

March 7, 2013

Mr. Fadi Chehadé, President & CEO, ICANN
Dr. Steve Crocker, Chairman, ICANN Board of Directors
Mr. Cherine Chalaby, Chair, ICANN's New gTLD Program Committee

CTIA-The Wireless Association® is the international nonprofit membership organization that has represented the wireless communications industry since 1984. CTIA represents companies and organizations associated with the wireless industry globally, including wireless carriers, suppliers, providers and manufacturers that contribute to wireless data services and products.

CTIA has not submitted comments to ICANN before, but the potential impact of the New gTLD Program on our community has triggered our comments on the "Closed Generic gTLD Applications" proceeding now open.

We join a rapidly growing group of companies, organizations and individuals who oppose Closed Generic gTLDs and the power they grant to Registries for exclusive authority and potential misuse within the Internet domain name system. The global community expects ICANN to adhere to its principles to promote competition and consumer trust. ICANN must avoid taking steps that would permit potentially anti-competitive activities in the New gTLDs. CTIA urges ICANN to provide options that will allow New gTLD Applicants seeking Closed Generic gTLDs to bring their applications into compliance with the non-discrimination rules of the New gTLD Program.

I. ICANN Should Adhere to Its Published Rules and Principles of Competition and Consumer Protection

In opening the New gTLD Program, ICANN published rules in its Applicant Guidebook that reflect an approach of equal access and non-discrimination. In particular, the "Base Registry Agreement," to which all New gTLD applicants must agree, requires Registries to: "provide non-discriminatory access to Registry Services to all ICANN accredited registrars..." and bars any Registry from "register[ing] in its own right, except for limited management or technical purposes, or subject to the exception of section 6, of the Registry Code of Conduct." Registry Agreement 2.9a, and Specification 9, respectively.

A narrow exception to the Registry Code of Conduct is available to applicants seeking *exclusive use* of all domain names in their applied-for TLD. Published at the end of the Registry Code of Conduct, this exemption is narrowly tailored to apply only in limited circumstances:

Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

Further, the grant of a fundamental generic term to a single member of the industry violates principles and norms of international trademark law. Trademark laws around the world prohibit granting any exclusive rights or other protections to generic words. U.S. trademark law, for example, bars the registration of any mark that is generic or “merely descriptive” of the goods or services of the trademark applicant. 15 U.S.C. Sec. 1052(e). Trademark law further provides for the cancellation of any trademark that becomes, over time, the generic name for a particular good or service. 15 USC Sec. 1064(3). Many of CTIA’s member companies hold extensive international trademark portfolios and CTIA respectfully submits that the same protections for generic words, and restrictions on limitations, exist around the world.

III. ICANN Should Either Deny the Challenged Closed gTLD Applications, or Seek Their Modification to Open TLDs

In light of these concerns, CTIA respectfully submits that ICANN should deny all applications for Closed Generic gTLDs or, at a minimum, require applicants for those gTLDs to withdraw their applications or modify them to be open. Such an approach would foster competition and remedy the potential for harms to competitive markets that will arise from the operation of the specified Closed gTLDs.

By providing applicants with these options, ICANN would be offering applicants for Closed gTLDs a remedy originally proposed by Google. Google, which applied for a variety of open and closed TLDs under the name of its wholly-owned subsidiary, Charleston Road Registry, offered to become an “Open TLD” if its application as a “Closed TLD” was denied:

“Charleston Road Registry intends to apply for an exemption to the ICANN Registry Operator Code of Conduct and to act as the sole registrar for the proposed gTLD. Given that the proposed gTLD is exclusively intended for use in connection with Google’s services, Charleston Road Registry believes that there is a reasonable case for such an exemption. Should ICANN not approve this proposed exemption, Charleston Road Registry will facilitate a fair and equitable registrar process, providing open access to any registrar who meets ICANN accreditation guidelines.”

CTIA supports the remedy proposed by Google that would permit any applicant for a Closed Generic TLD to modify their application and agree to operate as an “Open TLD.” In the alternative, ICANN should offer all Closed Generic TLD applicants the option of withdrawing their applications if they do not wish to modify their applications to operate as an “Open TLD.” CTIA further requests that ICANN not only enforce “open access to any registrar who meets ICANN accreditation guidelines,” as Google provides, but require the Registry to accept registrations from all Registrants that meet clear and non-discriminatory criteria corresponding to the TLD string and the generic goods, services and marketplaces the TLD string represents.

Registry Code of Conduct, Specification 9, Section 6.

This exception was widely understood to allow companies with well-known corporate names and brands to apply for “Closed Brand” TLDs, *e.g.*, dot-Sony or dot-Nike. It was certainly not the intent or understanding of many in the ICANN Community, and organizations such as CTIA outside the ICANN Community, that the exception would allow a Registry to bar all competitors, or discriminate among competitors, in their access to domain names in a TLD whose “string” is generic or common for the services, products, industries or marketplaces of the relevant commercial sector.

II. Proposed Closed Generic New TLD Applications Are Contrary to the Public Interest Because They Violate Basic Principles of Commercial and Trademark Law

A Closed Generic TLD can never be “in the public interest” as ICANN’s rules require. Equal access and non-discrimination are hallmarks of the ICANN system and of open and fair competition. If Closed Generic TLDs are granted, a single competitor will receive the exclusive right to register all the domain names in the generic space itself. Should that occur, one firm in a competitive market would have the ability to discriminate by restricting access to its competitors.

Potential harms from a Closed Generic TLD include the ability to deny competitors the opportunity to register and use industry-relevant gTLDs and control of industry-relevant generic terms, which can place competitors at a disadvantage in the corresponding direct navigation and online search markets. Moreover, certain specific proposed Closed Generic TLDs are inherently confusing and potentially deceptive to consumers. Given the generic nature of the TLD, consumers seeking out products, services and information within a particular area like mobile telecommunications will likely believe they are engaging with the full set of providers in the marketplace when, in fact, they are only receiving information, goods and services provided by a single company.

The following generic terms are both basic and ubiquitous within the wireless marketplace, yet multiple applicants have submitted closed generic applications to “wall them off” for their exclusive use: .MOBILE, .PHONE, .CALL, .TALK, .APP, .CLOUD and .SEARCH. Each of these terms is central to the wireless and telecommunications industry’s highly competitive market. Yet, in contravention of ICANN’s public interest rules, certain applicants seek ICANN’s permission to operate these specified TLDs in a closed and potentially anti-competitive manner.

These are not hypothetical concerns. Indeed, Dish DBS Corporation makes the following commitment, should its application for .MOBILE be granted:

Applicant plans to operate the proposed .mobile gTLD as a restricted, exclusively-controlled TLD and as such, will not be commercially offered for registration by the general public. Thus, Applicant and its affiliated entities will have exclusive ownership and control over all second-level registrations within the TLD.

Public portions of the Dish DBS application available at <https://gtldresult.icann.org/application-result/applicationstatus>

Conclusion:

CTIA appreciates this opportunity to provide ICANN with comments on the implementation of its New gTLD Program. Should you have any questions regarding this letter or the options it offers, please contact the undersigned.

Respectfully submitted,



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CTIA-The Wireless Association® is an international nonprofit membership organization that has represented the wireless communications industry since 1984. CTIA-The Wireless Association® offers membership to companies and organizations associated with the wireless industry, including wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products. CTIA advocates on behalf of its 256 members at all levels of government. The Association coordinates the industry's voluntary efforts to provide consumers with a variety of choices and information regarding their wireless products and services. This includes the voluntary industry guidelines; programs that promote mobile device recycling and reusing; and wireless accessibility for individuals with disabilities.