

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

CASE No. EXP/436/ICANN/53

ENTERTAINMENT SOFTWARE ASSOCIATION

(USA)

vs/

AMAZON EU S.Á.R.L

(LUXEMBOURG)

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.

TABLE OF CONTENTS

| | |
|---|----|
| I. The Parties..... | 1 |
| A. <i>Objector</i> | 1 |
| B. <i>Applicant</i> | 1 |
| II. The Expert | 2 |
| III. Summary of the Procedural History | 2 |
| IV. Procedural Issues and Applicable Rules | 5 |
| V. Summary of the Parties' Positions | 6 |
| A. <i>Objector's Position</i> | 6 |
| B. <i>Applicant's Position</i> | 7 |
| VI. Findings of the Expert | 8 |
| A. <i>Objector's Standing</i> | 9 |
| B. <i>The "Video Game Publishing Community"</i> | 15 |
| C. <i>The "Substantial Opposition" to the application</i> | 19 |
| D. <i>Targeting</i> | 22 |
| E. <i>Detriment</i> | 25 |
| VII. Conclusion | 29 |
| VIII. Decision | 29 |

TABLE OF ABBREVIATIONS

| | |
|-------------------------|--|
| Applicant | Amazon EU S.á.r.l |
| Centre | The International Centre for Expertise of the International Chamber of Commerce |
| Disputed TLD | “.game” |
| DRSP | Dispute Resolution Service Provider |
| ESAC | Entertainment Software Association of Canada |
| Expert | The Expert as defined in Section II of this Expert Determination |
| GNSO | ICANN Generic Names Supporting Organization |
| gTLD | generic Top-Level Domain |
| ICANN | The Internet Corporation for Assigned Names and Numbers |
| ICANN Guidebook | Module 3 of the ICANN’s gTLD Applicant Guidebook, version dated June 4, 2012. |
| ICC | The International Chamber of Commerce |
| ICC Practice Note | ICC Practice Note on the Administration of Cases |
| ICC Rules for Expertise | The Rules for Expertise of the International Chamber of Commerce in force as from January 1 st , 2003 |
| iGEA | Interactive Games and Entertainment Association |
| ISFE | Interactive Software Federation of Europe |
| Objector | Entertainment Software Association |
| Parties | Amazon EU S.á.r.l and Entertainment Software Association |
| Rules of Procedure | The ICANN’s Attachment to Module 3 – New gTLD Dispute Resolution Procedure |
| Third Party Objectors | ESAC, ISFE and iGEA |

EXPERT DETERMINATION

1. In accordance with Article 21 of the New gTLD Dispute Resolution Procedure (“Rules of Procedure”), the appointed expert (the “Expert”) renders this Expert Determination.

I. The Parties

A. Objector

2. Objector in these proceedings is ENTERTAINMENT SOFTWARE ASSOCIATION (“ESA” or “Objector”), an association established according to the laws of United States of America, domiciled at:

575 7th Street, NW, Suite 300
Washington, D.C. 20004
United States of America
Contact person: Mr. Christian Genetski
cgenetski@theesa.com

3. In these proceedings, Objector is represented by:

Mark V.B. Partridge
Partridge IP Law P.C.
161 North Clark Street, Suite 4700
Chicago, Illinois, 60601
United States of America
Tel.: +1 312-634-9500
E-mail:mark@partridgeiplaw.com

4. Notifications and communications arising in the course of these proceedings were made to the Counsel’s aforementioned e-mail address.

B. Applicant

5. Applicant in these proceedings is AMAZON EU S.À.R.L.(“Amazon” or “Applicant”), a company established according to the laws of Luxembourg, domiciled at:

5 rue Plaetis
Luxembourg, L-2338, LU
Luxembourg
Contact person: Ms. Lorna Jean Gradden
E-mail:lorna.gradden.am1@valideus.com

6. In these proceedings, Applicant is represented by:

Douglas M. Isenberg, Esq.
The GigaLaw Firm
5555 Glenridge Connector, Suite 200
Atlanta, Georgia 30342
United States of America
Tel.: +1 404348-0368
E-mail: disenberg@GigaLawFirm.com

7. Notifications and communications arising in the course of these proceedings were made to the Counsel's aforementioned e-mail addresses.

II. The Expert

8. On June 14, 2013, the Chairman of the Standing Committee of the International Centre for Expertise of the International Chamber of Commerce (the "Centre") appointed Prof. Dr. Guido Santiago Tawil as Expert in accordance with Article 7 of the Rules for Expertise of the International Chamber of Commerce in force as from January 1st, 2003 (the "ICC Rules for Expertise") and Article 3(3) of Appendix I to the ICC Rules for Expertise. The Expert contact details are:

Prof. Dr. Guido Santiago Tawil
M. & M. Bomchil
Suipacha 268, piso 12
C1008AAF City of Buenos Aires
Argentina
Tel.: + 5411 4321 7500
Fax: + 5411 4321 7555
E-mail: guido.tawil@bomchil.com

9. Managers of the Centre who are in charge of the file are:

Hannah Tümpel (Manager)
Špela Kosak (Deputy Manager)
ICC International Centre for Expertise
33-43, avenue du Président Wilson
75116 Paris
France
Tel.: +33 1 49 53 30 52
Fax: +33 1 49 53 3049
E-mail: expertise@iccwbo.org

III. Summary of the Procedural History

10. On March 13, 2013, ESA filed an Objection pursuant to Module 3 of ICANN's gTLD Applicant Guidebook, version dated June 4, 2012 ("ICANN Guidebook"), the ICANN's Attachment to Module 3 – New gTLD Dispute Resolution Procedure ("Rules of Procedure") and the Rules for Expertise of the International Chamber of

Commerce in force as from January 1st, 2003 (“ICC Rules for Expertise”) supplemented by the ICC Practice Note on the Administration of Cases (“ICC Practice Note”).

11. On March 16, 2013, the Centre acknowledged receipt of the Objection and conducted the administrative review of it in accordance with Article 9 of the Rules of Procedure for the purpose of verifying compliance with the requirements set forth in Articles 5 to 8 of the Rules of Procedure.

12. On April 3, 2013, the Centre informed the Parties that the Objection was in compliance with Articles 5 to 8 of the Rules of Procedure. Accordingly, the Objection was registered for processing.

13. On April 15, 2013, the Internet Corporation for Assigned Names and Numbers (“ICANN”) published its Dispute Announcement pursuant to Article 10(a) of the Rules of Procedure.

14. On the same date, the Centre informed the Parties that it was considering the consolidation of the present case with the case No. EXP/437/ICANN/54 (Entertainment Software Association v. Beijing Gamease Age Digital Technology Co., Ltd.; gTLD: “.game”) in accordance with Article 12 of the Rules of Procedure. Therefore, the Centre invited the Parties to provide their comments regarding the possible consolidation no later than April 17, 2013.

15. On April 16, 2013, Applicant filed its comments on the possible consolidation by e-mail, a copy of which was sent directly to Objector.

16. On April 22, 2013, the Centre informed the Parties that it decided not to proceed with the consolidation. It further invited Applicant to file a Response to the Objection within 30 days of the Centre’s transmission of such letter in accordance with Article 11(b) of the Rules of Procedure.

17. On May 18, 2013, Amazon filed its Response to ESA’s Objection.

18. On May 24, 2013, the Centre acknowledged receipt of Applicant’s Response. It further informed the Parties that the Response was in compliance with the Rules of Procedure.

19. On June 21, 2013, the Centre informed the Parties that on June 14, 2013 the Chairman of the Standing Committee of the Centre had appointed Prof. Dr. Guido Santiago Tawil as expert in accordance with Article 9(5)(d) of the Rules for Expertise. It further sent the Parties the expert’s *curriculum vitae* as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence.

20. On July 16, 2013, the Centre informed the Parties that the estimated costs had been paid in full by each party and confirmed the constitution of the expert panel.

21. On the same day, the electronic file was transferred by the Centre to the Ex-

pert.

22. On July 17, 2013, the Expert issued Communication E-1 by means of which he informed the Parties that (i) based on their submissions and pursuant to Article 12(1) of the ICC Rules of Expertise, he would circulate to the Parties for their comments a first draft of the Expert's Mission and (ii) at that stage, he did not consider necessary to request the Parties to submit any written statement in addition to the Objection and the Response, including their respective exhibits.

