Comments of the Public Interest Community to
Initial Report on the New gTLD Subsequent Procedures Policy Development Process
(Overarching Issues & Work Tracks 1-4)

We are free speech advocates, academics, and lawyers with expertise in social structures, global rules, intellectual property, and ethics law and policy. We submit these comments to express our deep concerns about recommendations of the Subsequent Procedures Working Group in the *New gTLD Subsequent Procedures Initial Report.* We address overarching concerns regarding this Initial Report and then specific concerns regarding recommendations.

Overarching Concerns

This is not a traditional Initial Report and should not move on to a Final Report in its next phase. We know that time is deemed to be of the essence to many in the Working Group (see Conflicts of Interest below), but this is not an Initial Report and not ready for "primetime." This is a preliminary report of Working Group subteams that raises important questions, requests insight, and seeks analysis and data. That is fine.

Nevertheless, the Subsequent Procedures Working Group (SubPro WG) has indicated that it will go forward from this "request for input" to a "final report" without intervening publication to the Community. Unfortunately, this publication does not reach the minimum standards of an Initial Report – there is no clear and unequivocal presentation of suggested policy recommendations. This report is:

- A presentation of ideas of SubPro subteams, not the full Working Group
- A request across 300 pages for huge amounts of input, ideas and data
- Very little presentation of data, even on issues for which ample data exists from the over 1900 New gTLD applications of the first round of New gTLD applications; and
- A brainstorming session much more than an initial report.

Accordingly, we look forward to providing input into this report and seeing a more structured and finalized set of SubPro WG ideas in the next Initial Report to come forward.

An Overview of Our Concerns

Given our work in the public sector, as professors who teach law and public policy and as advocates and lawyers who work on human rights and civil liberties, we have stark concerns about key issues in this report:

We oppose:

1. The push for Closed Generic Top Level Domains that allow the monopolization of generic terms of industries and businesses by a single competitor;
2. Allowing self-defined and self-imposed content and copyright rules, and rules regarding fraud and "other forms of [broadly defined] abusive behavior," generally at a registry's sole

discretion, potentially without giving registrants an opportunity to dispute a claim, or perhaps even to receive notice;

3. Overly broad protection of trademarks, in lists and procedures at the registry's discretion that go far beyond the more fair and balanced procedures that ICANN created through consensus policies;

4. Informal or summary takedown procedures available to members of the law enforcement community without due process or jurisdictional limitations;

5. Setting up a host of "procedural changes" that amount to a capture of the New gTLD Process by large incumbent portfolio applicants and some of the largest companies in the world. This set of self-interested procedural initiatives defy the original goals of the New gTLD process: to break the artificial scarcity of the original Generic Top Level Domains and open domain names to a worldwide population – and to encourage countries, communities, tribes and groups around the world to join the gTLD space. These laudatory goals will not be achieved by many of the policies being proposed which appear design to support the drafters – largely incumbent registries who benefited greatly from the first round of new gTLDs and seek to benefit again in subsequent rounds.

Specific and Substantive Concerns

I. **Closed Generics (2.7.3)**

Closed Generics is the idea that a single company – generally one of the world's largest– would "own" the generic description of a business or industry. Thus, in the first round, to the ICANN Community's shock, Google, Amazon, Dish DBS, L'Oreal and others applied for .SEARCH, .BLOG, .BOOK, .BEAUTY and .CLOUD (among dozens of other New gTLDs) as "Closed Generics." This meant they followed the .BRAND Model – in which the Registry is also the Registrant of each and every name in a domain.

The concept of Closed Generics runs contrary to basic principles of trademark law. A business may not claim exclusive use of the generic term for a product or service unless it can demonstrate through compelling evidence that the public has come to associate the term with a specific brand. By design, it would be next to impossible for common words like the proposed Closed Generics to be dedicated to the exclusive use of a single company under trademark law.

This unprecedented proposed control of domain names within an industry led to a backlash against the applicants. ICANN opened a public proceeding in which it heard from hundreds of small book publishers, booksellers and book printers about the proposal of Amazon to run .BOOK as a closed generic domain. Other entrepreneurs, small competitors in many fields and the Internet Community joined in this massive public comment period, and editorials opposing the land-grab appeared in blogs and publications around the world, including CircleID and The Hindu.

Government Advisory Committee members joined in the opposition and issued dozens of Early Warnings to ICANN about the violation of competition laws being created by the proposed monopolization of New gTLDs by a single competitor.

