

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

CASE No. EXP/505/ICANN/122

ICANN AT-LARGE ADVISORY COMMITTEE

(USA)

vs/

GOOSE FEST, LLC

(USA)

(Consolidated with case No. EXP/504/ICANN/121

ICANN AT-LARGE ADVISORY COMMITTEE (ALAC) (USA) vs/

DOTHEALTH, LLC (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**

EXP/505/ICANN/122

ICANN At-Large Advisory Committee (ALAC) (USA)

vs/

Goose Fest, LLC (USA)

Consolidated with EXP/504/ICANN/121

Expert Determination

Professor Jan Paulsson

13 January 2014

TABLE OF CONTENTS

The Applicant	3
The Objector	3
Defined Terms	4
The Procedural Framework	5
Overview	7
Grounds For The Objection	8
a) Standing	8
b) Community	8
c) Substantial Opposition	11
d) Targeting	14
e) Detriment	15
Response By The Applicant	18
a) The Objector’s Standing.....	19
b) A Clearly Delineated Community.....	20
c) Substantial Opposition.....	21
d) Targeting.....	21
e) Detriment.....	21
Assessment	23
a) “Communities” in general	25
b) “Global Internet communities”	27
c) .health in particular	32
d) Standing	39
Determination	40

THE APPLICANT

Goose Fest, LLC (Delaware)
10500 NE 8th Av NE, Suite 350
Bellevue, WA 98004
USA

Represented by

John M. Genga, Don C. Moody
The IP & technology Legal Group, P.C.
dba New gTLD Disputes
15260 Venture Blvd., Suite 1810
Sherman Oaks, CA 91403
USA
+1-888-402-7706; +1-818-444-4582
john@newtlddisputes.com
don@newtlddisputes.com

THE OBJECTOR

At-Large Advisory Committee (ALAC)
ICANN, 12025 Waterfront Dr, Ste 300
Los Angeles, 90094-2536
CA, USA

Represented by its Chair:

Olivier MJ Crépin-Leblond
+1-310-578-8647
ALAC-Objections@atlarge-lists.icann.org

DEFINED TERMS

gTLD	generic top-level domain.
Dispute Resolution Procedure.	Attachment to Module 3: New gTLD Dispute Resolution Procedure.
GAC	ICANN's Government Advisory Committee.
Guidebook	The New gTLD Applicant Guidebook, approved by ICANN on 20 June 2011, updated on 11 January 2012 and 4 June 2012.
IFHIMA	International Federation of Health Information Management.
IFIP	International Federation of Information Processing.
IMIA	International Medical Informatics Association.
NGO	non-governmental organization.
Objection	Objector's Objection dated 13 March 2013.
Objection Procedures	Module 3 of the Guidebook: New gTLD Dispute Resolution Procedures for Governmental Advisory Committee Advice on New gTLDs and formal third-party objections.
Policy	The GNSO Report of 11 September 2007 entitled "Introduction of New Generic Top-Level Domains" as adopted by ICANN's Board of Directors on 26 June 2008.
Response	Applicant's Response dated 6 June 2013.
Rules	Rules for Expertise of the International Chamber of Commerce.
TLD	Top-level domain, aka "string".

THE PROCEDURAL FRAMEWORK

1. The present Determination assesses the validity of a Community Objection to the New gTLD Application submitted by Goose Fest as a candidate to serve as registry operator for the string .health. Such Objections are defined in subsection 3.2.1 of the Guidebook as based on a claim that:

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.

Subsection 3.5.4 makes clear that a Community Objection will be successful only if the Objector satisfies each of the four following tests :

- *The community invoked by the objector is a clearly delineated community; and*
- *Community opposition to the application is substantial; and*
- *There is a strong association between the community invoked and the applied-for gTLD string; and*
- *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. Each of these tests is described in further detail below.*

2. In addition to the Objection Procedures and the Dispute Resolution Procedure, the rules applicable to the Determination are the Rules of Expertise of the ICC,

supplemented by the ICC Practice Note on the Administration of Cases under the Attachment to Module 3 of the Guidebook.

3. The place of the proceedings is Paris. They were conducted exclusively in English. All communications among the Parties, the ICC, and myself have been electronic. The file was consolidated with EXP/505/ICANN/121 by the Centre for Technical Expertise on 7 May 2013.

4. The Objection is dated 13 March 2013. The Response is dated 6 June 2013. I was informed of my appointment by the ICC Centre for Expertise on 11 July 2013. The file was transferred to me under cover of a letter from the ICC dated 2 August 2013, and I confirmed receipt thereof on 8 August 2013.

5. This draft Determination was submitted for scrutiny to the Centre within the 45 day time limit set down in Article 21(a) and (b) of the Procedure.

