

GAC Advice Response Form for Applicants



The Governmental Advisory Committee (GAC) has issued advice to the ICANN Board of Directors regarding New gTLD applications. Please see Section IV, Annex I, and Annex II of the [GAC Beijing Communiqué](#) for the full list of advice on individual strings, categories of strings, and strings that may warrant further GAC consideration.

Respondents should use this form to ensure their responses are appropriately tracked and routed to the ICANN Board for their consideration. Complete this form and submit it as an attachment to the ICANN Customer Service Center via your [CSC Portal](#) with the Subject, “[Application ID] Response to GAC Advice” (for example “1-111-11111 Response to GAC Advice”). All GAC Advice Responses must be received no later than 23:59:59 UTC on 10-May-2013.

Respondent:

Applicant Name	Lifestyle Domain Holdings, Inc.
Application ID	1-1326-50608
Applied for TLD (string)	.FOOD

Response:

Thank you for the opportunity to provide further information regarding our application for the .food gTLD. Scripps Networks Interactive, Inc. is a publicly-traded company in the United States, and is the parent entity of its solely-owned subsidiary Lifestyle Domain Holdings, LLC, the applicant for .food (collectively “Scripps”). Scripps is one of the world’s leading developers of lifestyle-oriented content for many media platforms, including television, digital, mobile and publishing. Scripps’ portfolio includes some of the most popular and famous media brands in the world, including Food Network, Food.com, HGTV, Travel Channel, Cooking Channel and DIY Network. Scripps has applied for numerous gTLDs related to its brands, including its famous FOOD brand.

The .food Application

Scripps has applied for .FOOD as a brand extension of its famous global brands FOOD, FOOD NETWORK and FOOD.COM. As stated in our application, the mission of .FOOD is to provide diverse internet users an enhanced online experience through high quality programming, content, information and authentic connected experiences centered on cuisine, cooking, recipes, restaurants, home life, entertaining, and other related concepts, topics and activities. The reputation of Scripps’ family of lifestyle brands is well-recognized as a single source for high quality entertainment, instruction, information, education and tips and tools to better enjoy life, make improvements inside and out of the home, cook, eat, travel and enjoy new experiences in an ever-increasing connected world. As result of the quality of content and level of service provided to its customers is highly regarded as the single most trusted source for lifestyle-related educational entertainment for generally and more specifically for cooking, cuisine and meal-related activities more specifically.

Internet users will benefit from the .FOOD TLD because it will provide an enhanced online experience connected to the existing family of Scripps’ lifestyle-branded .coms through the

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ability to build more personalized experiences for Internet users and provide greater control over its second level domains as a registry operator.

Maintaining distribution and content control over the top level domain is critical to ensure that the same high quality, integrity and authenticity of experience is delivered to internet users under Scripps' famous FOOD, FOOD NETWORK and FOOD.COM brands. Opening the top level domain would mean that anyone could register a domain for a small annual amount of money and exploit, confuse and infringe upon the brand equity and goodwill of the famous FOOD, FOOD NETWORK and FOOD.COM brands established by Scripps through a time period of more than twenty years and hundreds of millions of dollars in investment. This not only harms and misleads consumers, but is contrary to the global laws and policies that seek to protect both consumers and the investment made by brands in developing goodwill associated with its products and services. In this instance, as defined in more detail below, Scripps' FOOD brands are used in connection with programming, content and instruction relating to cuisine and the culinary arts provided on-line and via television networks. Accordingly, allowance of a .FOOD top level domain that is not owned and operated by Scripps in relation to its famous FOOD, FOOD NETWORK and FOOD.COM brands would directly infringe upon Scripps' trademark rights as recognized in multiple jurisdictions across the globe.

We have provided support below of Scripps' global trademark rights and evidence of the consumer connection between Scripps and its famous brands FOOD, FOOD NETWORK, and FOOD.COM. Furthermore, we have provided a policy recommendation with regard to brands that fairly balances the need to provide all internet users fair access to the internet with the need to protect brands and that supports the public policy associated with protecting and recognizing brands for developing good will, as well as following the spirit and tenets of the Application Guide Book (AGB) on which these applications were founded.

Public Interest in Scripps Operating .Food

While Scripps respectfully understands the GAC concerns, set out in the Communiqué following ICANN 46, to provide for equal access to the Internet, we urge you to consider an alternative policy for brands (using what could be considered generic terms) that have established global registrations and proof of a consumer connection between a brand name and associated products and services. We also urge you to consider the public interest that may be served in following the AGB as originally set out, that allows brands to provide a more secure and authentic experience in a closed top-level domain.