23. By e-mails dated July 21 and July 22, 2013, the Parties jointly requested a stay in these proceedings for thirty (30) days in order to engage in negotiations aimed at settling the dispute amicably based on the Centre's letter dated July 16, 2013, as well as Article 16 (d) of the Rules of Procedure.

24. On July 23, 2013, the Expert issued Communication E-2 by means of which it informed the Parties that (i) based on their request and pursuant to Articles 16(d) and 21(a) of the Rules of Procedure it granted the suspension of the proceedings for 10 (ten) days (i.e.: until Friday August 2, 2013), and (ii) requested the Parties to report by August 2, 2013, on the negotiation's progress.

25. By e-mails dated August 2, 2013, the Parties informed the Expert that they had been unable to resolve this dispute before expiration of the 10-day stay granted by the Expert on July 23, 2013. Further, they jointly requested a new stay of these proceedings for thirty (30) days based on a recent resolution from ICANN's New gTLD Program Committee.

26. On August 5, 2013, the Expert issued Communication E-3 through which it informed the Parties that the new resolution adopted by ICANN's New gTLD Program Committee constituted an "exceptional circumstance" under Article 16(d) of the Rules of Procedure which justified staying these proceedings. Therefore, based on the Parties' joint request and pursuant to Article 16(d) of the Rules of Procedure, the Expert granted the stay of the proceedings for thirty (30) days (i.e.: until September 1, 2013).

27. By e-mails dated August 30, 2013, the Parties jointly requested a new stay of these proceedings for thirty (30) additional days based on an ICANN's gTLD Program Committee recent resolution and taking into account its upcoming September meeting.

28. By means of Communication E-4, on September 2, 2013, the Expert granted the new stay of the proceedings for thirty (30) additional days (i.e.: until October 1, 2013).

29. By e-mails dated September 30 and October 1, 2013 the Parties jointly requested a new suspension of the proceedings in order to move forward with their settlement discussions and provided the explanations requested by the Expert in his mail of September 30, 2013.

30. On October 2, 2013, the Expert issued Communication E-5 by means of which he granted a fourth suspension of these proceedings for thirty (30) additional days (until November 1, 2013) and requested the Parties to report by October 21, 2013 on the negotiations progress. He further noted that the proceedings had been stayed for several months (Communications E-2, E-3 and E-4) and that, absent extraordinary circumstances, he would find extremely difficult to grant further suspensions.

31. On October 21, 2013, Applicant informed the Expert that (i) on October 4, 2013 the Parties had entered into a non-disclosure agreement to enable further discussion on relevant matters; (ii) on October 15 the Parties had a substantive telephone conversation about the proceeding; and (iii) on that same date, October 21, 2013, the Parties had exchanged a written request regarding the proceeding.

32. In the Expert's view, no further submissions are required from the Parties in order to render his Expert Determination.

33. No hearing was held in these proceedings as it was neither requested by the Parties nor proposed by the Expert.

34. In accordance with point 6 of the ICC Practice Note on the Administration of Cases ("ICC Practice Note"), by accepting the process as defined in Article 1(d) of the Rules of Procedure, the Parties are deemed to have waived the requirements for the Expert Mission as set out in Article 12(1) of the ICC Rules for Expertise.

35. Article 21(a) of the Rules of Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the "constitution of the Panel". The Centre considers that the Panel is constituted when the expert is appointed, the parties have paid their respective advances on costs in full and the file is transmitted to the expert. In this case, the Panel was constituted on July 16, 2013 (i.e., the date on which the file was transmitted to the Expert). The Centre and the Expert were accordingly to make reasonable efforts to ensure that his determination was rendered no later than August 30, 2013 (as calculated in accordance with articles 6(e) and 6(f) of the Rules of Procedure), bearing in mind, however, that the case was suspended on several occasions as indicated above. Pursuant to article 21(b) of the Rules of Procedure, the Expert submitted his determination in draft form to the Centre for scrutiny as to form before it was signed.

IV. Procedural Issues and Applicable Rules

36. Entertainment Software Association filed a "Community Objection", defined as "*substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*" according to section 3.2.1 of the ICANN Guidebook, against Amazon EU S.á.r.l application concerning the gTLD ".game".

37. Pursuant to Article 5(a) of the Rules of Procedure, all submissions –including

this Expert Determination— have been made in English. Further, all submissions and communications between the Parties, the Expert and the Centre were filed electronically as stated in Article 6(a) of the Rules of Procedure.

38. In accordance with Article 4(d) of the Rules of Procedure, the seat of these proceedings is the location of the Centre in Paris, France.

39. For the purpose of rendering this Expert Determination, the applicable rules are: the ICC Rules for Expertise, supplemented by the ICC Practice Note, the ICANN Guidebook and the Rules of Procedure, mentioned in paragraph 10.

V. Summary of the Parties' Positions

40. The issues to be addressed by the Expert shall be those resulting from the Parties' submissions and those which the Expert considers to be relevant to make a determination on the Parties' respective positions.

41. Based on the Parties' written submissions (Entertainment Software Association's Objection, Amazon EU S.á.r.l's Response and their respective exhibits), the main issues and claims under determination can be summarised as follows.

A. Objector's Position

42. ESA claims that it has standing to object to applications for the gTLD “.game” on the grounds that it represents the business and public affairs needs of companies in the video game industry¹, which have been impacted by such gTLD application. Further, Objector states that (i) ESA was founded in 1996 and has currently 36 members²; (ii) ESA owns and operates a website that has been active for over ten years; and (iii) ESA owns and organizes the E3 trade show, the world's premier trade show for computer and video games and related products.³

43. Regarding the description of the basis for the Community Objection as established in section 3.3.1 of the ICANN Guidebook, ESA claims that –along with ESAC, ISFE and iGEA (jointly “Third Party Objectors”)⁴– they represent many of the world's leading entertainment software and online game publishers, whose games account for a majority of the game software sold around the world.⁵

44. According to ESA, the Disputed TLD is both targeted explicitly and implicitly to

¹ According to Objector, “ESA represents its industry in Washington, across the nation and around the world, protecting the industry's legal rights and legislative interests”. See: Objection, page 4.

² According to Objector, “Including the three major video game console makers and most of the world's most prominent video game publishers”. See: Objection, page 4 and Annex A to Objection.

³ See: Objection, page 4 and Annex B to Objection.

⁴ According to Objector, this objection has third party support from the Entertainment Software Association of Canada (“ESAC”), the Interactive Software Federation of Europe (“ISFE”) and the Interactive Games and Entertainment Association (“iGEA”). See: Objection, page 5.

⁵ See: Objection, page 5.

the businesses and consumers in the video game industry, including Objector's members and their customers.⁶

45. In light of this statement, Objector argues that there is substantial opposition to the Disputed TLD Application from a significant portion of the community to which the TLD may be targeted, including the international membership of Objector's association and of Third Party Objectors, as well as the communities represented by the other persons and entities that specifically oppose the Application or generally oppose the delegation of closed generic TLDs for a market sector.⁷

46. Finally, Objector argues that Applicant submitted the Application for the .game generic TLD with an intent to administer it in closed or highly-restricted fashion. Therefore, according to Objector, *"it would be improper to grant the Application because doing so will threaten to severely hamper competition and consumer choice, particularly in this case where the Applicant seeks to obtain exclusive protection for a generic industry term in conflict with well-established international principles"*⁸ as well as ICANN's stated policy and goals.

47. Based on these allegations, Objector requests that the application for .game filed by Amazon be declined with an appropriate refund, or alternatively, require that the .game TLD operate as an open registry.⁹

B. Applicant's Position

48. Applicant rejects ESA's Objection. From the outset of its Response, Applicant alleges that Objector lacks standing because it *"has failed to prove all of the four tests required for a community objection, as set forth in subsection 3.2.2.4 of the Guidebook"*.¹⁰ It further alleges that, contrary to the basis of the objection¹¹, single-registrant gTLDs are permitted under ICANN's gTLD process. Therefore, according to Applicant, Objector should address the issue with ICANN in future rounds for GTLD applications and not with the Expert.¹²

49. In addition, Amazon alleges that ESA has no standing to object on the ground that it fails to prove the existence of any of the six ICANN Guidebook factors to determine that it is *"an established institution"* with *"an ongoing relationship"* with a clearly delineated community.¹³

⁶ See: Objection, page 6.

