



March 7, 2013

Stephen Crocker
Chairman
ICANN
4676 Admiralty Way, Suite 330
Marina Del Ray, CA 90292

Dear Chairman Crocker:

In response to ICANN's request for public comment, the Entertainment Software Association ("ESA"), the Entertainment Software Association of Canada ("ESAC"), the Interactive Software Federation of Europe ("ISFE"), and the Interactive Games and Entertainment Association ("iGEA") collectively write to express the video game industry's concern that two closed or restricted generic top-level domain applications for .game may adversely impact our industry.

EXECUTIVE SUMMARY

- ICANN introduced generic top-level domains ("gTLDs") with the stated goal of "enhancing competition and consumer choice."
- Contrary to this goal, two entities have submitted applications for the .game gTLD¹ with an intent to administer the gTLD in closed or highly-restricted fashion.
- It would be improper to grant these applications for the following reasons:
 - It will position the gTLD owner to gain unfair advantage over competing industry members, severely hampering competition and consumer choice; and
 - It will provide exclusive protection for a generic industry term in conflict with well-established international precedent and norms.
- Accordingly, we ask that ICANN decline both of these applications for .game gTLDs, with an appropriate refund, or alternatively, require that the gTLDs operate as open registries.

INTERESTS OF THE SIGNATORIES

ESA is the U. S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, personal computers, and

¹ Amazon EU S.à r.l. new gTLD Application for .game, Application ID No. 1-1316-7998, *available at* <http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/960>; Beijing Gamease Age Digital Technology Co., Ltd. new gTLD Application for .game, Application ID No. 1-1660-73645, *available at* <http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/558>.

the Internet. ESAC is the voice of the Canadian computer and video game industry. ISFE represents the interests of 445 video game publishers in 20 different European countries towards the European Union and international institutions. iGEA is an industry association representing the business and public policy interests of Australian and New Zealand companies in the computer and video game industry. ESA, ESAC, ISFE, and iGEA members represent many of the world's entertainment software and online game publishers, whose releases account for a majority of the game software sold in most countries around the world.

Increasingly, online distribution of games and game content (e.g., game downloads, mobile and social games, subscriptions, add-on content, and other digital entitlements) comprises a greater percentage of industry revenue.² Thus, ESA, ESAC, ISFE, iGEA and our members strongly support policies that create open, reliable, secure, and consumer-friendly venues for legitimate online transactions.³

ARGUMENT

We are writing to express concern that ICANN may issue gTLDs where applicants can control access to such domains in closed or highly-restricted fashion. Our concern is consistent with ICANN's stated goal of "enhancing competition and consumer choice" with the introduction of new gTLDs.⁴ Contrary to this goal, issuance of those gTLDs to applicants intending to control them as closed registries threatens to severely hamper competition and consumer choice, particularly where applicants seek gTLDs for generic terms in industries where they hold market share. ***We believe that ICANN must either decline both of the above-referenced applications for .game TLDs that are intended to be administered as closed registries, with an appropriate refund, or require that the TLDs operate as open registries.***

Of the over 1,900 applications filed for TLDs, most conformed with the stated goals of ICANN and fell into two groups: (1) closed brand name TLDs; and (2) open, generic TLDs.⁵ However, certain applicants

² See NPD's Annual The Games Market Dynamics: U.S. report for 2012, available at <https://www.npd.com/wps/portal/npd/us/news/latest-reports/video-games/> (noting that, in 2012, U.S. consumers spent a total of \$21.35 billion on the video game industry, including \$14.8 billion on software, \$4 billion on hardware, and \$5.92 billion on digital content (including downloadable games, DLC, subscriptions, mobile games, and social games)).

³ We also support policies that discourage online theft and infringement and that allow for expeditious response. Both ESA & ISFE have endorsed enhanced safeguards promulgated by the Coalition of Online Accountability for applications targeting sectors historically vulnerable to online theft, infringement, and fraud, including entertainment software, and ask the GAC and ICANN to evaluate applications with an eye toward compliance with these safeguards. See, e.g., [Report to GAC Members on new gTLD applications Targeting Copyright Sectors: Applying the Enhanced Safeguards](#) (Oct. 3, 2012).

⁴ See <http://newgtlds.icann.org/en/about/program> ("In June 2011, ICANN's Board of Directors approved the Guidebook and authorized the launch of the New gTLD Program. The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains.").