We believe that in weighing the balance of interests, the Board must consider that while a generic term is generic in one context, if applied to certain products or services and/or used extensively as a trademark, it may be afforded trademark protection in jurisdictions around the globe.

Consider for a moment the following trademarks and brand TLD applications: Live, Delta, Apple, A Family Company, Blockbuster, Frontier, Guardian, Jaguar, Juniper, Northwestern, Observer, Virgin, Yellow Pages. Each of these comprise terms which have acquired secondary meaning and distinctiveness as a brand and yet could also be considered a generic term in a different context. Additionally, there are many other famous brand trademarks such as American Airlines, Best Buy, World Market or Frosted Flakes which acquired secondary meaning and have

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been recognized as famous incontestable brands. The GNSO Intellectual Property Constituency agrees with this position. In their public comments provided on 15 March, 2013, they stated “Those categories that do NOT raise the potential concerns that gave rise to this request for comments are (a) “closed” gTLDs that identically match the applicant’s trademark for the same or related goods or services to be provided in connection with the proposed TLD – regardless of whether or not those TLDs are also ordinary dictionary terms.” They further state: “In determining whether a TLD qualifies as a “.brand,” the criteria should exactly match the criteria for inclusion and Sunrise eligibility in ICANN’s Trademark Clearinghouse. Such requirements include proof of use, and either a national or regional trademark registration; a trademark validated through a court of law; or a trademark protected by statute or treaty.” See Attached Annex One. In this instance, FOOD is a registered trademark of Scripps in multiple jurisdictions and is being used for the exact context and scope of goods and services for which that trademark was registered.

Additionally, it would be confusing, harmful to brand owners, and contrary to basic principles of fairness and equity for the GAC and the Board are to single out certain brands as closed generics and not others. While we acknowledge that brand rights of these terms may give a brand control over that top level domain, the greater good as a policy should be considered. It is also important to consider that there is no restriction in applying for these terms under a .com or under a .cc, and the lack of such a restriction has not curbed competition, innovation or consumer access to information. As clearly stated in the public comments provided by Amazon on 7 March, 2013, “Because the new gTLDs raise no more competition concerns than do registrations in .com or .us, ICANN should not allow a belated claims of competitive impact to derail this years-long process.” See Attached Annex Two.

Ultimately, we understand you must address the policy question: “why should you allow a brand to proceed as a closed brand if it could also be considered a generic term?” The answer is clear: (i) to support a global trademark system that recognizes consumer goodwill associated with a brand and intends to avoid confusion or misleading consumers; (ii) to acknowledge and respect the investment made by brand owners in that goodwill, integrity and brand equity, (iii) because consumers will likely have a better experience with the brand if there is an authentic top-level (i.e. who is better situated to ensure authentic, safe and secure environment), (iv) because there is still a wide open landscape of other open top level domains to provide for consumer choice without infringing on a famous global brand (i.e. in this instance .restaurants, .pizza, .cafe, .bar, .coffee, .cooking, .kitchen, .eat, .health, .recipes, .fish, .wine, .pub, . or any of the other 900+ new open generic terms to launch, and (v) because new opportunities will be created to apply for other related products in future rounds of gTLDs. Ultimately, the question is: are you creating a better internet environment by opening this domain to anyone, including bad actors, or is honoring a global brand furthering the goals of the gTLD program?

Accordingly, we recommend that the Board consider a policy for brands which have developed secondary meaning in an otherwise generic or descriptive term, a policy which affords owners the ability to protect their brands and consumers through operation of a closed TLD, so long as the brand owner has sufficiently provided evidence of: (i) a valid trademark in more than one jurisdiction, (ii) supporting evidence of consumer connection to the brand, and (iii) longstanding use of the brand and substantial investment in building brand loyalty and equity. This proposed approach would further trademark law and policy by protecting consumers from confusion

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caused by top level domains open to anyone and by acknowledging the goodwill and integrity companies have built through substantial investment in their brands.

Additionally, in support of this position, the final AGB contemplated such applications and permitted brands to invest in new top-level closed domains, a process in which all GACs and the Board participated. To now change the rules after substantial time and investment has been made would be inherently unfair and would be contrary to long-standing global trademark law and policy. In fact, in the GNSO meeting held 14 February 2013, this exact issue was discussed with regard to "closed generics". Pursuant to the transcript, Councilor Jeff Neuman, stated that the GNSO had discussed this exact issue and had agreed that there would be no opposition if, for instance, Kraft Foods had applied for .food. While the Board must consider the fair access to the internet and create a fair and equal balance of power, the purpose of the expansion was to create more consumer choice, as well as foster innovation by brands to utilize the internet in more meaningful ways to connect with consumers. If the brand is offering further assurances to protect internet users and provide an authentic and trusted source for content, information and experiences related to its brand name, then the Board should permit such brands to proceed, as doing so fosters the goals of the expansion.

