

Closed Generics: Harms Identified in 2013 Report of Public Comments

Excerpted from <https://www.icann.org/en/system/files/files/report-comments-closed-generic-08jul13-en.pdf>

Types of harm identified:

- Harm to Competition
- Harm to Public Interest
- Legal Principles
- ICANN Bylaws, Affirmation of Commitments, GNSO Policy, and Registry Agreement Code of Conduct
- Threat to Open Internet
- Cultural Harm
- Consumer Confusion
- Trademark Related Harm

Harm to Competition

➤ *These strings should be open and unrestricted since generic words used in a generic way belong to everyone. **Allowing such closed gTLDs would harm competition, limit consumer choice and confuse consumers.***

Position held by: Retail Council of Canada (6 Feb. 2013); IKEA (4 Mar. 2013); SDLC (4 Mar. 2013); Dot Food (5 Mar. 2013); Indigo Books & Music (5 Mar. 2013); IIA (5 Mar. 2013); Kobo (5 Mar. 2013); Alibaba Group (6 Mar. 2013); Yahoo! (7 Mar. 2013); Accor (7 Mar. 2013); Rakuten (7 Mar. 2013); JANE (7 Mar. 2013); Yves Rocher (7 Mar. 2013); AIA (7 Mar. 2013); Blacknight Solutions (7 Mar. 2013); Allianz (7 Mar. 2013); CTIA (8 Mar. 2013)

Harm identified: Harm to competition and consumer choice, risk of consumer confusion

Harmed parties: End users, registrants?

➤ *Open generic TLDs expand choice and free choice and free competition. **Closed generic TLDs reduce choice, hinder competition and would undermine the goals of the trademark system** which forbids individuals to gain exclusive property rights in generic names of products and an unfair competitive advantage in the marketplace.*

Position held by: McCarthy Institute (1 Mar. 2013); Yahoo! (7 Mar. 2013); US Telecom (7 Mar. 2013); Financial Industry Members (7 Mar. 2013); LAT (7 Mar. 2013)

Harm identified: Harm to choice, competition, and trademark system

Harmed parties: Registrants?, end users?

➤ *Closed gTLDs are anti-competitive. They **would limit opportunities for numerous businesses to compete** and have marketing power and the same prominence on the Internet as large corporations (e.g., gaining unfair advantage in direct navigation and online searching).*

Position held by: J. Fiero (18 Feb. 2013); V. Patel (27 Feb. 2013); Channel Cloud UK/Ireland (1 Mar. 2013); SDLC (4 Mar. 2013); FEP (4 Mar. 2013); Zumex (5 Mar. 2013); AXA Group (6 Mar. 2013); ThoughtWorks (7 Mar. 2013); Yahoo! (7 Mar. 2013); Accor (7 Mar. 2013); Yves Rocher (7 Mar. 2013); V. Asher (7 Mar. 2013); Allianz (7 Mar. 2013); Financial Industry Members (7 Mar. 2013); T. Gilles et al. (8 Mar. 2013)

Harm identified: Harm to competition

Harmed parties: Registrants

➤ *Delegation of a generic term matching an economic sector to one single player (e.g., .TIRES) could lead to **establishing a monopoly by excluding the direct and indirect competitors**.*

Position held by: Michelin (6 Mar. 2013); T. Ashcroft (6 Mar. 2013); Accor (7 Mar. 2013); Yves Rocher (7 Mar. 2013)

Harm identified: Harm to competition

Harmed parties: Registrants

➤ *Once closed gTLDs are delegated, it would likely be very difficult if not impossible to reverse such grants in the future, and **the registry operator would be able to control gTLDs delegated to it perpetually and thereby be able to prevent others from operating a similar gTLD in the future (based on string confusion)**.*

Position held by: Retail Council of Canada (6 Feb. 2013); IKEA (4 Mar. 2013); Indigo Books & Music (5 Mar. 2013); Kobo (5 Mar. 2013); Yahoo! (7 Mar. 2013)

Harm identified: Harm to competition

Harmed parties: Future applicants, registrants, end users

➤ *Control needs to stay within ICANN for generic terms. **Closed gTLDs are counter to the intent of the new gTLD program which is to create competition and choice, not to give large corporations like Amazon and Google control over large segments of the Internet. Once such giants are given that control it will not be legal to take it away from them.***

Position held by: T. Casey (4 Mar. 2013); Dot Food (5 Mar. 2013); Consumer Watchdog (7 Mar. 2013)

Harm identified: Harm to competition and choice

Harmed parties: Registrants, end users?

