

**NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”)
DISPUTE RESOLUTION PROCEDURE**

**Dissenting Opinion
by Prof. August Reinisch
12 December 2013**

relating to

**THE EXPERT DETERMINATION
of 11 December 2013**

issued by the Expert Panel,
composed of

Prof. August Reinisch
e-mail:
august.reinisch@univie.ac.at

Department of European,
International and
Comparative Law,
University of Vienna
Schottenbastei 10-16
1010 Vienna, Austria

Mr. Piotr Nowaczyk
e-mail:
piotr.nowaczyk@dentons.com

DENTONS
Rondo ONZ 1, 30th Floor
00-124 Warsaw
Poland
Tel. +48 22 24 25 705
Fax: +48 22 24 25 242

Mr. Ike Ehiribe
e-mail:
ehiribe@aol.com

Castaldi 7 Stones
Commercial & IP Chambers
88 Kingsway Holborn
London WC2 B6AA
England, United Kingdom

in Case No.
EXP/412/ICANN/29

Prof. Alain Pellet, Independent Objector (France) v. Ruby Pike, LLC (USA)

1. After having participated in an open exchange of views with my esteemed co-panelists, during which we have tried to arrive at a mutually acceptable expert determination in this case, I regret to find that this has proven impossible.
2. For the reasons outlined below, I am unable to concur with my colleagues' substantive determination to uphold the Independent Objector's (the "IO's") Objection in the case under consideration.
3. However, I am in agreement with them as regards the finding that there is no basis to assume the IO's lack of independence and impartiality, that the IO has standing in the present case and that there was no indication for a manifestly unfounded objection which would have justified a "quick look procedure".
4. I should state at the outset that I do share my co-panelists' concern about the importance of public access to reliable health-related information on the internet. However, I am unable to agree that this concern and the potential threat of future incorrect information received from websites/domains registered under the applied-for gTLD string ".hospital" constitutes a ground for upholding an objection to the registration of such a gTLD string.
5. As my colleagues have agreed, the scope of the Limited Public Interest Objection is expressly limited to the four grounds enumerated in paragraph 3.5.3. of Module 3 of the gTLD Applicant Guidebook (the "Guidebook") and "the wording of this paragraph clearly indicates that this catalogue has an exhaustive character." (Expert Determination of 11 December 2013, paras. 62, 63).
6. Pursuant to paragraph 3.5.3. of the Guidebook, "[a]n expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order." These principles are contained in a number of human rights instruments which are listed in a demonstrative fashion in paragraph 3.5.3. of the Guidebook.
7. The same provision also contains an exhaustive list of four "grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law." These grounds are
 - "Incitement to or promotion of violent lawless action;
 - Incitement to or promotion of discrimination based upon race, colour, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
 - Incitement to or promotion of child pornography or other sexual abuse of children; or
 - A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law." (paragraph 3.5.3. of the Guidebook).

8. In the present case, the IO has expressly limited his Objection to the fourth ground, i.e. he has argued that the applied-for string and its intended use would contravene “specific principles of international law as reflected in relevant international instruments of law.”
9. Importantly, paragraph 3.5.3. of the Guidebook mandates that “[t]he panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.”
10. In my view the majority misconstrues the grounds for objecting to gTLDs which should be primarily the string itself and could also take into account the intended use of the string in a subsidiary way “as additional context”.
11. As my co-panelists concede in the Expert Determination there is nothing in the string “.hospital” itself that is objectionable. It rather appears that, in their view, the intended use of this string is objectionable.
12. In their reasoning arriving at the result that the application is contrary to morality and public order, my co-panelists state that “[m]orality and public order require all the members of society, either public or private entities, to be extremely cautious of human life and health.” (Expert Determination of 11 December 2013, para. 79). Such caution would be required because unreliable information retrieved from websites could cause serious harm to vulnerable people and to society at large.
13. Apparently this implies for the majority that the Applicant would have to ensure the veracity of content on websites registered at domains using the gTLD string “.hospital”. In my co-panelists’ view “the sensitivity of .Hospital has a different dimension than gTLDs connected with banking or legal services since human life and health require greater care than pure commercial activity.” (Expert Determination of 11 December 2013, para. 83).
14. In concluding, the majority states that that the “Applicant has failed to appreciate the highly sensitive nature of the applied-for string .Hospital as articulated by the IO.” (Expert Determination of 11 December 2013, para. 85). Thus, the Objection is held valid.
15. It is this finding that the intended purpose of the string “.hospital” by the Applicant was considered “contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law” with which I am unable to concur.
16. In my view this construction of the subsidiary relevance of the intended purpose of an applied-for string exceeds the powers of this expert panel.
17. It is not the task of an expert panel to rewrite the application standards for gTLD strings and to supplement them with higher standards in the public interest. Rather,

its task is limited to determining whether a specific applied-for string, taking into account its intended use as stated in the application is “contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.”