⁵ Microsoft's January 31, 2013 letter to ICANN, available at <http://www.icann.org/en/news/public-comment/closed-generic-05feb13-en.htm>.

instead filed new TLD applications for generic terms, with the stated goal of controlling those TLDs as closed registries.⁶

As representatives of the video game industry, we find two current applications particularly troubling. Amazon EU and Beijing GameaseAge Digital Technology Co., Ltd. have submitted applications for issuance of the generic .game domain, and stated their intent to administer the domain in closed or restricted fashion.⁷

If either of these applications is granted, no one other than the applicant and its chosen designees will be able to register second-level domain names in the .game TLD, leaving the applicant free to exclude competitors and exploit the generic .game TLD for its sole benefit. The owner of the .game registry will:

- be positioned to gain unfair advantage in direct navigation and online search;
- become uniquely associated with the category of products it offers through its association with the relevant domain;
- be able to prevent substantially similar TLDs such as .games or .gamer in the future; and
- likely obtain a perpetual monopoly in the .game online space since the ICANN registry agreements permit unlimited automatic renewals.

This combination of market advantages from control of the .game gTLD will create steep barriers to entry for others in the game industry, and will ultimately harm the interests of consumers in the computer and video game market.

These potential harms from exclusive, *closed* operation of a *generic* TLD—as opposed to a closed *branded* TLD or an *open* generic TLD—are self-evident. Moreover, the policy rationale for preventing such harm echoes concerns long-recognized in the trademark context, where exclusive ownership, control, and use of generic industry terms by a single member of the industry is generally prohibited.⁸ Trademark law recognizes that generic industry terms are not entitled to exclusive protection because doing so will hinder competition.⁹

⁶ For example, we are aware of dozens of such applications for items and concepts as generic as .app, .cloud, .game, .search, and .video.

⁷ Amazon EU S.à r.l. new gTLD Application for .game, Application ID No. 1-1316-7998, *available at* <http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/960>; Beijing Gamease Age Digital Technology Co., Ltd. new gTLD Application for .game, Application ID No. 1-1660-73645, *available at* <http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/558>.

⁸ The reference to trademark principles is particularly relevant under the present circumstances because, as many commentators have noted, “trademarks and domain names have become inextricably intertwined over the years.” Dennis S. Prah & Eric Null, *The New Generic Top-Level Domain Program: A New Era of Risk for Trademark Owners and the Internet*, 101 Trademark Rep. 1757, 1757 (Nov-Dec, 2011).

⁹ 1-2 Gilson on Trademarks § 2.02; *see also* Restatement (Third) of Unfair Competition § 15 cmt. a (“The recognition of trademark rights in generic designations could significantly impede competition in the market for the goods or services denominated by the generic term”).

This same policy rationale applies with equal force here, where the value derived by generic TLDs approximates that of generic terms in the trademark context. Domain names often function, like trademarks, as source identifiers. Already, many of the most well-known and highly-valued brands and their owners are recognized primarily by their domain names (*e.g.*, Google, Yahoo, and eBay all are businesses that operate exclusively as online destinations and services). Applications to operate *branded* TLDs such as these in a closed fashion, and thus to leverage the source-identifying value of the domain, are consistent with both ICANN's stated goals and these underlying trademark principles.¹⁰ By contrast, a single market participant capturing the broad market value of a closed *generic* TLD runs directly counter to these principles.

For the reasons stated above, we share the concerns of others¹¹ that ICANN's delegation of closed generic TLDs for exclusive ownership and control by a single entity is contrary to the existing accepted legal norms for intellectual property rights and may have an anti-competitive effect that is contrary to ICANN's stated goals and policies.

CONCLUSION

It is imperative to address the threat that closed generic TLDs pose to competition and the public good. Accordingly, ICANN should decline both of the applications for .game TLDs that are intended to be administered in closed or restricted fashion, with an appropriate refund, or at least require that the TLDs operate as open registries. To do otherwise would threaten the openness of the Internet and create mechanisms to thwart competition in these broad and historically-innovative sectors.¹²

Thank you for your continuing attention to this important matter.

¹⁰ Several applicants for new *branded* TLDs explicitly recognize the inherent source-identifying role of the TLD in their applications. *See, e.g.*, SC Johnson new gTLD Application for .afamilycompany, Application ID No. 1-1248-76254, available at <http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1172>.

¹¹ *See, e.g.*, Microsoft's January 31, 2013 letter to ICANN, available at <http://www.icann.org/en/news/public-comment/closed-generic-05feb13-en.htm>.

¹² We note that the government of Australia, on November 20, 2012, issued warnings to these two applicants for the .game domain on grounds that "the proposed string, .game, is a common generic term relating to market sector," and the applicant is "proposing to exclude any other entities, including potential competitors, from using the TLD." *See* GAC Early Warnings, available at <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>.

Sincerely,

Christian Genetski

Senior Vice-President and General Counsel
Entertainment Software Association

David Sweeney

Senior Counsel
Interactive Software Federation of Europe

Jayson Hilchie

President & Chief Executive Officer
Entertainment Software Association of Canada

Ron Curry

Chief Executive Officer
Interactive Games and Entertainment Association