ICANN Bylaws, Affirmation of Commitments, GNSO Policy, and Registry Agreement Code of Conduct

➤ ***Delegation of closed gTLDs may violate ICANN's by-laws and the New gTLD Registry Operator Code of Conduct.** The exemption that permits closed gTLDs was intended for brand TLDs, not generic words that are common industry terms. ICANN's core values include promoting competition in the registration of domain names.*

Position held by: Retail Council of Canada (6 Feb. 2013)

Harm identified: Violation of Bylaws and the New gTLD Registry Operator Code of Conduct

Harmed parties: Registrants?

➤ *Other than for .brand gTLD applications, enforcement of the Code of Conduct is necessary to protect the public interest and exemptions to it should not be granted. **"Closed generic" TLDs are inherently anti-competitive** unless backed up by trademark rights and are also at complete odds with the very trademark law and principles that ICANN has sought to protect through such new RPMs as the Trademark Clearinghouse and the Uniform Rapid Suspension (URS). **Closed generic TLDs are at odds with the Affirmation of Commitments and relevant GNSO Council advice.** They are not a new issue, and addressing them sets no precedent for other potential amendments to the Applicant Guidebook. The Code of Conduct's default position is an open registry, and exemptions should only be granted narrowly to protect the public interest.*

Position held by: LAT (7 Mar. 2013)

Harm identified: Harm to competition, violation of Affirmation of Commitments and GNSO Council advice

Harmed parties: Registrants?

➤ ***Closed generic TLDs circumvent the Registry Operator Code of Conduct and New gTLD Registry Agreement.** Applicants would register names in their own right and would not provide*

open access to all registrars. Applicants are attempting to circumvent the Code of Conduct and Agreement through exemptions that were not intended for them.

Position held by: AXA Group (6 Mar. 2013); Michelin (6 Mar. 2013); Accor (7 Mar. 2013); Yves Rocher (7 Mar. 2013); Rakuten (7 Mar. 2013); JANE (7 Mar. 2013); V. Asher (7 Mar. 2013)

Harm identified: Violation of Registry Operator Code of Conduct and New gTLD Registry Agreement

Harmed parties: Registrants?

Threat to Open Internet

➤ *Closed gTLDs should not be allowed; they are a **threat to the openness and freedom of the Internet.***