As rightly noted in the Amazon public comment response on the issue of closed generics, the frequently asked questions about the gTLD application process supported this very idea: "9.3 If I want register a gTLD solely for my own use, for example, solely for use by my company, partners, consultants, shareholders, auditors, etc., can I limit the issuance of second level domains to those individuals? Can I refuse to accept applications for second level domains from members of the public in general?"

Yes. The applicant is responsible for setting the business model and policy for how they will use their gTLD, so long as the registry is in compliance with the terms of the registry agreement." See Attached Annex Two.

Internet users benefit more by these brands operating top level domains to create more trusted experiences. Left open to the wild west of typosquatters, and cyberquatters or fraudulent users, internet users will be harmed rather than helped. Additionally, the vast new opportunities on the internet create substantial opportunities which will not be limited by allowing brands to proceed.

Trademark Rights in the Famous Brand FOOD

In further support of our statements and positions above, we have provided a brief overview of our global trademark rights below:

- Trademark rights are held by Scripps in the mark "FOOD" for "entertainment services, namely, an on-going audio and visual program distributed over television, satellite, wireless, audio and video media, fiber optics, cable, and a global computer network in the fields of cooking and culinary arts, health, fitness, and nutrition." The mark has been registered on the Principal Register in the United States as Trademark Registration No. 4,049,665 since 01 November 2011.
- Trademark rights held by Scripps in the mark "FOOD" for "providing information via a global computer information network in the fields of cooking and culinary arts." The mark has

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been registered on the Principal Register in the United States as Trademark Registration No. 3,658,544 since 21 July 2009.

- Trademark rights held by Scripps in the mark "FOOD" for "entertainment services in the nature of ongoing television programs in the field of cooking and culinary arts, health, fitness and nutrition; production and distribution of television programs." The mark has been registered on the Principal Register in the United States as Trademark Registration No. 3,658,543 since 21 July 2009.
- Trademark rights held by Scripps in the mark "FOOD" for "cable television broadcasting services." The mark has been registered on the Principal Register in the United States as Trademark Registration No. 3,658,542 since 21 July 2009.
- Scripps also holds other marks on variants of FOOD, including "FOOD.COM" and "FOOD NETWORK," among others. These marks are registered in seventy-five (75) or more countries around the world for more than twenty years. A complete description of the FOOD and FOOD-related portfolio of marks held by Scripps is provided and attached.

We offer the following supporting positions for our trademark rights and consumer connection with FOOD to the famous FOOD, FOOD NETWORK, and FOOD.COM brands.

1. Scripps' acquisition and use of rights in the FOOD mark(s) has been bona fide as evidenced by the fact that those marks have been registered in more than seventy-five jurisdictions, in many instances for more than twenty years, in identifiable and legitimate classes of goods and services that have consistently been associated with the FOOD brand including, but not limited to, television broadcasting and entertainment services, online entertainment and information services, sweepstakes and contests, and other related goods and services.
2. In addition to the specific registration evidence as bona fide use, Scripps has been operating its famous television network under the brands FOOD and FOOD NETWORK for twenty years, and its television programming is currently watched in over 150 countries around the world, including 24 hour networks in the U.S., Great Britain, Asia, India and Africa. Consumer research has ranked Scripps' Food Network (which is branded on-air as "FOOD,") as the #1 favorite ad-supported cable channel in the United States, and international distribution of Scripps' FOOD programming continues to grow at a fast pace given the worldwide popularity of its content. Scripps' FOOD branded programming is enjoyed by almost 100 million television subscribers in the United States alone, and tens of millions more individuals throughout the world. Scripps' foodnetwork.com website averages over 225 million visitors each month, and Scripps' FOOD brand is the #1 brand relating to cooking and the culinary arts in social media with over 5 million collective fans and growing. Scripps expends approximately \$30 million per year marketing its FOOD and FOOD NETWORK branded shows and products, and Scripps' programming is often the subject of considerable attention from other branches of media, including coverage in leading newspapers, magazines and radio and television talk shows. Further, Scripps' FOOD brand represents more than eight hundred million dollars (USD \$800,000,000) in annual revenue.
3. In addition to Scripps' famous television network, Scripps has been operating a well-known website featuring recipes and information on cuisine and meal planning under the brand

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FOOD.COM since 2010. That website currently enjoys over 20 million visitors each month, and the brand has a rapidly-growing social media following of over 300,000 fans.

