

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

CASE No. EXP/451/ICANN/68

INITIATIVE FOR A COMPETITIVE ONLINE MARKETPLACE

(UK)

vs/

CHARLESTON ROAD REGISTRY INC.

(USA)

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

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

EXPERT DETERMINATION

Case-Ref.-N° EXP/451/ICANN/68

Re.: “.search” (Appl. No. 1-1141-50966)

**INITIATIVE FOR A COMPETITIVE ONLINE MARKETPLACE
(UNITED KINGDOM)**

VS/

**CHARLESTON ROAD REGISTRY INC.
(USA)**

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(D) GLOSSARY OF ABBREVIATIONS:

"Application"	An application for a new gTLD lodged in connection with the terms and conditions of the Applicant Guidebook. An application includes the completed Application Form, any supporting documents, and any other information that may be submitted by the applicant at ICANN's request.
"app"	Application software, see: http://en.wikipedia.org/wiki/Application_software
"Appendix III"	Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure.
"Art."	Article
"Centre"	ICC International Centre for Expertise
"DNS"	Domain Name System
"Guidebook"	Module 3 of the gTLD Applicant Guidebook, i.e. the gTLD Applicant Guidebook currently in effect, describing the requirements of the application and evaluation processes (version 4 June

	2012).
"gTLD"	Generic Top-Level Domain
"ICC Practice Note"	ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure.
"IG P"	Implementation Guideline P, Annex C to ICANN Generic Names Supporting Organisation, Final Report, Introduction of New Generic Top-Level Domains, 8 August 2007
"mobile apps"	Mobile application, see: http://en.wikipedia.org/wiki/Mobile_app
"NGPC"	ICANN Board New gTLD Program Committee
"Procedure"	Attachment to Module 3 - New gTLD Dispute Resolution Procedure
"Rules"	Rules for Expertise of the ICC
"SLD"	Second Level Domain
"TLD"	Top-Level-Domain
	Also see: http://newgtlds.icann.org/en/applicants/glossary

(E) CHRONOLOGY OF THE EXPERT DETERMINATION PROCEDURE:

March 13, 2013	Objector files Objection with Annexes A through Q
May 14, 2013	Centre decides not to consolidate EXP/451/ICANN/68 and EXP/490/ICANN/107
May 28, 2013	Applicant submits Response with Annex 1 through 23
June 28, 2013	Objector requests leave to submit further arguments
July 1, 2013	Applicant opposes Objector's request for leave to submit further arguments
July 2, 2013	The Chairman of the Standing Committee of the Centre appoints Erik Schäfer as Expert
July 25, 2013	The Expert is confirmed and the Centre transmits file to the Expert and confirms the full constitution of the Expert Panel
August 05, 2013	Expert grants leave for one round of further submissions
August 13, 2013	Objector submits Additional Submission in Response with one Appendice
August 19, 2013	Applicant submits Additional Written Submission with Annex 24
August 27, 2013	Expert requests Clarification
August 30, 2013	Objector submits Reply to Panel's Clarification Request
August 30, 2013	Applicant submits Clarification Response
September 13, 2013	Submission of draft Expert Determination for

	scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure
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(F) APPLICABLE RULES AND STANDARDS:

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

(G) SUMMARY OF THE PARTIES' POSITIONS:

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

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

5. Regarding Procedural Standing: Objector asserts that it satisfies the standing requirements for this Community Objection because it is an established institution that has an ongoing relationship with a clearly delineated community – that of general and vertical search providers that collectively comprise the .search community.
6. Objector claims to be an industry initiative founded in May 2008 in response to growing recognition of the importance of online commerce and concerns that decreasing competition in certain online sectors, including search, threatens the growth and vitality of online commerce whose members include organizations and businesses involved in Internet commerce, particularly online service providers, publishers, advertisers, and agencies active in online advertising. Objector states that it was not "established solely in conjunction with the gTLD application process." According to Objector, more than 70 companies, associations, and individuals representing 18 countries across Europe, North and South America, and Asia have endorsed its principles and are its members and no fewer than 20 members provide general and/or vertical search services. Objector adds that all of its members have a stake in the competitive health of the .search community because they utilize search engines to reach online users. Objector alleges that it is globally recognized as a leading voice on issues of importance to the .search community.
7. According to Objector, the .search community is a "clearly delineated community" recognized by the public. General search engines are often referred to as a discrete

economic sector or market. Vertical search engines target information within a specific industry, topic, or type of content and have also been identified as a discrete market. Objector submits that the .search Application itself combines general and vertical search into a single community of services and that the .search Application recognizes the connection between general and vertical search. Accordingly, in Objector's view, the community of general and vertical search providers meets the first delineation factor (see Art. 3.5.4 Guidebook; p. 4 March 13, 2013 Objection) and the .search community, comprising general and vertical search services, also displays identifiable, formal boundaries.

8. Objector submits that its membership composition reflects the existence of a .search community and the contours of that community that existed prior to September 2007. According to Objector, many of the world's leading general and vertical search engine services are available to users in nearly every country in the world and its membership alone spans 18 countries across four continents.
9. Objector asserts that the .search community consists of a large "number" of identifiable members, such as those who are members of FairSearch.org
10. Objector concludes that because the community of general and vertical search providers is globally recognized, bounded, longstanding, globally distributed, and numerous, the .search community is properly delineated for purposes of a Community Objection to Applicant's .search gTLD Application.
11. Regarding the substance of the Objection: Objector states that its mission is to promote principles that are essential to a healthy online environment, and among its key goals is to encourage competition, innovation, and transparency in search and related markets by identifying best practices, encouraging competition, and serving as a forum for discussion. Objector asserts that it has an ongoing relationship with the clearly delineated .search community described above, that its institutional purpose benefits the .search community, it regularly performs activities that benefit that community, and that it has mechanisms for members of the .search community to participate in its activities and membership. The .search community is said to directly benefit from Objector's mission and activities which are described in some detail.
12. Objector states that it filed the Community Objection on behalf of the .search community and reiterates that it has an ongoing relationship with a clearly delineated .search community and reiterates that the community expressing opposition to the .search Application is a "*clearly delineated community*".
13. Objector points out that Applicant is a wholly-owned subsidiary of Google Inc. It was established to provide registry operator services and is responsible for managing Google's gTLD portfolio and registry operator business, but will outsource all technical operations to Google.
14. Objector alleges that there is substantial opposition to Applicant's .search Application from a significant portion of the community with which the string is associated. Objector submits that, if the Objection is rejected, Applicant's parent company, Google, will have the incentive and ability to use the .search gTLD to extend its current dominance in search and search advertising, which will result in serious harm to competition, material detriment to the legitimate interests of a significant portion of the .search com-

munity (and search users), and may constitute or facilitate violations of antitrust law in the United States, Europe, and other markets.

