

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

CASE No. EXP/390/ICANN/7

THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION

(BELGIUM)

vs/

AFFILIAS LIMITED

(IRELAND)

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

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

vs.

AFILIAS LIMITED (IRELAND)

Expert Determination

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Procedure

1. On 12 March 2013, The International Lesbian Gay Bisexual Trans and Intersex Association ("ILGA"), represented by the International Gay & Lesbian Travel Association ("IGLTA"), filed a Community Objection against the application by Afilias Limited ("Afilias") for the string .LGBT. On 14 May 2013, Afilias filed its response. On 7 June 2013, I, Professor Dr. Bernhard Schlink, was appointed by the Chairman of the Standing Committee of the International Centre for Expertise ("Centre") of the International Chamber of Commerce ("ICC") as Expert in this matter.
2. On 3 July 2013, the Centre confirmed the full constitution of the Expert Panel, transferred the file to me and invited me to proceed with this matter. On 2 August 2013, I informed the parties that I had received the file and did not intend to invite additional submissions and did not consider holding a hearing. The parties did not submit any further submissions or statements nor did they request to be granted leave to submit additional submissions.
3. I proceeded with this matter in accordance with the Rules for Expertise of the ICC ("Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook") and Appendix III to the Rules.
4. The language of all submissions was English. All communications by the parties, the Expert Panel and the Centre were submitted electronically (Article 6(a) of the Procedure).
5. The draft Expert Determination was rendered to the Centre on 13 August 2013, *i.e.* within 45 days after receipt of the file transmitted by the Centre on 3 July 2013.

Summary of Parties' Positions

Objector's Position

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

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

7. ILGA claims substantial opposition from a significant part of the gay community to which the string .LGBT, using the acronym that stands for lesbian, gay, bisexual, and transgender, may be targeted. ILGA describes how the gay community came to understand that it needs a voice inside the new generic top-level domain ("gTLD") program, how it took the lead on the community application by dotgay llc ("dotgay") for the string .gay, how this application has the support from ILGA and more than 150 gay community organizations, and that these same organizations also object to the application by Afilias for the string .LGBT. The gay community did not, through ILGA or through an organisation closely related like dotgay, initiate a community application for the string .LGBT. Still, in ILGA's eyes, the string .LGBT and the string .gay for which dotgay has applied are identical, in so far as they target one and the same community, using names by which this community is known.

8. ILGA argues that Afilias's operation of the string .LGBT would damage the gay community. According to ILGA, Afilias presumes that the string .LGBT would bring together the people living the gay lifestyle into a community – as if being gay were merely a lifestyle and not the expression of the essential nature of a gay person, and as if the gay community did not already exist. According to ILGA, the operation of the string .LGBT would usurp and exploit the name of the abused minority community of lesbian, gay, bisexual, and transgender people and use it to generate profits that would not benefit the community. The operation of the string .LGBT would make this gTLD available to all registrants for any purpose and any use with no restriction, thereby allowing for abuses of the domain name that might cause the gay community harm, for example from registrants masquerading as members of the community who in fact were anti-gay activists intending to use the registration for anti-gay purposes.

9. ILGA sees the main damage in the loss of opportunities for the gay community with the operation of the string .LGBT by Afilias. The operation of the string .LGBT under a non-gay community leadership and responsibility, and solely for profit, would not give the gay community the safety that it could enjoy from a gTLD under gay community leadership and responsibility. Registrants of the string .LGBT could not rely on other registrants of the string .LGBT being reliably gay, and people who approach registrants of the string .LGBT could not rely upon finding trustworthy gay businesses and enterprises, gay community programs and services. In addition, the operation of the string .LGBT under a non-gay community leadership and responsibility and solely for profit would not generate the funds that the gay community needs to support its programs and services – something that the operation of the string .gay by dotgay would do, because dotgay has committed to give a substantial share of its profits back to the gay community.

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

Applicant's Position

11. Afilias responds that the operation of the string .LGBT is not meant to create a community, but rather, to provide an online environment whereby lesbian, gay, bisexual, and transgender

("LGBT") individuals, organisations, and companies can interact under a new secure domain name space. It further responds that operating the string .LGBT cannot exploit the name of the gay community, because the objector itself refers to this community again and again as gay and not as LGBT. It also points to the huge marketing trend of more and more businesses targeting the "gay dollar", the financial and monetary potential of the LGBT community; these businesses, even without themselves belonging to the LGBT community, should be able to use the string .LGBT to present themselves as having this special targeting focus. As to the damages that ILGA foresees, Afilias points to its robust policy and swift actions to remove abusive domain name registrations from its other domains and to the speculative nature of the damages envisioned by ILGA. As to the lost opportunities that ILGA claims, Afilias claims the freedom not to protect and to serve the gay community but rather to pursue a business.

