June 13, 2013

<u>Via Electronic Mail</u>

Mr. Fadi Chehadé, President and CEO
Dr. Stephen Crocker, Chairman of the Board of Directors
Internet Corporation for Assigned Names and Numbers (ICANN)
newgtld@icann.org

Dear Mr. Chehadé and Dr. Crocker:

FairSearch.org (FairSearch) submits these public comments to oppose Charleston Road
Registry Inc.'s (Google) amendments to its .search Generic Top-Level Domain (gTLD)
application.

Google plainly has the incentive to abuse its control of this search entry point. As the dominant
online search provider, Google has a unique economic interest in stifling existing and emerging
competitive threats to its position. Moreover, the online search and search advertising industry
is incredibly complex. For this reason, it is nearly impossible for ICANN to anticipate every
possible mechanism by which Google could operate the .search gTLD to disrupt competitors.
Left to its own discretion and without oversight, Google can use .search gTLD to entrench its
monopoly position even further.

Thus, Google's amended .search gTLD application does not assuage FairSearch's concern that
Google would operate the .search gTLD to exclude online competitors.

I.   FairSearch.org Promotes Innovation and Consumer Choice

FairSearch.org is comprised of businesses and organizations that defend competition in search
and mobile search in order to promote economic growth, innovation, and choice across the
Internet. FairSearch, formed in October 2010, promotes an open and vibrant search
ecosystem. It has established a reputation as a highly regarded voice for the Internet search
community. It also has become an interlocutor with a wide range of elected government
officials, various government agencies, and international organizations around the world on a
number of issues concerning the preservation of transparency, fairness, consumer choice, and
innovation in Internet search.

FairSearch's members are businesses that provide vertical search services in high-traffic,
specialty segments such as travel, jobs, health, real estate, media, and local search.

Irrespective of whether a competitor provides services related to travel, shopping, or other targeted areas of search, FairSearch's members share a common interest in fostering an innovative ecosystem of search offerings and promoting consumer choice.

II.   Google is a Monopolist in Search and Paid Search Advertising Services

Google is the dominant provider of search and paid search advertising. Competition authorities around the world independently have made just that finding in past investigations. For example:

- "The Commission's preliminary view is that Google is dominant in the European Economic Area (EEA) both in web search and search advertising. For instance, Google has been holding market shares in web search well above 90% in most European countries for several years now, a level which is higher than in many other parts of the world. There are also significant barriers to entry and network effects in both markets."[1]

- "Google [is] the firm that now dominates [the search and paid search advertising] markets."[2]

These agencies have an ample basis for their findings, as Google possesses a durable monopoly in a variety of jurisdictions. Google's algorithmic search market share in jurisdictions such as Europe ("[w]ell above" 90 percent of all search queries in most European countries), the United States (nearly 70 percent in the United States), and India (97 percent) far outpaces other competitors.[3] Moreover, search markets are characterized by significant barriers to entry. Notably, it becomes more expensive to provide high-quality search results to users as the Internet grows and becomes more complex. Further, there are network effects associated with search, which also raise the cost of entry.

A gTLD could chip away at those barriers by making it easier for users to identify new entrants. A new site could benefit from association with the generic industry term "search."

That result will not materialize if the entrant must go through the incumbent monopolist to obtain

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[1] Press Release, European Comm'n, Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers (Apr. 25, 2013), http://europa.eu/rapid/press-release_MEMO-13-383_en.htm.

[2] Press Release, Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc. (Feb. 18, 2010), http://www.justice.gov/atr/public/press_releases/2010/255377.htm.

[3] European Comm'n, *supra* note 1; Press release, comScore, comScore Releases April 2013 U.S. Search Engine Rankings (May 15, 2013), http://www.comscore.com/Insights/Press_Releases/2013/5/comScore_Releases_April_2013_US_Search_Engine_ Rankings; Indu Nandakumar, *CCI probing Google for abusing its dominance by adopting anti-competitive practices*, India Times (Aug. 21, 2012), http://articles.economictimes.indiatimes.com/2012-08-21/news/33303045_1_google-search-search-engine-google-ranks.

access to the .search gTLD. Rather, granting Google's application for the .search gTLD will ossify Google's existing dominant position.

