

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

CASE No. EXP/392/ICANN/9

THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION

(BELGIUM)

vs/

TOP LEVEL DESIGN, LLC

(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.

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THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION (BELGIUM)

vs.

TOP LEVEL DESIGN, LLC (USA)

Expert Determination

Objector

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Procedure

1. On 12 March 2013, The International Lesbian Gay Bisexual Trans and Intersex Association ("ILGA"), represented by the International Gay & Lesbian Travel Association ("IGLTA"), filed a Community Objection against the application by Top Level Design, LLC ("TLD") for the string .GAY, written in capital letters. On 22 May 2013, TLD filed its response. On 7 June 2013, I, Professor Dr. Bernhard Schlink, was appointed by the Chairman of the Standing Committee of the International Centre for Expertise ("Centre") of the International Chamber of Commerce ("ICC") as Expert in this matter.
2. On 4 July 2013, the Centre confirmed the full constitution of the Expert Panel, transferred the file to me and invited me to proceed with this matter. On 2 August 2013, I informed the parties that I had received the file and did not intend to invite additional submissions and did not consider holding a hearing. The parties did not submit any further submissions or statements nor did they request to be granted leave to submit additional submissions.
3. I proceeded with this matter in accordance with the Rules for Expertise of the ICC ("Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook") and Appendix III to the Rules.
4. The language of all submissions was English. All communications by the parties, the Expert Panel and the Centre were submitted electronically (Article 6(a) of the Procedure).
5. The draft Expert Determination was rendered to the Centre on 13 August 2013, *i.e.* within 45 days after receipt of the file transmitted by the Centre on 4 July 2013.

Summary of Parties' Positions

Objector's Position

6. ILGA presents itself as an established institution that has an ongoing relationship with the clearly delineated gay community, which ILGA writes capitalized as Gay Community. To demonstrate that it is an established institution that has an ongoing relationship with the gay community, ILGA documents that it is the only worldwide federation of more than 1000 lesbian, gay, bisexual, transgender and intersex national and local organizations in over 100 nations and on all five continents; that it has existed since 1978; that every two years it holds a world conference; that its many activities and particularly its fight against state-sponsored homophobia are covered in annual reports; and that it enjoys consultative status with the Economic and Social Council of the United Nations. To demonstrate that the gay community is a clearly delineated community, ILGA describes how a sense of community emerged among gay individuals in the early 20th century; how the Stonewall events in New York in 1969 triggered gay individuals around the world to experience themselves as part of a community; how since then more and more gay organizations sprout and provide the gay community with a network of cooperation, support, and services; and how the annual gay pride march demonstrates the unity, vitality, and strength of the gay community, which

includes all individuals whose gender identities and sexual orientations fall outside of the societal norms for heterosexual behavior.

7. ILGA claims substantial opposition from a significant part of the gay community to which the string .GAY may be targeted. It describes how the gay community came to understand that it needs a voice inside the new generic top-level domain ("gTLD") program, how it took the lead on the community application by dotgay llc ("dotgay") for the string .gay, how this application has the support from ILGA and more than 150 gay community organizations, and that these same organizations also object to the application by TLD for the string .GAY.

8. ILGA argues that TLD's operation of the string .GAY would damage the gay community. According to ILGA, TLD denies the existence of a gay community and does not understand that being gay is the expression of the essential nature of a gay person and not a choice of a gay lifestyle or a homosexual culture. To operate a string .GAY while denying the existence of the gay community would be a harmful act in and of itself. Furthermore, the operation of the string .GAY would usurp and exploit the name of the gay community, which these days includes lesbian, gay, bisexual, trans, queer, intersex people and allies. Taking a group's name and using it to create a profitable business should be regarded as exploitation, unless it is done for and endorsed by the community itself. TLD would use the string .GAY to generate profits that would not benefit the community. Its operation of the string .GAY would make this gTLD available to all registrants for any purpose and any use with no restriction, thereby allowing for abuses of the domain name that might cause the gay community harm, for example from registrants masquerading as members of the community who in fact were anti-gay activists intending to use the registration for anti-gay purposes.

