

Comments of NCSG members on 'Closed generic' TLD applications

March 4, 2013

As members of the Noncommercial Stakeholders Group (NCSG), we wish to express our support for a free, competitive, diverse and innovative domain name system. For that reason, we oppose any attempt by ICANN to become the world's arbiter of what constitutes a "generic word," and also oppose ICANN's suggestion that it arrogate to itself the right to decide whether applicants for generic terms in the TLD space may operate in a "closed" or "open" manner.

As NCSG stakeholders, our position is driven neither by paying clients nor by an interest in the success of specific applications. It is based on a principled commitment to the 'permissionless innovation' that has made the Internet a source of creativity and growth. Our aim is to maximize the options available to DNS users and to minimize top-down controls. We support the freedom of individuals and organizations to register domains and use them legally in any way they see fit. We support experimentation with new ideas about what a TLD can do. We see no reason to impose *ex ante* restrictions on specific business models or methods of managing the name space under a TLD.

As long-term participants in the new gTLD policy development process, we believe that closed generic applications were anticipated and allowed by the policies. We suspect that most of the opposition to closed generics comes from business interests who have discovered that they are competing with the likes of Google and Amazon for attractive generic TLD strings, and want to eliminate competitors from string contention. We also note that many registrars have an economic interest in forcing owners of potentially popular generic strings to open them to mass registration by registrars.

Nevertheless, some neutral observers and legitimate advocates of free expression and consumer rights have expressed concerns about the implications of closed generics. We believe that most of their fears are groundless, and devote the rest of our comments to answering their concerns.

Closed vs. open generic TLDs is just a business model choice

There are hundreds of applications for generic words at the top level, such as .BOOK, .MUSIC, .CLOUD, .ACCOUNTANT, .ARAB or .ART. Some of the applicants for these domains have chosen to make direct use of the name space under the TLD for their own sites rather than

offering them for broad general use. Amazon, for example, would probably make .BOOK an extension of its online bookstore rather than part of a large-scale domain name registration business; Google would probably make .SEARCH an extension of its own search engine business.

By proposing a managed or vertically integrated generic, Amazon and the others are simply choosing a business model. They propose to use their gTLD not for the sale of sub-domains but to support a set of goods or services external to the domain name industry. We see nothing inherently wrong with this. Indeed, the main purpose of the new TLD program was to promote innovation and alternative business models.

In the past, most TLD registries' business model was to sell millions of domain name registrations to anyone on a first-come, first-served basis. That horizontally separated model has served millions of consumers well. Our members support and often patronize this business model. But there is no reason it must be the *only* model. In an environment of thousands of new TLDs, some registries might want to create a specific image or environment inside a particular TLD. They might want to control registrations to maintain a reputation, or use them to support other lines of business, or even give away second-level domains to customers of their main business. The public benefits from having these options; ICANN should not pre-empt them.

Registration and restricted use of generic terms is already a common practice

Closed generics are no different in principle from Barnes and Noble registering BOOKS.COM, C/Net news registering NEWS.COM or the Scripps companies registering FOOD.COM. In all those cases, a company registered a common, generic word in one of the world's largest and most widely known global TLDs and used it to promote their own goods and services. This has not led to any notable issues related to consumer choice, market power, or attempts to prevent anyone from using the words 'books,' 'news' or 'food' in public discourse. Applicants for generic TLDs have proposed basically the same model using a top level name. We see no relevant difference between the second level and the top level of the DNS in this case.

Even if we restrict our attention to the top level, there is no relevant difference between a .BOOKS top level domain and the .MUSEUM top level domain, which ICANN has already approved. MUSEUM is a generic word, and the International Council of Museums restricts who can register in that domain. .MUSEUM is thus a "closed generic". We also think there is a resemblance between closed generics and community applications such as .ART or .ARAB. Those applications are also based on generic terms and several applicants have proposed to restrict registration eligibility in order to promote content and reputations supportive of their self-defined communities. We strongly support their right to do so, should they win the delegation.

In terms of their impact on users and the availability of names, closed generics are no different from "brand" TLDs when the brand name corresponds to a generic word. E.g., the domains

.APPLE, .DELTA and .BOOTS are generic terms, yet are also trademarked within certain industry sectors. Giving the TLD .APPLE to Apple Computer necessarily prevents some apple growers, apple lovers or people whose last name is Apple from registering a domain under .APPLE. Is this shocking or a major policy problem? Apparently no one thinks so. But if it is not a problem when brand owners do it, why does it become a problem when Amazon registers .BOOK, Google applies for .CLOUD or Toyota applies for .AUTO?

Competition and market power

Opponents of closed generics claim that acquisition of these terms by firms will limit competition in the markets signified by the generic word. It is argued that registration of the string .BOOK, for example, will give its owner an insurmountable competitive advantage in the market for book sales. Competing booksellers, it is claimed, will be severely disadvantaged if they cannot register under that TLD.

We find these claims to be hysterical and completely unpersuasive. Winning and controlling the market for books (or anything else) takes a lot more than the control of a TLD that refers to books. Buyers base their online commerce decisions on quality of product, reputation or experience with the vendor, and the content and features of the site, not just the TLD. While a clear and simple domain label related to one's trade is certainly helpful in promoting an online bookstore, no serious antitrust economist would argue that the mere possession of the .BOOK domain automatically gives its holder market power over the sale of books. Just ask Barnes and Noble, the current holder of BOOKS.COM, which is losing market share in the retail book market to the holder of the AMAZON.COM domain. The semantics of Amazon's domain have nothing to do with books, yet Amazon is winning the competition because of its better e-book fulfillment infrastructure, pricing, selection and other factors.

