



April 14, 2014

Dr. Steve Crocker, Chairman of the Board
Mr. Fadi Chehadé, President & CEO
Mr. Cherine Chalaby, Chair of the New gTLD Committee
Members of the New gTLD Program Committee
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Amazon's Response to M. Passa's Expert Report on .AMAZON (and related IDNs)

Dear Dr. Crocker, Messrs. Chehadé and Chalaby, and Members of the ICANN Board of Directors
New gTLD Program Committee,

Thank you for the opportunity to comment on the independent, third-party expert M. Jerome Passa's legal opinion ("Expert Report") regarding the application of law in the matter of .AMAZON and related IDNs ("AMAZON").

Amazon EU S.a.r.l ("Amazon") has tried to negotiate with the governments involved and, despite our best efforts, is disappointed that this matter has reached a point of impasse and is politicized in many fora. As it appears the New gTLD Program Committee ("NGPC") will be required to make a decision in this matter, we reiterate the points we have made throughout this process: Amazon submitted applications based on a community-created process (in which governments were involved); we followed the rules set forth in the Applicant Guidebook ("AGB"); we passed ICANN's evaluation process; successfully defended against a community objection filed by the Independent Objector;¹ and should be allowed to contract on our registries like any other applicant in a similar position.

We agree with M. Passa's core conclusions, which compel the same result:

1. Existing law on sovereign rights and geographical indications does not support blocking .AMAZON;² and
2. Granting .AMAZON would not prejudice the objecting governments as they may still represent the Amazonia region through future geographical gTLDs, such as .AMAZONIA or .AMAZONAS.³

¹ As the ICC ruled in that case, "Amazon' has been used as a brand, trademark and domain name for nearly two decades also in the States arguably forming part of the Amazon Community. It is even registered in those States. There is no evidence, or even allegation, that this has caused any harm to the Amazon Community's interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage." ICC Decision Case No. Exp/396/ICANN/13, cl. 102.

² Expert Report at 9.

³ Id. at 10.

The Expert Report also contains several inaccuracies, however, that require correction.

GAC Advice on Amazon is Inconsistent with International Law

As noted in our August 23, 2013 response (the "Response") to the Governmental Advisory Committee's Durban Communiqué ("GAC Advice"), international law and national legal systems have well-established mechanisms for protecting terms, including use of geographical names. These mechanisms fall into four major categories: (1) Intellectual Property; (2) Regulatory Recognition; (3) National Sovereignty; and (4) Indigenous Rights. The Expert Report only addresses the first of these four categories (intellectual property) in any detail.⁴ Though the Expert Report correctly concludes that sovereign rights under intellectual property regimes support Amazon's application,⁵ the same is true for each of these categories.

We have never argued, despite the question posed to the Expert, that Amazon is entitled to .AMAZON or that ICANN is obliged to award us .AMAZON based on intellectual property rights alone. Like other applicants, we followed the Applicant Guidebook ("AGB"); we applied for .AMAZON and IDN variants in accordance with the rules of the AGB; we are not using the term in a geographic manner; we passed the ICANN evaluation process, including the Geographic Names Panel; we successfully defended against a community objection filed by the Independent Objector; and, the applied-for gTLDs are not any of the banned terms found in the AGB. It is through successfully following the application process, as well as owning separate, legitimate interests to use and enforce our mark in a lawful manner, that Amazon should be allowed to proceed to contracting, as any other applicant would. In short, Amazon has a legitimate claim to make a non-geographic use of the term 'Amazon', including by applying for a gTLD reflecting its globally recognized and well-known mark.⁶ Indeed, with this ultimate conclusion, the Expert agrees.⁷

Further, we agree with the Expert Report that:

Beyond the law of geographical indications, the assignment of 'amazon' to Amazon would not in any event be prejudicial to the objecting states who, since they have no reason for linguistic reasons to reserve 'amazon', could always if they so wished reserve a new

⁴ The expert notes at the outset he was asked by ICANN to address only whether under intellectual property laws, governments could claim legally recognized sovereign or geographic rights in the term 'Amazon' or whether ICANN was 'obliged' to grant .AMAZON based on pre-existing trademark registrations.

⁵ "The [expert] has been consulted on the specific issue of whether, on strictly legal grounds in the field of intellectual property law relating, in particular, to the rules of international law or fundamental principles, ICANN would be bound [] to refuse to assign [.AMAZON] in order to protect prior rights as mentioned above." Expert Report at 2.

⁶ From the .AMAZON Applications response to Q.18(a) on the mission of the .AMAZON registry: "To provide a unique and dedicated platform for Amazon while simultaneously protecting the integrity of its brand and reputation. .AMAZON registry will: (1) Provide Amazon with additional controls over its technical architecture, offering a stable and secure foundation for online communication and interaction. (2) Provide Amazon a further platform for innovation. (3) Enable Amazon to protect its intellectual property rights."