⁷ See: Objection, page 14.

⁸ See: Objection, page 6.

⁹ See: Objection, page 18.

¹⁰ See: Response, pages 4 to 6.

¹¹ To the extent that Objector opposes the concept of single-registrant gTLDs.

¹² See: Response, page 4. In particular, Applicant claims that the dispute resolution service provider's mission is *"to evaluate narrow criteria of a specific objection to a specific application –not to second-guess ICANN's decision or established application requirements"*.

¹³ See: Response, pages 5 and 6.

50. In relation to the “Community” argument, Applicant argues that Objector has failed to prove that “the community expressing opposition can be regarded as a clearly delineated community” as required by the Guidebook¹⁴, nor has made any specific reference to any of the relevant factors therein.

51. Further, Applicant rejects Objector’s argument that the substantial opposition to the application comes from a significant portion of the video game Community. Indeed, it is Applicant’s position that, although Objector provided a list of its members and letters of support from Third Party Objectors, it is impossible to determine how substantial the opposition is relative to the community because there is no information as to the size of the community. Furthermore, Amazon argues that many of the world’s leading video game companies are not members of ESA and have not expressed any opposition to the application.¹⁵

52. In any event, Applicant states that “*there is not a strong association between the “Community” represented by Objector and the applied for “.game” TLD” string because (i) the Objection does not contain evidence of any associations by the public that the applied-for gTLD targets the community represented by Objector and (ii) the Application does not make reference to the phrase “video game”.*¹⁶

53. Finally, concerning the material “*detriment*” to the rights and legitimate interests of the Community, Applicant argues that Objector failed to prove a likelihood of material detriment. It further states that Objector’s argument that the Application would threaten to hamper competition and consumer choice is unsupported, speculative and ignores comments submitted to ICANN in support of “single-registrant” operations.¹⁷

54. Based on these arguments, Amazon requests the Expert to deny the Objection.

VI. Findings of the Expert

55. Having reviewed and considered the Parties’ positions expressed in their written pleadings and exhibits submitted in these proceedings, in order to make its determination the following issues need to be addressed by the Expert in accordance with the criteria listed in the ICANN Guidebook:

(1) *Does ESA have standing to put forward a Community Objection against the application made by Amazon?*

¹⁴ See: Response, page 6. In particular, it is Applicant’s position that Objector does not meet the following factors: (i) level of public recognition of the group as a community at a local and/or global level, (ii) level of formal boundaries around the community, (iii) length of time the community has been in existence and (iv) number of people or entities that make up such community.

¹⁵ See: Response, page 8.

¹⁶ See: Response, page 9.

¹⁷ See: Response, page 11.

(2) *Is the “Video Game Publishing Community” clearly delineated?*

(3) *Is there a substantial opposition to the application “.game” gTLD on behalf of a significant part of the “Video Game Publishing Community”?*

(4) *Is the “Video Game Publishing Community” explicitly or implicitly targeted by the application “.game” gTLD?*

(5) *Is there any material detriment to the rights or legitimate interests of the “Video Game Publishing Community” if the application “.game” gTLD is allowed to proceed?*

56. In the following sections, the Expert summarises the Parties’ positions concerning each of these issues, as elaborated by the Parties in their written pleadings, followed by the Expert’s own analysis and determination concerning such issues.

A. Objector’s Standing

(1) *Does ESA have standing to put forward a Community Objection against the application made by Amazon?*

57. Prior to considering the grounds of the objection, it is necessary to address the question of whether ESA has standing to put forward a “Community Objection” against the application “.game” gTLD made by Amazon.

(i) *Positions of the Parties*

58. Applicant has challenged Objector’s standing to file an objection to the application “.game” gTLD. In its Response, Applicant argues that Objector failed to prove that it is “*an established institution*” that has “*an on-going relationship*” with a “*clearly delineated community*” as a whole, failing to meet the standard established in section 3.2.2.4 of the ICANN Guidebook.¹⁸

59. Regarding the requirement that Objector be “an established institution”, Amazon argues that ESA failed to prove the Guidebook factors that need to be considered, namely, (i) level of global recognition of the institution¹⁹; (ii) length of time the institution has been in existence²⁰; and (iii) public historical evidence of its existence, such as the presence of a formal charter or national or international

¹⁸ See: Response, page 4.

¹⁹ See: Response, page 5. According to Applicant, “*The objection contains no information about global recognition other than an unsupported statement that Objector offers an unspecified “global anti-piracy program” and that “it represents its industry in Washington [and] across the world”.*

²⁰ See: Response, page 5. According to Applicant, “*Although Objector states that it was “founded in 1996”, this statement is unsupported by any evidence (...) and “fails to acknowledge that 1996 was 25 years after the video game industry began”.*

registration, or validation by a government, inter-governmental organization, or treaty.²¹

60. Similarly, as for the requirement that Objector have “*an ongoing relationship with a clearly delineated community*”, Amazon states that ESA failed to provide any evidence to support three of the four relevant Guidebook factors to consider in making such determination, namely (i) “the presence of mechanisms for participation in activities, membership and leadership”;(ii) “institutional purpose related to the benefit of the associated community”; and (iii) “the level of formal boundaries around the community”.²²

61. Applicant further states that, in fact, a “clearly delineated community” is unlikely to exist around any generic term such as “game” because “*by definition, a generic term is a term which is used by a significant number of people, who do not necessarily share similar goals, values or interests*”.²³

62. Although Objector has not dealt directly with these arguments, which were put forward once ESA had submitted its Objection, it claims that it has standing to object to the application for the “.game” gTLD since it represents the business and public affairs of companies in the video game industry²⁴, which has been impacted by the mentioned string application. According to Objector, ESA was founded in 1996 and represents its industry not only across the nation but also around the world.

63. Further, Objector states that it offers different services to video game publishers such as a global anti-piracy program, business and consumer research, government relations and intellectual property protection efforts. Based on this argument, ESA claims to protect “*the industry’s rights and legislative interests*”.²⁵

64. In particular, ESA alleges that it (i) has 36 members, “*including the three major video game console makers and most of the world’s most prominent video game publishers*”; (ii) owns and operates a website that has been active for over ten years and states ESA’s goals and activities, and; (iii) owns and organizes the E3 trade show, “*the world’s premier trade show for computer and video games and related products*”.²⁶

(ii) Considerations of the Expert

²¹ See: Response, page 5. According to Applicant, Objector “*has provided no historical evidence of its existence –no corporate registration, charter, organizational documents or other documentation that shows Objector is recognized by any government or when Objector was actually created*”.

²² See: Response, pages 5 and 6.

²³ See: Response, page 6.

²⁴ See: Objection, page 4. According to Objector, “*ESA represents the business and public affairs needs of companies in the video game industry, including companies that publish computer and video games for video game consoles, personal computers and the internet*”.

²⁵ See: Objection, page 4.

²⁶ See: Objection, page 4.

65. Pursuant to section 3.2.2 of the ICANN Guidebook, it is for the Expert to determine whether Objector has standing to object.

66. In accordance with the ICANN Guidebook, objectors must satisfy certain standing requirements to have their objections considered by the expert panel. In the case of a “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”*.²⁷

67. Therefore, to qualify for standing for a “Community Objection”, Objector should fulfill two conditions, namely (i) be an established institution, and; (ii) have an ongoing relationship with a clearly delineated community. Objector has the burden to prove that both requirements are met.²⁸

68. Referring to these factors, the ICANN Guidebook states that *“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”*.²⁹

69. The Expert notes that ESA is the sole community Objector. ESAC, ISFE and iGEA which allegedly supported the Objection as “Third Party Objectors”³⁰ should be treated as “related entities” since they have not submitted formal objections to Amazon’s Application. Therefore, the Expert will examine the issue of standing only regarding Objector, pursuant to the ICC “Clarifications regarding multiple Objections and multiple Objectors”.³¹

70. Regarding the first condition to be met (i.e.: *“established institution”*), section 3.2.2.4 of the ICANN Guidebook lists some key factors which may be considered by the expert panel in making its determination. These factors are: (i) the level of global recognition of the institution; (ii) the length of time the institution has been in existence; and (iii) the 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.