OVERVIEW

6. ICANN'S New gTLD Program was given its public launch in June 2011. The Applicant states that the founders of its ultimate parent company, Donuts Inc., participated in the "crafting" of that Program from 2004 onwards, and established Donuts Inc. specifically to acquire and operate new gTLDs. Describing itself as a "domain name registry bringing variety and choice to Internet naming", Donuts Inc. has declared that it is backed by "substantial funding" and intends to operate each of the gTLDs it has applied for. Donut Inc. has applied for 307 new gTLDs through subsidiary entities (like the Applicant) and paid ICANN's fee of \$ 185,000 for each application. (Google, with 101 applications, and Amazon, with 78, are the second and third most prolific applicants.)

7. ALAC raises the ground of Community Objection against Goose Fest, LLC. Its Objection was submitted to the ICC Centre on 13 March 2013.

8. The Community Objection is not the only possible obstacle to the success of an application. It is important to understand, as a matter of proper regulatory attribution of authority, that my assessment of the Community Objection is limited to the specific criteria set out in Paragraph 1 above. This is not the place to determine, for example, conformity with "generally accepted legal norms of morality and public order that are recognised under principles of international law". I do not mean to assume or suggest that such an inquiry is called for (or not) with respect to this Application, but seek only to point out that those are criteria pertinent to another Objection, classified as the "Limited Public Interest Objection", which is not before me.

GROUNDS FOR THE OBJECTION

Standing

9. ALAC explains that its standing to object is justified by its status as the primary organisational home for individual Internet users within ICANN. ALAC sits at the top of a pyramid comprised of so-called At-Large Structures which, once accredited by ICANN, become members of the appropriate regional At-Large Organisations (RALOs). Each of the five RALOs is represented on ALAC by three persons, two appointed by the RALO and one by ICANN's Nominating Committee. ALAC proceeded pursuant to subsection 3.3.2 of the Guidebook to organise what is known as the New gTLD Review Group to facilitate the process of developing and assessing potential objections. In this case, the Review Group received and considered comments from the International Medical Informatics Association (IMIA). The Objections was finally approved by more than three RALOs before being approved by vote by ALAC.

Community

10. ALAC recognises that a "Community Objection" cannot be successful unless the objector (or the community it seeks to represent) can be regarded as "a clearly delineated community". ALAC seeks to demonstrate the reality of such a community by relying on the sympathetic attitude to its Objection said to be that of IMIA, which it describes as follows:

The International Medical Informatics Association (IMIA; www.imia.org) plays a major global role in the application of information science and technology in the fields of healthcare and research in medical, health and bio-informatics.

The IMIA's basic goals and objectives are to:

- *promote informatics in healthcare and research in healthcare and research in health, bio and medical informatics.*
- *advance and nurture international cooperation.*
- *to stimulate research, development and routine application.*
- *move informatics from theory into practice in a full range of health delivery settings, from physician's office to acute and long term care.*
- *further the dissemination and exchange of knowledge, information and technology.*
- *promote education and responsible behaviour.*
- *represent the medical and health informatics field with the World Health Organization and other international professional and governmental organizations.*

11. ALAC explains that IMIA is a Swiss legal entity established in 1989 after its initial creation in 1967 as a Special Interest Group of the International Federation of Information Processing ("IFIP"). It is a non-governmental organization with "close ties" to the World Health Organization (WHO) and to the International Federation of Health Information Management ("IFHIMA"). ALAC describes the WHO as the

“directing and coordinating authority for health within the United Nations system”, and explains that IFHIMA has since 1968 “supported national associations and health record professionals to implement and improve health records and system.”

12. ALAC also observes that IMIA comprises member societies from 57 countries. These are active “in areas ranging from Health or Medical Healthcare Informatics to Telemedicine and Biomedical Engineering.” IMIA also has six “corporate” and 44 “academic” institutions among its members “from around the world”, as well as individual “corresponding members” from countries that do not have an appropriate organization eligible to become an IMIA Member Society.

13. ALAC describes IMIA as a “bridge organization” and states that its objectives include:

- *moving theory into practice by linking academic and research informaticians with care givers, consultants, vendors, and vendor-based researchers;*
- *leading the international medical and health informatics communities throughout the 21st century;*
- *promoting the cross-fertilization of health informatics information and knowledge across professional and geographical boundaries; and*
- *serving as the catalyst for ubiquitous worldwide health information infrastructures for patient care and health research.*

14. Given its status and activity, as described by ALAC, IMIA should in ALAC's view be regarded as "the representative of the global community of medical and health informatics professionals from public, private and academic sectors", and as such "a clearly delineated community" in the sense of subsection 3.5.4 of the Guidebook. ALAC adds that by virtue of its "goals and objectives" the IMIA "community" has developed a "strong" relationship with the global health community in general, "understood as the individuals and entities who provide health-related services and the beneficiaries of health care". ALAC argues that information science and technology in the fields of healthcare and research in medical, health and bio-informatics ultimately benefits the entire global health community, and that the Internet in particular enables members of this community to communicate, to exchange products and services, and to inform and educate.

c) Substantial Opposition

15. ALAC recognizes that a "Community Objection" must also demonstrate "substantial" opposition from a "significant" portion of the relevant community. ALAC's demonstration in this respect proceeds primarily by reference to the inclusiveness of IMIA. ALAC notes that IMIA includes organizations representing medical and health informatics professionals at a national level, corporations, academic institutions, and individuals. ALAC states that IMIA's designation as an NGO in "official relations" with WHO, and its partnerships with IFHIMA and IFIP as well its status as "liaison organization" for the health informatics technical committee of the International Organization for Standardization (ISO), are evidence of the recognition of its stature and expertise. IMIA's history and broad-based

membership, in ALAC's words, "lend credence to it having a highly accepted and recognized stature which commands the support and attention of the community it represents".

