Response to ICANN Request for Public Comments re "Closed-Generic" TLD Applications

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My firm represents new gTLD applicants, including a number of applicants intending to operate 'Single-Registrant' TLD models as allowed by the terms of the Final Applicant Guidebook and Draft Registry Agreement. My clients are disappointed that ICANN has reopened a significant policy issue that was debated many years ago, with community consensus allowing 'closed' registry business models. This was acknowledged in the so-called "Final" documents issued well more than a year ago, and again in ICANN Staff's Briefing Paper to the Board on this issue. I offer the following arguments as to why ICANN's current inquiry is wrong-headed, and as to why closed registry business models are not prohibited by ICANN policy and indeed should be encouraged as innovative and more protective of consumer interests than any 'open' models have been or are likely to be. I also fully support the comments of Ray Fassett, and of Members of the NCSG as posted by Milton Mueller.

1. Historical perspective: So-called 'closed generic' business models were openly discussed in early GNSO development of the Principles underlying the new gTLD program. Those Principles were adopted by a Supermajority consensus decision of the GNSO Council, and then nearly unanimously by the ICANN Board as the fundamental premises on which the Applicant Guidebook has been based. I was an active member of the GNSO Council at the time, intimately involved in development and negotiation of those Principles.

   One of those Principles was that ICANN's new gTLDs program should encourage innovative business models, some foreseen, and some not foreseen in the domain name industry of that day, or of today. Very early on it was decided by consensus, with no dissent as far as I recall, that there would be no 'categories' of new TLDs other than 'Community' and 'Standard'. We had been calling non-Community TLDs 'Open' but changed that because we realized there would be companies running 'closed' business models, including 'dotBrands', 'closed generics' and other innovative TLD business models. The impossibility of distinguishing between 'dotBrands' and 'closed generics' was further discussed as a reason not to try to create such categories.

   Such models were discussed again in the Vertical Integration Working Group. The discussion in the VI-WG was not really pertinent to the scope of that WG, but innovative business models were discussed as reason to permit vertical integration. And again there was never any quibble with the notion that 'closed generics' would be permissible, with such models likely to be more in the public interest than 'copycat' registries modeled on today's domain name industry (registry – registrar – reseller "open" models).

2. No late, material changes to the rules: Another of the fundamental Principles of the new gTLD program was that the rules would be clearly developed and actively noticed to all potentially interested parties, and would not be subject to change after the fact (except via PDP process, or in emergency situations). This was a fundamental GNSO Principle and also a fundamental GAC Principle, and was specifically adopted by the Board as one of the guiding principles of the program. To wit from the2007 GAC Principles (Annex B):

   Delegation of new gTLDs:

2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency, and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to applicants prior to the initiation of the process. Normally, therefore, no subsequent selection criteria should be used in the selection process.

and also:

2.13 ICANN should ensure that any material changes to new gTLD operations, policies and contract obligations be made in an open and transparent manner allowing for adequate public comment.

Now, the ICANN Board has unilaterally, from the 'top down', initiated this Public Comment period and some undisclosed 'expert analysis' of this issue (of course, that analysis and underlying documentation must be fully disclosed as soon as possible!). This is disheartening to me and the dozens of other community volunteers who actively participated in the new TLD program development. Many of us spent literally hundreds of hours of volunteer time to debate various policy options, and develop the fundamental Principles. Yet the current Board, in response to only very few, very clearly self-interested voices, appears ready to shunt aside all of that work and impose drastic, fundamental, last-minute changes to the program that will affect many applicants who have developed their business plans in reliance on the rules as set forth in the Applicant Guidebook. By doing so, ICANN risks expensive, protracted litigation and further substantial delays to the entire new gTLD program.

ICANN Staff's Briefing Paper on this issue clearly acknowledges that so-called 'closed generic' registry models are not prohibited by the terms of the Applicant Guidebook or otherwise. If divergence is thought necessary now, then the Board presumably will direct Staff to draft proposed Registry Agreement changes to implement some new policy relating to so-called 'closed generic' TLDs. Such a ruling would undermine the aforementioned fundamental principles of the program, to foster innovative business models based upon clear rules developed by the community and widely publicized in advance, before significant commercial investment in application and consulting fees. Such a late, highly material change at this point could not possibly be reasonable.