²⁷ See: section 3.2.2.4 of the ICANN Guidebook.

²⁸ See: section 3.2.2.4 of the ICANN Guidebook.

²⁹ See: section 3.2.2.4 of the ICANN Guidebook.

³⁰ See: Objection, page 5 and Annex C to Objection.

³¹ Available at: <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/how-to-file-an-objection/>. According to the ICC’s clarifications: *“Each Objection must be filed by one Objector only ... An Objector may wish to be supported by other entities”* either to demonstrate its standing or to finance its Objection. *“However, only the Objector itself will be considered as a party to the proceeding. All other entities will be considered as related entities. Accordingly, in case of a Community Objection, the Expert’s test as to whether the Objector has standing, will be tested solely with regard to the Objector itself”*.

71. Furthermore, “the institution must not have been established solely in conjunction with the gTLD application process”.³²

72. Applicant has challenged Objector’s standing on the grounds that it has failed to prove that it is “an established institution”. According to Applicant, Objector’s statement that it was founded in 1996 is unsupported by any evidence and, in any event, ESA was created 25 years after the video game industry began. Thus, it has existed for a short period of time compared to the age of the industry it allegedly represents.³³ Further, Objector has provided no information about its global recognition or any public historical evidence of its existence.³⁴

73. ESA is the U.S. trade association of the video game industry. Although Objector has provided no by-laws or public records of the institution evidencing that it was “founded in 1996”, the information of Objector’s structure and activities existing in the web indicates that ESA has been in existence for a significant length of time. This appears in principle as sufficient, in the Expert’s view, to consider Objector as an established institution and that such association was not created with the sole intention to participate in the gTLD application process. The fact that it would have been founded 25 years after the video game industry started –as alleged by Applicant– does not appear as relevant to determine if Objector is an “established institution”³⁵ nor is a Guidebook factor to be taken into account.

74. Objector also meets the standard of “global recognition” of the institution mentioned in the ICANN Guidebook. It has sufficient membership, comprising of 36 members including leading companies in the industry such as Microsoft Corporation, Nintendo of America, Sony Computer Entertainment of America, Ubisoft and Electronic Arts, among others.³⁶ These companies develop, publish and distribute interactive software worldwide.³⁷

75. Moreover, as reflected in Objector’s website³⁸, ESA represented the video game industry in the leading case “*Brown v. Entertainment Merchants Association/Entertainment Software Association*”³⁹, the U.S. Supreme Court’s decision that recognized that video games are entitled the same First Amendment protections as other forms of entertainment and art such as books, music, plays, movies, etc. In its decision, the U.S. Supreme Court acknowledged ESA’s standing to

³² See: section 3.2.2.4 of the ICANN Guidebook.

³³ See: Response, page 5.

³⁴ See: Response, page 5.

³⁵ Moreover, according to the ICANN Generic Names Supporting Organisation (GNSO)’s “New gTLDs Summary Principles, Recommendations & Implementation Guidelines” published on October 22, 2008 (available at: <http://gnso.icann.org/en/issues/new-gtlds>), an established institution is “an institution that has been in formal existence for at least 5 years ...”

³⁶ See: Annex B to Objection.

³⁷ See: Annex A to Objection.

³⁸ See: <http://www.theesa.com/policy/scotus.asp>.

³⁹ 556 F. 3d 950 (2011). The U.S. Supreme Court’s decision is available at: <http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf>.

represent the video game industry,⁴⁰ fact that in the opinion of the Expert further supports ESA's level of "public recognition".

76. ESA's policy-setting is led by member companies who serve on ESA's three working groups –Intellectual Property Group, Public Policy Committee and Public Relations Working Group– by means of which they act on issues that affect the entertainment software industry as a whole.⁴¹ This fact indicates that the institution has an organized structure.

77. Finally, the fact that ESA runs, organizes and hosts the Electronic Entertainment Expo ("E3"), an annual event that converges the attendance of leading computer and video game companies, business partners, buyers and retailers, consumers, worldwide media, etc.⁴² provides additional support to the "global recognition" of ESA.

78. The Expert finds, after balancing the relevant Guidebook factors⁴³, that the facts described before are reasonably enough to conclude that Objector is an "*established institution*" in the terms of section 3.2.2.4 of the ICANN Guidebook.

79. Having decided that Objector meets the first standard contained in the ICANN Guidebook, the Expert should now turn to the issue of whether Objector as an established institution has an ongoing relationship with a clearly delineated community.

80. In this regard, the Expert notes that the existence of a "clearly delineated community" is an element which must be proved by the Objector both (i) to establish standing⁴⁴ and (ii) to prevail on the merits.⁴⁵ Nothing in the ICANN Guidebook suggests that the words "clearly delineated community" should be given any different meaning when evaluating standing than they are given when evaluating the merits of an objection. Thus, the Expert will address the issue of the existence of a "Video Game Publishing Community" when evaluating the merits of the Objection.

81. That said to make a determination on whether Objector as an established institution has an ongoing relationship with a clearly delineated community, the Expert must take into account the guidelines provided in section 3.2.2.4 of the ICANN Guidebook. Such provision sets out some of the elements that may be

⁴⁰ Available at: <http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf>. According to the U.S. Supreme Court's decision, "*Respondents, representing the video-game and software industries, filed a pre-enforcement challenge to a California law that restricts the sale or rental of violent video games to minors*".

⁴¹ See: Annex B to Objection.

⁴² See: Annex B to Objection.

⁴³ Section 3.2.2.4 of the ICANN Guidebook states that the Expert "*will perform a balancing of the factors listed above, as well as other relevant information, in making its determination*".

⁴⁴ See: section 3.2.2.4 of the ICANN Guidebook.

⁴⁵ See: section 3.5.4 of the ICANN Guidebook.

considered: (i) the presence of mechanisms for participation in activities, membership, and leadership; (ii) the institutional purpose related to the benefit of the associated community; (iii) the performance of regular activities that benefit the associated community; and (iv) the level of formal boundaries around the community.

82. Applicant challenges Objector's relationship with the community on the grounds that it fails to define the "video game industry" and provides no information on (i) formal boundaries that may exist around the community; (ii) mechanisms for participation in activities, membership and leadership; and (iii) information about the institutional purpose of Objector or its alleged community.⁴⁶ Further, Applicant states that, in fact, a "clearly delineated community" is unlikely to exist around any generic term such as "game".⁴⁷

83. In the Expert's view, Applicant's argument is not convincing. First, Objector states that it represents a delineated community, the "Video Game Publishing Community"⁴⁸ comprised of companies that publish computer and video games for video game consoles, personal computers and the Internet.⁴⁹

84. In the words of Objector, "*ESA brings this Community Objection action on behalf of members of the video game publishing community ("the Industry") to prevent Amazon EU S.a.r.l. (...) from obtaining and operating the .game top-level domain as a closed registry (...)*"⁵⁰

85. Furthermore, Objector's institutional purposes are closely associated with the benefits of the community members it represents⁵¹ and its regular activities appear as naturally intended to benefit its members. Indeed, ESA offers services to interactive entertainment software publishers including (i) a global anti-piracy program; (ii) business and consumer research; (iii) information on federal and state regulations; (iv) intellectual property efforts and public affairs; (v) policy-setting⁵²;

⁴⁶ See: Response, pages 6 and 7.

⁴⁷ See: Response, page 6.

⁴⁸ See: Objection, page 5.

⁴⁹ See: Objection, page 4.

⁵⁰ See: Objection, page 5.

⁵¹ According to Objector's website (See: Annex B to Objection): "*ESA supports the interactive entertainment software industry by providing insight, knowledge and assistance to help companies move forward and achieve their goals. From market research to information on federal and state regulations, to intellectual property issues and public affairs, ESA's knowledge and expertise covers many issues faced by computer and video game publishers*".