4. Scripps' FOOD and FOOD-variant brands have developed unique and distinctive meaning as the one authentic source for high quality, trusted programming, instruction, advice, products and services relating to cuisine and the culinary arts. Internet users and consumers around the world regularly rely upon the goodwill and reputation associated with Scripps' FOOD brands in seeking out culinary content and advice. If the .FOOD gTLD were to be available to another party to resell second string domains to the general public on an unrestricted basis, it would irreparably damage the goodwill associated with Scripps' FOOD and FOOD variant brands and the products and services provided by Scripps by eroding consumer confidence in the brand as an authoritative source of information, programming, content and advice, and would ultimately confuse and mislead consumers into believing that the content, information and/or products in the .FOOD top level domain is provided by Scripps. Internet users and consumers will not only be confused, but harmed as a result of such confusion.

5. FOOD is commonly known by consumers as the famous FOOD brand as a source indicator to Scripps Networks high quality programming and content. In addition to the viewership and social media metrics already cited, as further evidence of the consumer connection between the FOOD marks and Scripps, it is telling that the first organic search result from popular web searches for "food" is Scripps' website.

6. If .FOOD were to be open to second string domains, the millions of consumers with known source identification to FOOD will be confused and potentially harmed. Whereas, Scripps' intended use of the top level domain is to provide internet users and consumers a safe, authentic environment to find content about cooking, cooking instruction, food preparation, entertaining and lifestyle related content associated with meals, with the security of knowing it is associated and connected with the famous FOOD brand. The goodwill associated with that famous FOOD brand is based upon more than twenty years of global operations and substantial investment in building that brand loyalty. Global trademark policies support protecting the investment made to acquire that goodwill and recognize the secondary meaning that is derived when that investment is made. In support of the above, we have attached a list of the Food Trademarks. More evidence and support can be provided if needed for your review of this matter.

In summary, the public will not be harmed and, in fact, will benefit from Scripps operating the top level domain .FOOD, as allowing Scripps to do so would: (i) demonstrate ICANN's support of a global trademark system that recognizes consumer goodwill associated with brands and avoids consumer confusion; (ii) recognize companies that invest in the goodwill, integrity and loyalty associated with their brands; and (iii) provide consumers a better experience as an authentic source indicator rather than misleading into a safe and unsecure environment open to anyone. In addition, Scripps should be allowed to proceed with its application to operate .FOOD as a closed system given that: (x) there is still a wide open landscape of other top level domains available in the 900+ generics that will go live in the next year and are open systems; (y) new opportunities will be available in future rounds to apply for food related top level domains; and (z) the AGB contemplated such closed brand domains and this is changing that policy at a late date in the process, penalizing brands who invested in the future of the Internet.

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Additionally, we fully understand the safeguards requested in the GAC Communiqué under Annex 1 regarding contractual oversight. We believe our application currently supports such safeguards, but remain open to providing any further contractual commitments to meet such concerns.

We thank you for your consideration of these matters and invite further discussion with you regarding the importance of allowing our application to proceed as intended for the benefit of internet users around the globe.

Comments of the GNSO Intellectual Property Constituency (IPC)
“Closed Generic” gTLD Applications

15 March, 2013

(<http://www.icann.org/en/news/public-comment/closed-generic-05feb13-en.htm>)

INTRODUCTION

A dramatic expansion of the Internet domain name space has been planned for many years through various iterations of the New gTLD Applicant Guidebook and is now imminent, with many hundreds of applications for new generic top level domains (gTLDs) pending. A substantial number of applications involve applied-for names that appear “generic” with “closed” registration policies¹. The purpose of this comment is to consider these issues to the extent relevant and possible within established legal frameworks that are generally acceptable under international principles of law.

When ICANN announced its plan to increase the number of gTLDs available in the Domain Name System (DNS), one of its stated goals was to enhance competition and choice.² Consistent with the rules as established for introducing new gTLDs by ICANN through its New gTLD Applicant Guidebook (the “Guidebook”), many applicants filed applications for top-level domains for common industry terms with the stated goal of controlling the domains as “closed” registries.

The IPC is pleased to provide the following comments on this important issue³.

A. What is a “Generic” string?

The IPC recommends that in determining whether a TLD is considered “generic” there must be an initial analysis of whether the applied-for TLD is a word that is a genus of a quality, feature, function, or characteristic of the stated mission and purpose of the applied-for TLD in its answer to question 18(a). We recognize that this analysis is not a bright line analysis and there are several nuances to the relatively straight-forward test set forth above.⁴ For instance, a word that has been used on a wide range of different types of products or services that are not within the same species may be less likely to be considered generic. *See 2 J. Thomas McCarthy, McCarthy*

¹ See Discussion *infra* regarding “what is a ‘generic’ string?”