12. Afilias suspects that ILGA's real issue with Afilias's application for the string .LGBT is that it is likely to provide competition with dotgay's application for the string .gay which is supported by ILGA and which tries to become the only gTLD on the Internet to serve the gay community.

Findings

13. ILGA's standing has not been doubted by Afilias and is not to be doubted. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), *i.e.* with a group that is publicly recognized as a community at a local and/or global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence.

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

15. ILGA has also proven substantial opposition against Afilias's application for the string .LGBT (Module 3.5.4 of the Guidebook, second test). It has named more than 150 gay community organizations that support the community application by dotgay for the string .gay and also object to the application by Afilias for the string .LGBT.

16. ILGA has used less care to prove a strong association between the string .LGBT and the gay community it represents (Module 3.5.4 of the Guidebook, third test). As Afilias points out in its response, ILGA itself refers again and again to the gay community and not to the lesbian, gay, bisexual, and transgender community. It was not required to prove the strong association with more care; it is common knowledge that the term gay community refers to this wider community, wider even than a lesbian, gay, bisexual, and transgender community, and that LGBT is one of the different abbreviations used to characterize it.

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

18. ILGA has not proven that Afiliás's application creates a likelihood of material detriment to the rights of a significant portion of the gay community, nor has ILGA attempted to prove this. Instead, ILGA has attempted to prove a likelihood of material detriment to the legitimate interests of the gay community. It has argued that the gay community needs its own gTLD, that is designed to serve the gay community and to operate accordingly. It should be a safe gTLD where registrants and users can rely on the fact that other registrants who present themselves as gay and as providers of programs, services, funds, and support for gay people are actually gay and trustworthy. It should not be operated only for profit, not even foremost for profit, but with the purpose of giving a fair share of the revenue back to the gay community for its needs and activities. ILGA also fears an usurpation and exploitation of the name of the gay community, should Afiliás operate the string .LGBT. But, while not negating that the gay community is also known by the name LGBT, ILGA emphasises that "the Gay Community is of course known by the name gay". It insists on the name gay as the one true name of the gay community, however else the community may be called and known otherwise, as there are indeed many abbreviations that can be formed and used to designate the gay community, and new abbreviations keep emerging.

19. The interest in operating its own gTLD and the interest in not having its name usurped and exploited are legitimate interests of the gay community. But the names gay and LGBT are different. It is not to be seen how Afiliás's operation of the string .LGBT could be a detriment to the gay community's interest in operating its own gTLD under the name gay. Nor is it to be seen how Afiliás's use of the name LGBT could be an usurpation and exploitation of the name gay that ILGA as the representative of the gay community regards to be truly the name of the gay community.

20. It may happen that among the registrants of the string .LGBT will be non-gay and even anti-gay registrants who try to use the registration for anti-gay purposes. But not all names that can be formed and used and may emerge to designate the gay community and not all commercial utilizations of them can be protected completely against abuse. Occasional abuse is not to be regarded as damage to the reputation of the gay community. Neither does the possibility of occasional abuse mean that Afiliás would not operate the string .LGBT in accordance with the interests of the gay community. It does not interfere with the gay community's core activities, nor does it cause economic damage to the gay community.

21. In other words, the gay community's legitimate interest - to operate its own gTLD, not to have its name usurped and exploited, and not to have a gay-related gTLD abused - cannot legitimize an exclusive claim to all names that can be formed and used and may emerge to designate the gay community nor to the gTLDs with the corresponding names. In a free society and on a free market, a community that represents the legitimate interests of its members cannot exclude competition to represent it, to serve it, to target its members as

customers and to do business with them. There is no legal or moral or social principle that would support this kind of exclusivity.

22. The legitimate interests of the gay community can only legitimize a claim to a gTLD that is exclusively linked to the gay community. A community that represents the legitimate interests of its members can claim a safe and secure position in the society and on the market, and this holds particularly for a community that represents the legitimate interests of a minority. Its claim to a safe and secure position in the society and on the market includes a safe and secure position in the internet. Therefore, while the gay community cannot exclude competition, it could file and has filed its own application for a gTLD that is designed to serve the gay community and to operate accordingly: dotgay's community application for the string .gay.

23. ILGA has shown a likelihood of material detriment to the legitimate interests of the gay community if there is no gTLD designed to serve the gay community and to operate under appropriate principles that grant safety and financial rewards for the gay community. ILGA has not proven that other gTLDs with names that can also be targeted to the gay community are likely to cause material detriment to the legitimate interests of the gay community or a significant portion thereof. They can only cause a certain amount of competition, and Afilias has convincingly argued that there is a legitimate interest in targeting the gay community without belonging to it or without belonging to the portion of it that supports the string .gay. A coexistence of an "official" gTLD of the gay community and another "unofficial" gTLD is no material detriment to the legitimate interests of the gay community.

Decision

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

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

16 November 2013



Prof. Dr. Bernhard Schlink, Expert

