

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

CASE No. EXP/517/ICANN/132 (c. EXP/519/ICANN/134)

INTERNATIONAL RUGBY BOARD

(IRELAND)

vs/

DOT RUGBY LIMITED

(GIBRALTAR)

and

INTERNATIONAL RUGBY BOARD

(IRELAND)

vs/

ATOMIC CROSS, LLC

(USA)

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

Consolidated Expert Determination

In the Matter of the Consolidated Community Objections by International Rugby Board to the
“.rugby” Applications of dot Rugby Limited and Atomic Cross, LLC

INTERNATIONAL RUGBY BOARD (IRELAND) vs/ DOT RUGBY LIMITED
(GIBRALTAR)
EXP/517/ICANN/132
(c. EXP/519/ICANN/134)

INTERNATIONAL RUGBY BOARD (IRELAND) vs/ ATOMIC CROSS, LLC (USA)
EXP/519/ICANN/134
(c. EXP/517/ICANN/132)

January 31, 2014

Mark Kantor
Sole Panel Member and Expert
110 Maryland Avenue, N.E.
Suite 311B
Washington, D.C., U.S.A. 20002
mkantor@mark-kantor.com

PARTIES AND REPRESENTATION

Case N° EXP/517/ICANN/132 (c. EXP/519/ICANN/134)

INTERNATIONAL RUGBY BOARD (IRELAND)

Contact person: Ms. Julie O'Mahony

Address: First Floor, Huguenot House, 35-38 St. Stephen's Green, Dublin 2, Ireland

Email: Julie.omahony@irb.com

DOT RUGBY LIMITED (GIBRALTAR)

Contact person: Mr. Geir Andreas Rasmussen

Address: 6A Queensway, Gibraltar GX11 1AA, GI

Email: icanntas23@famousfourmedia.com

International Rugby Board is represented by Ms. Kathryn A. Kleiman and by Mr. Robert J. Butler from the law firm FLETCHER, HEALD & HILDRETH, PLC, 1300 17th Street, North – 11th Floor, Arlington, Virginia 22209, United States

Emails: kleiman@fhhlaw.com; butler@fhhlaw.com

Dot Rugby Limited is currently not represented by outside counsel in this matter.

Case N° EXP/519/ICANN/134 (c. EXP/517/ICANN/132)

INTERNATIONAL RUGBY BOARD (IRELAND)

Contact person: Ms. Julie O'Mahony

Address: First Floor, Huguenot House, 35-38 St. Stephen's Green, Dublin 2, Ireland

Email: Julie.omahony@irb.com

ATOMIC CROSS, LLC (USA)

Contact person: Mr. Daniel Schindler

Address: 10500 NE 8th Street, Suite 350, Bellevue, WA, 20166, USA

Email: atomiccross@donuts.co; secondary@donuts.co

International Rugby Board is represented by Ms. Kathryn A. Kleiman and by Mr. Robert J. Butler from the law firm FLETCHER, HEALD & HILDRETH, PLC, 1300 17th Street, North – 11th Floor, Arlington, Virginia 22209, United States

Emails: kleiman@fhhlaw.com; butler@fhhlaw.com

Atomic Cross LLC is represented by Mr. John M. Genga and Mr. Don C. Moody from the law firm IP & TECHNOLOGY LEGAL GROUP, P.C., 15260 Ventura Blvd., Suite 1810, Sherman Oaks, California 91403, United States

Emails: john@newgtliddisputes.com; don@newgtliddisputes.com

TABLE OF CONTENTS

Table of Defined Terms

I. Introduction

II. Applicable Standards

III. Standing and Merits

A. Standing

1. Clearly Delineated Community
2. Other

B. Merits Objections and Responses

1. Substantial Opposition
2. Strong Association
3. dot Rugby (DVP)
4. Atomic Cross (Donuts)

IV. Decision

TABLE OF DEFINED TERMS

Term	Paragraph
dot Rugby Objection	1
dot Rugby Application	1
dot Rugby	1
DVP	1
Atomic Cross Objection	1
Atomic Cross Application	1
Atomic Cross	1
Donuts	1
Objector	1
IRB	1
Applications	1
Objections	1
Applicant	1
gTLD	1
Centre	2
ICC	2
Guidebook	4
Procedure	4
Rules	4
ICC Practice Note	4
dot Rugby Response	13
Atomic Cross Response	14
Responses	14
Final Report	25

1. This Expert Determination is made in connection with (1) the Community Objection (collectively with annexes thereto, the “dot Rugby Objection”) made by International Rugby Board (“IRB” or the “Objector”) to the Application (the “dot Rugby Application”) made by dot Rugby Limited (“dot Rugby”), the shares of which are partially owned by Domain Venture Partners PCC Limited (“DVP”) and (2) the Community Objection (collectively with annexes thereto, the “Atomic Cross Objection” and, together with the dot Rugby Application, the “Applications”) made by IRB to the Application (the “Atomic Cross Application” and, together with the dot Rugby Application, the “Applications”) made by Atomic Cross, LLC (“Atomic Cross”; together with dot Rugby, each an “Applicant” and collectively the “Applicants”), an indirect subsidiary of Donuts Inc. (“Donuts”), each for the generic top-level domain (“gTLD”) “.rugby.” For the reasons set forth below, the Panel determines that the dot Rugby Objection and the Atomic Cross Objection should each be upheld.