² See, <http://newgtlds.icann.org/en/about/program>

³ IPC President Kristina Rosette did not participate in the discussions or the drafting of this comment. IPC member Intellectual Property Institute of Canada also wishes to be on record as abstaining on this topic.

⁴ Compare, for instance, the holding of *In re Reed Elsevier Properties Inc.*, 482 F.3d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007) (LAWYERS.COM generic for “providing an online interactive database featuring information exchange in the fields of law, legal news and legal services”) with *In re Steelbuilding com*, 415 F.3d 1293, 75 USPQ2d 1420 (Fed. Cir. 2005) (STEELBUILDING.COM not generic for “computerized on line retail services in the field of pre-engineered metal buildings and roofing systems”).

on *Trademarks and Unfair Competition* § 12:23 (4th ed. 2009). Moreover, a proper analysis requires an in-depth factual investigation of the relevant public's understanding of the alleged generic term.⁵

Additionally, the weight given to the analysis will depend upon the intended purpose of the TLD. When the generic term describes the class, certain courts have found such use to be descriptive rather than generic. *In re Waverly Inc.*, 27 U.S.P.Q.2d at 1623. In *In re Waverly Inc.* the Board found that the mark MEDICINE was not generic for medical journals, but rather descriptive. *Id.* In reaching this decision, the Board noted that “[c]ourts have been reluctant to find a magazine title generic, perhaps in part because the magazines in such cases were not literally the class title designated but were *about* that class.” *Id.* at 1622 (quoting *CES Publishing Corp. v. St. Regis Publications, Inc.*, 531 F.2d 11, 188 U.S.P.Q. 612, 615 (2d Cir. 1975) (emphasis in original)). The Board in *In re Waverly Inc.* considered the competing interests of allowing magazine subscribers to more easily locate publications (by tolerating greater suggestiveness in magazine titles), enabling subscribers to differentiate among publications in the same field (by allowing registration of publication names whenever appropriate), while still protecting competition among publications (by forbidding registration of marks that would foreclose competition). *Id.* at 1623. As a result, it is possible that an applied-for closed TLD with a purpose to provide information on that genus may be considered non-generic.

B. Two categories of applications for gTLDs do not present the concerns that gave rise to this request for public comment.

Traditional principles of trademark law provide a foundation for distinguishing among categories of gTLDs, and identifying whether any categories may require further review. It is necessary to distinguish between those categories of new gTLDs that are *prima facie* consistent with traditional legal principles and other categories of applications. Those categories that do NOT raise the potential concerns that gave rise to this request for comments are: (a) “closed” gTLDs that identically match the applicant’s trademark for the same or related goods or services to be provided in connection with the proposed TLD - regardless of whether or not those TLDs are also ordinary dictionary terms (i.e. “.brand”); and (b) “closed” or “restricted” TLDs⁶ that consist of terms used by communities or associations and will be used by members of the community or association (whether the term is owned by an association or eligibility is limited to members of the category described by the term—e.g. banks in .bank or charities in .charity).

⁵ In the U.S., the Trademark Manual of Examining Procedure and relevant case law require substantial proof of examples of use of the generic term clearly used by both the applicant or competitors to refer to a genus or class of the products or services. TMEP § 1215.05 (citing *In re DNI Holdings Ltd.*, 77 U.S.P.Q.2d 1435 (TTAB 2005)).

⁶ While IPC’s comments do not propose a definition of “closed”, we stress that “closed” and “restricted” are not synonymous terms and should not be treated as such.

As evident above, not every dictionary term is of relevance because the majority of applications that seek to employ “closed” registration policies are for terms which, when viewed as trademarks, do not hinder competition, because they are not generic with respect to the goods and/or services sold in connection with those terms. For this reason, we again strongly encourage ICANN to recognize a specific “.brand” category of TLDs for which the registry would presumptively be able to set the policy requirements for second-level registrations. ICANN has repeatedly referenced “.brand” TLDs on its website and in its program materials dating back to its first announcement of new gTLDs in 2008.⁷

Such a category could conceivably form a replacement to the single-registrant-single-user exception from the Registry Operator Code of Conduct, an exception that was designed, at least in part, for the “.brand” registry - but was drafted more broadly, in a way that allowed “closed generic” registries to claim an exemption from the Code of Conduct. In determining whether a TLD qualifies as a “.brand”, the criteria should exactly match the criteria for inclusion and Sunrise eligibility in ICANN’s Trademark Clearinghouse. Such requirements include proof of use, and either a national or regional trademark registration; a trademark validated through a court of law; or a trademark protected by statute or treaty.