III. Google Can Use the .search gTLD to Enhance Its Search Dominance

In various contexts, Google has demonstrated its intent to undermine search competition. For example, Google manipulates results listed on its search results page to privilege its own vertical services systematically over other search services. Indeed, the European Commission noted that Google "*unduly diverts traffic away from Google's competitors in specialized search towards Google's own specialized search services*. . . ."[4] Google takes original material from other websites in such a way that "*may reduce competitors' incentives to invest in the creation of original content*."[5] Google imposed restrictions on its search advertising platform, AdWords, that "*create artificial switching costs that discourage advertisers using Google's AdWords from running parallel online search advertising campaigns on competing platforms, thereby reducing consumer choice*" and that "*stifle the development of innovative campaign management tools.*"[6] Perhaps unsurprisingly, the European Commission's findings, following on the heels of a two-year investigation, are contrary to Google's assurances that it does not manipulate search results or engage in other anticompetitive activities.[7]

Google's stated plans with respect to its .search application demonstrate similar intentions to exclude competitors. Indeed, before Google proffered its amended application, Google proposed to run the .search gTLD as a *closed* registry for .search. Google noted that "[it] intends to make it clear to Internet users that this is the authoritative and designated space where they can find Google Search services *offered solely by Google*, accessible via differentiated and streamlined web addresses."[8] Google proposed to make .search proprietary by "allow[ing] Google to manage the domain space *for its Google Internet search offerings*."[9] Google's anticompetitive intent was thus laid bare in its original .search gTLD application.

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[4] European Comm'n, *supra* note 1 (emphasis added).

[5] *Id*.

[6] *Id*.

[7] For example, "[w]e are confident that our business operates in the interests of users and partners, as well as in line with European competition law." Andrew Clark, *Google faces anti-monopoly probe by European Commission*, The Guardian (Feb. 23, 2010), http://www.guardian.co.uk/technology/2010/feb/24/google-monopoly-probe-european-commission (Google company statement). Also, "[w]e work very, very hard to keep the answers – the natural search answers completely unbiased with respect to economics." NPR, *CEO: Google Knows A Lot About You, Then Forgets* (October 2, 2009), http://www.npr.org/templates/story/story.php?storyId=113450803&ps=cprs (Eric Schmidt).

[8] New gTLD Application Change Request Form of Charleston Road Registry Inc. for .search, Appl. No. 1-1141-50966 at § 18.b.iv.

[9] *Id*. at § 18.n.i.1.

That Google would change course perhaps is a reflection of the regulatory scrutiny Google now faces in multiple, international jurisdictions.

As FairSearch discusses in greater detail below, even with its amended and provisionally accepted application to run the .search gTLD as an "open" registry and as a "dotless" domain, Google's new proposal is no more than a proverbial wolf in sheep's clothing.

IV.   Granting Google's Application for the .search gTLD Would Enhance Google's Dominance

ICANN asserts that the purpose of the gTLD program is to "foster diversity, encourage competition, and enhance the utility of the [Domain Name System]."[10] Yet granting Google's .search gTLD application would do the opposite. It would confer upon Google an even greater incentive and ability to exclude competitors from search markets. It would force competitors to go through their most significant rival—Google—for access to the .search gTLD. Indeed, as the Government of Australia noted in its Early Warning against the original .search application, restriction of common generic terms relating to a market sector could have a negative impact on competition.[11]

Below are critiques of four specific aspects of Google's amended .search application: (A) procedural defects; (B) access to competitively sensitive information; (C) reduced innovation; and (D) security and technical concerns.

A.   Procedural Defects

Google's .search gTLD application is rife with terms designed to reserve for Google alone significant authority to shape the terms of competition in search. The procedural defects to Google's application afford Google enormous authority over its competitors' access to the .search gTLD. The proposal, in effect, empowers Google with new tools to entrench its search monopoly further.

First, Google proposes to "*limit[] registration to only application developers"* such that any registrar with the search domain must confirm that it is *"an application developer via an established process*."[12] Google, however, says nothing about how it would limit registration. The breadth of that limitation could exclude innovative entrants that do not meet the Google-defined and Google-patrolled confines of who or what qualifies as an "application developer."

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[10] ICANN, gTLD Applicant Guidebook at Preamble (June 4, 2012).

[11] GAC Early Warning, AU-50966 (Nov. 20, 2012), https://gacweb.icann.org/download/attachments/27131927/Search-AU-50966.pdf?version=1&modificationDate=1353432170000&api=v2.