9. ILGA sees a major damage in the loss of opportunities for the gay community with the operation of the string .GAY by TLD. The operation of the string .GAY under a non-gay community leadership and responsibility, and solely for profit, would not give the gay community the safety that it could enjoy from a gTLD under gay community leadership and responsibility. Registrants of the string .GAY could not rely on other registrants being reliably gay, and people who approach registrants of the string .GAY could not rely upon finding trustworthy gay businesses and enterprises, gay community programs and services. In addition, the operation of the string .GAY under a non-gay community leadership and responsibility and solely for profit would not allow the gay community to assemble the funds and resources that it needs to support its programs and services.

10. In its objection, ILGA requests that TLD "be forced to withdraw its application". Pursuant to Article 21 (d) of the Procedure, the Panel in its Expert Determination decides whether an objection is successful or dismissed; it cannot force an applicant to withdraw its application. ILGA's request that TLD be forced to withdraw its application does not fall into the scope of the present proceedings.

Applicant's Position

11. TLD challenges ILGA's standing. It sees many different gay lifestyles and cultures, too many to talk of one gay community. Not wanting to categorically deny the existence of a gay community, TLD finds it at least impractical to define the gay community for the purposes of the new gTLD application and dispute resolution procedure. TLD also regards ILGA as a strawman for dotgay, the competing applicant for .GAY who itself does not have standing as an objector; TLD therefore regards ILGA's objection as abusive.

12. TLD further argues that there is no substantial opposition from a significant part of the gay community against its application, and that TLD does not even target the string .GAY to the gay community but welcomes anybody to register domain names under this gTLD without prior restrictions.

13. TLD finally argues that the material detriment to the legitimate interest of the gay community that ILGA sees likely to arise from TLD's operation of the string .GAY is irrelevant. TLD finds likelihood of material detriment not sufficient, but thinks that certainty is required. TLD does not deny that it will not operate the string .GAY in the particular interest of the gay community. But it sees no need to do so; it will operate the string .GAY in a completely open and unrestricted manner and thereby serve the interests of all who may register equally and, doing that, even reduce prejudice against the gay community.

Findings

14. Based on the submissions of the parties, ILGA has standing. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), *i.e.* with a group that is publicly recognized as a community at a local and/or global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook). The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence.

15. ILGA is a globally recognized institution, existing since 1978, organized around the cause of the gay community, fighting for the freedom to live and express one's gender identity and sexual orientation outside of the societal norms for heterosexual behavior without any discrimination. ILGA existed much prior to the new gTLD proceedings and its purpose is far broader than merely taking the role of objector in the present proceedings.

16. ILGA has also proven substantial opposition against TLD's application for the string .GAY (Module 3.5.4 of the Guidebook, second test). It has named more than 150 gay community organizations that support the community application by dotgay for the string .gay and also object to the application by TLD for the string .GAY. The strong association between the the string .GAY and the gay community that ILGA represents (Module 3.5.4 of the Guidebook, third test) is obvious.

17. For an objection to be successful, the objector has to prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted; Module 3.5.4 of the Guidebook, fourth test, mentions as detrimental in particular damage to the reputation of the community, a failure of the applicant to act in accordance with the interests of the community, interference with the core activities of the community, impairment of the community's dependency on the Domain Name System ("DNS") for its core activities, and economic damage to the community.

