

June 13, 2013

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Chairman of the Board of Directors
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Submitted electronically

Re: Google's Amended Application for the .APP gTLD

The Association for Competitive Technology (“ACT”) was founded in 1998 by independent software developers concerned about how the interactions between major companies and policy makers affected small and medium sized developers. ACT is listed on the European Union Transparency Register and its DC office is a registered 501(c)(6) non-profit organization in the United States. Specifically, the institutional purpose of ACT, as detailed in its U.S. charter documents, is directly related to the benefit of the application developer community because its purpose is to “enhance public understanding of the high quality of its members’ products and services and its members’ commitment to innovation and technological advancement.”

ACT is an established institution with an ongoing relationship with the clearly delineated mobile application community. ACT’s membership includes more than 5,000 small and mid-size mobile application “app” developers and information technology firms. ACT is an international group of leading members of the app industry (“Industry”). In addition to its small business membership, ACT includes sponsors such as Apple, AT&T, BlackBerry, eBay, Facebook, Intel, Microsoft, Oracle, PayPal, VeriSign, and Verizon.

ACT has been a prominent advocate and educational organization at a crucial time in the rapid expansion of the Industry. As a voice of the Industry, ACT has several concerns regarding ICANN’s preliminary acceptance of Google’s amended application for the .APP gTLD on May 14, 2013.

Google’s “Eligibility Criteria” Will Stifle Innovation, Consumer Choice, and Competition

Google’s amended application is problematic because it allows Google alone to set eligibility criteria by defining app developers and the Industry as a whole. The amended

application states: “Charleston Road Registry plans to develop and publish eligibility criteria for all registrants in the proposed gTLD and will work with its registrars to execute the eligibility verification process.”¹ Google is limiting the use of .APP to “provide a dedicated domain space for application developers.”² It will “develop and publish eligibility criteria for all registrants in the proposed gTLD.”³

An .APP gTLD should provide consumers with apps or content relevant to apps and allow developers a reliable space to promote their products. Innovation in the Industry means apps appear in new places every day. For example, apps are beginning to appear in cars, watches, and even refrigerators. Any eligibility criteria must therefore be broad enough to allow for further innovation within the Industry. Given that Google is a competitor in the Industry, its control over setting eligibility criteria and defining “app developer” is troubling.

These concerns are heightened when Google’s amended application suggests that it intends to use the eligibility criteria to promote its own economic interests. Google states that it will be “defining the meaning of the gTLD term, providing for the verification of registrants who will offer content in the proposed gTLD environment, and encouraging a specific use.”⁴ Google’s amended application retains the language from the previous version, asserting that it “considers the proposed gTLD to be a platform for innovation with existing and future Google products and services.”⁵

As these quotes indicate, Google is poised to set restrictive criteria to register an .APP TLD, thereby stifling Industry growth and consumer choice. Since developers’ primary presence is online, shutting large portions of the Industry out of .APP would interfere with the prosperity of the community. Developers who are not chosen by Google to participate in will be denied the legitimacy of the .APP TLD. Consumers will also expect .APP to be all-inclusive. If .APP becomes sufficiently socialized, through marketing and search engine optimization, potential customers would not find apps that do not meet Google’s criteria, resulting in less choice and customer confusion.

Finally, the prospect of Google setting restrictive eligibility criteria and encouraging use of Google’s products and services raises obvious competition concerns. As holder of the .APP gTLD, the criteria and conditions Google develops will determine who is an

¹ Amended Google Application for .APP, 18.b.i.1.

² Amended Google Application for .APP, 18.a.

³ Amended Google Application for .APP, 18.b.i.3.

⁴ Amended Google Application for .APP, 18.b.ii.2. (emphasis added).

⁵ Amended Google Application for .APP, 18.b.ii.3.

“app developer”, which app developers are allowed to register domain names, what apps they can sell, and what services they use to support their apps. As indicated above, Google is poised to use its position of authority to gain an advantage over the services provided to developers and consumers. This is not just a speculative worry; in the past, Google has used its supposedly open platform, Android, to gain competitive advantage at the expense of app developers. Just recently, European antitrust authorities have announced an investigation into Google’s preferential treatment to the Android smartphone platform and its mobile services.⁶ Specifically of concern to the European officials are the licensing of Android software and Google’s use of its agreements with mobile devices makers to pre-install and prominently place Google services.