3. ICANN is not a Competition Authority: Arguments against so-called 'closed generic' TLD business models have been raised only very recently and only by very few parties, namely a subgroup of ICANN Registrars, Microsoft and some tech press, and unspecified clients of two high profile lawyers in Washington DC. Generally those arguments boil down to the notion that 'closed generic' business models will provide an anti-competitive advantage to the registry operator, and this is not in the 'public interest'.

   Of course, each of these speakers is entirely motivated by their own self-interest rather than any semblance of public interest. Registrars fear they will be competing with huge companies like Amazon and Google, who may allow large numbers of users and affiliates to use domains within a 'closed generic' space. They may even offer such use free of charge. And they may preclude uses for competitive marketing purposes – perhaps Firestone will not allow Pirelli to register or use Pirelli.Tires. Naturally, entrenched market actors do not want to see disruption in their

industries and have vested interest in maintaining the market position they have acquired. They must show more than this to prove that such disruption is legally anti-competitive.

Anyone will still be free to use the relevant generic term in promoting their business, they just won't be able to buy domains ending in that precise generic term. This is hardly different from their current inability to buy some generic terms ending in .com, .net or many other TLDs, because such names have been purchased by their competitors or by speculators. Yet somehow they manage to compete on the internet… Given the plethora of domain name options at the second and top level, this is hardly a legitimate strain on competition in any industry. To be sure, that decision should be made by competent antitrust authorities, only after there is any evidence of true competitive and/or consumer harm. It should not be made by ICANN as a blanket *a priori* rule (however belatedly implemented) across all industries in all countries. This is far beyond ICANN's purview or authority. ICANN's retained expert economists have repeatedly found that no registry in the domain industry has or is likely to ever have 'market power' except possibly Verisign. Therefore, ICANN should leave this issue, to the extent it ever may rise to an issue of competition law, to competent competition authorities.

As for Microsoft's concerns, clearly it worries that Google and Amazon will have some sort of competitive advantage because they have made big plays for lots of TLD strings. And of course Microsoft had the same opportunity as Google or Amazon to do so. Indeed, Microsoft has filed 11 applications, all with 'closed registry' intentions, including .docs, .live, .office and .windows. To wit:

> The mission of the .docs gTLD is to lay the ground work for providing consumers and businesses who interact with Microsoft through the .docs registry with a more secure and authentic experience and to promote the Docs service.
>
> Registration of .docs domain names will be restricted to Microsoft Corporation and its wholly owned subsidiaries. All domains in the .docs registry will be registered to Microsoft Corporation or one of its wholly owned subsidiaries.

So it is entirely unclear how Microsoft thinks that its competitors' 'closed generic' applications would harm it competitively, as it is planning essentially the same model with four other common generic words, and it offers no details as to such prospective competitive harm. Yes it claims trademark in some those words (such as Windows and Office), but how does that make it fair for them to own those words to the exclusion of all entities in the (glass) window industry, and all other entities in the online office software industry?

ICANN's role has always been to ensure the stability and security of the internet, not to make judgment calls on what types of content should appear within a name space. It should have learned a painful and expensive lesson in this regard, from the .XXX delegation debacle. It should not repeat that mistake now, as to do so likely will lead to disputes which in their aggregate are several orders of magnitude larger than the .XXX dispute, likely with the same end result. While meanwhile a large number of new gTLD applications will be in limbo, including all applications in contention with any intended, so-called 'closed generic' application.

4. Categorization is impossible: ICANN requests public comment specifically as to how so-called 'closed generics' should be defined. Given general acceptance of the 'dotBrand' closed registry

business model, how can ICANN distinguish between that and the so-called 'closed generic' model? Many existing and future TLD strings have been registered as trademarks, particularly in the European Community and Benelux jurisdictions. Some would say that many of those TLD strings represent generic or merely descriptive words, such as .vegas, .cam, .music. But these designations have been registered as trademarks, .vegas in the United States, the other two in the European Union, all for domain name registration services. There are dozens if not hundreds more examples that can be found at some expense, which research hopefully ICANN is conducting through a professional trademark research firm.