16. ALAC goes on to argue as follows:

Acknowledging the extensiveness and diversity of IMIA's membership, the objection by IMIA, in speaking for all its members, would constitute significant expression of opposition relative to the community it represents, which is taken to be the global network of professionals working in the science of processing data for storage and retrieval of health knowledge. Such representation renders unnecessary for each of its members to submit an objection to Goose Fest, LLC's application for the .health gTLD. The fact that it boasts and represents members operating in several sectors (i.e. public, private, academic and individual persons) spread across numerous countries makes it a legitimate representative in expressing significant opposition to the present application.

Therefore, IMIA in being regarded as the established network for global community of medical and health informatics professionals, presents as a clearly significant portion, if not all, of the global medical and health informatics community.

17. ALAC also invokes and relies upon the fact that other entities "have shared our concerns over Goose Fest, LLC's application". In particular, it mentions "GAC Early Warnings" from the Governments of France and Mali against Goose Fest's application for the .health gTLD, and notes that the Government of Mali's Early

Warning was supported by Argentina, a GAC member. ALAC goes on to review the following expressions of concern from NGOs:

Twenty-three comments were received and published on the Application Comments Forum, thirteen of which were submitted by entities and/or individuals affiliated with those entities, which/who mostly comprise health care professionals, and which/who expressed either an objection or reservation to Goose Fest, LLC's application for the .health gTLD based on community objection grounds. Concerns were raised by (1) Save the Children, (2) The Cochrane Collaboration, (3) Drugs for Neglected Diseases initiative (DNDi), (4) Medicus Mundi International Network, (5) Health Innovation in Practice, (6) International Society for Telemedicine and eHealth (ISfTeH), (7) Health On the Net Foundation, (8) World Federation of Public Health Associations, (9) ISQua – International Society for Quality in Health Care, and (10) American Hospital Association; while an objection was raised by (11) Association of American Medical Colleges. The twelfth comment was an objection received from the (12) Association of Corporate Counsel, a global bar association that promotes the common professional and business interests of in-house counsel serving the professional and business interests of lawyers who practice in private sector legal departments, and the thirteenth comment was an objection from (13) IMIA.

d) Targeting

18. ALAC seeks to demonstrate that the .health string explicitly, or implicitly (by inference, based on public perception of the string), targets the community on behalf of which the objection is raised. It argues that the community “represented by IMIA”

is comprised of international medical and health informatics communities who use and provide information technology tools for the benefit of health sector, thus “involving and impacting the global health community in general”.

19. Goose Fest, in ALAC’s view, also seeks to have the same impact. Its application invokes the interest of a very broad and diverse group, including medical practitioners, veterinarians, scientists and researchers, biologists, nutritionists, dieticians, fitness experts, manufacturers, and others interested in promoting human and animal wellness, global public health, the eradication of disease, and healthy lifestyles.” ALAC also observes that Goose Fest deems .health to “represent a generic form of activity and expression” and invokes “no support from or association with any entity that would represent health sector [sic].”

20. Given the “sensitivity” of the .health gTLD, ALAC adds that it is “also guided by the French Government’s argument that it would not be in the public interest to entrust the responsibility for operating .health gTLD to an entity which is not affiliated with, endorsed by, or otherwise formally connected to the global health community”.

21. In conclusion, ALAC asserts that Goose Fest lacks “sufficient legitimate interest in the .health gTLD”.

e) Detriment

22. Finally, ALAC seeks to expose the "likelihood of material detriment to the rights or legitimate interests of a significant portion of the community. It reasons that a community may invoke the following “types of harm” as constituting “material

detriment”: (1) damage to the reputation of the community; (2) disregard of the interest of the community, including in effective security protection for Internet uses; (3) interference with “core activities” of the community, including those that depend upon the Domain Name System; and (4) concrete or economic damage to the community.

23. In particular, ALAC asserts that the present Application creates the likelihood of material detriment to the legitimate interests of the global public health community because health is a highly-regulated sector having safeguards that include, for example, licensing, monitoring and enforcement, and the strings associated with regulated sectors are likely to invoke a level of implied consumer trust. Consumer protection in health is particularly important within the online realm, as national or international rules cannot be effectively enforced to provide complete protection, thereby creating new risks for consumers, industry and governments. The reputation of the community represented by the Objector is based on the professionalism of the IMIA membership and its affiliation with other well-known international entities, WHO included, which supports the consumers’ trust in the medical and health informatics products, services and research provided by the IMIA members.