I. Introduction

2. As explained more fully below, the International Centre for Expertise (the “Centre”) of the International Chamber of Commerce (“ICC”) consolidated the proceedings with respect to the dot Rugby Objection by IRB with the proceedings with respect to the Atomic Cross Objection by IRB. The Panel is issuing one Consolidated Expert Determination with respect to the Applications. The determinations relating to the two Applications and Objections necessarily cover similar ground in many (but not all) respects.

3. In light of the consolidation of the two Objections, the Expert considers that respect for the process calls for assuring all parties that (a) each party has had the opportunity to make its own pleadings in full, separately from those of the other parties, (b) the Expert has considered the merits of each Objection and Response separately where the circumstances so require, (c) each argument has been taken into account regardless of which party made the argument and (b) the rules and principles the Expert has determined to be applicable pursuant to Article 20 of the Procedure have been applied fairly with respect to both Objections and Responses. The Expert has concluded that these responsibilities are best fulfilled by issuing a single Consolidated Expert Determination with respect to both Objections.

4. The establishment of new gTLDs requires the operation of a domain registry and a demonstration of technical and financial capacity for such operations and the management of registrar relationships. On 13 March 2013, IRB submitted its Objections to the dot Rugby Application and the Atomic Cross Application for the string “.rugby”. The Objections were made as community objections under the Attachment to Module 3 of the gTLD Applicant Guidebook (the “Guidebook”), New gTLD Dispute Resolution Procedure (the “Procedure”) for resolution in accordance with the Rules for Expertise (the “Rules”) of the ICC supplemented by the ICC Practice Note on the Administration of Cases (the “ICC Practice Note”) and Appendix III thereto.

5. Pursuant to Article 1(d) of the Procedure, the Applicants by applying for the gTLD “.rugby”, and the Objector by filing the Objections, have each accepted the applicable principles in the Procedure and the Rules.

6. Article 3(d) of the Procedure specifies that the Centre shall administer community objections.
7. Terms used in this Expert Determination and not otherwise defined herein shall have the respective defined meanings given to them in the Procedure and the Rules, as the case may be.
8. Pursuant to the Procedure, these findings “will be considered an Expert Determination and advice that ICANN [the *Internet Corporation for Assigned Names and Numbers*] will accept within the dispute resolution process.” Guidebook, Section 3.4.6.
9. The Centre conducted the administrative review of the dot Rugby Objection called for under Article 9 of the Procedure. By letter dated 9 April 2013, the Centre informed IRB and dot Rugby “that the Objection is in compliance with Articles 5-8 of the Procedure and with the Rules. Accordingly the Objection has been registered for processing (Article 9(b) of the Procedure).”
10. Atomic Cross disputed whether IRB had filed the Atomic Cross Objection on a timely basis. The Centre reviewed the matter and advised the parties the Atomic Cross Objection had been timely filed. The timeliness of that Objection and the correctness of the Centre conclusion are not matters before the Panel of Experts for determination.
11. The Centre conducted the administrative review of the Atomic Cross Objection called for under Article 9 of the Procedure. By letter dated 11 April 2013, the Centre informed IRB and Atomic Cross “that the Objection is in compliance with Articles 5-8 of the Procedure and with the Rules. Accordingly the Objection has been registered for processing (Article 9(b) of the Procedure).”
12. By letter dated 7 May 2013, following correspondence with the Applicants and the Objector, the Centre consolidated the proceedings with respect to both Objections into one administrative proceeding, on the basis set forth in that letter. The 7 May 2013 letter provides that only one Panel of Experts would be appointed to the consolidated proceeding, that the Panel will examine each objection on the merits and that the Panel would have the discretion to decide whether, based on the specificities of each case, to issue one or separate expert determinations.
13. On 5 June 2013, dot Rugby filed its Response to the dot Rugby Objection (collectively with annexes thereto, the “dot Rugby Response”).
14. On 6 June 2013, Atomic Cross filed its Response to the Atomic Cross Objection (collectively with annexes thereto, the “Atomic Cross Response” and, together with the dot Rugby Response, the “Responses”).
15. Following a prior appointment that did not proceed, the Centre by letter dated 27 August 2013 advised the Applicants and the Objector that it had proceeded with the appointment of the undersigned pursuant to Article 13 of the Procedure. Pursuant to Article 7 of the Rules and Article 3(3) of Appendix I to the Rules, the Vice-Chairman of the Standing Committee of the International Centre for Expertise of the ICC appointed the undersigned, Mark Kantor, on 26 August 2013 as the Expert in this consolidated matter and the sole member of the Panel.

16. By letter dated 29 August 2013, the Centre advised the Applicants and IRB that all advance payments had been received with respect to the Applications and Objections. Therefore, estimated Costs for the matter have been paid in full. Accordingly, “the Centre now confirms the full constitution of the Expert Panel.” In connection with that letter, the Centre transferred the files to the undersigned Expert in accordance with the Procedure and the Rules, together with any relevant correspondence between the Centre and the parties in the matters.

17. The Expert submitted a draft Determination to the Centre for scrutiny in accordance with Articles 21(a) and (b) of the Rules.

18. All submissions in the Procedure were made, and the Procedure was conducted, in English. All communications by the parties, the Expert and the Centre were submitted electronically. The place of these proceedings is the location of the Centre in Paris, France. See Articles 4(d), 5(a) and 6(a) of the Procedure.

19. No party has challenged the undersigned as Expert or raised any question as to the fulfillment by the undersigned of his duties as Expert or the qualifications, the impartiality or independence of the undersigned as Expert.