An additional group of applications appear to involve terms controlled by communities or associations where protection is again consistent with the traditional legal framework.

Similarly, a registry for a “generic” term that incorporates eligibility requirements relevant to the meaning of the term itself (for example, a .pomegranate registry limited to pomegranate growers) is permissible and would not fall under the definition of “closed generics”. This might be particularly appropriate in regulated industries (for example, a .bank registry limited to chartered banks or a .charity registry limited to bona fide charities in good standing), or in sectors where there are particular sensitivities to fraud, counterfeiting, IP infringement, and other consumer-abusive behaviors.

C. Concluding Observations

The IPC notes that some of its members have submitted public comments through their respective IP Organizations, companies or law firms or as individuals. We refer ICANN staff to these submissions for additional input and consideration on this complex topic.

The IPC believes that any decision by ICANN on this issue must be categorically without prejudice to determinations by national trademark offices and courts with respect to (i) the concept of a prohibition of generic terms as trademarks, and (ii) their evaluation of domain names (whether at the top, second, or other level) as trademarks.

⁷ See ICANN New gTLD Program materials (slide 7) at: <http://archive.icann.org/en/topics/new-gtlds/basics-new-extensions-21jul11-en.pdf>

Finally, the IPC reiterates its request for ICANN to disclose any third-party analysis or independent research commissioned by ICANN in association with this public comment topic.

Thank you for considering our views on these important issues. The IPC looks forward to participating in any policy-development or implementation steps taken by ICANN in connection with so-called “closed generics” as well as the post-delegation review of new gTLDs, and their impact on consumer trust, choice, and competition.

Respectfully submitted,

Steve Metalitz, IPC Vice President



March 7, 2013

Dr. Steve Crocker, Chairman of the Board
Mr. Fadi Chehadé, President & CEO
Mr. John Jeffrey, General Counsel
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Public Comment on "Open" v. "Closed" Registry Models

Dear Dr. Crocker, Mr. Chehadé, and Mr. Jeffrey,

Thank you for the opportunity to participate in ICANN's request for public comments on the subject of whether or not ICANN should retroactively limit certain "closed" generic top level domain ("gTLD") strings. We would like to address three issues. First, applicants relied on the rules set by ICANN in the Applicant Guidebook. Second, ICANN should not disfavor specific business models over others. Finally, ICANN should allow applicants to innovate and develop new opportunities through expansion of gTLDs.

Amazon is committed to working with ICANN, national governments and others toward the development of the Domain Name System ("DNS"). We believe that the original intentions behind this expansion – to innovate and create choice and change in the DNS – will benefit not only those who take part directly in the process, but, more importantly, consumers and businesses globally.

Amazon

Amazon's vision is to be earth's most customer centric company; a place where people can come to find and discover anything they might want to buy online. We fully support ICANN's goal of promoting innovation and competition through the expansion of the gTLD space.

An important factor behind Amazon's applications for new gTLDs is to find new and innovative ways, mechanisms, and platforms to surprise and delight our customers.¹

¹ Amazon serves four primary customer sets: consumers, sellers, enterprises and content creators. We serve consumers through our retail websites and focus on selection, price and convenience. We offer programs that enable sellers to sell their products on our websites and their own branded websites and to fulfill orders through us. We serve developers and enterprises of all sizes through Amazon Web Services (AWS), which provides access to technology infrastructure that enables virtually any type of business. Amazon serves authors and independent publishers with Kindle Direct Publishing, an online platform that lets independent authors and publishers choose a 70% royalty option and make their books available in the Kindle Store. Amazon's own publishing arm, Amazon Publishing, offers authors another outlet to publish their books. Amazon also serves authors, musicians, film makers

Innovation is one of the core drivers behind ICANN's opening of the gTLDs. Amazon intends to bring this same philosophy and focus to its new gTLDs.