24. ALAC asserts that IMIA considers that a .health gTLD with “insufficient measures” to address these risks will “undermine consumer trust” and harm “legitimate enterprise, competition and the growth of the health industry”; a commercial entity without links to the global health community should not, in ALAC’s view, be entrusted with this responsibility. ALAC pursues its argument as follows:

It is IMIA's view that Goose Fest, LLC's application for the .health gTLD does not provide sufficient guarantees to safeguard the public interest. The applicant intends to market the gTLD to consumers and other health stakeholders but has validation processes which, according to IMIA, are insufficient. Without a legitimate link to the community and clarity on appropriate governance and policies, IMIA believes Goose Fest, LLC will perpetuate a status quo that has already proved detrimental and costly to the global public health community.

IMIA considers that the .health gTLD should only be delegated to an entity endorsed by the health community and only after a broad-based consultation of the community has taken place, where the rights, rules and responsibilities for the operation of the domain have been properly elaborated. IMIA proposes that there be at least one trusted place on the Internet for health and that .health should be considered for this purpose as a global asset for health. In other words, .health should have some of special, protected status, given the significance of the .health string to the health community and to public welfare.

25. ALAC insists that IMIA “goes further to suggest” that any delegated .health gTLD “needs to be the subject of an externally imposed set of rules that safeguard public interest,” and that these rules “ought to be established by relevant global stakeholders of the health community”. It is IMIA’s position, so ALAC states, that the Applicant “cannot be trusted to self-police the .health domain space.”

26. ALAC concludes that if in fact the Applicant were successful but then failed to achieve adequate protection of the .health string against the promotion of illicit goods and services and the dissemination of false, misleading, and/or inaccurate health

information, “it is reasonably certain that public welfare will be harmed, health and life could be endangered, and the reputation of the health industry damaged”. ALAC adds that if the successful applicant of the .health gTLD places commercial interests before public welfare interests, “which seems more than likely in the case of a commercial applicant”, those wanting to communicate important public service health information to consumers through the Internet via the .health gTLD will “more than likely” be disfavored as against “income-generating subscribers which publicise health related goods and services.

RESPONSE BY THE APPLICANT

27. Goose Fest deems the Objection to be wrong as a matter of fundamental principle. In “a world of only 22 gTLDs”, as it puts it, competition among registries was inadequate, and consumers were deprived of its benefits. Donuts makes no secret of its comprehensive approach; its affiliates have applied for 307 gTLDs in order to offer domains to open up forums for “subjects” which may otherwise not have them. The Applicant describes its approach as follows:

Applicant would make the <.HEALTH> domain open to all potential registrants for legitimate use of that common word’s various meanings. The registry would operate neutrally, and with over two dozen anti-abuse mechanisms not required of existing gTLDs. Caregivers, patients, commentators, reviewers, personal trainers, nutritionists, and others that may not be formally credentialed – yet nonetheless interested or even expert in various aspects of the field, with much to contribute to public discourse – would have nondiscriminatory access to the TLD, with unprecedented protections.

28. The term “health” is already registered more than 267,000 times under “.com” and other existing gTLDs, the Applicant observes, and goes on to contend that the present Objection is anti-competitive, seeking to close an entire segment of the Internet to uses of a term “which currently appears unfettered in second-level names and does not describe clearly delineated community.”

29. The Applicant’s first argument is to the effect that the Objector lacks standing. Alternatively, it addresses the merits by contesting each of the Objector’s contentions.

a) The Objector’s Standing

30. Subsection 3.2.2.4 of the Guidebook requires that every objector must prove that it is an “established institution” with an “ongoing relationship with a clearly delineated community” which the Applicant understands to mean “a locality, or a group of individuals sharing specific characteristics or interests, or entities that provide a common service.”

31. The Guidebook does not give ALAC any particular status that would dispense it from having to meet the same requirements as all other Community Objections. The Applicant challenges the IMIA’s association on the grounds that IMIA represents only one particular segment of the “many diverse interests” that might use “.health”. There is no “evidence of member support”, says the Applicant, and the Objection relies upon ALAC rather than upon community segments other than IMIA. Although the new gTLD program allows ALAC to make subsidized objections, the Applicant submits that Community Objections are not properly to be brought by ALAC as an

“ICANN policy advisory body” which does not emerge from a “clearly delineated community”.

32. The Applicant moreover insists that ALAC’s association with IMIA does not solve the problem of standing, because IMIA, described as representing the “global community of medical and health informatics professionals”, does not demonstrate the required “strong association” with health – the Objection does not challenge an application for “.imia” or “.informatics”. Those terms suggest that IMIA represents a different community than the Applicant here.

b) A Clearly Delineated Community

33. Goose Fest insists that “a clearly delineated community” must, as a substantive criterion, be “more stringent” than when it is considered for the separate purpose of standing. It observes that ICANN contemplated “community” to denote “specific organizations, cultures and other groups – e.g. Navaho, Amish – that can demonstrate harm to their interest by a domain relating to them”. By contrast, the “host of possible meanings” for “health” precludes the notion of “health” as a “true delineated ‘community’.” The publishers of “Health” magazine and the “Substance Abuse and Mental Services Administration”, for example, use health.com and health.org as their domains; this is legitimate – and ALAC does not speak for either of them.

