to the composition of the community as the Objector did not provide any estimates of the number of community members. Consequently, it is not possible to compare number of expressions of Objection and size of the community on the basis of the information submitted by the Objector.

208. The Applicant stated that the community connected with online mapping is comprised of a broad variety of mapping services⁹⁵ and even six Objections from supposed members of this community do not amount to a sufficient number of expressions of Objection. The Panel tends to agree that number of members of mapping community could be substantial and only 6 Objections should not be considered as a view of significant part of the members of mapping community.

209. The Objector has also provided a number of statements by governments, business organizations and commentators that oppose *closed* gTLDs.⁹⁶ The Panel considers it important that the Applicant does not intend to make a closed gTLD on the basis of the Disputed gTLD. The Application stated that "[a]ll second-level domains in the .map gTLD will be restricted to pointing to a verified map services provider."⁹⁷

210. The Panel also finds the statements provided by the Objector are irrelevant to the community opposition, as these statements were made by entities who should not be considered as members of the alleged "online mapping community" (at least, there is no evidence that they are members of the alleged mapping community).

211. The absence of a substantial number of community members opposing the Application is also supported by the fact, mentioned by the Applicant⁹⁸, that there are only 9 comments on applications for the Disputed gTLD, including two comments on the Application, among 12,200 comments on ICANN's official new gTLD Comments Forum.⁹⁹

ii. The Representative Nature of Entities Expressing Opposition

212. The Objector did not provide information about the companies that had issued declarations supporting the Objection, which were contained in Annex B of the Objection, or information on their connection with mapping services.

213. Consequently, in order to assess the representative nature of the companies which expressed opposition against the Application, the Panel can only use information provided in the declarations of these companies. Two of the companies (the Glover Park Group and Foundem) did not mention that they are connected with mapping services.

⁹⁵ See the Response, para. 3.

⁹⁶ See the Objection, paras. 48-54.

⁹⁷ See the Application, Section 18.b.ii.1.

⁹⁸ See the Applicant's Additional Written Submission, p. 8.

⁹⁹ See <https://gtldcomment.icann.org/applicationcomment/viewcomments>

214. Additionally, the Applicant pointed out that half of these six companies are already members of the Objector (Microsoft, Foundem and the Glover Part Group). The other three companies (Hot Maps Medien GmbH, Streetmap.EU and Euro-Cities AG) have filed complaints against Google with the European Commission and two of them (Hot Maps Medien GmbH and Streetmap.EU) are members of the "anti-Google group ICOMP."¹⁰⁰

215. The Panel finds that a simple fact that some companies are member of the "anti-Google group ICOMP" or filed complains against Google does not itself disqualify them for the purpose of deciding representative nature of these entities.

216. However, in the absence of information regarding total number of members of the alleged mapping community, the way it is structured, governed and conducts its activity, the Panel finds that the Objector did not provide sufficient evidence to support the representative nature of the entities expressing opposition.

iii. Level of Recognized Stature or Weight among Sources of Opposition

217. The information the Objector provided on the sources of opposition was limited to the Objection and the six declarations attached to the Objection. The Objector did not show that these Objections were voiced anywhere else. Nor did the Objector show any proof which would allow an evaluation of the stature or weight of the companies that made these declarations.

iv. Distribution or Diversity among Sources of Expressions of Opposition

218. The Parties did not discuss separately the question of distribution or diversity among sources of expressions of opposition.

219. From available information the Panel concludes that distribution of opposition is limited to the companies located in the United States and Europe, even though some of them operate worldwide. No proof that companies operating in other parts of the world that might fall into the alleged "mapping community" (should such community exist) were provided to the Panel.

220. Under such circumstances and taking into account the doubts in objectiveness of the opposing companies (see para. 214 above), the Panel is not in the position to conclude that the sources expressing opposition are diverse.

v. Historical Defence of the Community in Other Contexts

221. The Objector claimed that it advocated for competition in the online mapping market, providing examples of its actions focusing on Google's alleged violations.¹⁰¹ The Objector does not give examples of defending the alleged community in the other contexts.

¹⁰⁰ See the Response, paras. 7-8.

¹⁰¹ See the Objector's Additional Written Submission, para. 55, footnote 92.

222. The Applicant denied the alleged relationship with the community and stated that the examples the Objector provides of interacting with an "online mapping services community" occurred after the Objector filed the Objection on 13 March 2013.¹⁰²

223. As mentioned in para. 165 above, only one reference provided by the Objector is dated earlier than the filing date of the Objection (i.e., 13 March 2013).