⁵² According to Objector's website (See: Annex B to Objection): "*ESA members set the priorities for our work on Capitol Hill and with state legislatures and local governments across the nation. One of ESA's top priorities is to ensure that video games receive the same First Amendment protection as books, movies and music". ESA represented the industry before the U.S. Supreme Court in *Brown v. EMA/ESA*, a historic challenge to this protection, resulting in a landmark ruling by the Court that affirmed video games' First Amendment rights. ESA also works with policymakers on key financial issues, such as taxation and incentives*".

and (vi) the E3 show.⁵³

86. In addition, Objector, as an institution that represents multiple video game publishing companies, explicitly foresees –through its website⁵⁴– mechanisms for participation in ESA’s regular activities such as policy-setting, lobbying efforts, business and consumer research and the E3 show. According to the information existing in Objector’s website, member companies participate and “*set the priorities*”⁵⁵ for policy-setting by serving on the three “Working Groups” already mentioned.⁵⁶ They also participate actively in the annual E3 show “*which offers opportunities for both ESA members and non-members to stage major press events and hold meetings with media, retailers, business partners and other key audiences...*”.⁵⁷

87. As explained above⁵⁸, the Expert will address the issue of the existence of a “Video Game Publishing Community” when evaluating the merits of the Objection. Notwithstanding so, for the sole purpose of determining standing, the Expert advances his view –developed in section B (2) below- that Objector’s “community”, which includes multiple companies that publish computer and video games, is “*clearly delineated*” for the purpose of objecting to the application for “.game” gTLD made by Amazon.

88. Therefore, in the Expert’s view, the Entertainment Software Association is an established institution which has an ongoing relationship with a clearly delineated community –the “Video Game Publishing Community”- and, in such role, has standing to object to Applicant’s application in the present case.

B. *The “Video Game Publishing Community”*

(2) *Is the “Video Game Publishing Community” clearly delineated?*

89. Having decided that ESA has standing to object to the application for “.game” gTLD made by Amazon, the Expert will now focus on the issue of whether the

⁵³ According to Objector’s website (See: Annex B to Objection) ESA owns and operates the E3 show, which converges leading computer and video game companies from over 100 countries. In this regard, “*The three-day event offers opportunities for both ESA members and non-members to stage major press events and hold meetings with media, retailers, business partners and other key audiences. (...) The most influential people leading the most innovative companies in the industry attend E3 to see groundbreaking new technologies and never-before-seen products for computers, video game consoles, handheld systems, mobile and social, and the Internet*”.

⁵⁴ Available at: www.theesa.com.

⁵⁵ According to Objector’s website (See: Annex B to Objection): “*Members set the priorities for the association’s legislative, anti-piracy and intellectual property initiatives, providing an opportunity to influence issues that affect the entertainment software industry overall, as well as their individual bottom lines*”.

⁵⁶ According to Objector’s website (See: Annex B to Objection): “*ESA’s policy-setting is led by member companies serving on ESA’s three Working Groups: Intellectual Property Working Group, Public Policy Committee and Public Relations Working Group*”.

⁵⁷ See: Annex B to Objection.

⁵⁸ See: paragraph 80.

“Video Game Publishing Community” is clearly delineated.

(i) Positions of the Parties

90. As mentioned in section V above, Objector claims that ESA –along with Third Party Objectors⁵⁹– represent many of the world’s leading entertainment software and online game publishers, whose games account for a majority of the game software sold around the world.⁶⁰

91. Objector also explains that online distribution of games and game content comprises the greatest percentage of industry revenue.⁶¹

92. Finally, Objector argues that Amazon itself is involved in the video game industry and therefore, as a “major vendor and creator of video games”, participates in Objector’s industry.⁶²

93. As mentioned in section V above, Applicant rejects Objector’s assertion on the grounds that Objector failed to prove that the community expressing opposition can be regarded as a “clearly delineated community”.⁶³ Indeed, Applicant argues that Objector failed to address the five Guidebook factors to be considered in order to perform the community test.

94. In this regard, Applicant affirms that Objector provides no information as to the level of public recognition of either Objector or of the video game industry. Neither does it provide any criteria for the formal boundaries that form the community. Therefore, Applicant has been unable to determine who is eligible to become a member of Objector’s association. It further argues that *“it is also quite unclear whether the relevant community consists solely of Objector’s members or whether it is broader (given, for example, Objector’s references to Third Party Objectors (...))”*.⁶⁴

95. As for the length of time the community has been in existence, Applicant argues that Objector is a “relatively new entity”.⁶⁵ In addition, Objector’s statement that it has 36 members is meaningless without additional information.⁶⁶

⁵⁹ See: Objection, page 5. According to Objector, the objection “has third party support from the Entertainment Software Association of Canada (“ESAC”), which represents the Canadian computer and video game industry; the Interactive Software Federation of Europe (“ISFE”), which represents the interests of 445 video game publishers in 20 different European countries; and the Interactive Games and Entertainment Association (“iGEA”), which represents the business and public policy interests of Australian and New Zealand in the computer and video game industry (collectively, “Third Party Objectors”)”.

⁶⁰ See: paragraphs 42 and 43.

⁶¹ See: Objection, page 6.

⁶² See: Objection, page 6.

⁶³ See: paragraph 50.

⁶⁴ See: Response, page 7.

⁶⁵ See: Response, page 7.

⁶⁶ See: Response, page 7.

96. Furthermore, according to Applicant, ICANN's Independent Objector has made clear that it is unlikely that a "clearly delineated" community exist around a generic term (".game") which is by definition used by a significant number of people, who do not necessarily share similar goals, values or interests.⁶⁷

97. Finally, Applicant affirms that if Objector represents any community that would be the "video game" community *"which is a much narrower community than the broad "game" community that might be identified by the applied-for string, given that the word "game" can be associated with many industries or communities other than the video game industry (...)"*⁶⁸

(ii) Considerations of the Expert

98. In accordance with section 3.5.4 of ICANN Guidebook, *"For an objection to be successful, the objector must prove that ... the community expressing opposition can be regarded as a clearly delineated community"*.

99. As mentioned before, the ICANN Guidebook offers useful guidelines in order to determine whether a community is clearly delineated. *"A panel could balance a number of factors to determine this, including but not limited to:"* (i) *"The level of public recognition of the group as a community at a local and/or global level;"* (ii) *"The level of formal boundaries around the community and what persons or entities are considered to form the community;"* (iii) *"The length of time the community has been in existence;"* (iv) *"The global distribution of the community (this may not apply if the community is territorial); and"* (v) *"The number of people or entities that make up the community"*.⁶⁹

100. Having set out the factors to be considered, the ICANN Guidebook further provides that *"...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"*.⁷⁰

101. The word "community" is broad and allows more than one interpretation. Besides the political (nationality), religious or ethnic meanings or implications that the term may have, it generally refers to a "group of people" that may be considered as a "unit" that share similar interests, goals or values.⁷¹

⁶⁷ See: Response, page 7.

⁶⁸ See: Response, page 7.

⁶⁹ See: section 3.5.4 of the ICANN Guidebook.

⁷⁰ See: section 3.5.4 of the ICANN Guidebook.

⁷¹ According to the British English Dictionary, the word "community" has three different meanings "1) the people living in one particular area or people who are considered as a unit because of their common interests, social group, or nationality, 2) a group of animals or plants that live or grow together, 3) the general public". See British English Dictionary, Cambridge Ed., 2013. Module 4 of the ICANN Guidebook introduces some criteria when approaching Community Priority Evaluation for String Contention Procedures involving a community-based application. Although such criteria are not applicable in this case, they are consistent with the analysis performed in the present case.

102. The GNSO recommends that *“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”*.⁷² Although GNSO’s report provides a useful guideline, the Expert notes that such report is not part of the formal standards that must be followed according to the ICANN Guidebook.

103. In similar terms, ICANN’s Independent Objector (IO) determined that *“the notion of ‘community’ is wide and broad ... It can include a community of interests, as well as a particular ethnical, religious, linguistic or similar community. Moreover, communities can also be classified in sub-communities (i.e. the Jewish community in New York or the Italian community on Facebook). However, beyond the diversity of communities, there are common definitional elements and a community can be defined as a group of individuals who have something in common (which can include their nationality or place of residence –i.e. the French community...– or a common characteristic –i.e. the disability community), or share common values, interests or goals...”*⁷³

104. In the case at hand, Objector has not provided an accurate definition of the community it purports to represent. However, it appears that the community at issue is the “Video Game Publishing Community” as a group of companies in the video game industry that publish computer and video games.