18. ILGA has not proven that TLD's application creates a likelihood of material detriment to the rights of a significant portion of the gay community, nor has ILGA attempted to prove this. Instead, ILGA has attempted to prove a likelihood of material detriment to the legitimate interests of the gay community. To prove this, it would have been sufficient to prove the likelihood of damage to the reputation of the community, of a failure of the applicant to act in accordance with the interests of the community, of interference with the core activities of the community, of impairment of the community's dependency on the Domain Name System ("DNS") for its core activities, or of economic damage to the community (Module 3.5.4 of the Guidebook, fourth test). ILGA has argued that the gay community needs a gTLD that is designed to serve the gay community and to operate accordingly. It should be a safe gTLD where registrants and users can rely on the fact that other registrants who present themselves as gay and as providers of programs, services, funds, and support for gay people are actually gay and trustworthy. The gTLD should be safeguarded against anti-gay registrants who want to use it as a tool for discrimination against the gay community. Furthermore the gTLD should not be operated only for profit, not even foremost for profit, but with the purpose of giving a fair share of the revenue back to the gay community for its needs and activities. To avoid these likely usurpations and exploitations the gTLD should be administered by the gay community itself.

19. With these submissions ILGA has not proven an interference with the gay community's core activities or an economic damage to the gay community that would result from TLD's operation of the string .GAY. Nor has ILGA proven that TLD would not act in accordance with the interests of the community; all that is clear from ILGA's and also TLD's assertions is that TLD would not feel a particular responsibility towards the community but rather treat its members and interests like any other users and interests.

20. ILGA has shown that over the last century and particularly over the last decades the gay community has turned the name gay from a derogatory term into a respected name. Even though the name gay is not a legally protected name of the gay community, ILGA's concern, that the usurpation and exploitation of this name for naked profit making might make the gay community look like a community of customers and consumers rather than a community of people with a special identity and special concerns, may be understandable. But this feared adverse effect on the gay community's appearance would be far from a damage to the reputation of the gay community. In our capitalist world, each and every name is being used for profit making, and everybody is being targeted as a customer and consumer. The reputation of individuals and communities grows out of their qualities, engagements, and activities that transcend the level of profit making and being a customer and consumer.

21. ILGA has certainly demonstrated that the gay community depends on the DNS for its core activities. Within the DNS it depends on its own gTLD. TLD's operation of the string .GAY would not impair the gay community's core activities or economic situation or even reputation. But since the strings .GAY and .gay, written differently, but treated identically within the DNS, can not exist simultaneously, TLD's operation of the string .GAY would keep the gay community from promoting its core activities, improving its economic situation, and also enhancing its reputation by operating its own string .gay. It would also keep the gay community from operating its own string .gay with special mindfulness for the gay community's needs and interests. The interference that can be found in this is an interference less with what the gay community has than with what the gay community wants – its own gTLD. If TLD would operate the string .GAY, the gay community would be deprived of the chance to operate its own string .gay and to make manifold use of it.

22. The detriment that the gay community is threatened by, is the loss of the chance to operate its own string .gay. Supported by ILGA and more than 150 gay organizations, dotgay filed a community application for the string .gay. If TLD, rather than the gay community represented by ILGA as the objector and dotgay as the applicant, were granted the string .gay, the gay community would lose the chance to operate its own string .gay. This loss might be regarded as a detriment to the legitimate interests of the gay community. But Module 3.5.4 of the Guidebook clarifies that this detriment alone is not sufficient for ILGA's objection to be successful.

23. Module 3.5.4 of the Guidebook states that "an allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment". This cannot be taken literally as referring to a situation in which the objector's one and only argument is that it, in its role as an applicant for the string, should get the string rather than the other applicant; no objector would argue in such a reductionist way. It can only refer to a situation in which the objector argues that the community involved would be better served if its application were successful and it got the string rather than the other applicant. The logic behind the quoted Module 3.5.4 of the Guidebook is that the Guidebook stipulates a different procedure for the contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win against the standard applicant. That procedure is the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

24. The objector that the above quote of Module 3.5.4 of the Guidebook deals with is an applicant himself. But, again, this must not be taken literally as meaning that the objector and the applicant have to be one and the same institution. The institutions must not be identical as long as the interests and the community involved are.