224. As no further evidence of historical defence of the alleged community was provided by the Objector, the Panel finds this criterion not satisfied by the Objector.

vi. Costs Incurred by the Objector in Expressing Opposition, Including Other Channels the Objector May Have Used to Convey Opposition

225. While it is evident for the Panel that the Objector incurred a number of costs related to expressing opposition against the Application and other relevant actions against the practices of Google, the Objector did not provide any comments on their amounts, nature or relevance to the Disputed gTLD.

226. In the absence of such information, the Panel finds that the Objection does not meet this criterion.

227. Taking into account all considered criteria, the Panel finds that the Objection does not show that there is substantial opposition to the Application from the community.

C. Whether There Is a Strong Association between the Community Invoked by the Objector and the Disputed gTLD

228. For the Objection to be sustained, the Objector must prove that there is a strong association between the community invoked by the Objector and the Disputed gTLD. Section 3.5.4 of the Guidebook provides a non-binding and open list of factors for the Panel to consider in this regard:

- Statements contained in the Application;
- Other public statements by the Applicant;
- Associations by the public.

229. The Objector argued that "[t]he online mapping community [wa]s strongly associated with the "map" string [...],"¹⁰³ as two large mapping services are members of the Objector and "[...] online mapping providers around the world rely heavily on the "map" string to indicate to the public that their websites provide mapping services."¹⁰⁴

¹⁰² See the Applicant's Additional Written Submission, p. 7.

¹⁰³ See the Objector's Additional Submission, para. 56

¹⁰⁴ *Id.*

230. The Applicant's argument was that "there [wa]s no evidence suggesting that consumers [would] see .MAP and assume that the gTLD relates to the limited community FairSearch purports to represent."¹⁰⁵

231. The Panel tends to agree with the Applicant's argument. Apart from the fact that the Objector failed to prove the existence of a clearly delineated community, no proof was submitted that the Disputed gTLD would be associated with the mapping services that are members of the Objector (and support it) rather than with all other companies somehow related to the mapping business (or even other associations in other languages).

D. Whether There Is a Likelihood of Material Detriment to the Rights or Legitimate Interests of a Significant Portion of the Community to Which the Disputed gTLD May Be Explicitly or Implicitly Targeted

232. According to Section 3.5.4 of the Guidebook, in order to establish 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 Disputed gTLD may be explicitly or implicitly targeted.

233. As described above, the Panel believes that no clearly delineated community to which the Disputed gTLD may be targeted exists. However, even if for the purposes of this analysis we assume that such a community exists, the Objector did not prove the likelihood of material detriment to the community.

234. The Objector asserted that if the Applicant was allowed to manage the Disputed gTLD, the Applicant would:

- i. receive discretionary authority to hinder competition and cause harm to its competitors by imposing restrictions in registration of second-level domains within the Disputed gTLD;¹⁰⁶
- ii. receive an opportunity to unfairly access "data passing through the .MAP gTLD;"¹⁰⁷
- iii. harm consumers of mapping and related services;¹⁰⁸ and
- iv. be able to administer the Disputed gTLD for indefinite period of time.¹⁰⁹

235. Below the Panel addresses each of these arguments in more detail.

¹⁰⁵ See the Applicant's Additional Submission, p. 8.

¹⁰⁶ See the Objection, paras. 28-32.

¹⁰⁷ See the Objector's Additional Written Submission, para. 57.

¹⁰⁸ See the Objection, para. 33.

¹⁰⁹ See the Objection, para. 34.

i. Alleged Restrictions in Registration of Second-Level Domains

236. For the purposes of this dispute the Panel considers it important that the Applicant does not intend to make a *closed* gTLD on the basis of the Disputed gTLD.

237. The Application stated that "[a]ll second-level domains in the .map gTLD will be restricted to pointing to a verified map services provider."¹¹⁰

238. The Applicant expects that uses of the domain names in the disputed gTLD "may include but are not limited to applications such as mapping and navigation services; running/hiking trail maps; and weather mapping."¹¹¹

239. The Applicant argued that the Objector's concerns about restricted gTLDs were unfounded, as a larger number of gTLDs would cause competition between them, would possibly lead to emergence of new technical or commercial models used by gTLDs and would result in diversified user choice.¹¹²

240. The Objector, in its turn, stated that as a registry operator for the Disputed gTLD, the Applicant "reserve[d] broad discretion for itself to decide which competitors [we]re eligible to be a part of the .map and .fly domains."¹¹³ The Objector argued that the Applicant had an incentive to foreclose competition because, according to the Objector, there was a history of actions by the Applicant which deliberately harmed competition.¹¹⁴

241. The Objector further stated that the Applicant "[...] frustrate[d] neutrally determined processes [...]" provided by the Guidebook by amending its application for ".SEARCH" gTLD, while the Guidebook did not provide an opportunity for such amendment.¹¹⁵ According to the Objector, this fact "casts serious doubt as to whether Google is fit to register the .MAP string."¹¹⁶

242. Going further, the Objector stated that "[i]rrespective of whether the Applicant would deny competitors access to the .map or .fly second-level TLDs inappropriately or not, placing such an advantage in the hands of a significant rival w[ould] inhibit online competition"¹¹⁷.