105. In the Expert’s view such community meets the standard of “global recognition”, as mentioned in the ICANN Guidebook. ESA and the Third Party Objectors have a substantial membership, including leading multinational companies in the industry such as Microsoft Corporation, Nintendo of America, Sony Computer Entertainment of America, Ubisoft and Electronic Arts, among others. These well-known companies develop, publish and distribute interactive software worldwide and their local subsidiaries are members of their respective regional associations (United States of America, Canada, Europe and Australia and New Zealand) which represent the video game publisher’s interests locally. In the Expert’s opinion, the community’s member companies are widely recognized by the public as leading and representative global players in this field.⁷⁴

106. Further, regarding the *“number of... entities that make up the community”*, an aspect that the ICANN Guidebook highlights as relevant, the Expert notes that

⁷² See: GNSO’s “New gTLDs Summary Principles, Recommendations & Implementation Guidelines” published on October 22, 2008, available at: <http://gns0.icann.org/en/issues/new-gtlds>.

⁷³ See: “The Issue of ‘Closed Generic’ gTLDs Applications – The Views of the Independent Objector” available at: <http://www.independent-objector-newgtlds.org/home/the-issue-of-closed-generic-gtlds/>.

⁷⁴ In the words of Objector, ESA and Third Party Objectors “represent many of the world’s leading entertainment software and online game publishers, whose games account for a majority of the game software sold in most countries of the world”.

ESA⁷⁵, ESAC⁷⁶, ISFE⁷⁷ and iGEA's⁷⁸ websites indicate that (i) ESA has 36 members; (ii) ESAC has 17 members; (iii) ISFE has 27 members; and (iv) iGEA has 19 members.

107. Most of the leading companies in this field⁷⁹ are members of the four above-mentioned associations either directly or through their local or regional subsidiaries. Each association represents the regional video games industry and this fact seems to confirm that the standard of global distribution is met.

108. As for the *"level of formal boundaries around the community..."*, the available information indicates that the "Video Game Publishing Community" is limited to companies which produce or publish computer and video games for video game consoles, personal computers and the Internet.⁸⁰

109. Balancing all the relevant factors, the Expert concludes that the "Video Game Publishing Community" is a clearly delineated community which comprises companies in the video game publishing industry. This community has a strong relationship with the different players of the video game industry as a whole such as consumers ("video gamers"), the media, video game distributors, retailers and other important participants therein.

110. However, in the Expert's opinion, it can be noted in passing that there is a broader "Games Community" which encompasses not only the community at stake but also other relevant communities that may exist around different types of games such as board games, card games, dice games, role-playing games, etc.

C. The "Substantial Opposition" to the application

(3) *Is there a substantial opposition to the application ".game" gTLD on behalf of a significant part of the "Video Game Publishing Community"?*

111. Having decided that the "Video Game Publishing Community" is clearly delineated, the Expert now turns to determine whether there is a substantial opposition of a significant part of the "Video Game Publishing Community".

⁷⁵ Available at: www.theesa.com.

⁷⁶ Available at: www.theesa.ca.

⁷⁷ Available at: www.isfe.eu.

⁷⁸ Available at: www.igea.net.

⁷⁹ According to the available information at the websites, companies such as Activision Blizzard, Disney Interactive Games, Electronic Arts Inc., Microsoft Interactive Entertainment, Sony Computer Entertainment, Nintendo and Warner Bros. Home Entertainment are represented in all of the four associations (ESA, ESAC, ISFE and iGEA).

⁸⁰ For example, according to ISFE's website: *"Who is eligible to be a member? Any association or multinational corporation based in the EEA (EU plus Norway, Iceland and Liechtenstein) representing the interactive software industry, or with the business objective of producing and/or publishing interactive software. Other entities closely connected with the interactive software industry may also be admitted"*.

(i) *Positions of the Parties*

112. Objector highlights that “*there is substantial opposition to the Disputed TLD Application from a significant portion of the community... including the international membership of Objector’s association and of Third Party Objectors*”⁸¹, as well as the communities represented by the other persons and entities that specifically oppose the Application or generally oppose the delegation of closed generic TLDs.”⁸²

113. Objector claims that Third Party Objectors (ESAC, ISFE and iGEA) supported the Objection by means of a letter sent to ICANN on March 7, 2013.⁸³

114. According to Objector, other institutions have specifically opposed to the “.game” Application⁸⁴ including the American Intellectual Property Law Association, the Coalition for Online Accountability, the Consumer Watchdog and Dot Food LLC.⁸⁵

115. Further, Objector provides additional examples of international opposition to generic gTLDs and states that governments, business organizations, commentators and other entities have “*united in international opposition to granting an individual member of an industry a closed generic TLD comprised of a common generic industry term*”.⁸⁶

116. In turn, Applicant claims that ESA has failed to prove “substantial opposition” to the application “within the community it has identified itself as representing”, since Objector provided no adequate evidence of the ICANN Guidebook factors to determine whether there is substantial opposition.⁸⁷

117. Applicant states that although Objector provided letters of support “*it is impossible to determine how substantial this opposition is ‘relative to the composition of the community’, because the objection contains no information as to the size of the community*” (Emphasis added by Applicant in its Response).⁸⁸

118. Further, Amazon also claims that many important and well-known companies in the video game community are not members of ESA and therefore have not expressed opposition⁸⁹ including Rovio⁹⁰, Atari⁹¹, Activision Blizzard⁹², Zynga⁹³

⁸¹ See: Objection, page 5, page 14 and Annex C to Objection.

⁸² See: Objection, page 14.

⁸³ See: Annex C to Objection.

⁸⁴ See: Objection page 15, page 16.

⁸⁵ See: Objection, page 15, page 16 and Annex P to Objection.

⁸⁶ See: Objection page 14, page 17 and Annexes P and Q to Objection.

⁸⁷ See: Response, page 7.

⁸⁸ See: Response, page 8.

⁸⁹ See: Response, page 8.

⁹⁰ See: Annex 3 to Response.

⁹¹ See: Annex 4 to Response.

⁹² See: Annex 5 to Response.

and Valve.⁹⁴

119. Finally, Applicant alleges that Objector did not submit any comments on Applicant's ".game" Application during the three-month period in which ICANN invited the public to submit comments on all of the gTLD applications.⁹⁵

(ii) *Considerations of the Expert*

120. The Expert has to decide whether there is a substantial opposition to the application ".game" gTLD on behalf of a significant part of the "Video Game Publishing Community".

121. In this respect, the Expert will focus on section 3.5.4 of the ICANN Guidebook, which establishes some of the standards to be examined in order to make a determination on this issue.⁹⁶

122. Although the Expert acknowledges that entities outside the "Video Game Publishing Community" have expressed opposition both to the ".game" Application and to the gTLD's in general, it will only consider the opposition expressed within the community at issue.

123. Having said that, in order to determine the appropriate standard to evaluate the Objection, it should be noted that section 3.5.4 of the ICANN Guidebook does not require that the "entire" community expresses its opposition. Rather, it requires that Objector prove a "substantial" opposition within the community it has identified itself as representing.

124. Therefore, the Expert is of the view that the argument on the impossibility to determine how substantial the opposition is relative to the composition of the community, as put forward by Applicant, should be balanced with the relevance and representative nature of each opposition within the community. ESA along with the Third Party Objectors comprise a significant portion if not the most important companies within the "Video Game Publishing Community". For instance, the opposition made by an individual "video gamer" or fan should not have the same weight in order to determine if an objection represents substantial opposition that the one made by the Interactive Software Association of Europe, as occurred, indeed, in the present case.

⁹³ See: Annex 6 to Response.

⁹⁴ See: Annex 7 to Response.

⁹⁵ See: Response, page 9.

⁹⁶ According to such provision, "a panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:" (i) "Number of expressions of opposition relative to the composition of the community;" (ii) "The representative nature of entities expressing opposition;" (iii) "Level of recognized stature or weight among sources of opposition;" (iv) "Distribution or diversity among sources of expressions of opposition, including:" (a) "regional", (b) "subsectors of community", (c) "the leadership of community", (d) "membership of community;" (v) "Historical defense of the community in other contexts; and" (vi) "Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition".

