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June 13th, 2014

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Re: **ICANN's Approval of Amazon Applications' Material Change Requests**

Dear Dr. Crocker, the ICANN Board, GAC Chair, Ombudsman, and General Counsel to ICANN:

It is with deep concern that we present this letter to highlight looming problems facing the new gTLD Program. Unfortunately, it appears that there is a lack of consistency in the treatment of Applicants as well as a lack of transparency when it comes to major changes to highly sensitive intellectual property related strings. We are particularly concerned about the ability of one Applicant to make massive changes to generic strings that may control the future dissemination of all methods of intellectual property – such as music, movies and books worldwide. The potential of one large corporation to control freedom of speech and expression, without clear accountability, transparency, and meaningful dialogue is deeply troubling.

As you are aware, in the past two months, Amazon EU S.à.r.l. ("Amazon") submitted comprehensive sweeping changes to all of its generic string Applications which originally had exclusive access ("closed") policies. ICANN approved these material changes in violation of the AGB Section 1.2.7. Although we, and a few others, were able to discover the material changes and post public comments it is imperative that ICANN address the method, manner and process by which these Change Requests were evaluated and approved.

As a quick review (and for public awareness), the Change Requests pertain to, most if not all, of Amazon's exclusive-access Applications. These were strings where Amazon sought to improperly restrict access to domain name registration and use to, essentially Amazon alone -- without trademark rights or community standing. While this issue affects new gTLD strings related to video (.MOVIE and .VIDEO) and print (.BOOK) (of great public interest and significance), we are particularly negatively impacted by the material changes to Amazon's Applications for .MUSIC[1], .SONG[2] and .TUNES.[3]

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[1] Amazon .MUSIC Application ID 1-1316-18029 (Original Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadfromdocument/3478?t:ac=966), Updated Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadtodocument/3478?t:ac=966)

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First, it appears ICANN failed to apply (let alone balance) the seven (7) criteria required by the Applicant Guidebook (AGB, Section 1.2.7) to approve a change request http://newgtlds.icann.org/en/applicants/customer-service/change-requests and has allowed Amazon to make significant material changes, such as materially altering their mission statement (Question 18) by deleting all exclusive access language. Other relevant changes included modifications to Questions 22, 28, 29, 46, 47, 48, 49, and 50. We further note that Questions 28 (Abuse Prevention and Mitigation), 29 (Rights Protection Mechanism), 46 (Projections Template), 47 (Costs and Capital Expenditures), 48 (Funding and Revenue), 49 (Contingency Planning) and 50 (Funding Critical Registry Functions) are scored points in which Amazon has originally received a score of 2, 2, 1, 2, 2, 2 and 3 respectively in their original Initial Evaluation scores, totaling 14 points, not an significant number for evaluation.

Second, Section 1.2.7 of the AGB calls for changes by Applicants, providing that: "if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant…" "ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application." Based on the foregoing language of the AGB, Section 1.2.7, it appears that Amazon's sweeping changes across multiple Applications would require re-evaluation.

Given the significant debate and time spent on protecting Category 1 and Category 2 strings it is surprising that such important strings are being changed without notice or evaluation. We accordingly request that ICANN identify the basis for approving the Change Requests and how the changes to these Applications are being evaluated (if at all). We also ask ICANN to identify the basis provided by Amazon to justify such changes were filed so late in the program. This action is precedent setting and must be clearly explained and transparent.

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[2] Amazon .SONG Application ID 1-1317-53837 (Original Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadfromdocument/3488?t:ac=942), Updated Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadtodocument/3488?t:ac=942)

[3] Amazon .TUNES Application ID 1-1317-30761 (Original Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadfromdocument/3494?t:ac=938), Updated Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadtodocument/3494?t:ac=938)

Third, exceptional GAC Advice resulted in new binding contractual changes in the Program and is designed to protect the public interest. The GAC Category 2 Exclusive Access Advice, related NGPC Resolutions and revisions to the new gTLD Registry Agreement[4] provide that registry operators of a "generic string" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" (2.9(c) of Registry Agreement). The issue of "closed generics" and CAT2 Advise is not insignificant. We and others remain concerned whether the language used by Amazon in its "new" Applications actually answers the GAC Advice and appropriately protects the public interest. If the Change Requests were filed in response to the GAC Advice, it is imperative that ICANN identify whether or not such purported changes address the concerns raised in the GAC Advice. This particularly necessary because Amazon has applied for multiple sensitive intellectual property (IP) related strings, and has the potential to control access to virtually all IP-related sectors. A review of Amazon's changes indicates that even though Amazon made significant and material changes to its Applications, Amazon appears to maintain a desire to control sensitive generic strings in a manner inconsistent with the public interest. Given the significance of what is at stake, participants in the new gTLD Program, other Applicants, and the public deserve further analysis and clarification of Amazon's Applications. In these instances, Amazon does not have the right to strictly control or regulate the registration of domain names to protect its "brand." Moreover, Amazon does not have the support from string-related communities nor has the appropriate policies, including a sector-specific Policy Advisory Board structure to regulate these sensitive strings that operate in a regulated sector.