34. Goose Fest cites the hypothetical case of pharmaceutical companies as compared to that of insurance companies. The former might promote “name brand medicines” while the latter might advocate “generic” alternatives.

[I]f one side controlled .health, the other might find its views suppressed. Just as in existing namespaces, neither Applicant nor the public should suffer from restricted discourse on a subject of such universal relevance.

c) Substantial Opposition

35. First of all, in Goose Fest’s view, the vagueness of the “community” asserted by ALAC is such that it is impossible to attribute opposition from a “significant portion” of it. IMIA might have referred to an .informatics community, but that would not encompass the 8.6 million doctors, 16.7 million nurses and midwives, 1.2 million dentists or 2.1 million pharmacists reflected in WHO data for 2012.

d) Targeting

36. Goose Fest disavows any intention of targeting *any* “community”, let alone the discrete “bio-informatics” sector that dominates ALAC’s Objection. In a striking phrase, Goose Fest states that it “targets the world, not any particular ‘community’.” The proper purpose of the Community Objection is to prevent the misappropriation of a string that “uniquely or near-uniquely identifies a well-established and closely connected group of people or organizations.” Medical informatics, so writes Goose Fest, “represents but one sliver of a subset of one possible connotation of the word ‘health’.” There is no evidence that the public “strongly associates” the .health string with “informatics”.

e) Detriment

37. Second-level domain names use “health” hundreds of thousands of times; this, agrees Goose Fest, reflects “the widespread embrace of the term for the free flow of information.” ALAC concedes that the approval of the Application would perpetuate the status quo; it cannot then claim that Goose Fest’s proposed string would create any “greater” or “different” harm to the alleged “health community” than what occurs under the existing regime of generic TLDs (notably .com).

38. Goose Fest goes on to assert that it has the capability to deal with abuse “far better than most registry operators and New gTLD applicants.” Fulfilling ICANN’s new requirements, it would thus positively ameliorate “the existing domain landscape, where targets of cybersquatting and phishing must affirmatively search for separate needles in the haystack of the entire Internet.”

39. Goose Fest observes that 95 “Initial Evaluation” tests have been successfully passed with respect to applications by its affiliated entities.

40. Finally, Goose Fest vehemently rejects ALAC’s “sweeping generalization” to the effect that “for-profit” entities cannot be relied upon to protect “community interests”: “Sheer speculation does not and cannot satisfy Objector’s burden to affirmatively *prove* that harm is ‘likely’.”

ASSESSMENT

43. Goose Fest's Application has made it clear, under point 19 of its Application, that it does not pertain to "a community-based TLD". The paradigm of a community on behalf of which the possibility of an Objection of the present kind was conceived readily emerges from the perusal of the Guidebook. The paradigm would be a group of people who have in common not only well-established and distinct origins, beliefs, traditions, and practices, but also the self-perception that they constitute a group whose distinctive interests it is important to preserve and promote. Its members, who might also occupy a distinct economic niche or constitute a social minority, are readily perceived by outsiders as forming such a group, and their concerns or indeed grievances are readily comprehensible, because they are expressed by voices recognised as reliable reflections of the feelings and legitimate ambitions of the community. The infinite and infinitely heterogeneous groups of persons keenly interested in "health" -- including for example the "group" of hundreds of millions of people who suffer permanent afflictions of various intensity -- is self-evidently at the antipode of this paradigm.

44. It is rather ALAC that asserts, as it must (see Paragraph 1 above), the existence of a relevant community on behalf of which it purports to act. (This is the "Community invoked by the Objector", in the words of subsection 3.5.4 of the Guidebook). As an Objector, ALAC accepts (as it must) that it has the burden of proving each of the four requisite elements of a successful Community Objection (see Paragraph 1 above). ALAC fails, as shall be seen, at each of these hurdles. But first it seems necessary, given the arguments raised in support of the Objection, to dispel

the notion that the concerns of “communities” disqualify commercial corporations as Registry operators.

45. The Guidebook refers its readers, at page 1-2, to a “complete set of the supporting documentation and more about the origins, history, and details of the policy developed background of New gTLDs Program”, to be found at <http://gns0.icann.org/issues/new-gtlds/>. That site prominently displays a document dated 22 October 2008 entitled “New gTLDs Summary – Principles, Recommendations and Implementation Guidelines”.

46. The Guidebook states in subsection 1.2.1, when defining “eligibility,” that “established corporations, organizations, and institutions in good standing may apply for new gTLDs”. The Guidebook furthermore asserts that “ICANN has designed the New gTLD Program with multiple stakeholder mechanisms”. The Preamble is worth quoting, since it gives substance to the notion of a public/private collaboration:

The program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the Generic Names Supporting Organization (GNSO) – one of the groups that coordinate global Internet policy at ICANN – formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits, and risk of new gTLDs, the selection

criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008.