125. In this respect, the Expert is satisfied with the evidence produced by Objector, which includes a letter submitted to ICANN⁹⁷ in response to its request for public comment, where different “Video Game Publishing Community” members express their opposition to the Application at hand. The Expert has already elaborated in its opinion that ESA, ESAC, ISFE and iGEA represent most of the leading companies in the video game publishing industry and therefore it concludes that the community opposition is substantial.

126. The fact that some important companies in the video game industry have not expressed opposition should not be seen as a reason to rule out Objector’s claim as ESA and the Third Party Objectors represent a very significant part of the “Video Game Publishing Community” and the ICANN Guidebook by no means require that each and every member of the community expresses its opposition.

127. Finally, the fact that Objector did not submit comments during ICANN’s public comment period does not preclude ESA from filing a Community Objection nor does it indicate the lack of substantial opposition from the relevant community.

128. Therefore, based on the representative nature of Objector within the “Video Game Publishing Community”, the relevance of the entities which have expressed their opposition through Objector and Third Party Objectors and the global recognition of the entities which are represented in these proceedings, the Expert concludes that there is a substantial opposition to the application “.game” gTLD on behalf of a significant part of the “Video Game Publishing Community” as established in section 3.5.4 of the ICANN Guidebook.

D. Targeting

(4) *Is the “Video Game Publishing Community” explicitly or implicitly targeted by the application “.game” gTLD?*

129. The next issue to be decided by the Expert is whether the “Video Game Publishing Community” has been explicitly or implicitly targeted by the application “.game” gTLD made by Applicant.

⁹⁷ See: Annex C to Objection. According to the letter dated March 7, 2013, ESA, ESAC, ISFE and 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”. In the letter’s Executive Summary, the associations make the following statements “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 gTLD 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”.

(i) *Positions of the Parties*

130. Objector states that *“the Disputed TLD is explicitly and implicitly targeted to the businesses and consumers in the Industry, including Objector’s members and their customers”*.⁹⁸

131. According to Objector, *“it is self-evident that the Disputed TLD .game, is comprised of the common generic term for the game industry”*.⁹⁹ In this regard, Objector provides dictionary definitions and other references to establish that “game” is a common generic term for its industry.¹⁰⁰

132. Therefore, Objector contends that *“the term ‘game’ is regularly used as a generic term to designate the kind of products in Objector’s Industry, as demonstrated by countless United States and European trademark product and service descriptions in which the word ‘game’ is used as a generic term in connection with ‘computer’ or ‘software’ ...”*.¹⁰¹

133. Conversely, Applicant alleges that Objector failed to prove a *“strong association”* between the applied-for gTLD string and alleged community –as required by the ICANN Guidebook– since Amazon’s Application contains no reference to the phrase “video game”. Therefore, according to Applicant, *“there are no statements in the Application indicating an association (let alone a “strong association”) between the applied-for gTLD and the community represented by Objector”*.¹⁰²

134. Further, Applicant argues that ESA’s Objection contains no evidence –no surveys or other documents– of any associations by the public between “.game” and the community at issue and, in any event, the word “game” has many definitions, none of them associated with the video game industry.¹⁰³

135. Finally, Applicant argues that the term “game” can be associated with many communities other than the video game industry since “game” can refer to board games, sport games, card games, the Olympic Games, etc. Therefore, *“given this multitude of definitions for the word “game”... it is impossible to conclude that ... it is strongly associated with the Objector’s community”*.¹⁰⁴

(ii) *Considerations of the Expert*

136. It is for the Expert to decide whether the “Video Game Publishing Community” is explicitly or implicitly targeted by the application “.game” gTLD.

⁹⁸ See: Objection, page 6.

⁹⁹ See: Objection, page 7.

¹⁰⁰ See: Objection, page 7 and Annex E to Objection.

¹⁰¹ See: Objection, page 7 and Annex F to Objection.

¹⁰² See: Response, page 9 and Annex 8 to Response.

¹⁰³ See: Response, page 9 and Annex 9 to Response.

¹⁰⁴ See: Response, page 10.

137. Pursuant to section 3.5.4 of the ICANN Guidebook, *“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:”* (i) *“Statements contained in application;”* (ii) *“Other public statements by the applicant; and”* (iii) *“Associations by the public”*.

138. The ICANN Guidebook does not define what it means for a community to be “strongly associated” with the applied-for gTLD. Rather, it suggests certain non-exclusive factors that the Expert could balance in order to determine this community ground.

139. In section B above, the Expert found that the “Video Game Publishing Community” is “clearly delineated” although encompassed in a broader “Games Community”.

140. Generic strings consist of words that denominate or describe a general class of goods, services, groups, organizations or things and do not distinguish specific types of goods, services, groups, organizations or things from others within the general class.

141. In the Expert’s view, “game” is a generic term that can be associated with many relevant communities that may exist around different types of games such as board games, card games, dice games, role-playing games, etc. All these communities, along with Objector’s community, exist around a broader “Games Community” which is more likely to be targeted by the applied-for string “.game”.

142. Accordingly, the generic term “game” without any specificity (i.e. “video game”) not only does not match the name of the community at stake but also clearly has other meanings beyond identifying such community. Therefore, the Expert finds that the term “game” goes beyond the specific goals, values or interests of the “Video Game Publishing Community” and does not effectively name the community at issue.

143. In fact, the Expert introduced the word “game” or “games” in Amazon’s U.K. search-engine, and obtained 5,294,179 results classified into different “Departments” such as board games, trivia and quiz games, puzzles, educational games, travel and pocket games, PC and video games, etc.¹⁰⁵

144. Moreover, there are other existing terms that identify the “Video Game Publishing Community” such as the term “video game”. If Applicant had applied for the “.videogame” gTLD then it is probable that Objector would have succeeded in its argument of “strong association” with said community, but the applied-for gTLD lacks specificity and does not appear to target the community at issue.

¹⁰⁵ See:http://www.amazon.co.uk/s/ref=nb_sb_noss_1?url=search-alias%3Daps&field-keywords=games.

145. As regards the suggested ICANN Guidebook factors to be taken into account, according to the GNSO's recommendations, "*explicitly targeting means there is a description of the intended use of the TLD in the application*" and "*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*".¹⁰⁶

146. In its Application Amazon does not state that it intends to use the gTLD particularly in relation to video games¹⁰⁷—in fact, the Application contains no reference to the phrase "video game" or "video game industry"—and as for implicit targeting, the Objection contains no evidence of any "associations" made by the public between the term "game" and the "Video Game Publishing Community".

147. For all these reasons, the Expert concludes that there is no "strong association" between ".game" and the "Video Game Publishing Community" and that Objector has failed the "targeting" test of section 3.5.4 of ICANN's Guidebook.

148. This, in addition to the fact that—as will be determined below—Objector has failed to prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community, lead the Expert to dismiss the Objection.

E. Detriment

(5) *Is there any material detriment to the rights or legitimate interests of the "Video Game Publishing Community" if the application ".game" gTLD is allowed to proceed?*

149. Finally, the Expert will address the issue of whether the application ".game" gTLD causes any material detriment to the rights or legitimate interests of the "Video Game Publishing Community".

(i) Positions of the Parties

150. Objector states that Applicant intends to operate the Disputed TLD as a closed registry and that "*it would be improper to grant the Application because doing so will threaten to severely hamper competition and consumer choice, particularly in this case where the Applicant seeks to obtain exclusive protection for a*

¹⁰⁶ See: GNSO's "New gTLDs Summary Principles, Recommendations & Implementation Guidelines" published on October 22, 2008, available at: <http://gnso.icann.org/en/issues/new-gtlds>.

¹⁰⁷ See: Annex 8 to Response. In its answer to question 18(a) —"Mission/Purpose", Amazon states "*The mission of the .GAME registry is: to provide a unique and dedicated platform for Amazon while simultaneously protecting the integrity of its brand and reputation. A .GAME registry will ... provide Amazon with additional controls over its technical architecture, offering a stable and secure foundation for online communication and interaction ... provide Amazon a further platform for innovation ... enable Amazon to protect its intellectual property rights*".