II. Applicable Standards

20. IRB filed its Objections to the Applications as community objections. A community objection, according to the Procedure and the Guidebook, refers to an objection that “there is substantial opposition to the application from a significant portion of the community to which the string [here, “.rugby”] may be explicitly or implicitly targeted.” Procedure, Article 2(e)(iv).

21. Article 20 of the Procedure sets out the standards to be applied by an Expert Panel with respect to each category of objections, including a community objection. Article 20 states as follows:

Article 20. Standards

(a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.

(b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.

(c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

22. ICANN has set out standards in the Guidebook for determining whether the Objector has standing to make a community objection.

3.2.2.4 Community objection

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. To qualify for standing for a community objection, the Objector must prove both of the following:

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.

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.

The panel will perform a balancing of the factors listed above, as well as other relevant 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.

23. In addition, ICANN has set out standards in the Guidebook for the Panel to determine whether or not a community objection will be successful.

3.5.4 Community objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the Objector must prove that:

- 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.

24. Each of these tests is described in further detail below.

Community – The Objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the Objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition – The Objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by the Objector in expressing opposition, including other channels the Objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The Objector must prove a strong association between the applied-for gTLD string and the community represented by the Objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

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. 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.

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.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant’s operation of the applied-for gTLD, the objection will fail. The Objector must meet all four tests in the standard for the objection to prevail.

25. The Guidebook refers back to the ICANN Final Report Regarding the Introduction of New Generic Top-Level Domains, dated 8 August 2007 (the “[Final Report](#)”). The Final Report set out a table of Implementation Guidelines with views regarding the determination by the Panel of *inter alia* “community,” “substantial opposition” and “material detriment” in connection with a community objection.

<p>IG P*</p>	<p>The following process, definitions and guidelines refer to Recommendation 20.</p> <p>Process</p> <p>Opposition must be objection based.</p> <p>Determination will be made by a dispute resolution panel constituted for the purpose.</p> <p>The Objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).</p> <p>Guidelines</p> <p>The task of the panel is the determination of substantial opposition.</p> <ul style="list-style-type: none"> a) substantial – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment b) significant portion – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting. c) community – community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted. 	
------------------	---	--

d) **explicitly targeting** – explicitly targeting means there is a description of the intended use of the TLD in the application.

e) **implicitly targeting** – implicitly targeting means that the Objector makes an assumption of targeting or that the Objector believes there may be confusion by users over its intended use.

f) **established institution** – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.

Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.

The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

g) **formal existence** – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.

h) **detriment** – the Objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.

III. Standing and Merits

26. In this Section of the Expert Determination, the Panel summarizes the positions of the parties as set out in the Objections, the Responses and related correspondence. This summary is made for the convenience of the reader and does not purport to be exhaustive. The Panel has carefully

reviewed the Objections (including all annexes), the Responses (including all annexes), other correspondence from the parties, the Procedure, the Rules, the Guidebook and any other rules or principles that the Expert has determined to be applicable. The absence in this Expert Determination of any specific reference to any particular information, document or provision is not to be taken as an indication that the Panel has failed in any way to consider fully the submissions of the parties or the standards, principles and rules applicable under the Procedure.

a. Standing

27. Each Applicant asserts that IRB does not have standing to pursue a community objection. Pursuant to Article 20 of the Procedure, IRB has the burden of proving it has standing to assert a community objection. IRB must prove, among other matters, that it is an “established institution,” that there is a “clearly delineated community” corresponding to the “rugby community” and that IRB has an “ongoing relationship” with such a community.

28. The challenges by dot Rugby and by Atomic Cross to IRB’s standing to pursue a community objection are quite similar. I address them together below.

29. Recognizing that it has the burden of proof, IRB initially set forth its position regarding standing in its Objections. IRB detailed its background, the identity of its members, and its participation with the members of the global rugby community. As a preliminary matter, the Expert notes that neither Applicant has challenged IRB’s assertion that it is an “established institution” as required under Section 3.2.2.4 of the Guidebook.

1. Clearly Delineated Community.

30. Objector asserts that a clearly delineated “rugby community” exists. Objector points to the number of participants in, and growth of rugby as a team sport throughout the world. The government of the United Kingdom notes the existence of a “global community of rugby players, supporters and stakeholders” (attachment C2 Objection). The Objector has more than 5 ½ million registered individuals participating in 118 countries. Rugby 15’s have participated in four Olympics. Rugby 7’s will participate in the 2016 Olympics. Several federations (including the Objector, the Rugby League International Federation, and Wheelchair Rugby) represent the interest of members of the community. The Rugby World Cup is one of the most prominent of sporting events in the world.

31. Each Applicant argues that Objector has not shown it has “an ongoing relationship with a clearly delineated community” (Guidebook Sec. 3.2.2.4) or that Objector represents “a community... strongly associated with the applied-for gTLD string” (Guidebook Sec. 3.2.2.4 at 3-8). In this regard, both Applicants assert that Objector has failed to describe the “formal boundaries” defining the community or what constitutes that community. The Applicants each, for example, argue that the “community” described by Objector “is too broad, diverse and wide-ranging to be “clearly delineated.”” Atomic Cross further asserts that the notion of a rugby community “which would allow a single party to control the use of that dictionary term to the exclusion of all others, defies reason.” (Atomic Cross Response, p. 7)

32. It is also worth noting that Atomic Cross argues Objector must satisfy a “more stringent “clearly delineated” test on the merits than it need do for standing.” I am highly skeptical of the argument that a “more stringent” standard applies on the merits, but there is no need to resolve that question because Objector has easily satisfied the requirement.