⁷ "At the very most, the Amazon company's trademarks permit it to claim a legitimate interest for applying for assignment of 'amazon.'" Expert Report at 10.

gTLD such as '.amazonia' or '.amazonas' which would create no risk of confusion with '.amazon.'⁸

Amazon has repeatedly agreed to co-exist with any future geographic gTLD applied for by the Governments of the Amazonia region for .AMAZONIA, .AMAZONAS, or .AMAZONICA. From the time concerns were raised, we reiterated this offer in our numerous attempts to negotiate with the Governments as well as in writing to ICANN. As the Expert agrees, the grant of .AMAZON does not block local governments or people from representing their region in a gTLD. The terms used by the vast majority of the people in the region are still available for future registration and use. Amazon should not be penalized, however, for applying when the Governments did not (unlike the Swiss Confederation for .SWISS; the League of Arab States for the .ARAB IDN; or the City of Paris for .PARIS, among others).⁹ Nor should ICANN create rights for the governments that the governments themselves have not obtained through international and national law – be it intellectual property or otherwise.

Accepting GAC Advice in Contravention to International Law and ICANN's Bylaws Results in a Reversal of Multistakeholder-Created Consensus Policy

GAC Advice should not be used to override years of multistakeholder-created consensus policy, which the AGB represents. The 2007 GAC Principles are now being cited to by the GAC to retroactively modify rules and revive proposals previously rejected by the multistakeholder ICANN Community and Board. The Board has already rejected GAC advice that the GAC has a carte blanche right to block any gTLD application based on principles of "national sensitivities" or broad-based, undefined geographic terms or national interests.¹⁰ Similarly, the GNSO's initial new gTLD policy recommendations¹¹ and adoption of the final AGB represent a rejection of those Principles. ICANN's willingness to grant the GAC this right after GNSO consensus policy and Board approval sets a dangerous precedent that has potentially damaging ramifications for both current and future gTLD applicants (and potentially, based on recent suggestions from a GAC Working Group, on future rounds and rules applying to second-level names in new gTLDs), and for the transparency, predictability and non-discriminatory nature of the new gTLD application process.

Amazon recognizes the various sensitivities this issue presents to the Amazonia region and has tried on numerous occasions to come to a mutual resolution. As recently as the Singapore ICANN meeting, however, these efforts have met with resistance to conducting negotiations on any level. Cultural diversity is not constrained by allowing .AMAZON to proceed; the region and its territories,

⁸ Expert Report at 10. Indeed, the ICC Community Objection decision reiterates this. "[T]here is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community, or that Amazonia and its specificities and importance for the world will be removed from public consciousness, with the dire consequences emphasized by the IO. Were a dedicated gTLD considered essential for the interests of the Amazon Community, other equally evocative strings would presumably be available. "Amazonia" springs to mind." ICC Decision Case No. Exp/396/ICANN/13, cl. 103.

⁹"Beyond the law of geographical indications, the assignment of '.amazon' to Amazon would not in any event be prejudicial to the objecting states who, since they have no reason for linguistic reasons to reserve '.amazon', could always if they so wished reserve a new gTLD such as '.amazonia' or '.amazonas' which would create no risk of confusion with '.amazon'." Expert Report at 10.

¹⁰ See Amazon Response, p. 14-16.

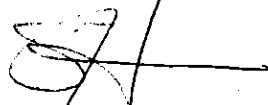
¹¹ICANN GNSO Final Report - Introduction of New Generic Top-Level Domains (8 August 2007).

identities, and cultural identity can still be fully represented by the terms commonly used and recognized as representing the region – .amazonia, .amazonas and .amazonica.

If ICANN allows the GAC to supersede the community-derived process and policy found in the AGB (which included Board review and rejection of certain of the 2007 GAC Principles, including those cited to now by certain members of the GAC) governments will have the final say over multistakeholder and community driven policy, and established international/national law. This sets a dangerous precedent for the transparency, predictability and non-discriminatory nature of the new gTLD application process. It injects uncertainty on participants; it creates and affirms a form of sui generis rights for governments not supported by international or national law; it penalizes a legitimate applicant, with legitimate rights, and which has otherwise cleared through all stages of the applicant process; and it sets a dangerous precedent for multistakeholder created policy.

We thank the NGPC for its time and consideration of our comments, and ask the NGPC to reject the GAC Advice on .AMAZON and allow our applications to proceed. We welcome any questions and would be happy to discuss this and any other submissions at your convenience.

With best regards,

A handwritten signature in black ink, appearing to be 'Scott Hayden', written over a horizontal line.

Scott Hayden
Vice President, Intellectual Property - Amazon