ICANN clarified the rules and required that these Closed Generics be opened, and dozens were opened, or their applicants withdrew (with only one exception). These gTLDs are now some of the most robust DNS spaces online, with .BLOG and .CLOUD, among others, being used by an array of new entrants, entrepreneurs and small businesses, in addition to the large incumbents.

It comes as a great shock to the community that Closed Generics are rearing their ugly heads again. The world clearly told the ICANN Board and ICANN Community in 2013 that Closed Generics should be barred, the ICANN Board did that, and experience has shown that this bar was a positive step for fair competition and openness of gTLDs.

The words Michele Neylon wrote at the time still echo today:

> **5 Reasons Why Closed Generic New gTLDs Should Be Opposed, CircleID, Feb. 24, 2013.**
>
> *If you're not a domain "geek" then the danger of this issue might not be that easy to understand, so here are five reasons why "closed generics" are a really bad idea.*
>
> *The Internet thrives with freedom of choice and openness*
>
> *Dozens of applications to ICANN for new top level domains (gTLDs) seek to completely segregate and close-off common words for use by one company, rather than for the entire industry, group or class.*
>
> *Generic Words Belong to All People; .CLOUD, .BEAUTY, .BOOK, .BLOG, .SEARCH and .SECURITY should be open to all with appropriate interests and industries*
>
> *Closed Generic TLDs lead to unfair closures and improper restrictions. Companies will be barred from using the generic string of their industry to promote their own businesses on an equal and fair footing online; Entrepreneurs and inventors will be inhibited from bringing new products to market for fear that a large segment of the Internet marketplace will be closed to them; and Consumers, thinking they are accessing an entire industry, will not know the name space is controlled by one entity and competitors are locked out*
>
> *ICANN rules allowed a limited exception for Brands to create a closed space (.BMW), but not for entire classes of goods, services and people to close off (.STORE, .CARS and .BABY)*

We note that Microsoft emphatically agreed.
https://www.icann.org/en/system/files/correspondence/pangborn-to-crocker-et-al-31jan13-en.pdf.

It may serve the financial interests of many ICANN incumbents and existing New gTLD portfolio applicants to re-create Closed Generics, but it violates every modicum of fairness, use of language, and legal precedent.

We strongly support the option of 2.7.3.d.1: No Closed Generics: Formalize GNSO policy, making it consistent with the existing base Registry Agreement that Closed Generics should not be allowed.

To specific questions raised in the report, we add:

2.7.3.e.1 No Closed Generics for the reasons set out above.

2.7.3.e.2 No Closed Generics for the reasons set out above.

2.7.3.e.3 No Closed Generics for the reasons set out above.

II. Voluntary Public Interest Commitments (2.3.2)

Let's stop calling "voluntary public interest commitments" part of the "Global Public Interest." They're not. Voluntary Public Interest Commitments (better labeled "Individual Commitments by Applicants"), imperil free expression and due process.

We note these Individual Commitments by Applicants (Voluntary Public Interest Commitments "VPICs") were not created by the ICANN policy development process. They were an idea created "on the fly" by then ICANN CEO Fadi Chehade. He was seeking a place in the ICANN contract for Applicants to respond to Government Advisory Committee "early warnings" in a meaningful and directed way. He decided that applicants should place their commitments to Government Advisory Committee members directly into the registry's agreement with ICANN. Unfortunately, ICANN allowed revisions far beyond these narrow agreements.

Instead, ICANN created a dumping ground called "Specification 11." ICANN Staff allowed applicants to place anything they wanted to commit to in this section. ***Unlike any other section of the New gTLD applications, these Individual Commitments (VPICs) were never open for review by the public; and ICANN's Legal Staff never reviewed them either.*** Instead, this laundry list of unilateral terms thrown into the applications at a chaotic time became a desperate attempt by applicants to curry favor with anyone who they thought might help them though the application process.

No one disputes that in Round 1, these Individual Commitments by Applicants (VPICs) violated a huge range of human rights and civil liberties. They included:

- Regulation of Internet content by registries, and suspension of domain names, based on arbitrary criteria and without due process. These included proposals to police the Internet for copyright infringement and fraud (vaguely defined). Registries would act as police, judge, jury, and executioner, applying unilateral rules not required by national law or ICANN consensus policy. Registrants of suspended domains would have no meaningful recourse.

