



## **Comments of MARQUES, the Association of European Trade Mark Owners on Closed Generic registries**

**7 March 2013**

Marques thanks ICANN for the opportunity to comment on the issue of Closed Generic registries in the new gTLD programme.

### **Introduction to MARQUES**

MARQUES is the European Association representing brand owners' interests.

MARQUES unites European and international brand owners across all product sectors to address issues associated with the use, protection and value of IP rights, as these are vital to innovation, growth and job creation, which ultimately enhance internal markets.

MARQUES membership crosses all industry lines and includes brand owners and trademark professionals in more than 80 countries.

### **MARQUES position on Closed Generics**

We have consulted widely amongst our members and opinion is sharply divided over the issue of Closed Generic Registries

There are some MARQUES members who have applied for Closed Dot Brand registries and some who have applied for Closed Generic registries. All MARQUES members are concerned that the expansion of Open Generic registries will inevitably lead to increased costs and infringement but opinions are divided on Closed Generics.

In favour of all generic terms being open are some of our members who fear a negative impact on competition. There is a concern about industry players capturing the relevant industry term. This is not allowed in trademark registries and is generally held to be contrary to legal norms for IP rights.

In favour of Closed Generic registries are some of our members who applied themselves for Closed or "Restricted Open" registries. They say that there were no restrictions in the Applicant Guidebook on Closed Generics. They say that domain registries are not trademark registries and that if the only model for a generic string is open, featuring the selling of second level domains, the expansion of the domain system is pointless, hindering innovation and benefitting only registrars and domain investors.

In the middle are a larger number of our members who do not simply see Open Generics as good and Closed Generics as bad. They recognise that there are some business models for

Closed Generic registries which can be beneficial – such as a registry that serves a defined community with transparent eligibility criteria – and some business models for Open Generic registries which can be harmful – such as a registry which allows unrestricted access to strings associated with a regulated market sector.

The picture is clouded by interests in the ICANN community arguing for different business models. For example, there are some registrars who fear that restricted access to “the most valuable internet real estate” means they will not be able to sell as many domain names as they like, especially to domain investors who trade in premium generic terms. Equally, there are consumer protection advocates who recognise the benefit of “Trusted” registries with strict eligibility criteria especially those linked to an established trade association representing a market sector.

MARQUES regrets that this debate has emerged at this late stage: we called repeatedly for a Public Interest test to be included in the application process during successive comment periods on the Draft Applicant Guidebook. We hope that such a test will be included in future rounds and that all statements made in an application, including those relating to Mission and Purpose, will be evaluated and scored.

We also hope that the PIC (Public Interest Commitment) process will be developed so that it becomes a useful tool. We regret that as the PIC process is not yet complete, it may not be as effective as it might be because applicants are naturally unwilling to commit themselves to a process which potentially exposes them to unlimited third party complaints with uncertain outcomes or costs.

We note that ICANN has reserved the right to make “reasonable updates and changes” to the Guidebook (1.2.11) as a result of policy discussions. However, we think that a change of the magnitude of eliminating Closed Generic applications two months before the first application is due to be delegated may not be regarded by many as “reasonable”. It may destabilise the new gTLD project, and possible embroil ICANN in litigation.

Mindful of the fact that the normal rules of law in relation to anti-competitive behaviours will apply to all registries, including both Open and Closed Generics, MARQUES position is therefore that the status quo as set out in the Applicant Guidebook should apply. Both Open and Closed Generics should continue to be allowed in this first application round but both should be subject to significant scrutiny after launch by ICANN to ensure that the interests of rights owners and consumers are protected.

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