15. Objector contends that a qualitative and quantitative analysis reveals that there is substantial opposition to the .search Application within the .search community. According to Objector, the number and range of entities expressing opposition to the .search Application illustrate the representative nature of the opposition. In addition, Objector contends that it and its members have spent significant time and resources seeking to promote greater competition in general and vertical search. According to Objector, a very strong association exists between the .search gTLD string and the .search community. Objector argues that statements in the .search Application itself support this conclusion.
16. Objector contends that the .search Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the .search community and that the .search string is explicitly targeted to this community.
17. According to Objector, the .search community has a strong interest in vibrant competition and it is critically important that members of this community have the ability to compete for user traffic and advertising revenue on a competitive level playing field.
18. Objector asserts that Google undoubtedly possesses monopoly power in search and search advertising, markets characterized by high barriers to entry. Objector contends that as of January 2013, Google controlled nearly 70% of all search queries in the United States and more than 90% of all search queries in Europe. Objector states that Google's dominance already gives it unprecedented power over what information users see, which Internet sites they visit in response to search queries, and how much traffic those sites receive. According to Objector, Google has in recent years leveraged its power in search to quickly gain market share in several "vertical" search categories. Objector contends that today Google seeks to direct search users to its own vertical search and other services, such as Google Maps, Google Local, Google Shopping, Google Finance, and YouTube and that this has already significantly diminished competition.
19. In Objector's view, the Application itself reveals a critical part of Google's strategy to foreclose competition from rival general and vertical search providers. Awarding Applicant the .search gTLD would give Google an incentive and the ability to further entrench its dominance in search and to do so through means other than competition on the merits. According to Objector, Google's comments with which it addressed these concerns neither have legal significance nor address the substantial threat to competition posed by the .search Application. If ICANN were to admit the Applicant's Change Request and the changed request were implemented, the wording of the new request and obligations resulting therefrom would – according to Objector – be insufficient to counteract the anti-competitive effects of Google's exclusive control over the .search gTLD.
20. Objector stresses that the .search community is highly dependent on the Domain Name System for its core activities since it would not exist but for the DNS. Google, as the world's dominant search engine, by its own admission "*now runs the biggest DNS system in the world.*" Objector asserts that rival search engines today depend on non-discriminatory, open, and fair access to the DNS system in order to compete. Ob-

jector states that, if - as seems quite plausible and surely as Google intends - the .search gTLD becomes a major future source of search engine queries, granting Google exclusive control over the .search gTLD could provide the company with an insurmountable competitive advantage. This, asserts Objector, will deprive rivals of opportunities to access this major source of queries, and have the inevitable effect of diminishing competition in search – to the tremendous detriment of the .search community. Pursuant to Objector, Google is the only company with the market power to make or break any new gTLD by ranking it high or low in Google search results. Accordingly, Objector submits that, if permitted to proceed, the .search Application is likely to significantly harm the .search community.

21. For Objector, Google's intention to promote its new gTLDs "collectively" underscores the potential for harm. Objector notes that in total, Google has applied for 98 gTLDs, many of which are foundational gTLDs (such as .map) that could replace existing generic Internet addresses (such as .com, .org, and .net). Objector asserts that due to its market power in search, Google has an unprecedented ability and incentive to give preferential treatment to Google's own vertical search services such as Google Maps, where the company already holds a dominant share in several markets. To Objector it is inconceivable that Google's competitors can meaningfully compete within a market in which Google is dominant and Applicant's claim that the .search gTLD will increase competition through the "incremental availability" of second-level domain names is in contradiction to its stated intention to restrict use and registration of .search domains to Google.
22. According to Objector, Applicant's .search Application for a closed .search gTLD significantly threatens the core activities of the .search community. Its operation of the .search gTLD as a closed registry would deprive all other existing and future search providers of a critical opportunity to compete on the merits. However, Objector stresses that requiring Google to operate the .search gTLD as an "open" registry would not remove these competition concerns, as it is inconceivable that Google's competitors would willingly allow Google to monitor their relationships with their customers.
23. Objector notes that the material detriment described is extremely likely and that the dangers arising from Google's dominance in search have grown considerably because Google has entered into competition with the very websites that use Google to reach consumers. Given Google's dominance, these websites – according to Objector – do not have meaningful and effective substitutes for the user traffic they obtain today through Google. Objector contends that denying its objection and allowing Applicant's .search Application to proceed would give Google "*...the incentive and ability to monopolise both sides of the business model ...*" (p. 16 March 13, 2013 Objection) by allowing it to direct a massive volume of search traffic to its own vertical search services – beyond even what it achieves today by manipulating search results and other means. Objector stresses that the more traffic Google is able to channel through its own products and services, the fewer opportunities remain available to other members of the .search community and the more the community as a whole suffers. Objector contends that in sum, allowing Applicant's .search Application to proceed would impose immediate, substantial, and quite possibly irreversible harm to the .search community.

24. Objector requests that its objection be upheld and the application for .search filed by Charleston Road Registry Inc. be rejected.

(G.2) The May 28, 2013 Answer to the Community Objection

25. Concerning Objector's Standing, Applicant asserts that Objector cannot claim that it represents the search community when it also claims it represents publishers, Internet commerce companies, and other non-search related businesses. Applicant notes that Objector admits that only 28% of Objector's membership is even a part of the search community. Moreover, Objector was only founded in May 2008. Therefore, Objector has no standing to lodge an objection against the .search Application.
26. Applicant asserts that Objector lacks an ongoing relationship with a clearly delineated community, because it claims that it represents the search community at-large whilst its members include only a small fraction of the general and specialized web search companies that operate today. Applicant asserts that, among general web search sites, only Microsoft (which owns the general web search engine Bing) and Seznam (a Czech-based search engine) are members of Objector.
27. Applicant denies Objector's claim that it represents any one community, because in its view, Objector's membership roster includes a number of companies whose only commonality is that they have previously filed unrelated complaints against Google with antitrust regulators or are in litigation against Google. In Applicant's opinion, Objector has a single goal; i.e. to represent companies who either compete directly with Google, are engaged in active litigation against Google, or do not like where their websites appear in Google's search results. Applicant asserts in this regard that Objector is widely recognized by industry commentators as being a biased coalition whose primary goal is to impede Google's business practices and does not represent the search community, but rather some companies who have a certain perspective as to how the Internet should evolve.
28. Applicant contends that the alleged community is not clearly delineated and that Objector fails to prove that the alleged .search community is clearly delineated, because it is comprised of a significant number of entities which do not necessarily share similar goals, values, or interests. Applicant notes that "search" is not comprised solely of vertical and horizontal search sites. Applicant asserts that "search" includes also social networks. Applicant submits that the use of the term "search" in classification systems does not create formal boundaries or delineation for the alleged search community and that this group, by definition, lacks any local or global cohesion, formal boundaries, and no accurate determination can be made with respect to age, global distribution, or number of entities comprising alleged community. For Applicant, there is a diversity and conflict of goals, and controversy or uncertainty as to what persons or entities are considered to form the community. Thus, the alleged community is not clearly delineated.
29. Applicant submits that Objector cannot legitimately claim to represent the "search" community as its membership does not include representatives of other businesses with a different type of activity that, due to the functionalities offered by them to users, should also be considered being part of the "search" community, or many other essential participants in the search environment. In this regard, Applicant notes that only two comments opposing Applicant's .search application were filed on the ICANN

new gTLD website - both of which came from groups with similar membership - which cannot be considered to be "substantial". Applicant is of the view that two filed comments hardly convey that there are numerous organizations that felt compelled to register an opinion in support of this objection.