- Barring of proxy and privacy services, thus bypassing both privacy rights and the ICANN consensus policy embracing proxy and privacy services;

- Close and secretive cooperation by the Applicant with law enforcement requests without regard to jurisdictional limits of those law enforcement officers, or to due process and existing mechanisms that require registrants be notified of allegations against their speech or activities online; and

- Adoption of the much-maligned "Global Protected Marks List" – a block of trademarked terms across many new gTLDs that are enforced without regard to context in a way that violates the jurisdictional limits of the trademark, and far overreaches the categories of goods and services protected under the issued trademark. The List deprives other potential registrants of basic words and names that accurately describe their activities online, both noncommercial and commercial. It also violated the New gTLD Rights Protections Mechanisms created by the ICANN Community. The Community adopted these mechanisms as Consensus Policies that offer many

forms of protection for trademark owners, but the Community expressly (and loudly) rejected the Globally Protected Marks List.

Given that these Individual Commitments (VPICS) were not reviewed by the Community, or even by ICANN staff, they can have no precedential value. **Individual Commitments (VPICs) must not be grandfathered into future new gTLD applications**. Accordingly, in future rounds**:**

- Only Individual Commitments (VPICS) narrowly tailored to the precise concerns of the GAC and Community for a particular New gTLD application should be allowed in an application;
- No other Individual Commitments should be allowed;
- All Individual Commitments must be put out for public comment and review;
- Any Individual Commitment outside the scope and mission of ICANN as set out in the New Bylaws must not be accepted. In particular, Individual Commitments should not encompass the regulation of speech on websites or in Internet applications.

New gTLD Applications in future rounds must be an opportunity run a gTLD, not to become a global censor, set aside ICANN Consensus Policy, expand intellectual property protection, or bypass due process.

To specific SubPro WG Report Questions:

2.3.2.c.1: Mandatory PICs: No, the Working Group should not recommend that Specification 11, Section 3(a) be adopted as a policy recommendation. It ensompasses intellectual property policing of Internet content which is beyond the scope and mission of ICANN.

2.3.2.c.2 – Only narrowly-tailored Voluntary Commitments with the GAC, the Board and the Community to settle a specific pending issue should be allowed. All such Individual Commitments must be put out clearly and prominently for public comment as a revision to the Public Portion of the Application which the public is already reviewing.

2.3.2.c.3 No other forms of Individual Commitments (VPICs) should be permitted for the reasons set out above.

2.3.2.c.4 No other forms of Individual Commitments (VPICs) should be permitted for the reasons set out above.

III. Delete from "Technical, Financial and Operational Review" the massive overreach and overprotection of Trademark owners in Globally Protection Marks List (Section 2.7.7 Applicant Review)

Buried in the technical, operation and financial review section of the report, strangely, is a broad and unjustified enforcement mechanism for the Globally Protected Marks list (the rejected over-expansion of trademark law discussed in Section II above). As noted, this type of protection applied to a string of letters, divorced from the context of specific goods, services, and geographic territories of use, was roundly rejected by the GNSO and ICANN Board, but slid into the Individual Commitments of the so-called Voluntary Public Interest Commitments of the first round (and later technical modifications).

Clearly, there is nothing technical, financial or operational about the over-protection of trademark rights. These issues are handled in another working group – the Review of All Rights Protections Mechanisms PDP WG – and do not belong here. Sliding GPML as an automatic service that all future gTLD applicants may offer is a bastardization of the ICANN process and a burying of issues that deserve to be discussed in the light of day.

Since the "first round," ICANN has gained its independence from ICANN and adopted rules that dictate the scope and mission of its work. These "New Bylaws" are narrowly tailored for the oversight of the Internet infrastructure, not the over-expansion of trademark law.

GPML must not be grandfathered in, and must certainly not be buried under the seemingly technical title of Applicant Reviews. They must simply be eliminated completely.

IV. Procedural Issues

A range of procedural proposals trouble us also. We note that each of these requires additional work, further definition and a return to the Community in a future "initial report" for discussion and debate prior to any final decisions.

1. **No unlimited numbers of registrations and no first-come, first-served registrations (Section 2.2.3)**

First-come, first-served applications (which SubPro WG appears to reject in one part of its report and put out for public comment in another part) should simply be rejected. It gives the largest Internet companies unlimited opportunity to apply for New gTLDs before anyone else has a true chance to apply. It goes against the ICANN Community's goal of opening up New gTLDs to the Global South and smaller communities by bypassing the opportunity for education and outreach. Whoever knows about the New gTLD applications can file thousands of applications when the round opens, and thereby eliminate opportunities from the rest of the world.

Accordingly, New gTLDs should be opened in future "rounds" and applications must be limited.

a) **Future rounds** – we agree that there must be specific times when applications can be submitted, when the acceptance window closes, and when the process for review by the public begins.

