

February 26, 2013

Re: Closed Generic Top Level Domains (gTLDs)

As we understand it, a number of companies have applied for gTLDs that consist of generic industry product categories with the ability to exclude competitors for their sole economic advantage – such as .search or .insurance. We write to request that ICANN withhold approval for such closed, generic gTLDs.

Trademark law in every country in the world forbids individuals to gain exclusive property rights in generic names of products. One of the primary rationales for this rule is to prevent a single person or company from gaining an unfair competitive advantage in the marketplace. Private ownership of generic language is not consistent with free enterprise and fair competition in an open economy. If ICANN were to approve closed, generic gTLDs, these important goals would be undermined.

Marriot (or any other hotel chain), for example, should not be permitted to own “.hotel” and then allow only certain hotels to advertise in that space. If such a practice were allowed, the owner of the closed, generic gTLD would be positioned to hinder competitors and control markets. To be sure, other gTLDs with similar names may be allowed in the future; but they may not. And by the time that future comes, unfair advantages will already be gained and barriers to entry heightened. Consumers cannot be expected to fully understand the closed nature of the new generic gTLDs. A consumer, for example, may believe that when she searches for a hotel at .hotel, in a particular geographical place, all available and relevant data will be reported. She may not know, nor is there currently any requirement she be told, that the domain is closed and controlled by one company in an anti-competitive manner.

Transparency and consumer choice are goals of the trademark system of every country in the world. In our view, these values are threatened by closed, generic gTLDs. Indeed, should these types of new gTLDs be approved, consumers may mistakenly believe they are using a gTLD that allows for competition, when in reality the gTLD is closed and the apparently competitive products are being offered by a single entity. This would allow the owner of the generic gTLD to gain exclusive recognition as the provider of a generic service, something that is prohibited by Trademark law.

ICANN should only approve generic gTLDs on the condition that they are open to any company that seeks to register therein – or in special cases restricted to entities on a neutral basis (e.g. it would seem appropriate, for example, to allow .bank to be limited to certified banks). Open generic gTLDs expand choice and free competition; closed generic gTLDs reduce choice and hinder competition.

We therefore respectfully urge ICANN to withhold approval of currently pending applications for closed, generic gTLDs.

David J. Franklyn and J. Thomas McCarthy
Directors, the McCarthy Institute for Intellectual Property and Technology Law