[12] New gTLD Application Change Request Form of Charleston Road Registry Inc. for search, Appl. No. 1-1141-50966 (Amended) at § 18.b.iv (hereinafter Google's .search gTLD application).

Nor does Google justify why it would limit registration in this way. Search engines may take a variety of forms in the future. Limiting the .search gTLD to Google's vision of search imposes today's search architecture on tomorrow's innovative search engines. If administered inappropriately, such limitations on registration may stymie the development of innovative new search engines. The proposed application also bestows to Google authority to decide how such innovation should evolve. Given its dominance in this space, of all entities, Google should not be the one to decide when to implement and how to limit registration for the .search gTLD.

Second, Google "*reserves the right to adopt enforcement measures, including a request that registrars facilitate a user reporting method to log complaints and/or potential instances of misuse within the gTLD*."[13] For violators of the registry-registrar agreement or the registrar-registrant agreement, Google "*may request that the appropriate registrar enforce such agreements through penalties, including but not limited to suspension of the domain name*."[14] The proposal gives Google too much latitude to exclude competitors from the .search gTLD. Google likely will set the terms of the registry-registrar agreement with no input from ICANN or third parties. Applicants will have no bargaining power or ability to change the terms of that agreement. For those applicants that do qualify as an "application developer" (and are thus eligible to use the .search gTLD) under Google's definition, Google still can monitor those registrants and can enforce suspensions against them actively.

In short, Google reserves for itself the ability to exclude certain registrars and registrants (i.e., competing vertical providers) from availing themselves of the .search gTLD. With that authority Google may exclude vertical search providers that pose a threat to its search and search advertising monopolies. Some of that exclusion may be overt in the form of denying access to worthy competitors.

Google can (and often does) use less obvious means to exclude competitors, too. Indeed, Google's pattern of anticompetitive activity demonstrates that Google is capable of subtler methods, be it in biasing search results or otherwise undermining competition. For example, EC Commissioner Joaquín Almunia underscored that Google manipulates its search results to send traffic *away* from competing vertical search providers and *towards* Google's owned-and-operated properties when he stated that his "conviction is [Google] are diverting traffic."[15] Those subtle mechanisms of exclusion are difficult to detect. But, for competitors, the effects can be devastating.

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[13] *Id*.

[14] *Id*.

[15] Greg Sterling, *EU-Google "Rival Links" Antitrust Settlement Provision Creates New Controversy*, MarketingLand (May 27, 2013), http://ma-rketingland.com/eu-google-rival-links-settlement-provision-creates-fresh-controversy-45661.

These restrictions that Google would impose on other search competitors applying for access to the .search gTLD are contrary to the recommendations of the ICANN Governmental Advisory Committee (GAC). GAC advised that "the general rule [is] that the gTLD domain name space is operated in an open manner."[16] While GAC recommended restricted registration where the strings "are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm," .search was not one of those strings.[17] To that end, Google's proposed restrictions are in tension with the GAC advice that only certain gTLDs—not including .search—be subject to restricted access.

At the very least, there is a glaring lack of information regarding how Google intends to administer the .search gTLD. GAC advises that registries for generic terms operated on a restricted access basis should be administered "in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue advantage."[18] Google, however, provides no such transparency. If past is prologue, FairSearch has every reason to believe that Google will "give undue preference" to its owned-and-operated properties and services.

Third, Google retains the right "*to charge different prices for unique second-level domains within the gTLD . . . .*"[19] Google assures that it will not "*price discriminate among ICANN-accredited registrars.*"[20] Yet Google says nothing about why it would charge varying prices to different vertical search providers. Nor does it discuss what types of second-level domains will be charged different prices or the pricing structure that it may adopt or potential models it may use to set prices. The lack of transparency on this point is startling. The only thing Google has said is that it likely will charge different prices. While Google may promise not to price discriminate among ICANN-accredited registrars, that assurance does not foreclose Google from adopting a structure that effectively achieves just that effect. Against the backdrop of its prior exclusionary practices and without any third-party oversight, the dearth of detail in Google's proposal should engender serious concerns.

These are but a few examples of how Google's .search gTLD application leaves open procedural defects that Google can use to exclude competitors. FairSearch cannot anticipate now all other ways in which Google may use the .search gTLD to harm competitors, Google, however, will have the incentive to exploit every loophole possible to privilege its owned-and-operated properties over rival sites and services.