30. Applicant stresses that, since Applicant's Application for .search is no longer closed to third parties, any reference to the application for a closed domain is no longer germane to this proceeding.
31. Applicant denies that there is a strong association between .search and the alleged community and asserts that Objector has failed to prove such a strong association. According to Applicant, the distinction between vertical and general search engines is significant for the purposes of defining a search community, as search is a feature that spans a vast range of very different web services, business models and end users themselves. Applicant argues that it is unclear how the reasoning that by not addressing vertical search as separate from general search Google is insinuating that there is a strong association between the .search term and a defined search community. Applicant submits that it is nearly impossible to use generic terms to define a specific community, especially, because the term "generic" is difficult to "*demarcate reasonably*": Words are generally only meaningful or generic in a specific language and there is considerable overlap between what many people think of as brands and so-called "generic" terms.
32. Applicant asserts that Objector has not provided evidence of material detriment to the rights or legitimate interests of a significant portion of the .search community. Objector's claim that the Application for .search presents a material threat to the search community is not backed up by any evidence or proof of (1) reputational, concrete, or economic damage to the community; (2) how the .search TLD will interfere with the community's core activities; (3) how the community's core activities depend on the DNS; and (4) how there is certainty that the given detrimental outcomes would occur.
33. Applicant asserts that Google is not a monopolist in search or search advertising since the Internet and the advertising space are incredibly competitive, and Google competes with a vast array of companies for users as further explained in detail in the Answer to the Objection.
34. Applicant denies that Google is a gatekeeper to the Internet, because search engines are useful, because consumers have many ways of finding the content they are looking for online. Google serves more like a global positioning system than an on-ramp; it helps people get around, but it is not necessary. Claiming that the search industry has significant barriers to entry discounts the ever changing search environment. The entire premise of the new gTLD program is to give users new ways to access information online by making use of the DNS.
35. According to Applicant, new Top-Level Domains do not convey a competitive advantage to applicants, because the search industry in the US is highly competitive.
36. Applicant contests the veracity of Objector's assertion that gTLDs will significantly aid future competition assumes specific strings have an inherent value from which applicants can somehow create competitive advantage. Applicant states that there is a spotty record over the past decade for new gTLDs. According to Applicant, a new

gTLD operator will need to make significant investments to raise awareness of the TLD and make the case to users to change their behavior and, if these TLDs are successful, it will not be due to the inherent value of a generic term, but rather because users are persuaded to make use of these domains.

37. Finally, Applicant contends that Objector's argument that Google will obtain total control over .search is incorrect because Applicant has revised its Application to reflect that it will operate the TLD not as a closed registry, but as a registry that is open to all providers of search functionality. Applicant asserts that opening .search as described in Applicant's written representations to ICANN and other relevant instances and in the Change Request removes any possibility of alleged harm. Applicant submits that its Application for .search does also not pose harm to consumers and Objector has not provided any proof that the Application will harm consumers. Moreover, Applicant alleges that since Google does not have a monopoly in search or search advertising it is not a gatekeeper between consumers and Internet content.
38. Applicant argues that as far as Objector also considers it "*an unacceptable business risk to allow Google, as DNS operator, to monitor their [Google's] users' search queries and related web activities, and other commercially valuable and competitively sensitive information*", its line of argument is not to be followed. Applicant states that by its nature, every registry could potentially access competitors' user data and other information during the SLD provision process. Applicant concludes that it is therefore not a legitimate argument to single out Google because under this sort of logic, no registry applicant, including Microsoft, should be trusted to serve as a registry. Applicant concludes that, in any event, this objection ignores that Google has adopted a privacy policy and follows other industry best practices to safeguard user data.
39. Applicant also underscores there is no obligation to register within the .search gTLD since there will still be the possibility to use existing websites or an existing TLD for search related services. Applicant asserts that with the growth of mobile apps, social networks, and online retailing, the role of domain names is now less critical to the business models of many services that provide search functionality, among many other products and services. Applicant contends that more and more users access search functionality through browser toolbars, clicking on app icons or within product and retailing websites, activities that go beyond the DNS.
40. Applicant asserts that Google will not favor its TLDs in search results and that whether Google manages a new domain will not be a factor in how Google ranks those sites in search results.
41. Applicant concludes that Objector's assertion that the .search community is threatened is unjustified because Objector does not represent the search community. Applicant states that it has committed to allowing third parties to register within the .search gTLD, and as such the concerns that the industry will incur material detriment are unfounded. Applicant underscores that many alternatives exist and .search registrants will be subject to identical ICANN and registry policies, which are similar to the *status quo* of policies on .com today. According to Applicant, contentions that Google would significantly alter its business model to drive traffic from third party sites to its own are unsupported by evidence, and thus are purely hypothetical speculation. Applicant asks the Panel to summarily dismiss this Objection on the grounds that no significant community opposition exists.

(G.3) August 12, 2013 Second Submission by Objector

42. Objector submits that the Amended .search Application retains the key competitive harms posed by Applicant's Original .search Application, raises further competitive risks, and introduces new risks to Internet stability and security.
43. Objector informs the Expert Panel that, although ICANN preliminarily accepted the Amended .search Application on 14 May 2013, ICANN also accepted public comments on whether to finally accept Google's Amended .search Application. ICANN's final decision is pending.
44. Objector also contends that Applicant submitted an amended .search Application to ICANN on 6 April 2013 in which it contends that "*[t]he goal of the [amended] proposed gTLD is to provide a space dedicated to Internet search offerings,*" including offerings from competitors. Nonetheless, according to Objector the Application still seeks to "*establish [...] an authoritative community of websites that offer search functionality,*" namely, one conforming to standards defined and policed solely by Google. Moreover, the Amended .search Application proposes a wholly new functionality on the "*dotless search domain.*" According to Objector, the Amended .search Application creates an even greater likelihood of material detriment to the legitimate interests of the search community. Objector submits that the Amended .search Application causes additional competitive harms and introduces new risks to Internet stability and security. Pursuant to Objector this creates an even greater likelihood of material detriment to the legitimate interests of the search community than Applicant's Original .search Application.
45. According to Objector, the Amended .search Application retains and expands the anticompetitive risks that were contained in the original Application. The amended .search Application's material alteration of the proposed .search gTLD from a *closed* to a *restricted* registry does not ameliorate the anticompetitive effects of the Original .search Application. Rather, it would grant Applicant (Google) new opportunities to restrict competition and innovation in search.
46. Objector asserts that Google dominates search in the vast majority of markets and is currently under investigation by antitrust authorities in Europe and elsewhere for abusing its dominance in general search to acquire dominance in several vertical search sectors and thereby illegally foreclose competition. Allowing the Amended .search Application to proceed would strengthen Google's incentive and ability to engage in illegal anti-competitive conduct by enabling it to restrict competitors' access to a gTLD with the same name as the market (search) that Google currently dominates.
47. According to the Objector, the Amended .search Application demonstrates that Google intends to tightly control competitors' access to the .search gTLD. This restriction would allow Google to divert user search queries directed at second-level domains that are not identical to registered trademarks — such as those using common or generic terms — solely to Google. Nothing would prevent Google from abusing this power to disadvantage search providers that compete with Google's own offerings. In short, the Amended .search Application does not resolve the serious risk of material detriment *Google's* [Applicant's] Application poses to the legitimate interests of the search community.