33. I determine that Objector has established for purposes of both standing and merits the existence of a “clearly delineated” rugby community “strongly associated” with “.rugby.” Objector has also established its “ongoing relationship” with that community.

34. Numerous individuals and organizations self-identify with the rugby community, whether as players, fans or otherwise. The fact that the game of rugby is played in several configurations and in several leagues, as well as being played outside leagues, does not undermine the existence of a clearly delineated community. Rather, it simply reminds us that rigidity is not a necessary component of a community. Here, Objector has persuasively demonstrated that the rugby community has more cohesion than a mere commonality of interest. Rather, participants in the rugby community are an “identifiable group of individuals sharing specific interests or characteristics.” One need only stand on the edges of a dispute between rugby partisans and cricket partisans to see a demonstration of that sharing of interests and characteristics. As Expert, I agree with the United Kingdom Government that a global rugby community of players, supporters and stakeholders exists. The boundaries of the rugby community are set by its players, fans, organizations, teams and clubs, tournaments and other economic and social stakeholders.

35. The Applicants appear to argue impliedly that ICANN rules require one and only one representative of the community. The fact that several associations exist in support of different configurations of rugby play does not either undermine the existence of a global rugby community or prevent Objector from asserting a community objection on behalf of that community. Neither ICANN procedures nor common sense so require.

36. Both Applicants argues that the Objector does not have an “ongoing relationship” with a clearly delineated rugby community. Rather, says dot Rugby, “their [IRB’s] relationship is with a particular subset of the alleged community which is itself not clearly delineated.”

37. Illustratively, dot Rugby asserts that Objector does not have a relationship with the sport as a whole (“for example Touch Rugby or Rugby league”), that Objector purportedly focuses “too heavily on elite rugby” and has been “accused of failing the smaller nations,” and that Objector “does not represent the alleged community as a whole which would include unorganized or unofficially recognized leagues, many clubs and teams (e.g., community social/recreational leagues and clubs, company-sponsored after work rugby recreational leagues and social leagues), rugby equipment/clothing manufacturers and retailers, media outlets, fan participants (i.e. fantasy rugby league), the video game industry and indeed Touch Rugby or Rugby League.”).

38. Both Applicants further argue that Objector lacks standing because Objector could have itself applied for “.rugby” as a community applicant, but chose not to do so. Rather, an affiliate of IRB (IRB Strategic Developments Limited) has also applied for an open registry for the string. Nothing in the Procedure requires a community objector itself to make a community application as a condition to pursuing the community objection to another application. Moreover, it would not be

sensible to create such a presumption (especially in the absence of any ICANN rule so requiring). To do so would unnecessarily restrict the choices available to applicants and objectors, without providing any meaningful benefits for the system.

39. Dot Rugby also points to a self-commissioned survey “suggesting that formal organization is not a necessity to participate in the sport.”

40. It is also quite clear that Objector is an established institution with an ongoing relationship with the rugby community. Objector has been the global governing body for Rugby Union for many years, established in 1886. Its charter documents have been publicly available for more than a century. Membership comprises 100 national rugby unions or associations, 17 associate members and 6 regional members. The IRB Council meets twice yearly with members from eight founder unions, four additional nations and the six regional associations. The executive committee meets regularly. The full membership meets every other year.

41. The professional staff of the IRB (50+) organizes and runs numerous tournaments, including the Rugby World Cup, the Women’s Rugby World Cup and many others. The established nature of the Objector and its ongoing relationship with the rugby community are undeniable

42. Applicants argue that IRB does not have an “ongoing relationship” with the rugby community. Those arguments are unpersuasive. Applicants’ approach towards determining whether an ongoing relationship exists seeks to create an exclusivity requirement not found either in the Procedure or in common sense. Any community may have more than one representative. Moreover, the proposed approach would effectively eliminate any representative organization from ever being within an ongoing relationship, except in the very smallest and homogenous of communities. Here too, the Procedure does not compel such unrealistic barriers to standing.

43. The Applicants further insists that the asserted global rugby community is not “clearly delineated.” For example, dot Rugby asserts that the term “rugby” is a generic word and that the community is comprised of “a significant number of stakeholders who do not necessarily share similar goals, values or interest, and thereby lack formal boundaries.”

44. While members of the global rugby community may have diverse goals, values or interest, that does not preclude them from sharing at the same time similar goals, values and interests - here, participation in and promotion of the sport in its many variants. The illustration of an extraordinarily broad “book community” offered by the Independent Objector encompasses a far broader set of stakeholders and participants than a community focused on one sport, rugby.

45. The argument that Objector only represents a subsector of the rugby community, made by both Applicants in differing ways, implicitly presumes that a community must comprise only one strand of thread in a garment. The garment itself exists in its entirety as a cohesive unit, even if it (like every single entity or activity in the world) can be deconstructed down into specific components of different characteristics and qualities. Again, that argument, if accepted, would set an unrealistically high barrier to standing – one that is not found in the Procedure. Moreover, the opposition letters from the Rugby League International Federation and other associations illustrate

that important representative associations inside the rugby community do not establish such artificial barriers between themselves.

2. Other

46. The claim that the rugby community has not expended substantial resources to protect their interest in the “.rugby” gTLD is frivolous. The size of sums expended relative to the size of a large community such as the global rugby community is plainly not the only measure of whether substantial resources have been expended. Moreover, numerical measures are not the only test of whether substantial resources human commitment and organizational commitment count equally. The many opposition letters demonstrate the expenditure of substantial human and organizational resources.

b. Merits Objections and Responses

47. Having easily established it has standing to make these objections, the Objector must still demonstrate as to each Applicant that granting the string “.rugby” to that particular Applicant would likely cause material detriment to the global rugby community (Guidebook Sec. 3.5.4). The Panel now turns to the substantive objections to the Applications that are presented by IRB. Pursuant to Article 20 of the Procedure, IRB again has the burden of proving its substantive objections.