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[16] ICANN Governmental Advisory Committee, GAC Communiqué – Beijing, People's Republic of China at 10 (Apr. 11, 2013).

[17] *Id*. at 8-10.

[18] *Id.*

[19] Google's search gTLD application at § 18.c.ii.

[20] *Id*.

B.   Access to Competitively Sensitive Information

In order to obtain access to the .search gTLD, Google's competitors would be required to apply to and serve at the whim of their most significant competitor. Even worse, by availing themselves of the .search gTLD as set out in Google's proposal, online businesses unwittingly may provide Google with access to competitively sensitive information.

Google's proposal states that it will "*ensure the appropriate level of privacy and security will be met for its users*" and that Google plans to encrypt data "*to ensure third parties cannot access personally identifying information or other sensitive data as it crosses the Internet.*"[21]

While Google promises to prevent third parties from accessing users' confidential information, Google's .search gTLD application says *nothing* about whether Google *itself* will be exposed to queries, search results, and other data that passes through the .search gTLD. To the extent Google can access user data as it moves through other sites and second-level domains, Google imposes no specific limitations as to how Google will use that information. The amended application does not anticipate third-party oversight on this point.

Further, if Google has access to data of competing vertical search sites registered to the .search gTLD, Google may be able to utilize that information to benefit its own search services. Such activity will give Google an even greater competitive advantage and allow Google to entrench its existing monopoly in search and its data advantages even further. For a company with the stated mission to "organize the world's information" and with a history of engaging in anticompetitive tactics to obtain user search data, competitors have every reason to believe Google will use control of the .search gTLD as an opportunity to access user and competitor information.

Moreover, Google's procedure for setting defaults within the .search gTLD is concerning: "*When the user has not set a preference for a search engine, they will be prompted to select one.*"[22] A first question is which provider(s), other than Google itself, will be promoted during the selection process. The application says nothing about how Google will decide which competitors to list as one of the "default options." There is no discussion of whether vertical search services will appear in the default menu options. After a user selects a preference for a default search engine, Google's "redirect service will redirect the initial query to the second level domain name indicated by the user's preference, including any query string provided by the user."[23] If it consistently promotes Google's search services above others, the redirect service will be another way for Google to capture user queries entered into the .search gTLD. Finally, Google provides no assurance that it will refrain from seeking to override a user's choice after

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[21] *Id*. at § 18.b.v.

[22] *Id*. at § 23.10.

[23] *Id*.

the user has elected a non-Google search default.

C.   Reduced Innovation

Google claims that the manner in which it will administer the .search gTLD will promote innovation. Nevertheless, if implemented as described in Google's application, Google very well could very well impose its view of search architecture on the search ecosystem.

The amended application seeks to "*encourage websites with search functionality to adopt common query frameworks. . . .*"[24] Google asserts that this technology "*may allow the emergence of new services and make it easier for users to switch between search functionality.*"[25] The .search gTLD effectively would become a "*simple technical standard describing how users and other software interact with search functionality within the TLD.*"[26]

Google's .search gTLD application presupposes that Google either will discern the best way to standardize common query frameworks for future innovation or that, in the face of new innovation, Google will find a way to accommodate new search architectures. But the application fails to specify who will define and approve a standard search architecture. Will Google do so alone without input from the online community?

Notwithstanding Google's platitudes, it is not comforting to FairSearch that Google, as the dominant search firm, is eager both to define and to enforce standardization across search technologies. Google, throughout its company history, has proven its ability, incentive, and desire to exclude technologies that may be disruptive to Google's search monopoly. New search engines may only have an opportunity to pierce Google's search monopoly by conceiving of an entirely new search architecture that disrupts Google's existing model. But they will not have that opportunity if Google has complete discretion in how it operates the .search gTLD.

D.   Security and Technical Concerns

Google portends to run .search as a "dotless" domain, but Google's amended .search gTLD application does not address relevant security and stability concerns. Security experts, including ICANN, have evaluated dotless domain names and have found them wanting. In a February 2012 report from ICANN's Security and Stability Advisory Committee (SSAC), SSAC recommended "strongly against [dotless domain] use."[27] Indeed, they would "lead to

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[24] *Id*. at § 18.b.ii.3.

[25] *Id*.

[26] *Id*.

