

Financial Industry Members Oppose Closed Generic Top-Level Domains as Impeding Competition, Against the Public Interest, and Contrary to Internationally-Recognized Principles of Law

TD Ameritrade, Charles Schwab & Co., Inc., and Teachers Insurance and Annuity Association of America (TIAA) (collectively, the “Commenters”) urge ICANN to adopt a strict rule prohibiting closed registration of generic terms as gTLDs, such as the proposed applications for .ira, .mutualfunds, .retirement, and .broker. This includes terms defined by statute or other legal authority, such as the acronym “IRA,” which has specific meaning under United States tax law.

By definition, a generic word, phrase, or acronym that is a common name for a genus of goods or services can be used by anyone and everyone and cannot be registered or otherwise protected as a trademark for exclusive use by a single company. This principle is firmly established in the laws of many jurisdictions around the globe. For example, under the Madrid Agreement and Protocol (which has 89 member countries), if a term is generic, that is an absolute ground for refusing international registration. (See <http://www.wipo.int/madrid/en/faq/refusals.html>.) Similarly, the United States Patent and Trademark Office (“USPTO”) not only prohibits trademark protection of both generic and descriptive terms on their face, but also expressly requires a disclaimer of the generic terms contained in an applied-for trademark and requires the applicant to state that no right is claimed to the term. (See 15 U.S.C. §1056; TMEP §§ 1213.03(a)-(b).) In fact, a search of the USPTO’s online database revealed at least 1,900 trademark applications or registrations in which the terms “IRA,” “mutual funds,” “retirement” or “broker” were specifically disclaimed. (Search conducted on March 7, 2013; see USPTO database at <http://tess2.uspto.gov>.) Generic terms belong to our human heritage and collective lexicon. These familiar words belong to us all.

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 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 and further harming competitors and consumers. The gTLD process should not lend itself to simply taking more popular, descriptive terms out of public use.

Given the steps ICANN has taken to prevent trademark infringement and otherwise serve the public interest, the attempts by some applicants to assume exclusive control of generic words on the Internet raise serious concerns of propriety and responsible internet governance, regardless of whether such attempts are intended to circumvent trademark law. The very idea of a closed gTLD contradicts ICANN's core values. Core Value number 6 provides that ICANN is to foster the introduction and promotion of "competition in the registration of domain names where practicable and beneficial in the public interest." (See <http://www.icann.org/en/about/governance/bylaws#>, last visited March 6, 2013.) Restricting the use of generic words for the gain of any one business at the cost of competition, and against the interests of consumers, does not positively serve the public interest; rather, restricting in that manner is harmful to 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. For example, the term "IRA" stands for "individual retirement account" and has specific, statutorily defined meaning under United States tax law. As permitted by law, IRAs are offered competitively by a variety of commercial service providers. Allowing any one company in a particular industry to obtain proprietary rights to a statutorily-defined term by using that term as a closed gTLD would suggest to the public that the company has a unique, preferred, or even government-sponsored role with respect to the products marketed under that domain. Though such impression-creating may be an objective of closed generic gTLD applicants, it is also inaccurate and misleading to the public. ICANN's Core Values recognize the appropriate interplay between government and the private sector: "[G]overnments and public authorities are responsible for public policy and [ICANN should] duly [take] into account governments' or public authorities' recommendations." (Core Value number 11.) It is a disservice to consumers to suggest that one service provider, among many, defines and controls a genus of products defined and supervised by the government.

We recognize that similar risks may also arise in the context of individual domain names registered in established gTLDs such as .com, but the potential impact of a new gTLD string is much greater. Internet users are likely to be aware that anyone can register a <.com> domain online in a matter of minutes, for a nominal fee. A new gTLD, by contrast, requires ICANN approval and substantial resources, both for the application and for the operation of the gTLD. Moreover, 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 supported and controlled by an established, relevant institution. Thus, the stakes are higher in the context of ICANN delegation of a gTLD, and the public interest concerns must weigh more heavily than they do for individual domain names.

The global community, whether evaluated in terms of commerce, communications, or human rights, benefits from an open internet that is not needlessly hindered by a particular player's influence. Allowing a single entity to operate a domain registry using a term that is generic would give it an unfair competitive advantage and damage consumers' interests by giving that entity a monopoly over a term that belongs to the general public, in contravention of established trademark principles. Granting such a monopoly also prevents others in the same

industry from accessing or using the domain. The company would be positioned to gain an unfair advantage in direct navigation, online search, and search optimization. This monopolistic and negative competitive impact is in contravention of established principles of antitrust laws and competition. In short, the company's online offerings would become associated with the very genus of products it offers to the exclusion of offerings by other companies in the same field. Permitting use of the generic string with exclusive rights as a closed string in connection with the very products being provided would cause the individual consumer to suffer from loss of choice and from biased content delivery. Principles of international law cannot permit such an anti-competitive and consumer-harming operation.

The Commenters urge ICANN to adopt a procedure to review readily-accessible public information, for example, through common dictionary and Internet searches, to determine whether an applied-for gTLD is the term used as a common or class name for the goods or services offered by the applicant. If a term is identifiable as a common or class name for the goods or services (including, without limitation, if it is defined by statute or other legal authority), ICANN should reject the application.

We respectfully request that ICANN reject closed generic gTLD applications because of the substantial anticipated ensuing harm they would cause.

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