The impact on the Industry will be severe. Most app developers rely on the services of third parties to provide functions for their apps, such as analytics, hosting, and security. Since many developers are small businesses, it is more cost efficient to contract with these third parties. Google currently owns several companies which provide such services to app developers. However, they are far from the only players in the market. There are hundreds of companies built around the app industry which provide services for app developers. As the holder of the proposed gTLD, Google has the power over potential registrants to require the use of Google services. This would allow Google an unfair competitive advantage in the third party market to provide services to app developers. It would potentially put thousands out of business when app developers are forced to switch to Google services, regardless of how well or poorly those services fit the developer’s businesses.

Because Google is a competitor in the app industry, the effect that it could have on competition and consumer choice with control over the .APP gTLD is deeply troubling. Google’s management of the .APP gTLD should not artificially benefit Google’s products and services.

GAC Advice Needs Due Consideration

It is premature and improper for ICANN to approve this amendment given the Safeguards on New gTLDs issued by the GAC in the GAC Beijing Communiqué. The Communiqué suggests safeguards for the .APP gTLD that should be addressed before approving Google’s amended application.

⁶ Daniel Thomas and Alex Barker, “Google Faces Brussels Probe Over Android Licensing,” Financial Times (June 13, 2013).

Generic Terms

GAC's advice and Google's application agree that .APP is a generic term which represents the entire app industry.⁷

Because of the significant potential for consumer confusion and harm to competition, GAC has advised that strings representing generic terms should serve "a public interest goal"⁸. The GAC also stated that as a "general rule" gTLDs should be "operated in an open manner" and that the only exception should be strings relating to professional or regulated sectors.⁹ Where a generic string would have significant impact on a single industry, it is important to ensure that the TLD is in line with the public interest and operated in an open manner.

The restrictive eligibility criteria present in Google's amended application does not meet the public interest test and is by no means "open". Furthermore, Google's argument that the GAC Communiqué does not apply to .APP because this gTLD is "restricted" and not "closed" is inapplicable because the GAC specifically stated that the only strings that should be able to set restrictive registration policies are those relating to professional or regulated sectors.¹⁰ As even Google asserted in their public comments to the GAC Communiqué, .APP does not target a regulated or professional sector.¹¹ Even if the .APP gTLD fell into that category, the restricted access should "be appropriate for the types of risks associated with the TLD."¹² In this instance, Google's amended application gives no indication how allowing them a restricted gTLD would provide protection for intellectual property.

⁷ See GAC Communiqué – Beijing, People's Republic of China, Annex 1, pg. 8 (April 11, 2013); Amended Google Application for .APP, 18.a.

⁸ GAC Communiqué – Beijing, People's Republic of China, Annex 1, pg. 11 (April 11, 2013).

⁹ GAC Communiqué – Beijing, People's Republic of China, Annex 1, pg. 10 (April 11, 2013).

¹⁰ Id. ("As an exception to the general rule that the gTLD name space is operated in an open manner registration may be restricted, in particular for strings mentioned under category 1 above. In these cases, the registration restrictions should be appropriate for the types of risks associated with the TLD. The registry operator should administer access in these kinds of registries in a transparent way that does not give undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage.")

¹¹ Public Comment on GAC Advice by Google Inc., pg. 4 (May 14, 2013).

¹² GAC Communiqué – Beijing, People's Republic of China, Annex 1, pg. 10 (April 11, 2013).

The letter from the ICANN Board of Directors to the GAC dated June 6, 2013¹³ indicates that ICANN had not yet evaluated the GAC Advice to the ICANN Board regarding Safeguards for new gTLDs. ICANN Bylaws require the Board to take into account the GAC's advices on public policy matters in the formulation and adoption of its policies. It is therefore premature for ICANN to approve Google's amended application since the GAC's advice has not yet been considered by the ICANN Board.

Conclusion

We ask that ICANN implement the GAC advice that generic gTLDs such as .APP be operated in an unbiased and completely open manner, and reject any attempt by Google to control .APP as a closed or restricted gTLD.

Thank you for the opportunity to address these important issues.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Zuck". The signature is written in a cursive, slightly slanted style.

Jonathan Zuck
President

CC: Cherine Chalaby and Heather Dryden

¹³ Letter from ICANN Board to Governmental Advisory Committee regarding NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué (June 6, 2013).