243. The Objector also claimed that as a consequence of arbitrary restrictions which could be imposed by the Applicant, all members of the community would be harmed, both those who successfully registered their second-level domains within the Disputed gTLD and those who did not, since the former would face undue and unrestricted scrutiny of the Applicant, while

¹¹⁰ See the Application, Section 18.b.ii.1.

¹¹¹ See the Application, Section 18.a.

¹¹² See the Response, paras. 38-41.

¹¹³ See the Objection, para. 31.

¹¹⁴ See the Objector's Additional Written Submission, paras. 31-39.

¹¹⁵ See the Objector's Additional Written Submission, para. 43.

¹¹⁶ See the Objector's Additional Written Submissions, para. 40.

¹¹⁷ See the Objection, para. 32.

the latter would be "at a competitive disadvantage if they choose not to deal with the Google-operated .MAP registry."¹¹⁸

244. Finally, according to the Objector, permitting the Applicant to operate the disputed gTLD would interfere with the core activities of the community, since not all major providers would be able to rely upon the .MAP domain to signal their membership in the community.¹¹⁹

245. The Panel finds that the Objector's arguments regarding the amendment of the Applicant's application for ".SEARCH" gTLD is not relevant to this case, since it does not affect the Application for .MAP. The Panel will not comment on the Applicant's argument that the new gTLD could lead to the emergence of new technical or commercial models as this it is not relevant to these proceedings.

246. The Panel cannot agree with the above mentioned arguments of the Objector for the following reasons.

247. **First**, according to Section 18(b)(iv) of the Application, the Applicant is to develop and publish verification criteria for the registrants of the second-level domain names within the Disputed gTLD. Every registrant would be required to verify whether the registrant satisfies certain criteria. While these criteria have not been developed yet, the Objector did not prove that the Applicant would use the criteria to arbitrarily refuse its competitors' registration of domain names. The past Applicant's behaviour itself, even if proved, cannot be considered that the Applicant will follow the same pattern in future.

248. **Second**, the Applicant will be restricted in its possibilities to abuse its position as a Disputed gTLD operator by Specification 11 of the final Registry Agreement, which prohibits giving advantages to certain registrants.¹²⁰ All commitments, statements of intent and plans set forth in the Application shall be incorporated into the Registry Agreement by virtue of Specification 11. These commitments include the Applicant's obligations to promote competition and not to provide undue preference to certain registrants. In addition to this, the Applicant will be obliged to "operate the TLD in a transparent manner consistent with the general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies" subject to public interest commitments voluntarily made by the Applicant.¹²¹

249. **Third**, the Registry Agreement provides an enforcement framework which allows ICANN and third parties to enforce the Applicant's obligations (should the Applicant be appointed the Registry Operator with regard to the Disputed gTLD) in case of breach. This framework includes, but is not limited to, the following procedures:

¹¹⁸ See the Objector's Additional Written Submission, para. 58.

¹¹⁹ See the Objector's Additional Written Submission, para. 59.

¹²⁰ See the Applicant's Additional Written Submission, p. 9

¹²¹ See the Applicant's Additional Written Submission, Annex 34.

- The Registry Operator agrees to adhere to and implement any remedies ICANN imposes subject to Specification 11 of the Registry Agreement. These remedies may include termination of the Registry Agreement according to Section 4.3(e) of the Registry Agreement.¹²²
- Following the particular procedure provided in Section 4.3(a) of the Registry Agreement, ICANN may, upon notice to the Registry Operator, terminate the Registry Agreement.
- Finally, the registrants whose applications were unduly rejected may always use all available remedies available to them in law and equity, including bringing relevant claims against the Registry Operator.¹²³

250. Therefore, there exist a number of restraining measures for Registry Operators which will result in either forcing the Registry Operator to cure a breach of its obligation or terminating the Registry Agreement.

251. *Finally*, while it is impossible to completely exclude the possibility of the Applicant abusing its authority, it is not sufficient to demonstrate the theoretical possibility that such abuse could take place or that the Applicant previously has acted in an anticompetitive manner in order to sustain the Objection.