   As part of the community of "watchers," we need specific times to check new lists of gTLD Applications, to file public comments and to assist with objections (as appropriate). There should be years between each round of New gTLDs to be fair to everyone, including the public and the watchers who serve as volunteers in this process. Full and fair public review is a part of the legitimacy of the New gTLD process.

b) **Limit Applications** - In a similar vein, applications by a single company, partnership or venture must be limited. There are incumbents in this community who have the time, resources and interest to submit thousands of new gTLD applications. Such unlimited applications are not fair to the rest of the world (still learning about the New gTLD process) or to the Community which needs to comment on them. Strict limits on the number of applications per company and in cooperation with other companies is both fair and allows for adequate oversight and public

review. We recommend that ICANN allow no more than 2 dozen applications for each company, including its parent company, subsidiaries, and affiliates.

The few gTLD companies of today must not be allowed to dominate the DNS resources of tomorrow.

2. **The Predictability Framework (Section 2.2.2)**

The Predictability Framework is a misnomer. It creates with the "implementation review team" a standing group for New gTLD policy interpretation. There are two problems with this proposal:

a) It is not what implementation review teams do, and
b) It is unfair to the public.

While implementation review teams are technically open, in reality, they operate small groups run by ICANN staff working with the few people in the Community (normally registries and registrars) who can work through the technical details of deploying the policy. Few member of the public follow implementation review teams closely, and for good reason. if they do their jobs properly, these teams merely create the technical template for implementation of policies created in the open and public PDP process by the Community.

Increasingly, however, implementation review teams are re-interpreting and changing policy decisions made by the Community. This is an over-extension of implementation review teams widely opposed and contrary to the multistakeholder model. However, it looks as if the SubPro WG is looking to instantiate the worst of the implementation review team attributes into a standing implementation team – with policy interpretation (which is in truth policy-making) powers – and put under the Predictability Framework.

Such a concept we strongly oppose. It is a violation of ICANN processes, and hides from the public the policy making process (buried within a technical proceeding). Further, it hands policy interpretation to a narrow subgroup—those who are implementing for their own use and in their own interests. This cannot be a good idea.

Accordingly, in response to question 2.2.2.e.1, *Does the concept of a Predictability Framework make sense to address issues raised post launch?* The answer is a clear NO. The dangers outweigh the benefits and play into the hands of those seeking to expand their own financial interests.

3. **Variable Fees (Section 2.5.1)**

We worry about fees that would advantage incumbents and penalize newcomers. We recommend that a single free structure be adopted, at least in a given category of New gTLDs.

4. **Application Queuing (Section 2.6.1)**

We recommend that the New gTLD Application Queuing process continue to place Internationalized Domain Names at the top of the list for technical, operational and financial review. This process worked well in the first round and allowed many newcomers to the ICANN process to have shorter timelines on their application processing. We see no reason to change a system that worked, and that served the larger goals of the New gTLD program, namely to open New gTLDs to registries across the world, to new languages and scripts, and to new populations and communities.

V. A Warning about Conflict of Interest and Self-Interested Policies

We note that the ICANN Volunteer Community is stretched very thin these days. There are many policy issues on the table, and an insufficient number of volunteers to staff them from across the Community. This raises a special obligation for impartiality among those writing the rules – especially among those in the SubPro WG.

In our observation, however, many in the SubPro WG seem to have direct financial ties to the outcome of the policies they are negotiating for New gTLDs, on behalf of their companies, clients and customers. We understand that many individuals in this WG stand to benefit directly from the rules they create.

This is a problem. Further consideration, and special emphasis on public interest and human rights issues, needs to be done. Further, in the interests of fairness, fuller disclosure of the financial interests of the SubPro WG participants needs to take place – or else everyone with a direct interest in the outcome of the policies being negotiated (on behalf of themselves, companies, clients or customers) needs to recuse themselves.

In the next report, we ask that published contemporaneously be a table of:

- The SubPro Member Names and Employers
- Past and Current clients and customers of New gTLD applicants and registries
- Working Group meetings attended
- Subteam membership and subteam meetings attended.

Conclusion

New gTLDs are a global resource and policies must be created to share them across the world – not just those who are next to the New gTLD application table. New gTLD applicants and registries must not be allowed to create their own rules for content monitoring and deletion, trademark expansion, due process bypassing and other forms of content control, and they should not be allowed to be register unlimited numbers of New gTLD applications.

Not only the interest of those at the SubPro WG table must be respected, but prior issues and concerns raised by the Community. In no event should Closed Generics be allowed to return; the world rejected this idea years ago.

Those with a direct financial interest in the policies they are creating should flag their interests more clearly in the next round of SubPro WG proposals. We look forward to another round of comment with more details and recommendations.

Sincerely yours,

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