Applicants Relied on Rules Set by ICANN

The new gTLD Program has its origins in the "carefully deliberated policy development work of the ICANN community."² In 2005, ICANN's Generic Names Supporting Organization ("GNSO") began a policy development process to consider the introduction of new gTLDs. In 2008, the ICANN Board adopted 19 specific policy recommendations for implementing new gTLDs. After approving the policy, ICANN undertook an open, inclusive, and transparent implementation process to address stakeholder concerns, such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work included public consultations, review, and input on multiple draft versions of the Applicant Guidebook ("AGB").³

In June 2011, ICANN's Board of Directors approved the Applicant Guidebook and authorized the launch of the new gTLD Program. The Program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs.⁴

During the development of the Applicant Guidebook, the question of what types of business models should be allowed, including "open", "sponsored", "closed", "brand", and "community" applications were discussed and debated in various fora. In the end, the only differentiation the ICANN community chose to recognize in the Applicant Guidebook is the need to recognize specific "community" applications. All other business models for operating a domain – "open", "sponsored", "closed", and "brand" – fall under the scope of a standard application which, according to the Applicant Guidebook can be used for "any purpose consistent with the requirements of the application and evaluation criteria," and "may or may not employ eligibility or use restrictions."⁵ Ultimately, the choice of business model is left to the applicant.⁶

and other content creators through CreateSpace, which provides on-demand publishing and manufacturing for independent content creators, publishers, film studios, and music labels.

² AGB, Preamble.

³ <http://newgtlds.icann.org/en/about/program> The AGB was developed after five drafts, extensive input by the IRT, GNSO, ALAC and GAC, and nine separate public comment periods. <http://newgtlds.icann.org/en/about/historical-documentation>

⁴ <http://newgtlds.icann.org/en/about/program>

⁵ AGB, 1-27. During the summer of 2011, ICANN released an instructional video for organizations considering whether or not to apply for a new gTLD. The video states:

"If your organization runs its own TLD, your organization sets the rules. You can make your own TLD as inclusive or exclusive as you want. For example, you can sell second level domain registrations at a price you choose. Or you could decide not to sell them at all. Maybe you issue them only to your employees. You could offer specialized security services. Or perhaps you want all the web addresses in your TLD to work with your native alphabet. It is up to you."

Years of deliberations went into developing the rules guiding the new gTLD Program, and over 1900 applications were submitted based on the Applicant Guidebook, but some are now calling for significant and retroactive changes to the rules. These calls for change have only occurred, however, after it became clear who applied and for what strings. We do not think it is appropriate to retroactively change rules that have been debated and discussed for more than four years.⁷

Applicants relied in good faith on the rules and limitations set forth in the Applicant Guidebook. Applicants have expended significant time, money and resources on preparing and defending their Applications based on this reliance. Changing direction at this time will undoubtedly result in delays for all applicants, and a loss of confidence in the process itself.

ICANN Should Not Disfavor Specific Business Models Over Others

Under the current rules, ICANN evaluates an applicant's "proposed registry services for any possible adverse impact on security or stability."⁸ A number of independent experts and groups assist in the evaluation of applications and registry services as they relate to security and stability, including String Similarity, DNS Stability, Geographic Names, Technical Evaluation, Financial Evaluation, and Registry Services Technical Evaluation Panels.⁹ None of the panels is tasked with reviewing the purpose or business model of the registry.

Those that want to prohibit only certain "closed" gTLDs based on an assumed understanding of business models must recognize that such a policy would require ICANN to make judgments on difficult and unsettled issues. This raises a number of questions.

Who would make the determination that a term is "generic" and in what language? Who would determine what is "closed"; whether something is actually a trademark or used as a generic term; or whether using just a portion of a trademark in a string would be "generic" use or "brand" use?¹⁰ Does use of a term in its generic sense override use of a term as a trademark if there are

Overview: Get Ready for the Next Big Thing, ICANNnews Channel

<http://www.youtube.com/watch?v=AybZsS3NmFo> (starting at 1:52). The video separately discusses community, IDN, government and brand gTLDs.

⁶ From the New Generic Top Level Domains, Frequently Asked Questions. See Appendix.

⁷ Should the ICANN Board want to seriously consider a prohibition on certain business models, any such change would be a material change of the Applicant Guidebook and must go through the appropriate policy development process. In any event, such changes if approved through appropriate channels should only apply to applicants in future rounds. The current AGB lists certain strings that are designated ineligible for delegation. "Future application rounds may differ according to consideration of policy advice." AGB, 2-10.

⁸ AGB, 2-24.

⁹ AGB, 2-29-30.

¹⁰ Granting an applicant the right to run a registry with a string that reflects a generic term does not in and of itself grant trademark rights or something akin to trademark rights. Such rights arise from use of a mark in a certain way and are subject to national laws. Some critics have suggested that granting these rights will result in "additional IP rights." It is not for the ICANN community to determine whether a use of a term is use sufficient to evidence rights

competing interests? What happens to a trademark that becomes generic through use? What about generic terms that have several meanings? If ICANN starts acting as the gate keeper of business models for the top level, why would it not also be subject to proscribing similar rules in the second level?