48. Moreover, the Objector submits that the Amended .search Application adds new competitive risks because it gives Google broad new latitude to operate the .search gTLD anti-competitively. According to Objector, four aspects of Google's [Applicant's] proposed operational authority are particularly troubling:
- **Differential Pricing:** The Amended .search Application "reserves [to Google] the right to charge [third parties] different prices for unique second-level domains within the gTLD."
 - **Compatibility:** If granted, the Amended .search Application would give Google [Applicant] the unilateral right to impose unspecified and potentially anti-competitive "compatibility" requirements on competitors and to unilaterally "audit" compliance by registrants — absent any oversight by a neutral third party or similar mechanisms to prevent abuse.
 - **Access to Competitor Data:** Google's [Applicant's] pledge "to ensure that third parties cannot access" information transmitted through the registry does not preclude Google [Applicant] itself from accessing user search queries or a search provider's responses as the registry rationalizes the requests to a competing search provider. Google [Applicant] could target non-Google users with advertising or otherwise monetize traffic directed to competing search providers and collect data on the responses returned by competitors, thereby allowing Google [Applicant] to improve its own search algorithm in response.
 - **Stifling Innovation:** Google contends that its .search gTLD "will encourage websites with search functionality to adopt common query frameworks." [Amended .search Application at § 18.b.ii.1]. But as the world's dominant provider of general search services and gatekeeper to the .search gTLD, Google will have the ability and incentive to abuse this power to define how such "common quer[y/ies]" must be framed—or even what constitutes a valid search query.
49. Objector concludes on this point that, because the Amended .search Application fails to ameliorate the anticompetitive risks identified in Objector's Community Objection, and in fact poses substantial new competitive risks to the search community, the Panel should uphold Objector's Community Objection.
50. For Objector, the amended .search Application threatens Internet security and stability, since it proposes a wholly new functionality on the "*dotless search domain*." Referring to several references, Objector explains in more detail why this is the case. According to Objector, this aspect of the Application fundamentally threatens Internet security and stability and thus constitutes an additional and independent ground that the Application creates a likelihood of material detriment to the legitimate interests of the search community.
51. Objector concludes that in light of the serious threat posed by dotless domains to Internet security and stability, the Amended .search Application's proposal to include dotless domain functionality constitutes an additional and independent basis for upholding Objector's Community Objection on the ground that it would create a likelihood of material detriment to the legitimate interests of the search community.

(G.4) August 19, 2013 Second Submission by Applicant

52. Applicant reiterates that the Objection is procedurally defective in several important respects and fails to carry the burden of proving that the Application does not meet the applicable criteria under ICANN's rules for assignment of the gTLD. Accordingly, the Objection should be dismissed.
53. Applicant asserts that Objector has not demonstrated any of the factors necessary to sustain a Community Objection: Objector has failed to meet its evidentiary burden and tried instead to expand this Objection process by importing factually incorrect allegations about legal proceedings before competition authorities. According to Applicant, Objector also still has not shown itself to be a proper community representative for any "search" community. Applicant asserts that Objector fails both tests established in the Guidebook for this purpose (see Applicant's 19.08.2013 submission at p. 5, *introduction*) and provides no additional evidence as to why it should pass.
54. Applicant contends that Objector's attempts to equate management of a registry with control of an entire industry are misconceived, since accepting this argument would be to reject the entire concept of ICANN's current gTLD process. It would suggest that no company should manage a registry involving any dictionary word, lest that management confer control of an entire industry related to the word. There is no limiting principle, and there is no reason why this type of sweeping claim should be raised in an objection to a single application for .search, as opposed to raising it with ICANN more broadly.
55. Applicant reiterates that Google is not dominant in search and that Objector's competition law and language arguments are far beyond the scope of this proceeding. In Applicant's view, the ICANN objection process is not the forum for Objector to bring a broad competition complaint against Google. It is free to do that before such authorities as the U.S. Federal Trade Commission (FTC) and the European Commission, and has done so. But this line of argument is outside the scope of the Guidebook's objection process and speculation. For Applicant only competition authorities can evaluate actual impact on the relevant market.
56. According to Applicant, it is inappropriate for Objector to continue making the same arguments in its Objection that it has made previously and elsewhere. Applicant re-asserts that Google is not a monopolist in search or search advertising; Google is not a gatekeeper to the Internet; and a new gTLD does not confer a competitive advantage to Applicant over the services associated with the domains which it controls.
57. Applicant alleges that Objector mischaracterizes Applicant's amended Application and that there is no "likelihood of material detriment" to the community and Applicant will not selectively control access to the TLD.
58. According to Applicant, Objector has failed to prove a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. According to Applicant, Objector has not explained how any community will be "targeted" and its statements about effects are hypothetical and speculative. Applicant states that its plans to implement many protections that go above and beyond those required by ICANN demonstrate that it is serious about operating an inclusive, secure, and useful TLD.

59. Applicant denies that it will somehow give advantages to certain registrants (such as Google) over others. Applicant argues that Objector's contentions fail to take into account the ICANN requirement in Specification 11 of the final Registry Agreement prohibiting such conduct. If Applicant were to ever operate the .search gTLD in the manner that Objector alleges it would, Applicant would breach the Registry Agreement and be immediately subject to claims by affected parties under the Public Interest Commitment Dispute Resolution Policy. Applicant is of the view that, given that the purely theoretical alleged harm is not only barred by the Registry Agreement but also subject to enforcement procedures by affected parties, there is no reason that the Application should be rejected on the mere speculation that such behavior may harm competitors in the future.
60. Applicant asserts that Objector offers no proof that Applicant's operation of .search would cause economic damage to search service users. Search services are currently flourishing on the Internet without a dedicated TLD. Granting the .search TLD to Applicant will, in Applicant's view, in no way foreclose Google's competitors from operating search-related domain names and websites on the Internet, especially, because there are many other options. Applicant points out that "... *potential registrants for specific gTLDs happily coexist in other gTLDs even when they satisfy all eligibility requirements with no discernible disadvantage.*" (Applicant's 19. August 2013 submission, p 7, 2nd paragraph)
61. Applicant also asserts that Objector mischaracterizes "differential pricing" because, although it does reserve the right to potentially charge different prices for different second level names, these prices would be based on the selected domain name rather than on the intended registrant. ICANN's mandatory public interest commitments require a registry to operate under a transparent and non-discriminatory registration policy that would not permit Applicant to favor one registrant over another through its pricing policy.
62. Applicant denies that it would have "unilateral" authority to control registrations since it will not provide preferential treatment to its parent company, Google Inc., in either the allocation of names or in considering eligibility criteria for registration within the TLD. Applicant states that it will not be setting a "compatibility standard" because the technical eligibility criteria for the .search string are common industry practice and were developed precisely to be as generic and inclusive as possible. Furthermore, the required query interface has already been implemented by a variety of search engines and any website that currently uses or is able to implement the common industry technical standard will have the ability to register a second-level name. Applicant does not propose that the interface required for registration in .search be the only mechanism to access a registrant's search functionality, just that such interface support at least this standard in addition to other mechanisms that remain purely at the registrant's discretion.
63. According to Applicant, legal checks are in place to govern registry behavior, and the asserted potential violations are merely speculative, especially, because the idea that there is no oversight within the new gTLD environment is false. Applicant is subject to the entire public interest commitment dispute resolution policy and would be legally bound by Specification 9 "Registry Operator Code of Conduct" which requires appropriate and non-preferential handling of registry data. According to Applicant, Objector's assertion that Applicant will mishandle registrant and query data is unsubstanti-

ated and fails to take into account these requirements, which are a part of the final Registry Agreement.

