

COALITION FOR ONLINE ACCOUNTABILITY

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Comments of Coalition for Online Accountability (COA)

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COA appreciates this opportunity to comment on the issue of “closed generic” gTLD applications. See <http://www.icann.org/en/news/public-comment/closed-generic-05feb13-en.htm>

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners (listed below). COA and its participants have engaged actively in many aspects of ICANN’s work since the inception of the organization, including more than 19 formal submissions regarding the new gTLD program. For further information, see www.onlineaccountability.net.

Throughout the development of the new gTLD program, the Intellectual Property community (including COA) has remained consistent in its requests for ICANN to recognize different categories of applications, and apply differentiated criteria and procedures to them. Consequently we commend ICANN for recognizing the importance of this issue now, and for asking whether any customized criteria should apply to “closed generic” applications. COA’s comments are focused on a subset of such applications: those whose strings are aimed at the distribution of music, movies, games, and other digital material protected by copyright.¹

COA’s primary objective remains to ensure that new gTLD registries targeted to sectors dependent on copyright protection (the “creative sectors”) do not become havens for registrants promoting or tolerating online copyright piracy. For this reason, we have urged applicants to incorporate specific enhanced safeguards in their applications (and into their Public Interest Commitment specifications); and we have asked ICANN (in its evaluation processes) and GAC members (in their Early Warning reviews) to take into account whether new gTLD applicants

¹ COA does not propose a detailed definition of “closed generic gTLD,” but clearly a proposed registry qualifies if its name is identical to a dictionary word for a product protected by copyright (e.g., music, movie, game, book, film, video), and if only a single registrant is allowed to register second level domains in that TLD. These comments also assume that a true .brand, in which the gTLD name is identical to a word in which the registry operator holds trademark rights, is not included.

targeting the creative sectors have committed to enhanced safeguards.² Standard (i.e., non-community) applications targeting the creative sectors, whether their registry policies are open, closed or in between, should be required to implement enhanced safeguards to protect IP rights; and these safeguards should be treated as an enforceable part of the registry contract.

In creating any special rules regarding “closed” registries – those in which only a single entity may register – ICANN must be careful not to treat all registries that have restrictive registration requirements as closed. If properly designed and implemented, restrictions on who may register in a new gTLD, and for what purpose, can be a powerful tool for reducing the risk of abusive registrations. For example, some applicants applying for restrictive registries are committed to protecting IP rights and have pledged to restrict registrations so as to make the domain unavailable to those operating outside the legal IP paradigm. ICANN should avoid condemning restrictive registration policies, or according any blanket preference for open registries in standard (non-community) applications, especially those targeted to creative sectors, to the extent the restrictions are aimed at promoting the public interest by reducing the risk of intellectual property infringement.

We acknowledge that concerns have been raised that exclusive ownership of industry terms as closed gTLDs could present an increased risk of anti-competitive behavior. In light of this, and in addition to the IP-focused requirements summarized above, ICANN should consider heightened scrutiny of such new registries. Specifically, we recommend the following additional audit and renewal procedures:

- *Enhanced reporting requirements*, under which such registries would provide certified data to ICANN on an annual basis showing that they have effective policies in place that ensure non-discrimination and (especially for those targeted to creative sectors³) protection of intellectual property;
- “*Mid-term*” reviews” conducted by ICANN at the 3-year and 6-year mark after delegation of a closed generic gTLD, during which members of the public (including competition authorities) would be invited to comment on the certified annual reports and on how the operation of the registry impacts competition ;
- *Flexibility for registry operators* to make changes (enforceable as amendments to the contract with ICANN) to operational policies according to criteria arising from the mid-term reviews;

² See http://www.onlineaccountability.net/pdf/2012_Mar06_EnhancedSafeguards.PDF for the text of our proposed enhanced safeguards, and see http://www.onlineaccountability.net/pdf/2012_Oct_Report_to_GAC_re_enhanced_safeguards.pdf for our report to GAC members on applying these enhanced safeguards. Our enhanced safeguards drew from those developed by the financial services sector.

³ As noted above, a non-exhaustive list of such registries would include .movie, .music, .book, .game/.games, .film, and .video, if operated on a closed basis.

- *Limiting the term of closed generic gTLDs to 10 years, if the registry operator failed to cure any deficiencies identified during the 3 and 6-year reviews.*

Finally, we encourage ICANN to follow its well-established public comment process by providing a reply round in which members of the community may comment on responses received regarding closed generic TLDs. This is an important issue that touches many industries; a hasty decision made without all the facts does not serve the public interest.

As a related matter, the new gTLD formal objection period should be extended for all strings with “closed generic” applications, to a date that is several weeks after the reply period ends and ICANN issues its written decision on whether customized criteria should apply to closed gTLDs.⁴ Maintaining the existing formal objection deadline of March 13 for closed gTLDs does not provide adequate time for either ICANN or objecting parties to consider this complex issue, and would result in an unnecessary and unfortunate waste of resources.

Respectfully submitted,

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⁴ As a number of commenters have previously noted, closing the objection period before any new gTLD applications have completed the initial evaluation process is also an unsound and inefficient practice.