ICANN should avoid making any changes based on assumptions about applicant business models and stay focused on its core mission – the security and stability of the Internet – and the timely launch of all new gTLD strings.

ICANN Should Allow Innovation to Develop

Recently, concerns have been raised about whether allowing gTLDs could potentially affect competition and consumer choice. ICANN has a long and successful history with “sponsored” domains such as “.mil”, “.gov”, “.museum”, “.coop”, and, more recently, “.cat” allowing users and providers to be confident that the websites and services operating in those gTLDs are in compliance with the rules established for that domain.

The use of generic terms in the second level have traditionally been allowed by ICANN without question over competition issues. Why should a company be able to own “widget.com” and not “.widget”? In the second level, third parties can still register alternative names in alternative spaces. Currently .com may be considered more “valuable” space, but that does not create a competition issue for the owner of the generic second level domain. Similarly, ownership of a “closed” or “sponsored” top level domain does not preclude an entity from registering a second level domain in an alternative space nor does it preclude an applicant from applying for alternative top level domain strings in future rounds.¹¹ Because the new gTLDs raise no more competition concerns than do registrations in .com or .us, ICANN should not allow belated claims of competitive impact to derail this years-long process.

Amazon does not understand how the allocation or use of a gTLD or an SLD could have an impact on competition in a relevant market segment. There is no evidence that past “closed” domains have led to any market power. Any impact would occur through the ultimate actual use, and not allocation and use of the name *per se* (or else all registry/registrar activities, including in “open” spaces, are anti-competitive by nature). ICANN must wait until each gTLD is in use, and then relevant competition authorities -- which have significant experience and robust procedures and tools addressing issues like market definition and the competitive impact of innovative technologies -- can measure actual behavior against relevant competition laws. Therefore, we urge ICANN to leave competition issues to the appropriate authorities enforcing the laws of their respective jurisdictions.

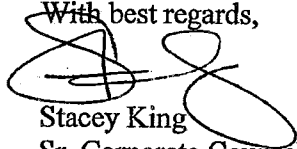
as a trademark, just as it is not for the ICANN community to determine whether future use of a potential business model is anti-competitive. These are determinations that must be left to the appropriate national legal authorities.

¹¹ To take this to another level, certain companies offer paid registrations in a third-level subdomain, operating their second level as a “registry”. The new gTLDs create no more competition issues than do these second-level registries.

Conclusion

Amazon supports ICANN's goal of opening the top-level to allow for competition and innovation that will benefit Internet users across the world, and controls will still apply for responsible companies.¹² We recognize that the relevant national laws apply to all participants in the DNS process throughout the lifecycle – ICANN, current and future registries, or registrars - and do not believe there is any justification for retroactively changing the rules based on conjecture. We look forward to developing the new gTLDs in innovative ways that will benefit users across the world as we continue to work with ICANN, governments, and the greater Internet community.

With best regards,



Stacey King
Sr. Corporate Counsel, Amazon

¹² "One of the reasons ICANN is opening the top-level space is to allow for competition and innovation in the marketplace. ICANN recognizes that business models may evolve as the market matures." Excerpt from Questions and Answers, <http://newgtlds.icann.org/en/applicants/customer-service/faqs/faqs-en>.

Appendix

“9.3 If I want to register a gTLD solely for my own use, for example, solely for use by my company, partners, consultants, shareholders, auditors, etc., can I limit the issuance of second level domains to those individuals? Can I refuse to accept applications for second level domains from members of the public in general?”

Yes. The applicant is responsible for setting the business model and policy for how they will use their gTLD, so long as the registry is in compliance with the terms of the registry agreement.

9.4 If I want to register a gTLD solely to promote my own brand and undertake my own marketing plans, can I refuse applications for second level domains from my competitors? Can I also refuse applications for second level domains from individuals who appear to be cybersquatters or scammers?

Yes. The applicant is responsible for setting the business model and policy for how they will use their gTLD, so long as the registry is in compliance with the terms of the registry agreement.

....

9.6 Will applications be categorized as “sponsored” or “unsponsored” in this New gTLD application round?

No, applications will not be categorized as “sponsored” or “unsponsored” in this new gTLD application round. ICANN carried out 2 previous new gTLD application rounds. Sponsored and unsponsored TLDs were part of these 2 previous programs. These distinctions are not relevant to the New gTLD program. Under the New gTLD program, a community-based designation can be made on any application. Please refer to section 1:2.3 of the Applicant Guidebook for more information on community-based designation. “

[Http://newgtlds.icann.org/en/applicants/customer-service/faqs/faqs-en](http://newgtlds.icann.org/en/applicants/customer-service/faqs/faqs-en) (visited February 27, 2013).