252. The Application cannot be rejected on the grounds of future violations which might, without any reasonable degree of certainty, or might not be committed by the Applicant. Instead, specifically for cases of any potential breach by an applicant, ICANN designed the above-mentioned enforcement mechanisms.

ii. Access to Data Passing through the Disputed gTLD

253. The Objector claimed that the Applicant as a Registry Operator will have an advantage of "viewing data passing through the .MAP gTLD,"¹²⁴ and this advantage will likely cause economic damage to the Applicant's competitors.¹²⁵ At the same time, the Objector did not provide any proof of either this statement or the extent of the Applicant's alleged access.

254. As is pointed out by the Applicant "[...] a Registry Operator does not serve as a conduit for all data used by its registrants."¹²⁶ The technical function of the DNS protocol and consequently of the Registry Operator is simply to inform a computer program (internet browser, email agent etc.) where to find a particular server within the relevant gTLD.

¹²² See Specification 11 of the Registry Agreement, para. 2.

¹²³ Registry Operator is also supposed to be bound by determination of any panel made in accordance with Public Interest Commitment Dispute Resolution Process ("PICDRP" – see <http://www.icann.org/en/news/public-comment/draft-picdrp-15mar13-en.htm>). PICDRP is still in the process of approval by ICANN, and in case of approval, according to the PICDRP draft, any allegedly harmed person or entity will be able to initiate proceedings claiming that the Registry Operator has violated one or more of its Public Interest Commitments. Panel determination may direct the Registry Operator to cure the breach, suspend registration of new domains in the relevant gTLD or in extraordinary circumstances provide for termination of the Registry Agreement

¹²⁴ See the Objector's Additional Written Submission, para. 57.

¹²⁵ *Id.*

¹²⁶ See the Applicant's Additional Written Submission, p. 11.

255. Moreover, as a result of multi-level caching implemented in the DNS infrastructure the Registry Operator will not receive most DNS queries, which will be handled by other DNS intermediaries (mostly, internet service providers).

256. The Applicant gave a similar clarification regarding the scope of data available to the Registry Operator.¹²⁷

257. Therefore, the Panel does not find that the Applicant will receive access to the data of its competitors to the extent that it would provide the Applicant with uncompetitive advantage.

iii. Harm to Consumers of Mapping and Related Services

258. According to the Objector, the Applicant as a Registry Operator will be able to hinder competition in the industry and consequently deprive consumers of mapping and related services of "a vibrant ecosystem of vertical search and mobile competitors."¹²⁸

259. As already described, the Objector failed to prove that the Applicant would have an opportunity to hinder competition in the mapping industry as Registry Operator. Therefore, the Objector did not show any likelihood of detriment to consumers.

iv. Administration of the Disputed gTLD by the Applicant for an Indefinite Period of Time

260. The Objector asserts that the Registry Agreement between ICANN and the Applicant will be automatically renewed every ten years.¹²⁹

261. Indeed, subject to Section 4.2(a) of Registry Agreement, it is renewed for successive periods of ten years. Nevertheless, in accordance with Section 4.2(b), if the Registry Operator during the preceding term of the Registry Agreement was in material breach of its obligations, then the Registry Agreement is terminated at the expiration of its term.

262. Moreover, as was mentioned above, the Registry Agreement can be terminated by ICANN following a certain procedure if the Applicant breaches its obligations.

263. Further, there exist other remedies discussed above to cure breaches of the Registry Operator, should it commit such breaches.

264. Based on the above, the Panel is not convinced that any breaches and/or abuses by the Registry Operator (if any) will continue for an indefinite period of time.

265. Therefore, the Panel believes that the Objector did not prove the likelihood of detriment to the community (even if such a community existed).

¹²⁷ *Id.*

¹²⁸ See the Objection, para. 33.

¹²⁹ See the Objection, para. 34.

266. Based on all the above, the Panel finds that the Objection does not meet the standards set forth in Section 3.5.4 of the Guidebook.

7. Publication of the Expert Determination

267. The Parties did not come to an agreement on whether to publish this Expert Determination in full on the Centre's website. In the absence of consensus between the Parties and in accordance with Article 21(g) of the Procedure, the Panel has decided to follow the default procedure that supposes publication of the full text of the Expert Determination on the Centre's website.

X. DECISION

268. For the reasons set out above and in accordance with Article 21(d) of the Procedure, I hereby render the following Expert Determination:

- i. FAIRSEARCH.ORG's Objection is dismissed.
- ii. Applicant CHARLESTON ROAD REGISTRY INC. prevails.
- iii. Applicant will be refunded its advance payment of Costs by the Centre.

Date: 27 December 2013

Signature: 

Vladimir Khvalei
Expert