Position held by: Retail Council of Canada (6 Feb. 2013); J. Fiero (18 Feb. 2013); J. Cassells (26 Feb. 2013); P. Labelle (27 Feb. 2013); Lanvac Surveillance (27 Feb. 2013); Surveillance Lanvac Monitoring (27 Feb. 2013); Lanvac (27 Feb. 2013); Dan (27 Feb. 2013); Houle Electric (27 Feb. 2013); Precision Protection Systems (27 Feb. 2013); Keystone Security Systems (27 Feb. 2013); Safe Tech (28 Feb. 2013); G. Girardello (28 Feb. 2013); Cairn Control Systems (28 Feb. 2013); Safe Home Security (28 Feb. 2013); Affordable Lock Services (28 Feb. 2013); Infynia.com (28 Feb. 2013); Secur-Icare (28 Feb. 2013); Wilsons Security (28 Feb. 2013); B. Pianka (1 Mar. 2013); Northern911 (3 Mar. 2013); A. Watson (3 Mar. 2013); S. Reiss (3 Mar. 2013); B. Aamodt (4 Mar. 2013); Canadian Security Association (4 Mar. 2013); T. Casey (4 Mar. 2013); M. Cairns (5 Mar. 2013); SuperMonopolies dot com (5 Mar. 2013); Zumex (5 Mar. 2013); I. Moysse (5 Mar. 2013); Dot Food (5 Mar. 2013); Indigo Books & Music (5 Mar. 2013); IIA (5 Mar. 2013); Kobo (5 Mar. 2013); P. Driscoll (6 Mar. 2013); M. Reynolds (6 Mar. 2013); S. Cox (6 Mar. 2013); AXA Group (6 Mar. 2013); T. Ashcroft (6 Mar. 2013); ThoughtWorks (7 Mar. 2013); M. Baudier (7 Mar. 2013); Rakuten (7 Mar. 2013); JANE (7 Mar. 2013); V. Asher (7 Mar. 2013); OFE (7 Mar. 2013); K.J. Mobberley (7 Mar. 2013); Blacknight Solutions (7 Mar. 2013); Consumer Watchdog (7 Mar. 2013); R. Lancefield (7 Mar. 2013); Allianz (7 Mar. 2013); Financial Industry Members (7 Mar. 2013); Authors Guild (8 Mar. 2013); T. Gilles et al. (8 Mar. 2013)

Harm identified: Threat to Internet openness

Harmed parties: End users?

➤ ***“Closed generics” introduce distortions and gaming of the application process (e.g., Google’s decision that its Charleston Road subsidiary would not purchase tickets for its generic word TLDs applications, thereby delaying competitors’ applications). Closed generic TLDs are also crass commercial exploitation of a program meant to benefit the global public of Internet***

users. ICANN has no mandate to auction off the most significant words in all major languages for the exclusive use of private parties as if they were selling naming rights to a municipal sports stadium. If ICANN fails to find closed generics incompatible with protection of the public interest in this first round of the program, it can expect to be deluged with such applications in the second rounds as global corporations seek to lock up key generic words before their competitors do. **This will pervert a program that was meant to expand and open the DNS into one that permanently closes off large and significant sections, which is incompatible with benefiting Internet users as well as with ICANN's long term interests.**

Position held by: LAT (7 Mar. 2013)

Harm identified: Distortions and gaming of the application process, harm to openness

Harmed parties: Registrants, end users

Cultural Harm

➤ *.MUSIC strongly opposes "closed generic" TLDs for strings that are semantically and culturally significant, such as .MUSIC, .SONG, .TUNES. Closed gTLD applications should be accepted only in the case of "Dot Brands"-- i.e., the applicant has internationally recognized trademarks for the string applied for. We are troubled by the applications of dominant companies with market power such as Amazon and Google who have applied for a significant portfolio of "closed" gTLDs to **expand their Internet monopolies and thwart competition.** ICANN should look at the entire gTLD program, applications and applicants within the context of each TLD's subject matter, including any unintended but expected economic and cultural repercussions that specific "closed" applications will inevitably have on competition and consumer choice. ICANN should serve the global public interest and **reject those anti-competitive applications that clearly have the intention to create detrimental economic and cultural harm to significant portions of the Internet community, such as the clearly delineated music community.***

Position held by: .MUSIC (7 Mar. 2013)

Harm identified: Harm to competition, cultural harm

Harmed parties: Registrants, end users

➤ ***For non-Latin character sets in languages such as Chinese and Japanese, closed generics will place entire cultural identities at risk. There will be loss of opportunity for people and businesses in that native language to express, pursue and flourish in TLD namespaces designed for them. This should not be allowed.***

Position held by: T. Gilles et al. (8 Mar. 2013)

Harm identified: Loss of opportunity to express cultural identity

Harmed parties: Registrants, end users?

Consumer Confusion

➤ *Generic closed gTLDs can be expected to function as would a deceptive trademark, **misleading consumers and other members of the Internet public regarding what they expect to find when pointing to a domain name ending in a generic term.** Proprietary claims to marks that would be expected to deceive or mislead consumers are universally disallowed.*

Position held by: S. Reiss (3 Mar. 2013)

Harm identified: Risk of consumers being misled

Harmed parties: End users.