48. As noted in the Introduction above, the Panel addresses the objections to each of the Applicants separately below to assure that all objections and responses are addressed in this Determination.

49. As a preliminary matter, it is important to note the unequivocal views of the Government of the United Kingdom as to both Applicants - the U.K. Government has stated that these Applicants do “not represent the global community of rugby players, supporters and stakeholders.” Further, the U. K. Government has advised that each Applicant “should withdraw their application.” The strength of the opposition by the U.K. to these Applications is an extremely important factor in the balance, in view of the substantial role the U.K. plays with respect to the rugby community.

1. Substantial Opposition

50. Both dot Rugby and Atomic Cross argue that Objector has not shown “substantial opposition” to their respective Applications (Guidebook Sec. 3.5.4), claiming that the demonstrations of opposition Objector has assembled are small relative to the size of the rugby community as a whole. Of course, Objector itself is an umbrella organization broadly representative of the rugby community. Moreover, the Government of the United Kingdom opposes. Associations in Tonga, Japan, Kenya and Italy, as well as umbrella organizations in numerous other countries, oppose. They are joined in their opposition by a wide array of prominent rugby organizations: Australian Rugby Union; Tonga Rugby union; South African Rugby Union; New Zealand Rugby Union; Fédération Française Rugby; Federazione Italiana Rugby; Rugby Football Union; Unión Argentina de Rugby; Rugby League International Federation; Rugby Football League; International Wheelchair Rugby Federation; IRUPA (the players union); and numerous prominent individuals.

51. The arguments by Applicants that Objector has not shown “substantial opposition” are frivolous.

2. Strong Association

52. Objector must show that a “strong association” exists between the rugby community and the gTLD string “.rugby.” Objector points out, correctly, that the term “rugby” defines the community; “it is the sport of rugby, in all of its denominations, and globally organized under the auspices of IRB and the other rugby federations and associations that represent the common interest and link among all of the members of the community.”

53. Moreover, the Government of the United Kingdom, a pre-eminent public voice with respect to the sport of rugby and its continuing integrity, has expressly recognize the existence of a rugby community and Objector’s own representative position in that community (UK GAC Early Warning, Objections Attachment C).

54. Dot Rugby asserts that any association between the rugby community and Objector is “purely ancillary or derivative”. That assertion is unpersuasive rhetoric. The claim by dot Rugby that public perception shows it has a broader target than the rugby community may indeed define DVP’s commercial objectives, but that has little bearing on the patently strong association between the term “rugby” and the global rugby community. Dot Rugby claims that the survey also shows that the dot Rugby Application does not expressly or implicitly target the rugby community. That claim is equally unpersuasive. Both Applications patently aim at the rugby community, even if they aim beyond as well. The Applicants again seek to create exclusivity requirements not found in the Procedure.

55. Atomic Cross has argued that “The TLD has an open purpose and is not tied to a specific community. That is the whole point of the generically worded TLD.” Whatever an Applicant’s subjective purpose may be, though, the term “.rugby” is objectively tied to the rugby community. Atomic Cross’s critique is not persuasive.

3. dot Rugby (DVP)

56. Objector argues that granting the Application of DVP’s affiliate dot Rugby would be likely to cause material detriment for several reasons.

57. First, the affiliation with DVP itself. Objector points out that DVP has submitted a number of applications across three general categories: lifestyle applications such as “.date,” gambling applications such as “.bet” and sports applications such as “.rugby.” As discussed below, the association with gambling strings is particularly troubling for operation of a string such as “.rugby.”

58. Objector further criticizes the failure of dot Rugby and its parent DVP to consult with stakeholders in the rugby community. Thus, says Objector, Applicant is not acting in the interest of the rugby community. As part of this objection, Objector asserts that dot Rugby and DVP have

not consulted with Objector. That part of the complaint is unpersuasive. An applicant has no duty to “engage in outreach” to the very association organizing the opposition to its application and mounting a competing bid through an affiliate. Objector offers no evidence that dot Rugby and DVP have failed to engage in outreach to others in the rugby community. The persuasiveness of the dot Rugby Objection must thus rest elsewhere.

59. Objector additionally criticizes DVP for its profit motive; “DVP apparently exists for one purpose: profit.” That criticism too is misplaced. ICANN procedures do not count the profit motive as a negative factor, nor is there any persuasive reason to deny an application because the applicant is a “for-profit” enterprise.

60. More substantively, Objector criticizes the dot Rugby Application and the Governance Council proposed by DVP for allocating management and control entirely to DVP and its affiliates (“The true system of management and control within the TLD is entirely within the DVP structure.”). That criticism is correct. The global rugby community, including IRB and the other representative associations, would be left with a voice only in a weak forum. ICANN procedures do not compel an applicant to give a formal role in governance to members of a community strongly associated with the applied-for gTLD string. Still, this criticism, in association with other objections, does weigh in the balance.

61. Again more substantively, Objector criticizes the approach DVP will employ for registration of domain names; general availability and “all domain names will generally be registered on the first-come, first-served basis.” Objector argues that this policy will provide inadequate protection for brands, players, officials, sponsors and teams in the rugby community, including (1) ambush marketing in bad faith association of products and services, (2) scalping of tickets and fraudulent ticket sales, (3) improper sale of merchandise in violation of intellectual material property rights and (4) cybersquatting.