This example proves that there is no automatic linkage between possession of a generic domain and domination of the market signified by that domain. It also proves that viable competition for the market signified by the generic term can come from firms that possess domain names with no semantic relationship to the generic term for the industry. There is not even any evidence that the presence of a generic word in the top level has a competitive advantage over possession of the generic name in the second level.

All commercial markets can be associated with a generic descriptor (in hundreds of languages). If ICANN really believes that generic TLDs create market power and that it is ICANN's responsibility to mitigate competitive advantages that might come from their assignment, it would have to make competition policy-related decisions about thousands of industries in thousands of different geographic markets. We think this is far outside ICANN's competence and mission. We suggest that ICANN leave judgments about market power and anti-competitive behavior to legally recognized authorities operating under well-established antitrust laws.

Consumer choice

While closed generic TLDs foreclose the option of registering a name under a generic term, they can also improve the options available to consumers in markets other than domain name registration services. For example, suppose a company offering hotel booking services obtains the .HOTEL domain and restricts it to its own booking services. This means that thousands of individual hotel web sites cannot register under the .HOTEL domain. But consumers might prefer an integrated service under a single, clearly identified, trusted domain to a random grab-bag of thousands of independently operated web sites under the .HOTEL domain. Such integration and intermediation might actually improve competition among hotels, as well.

The existence of closed generics does not prevent anyone from continuing to patronize traditional open registries and registrars if they wish to, and it appears from the large number of applications that there will be plenty of those to choose from. For consumers, closed generics represent an additional option in the marketplace, a different type of platform, not a restriction of their choice.

Free expression issues

Noncommercial stakeholders have consistently tried to apply principles of free expression to domain name policy. In this long-running battle, we have resolutely maintained that domain names are a form of expression that fall under the legal protections afforded spoken and written expression, and we have steadfastly opposed efforts to extend the scope of trademark protection beyond its legal boundaries in ways that limit criticism, discussion, and product comparison.

Giving a registry vertically integrated control over the use of names in its domain is not a restriction of the general public's rights so much as it is an extension of the registry operator's right of free association and free speech. When ICANN declares that it can impose an 'open' business model on TLD registries, a business model that elevates mass sales of individual registrations above all other values, it is harming the cause of free expression by preventing TLD owners from using the domain to project a consistent message and feature the kind of content and services they want to feature. By forcing a generic name to be open to other registrations, they are forcing a registry into associations it might prefer to avoid.

As free expression advocates, we are deeply concerned about the long term implications of giving ICANN the authority to decide what is and is not a generic term and how their use should be regulated. We believe that it moves ICANN towards content regulation. The last thing ICANN needs in this politically and culturally contentious world is to insert itself into battles over the meaning and significance of non-trademarked words.

We are also disturbed by the favoritism shown to trademark holders, which gives them an unquestioned right to control the content and management of a closed generic associated with a trademark, but denies that right to anyone else using a generic term.

One of the most unfair and misguided accusations made against generic TLDs is that they would give the TLD registrant “ownership” of a generic word. This is just false. Registering a generic-word domain does not and should not vest the registrant with any exclusive rights outside the domain name system. Registering .COFFEE in the top level, for example, cannot stop anyone from uttering, printing, writing or otherwise making use of the word “coffee”. It also does not prevent someone from registering the word in the second level of open TLDs, or registering the term in other languages or scripts, or registering different strings with similar meanings, such as CAFÉ. The registrant simply gets exclusive use of the unique string COFFEE in the top level of the domain name space administered by ICANN.

The DNS is a vastly extensible resource, so there are plenty of domains to accommodate diverse names in the top, second and third levels of the DNS. By regulating the right of domain name registrants to operate closed generics, ICANN would actually limit free expression by imposing collective obligations and top-down regulations on domain owners.

Conclusion

In closing, we reiterate our responses to the two questions ICANN posed in its request for comments. ICANN asked:

- Are there objective criteria for determining whether a string is generic?
- Are there specific circumstances under which a particular TLD operator should be permitted to adopt "open" or "closed" registration policies?

The answer to the first question is No. By venturing into the dangerous business of classifying words for regulatory purposes ICANN would be creating a new form of centralized, global content regulation that would pose long-term threats to freedom of expression. We would prefer to keep ICANN out of that territory altogether.

The answer to the second question is that ICANN should not be dictating business models. The choice of a business model should be left to registries subject to the discipline of the market. There should be no intervention until and unless there is a well-documented problem related to monopoly power, such as occurred with .COM in the late 1990s. In cases where problems can be proven, competition authorities in the US or EU or other jurisdictions are in the best position to act lawfully and with expertise. ICANN's only significant obligation should be to ensure that sufficient open gTLDs exist to provide choice for registrants and competition amongst registries and registrars of open gTLDs. It should not be requiring specific instances of gTLDs to be completely open, partially open or closed.

Signed (partial list, as of March 4)

Dr. Milton Mueller, NCSG Executive Committee, Professor, Syracuse University

Robin Gross, Chair, NCSG, IP Justice Director

Avri Doria, NCSG member and independent research consultant

Prof Andrew A. Adams, NCSG member and Professor of Information Ethics, Meiji University
Nicolas Adam, NCSG member and Ph.D student
Brenden Kuerbis, NCSG member and postdoctoral researcher