*generic industry term in conflict with well-established international principles*¹⁰⁸

151. According to Objector, the exclusive operation of “.game” will grant Amazon an improper perpetual monopoly over a common generic industry term since it will be able to prevent others from registering similar TLDs such as “.games” or “.gamer” in the future and will be in position to gain advantage in both direct navigation and online search results therefore *“hindering effective online competition by others”* in the industry.¹⁰⁹ In addition, ESA contends that *“given that most generic TLDs will be open, consumers likely will not recognize that websites associated with the Disputed TLD are from a single entity, thereby threatening consumer’s ability to choose and harming Applicant’s competitors who cannot avail themselves of the Disputed TLD”*.¹¹⁰

152. Further, according to Objector, international law does not allow exclusive ownership or control of common generic terms and this same prohibition applies with equal force to generic TLDs since *“the value derived by generic TLDs approximates that of generic terms in the trademark context”*.¹¹¹

153. Finally, Objector also notes that Amazon’s Application is contrary to ICANN’s stated goal of “enhancing competition and consumer choice” with the introduction of new generic TLDs.¹¹²

154. Applicant contends that Objector has not proved a likelihood of material detriment to the rights or legitimate interests of the alleged community as required by the ICANN Guidebook. In its opinion, Objector has failed to address the issue or provide any evidence regarding the relevant factors to determine the existence of material detriment. In Applicant’s words, *“Objector’s arguments appear to rely solely on an unfounded, unsupported and illogical concern that the Application ‘would threaten to severely hamper competition and consumer choice ...’*¹¹³

155. According to Applicant, Objector’s argument is purely speculative and unsupported by any evidence. It also ignores several comments submitted to ICANN –which Applicant lists in its Response– which state that single-registrant gTLDs foster competition and innovation rather than restrict it.¹¹⁴

156. In response to Objector’s argument that Amazon’s use of “.game” will “hinder effective online competition by others”, Applicant states that many generic words

¹⁰⁸ See: Objection, page 6.

¹⁰⁹ See: Objection, page 8.

¹¹⁰ See: Objection, page 9.

¹¹¹ See: Objection, page 11.

¹¹² See: Objection, pages 12 to 14.

¹¹³ See: Response, page 10.

¹¹⁴ See: Response, pages 10 and 11 and Annex 10 to Objection.

associated with the community at issue have been registered as second level domain names without hindering any competition.¹¹⁵

157. Furthermore, according to Applicant, it is possible for Objector or others to apply and obtain “.games”, “.gamer” or “.videogame” in future rounds for gTLDs since ICANN has recently decided not to place singular and plural versions of the applied-for strings into contention sets.¹¹⁶

158. Finally, Applicant describes a number of “inaccurate or misleading” statements that Objector makes in support of its position.

(ii) *Considerations of the Expert*

159. The Expert has to decide on the likelihood of material detriment to the rights or legitimate interests of the “Video Game Publishing Community” in the event that the application process ends with the adjudication of the string (“.game”) to Applicant.

160. The Expert first notes that, in accordance with section 3.5.4 of the ICANN Guidebook, *“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”*.

161. In this regard, ICANN’s Guidebook clearly stresses that *“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”*.¹¹⁷

162. Such section also provides the factors that could be used by an expert panel in making this determination. These elements include, but are not limited to: (i) *“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”*; (ii) *“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”*; (iii) *“Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string”*; (iv) *“Dependence of the community represented by the objector on the DNS for its core activities”*; (v) *“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 (vi) *“Level of*

¹¹⁵ See: Response, page 13 and Annexes 12, 13 and 14 to Response. Applicant mentions: “game.com” used exclusively by Hasbro to promote its own board games, “games.com” used exclusively by AOL to promote its own video games and “videogames.com” used exclusively by CBS Interactive to promote its GameSpot services.

¹¹⁶ See: Response, page 13 and Annex 15 to Response.

¹¹⁷ See: section 3.5.4. of the ICANN Guidebook.

certainty that alleged detrimental outcomes would occur”¹¹⁸

163. First, the Expert finds that the ICANN Guidebook does not call for “actual damage” for an objection to be accepted. It establishes a lower bar, namely a “*likelihood of material detriment*”, logical consequence of the impossibility of assessing any damage when Applicant has yet to start operating the gTLD string.

164. Therefore, the standard that the Expert should apply to this issue is the “chance” that detriment will occur, although it requires a level of certainty. In other words, the standard of a “*likelihood of material detriment*” is, in the Expert’s opinion, equivalent to future “possible” damage.

165. Objector merely addresses the issue by stating vaguely that if the Application is granted it will “*threaten to severely hamper competition and consumer choice*”. Far from describing precisely the material detriment that the Application will cause if successful, Objector fails to identify the possible harm that the community at issue would suffer if ICANN granted Amazon the exclusive operation of the “.game” gTLD. Consequently, the Expert finds it difficult to determine by its own means what specific potential detriments the community may suffer in the case at hand.

166. In the Expert’s view, Objector has failed to address, let alone prove, any of the suggested ICANN Guidebook factors mentioned above¹¹⁹ in order to make a determination on this issue. In particular, (i) Objector fails to explain how Amazon’s operation of “.game” would result in material detriment to the reputation of the community at issue; (ii) no evidence has been provided –nor stems from the Application– that Applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely; (iii) Objector provides no evidence that Amazon’s operation of “.game” would interfere with ESA’s core activities; (iv) Objector has not proven that the community it purports to represent depends on the DNS for its core activities; (v) the Objection contains no information on concrete or economic damages that the “Video Game Publishing Community” would suffer if the Application was granted; and (vi) Objector has provided no adequate evidence that could allow the Expert to conclude that there is a level of certainty in ESA’s allegations regarding the Application’s threat of hampering competition or consumer choice.

167. As mentioned above¹²⁰, according to the ICANN Guidebook, the types of detriment or harm that a community may invoke in support of this ground include economic detriment, concrete detriment, reputational detriment and interference with core activities.

168. In the Expert’s view, Objector has failed to prove any likelihood of material

¹¹⁸ See: section 3.5.4 of the ICANN Guidebook.

¹¹⁹ See: paragraph 162.

¹²⁰ See: paragraph 162.

detriment to Objector's community in this regard. In such condition, Objector's allegations appear as purely hypothetical and speculative.

169. Further, it appears that Objector's underlying position is that Amazon, as a competitor, will benefit from the operation of the applied-for string. This argument is not enough, in the Expert's view, to find that the Application creates likelihood of material detriment to be protected under the applicable rules.

170. That been said, in the event that Applicant's future conduct represents in any way a limitation to competition within the industry, nothing prevents Objector or any other party to pursue the remedies available under the applicable legislation.

171. Objector's argument that international law prohibits exclusive ownership of gTLDs appears to refer to ICANN's new gTLD program policy and not to the present Application. The Expert is of the view that a community objection is not the appropriate mechanism to challenge ICANN's new gTLD program.

172. Finally, regarding the alternative relief sought by Objector that the .game TLD operate as an open registry¹²¹, the Expert notes that, pursuant to Article 21(d) of the Rules of Procedure¹²² and the definition of "Community Objection" in Article 2(e)(iv) of said Rules, the Expert does not have the power to "require that the .game TLD operate as an open registry".

173. In sum, the Expert concludes that the likelihood of material detriment to the rights or legitimate interests of the "Video Game Publishing Community" has not been established. For this reason, the Objection must also fail.

VII. Conclusion

174. The Expert concludes that Objector has established that it has standing to put forward a community objection against the application ".game" gTLD made by Amazon.

175. However, Objector has failed to prove that (i) there is a strong association between the community invoked and the applied-for string and (ii) 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. Therefore, the Objection must fail.

VIII. Decision

¹²¹ See: Objection, page 18.

¹²² Article 21(d) of the Rules of Procedure provides that "(...) *The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules*".

176. Having read all the submissions and evidence provided by the Parties, for the reasons set out above, and in accordance with Article 21(d) of the Rules of Procedure, I hereby render the following Expert Determination:

I. The “Community Objection” which has been put forward by ENTERTAINMENT SOFTWARE ASSOCIATION in these proceedings is dismissed.

II. Applicant, AMAZON EU S.À.R.L., prevails.

III. The Centre shall refund Applicant, as the prevailing party, its advance payment of costs made in connection with these proceedings.

Place of the proceedings: Paris, France

Date: February 5, 2014



Signature: _____
Prof. Dr. Guido Santiago Tawil
Expert