62. Dot Rugby responds to these criticisms by citing to its proposed Governance Council and to the commitment by applicant to a “PIC Spec,” thereby permitting challenges (whether by the Governance Council or others) under the Public Interest Commitment dispute resolution procedures. Dot Rugby further asserts that the harms to which Objector points are speculative.

63. The Governance Council, however, is advisory in nature. It does not afford community voices any meaningful substantive role in protecting the interests of the community, including misuse of intellectual property interests and cybersquatting.

64. Dot Rugby also points to its intention to perform periodic consumer surveys to measure trust and satisfaction with “.rugby.” While commercially sensible, Dot Rugby offers no link between those surveys and either governance of the gTLD or responsiveness to the protection of intellectual property interests held by members of the rugby community, big and small.

65. Dot Rugby points to its Acceptable Use Policy as protection from abusive or infringing registrations. Further, DVP will participate in the Trademark Claims Service during the first 90 days of general registration to provide notice to potential registrants of registered marks in the Trademark Clearinghouse. This is a useful mechanism, but it cannot and does not affirmatively

reach out to all worldwide holders of marks. Instead, it leaves individual investigatory responsibility in the hands of the holder - who may be a small club or team, or a commercial provider, individual or organization with limited resources. That weakness is particularly apparent for small communities and in the developing world. The protections offered by the Trademark Claims Service (however valuable they may be) do not offer sufficient solace to the rugby community, other than to members of that community who are themselves fortunate to have significant investigatory resources.

66. Further, the Trademark Claims Service covers only registered trademarks. It does not provide protection for intellectual property interests other than registered trademarks, a matter of particular importance again to smaller and resource-poor organizations especially in the developing world.

67. In addition, says dot Rugby, the Applicant will require “all registrars... to review all domain names requested to be registered during the trademark claims to determine if they are an identical match that is been filed with the trademark clearinghouse.” That approach fails to give protection outside the trademark claims, fails to give protection to marks not affirmatively filed with the Trademark Clearinghouse, and fails to provide protection from domain names that are confusingly similar rather than “an identical match.”

68. Applicant also proffers an Abuse Prevention and Mitigation Plan, in conjunction with the Governance Council and an internal working group. I have commented on the limitations of the Governance Council above. The additional presence of an internal working group and a “plan” are not a substitute for demonstrable enforcement mechanisms and resource commitment.

69. Objector additionally asserts that Applicant’s operation of “.rugby” will significantly interfere with core activities of the rugby community, both commercial and non-commercial. Objector notes that “[f]ew if any of these activities at the local and provincial levels are associated with trademarks.” As pointed out above, Objector correctly notes that the DVP proposals fail to offer protection for identifiers that are not trademark and registered with clearinghouse. Under various applicable laws, many such names and brands cannot be trademarked, as they are non-commercial activities.

70. The response by dot Rugby is to assert that “it seems unlikely that local and provincial amateur teams would suffer significant cybersquatting issues.” In any event, further says dot Rugby, the Governance Council Board may recommend reservation of specific domains. Those responses are inadequate. The worldwide local and small rugby activities, especially in communities that are resource-poor, are entitled to protection just like major commercial sponsors. The Governance Council is, as noted above, advisory in nature and lacks management and enforcement impact.

71. Objector makes two complaints about the prospects that granting the string to dot Rugby will injure the reputation of the rugby community. The first complaint, relating to a civil lawsuit in the U.S. Federal courts in Florida against the CEO and COO of DVP along with DVP in the United States, is entirely speculative unless that case proceeds and until the court makes rulings on the merits of the claims in the case. The mere bringing of a claim, especially in the U. S. judicial system (which is characterized by quite low barriers to the bringing of claims), is not alone a basis for inferring, before the adversarial process has moved forward, that such a claim has merit.

Further, the full record of the court proceedings is not in the record before me. The Objector bears the burden of coming forward with evidence in support of its Objection and has not done so on this point.

72. The second criticism is that DVP, by bidding on a number of gambling-related gTLDs, is seeking to become associated with gambling. IRB argues that association would harm the rugby community. That argument is persuasive, especially in light of the measures the rugby community has taken to minimize the potential adverse impact generally. IRB Regulation 6 and IRB Code of Conduct Section 1 illustrate a concern felt widely in the global rugby community: “Unions, Associations, Rugby bodies, clubs and persons may not engage in conduct that would undermine the integrity of the sport or bring it into disrepute.” Moreover, Host Union Agreements prohibit any improper association with gambling-related sponsorships.

73. DVP seeks to operate at least five gambling strings and simultaneously seeks to operate at least eight sport strings. Moreover, DVP has made no persuasive showing of any effort to avoid cross-promotion, cross-staffing and commingling of resources between gambling domains and sports domains. To the contrary, dot Rugby is noticeably silent as to the substance of these allegations.

74. Dot Rugby characterizes Objector’s assertion of this association as “pure speculation.” To support this position, dot Rugby notes that there is no mention in its Application of any plan to associate “.rugby” with gambling. Dot Rugby further, and carefully, writes “Neither Applicant nor any of its affiliated entities have any link or do business with Gibraltar based gaming companies.” But dot Rugby is silent about gambling links outside Gibraltar. Dot Rugby is also substantively silent in its Application and its Response as to its plans. Silence offers little comfort. Moreover, DVP’s intended links with gambling-related domains is itself a red flag for the likelihood of material detriment to the rugby community.