64. Applicant reiterates in some detail that its Application will actually enhance innovation and choice, since its principal goal for its new gTLD program is to increase innovation in the domain name sector by developing unique and interesting ways to expand the name space and extend the utility of the DNS. In deciding to amend its application for .search, Applicant spent considerable time thinking about what could be innovative and provide unique choices for end users not yet available on the Internet to date.
65. Objector's allegedly exclusive focus on search providers fails to consider opportunities for application developers or end users of search services (which is said to be unsurprising since their objection and notion of the "search community" generally fails to take note of this broader set of stakeholders).
66. According to Applicant, the Community objection process is not the forum to decide security and stability issues. Applicant states with some detail that it is committed to protecting the security and stability of the Internet and it amended its Application after careful thought and consideration of ways to mitigate some of the well-known concerns regarding dotless domains. It also asserts that other ICANN bodies are the proper forums to decide security issues where technical experts as well as the community can participate and that such issues are beyond the intended purpose of the Procedure.
67. Applicant submits that more recently, the new gTLD Program Committee (NGPC) of the ICANN Board affirmed, "...that the use of dotless domains is prohibited." Therefore, the Applicant is of the view that 'dotless' portion of the Amended .search Application will presumably not be approved (as per the process), so any concerns relating to the nature of dotless domains likely are moot.
68. Applicant summarizes its arguments by concluding that the Objector lacks standing and has failed to provide sufficient evidence, that Applicant's intended use of the gTLD is proper, and that it presented evidence that it will in no way cause harm to its competitors or Internet users.

(H) REASONING UNDERLYING THE EXPERT'S FINDING

(H.1) General Considerations

69. Prior to providing the reasoning upon which the Expert Determination *strictu sensu* is based in accordance with Section 3.4.6 of the Guidebook, the nature and scope of the Expert's mission need to be described. The mission and powers of the Expert Panel and the effect of the Expert Determination are governed by the Guidebook and any rules which apply according to the Guidebook. This general rule is spelled out in Section 3.5 Dispute Resolution Principles (Standards) of the Guidebook as follows:
70. *"Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards. The Objector bears the burden of proof in each case."*

71. Art. 20 (a) of the Procedure states:
72. *"Standards (a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN."*
73. Accordingly, the criteria (e.g. *principles, standards*) for making the Expert Determination are conclusively specified in the rules contained or referred to as being applicable in the Guidebook and / or in relevant international law. Basically, this implies that these principles and standards are *prima facie* intended to be autonomous and independent of national laws, which include consumer protection laws, competition / anti-trust laws, and other laws. However, the fact that the Expert Panel does not have to apply other rules, regulations, or laws that are otherwise applicable does not imply that these are not to be applied by the respective competent authorities, such as competent national courts or anti-trust authorities. In other words, the Expert Panel has no jurisdictional function and the application of national law, rules and regulations is beyond the scope of the Expert Panel's mission. The Expert Panel mission is to deal with issues that are referred to it by the Guidebook and the Rules and must leave any other problem in the context of a new gTLD or its subsequent use to the institutions with the requisite authority to address such issues.

(H.2) General Considerations Concerning The Community Objection

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

cant and Objector have informed the Expert Panel that this part of the Change Request may not be allowed.

76. Facing this situation the Expert Panel notes that it was seized with the Objection against '.search' (dot .search), which is the application filed prior to the 2012 deadline specified in Module 1, Section 1.1, of the gTLD Applicant Guidebook. As long as the Change Request to the 'dotless' domain is not allowed and this fact is made known by the Parties to the Expert Panel, the Expert Panel shall decide on the Objection against '.search' (dot search) Application. The Expert Panel finds, that basing the decision on the still not allowed 'dotless' domain name is not appropriate. Accordingly, the Expert Panel will make his Determination regarding the '.search' domain based on the assumption that this domain would in all events be operated as open gTLD.

(H.3) Considerations Concerning Objector's Standing Regarding The Community Objection

77. Based on the arguments summarized above, Applicant contests Objector's standing to bring a Community Objection.
78. Pursuant to Section 3.2.1 (Grounds for Objection) of the Guidebook, a formal objection may, *inter alia*, be filed if "there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted". Section 3.2.2 (Standing to Object) of the Guidebook requires that "Objectors must satisfy standing requirements to have their objections considered". According to Section 3.2.2.4 (Community Objection), only "established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the Objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection."
79. Section 3.2.2.4 further requires that, in order to have the standing needed for a Community Objection, the Objector must prove that it is an established institution. "*Factors that may be considered in making this determination include, but are not limited to:*
- *Level of global recognition of the institution;*
 - *Length of time the institution has been in existence; and*
 - *Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process."*
80. Additionally, Objector must prove that it has an ongoing relationship with a clearly delineated community. "*Factors that may be considered in making this determination include, but are not limited to: The presence of mechanisms for participation in activities, membership, and leadership; Institutional purpose related to the benefit of the associated community; performance of regular activities that benefit the associated community; and the level of formal boundaries around the community."*
81. Furthermore, the Guidebook provides the following guidance to the Expert Panel: "*The panel will perform a balancing of the factors listed above, as well as other rele-*

vant information, in making its determination. It is not expected that an Objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements."

82. Is Objector an established institution as required in the Guidebook? Applying the above standards as construed on the basis of IG P in the ICANN Generic Names Supporting Organisation Final Report, the answer would be 'yes', because Objector (founded in May 2008) has existed for roughly 5 years (IG-P [f]) and, as evidenced by Objector's Annex C with the UK Certificate of Incorporation N° 6487907, has a 'formal existence' since March 4, 2008 in the sense referred to in IG-P [g]). Based on the parties submissions the Expert Panel is also satisfied that Objector has existed since at least March 2008 as coalition of legally existing companies or groups of companies actively engaging in business models which rely in one form or the other on the Internet, particularly the World Wide Web. The Expert notes that in the final version of the Guidebook the term 'formal' - which was included in the older final report - is not maintained, wherefore a coalition or group of members without formal legal personality under the applicable law may apparently qualify as institution, if it has a stable presence as group, even if its legal nature remains unclear. There is no indication that Objector was formed solely in conjunction with the gTLD application process.
83. Considering the preceding findings and the fact that well established companies such as *inter alia* Microsoft Corp. - which vis-à-vis Google offers some competing web-based services, such as the search-platform 'bing.com' - are members of Objector, the Expert finds that Objector has proven the circumstances requiring that Objector is an established institution.
84. Objector must also prove that it has an ongoing relationship with a clearly delineated community. Applicant contests that Objector meets this requirement. Module 3 of the Guidebook does not provide many criteria or a definition allowing to establish what the notion '*clearly delineated community*' means in practice. Module 4 (String Contention), Criterion 1 '*Definitions*', provides rather precise guidance in regard to that meaning of the term 'community', albeit in a different functional context. However, IG P in the ICANN Generic Names Supporting Organisation Final Report states in relation to the functional context of the kind of Community Objection at hand that the term '*community*' should be interpreted broadly to include for example, an *economic sector*, a cultural community, or a linguistic community and could even refer to a closely related community which believes it is implicated.
85. The Expert Panel finds that, due to the functional differences, the definition criteria contained in the mentioned Module 4 may not be directly transposed for the purposes of defining a community in the context of a Community Objection, since Module 4 deals with a different kind of dispute, namely String Contentions that have different characteristics.
86. In any event, Module 4 states what should be obvious: The term 'community' refers to a plurality of natural or legal persons or groups of such persons which all have certain things in common which other persons or groups do not have in common. The members of this group or somebody else, who is ascribed the required authority within the social reference system, must decide that the common characteristic feature(s) of the (potential) members actually makes them a community. By stating that a community, in order to be qualified as such, needs more cohesion than a mere com-

monality of interest, a highly problematic and qualitative element is being introduced. Sportfishers, triathlon-amateurs, Germans, Frenchmen, native tribes of all kinds, are often referred to as communities, as can easily be seen on the internet of reference manuals such as Collins Thesaurus. However, based on his personal experience this Expert Panel cannot imagine that the individual members of any of these groups share all or even only a preponderant part of their interests. So what could the requirement that there must be more than a commonality of interest actually mean in the context of a Community Objection? Since this requirement contained in Module 4 but not Module 3 is so difficult to apply and such a high threshold does not seem to be as crucial as Filter for Community Objections, the Expert Panel finds that the guidance given for the construction of the term 'community' in IG P is more appropriate and helpful in the context at hand - especially because it indicates that an *economic sector* may qualify as delineated group.