18. The grounds for objection listed in paragraph 3.5.3. of the Guidebook provide a clear indication that only a very limited set of particularly reprehensible behavior is objectionable. The examples listed in the Guidebook referring to the incitement or promotion of violence, unlawful discrimination and sexual abuse of children clearly illustrate this.
19. The limited scope of the fourth ground of objection in paragraph 3.5.3. of the Guidebook is also evident in the ICANN Explanatory Memorandum of 29 October 2008. Under the heading "Morality and Public Order Objection Considerations in New gTLDs" it stated that “[e]xtensive research has shown that it is difficult to identify existing generally accepted legal norms relating to morality and public order. There are, however, peremptory norms of public international law from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character (jus cogens), such as the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting piracy and trade in slaves.” (ICANN, New gTLD Program Explanatory Memorandum, p. 3, available at <http://archive.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>). This implies that only certain particularly reprehensible acts and omissions constitute grounds for objection.
20. This concept was taken up by the IO in stating his mission as one of protecting against the promotion of seriously offensive behavior. According to the IO, “the essential criterion is not to determine whether or not the application is contrary to the multiple potential interests of the public who use the global Internet. It is not the mission of the Independent Objector to protect personal or commercial interests of individual Internet users. The limited public interest objection aims at ensuring that no applied-for gTLD string and its intended use is contrary to fundamental norms of public order and morality that are recognized under international law.” (Website of the Independent Objector, <http://www.independent-objector-newgtlds.org/>).
21. The IO also provides an illustration of the limited scope of objectionable application by stating that “a limited public interests objection could be triggered in case an application promote unlawful activities or international crimes, such as child pornography, sale of counterfeit medicines, slavery, torture or genocide; in case it endangers international public order or again in case it is obviously against moral values that have been transcribed in international norms.” (Website of the Independent Objector, <http://www.independent-objector-newgtlds.org/>).
22. As stated in paragraph 3.5.3. of the Guidebook, in order to take the intended use into account, the IO and the Panel of Experts are required to look at the application itself.

23. Applying these considerations to the present case, one may well consider that the application for a string “.hospital” which contains an indication that the intended purpose of such a string might be the sale of counterfeit medicine or maybe also the offering of unsafe medical treatment or other high risk medical services might be objectionable.
24. However, I fail to see that the application by the Applicant indicates any intention of inciting or promoting any such highly reprehensive behavior.
25. The Applicant is a commercial domain name provider who intends to offer domain sites with the gTLD string “.hospital”. It is the task of such a provider to ensure that domains are available and functioning and that specific users may register. The prospective domain name provider in the present case is not itself active in the health or medical field and there is nothing in the application that lends itself to presume that it intends to engage in any activities like the sale of medicine, the offering of medical treatment or other medical or hospital services, let alone in the sale of counterfeit medicine or other reprehensible behavior.
26. Thus, under the IO’s own standards it would appear difficult to image how the present application could be considered to be contrary to “fundamental norms of public order and morality that are recognized under international law.”
27. One may criticize that Applicant’s purpose is primarily commercial, regarding the applied-for gTLD string as mere “commodity”, but that does not render it contrary to “morality and public order”.
28. I am sympathetic with the majority’s concern that the lack of a specific guarantee that the Applicant will ensure that the information imparted through internet sites registered with the “.hospital” gTLD will be reliable and trustworthy information is problematic.
29. However, I cannot tell from the current ICANN registration prerequisites that such an implied substantive, content-wise check is a precondition for a gTLD string registration.
30. The majority relies heavily on the fact that the present application “does not include those specific protection safeguards listed at page 8 of the GAC’s comments.” (Expert Determination of 11 December 2013, para. 83). Indeed, on 11 April 2013, ICANN’s Governmental Advisory Committee (GAC) issued an Advice to the ICANN Board which stated that extensive additional safeguards should be put in place for a whole range of gTLDs including “.hospital”. (Available at <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>).
31. The recommended safeguards comprise for all new gTLDs: (i) increased WHOIS verification and checks; (ii) expanded terms of use by registry operators to mitigate abusive activity; (iii) increased security checks by registry operators, (iv) constant record keeping by registry operators to identify frequent inaccurate WHOIS records and security threats; (v) provision of mechanisms for the handling of complaints by registry operators arising from the provision of inaccurate WHOIS information or

the facilitation of infringement activity contrary to applicable law; and (vi) the identification of real and immediate consequences for providing inaccurate WHOIS information and engaging in infringement or unlawful activity.

32. In addition, the GAC recommended safeguards for new gTLDs carrying a higher risk of consumer harm, which include the string “.hospital”, such as: (i) heightened use policy requirements in the interest of consumers, (ii) information obligations of registrars in this request, (iii) security measures for sensitive health and financial data, (iv) strategies to mitigate fraud and other illegal activities, and (v) the establishment by registrants of single points of contact for complaints.
33. I agree with my co-panelists that “the issue is not whether ICANN will follow these suggestions or not because this Panel is only expected to examine the present Application and cannot take into account possible amendments that may be made in the future.” (Expert Determination of 11 December 2013, para. 83).
34. However, I feel compelled to conclude that as long as ICANN has not adopted these GAC recommendations and added specific additional requirements for applications relating to the health sector, it would be inappropriate to demand compliance with such recommendations from applicants in order to grant gTLDs.
35. This consideration is all the more relevant to the function of the Expert Panel whose task is limited to ensuring that gTLD names, taking into account their intended use, are not contrary to “fundamental norms of public order and morality that are recognized under international law”. It is not the Expert Panel’s assignment to check compliance with registration prerequisites.
36. While I agree with my colleagues that “a hard case [...] requires not only the simple application of legal rules, but also the balancing of different values and rules” (Expert Determination of 11 December 2013, para. 89), I do not think that this would entitle us to rewrite ICANN’s current registration policy and usurp its registration role.
37. Consequently, I have to dissent and would reject the IO’s Objection. I cannot see that the IO has met the burden of proof establishing that the intended purpose of the Applicant for the gTLD string “.hospital” as stated in its application is contrary to “fundamental norms of public order and morality that are recognized under international law.”



August Reinisch

(12 December 2013)