Fourth, the Change Requests "corrected" problems with Amazon's Applications that were identified in Community Objections ("COs"). The COs were filed to address community and public concern over Amazon's exclusive access language for sensitive strings. Now, after significant expense of DotMusic and Objectors, Amazon has (with ICANN's approval) changed their purported plans for these strings and attempted to move from exclusive-access to non-exclusive. ICANN's approval of these Change Requests as "non-material" is troubling and harmful. It also appears that Amazon was providing misleading and false information to

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[4] 3(c) and 3(d) of Specification 11 provided that: (c) Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies. (d) Registry Operator of a "Generic String" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" [. . .]. "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things (New gTLD Registry Agreement, July 2nd, 2013, https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d).

Panelists and highlights the inappropriateness and material harm their Applications posed to the Objectors consistent with the original position of the Objectors.[5]

Fifth, it has come to our attention that many other Applicants have filed Change Requests under less material grounds, only to have their changes rejected by ICANN. At the same time Amazon's broad and sweeping changes across many strings have been approved and deemed non-material.   Such uneven and discriminatory treatment of Applicants Change Requests appears to show a bias requires a transparent answer and explanation from ICANN.

Finally, the Amazon Change Requests were seemingly filed to address program wide concerns that were discovered and debated since Applications were first accepted in April, 2012. Much has been learned since Applications were prepared and filed over 2 years ago. As the new gTLD Program has evolved so to have Applicants. Amazon appears to have moved to "correct" errors and potentially fatal problems in its Applications while Community Applicants are unable to submit changes to appropriately revise their Applications in response to program-wide changes and discussions. Community Applicants cannot afford any margin for error because of the strict threshold to pass Community Priority Evaluation. However, it is now apparent that other types of Applicants can circumvent the process by filing PICs to "fix" serious issues with their Applications (such as the lack of enhanced safeguards). It is also clear that ICANN is approving material change requests pertaining to exclusive-access language to remedy perceived flaws in Applications despite their materiality and the prejudice and financial harm they caused to third-parties, such as Objectors. Such preferential treatment for one Applicant type over another is inappropriate and not aligned with the new gTLD Program's goals or ICANN's Affirmation of Commitments. We have also submitted a Re-Consideration Request pertaining to the ICANN approval of Amazon's material change requests.[6]

Amazon's Change Requests present terms the can be reasonably understood to mean that Amazon will still maintain strict control over the registration of domain names in key sensitive generic strings. Changes like: "Amazon intends to initially provision a relatively small number of domains in the [TLD];" and "Applications [for domain names] from eligible requestors" will

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[5] We note that Applicants of 10 applications (not including Amazon) consistently indicated that the applied-for TLDs will still be operated as exclusive access registries and will defend their position (See http://newgtlds.icann.org/en/announcements-and-media/announcement-4-09oct13-en). In antithesis, Amazon has made a 180-degree change in its position without any accountability for the position it defended in Legal Rights Objections and Community Objections which is now deemed false, misleading and harmful against Objectors made to circumvent the Objections. According to the Applicant Guidebook 1.2.7 (http://newgtlds.icann.org/en/applicants/customer-service/change-requests): "2. Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application."

[6] https://www.icann.org/resources/pages/14-28-2014-06-11-en

be "considered by Amazon's Intellectual Property Group" do not provide clear guidance on how Amazon will open the sensitive TLDs and serve the public interest. Moreover, given Amazon's historical desire to strictly control these sensitive strings, the lack of a defined "Domain Name Management Policy" and use of language like "trusted third parties," are terms that require further discussion and evaluation <u>before</u> their Applications proceed forward.

Without close attention these strings, the world could end up with Amazon running many "closed generics" despite language of the Change Requests. Because of the sensitivity of these strings, we request that this issue be further investigated and that Amazon's eligibility requirements be subject to close scrutiny to protect the public interest.

With the ICANN 50 Meeting fast approaching, we request that these concerns be addressed in London and a formal discussion be initiated to solve these overarching issues surrounding the new gTLD Program and to protect these important issues of intellectual property and free expression.

Respectfully submitted,

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