47. The proposition that private corporate entities are free to apply without requiring the approval of public officials is unmistakably confirmed in a number of ways, notably by the fact that Module 2 of the Guidebook (a) requires government support only with respect to strings that wish to use geographic names, such as those of a country or a city, and (b) contains detailed references to “evaluation procedures” which notably provide that corporations listed on the world’s 25 largest stock exchanges will be deemed to have passed the “general business diligence and criminal history screening.”

48. Among the “Implementation Guidelines” set down in the document dated 22 October 2008 (see Paragraph 45 of the Implementation Guidelines), we find the plain words:

community should be interpreted broadly.

It therefore seems proper to begin by considering how a “broad interpretation” of “community” should be understood.

a) “Communities” in general

49. The word “community” refers not to a place, but to an abstraction: the convergence of a sense of involvement with common interests. True enough, a community may have a physical center, in the sense that its members care about the amenities, prosperity, security, and reputation of the place where they live. One may also speak, however, of communities which are unattached to a locale, such as those comprised of defenders of animal rights, speakers of Esperanto, adherents of Swedenborg, or fans of the Ajax football team. Communities of persons united by their interests in how they earn their living may be especially strong, whether they form permanent organisations (like professional associations) or not (like the entire population segment of retirees).

50. Communities do not necessarily create institutions. They do not necessarily function as a polity, in the sense of identifying officials formally authorized to act in their name, represent their interests, or formulate their policies. They may exist without structures of self-governance, such as membership committees which admit or exclude individuals by reference to more or less well-articulated standards of qualification or conduct.

51. It follows that communities may include individuals who are more or less concerned with the welfare of the group as a whole; it may contain cynics as well as idealists, speculators as well as altruists. Naturally it may include subgroups or even individuals whose opinions and preferences are sharply at odds with those of the majority of the community. Unless the community has in some constitutional sense defined itself as excluding undesirable individuals, or at least limited their capacity to make claims to speak as members of the group, someone looking at a community

from the outside, and armed only with this broad understanding of what a “community” may be, has no rules-based criteria for evaluating who does or does not belong to the community.

b) “Global Internet communities”

52. The determination I am now charged with effecting deals – so the Guidebook states in subsection 1.1.2.3 – with “global Internet communities”. That expression has not, however, been given further specific definition. One must therefore proceed on the basis of (i) discerning what the relevant rules *do not* say about “communities” and (ii) being attentive to implied constraints derived from principles developed by ICANN.

53. ICANN defines itself as a

private-public partnership dedicated to: preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of global Internet communities, and developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion. (Guidebook, subsection 1.1.2.3.)

54. The same subsection further explains that a

distinction should be made between application comments, which may be relevant to ICANN’s task of determining whether applications meet the established criteria, and formal

objections that concern matters outside those evaluation criteria. The formal objection process was created to allow a full and fair consideration of objections based on certain limited grounds outside ICANN's evaluation of applications on their merits.

55. Six "Principles" are defined in the 22 October 2008 document referred to in Paragraph 45 above. They are worded as follows:

- A *New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.*

- B *Some new generic top-level domains should be internationalized domain names (IDNs) subject to the approval if IDNs being available in the root.*

- C *The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition to the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.*

- D *A set of technical criteria must be used for assessing a new gTLD registry applicant to minimize the risk of harming the*

operational stability, security and global interoperability of the Internet.

E *A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meet its obligations under the terms of ICANN's registry agreement.*

F *A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.*

G *The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.*

56. It is striking that this list of principles focuses primarily on technical performance – reliability, coherence, and capability to secure compliance with relevant protocols imposed by ICANN's registry agreement. To the extent that abstract or aspirational principles are defined, they are those of a free market (“competition”, “consumer choice”, “differentiation” and “diversity”) and freedom of expression, rather than regulatory constraints arising from a protective (or authoritarian) desire to filter “wrong” or “unsound” views, or otherwise restrict access so as to reserve it to those who are vetted by some type of official bodies.

57. To put it another way, I see no reflection here of ALAC’s undisguised bias against “commercial applicants” who “cannot be trusted to self-police the .health domain space and are “more than likely” to place “commercial interests before public welfare interests” (see Paragraphs 25-26 above). This type of policy was not the road taken, notwithstanding the lengthy and broad consultations described in The Guidebook (see paragraph 46 and the quotation in paragraph 55 above). It is not for me to express preferences in this regard, but to apply the relevant rules as I find them. The Objector’s animadversions against the Applicant miss the target; profit-seekers may apply; the public interest is evidently intended to be protected by protocols imposed by ICANN in a manner akin to that of regulators whose supervision constrains the conduct of for-profit providers of public services generally.

58. Twenty “Recommendations” are articulated in the 22 October 2008 document. Broadly speaking, they concern matters relating to achieving realistic assurances that strings should be technically reliable, not infringe legal rights, and be run by entities having adequate “financial and organizational operational capability” (Principle 8).