[27] ICANN Security and Stability Advisory Committee, SSAC Report on Dotless Domains (Feb. 23, 2012), http://www.icann.org/en/groups/ssac/documents/sac-053-en.pdf (hereafter SSAC Report).

unpredictable and unexpected dotless domain behavior."[28] Google's proposal run a dotless .search domain circumvents SSAC's recommendation. Moreover, it violates ICANN's promise to "preserv[e] the operational security and stability of the Internet . . . ."[29]

Indeed, even one of Google's own engineers, Ian Fette, has voiced concerns about dotless domains. In providing feedback to SSAC's efforts to develops its report, Fette noted that "the migration to using the new TLDs in a 'dotless' fashion may simply not be possible in a secure manner . . ." and predicted that "at least for the next three years for sure (as I have concerete [sic] evidence of this time period), *such an evolution [to dotless domains] would be actively harmful.*"[30]

The reasons for these concerns are legion. Web browsers and enterprise Intranet sites were designed under the assumption that dotless domains would not pervade the Internet. Rather, dotless domains primarily operate as trusted internal or local Intranet addresses. Consequently, introduction of a widely used dotless .search domain could pose serious security risks to enterprise security architectures. For example, most Intranets and local area networks (LANs) use addresses similar to or exactly the same as the proposed dotless domains. As a result, an attempt to access a dotless domain could inadvertently connect the user to an unintended address or malicious site, or trigger an unintended command within the Intranet and LAN, potentially providing Google with security privileges to corporations' internal networks. Web browsers, existing lines of business applications, network resources, and other applications, services, systems, as well as devices connecting to network resources also would have to be reconfigured to address ambiguous destinations that assume the dotless domain is an incomplete address. Secure HyperText Transfer Protocols (HTTPS), which historically granted security certificates to dotless domains on the principle that they likely pointed to secure Intranet sites, potentially would provide certificates to unsecure dotless domain sites. In all these contexts, the dotless domain would confound existing security structures and would require significant reengineering costs.

Furthermore, granting Google a dotless domain would "violate a longstanding (more than 20 year) assumption that a dotless hostname is within an organization's trust sphere."[31]

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[28] *Id*.

[29] ICANN, gTLD Applicant Guidebook at § 1.1.2.3. (June 4, 2012).

[30] I. Fette, ICANN Email List Archives [sac053-dotless-domains], *Expanding on Dam Kaminsky's comments*, Oct. 3, 2012, http://forum.icann.org/lists/sac053-dotless-domains/msg00033.html (emphasis added).

[31] ICANN, gTLD Applicant Guidebook at § 4. (June 4, 2012).

V.   Conclusion

Google is, by far, the dominant search provider. It has the incentive, the ability, and the demonstrated intent to exclude competitors. If ICANN grants Google's application for the .search gTLD, ICANN will erode a potential opportunity for true search competition. Conferring to Google this new tool to exclude or to access and potentially to utilize rivals' data without any third-party oversight would exacerbate competitive problems that exist in the search ecosystem today.

Google's amended .search application falls well short of an inclusive, considered approach to access for the critical .search gTLD. FairSearch remains highly skeptical that Google will be able to craft any application that resolves FairSearch's concerns. For these reasons, Google is not the appropriate registrant for the .search gTLD.

FairSearch understands that ICANN's provisional acceptance of Google's requested amendment took place notwithstanding that serious stability and security concerns relating to dotless domains remain unresolved. Indeed ICANN's SSAC expressed its reservations well in advance of Google's amendment. This course of events appears to place the cart before the horse.

In any event, ICANN now has commissioned two new "Security Studies on the Use of Non-Delegated TLDs, and Dotless Domains" to be delivered before the mid-July 2013 GAC meeting in Durban, South Africa. It is critical that the terms of reference for these studies be published and subject to a public comment period. ICANN must ensure that the online ecosystem participates in the discussion about potential risks related to dotless domains. Otherwise, the process may suffer from legitimacy concerns.

At the very least, FairSearch submits that an appropriate course now is to halt consideration of Google's application until ICANN's analysis of dotless domains, including public comments, is complete.

Finally, FairSearch believes ICANN should consult the Internet Engineering Task Force (IETF) *before* making such technical policy decisions that would involve significant security and financial implications for entities worldwide. It has been within IETF's purview to navigate these thorny technical policy decisions.

Given that IETF in conjunction with the Internet Architecture Board (IAB) currently are working to address these concerns, granting any application for a gTLD that expresses specific plans to implement a dotless domain would be premature.

Sincerely,

Ben Hammer
FairSearch.org