75. DVP’s Acceptable Use Policy, moreover, only commits that *registrants* will “use in accordance with applicable law.” That says nothing about the conduct of DVP and its affiliates themselves. It also says nothing about activities that are lawful but nevertheless detrimental to the sport and to participants in the rugby community, such as an improper association with gambling.

76. Objector’s claim that operation of the “.rugby” gTLD will create a likelihood of material detriment to the rugby community due to DVP’s proposed cross-ownership of gambling strings and sports strings, and the absence of any meaningful controls and separation in the governance structure, is persuasive.

77. For the foregoing reasons, I find that granting the dot Rugby Application is likely to cause material detriment to the global rugby community.

78. In light of the foregoing, the dot Rugby Objection is successful and the Objector thus prevails with respect to that Objection.

79. Pursuant to Article 14(e) of the Procedure, upon termination of the proceedings the Dispute Resolution Provider shall refund to the prevailing party, as determined by the Panel, its advance

payment in costs. The Objector has prevailed on the dot Rugby Objection, and thus shall have its advance costs refunded by the Centre.

4. Atomic Cross (Donuts)

80. Objector argues that granting the Atomic Cross Application would be likely to cause material detriment. As stated above, I address the Atomic Cross Objection and Atomic Cross's responses as well in this Consolidated Expert Determination.

81. Objector argues that granting the Application of Donut's affiliate Atomic Cross would be likely to cause material detriment for several reasons.

82. First, Objector points out that, "in addition to seeking to operate .RUGBY, Donuts has applied for gambling-related strings including .BET, .BINGO, .CARDS, .CASINO and .POKER." Donuts seeks to operate gambling-related strings along with ".rugby" and other sports-related strings, without limitations and protections to mitigate the adverse consequences.

83. The association with gambling strings is particularly troubling for operation with a string such as ".rugby." IRB argues that association would harm the rugby community. As stated above with respect to the dot Rugby Application, that argument is persuasive, especially in light of the measures the rugby community has taken to minimize the potential adverse impact generally. Here again, IRB Regulation 6 and IRB Code of Conduct Section 1 illustrate a concern felt widely in the global rugby community: "Unions, Associations, Rugby bodies, clubs and persons may not engage in conduct that would undermine the integrity of the sport or bring it into disrepute." Moreover, Host Union Agreements prohibit any improper association with gambling-related sponsorships.

84. I conclude that operation of the ".rugby" gTLD by Atomic Cross will create a likelihood of material detriment to the rugby community due to Donuts' proposed cross-ownership of gambling strings and sports strings, and the absence of any meaningful controls and separation in the governance structure.

85. Second, Objector claims that persons associated with Atomic Cross have a track record for weak operation of domains.

It is our understanding that the founder and CEO of Donuts was formerly President of Demand Media. Demand Media has a well-known track records in the ICANN Community. During Stahura's tenure, the public record shows that Demand Media and its subsidiaries faced numerous allegations of cybersquatting – the registration, trafficking in, or using a domain name with bad-faith intent to profit from the goodwill of a trademark belonging to another. During this time, Demand Media, eNom and other subsidiaries of Demand Media lost twenty-six "UDRP" cases, domain names disputes brought under ICANN's Uniform Dispute Resolution Policy rules. In many of these cases, the Panelists of the World Intellectual Property Forum and National Arbitration Forum delivered a finding of that "the disputed domain name has been registered and used in bad faith."

86. The Atomic Cross Response is silent as to this allegation. The record of Demand Media in managing other domains is not by any means dispositive of this Application. It does, however, weigh in the balance.

87. The Atomic Cross Application too “proposes limitations based only on trademark protection and abuse mitigation.” It does not propose protection for intellectual property interests other than registered trademarks. As I have concluded above with respect to the dot Rugby Application, that approach is insufficient protection for a worldwide community characterized by so many small participants, especially in resource-poor communities and in the developing world.

88. The Atomic Cross Application also does not offer community members an enforceable voice in governance of a gTLD strongly associated with that community. The governance structure for a community-associated domain must necessarily be more protective of the interests of that community than the governance structure for a generic domain.

89. Objector further criticizes the failure of Atomic Cross and its parent Donuts to consult with stakeholders in the rugby community. Thus, says Objector, Applicant is not acting in the interest of the rugby community. As part of this objection, Objector makes a complaint substantially identical to its complaint against dot Rugby and DVP; IRB asserts that “Donuts has not reached out to IRB leadership for review or support of its policies and plans for the .RUGBY TLD.” IRB’s criticism of the conduct of the Applicants and their parents in this regard is not persuasive. As noted above, an applicant has no duty to “engage in outreach” to the very association organizing the opposition to its application and mounting a competing bid through an affiliate. Objector offers no evidence that Atomic Cross and Donuts have failed to engage in outreach to others in the rugby community.

90. But other aspects of the Atomic Cross Objection are much more persuasive. Atomic Cross admittedly has no links at all with the worldwide rugby community. And Atomic Cross additionally seeks to operate gambling-related strings along with “.rugby” and other sports-related strings, without limitations and protections to mitigate the adverse consequences. “In addition to seeking to operate .RUGBY, Donuts has applied for gambling-related strings including .BET, .BINGO, .CARDS, .CASINO and .POKER.” The failure to have links with a sports-related community with which the domain is strongly associated, together with the prospect of cross-linkage with gambling sites, is a topic that must be the object of discussion with leading voices in the rugby community, as well as the U.K. Government and other Governments and institutions with a strong interest in the integrity of the sport.