87. Therefore, the term 'community' is construed based on the explanations given in the IG P.
88. Objector's identified 'search-community' is mostly legal persons/entities that pursue business goals which are based on business models that at least partially rely or depend on search services for retrieving information on the Internet, namely the World-Wide-Web. Applicant itself has 'delineated' this community in the new wording inserted in its Change Request (Applicant's Annex 2, cover letter, 1st bullet point, Change Request p 1 [Reasons for Change], p 1, 3-6, 13).
89. The Expert Panel finds that in order to form part of the search community it is sufficient that the prospective community member provides or has provided a search service, the use of which by users generates data, and that this service and / or data are needed to implement the community member's business model and / or that entity's community member develops and deploys search related applications ('apps'). It is not necessary that the members of this community all understand themselves as members thereof, for example, because they view the others as direct adversaries or direct competitors competing for the same customers. Applicant itself defines the concerned community in its changed Application at N° 18.b.ii.1. by stating that "... 'search' will provide a new online structure for the aggregation of websites with search functionality ...". Thus, the Application targets as potential registrants entities 'running' websites with search functionality, which generally may be referred to as 'search-engines'. As may for example be seen from an entry in Wikipedia 'List of search engines', the (better known) members of this group have been identified and listed by the informed Wikipedia community (http://en.wikipedia.org/wiki/List_of_search_engines). Based on these considerations the Expert Panel finds that the community thereby defined is just sufficiently clearly delineated.
90. Is Objector 'associated' with the above described search community? Applicant contends that the activities of Objector are aimed against its activities and not related to any other interest or common goal which the search community may have. The Objector's maintain a web site which, at a first glance, may lead to the conclusion that Objector is only associated with its membership but no different clearly delineated wider community, such as the described search community. However, the Expert Panel finds that of the various ordinary meanings (synonyms) ascribed to the word 'associate(d)' the terms "connect(ed)" and "link(ed)" best describe what is required here: There must be a link between Objector and the search Community that is not

arbitrary and exists for the general public as understood by the Expert Panel. Even if its activities are *prima facie* partisan and not 'objective', Objector's activities generally relate to practices in trade that concern the implementation of business models which in turn concern in one way or another searches for content on the World Wide Web. This nexus to the search community does, in the opinion of the Expert Panel, suffice for the purposes of Section 3.2.2 of the Guidebook, which is primarily aimed at preventing the filing of manifestly unsubstantiated or abusive objections or any member of the public.

91. Accordingly, the Expert Panel finds that Objector has the standing for filing the Community Objection.

(H.4) Considerations Concerning The Merits Of Objectors Community Objection

92. According to Sections 3.5 and 3.5.4 of the Guidebook, for a Community Objection to succeed it must pass muster in regard to four tests. Only if the four tests are passed, the Expert Panel may conclude that the Objector has proved that there is substantial opposition from a significant portion of the community to which the string may be targeted, namely: *"The invoked community must be a clearly delineated community; and the opposition to the application by this community must be substantial; and there must be a strong association between said community and the concerned gTLD; and the application must create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted."*
93. Since the Expert Panel has found above that the search-community invoked by Objector is a sufficiently clearly delineated community and the string 'search' - being a common English word - refers in the context of the Internet to the activity carried out by users through using online structures for the aggregation of websites and/or applications with search functionality offered by community members, it is necessary to establish whether a strong association between the applied-for gTLD string and the community invoked by the Objector does exist, as is required by the non-conclusive factors (criteria) set forth under "Targeting" in Section 3.5.4 of the Guidebook.
94. (a) 'targeted' requirement: For the purposes of its Change Request, Applicant summarizes the revised plans for '.search' as follows (April 6, 2013 letter to Ms C. Willet, N° 18.b.i.1, of the Change Request document): *"The goal of the proposed gTLD is to provide a space dedicated to internet search offerings, and to make it easier for users to access the search functionality of their choice."* The English word search describes broadly what users do when using the functionalities offered by entities providing search functionality. Based on the above, the Expert Panel finds that entities providing search functionality and/or apps with related functions are targeted by "search".
95. (b) 'substantial opposition' requirement: Whether Objector has established that the opposition to the Application within the community is substantial, is – especially if one considers the 'wooly' criteria given as non-conclusive examples in the Guidebook – open to debate, since these criteria are a 'mix' of qualitative and quantitative factors. In the instant case one of Objectors members – Microsoft with .bing - is one of the few global providers of search services with a notable market share. Objector has submitted that it has anticipated costs and fees for the present proceedings in excess of US\$ 50.000,-. Objector's members have their seats in at least two continents. Is this suffi-

cient for concluding that there is substantial opposition? The Expert Panel is of the view that this requirement may, in a case like the instant one, where it is not obvious to which extent Objector is indeed representative of the complete invoked community, be decided by considering the required minimum threshold along with the likelihood of material detriment. If such detriment is very likely and the likely negative impact on the community great, any weakness in the degree of representativeness of the targeted delineated community may be compensated up to a certain point. The reason is that the weight (substantiality) of opposition also depends on how great the detriment is. Consequently, the Expert Panel finds that, to the extent that Objector fails to establish the required likelihood of material detriment, it would also fail on the requirement that there must be "*substantial opposition*". Accordingly, the Expert Panel will examine and determine first the 'likelihood of material detriment'.

96. (c) 'likelihood of material detriment' requirement: The Guidebook further requires a likelihood of an adverse effect on the .search community, should the .search gTLD be awarded to the Applicant. The relevant part of Section 3.5.4 of the Guidebook reads: "*Detriment – The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Factors that could be used by a panel in making this determination include but are not limited to:*

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

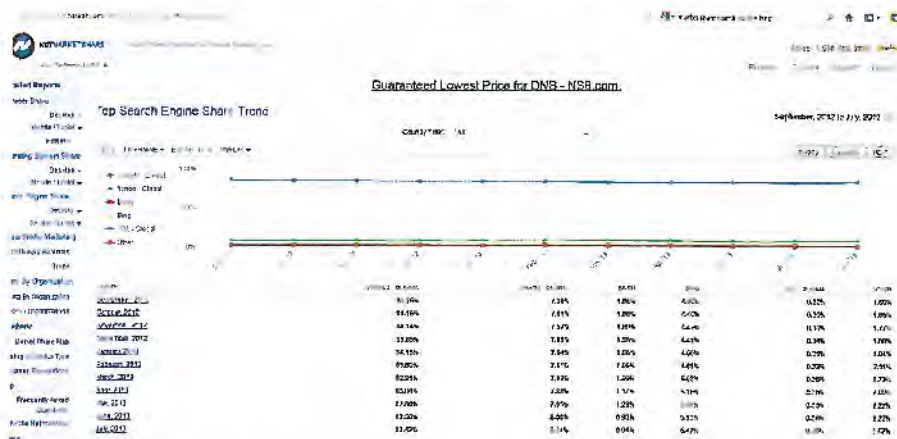
97. An allegation of detriment that consists only of the Applicant being delegated the string instead of the Objector will not be sufficient for a finding of material detriment.

