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Background Paper

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WS 253 The Debate on ‘Closed’ Generic Top Level Domains

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http://www.intgovforum.org/cms/wks2013/workshop_2013_accomplish_list_view.php?xpslti_pq_ie=253

Overview

ICANN’s New gTLD Program has given rise to business interest in running registries for so-called “closed” gTLDs (generic Top Level Domains). “Closed generics” are common words for which the applicants do not have trademarks but nevertheless would be the exclusive registrants, i.e. only they could have names under them, or “to the left of the dot.” Examples include proposed gTLDs like .antivirus, .app, .baby, .beauty, .blog, .book, .broker, .cars, .cloud, .courses, .cruise, .data, .flowers, .food, .game, .hotel, .movie, .music, .news, .search, .store, .tires, .video, and .weather, as well as some related multilingual domain names. Many of the applications for particularly choice character strings have been made by major corporations that heretofore have not been significantly involved in the domain name industry or in ICANN’s policy processes.

“Closed generics” have become a subject of great debate within the ICANN community. Critics argue, *inter alia*, that common words should be viewed as part of mankind’s shared heritage rather than private property; that closure is anticompetitive for domain suppliers and users alike; and that closure is contrary to core Internet principles. Supporters counter that the possibility of closed generics was accepted long ago within ICANN’s bottom up multistakeholder policy process; that the late opposition is driven mainly by registrars who would like to be able to sell names under these new gTLDs; that closed generics could stimulate the development of innovative, pro-consumer business models; and so on. Proponents of these polar positions and others it between can be found within as well as across stakeholder groups like civil society and the private sector, making this a particularly interesting debate characterized by unusual alignments and cleavages.

At ICANN’s April 2013 meeting in Beijing, the Government Advisory Committee (GAC) advised the Board of Directors that exclusive registry access should serve a public interest goal. In late June, the Board’s New gTLD Program Committee decided to prevent applicants for closed generic from signing registry contracts, pending more talks with the GAC. To sign a registry agreement, applicants will have to agree to Public Interest Commitments, which include obligations to operate in a transparent and non-discriminatory

manner, and to not impose eligibility requirements limiting registrations exclusively to a single person or entity or its affiliates. In addition, with the United States remaining neutral, the Government Advisory Committee decided to file a formal consensus objection against Amazon's application for the .amazon gTLD; a legal challenge may ensue. Hundreds of "category 1" applications are now on hold, but many applicants have signaled their desire to go ahead and accept a Registry Agreement that prohibits the use of their proposed strings as closed generics.

Regardless of the current state of play and eventual outcomes, the proposals for closed gTLDs raise a range of issues that merit serious consideration by the global community, including actors who do not participate in ICANN processes. But regardless of any near-term policy decisions, the proposals for closed gTLDs raise a range of issues that merit serious consideration by the global community, including actors who do not participate in ICANN processes. Accordingly, the purpose of this workshop is to foster multistakeholder debate on this range of economic, socio-cultural and political issues associated with closed gTLDs in a manner that is suited to a diverse global audience.

Sample Questions for Discussion

1. The possibility of 'closed' generics was considered by the Generic Names Supporting Organization (GNSO) in ICANN when the Applicant Guidebook for new gTLDs was being drafted, and multiple Public Comment Periods were held. Their inclusion in the new gTLD program was not deemed controversial by the ICANN community, including governments. But now, after the fact, complaints are being raised, *inter alia* by registrars that want to be able to sell names without restrictions. From a legal and institutional standpoint, is not ICANN obligated to follow the process it established? Would not a prohibition on such names at this late stage throw the whole gTLD process into doubt?
2. One of the arguments for closed generics is that investors should be free to experiment with new business models, and that ICANN should not be in the business of picking beauty contestants based on undefined criteria. Moreover, some such business models could actually turn out to allow new activities that we would consider to be beneficial to citizens and consumers. So would a prohibition on closed generics signal a shift to a more expansive regulatory role for ICANN, one that can be gamed and manipulated at any stage in the process?
3. How much difference does the position of a dot make? Nobody raised major objections when Barnes and Nobles got books.com, but apparently if Amazon gets .books everything is different. Why?
4. How does the existence of a multitude of synonyms for any word in a single language, and the multiplicity of equivalent terms in other languages, affect the argument that closed generics are in some sense theft of the commons?

5. What is the proper role and requirements of a Registry in the new gTLD system where the TLD is THE generic term of a whole industry? Are there or should there be any obligations imposed by ICANN in such cases?
6. Some observers argue that generic words belong to the general public and cannot be trademarked or otherwise privatized. So if companies obtain exclusive rights without any obligation to let the rest of the world participate, would this constitute a “privatization of common goods” that is inconsistent with the public interest?
7. Particularly controversial have been applications for closed generics that are also (or can be construed as) geographic terms. Should special considerations apply in such cases, and if so, on what basis?
8. What might the implications of closed gTLDs for internationally recognized human rights, such as freedom of speech and cultural rights? Is there a rights based analysis of any registrant's ability to register for a domain name in any TLD? Would a restriction to one, several, or many as opposed to open registration be an infringement on rights? Are there countervailing rights to any such infringement? Is there a rights based difference between allowing registration to only one user as opposed to a type of user?
9. If there is no right to register in any and all TLDs, how do we explain the ability of ccTLDs to be restricted, as some are, on the basis of citizenship or residence? Should ccTLDs all be forced to open up? What about the limited registration policies that allow supported TLDs (sTLD) such as .museum, .aero, or .cat, or community TLDs?
10. Is this ultimately about big businesses from the developed countries vs. developing countries that may want public access to the words, or perhaps might have wanted local companies to bid for the names themselves?
11. Is the problem not about whether applicant companies have legitimate rights like their competitors in the name space, but more about trademark conventions, treaties and other legal framework that let such situations arise?

Panelists

William J. Drake (moderator)

International Fellow and Lecturer, Media Change & Innovation Division, Institute of Mass Communication and Media Research, the University of Zurich; and Chair, Noncommercial Users Constituency; Switzerland

Olga Cavalli

Representative of the Government of Argentina to ICANN's Governance Advisory Committee; former Vice Chair of the GNSO Council; Argentina

Rafik Dammak (Remote Moderator)

Engineer, NTTCom; member, NCUC; incoming Chair, NCSG; Tunisia/Japan

Avri Doria

Independent Consultant; former Chair of the GNSO Council; member, NCUC; USA

Kathy Kleinman (remote participant)

Internet Counsel, Fletcher, Heald & Hildreth; member, NCUC; USA

Joy Liddicoat

Director for Global Internet and Human Rights, Association for Progressive Communications; member, NCUC; New Zealand

Stéphane Van Gelder

Consultant; former Chair of the GNSO Council; France

Thomas Schneider

Deputy Head of International Relations Service and International Information Society Coordinator, Federal Office of Communication, Government of Switzerland

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