



Internet New Zealand (Inc)

Submission to ICANN

on
Closed Generic gTLD Applications

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Public Version (there is no confidential version)

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I Introduction

- I.1 This submission is from InternetNZ (Internet New Zealand Inc).
- I.2 InternetNZ is a membership-based, non-partisan, not-for-profit charitable organisation that exists to protect and promote an open and uncaptureable Internet in New Zealand.
- I.3 InternetNZ is an At-Large Structure and is responsible for the administration of the .nz top level domain.
- I.4 InternetNZ has two wholly-owned charitable subsidiaries to whom management, operation and regulation of the .nz top level domain are delegated. These are:
 - I.4.1 .nz Registry Services, the Registry
 - I.4.2 Domain Name Commission, the Regulator
- I.5 InternetNZ is not applying for a new gTLD nor is it providing any services to any applicant for new gTLDs. The registry software developed by .nz Registry Services is freely available as open source but we are not aware of any new gTLD applicants intending to use it.
- I.6 This submission is in response to ICANN's consultation on "Closed Generic gTLD Applications". InternetNZ has submitted on this matter on prior occasions:
 - I.6.1 As an At-Large Structure, InternetNZ lodged a comment with ALAC on 26 July 2012 for the latter's consideration in drafting an ALAC-wide comment to be lodged within the Application Comment Period. Our comment was not adopted by ALAC for its own commenting purposes because the broader policy question we raised was out of scope, but the issue was referred to the At-Large new gTLD Working Group for discussion¹.
 - I.6.2 We posted an abridged version of this comment across a number of 'closed generic' applications, independently, in the Application Comment Forum within aforementioned Period.
 - I.6.3 In our November 2012 submission² to the ICANN consultation on "Drawing for Prioritising New gTLD Applications" we also noted that "in our view, closed generics, rather than providing any benefit to Internet users are actually harmful".
 - I.6.4 InternetNZ was a co-signatory to a letter³ to the ICANN board on 22 January 2013, explaining our opposition to closed generics, which in turn led to this consultation.

¹ <http://mm.icann.org/pipermail/newgtldrg/2012-August/000114.html>

² <http://forum.icann.org/lists/drawing-prioritization/msg00031.html>

³ <http://www.icann.org/en/news/correspondence/neylon-et-al-to-chalaby-et-al-22jan13-en>

- 1.7 The form of this brief submission tracks ICANN's consultation document - its substance divided into two parts, each responding to the two questions posed by ICANN, which seeks commentary on:
- 1.7.1 "classifying certain applications as 'closed generic'" TLDs, i.e., how to determine whether a string is generic; and
 - 1.7.2 determining the circumstances under which a particular TLD operator should be permitted to adopt 'open' or 'closed' registration policies."
- 1.8 We address these in reverse order. Our response is guided by a number of InternetNZ Policy Principles and Top Level Domain Principles⁴ namely:
- 1.8.1 The Internet should be open and uncaptureable*
 - 1.8.2 Internet markets should be competitive*
 - 1.8.3 The Internet should be accessible by and inclusive of everyone*
 - 1.8.4 Choice for registrants should be maintained and expanded*

2 On 'open' or 'closed' registration policies for new gTLDs

- 2.1 InternetNZ is of the opinion that all new gTLD operators should be required to follow an open registration policy at the 2nd level. If closed registration policies are to be allowed then this should only be under certain circumstances, as an exception to the rule. This policy approach would encourage a more open, competitive and diverse domain name system. It would expand registrant choice. A closed policy would do the opposite.
- 2.2 Under an open policy, sponsoring organisations would be required to open registration at the 2nd level to the general public - including competitors - allowing all parties to register a domain name under the relevant string. Under a closed policy, the sponsoring organisation could keep all 2nd level registrations to itself, precluding competitors (and others more generally) from registering a domain name, foreclosing competitive opportunities and restricting registrant choice.

3 On determining the genericism of a word

- 3.1 ICANN has, through its consultation document, asked the community for advice on how it should define 'generic'. Many organisations and individuals will offer different criteria for genericism. Gaining consensus support for an accepted definition of generic will be extremely contentious and potentially impossible.
- 3.2 ICANN can avoid the painful and highly controversial task of outlining the criteria for genericism by adopting the policy approach of clearly defining under what circumstances an exception to an open policy will be permitted.

⁴ The two sets of principles are available at www.internetnz.net.nz/principles

- 3.3 The sole exception that we consider ICANN could permit is for 'fanciful' trademarks. "Fanciful' marks consist of 'coined' words that have been invented or selected for the sole purpose of functioning as a trademark. Such marks comprise words that are either totally unknown in the language or are completely out of common usage at the time."⁵
- 3.4 The onus of proving ownership of a fanciful trademark should be placed on the new gTLD applicant if that applicant intends to exercise a closed registration policy.
- 3.5 This exception better accommodates the universe of potential registrants because there will be less public interest in fanciful marks as TLDs than generic words (broadly understood). These words are more likely to be used by more people on more occasions. Fanciful marks are made up words. They are fewer in number and less common in usage.
- 3.6 Most people will expect to be able to register in a .book or .music TLD rather than a .xerox or .kodak TLD. This simple observation is illustrated within the existing applications for new gTLDs where the applicants have applied for those strings they believe will have the greatest demand. Those strings most applied for are "generic" words. Further, people will naturally not assume that they have the right to register under a fanciful mark TLD as they would with a generic word TLD.

4 Conclusion

- 4.1 The creators of the Internet and the World Wide Web shared a predisposition towards openness. Opinions on ICANN's new gTLD programme and the policies that direct it diverge wildly, but, amongst those contributing to this conversation, one would surely find agreement between all parties that the success of the Internet depends upon its openness. Openness, not closure, should guide the policies directing this unprecedented addition of a large number of new TLDs to the global root because openness, not closure, has a proven track record of fostering online environments that support competition, diversity and innovation. For the above reasons, InternetNZ believes that the default registration policy at the 2nd level should be open.

With many thanks for your consideration,

Yours sincerely,

InternetNZ

⁵ 2 McCarthy on Trademarks and Unfair Competition s 11:5 (4th ed) (updated 2012)