➤ *That generic terms are regularly awarded in closed fashion at the second level is not good cause for allowing the same to occur at the top level. The top level clearly holds ultimate prominence in the minds of Internet consumers. **It is unfair that an ICANN policy should result in a burden placed on all Internet users to learn that when a word appears in the top level of a domain name, it does not mean what it says.***

Position held by: S. Reiss (3 Mar. 2013)

Harm identified: Consumer confusion

Harmed parties: End user

Trademark Related Harm

➤ *Where a gTLD corresponds to a trademark, the rights holder may have exclusive rights to use the descriptive gTLD for the goods and services for which it has trademark protection. However, **a descriptive gTLD holder should not be able to extend their rights beyond the scope of their trademark protection in order to create a monopoly** excluding interested users from benefitting from the gTLD.*

Position held by: IKEA (4 Mar. 2013); Dot Food (5 Mar. 2013); Indigo Books & Music (5 Mar. 2013); Kobo (5 Mar. 2013); A. Babenhausenerheide (6 Mar. 2013); Michelin (6 Mar. 2013); TLT LLP (7 Mar. 2013)

Harm identified: Improper extension of trademark rights, harm to competition

Harmed parties: Registrants, end users?

➤ *Allowing applicants to register gTLDs comprised of terms that the public commonly uses to identify a class of products or services as a closed domain would be the equivalent of granting*

trademark protection when there should be none. **Allowing such a term's exclusive use by any one entity, whether as a trademark or as a gTLD, would infringe upon an important collective and society-wide ownership. A closed gTLD would grant a single business the exclusive use of a generic word and render that exclusivity enforceable on the Internet while unenforceable anywhere else.** Similarly, allowing a closed gTLD string that is comprised of a descriptive rather than a generic term gives a single company powerful exclusivity in using that descriptive term, which it would not have under trademark law. **The company could conceivably leverage its use of the gTLD over time to argue that the string has acquired secondary meaning warranting trademark protection, further harming competitors and consumers.** The gTLD process should not lend itself to simply taking more popular descriptive terms out of public use.

Position held by: Financial Industry Members (7 Mar. 2013)

Harm identified: Improper extension of trademark rights, harm to competition

Harmed parties: Registrants, end users?

Harm to Public Interest

➤ ***Closed gTLDs contradict ICANN's core values, including promotion of competition in the public interest. The public interest is particularly at risk in the case of generic terms that are defined by statute or other legal authority (e.g., IRA). While similar risks may arise in the context of individual domain names registered in .com, but the potential impact of a new gTLD string is much greater. By contrast to the registration of a .com domain name, a new gTLD requires ICANN approval and substantial resources, both for the application and for the operation of the gTLD. Search engines are likely to give priority to pages associated with a gTLD that appears to be dedicated to content related to the search terms and more likely to be controlled by an established, relevant institution. The stakes are higher regarding ICANN delegation of a gTLD, and the public interest concerns must weigh more heavily than they do for individual domain names.***

Position held by: Financial Industry Members (7 Mar. 2013)

Harm identified: Harm to competition and the public interest

Harmed parties: End users, registrants?

Legal Principles

➤ ***Delegation and operation of closed registries for generic industry terms by a single industry participant would be contrary to well-established legal principles (see Appendix A of Microsoft comments, Foreign Statutes Pertaining to Generics) and would present an anti-competitive risk. ICANN policy must prioritize the best interests of consumers worldwide. ICANN***

should not be distracted by arguments that the Applicant Guidebook did not speak to “closed generics” in particular. Nor should ICANN accept the specious claim that certain applicants may have to revise business models, when none of those business models have even been launched, or that ICANN would become a “regulator” by abiding by its own principles and contractual commitments.

Position held by: Microsoft (7 Mar. 2013); F. Bennett (5 Mar. 2013); CTIA (8 Mar. 2013)

Harm identified: Violation of legal principles, harm to competition

Harmed parties: End users, registrants?