98. To demonstrate that assigning ".search" to Applicant creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community, Objector relies on several assertions which shall first be analyzed one by one and then be evaluated together.

99. Objector's arguments revolve around its implicit assertion that Applicant, as wholly owned subsidiary of Google Inc., must - for the purposes of these expert proceedings

- be treated as a sort of *alter ego* of Google Inc., which Objector alleges is dominant in the search sector on the Internet. Applicant - for example in the Change Request - does not clearly or consistently distinguish between itself and Google as legally separate entities. However, Applicant contests Google’s dominance in the search sector on the Internet. One may easily imagine that in anti-trust or competition law proceedings ‘armies of lawyers’ could – based on the applicable national or transnational (EU) set of legal rules – have protracted arguments about what the relevant market(s) is/are and whether Google is dominant in such market(s). Such considerations go well beyond what is reasonably possible in the present expert proceedings.

100. For the instant proceedings it is sufficient to note that Google has not denied in the required substantiated manner the search query percentage figures for its search services provided by Objector under lit. II.A of the initial Objection. Also, based on coherent information from multiple sources readily available to the public on the Internet and retrieved using Google, concerning the share of attracted search traffic, there can be little doubt that Google is indeed a very strong market leader and that competitors in any market it is targeting have substantially less clout.



101. This strength of Google’s market share is a basis for Objector’s assertion that even the amended ‘open’ Application entails risks because it gives Google broad latitude to operate the .search gTLD anti-competitively. In this context, Objector first refers to a risk of differential pricing by charging competitors materially higher prices. Applicant denies this by stating that it has committed itself to refrain from such practices and would also be prevented by ICANN rules to do so. The pricing argument may not out rightly be dismissed because - even if legally Google were treated like any other entity registering under the .search gTLD and paid identical amounts - economically there would be a difference since as owner it would sometimes get (some) profit out of Applicant’s operation of the gTLD, if a profit remains after paying Google’s service fees. Notwithstanding, Applicant’s commitments and ICANN’s framework of rules try to legally prevent price discrimination and other forms of discrimination and Google may solve such issues in conformance with the mentioned requirements. Insofar as Objector refers to investigations by the competent competition law authorities such as those in the EU, the Expert Panel finds that these facts alone are insufficient for concluding that there is a likelihood of discrimination. That certain matters are investigated does not imply that the facts that are suspected and instigated the investigation do exist. The term “likelihood” used in the Guidebook is to be understood as “level of certainty” as described in the last bullet point in paragraph N° 96 above. The Expert Panel finds that there must be sufficient or preponderant likelihood and not only a suspicion

or risk. In relation to potential price discrimination, the Expert Panel finds that the Objector did not prove this level of likelihood of a *material detriment* resulting from a sufficiently likely threat of discrimination.

102. The above mentioned strength of Google's market share is also the background for Objector's assertion ("Compatibility") that by retaining the power to impose still unspecified requirements for securing compatibility and the right to audit compliance by registrants, Applicant (Google) is in the position to exploit these powers to intimidate rivals and prevent them from offering innovative new services within the .search gTLD. Objector submits that the likelihood of such behavior is evidenced by Google's past behavior and explicitly relies on one case, which it has not described in detail. To conclude that there is a sufficient level of certainty of such anticompetitive behavior, Objector would need to substantiate (i) on the basis of the wording of the changed Application, precisely how the standards and protocols circumscribed therein could be used to intimidate or prevent competitors from implementing innovative services, (ii) that there is a sufficiently high likelihood that the .search gTLD will attract users in a way that such new services depend on operating within the .search gTLD in order to be successful, and (iii) that Applicant's (Google's) past behavior is of a nature to make competitor obstruction, as described by Objector, sufficiently probable. The Expert Panel finds that when considering all these factors together, the required level of likelihood was not proven by Objector.
103. The above mentioned strength of Google's market share is furthermore the background for Objector's objection that Applicant's service provider and parent company Google will gain access to the data of competitors and use such data for their own purposes to the detriment of potential competitors. At N° 23 (p. 10) of the Change Request Application, Applicant states that the complete technical operation will be outsourced to its parent company Google. N° 18.b.v. of the Change Request describes the protection of Privacy and Confidential Information against third parties, but does not address the question of how query data directed to a competitor's service is shielded from Google's 'eyes'. It does not seem that, in the specific context and as set forth in paragraph 3 at page 8 of the Change Request Application, Applicant intends Google to be a 'third party'. Furthermore, at N° 23.10 (p 13) of the Change Request Application, Applicant describes the "Redirect Service" with the common query interface (see also p. 5). According to this description, Google's system will 'check' each query and redirect it to the search service chosen by the user. This seems to require technically that Google has full access to the content of each query by a user and all data associated with it. However, query data pertains to the user who makes a query and not the service provider. If the redirect feature will direct the query to the search service of the domain name registrant of the user's choice Google will only have the opportunity to directly display on its search results page query related advertisements or other information that is worth money, if it is the search provider chosen by the individual user. Otherwise, the chosen other search service provider can present the user with this kind of data. Objector has not explained the value of query data that Google may extract as .search registrar without being the chosen search service provider that it could not otherwise obtain without the proposed use of the .search gTLD (i.e. without the possibility to directly display contextual ads and information on the Google results pages). Objector also failed to explain the adverse effects thereof on the .search community. According to the Applicant's description, if a user has not already chosen a search service, she / he will be prompted with a page to select a search provider. How Google's search provider selection page is going to look like is

- not described in the Application or Applicant's submissions. Therefore, it is unknown how complete the list from which to select will be or how easy or onerous choosing providers other than Google will actually be. Considering that Google has undertaken that it will deploy its role as service provider for Applicant and Applicant has undertaken not to give Google preferential treatment in its capacity as registrar or registrant, is also still not known whether and how it could or would use its technical capabilities to thwart its competitors. Finally, as already stated above, it is still unknown whether the .search gTLD, if awarded to Applicant, would acquire such significance that to successfully implement their respective business models, members of the .search community would need a presence with a domain name under this gTLD. Accordingly, the Expert Panel finds that when considering all these factors together, the Objector did not prove the required level of likelihood of the above mentioned adverse effects (i.e. a *material detriment*) on .search community members.
104. Finally, the above mentioned strength of Google's market share is the background for Objector's assertion that, by implementing the unified search / common query interface and the underlying standard, Applicant's service provider and parent company Google will stifle innovation. Again, this assertion is implicitly based on the assumption that due to user preferences, any developer or service provider in the search community would in the future depend on having a presence within the .search gTLD-space in order to successfully compete. Moreover, insofar as Objector contends that Google would have the ability and incentive to abuse the power for defining what constitutes a valid search query, the ability and incentive to do something may lead to some probability that it will be done, but do not rise to the required level of probability. All in all, the Expert Panel finds that also in this regard the required level of likelihood of a material detriment was not proven by Objector.
105. Notwithstanding the above findings, Objector's concerns are *prima facie* not of such a nature that they may be dismissed out rightly, especially, if the whole context is being considered out of which they arise. Therefore, even if the Objector did not prove sufficiently each individual aspect of the potentially damaging effects, the more general picture merits to be analyzed again from a slightly different angle for arriving at the final conclusion on the probability of an adverse impact if the Application were to succeed:
106. (a) If Applicant were to be awarded the '.search' domain, it would become the 'gate-keeper' for all sub-domains within the '.search' GTLD, albeit subject to the rules and other terms and conditions imposed by ICANN or through ICANN approved processes. In this very limited sense Applicant would obtain full control. Since Objector does not object to the '.search' gTLD as such but to it being awarded to Applicant, the Objection is based on the alleged likely usage by Applicant of the '.search' gTLD and the contention of a likely detriment caused thereby to the relevant community. The contentions put forward in this regard rest on the assumption that the new generic '.search' domain will change the way users use internet search offerings by search facility providers. To be correct, this assumption would require that a substantial percentage of users will prefer using such search offerings with a substantially higher likelihood because the sub-domain names 'pointing' to the servers with the search pages/facilities are in the ".search" domain and not any other domain, for example a '.find' domain. Under the existing DNS one does not find examples that do *prima facie* corroborate the correctness of such a hypothesis. Users are accustomed to the sub-domain before the dot being what matters (for example: one may find the sub-