So how do so-called 'closed generic' applications differ from Microsoft claiming trademark rights in 'Windows' and then precluding any competitors, or anyone else including window glass manufacturers and sellers, registering in .windows TLD? Why does AAA get awarded to the American Automobile Association, rather than any of the thousands of other valid owners of trademark rights in 'AAA' (same with ABC, AFL and so many other 'dotBrands' that in fact are quite generic in the abstract… .active, .ally, .americanfamily, .apple… without even getting to the letter B in the list of new gTLD applications)? Since someone (disclosure: my client) has registered .CAM in the European Union, ICANN must give that trademark every bit the same respect as Apple Computer's trademark in the generic word apple. Any efforts to make a distinction based upon geographic scope of registrations simply would give a competitive advantage to bigger richer companies who have been around a long time, which clearly is anathema to the principles underlying not only ICANN's new gTLD program, but ICANN as a whole.

While trademark law, by definition, may prohibit trademark registration of generic terms, it does not and has never prohibited individuals from gaining exclusive property rights in generic terms. There are millions of generic terms that are the subject of exclusive domain name property rights, i.e. chocolate.com, sex.com, etc. Many countries recognize that chocolate.com, for example, can function as a trademark even for the service of selling chocolate, particularly after a period of exclusive use by which distinctiveness is acquired. There are many such trademark registrations in many jurisdictions. More importantly to this discussion, exclusive ownership has always been permitted, by definition, in regards to domain names at all levels of the DNS – including the top level. Why should there be any policy difference between TLDs and .com domains? To the extent such different policy might be considered, it must be done through bottom-up community consensus (which previously has accepted such models), rather than through top-down Board fiat at the behest of a few loud and late objectors.

In response to Professors McCarthy and Franklyn and their concern that consumers will be confused; that concern is purely speculative and not well grounded in trademark law. As Prof. McCarthy taught me and thousands of others, trademark law seeks to prevent confusion as to source of a good or service. The type of confusion he and Prof. Franklyn cite in their statement on this issue has nothing to do with product source, and is purely speculative. They state:

> "consumers may mistakenly believe they are using a gTLD that allows for competition, when in reality the gTLD is closed and the apparently competitive products are being offered by a single entity"

They are speculating, without citation to any evidence or authority, that consumers "may" be confused as to some aspect or quality of the TLD service, but that has nothing to do with

confusion as to the source of that service. They are speculating that the marketing of such TLDs will be confusing, when there is no factual basis whatsoever for such speculation. Web users have had long exposure to generic domain names used by myriad businesses, including well-known brands, throughout the world for more than 20 years, with absolutely no confusion ever documented as far as I am aware. That evidence ought to trump the blank speculation even of well-respected trademark academics.

5. Consumer Protection: The Single-Registrant model was developed specifically to permit 'closed' business models, because they were deemed innovative and far less likely to be the subject of abuse as in copycat 'open' models. Since the registry operator assumes full control and legal responsibility for all registrations and usage within the TLD, there is a single point of contact for abuse complaints, and it is expected they will be dealt with strictly and quickly since the registry operator is also the registrant of record – legally responsible for use of the domain. This has always been deemed a model far less likely to experience abuses such as phishing, cybersquatting, IP theft, etc.; thus further innovative, and to be supported.

   Sure, some of the 'portfolio applicants' for many arguably generic, open TLDs are pledging to do better than past registry operators with respect to consumer protection. But none of them are stating that they will accept legal responsibility for use of domains within the TLD, as would be required of Single Registrant TLD operators. None are stating they will have eligibility restrictions such as are inherent to Single Registrant models. None are stating that they will place any prior restraints on registrations within their 'open' TLDs, though of course Single-Registrant models have ample incentive to do so, and many have explained such plans to ICANN in their TLD applications. For these reasons, Single Registrant models are far more likely to be in the public interest than are new open TLDs which simply replicate traditional domain sales business models.

   Since publication of the final Applicant Guidebook, ICANN Staff have made some troubling communications that would seem to weaken the ability of Single-Registrant models to devolve use of domains to affiliated third parties, such as Amazon sellers or Google users, for example. Specifically, they have published an extremely narrow 'clarification' as to the purported definition of 'control' within the Registry Agreement. That term was adequately defined in advance in the Draft Registry Agreement, to permit the single registrant registry operator to allow third parties to use domains in the TLD, so long as the registry operator remained the sole registrant and assumed legal 'control' over use of that domain. Business models have developed based upon that common sense interpretation (and contractually stated definitions) of the Draft Registry Agreement contained in the Final AGB. Therefore, this late attempt by Staff to materially change this important definition via purported 'clarification', without any public comment or reasonable rationale for that purported clarification, must be rejected. ICANN instead should restate that common sense definition, as Staff's later attempt at 'clarification' is without any legal authority or community support.