91. According to the Applicant, “Objector tenders not a shred of evidence that Applicant’s operation of the string would create any *greater* or *different* harm than takes place under the existing regime of <.COM.> and other generics.” That argument, however, fails to appreciate the difference between a generic and a domain strongly associated with a particular community.

92. Atomic Cross has committed to employ a compliance staff to enforce intellectual property protections and restrain fraudulent activity. Atomic Cross further points to “eight additional measures” to protect users:

1. Periodic audit of WhoIs data for accuracy;
2. Remediation of inaccurate WhoIs data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

93. A review of these measures shows that few, if any, are new and innovative. Audits of WhoIs data and remediation of WhoIs data are standard operating procedure for a careful operator. Terms of use and published policies and procedures for abusive activity are also standard operating procedure.

94. Two of the remaining measures, items 3 and 4, relate solely to implementing standard trademark protections or to extending the duration of those protections. As described in Atomic Cross's Public Interest Commitment, they comprise the following:

3.3 Establish and maintain a Domains Protected Marks List (DPML), a trademark protection service that allows rights holders to reserve registration of exact match trademark terms and terms that contain their trademarks across all gTLDs administered by Registry Operator under certain terms and conditions.

3.4 At no cost to trademark holders, establish and maintain a Claims Plus service, which is a notice protection mechanism that begins at the end of ICANN's mandated Trademark Claims period.

95. Proper resourcing for all of these measures (item 8), and indeed for operations of a gTLD generally, is a minimum requisite for domain operation, not a new and additional measure.

96. Objector argues that Atomic Cross's operation of ".rugby" will significantly interfere with core activities of the rugby community, both commercial and non-commercial. The Donuts proposals fail to offer protection for identifiers that are not trademarks and registered with a clearinghouse. Under various applicable laws, as I commented above with respect to the dot Rugby Objection, many such names and brands cannot be trademarked, as they are non-commercial activities.

97. Atomic Cross also challenges Objector's claim that Applicant "does not intend to act in accordance with the interest of the community of users more widely." In this regard, Objector does not offer persuasive evidence of mal-intent on Applicant's part. Objector in this regard criticizes Donuts for its profit motive just as it criticized DVP. That criticism does not carry persuasive weight under the Procedure. For the reasons I pointed out in connection with the similar criticism of dot Rugby, ICANN procedures do not count the profit motive as a negative factor, nor is there any persuasive reason to deny an application because the applicant is a "for-profit" enterprise.

98. Objector's claim that Applicant's operation of the string would interfere with the core activities of the rugby community has much more force. Objector points in this regard to Atomic Cross's lack of ties to the rugby community. Objector further asserts the prospect of losing to speculators domain names corresponding to non-trademarked identities.

99. In both cases, Atomic Cross argues in response that these concerns are in fact advantages rather than disadvantages. Atomic Cross claims "its absence from the rugby industry enables it to ensure groups and individuals unaffiliated with Objector and its affiliates will have the same opportunity for expression on the TLD as those with incumbent interests." However, in addition to that response focusing only on Objector and its affiliates, rather than the rugby community as a whole, that approach, as previously noted, fails to take account of the strong association between the rugby community and the particular string ".rugby."

100. Additionally, Atomic Cross argues that "a group without trademark status or comparable protection on existing gTLDs should not enjoy trademark-level protection in any TLD." That argument, as discussed above, presumes that only registered trademarks are properly entitled to protections. While that may be true for generic domains, it is an overstatement with respect to gTLDs strongly associated with a particular global community. Small, resource-poor and non-commercial participants in a community require protection as well as larger commercial enterprises.

101. Atomic Cross argues as well that Objector has made no showing that the rugby community depends on the DNS for core activities. The argument that "rugby is played on an athletic field, not a DNS," is fine rhetoric but ignores the extraordinary growth of the Internet in supporting and encouraging communication, participation and commerce for this community like so many others.

102. One final element of Applicant's response deserves attention. Atomic Cross asserts that Objector has failed to show any level of certainty that Applicant's operation of the string ".rugby" creates a likelihood of material detriment, and no reasonable quantification of such an outcome. There is no quantification threshold in the Procedure for a "material detriment" showing. Since the question is inherently forward-looking for new domains, quantification of likely future harms cannot reasonably be expected to be easy to show. The ICANN process does not require such a rigorous empirical showing.

103. In light of the foregoing, the Atomic Cross Objection is successful and the Objector thus prevails with respect to that Objection.

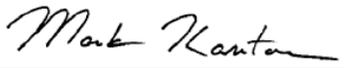
104. Pursuant to Article 14(e) of the Procedure, upon termination of the proceedings the Dispute Resolution Provider shall refund to the prevailing party, as determined by the Panel, its advance payment in costs. The Objector has prevailed on the Atomic Cross Objection, and thus shall have its advance costs refunded by the Centre.

IV. Decision

105. For the foregoing reasons and according to Article 21(d) of the Procedure, the Expert renders the following Expert Determination.

1. IRB's dot Rugby Objection is successful.
2. IRB is thus the prevailing party with respect to the dot Rugby Objection.
3. IRB's advance payment of Costs with respect to the dot Rugby Objection shall be refunded to it by the Centre.
4. IRB's Atomic Cross Objection is successful.
5. IRB is thus the prevailing party with respect to the Atomic Cross Objection.
6. IRB's advance payment of Costs with respect to the Atomic Cross Objection shall be refunded to it by the Centre.

Date: January 31, 2014

Signature: 
Mark Kantor
Expert