25. This is confirmed by Module 3.2.2.4 of the Guidebook, which gives standing for a Community Objection only to an institution that has "not been established solely in conjunction with the gTLD application process". Because the possibility of applying for a new gTLD is new, and the operation of a new gTLD is a technically and logistically advanced and sophisticated business, for an established institution that represents an established community, the obvious choice is not to take on the task of operating this business itself but rather to delegate it to a new, technically and logistically properly equipped institution. In this situation, Module 3.5.4 of the Guidebook, if taken literally as requiring objector and applicant to be one and the same institution, would become irrelevant: the new institution, as applicant, could not object under Module 3.2.2.4 of the Guidebook and the old institution that could object, not being the applicant, could not argue that the community involved would be better served if its application were successful and it got the string rather than the other applicant. But Module 3.2.2.4 of the Guidebook is meant to become relevant and to steer the contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win to the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

26. So for Module 3.5.4 of the Guidebook, the objector, the established institution, and the applicant, the new institution, are to be treated as one entity under the following conditions: The objector and the applicant are intrinsically linked because they serve the same community, share the same interests, cooperate closely, and practice a division of labor under which the

objection comes from the established institution that has established ties to the community and knows and represents its interests plausibly and competently, while the application comes from the new institution charged with applying for a new gTDL and running it on behalf of the community.

27. In this case, if the arguments that the objector brings forward under the Community Objection Procedure of Module 3.5.4 of the Guidebook are the same that matter in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook, then they have to be dealt with under the latter procedure, and therefore cannot be regarded as material detriment under the Community Objection Procedure of Module 3.5.4 of the Guidebook.

28. ILGA and dotgay are not one and the same institution, but they are intrinsically linked. As described in ILGA's objection, the gay community, of which ILGA is the established representative, took leadership of the community application by dotgay, and dotgay advised, supported, and organized ILGA's community objection. ILGA, the established institution, and dotgay, the new institution, practice a division of labor under which they serve the gay community and pursue the same interests optimally.

29. ILGA argues that the gay community would be better served if dotgay's application were successful and dotgay got the string rather than TLD. It emphasizes the history, vitality, and strength of the gay community and how it is clearly defined and richly organized; the nexus between the string .gay and the gay community; the registration policies under which dotgay would operate the string .gay in the interest of the gay community; and the gay community's support for the operation of the string .gay by dotgay. These are the arguments that matter in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

30. The interplay between the Community Objection Procedure of Module 3.2.2.4 of the Guidebook and the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook is intricate. The contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win against the standard applicant, belong into the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook. If the community involved could exclude the other applicant by using the Community Objection Procedure of Module 3.2.2.4 of the Guidebook, presenting an established institution as an objector, and presenting arguments that were not sufficient to win in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook, this procedure would be voided and kept from serving the purpose for which it is created.

31. One might consider dealing with the intricate interplay between the two procedures by requiring that the likelihood of material detriment to the legitimate interests of the community under Module 3.5.4 of the Guidebook were proven in a manner that would also fulfill the criteria of the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook and, if that proof succeeded, allow the objection to prevail. The arguments that ILGA presents offer enough material to suggest that such criteria might well be fulfilled. But the Guidebook stipulates the Community Priority Evaluation as a different procedure before a different panel. This has to be respected.

32. So while the lost chance of operating its own string .gay, caused by TLD being delegated the string .GAY, might be regarded as a detriment to the legitimate interests of the gay community, under Module 3.5.4 of the Guidebook this detriment is not sufficient for a finding of material detriment and for ILGA's objection to be successful.

Decision

For all the above reasons and according to Article 21(d) of the Procedure, I hereby render the following Expert Determination:

1. ILGA's objection fails and is dismissed.
2. The Applicant TLD prevails.
3. TLD's advance payment of costs shall be refunded by the Centre to TLD.

16 November 2013

A handwritten signature in blue ink, appearing to read 'Schlink', written in a cursive style.

Prof. Dr. Bernhard Schlink, Expert