domain names 'google', or 'bing' or 'wikipedia' etc. registered under a large variety of different gTLD). An assertion that the search habits of internet users will inevitably change in a way that a 'presence' under the '.search' domain becomes a sort of 'must have' for entities offering search services is speculative.

107. (b) There are no applicable international or ICANN rules providing that managing the gTLD and being a registry on one hand and, at the same time, being a registrant and (direct) competitor vis-à-vis other registrants is incompatible or a fatal obstacle to being awarded the gTLD. Objector has failed to sufficiently substantiate a rule of international law or a rule equivalent to an international norm which would prohibit what is not prohibited by ICANN's applicable rules. Competition / Anti-Trust Laws are limited to certain territories, albeit sometimes with extraterritorial effects. They are part of national law (in the case of EU competition the joint law of several countries). However, they are not part of international law as referred to in the last sentence of the first paragraph of Section 3.5 of the Guidebook. The competition Laws also substantially differ from country to country in many respects.
108. (c) Even if one were to admit that due to the pivotal role of the World-Wide-Web for a vast number of commercial activities, there is a general requirement for entities operating a gTLD and registries or registrars to treat registrants with equality and not to discriminate against any registrant, the Objector's factual arguments and the material submitted may only give rise to certain initial suspicions that such a discriminative behavior may not be ruled out for the future. These suspicions are, for example, nurtured by the wording of the relevant sections of the Change Request (e.g. (i) the imposition of a protocol with one consistent common query interface is peculiar for an Applicant and future registrar; (ii) that a direct competitor of at least some of the other '.search'-community members does indirectly, through an affiliated company, become Applicant and future registrar and defining registration rules and prices within the '.search' domain; (iii) that Applicant will use a competitor (Google) of the providers of search-services as provider of the relevant technical services for running the '.search' domain; (iv) that at N° 18.b.ii.1, 4th para. the Change Request, Applicant only states that it shall treat "all registrars" equally but does not mention registrants who at least indirectly may be affected by the contracting registrars behavior; (v) do the words "search functionality of their [the users] choice" really refer to the search functionalities of the different competing entities / companies, which users deliberately and consciously chose, or do they refer to the search functionality which already is – if one believes unverified information on the web – globally the choice of more than 85% of users using such search facilities, i.e. Google's facility?). However, the precise implications thereof and the probability that Applicant/Google might commercially exploit its position to the detriment of the search community were not sufficiently substantiated by the Objector to enable the Expert Panel to make a positive ruling on the probability of detriment.
109. Because nowhere in the Guidebook's relevant sections there is wording that could be construed as requiring or even inciting an Expert Panel to enforce anti-trust law or competition law standards which such Panel would need to distill as smallest common denominator (tronc commun / common trunk) from national laws, the only inroad for such national laws could be Section 3.5.4 "Detriment", where reference is made to "rights and legitimate interests" of community members. Within the search community as understood above there is a great variety of existing and possible future business models and interests. The impact of a success of the Application on each differ-

ent sub-group of stakeholders within the .search communities and their rights under national laws has not been established with sufficient depth of detail by Objector, a future detriment of rights or legitimate interests by the way Applicant would run the '.search' domain has not been substantiated to conclude that such detriment is sufficiently likely and will affect a sufficiently big group within the search community.

110. The Expert Panel concludes that Objector's arguments evaluated together still fall short of establishing with the required degree of likelihood that material detriment to the search-community as described above will occur.
111. Because the relevant part of Section 3.5.4 of the Guidebook states that "...the Objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Factors that could be used by a panel in making this determination include but are not limited to: ...", the Expert Panel summarizes his conclusions:
- *"Nature and extent of damage to the reputation of the community represented by the Objector that would result from the applicant's operation of the applied-for gTLD string."*
 - Finding: The Objector did not allege that the reputation of the community would be damaged and the facts presented by the parties do not suggest a likelihood that it would occur.
 - *"Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests."*
 - Finding: Based on the understanding that (i) the '.search'-domain will not be a dot-less domain, (ii) it would be an open domain accessible to registrants who consider themselves to be direct or indirect competitors of Google and (iii) assuming that it will be administered without any discrimination and equitably in accordance with ICANN requirements and, as the case may be, any mandatorily applicable national rule of laws, as can be understood from the Application in the version of the Change Request, there is no other submitted information or evidence that would allow the Expert Panel to conclude that there is a sufficiently high degree of likelihood that Applicant does or will act in the described negative manner and inflict material detriment.
 - *"Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string."*
 - Finding: Facts from which such likelihood could be derived have not been sufficiently established by the Objector to the degree of probability required by the Guidebook.
 - *"Dependence of the community represented by the Objector on the DNS for its core activities."*
 - Finding: Members of the search community as described above virtually completely depend on the DNS system for implementing their business models. How-

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


- *"Nature and extent of concrete or economic damage to the community represented by the Objector that would result from the applicant's operation of the applied-for gTLD string."*
 - Finding: Due to the uncertainties resulting from the preceding findings and based on what was submitted as argument and evidence to the Expert Panel, concrete or economic damage to the community was not established with the required level of degree and likelihood.

112. Weighing all the above findings and considerations together, the Expert Panel finds that Objector has not sufficiently dissipated the uncertainties regarding a future adverse impact of awarding '.search' as - except for the "dot-less" feature - described in the Changed Application. Consequently, in its submissions to the Expert Panel, Objector has not met all four tests in the standard for the objection to prevail. Accordingly, the Objector's Community Objection does not prevail (Section 3.5.4 Guidebook, last paragraph).
113. Pursuant to Article 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the Panel, its advance payment of costs. The Applicant has prevailed, and thus shall have its advance on costs be refunded by the Centre.
114. The Findings of the Expert Panel are made in accordance with the Guidebook and Article 21 (d), (e) of the Procedure.

(I) DECISION:

115. Based on the above considerations and in accordance with Art.21(g) of the Procedure, I hereby render the following Expert Determination:
- (a) **The Objector Initiative For A Competitive Online Marketplace's Objection is dismissed.**
 - (b) **The Applicant, Charleston Road Registry Inc. prevails in this proceeding.**
 - (c) **The Applicant shall be refunded its advance payment of costs by the Centre.**
115. This Expert Determination shall be published in full in accordance with Article 21(g) of the Procedure

04. February 2014


Erik G. W. Schäfer
Expert

Place of Proceedings: Paris (France)