59. Only three of these Recommendations merit mention for present purposes:

1 *ICANN must implement a process that allows the introduction of new top-level domains.*

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

- 6 *Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.*

Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDWA) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property organization (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

- 20 *An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.*

60. Recommendation 1 focuses on fairness, transparency, non-discrimination, and predictability. If there had also been an intent to adopt such a fundamental principle as the requirement that the right to apply – whether generally or with respect to certain strings – be exclusively reserved for non-profit entities, it surely would have been explicit.

61. Recommendation 6 clearly concerns matters of political interest, but I have no reason to presume that the Applicant in this case is to be suspected of the intent to administer .health in violation of fundamental norms of “morality and public order”.

62. Recommendation 20, of course, echoes the criteria for the present determination (see Paragraph 1 above).

c) .health in particular

63. The Guidebook states in subsection 1.1.2.4 that:

A GAC Early Warning may be issued for any reason.

64. That sentence, however, refers to the following footnote at the bottom of page 1-8:

While definitive guidance has not been issued, the GAC has indicated that strings that could raise sensitivities include those that “purport to represent or that embody a particular group of people or interests based on historical, cultural, or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national

minority, disability, age, and/or a language or linguistic group (non-exhaustive)” and “those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse.”

65. I have noted ALAC’s reference to the “sensitivity” of the .health string, as well as its reference to the French Government’s Early Warning to the effect that responsibility for operating that string must be given to an entity “affiliated with, endorsed by, or otherwise formally connected to the global health community.”

66. ALAC has not explained what France may have meant by “the global health community”. Nor has ALAC indicated whether France’s Early Warning evolved into the status of GAC Advice pursuant to subsection 1.1.2.7 of the Guidebook (in the absence of which I see no reason to give it any weight in making this Determination). For present purposes, I proceed on the basis that the relevant “community” is to be understood by reference to the criteria articulated, however diffusely, in the relevant ICANN rules. As should already be clear, I have seen no warrant for considering that the .health “community” is limited to that of a) public health administrations or b) private health practitioners or bodies operating under public license or accreditation, or even c) private health professionals generally.

67. This does not mean that I do not acknowledge the variable intensity of public interest that may attach to different strings. ALAC seems to be missing the mark when it refers to the “sensitivity” that should attach to .health; a more careful reading

of the footnote quoted in Paragraph 64 above should have led to the conclusion that the issue is not one of the very subjective “sensitivities” referred to in the first part of the footnote, but to the “particular sectors” alluded to in the second part as being subject either to national regulation or vulnerability to online fraud or abuse. No matter; I readily accept that there is greater public interest, and greater risk of socially undesirable outcomes, if .health were poorly administered than if proper protocols were ignored with respect to strings that target communities defined by their interest in philately or sports memorabilia.

68. The footnote in question, however, begins with the acknowledgment that “definitive guidance has not been issued” – indeed without an explicit indication that such guidance was forthcoming or anticipated or possible (such as might have been signalled by the insertion of a “yet” before the words “been issued”). I draw the conclusion not that the unquestionably important concerns alluded to in that footnote have been ignored, but are left to be addressed in the protocols imposed on those who administer those strings that are of an inherently higher intensity of public concern.

69. The more significant problem with ALAC's presentation, however, is its introduction of the notion of a "health" community in the first place. In so doing, it misses the essential point that the "community whose interests" are putatively served by a Community Objection is, as the Guidebook provides explicitly (see Paragraph 1 above), the community "invoked" by the Objector. *That* community is not necessarily one conceived as coextensive with the inherent scope of the string, which may be far broader. In other words, in the present case one needs to assess, in the first place, the

credentials of "medical informatics" as a "targeted" community rather than those of "health".

70. True enough, it is natural to consider the ambit of the inherent reach of the string itself. It would be natural to consider the population plausibly concerned by a string named ".astrophysics" when evaluating the contention that that string targets the community of UFO enthusiasts. There is a connection -- but the world is full of connections, and one must be guided by a sense of degree, proportionality, and realism.

71. The Objection itself reveals either that IMIA does not in fact represent the global health community, or else that ALAC does not demonstrate an accurate comprehension of it. ALAC states that "through its goals and objectives the IMIA community [sic] has strong ties to the global health community in general, understood as the individuals and entity who provide health-related services and the beneficiaries of health care." It should be perfectly obvious that this conception misses important segments of human society devoted to "health" in a multitude of enabling capacities, from entrepreneurs to agencies that test foods and medicines in the interest of public health. Moreover, "health" is not limited to the absence of disease and infirmity. And to say that IMIA has "strong ties to the global health community *in general*" – which is doubtless likely true with respect to the particular, and highly specialized, interface between medical informatics and those who use such technologies – illustrates the nebulosity of the claim that IMIA represents a "delineated" community which is perforce affected by a string that evokes the interests of a putative "global health community".

72. ALAC has not been able to explain how it (or IMIA) could be considered to represent the vast concatenation of stakeholders Goose Fest intends to serve and at the same time be said to constitute a "delineated community". I have not seen any persuasive evidence to the effect that Goose Fest intends to "target" the "medical informatics" community (or anything like it) in any sense of the word "target" which is relevant to the rules that apply to this Determination.

