GetNewTLDs
Pre-register for New Top Level Domains

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To Whom It May Concern:

Yes, I am in favor of closed generics. The purpose of the new Top Level Domains program was to increase the utility of the DNS. The full purpose of this expansion cannot be accomplished if we try and dictate the ways that TLDs can be used. The true value of this expansion is in the services that can be provided as a result of this unprecedented expansion of the DNS.

However, to address the concerns about the claiming of dictionary terms, ICANN should turn to the existent body of law which currently governs the "claiming" of words for business purposes: Trademark law. Trademark law is a body of law which has been refined over hundreds of years and is supported by international treaties. Trademark law governs the claiming of unique terms across various lines of business. However, at this time, the United States Patent and Trademark Office (USPTO) refuses to provide Trademark protection for Top Level Domains, despite the fact that many Top Level Domains are referred to in common speech as "branded" TLDs, and Top Level Domains, such as the .CO Top Level Domain, have been advertised in the Super Bowl with the "TM" symbol, which stands for "Trade Mark". The lack of Trademark protection for this multi-million dollar industry has resulted in ICANN's attempt to devise Trademark protections for an industry that does not have Trademark protection, and has resulted in applicant confusion, and indeed has resulted in this public comment period. We assert that the United States Patent and Trademark Office must retain authority to administer Trademark protection for all industries in the United States, while ICANN must continue to retain authority for approving new Top Level Domain operators. We urge ICANN to encourage the USPTO to begin providing Trademark protection for Top Level Domains.

There is clear precedent for this division of responsibilities. The Federal Communications Commission (FCC) grants approval for telecommunications providers to operate on specific frequencies, however, the USPTO grants Trademarks for those operators. In the same way, we assert that ICANN should retain authority to approve new Top Level Domain operators; however, the USPTO must retain authority to administer Trademark law.

If Trademark law were to be applied to Top Level Domains, then closed generics would be permitted, since Trademark law provides for an orderly process to claim generic terms as long as the generic term is not used in a way that is merely descriptive of the item or idea that the name is applied to. This means that the word “apple” could be Trademarked to sell computers – because computers are not apples, and therefore the word “apple” in common language does not describe computers in general - but the word “apple” could not be Trademarked as a brand of apple, because the word “apple” actually describes an apple, and therefore, no one can claim the “right” to the exclusive use of the word “apple” to describe, well, apples. Thus, any string except for .TLD or .Registry would be eligible for Trademark protection in a hypothetical “Registry Services” trademark business class.

The appropriate participation of the USPTO in the assignment of Top Level Domains is better for everyone. While ICANN would no longer have access to the potential revenues from applicants bidding against each other for a TLD string, neither would ICANN be subject to ongoing legal disputes.

Furthermore, Trademark protection would protect Registries in the long term, since ICANN would not have the ability to transfer a TLD from one operator to another if the Registry operator had Trademark protection, just as the FCC cannot transfer AT&T’s customers to another carrier, but the FCC can withdraw operational approval for failure to meet requirements. In addition, future prospective registries would be spared the cost associated with applying for a name where a Trademark already exists. This will, in the long term, increase the number of applications for Top Level Domains that ICANN receives, since the risk associated with the application process would be greatly reduced if applicants had Trademark protection to protect them against potential competitors.

With regards to the Name.Space lawsuit, I agree that Name.Space is entitled to legal protection. Just because they are significantly smaller than ICANN does not mean that they don’t have legal rights. The mom and pop coffee shop is as much entitled to their mark as is Starbucks.

However, in the same way that a coffee shop operating in Madison, WI, has common law rights to their mark within the city of Madison, even without applying for a Trademark, so, in my opinion, Name.space has common law rights to their marks on their own network. However, in order to be eligible for true Trademark protection that expands outside of the “geographic” borders within which namespace operates, Name.Space would have to have applied for an actual Trademark.

No one would suggest that we ought to disallow generic domain names because someone else got the best domain name first; nor should we disallow generic Top Level Domains for the same reason or because someone invents a better way to use a Top Level Domain for commerce.

Sincerely,

Mary Iqbal
Get New TLDs Inc.