73. In sum, the Objection is based, in my judgment, on vague concerns and suppositions which might be relevant to debates about the policy choices that should be reflected in the New gTLD regime. Such debates, ICANN has explained, have already taken place and have included wide and deep consultations. They have resulted in extensive and highly technical requirements which are obviously not for me to evaluate, but which constitute the bulk of the Applicant's documentation and explanations in support of its candidacy. The "concerns" articulated by the Objection to some extent be co-extensive with the objectives pursued by ICANN's regulatory scheme, and fall to be assessed in that context, but they simply do not belong in the realm of Community Objections.

74. The Internet, as operated under ICANN's system of policies, is conceived as an open vehicle for communication, intended to promote free expression, to enable innovation, to increase consumer choice, and to permit the dissemination of diverse data, analyses, and opinions rather than the orthodoxy proclaimed by public officials who assert the authority to decide what is "true" or "sound".

75. For a string to succumb to a community-based Objection, its very name must surely bring to mind the identity of the Objector (or those sought to be protected by the Objector) as its “target”. I cannot see how IMIA can be accepted as speaking for a class of inevitable potential victims of Internet communications that concern the diffuse aggregation of human beings who are vitally concerned by “health”. The very notion of a community of “medical informatics” has not, moreover, been shown to me as “clearly delineated”.

76. We are certainly at a great remove from the case of a unitary ethnic or confessional community reasonably apprehensive of its vulnerability to detractors and persecutors, or other groups put at risk by reason of the particular circumstances or characteristics that define them.

77. If the existence of a clearly delineated community is not shown, it is impossible, for want of reference points, to see how any opposition could be characterised as substantial.

78. Moreover, considering that the first of the various “factors” listed by the Guidebook (at p. 3-23) as relevant in evaluating the materiality of opposition, namely “Number of expressions of opposition relative to the composition of the community,” I can only record that the Objection, even assuming its factual accuracy as far as it goes, gives me no basis to conclude that ALAC has discharged its burden to prove that the opposition to the Application among the persons and entities who deal extensively with medical informatics is substantial.

79. What ALAC (through IMIA) must show is that the Applicant here targets “the Community represented by the objector”. I have seen no convincing evidence that “informatics” or “bioinformatics” is in fact is the Applicant’s target, save in the purely contingent sense that the registry would (a) understand that persons involved therein would have an interest in some of the communications pertaining to “health”, and (b) certainly not exclude them.

80. The matter of “detriment” is, in my view, the locus of the Objector’s principal misconception. ALAC presumes that for-profit entities cannot be trusted to be properly heedful of the public interest. That is a political stance, and controversial. Some will say that history shows that great social benefit has resulted from private innovation and enterprise. Others will say that public or quasi-public regulators are as likely to stifle as to stimulate progress. It is not my role here to express any views as to the policy choices made, except to point out that ICANN insists on the deliberative and inclusive manner in which they have been made (see Paragraph 46 above), and that the rules upon which the present determination is based rely on the agreements and protocols which ICANN impose on registry administrators, as well as on the way they are enforced and monitored to ensure that public concerns are considered, and reflected in conduct.

d) Standing

81. Logic suggests that the issue of standing be resolved prior to any consideration of the merits. Indeed, subsection 3.2.2 of the Guidebook provides that “Objectors must satisfy standing requirements to have their objections considered.” There is,

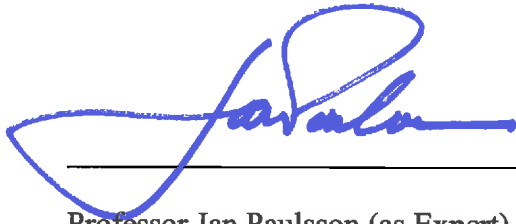
however, considerable overlap between the requirement of standing (to be an “established institution associated with a clearly delineated community”) and the test that the “community invoked” must be a “clearly delineated community” -- indeed so much of one that it seems any Objector who succeeds in establishing standing has perforce prevailed on the first out of the four merits tests under subsection 3.5.4 of the Guidebook. That conclusion strikes me as sufficiently unusual to put into question whether such was the intention of the drafters. For that reason I assumed *pro tem* that the Applicant had standing, and assessed the merits, with the result that I reach the unhesitant conclusion that the Objection is unfounded. This confirms that standing and merits are indeed inextricably linked; as there is no “clearly delineated community” of present relevance, the Objector, irrespective of its institutional quality, in this case simply cannot be “associated with a clearly delineated community” since there is no so defined community to be associated with.

DETERMINATION

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

- 1 - ICANN At-Large Advisory Committee's Objection fails;
- 2 - The Applicant, Goose Fest LLC, is the prevailing party.
- 3 - The advance payment of costs made by Goose Fest LLC under Article 14(e) of the Procedure shall be refunded to the Applicant by the Centre.

Signed this 13th day of January 2014.



Professor Jan Paulsson (as Expert)
Michael Klein Distinguished Scholar Chair
Faculty of Law
University of Miami