Rami Schwartz A.
CEO
Latin American Telecom LLC
4 Gateway Center 9th Floor
Pittsburgh, Pa.
15222
1(855) DOT TUBE
rami@mexico.com

To: ICANN

Re: "Closed Generic" gTLD Applications

This comment letter is submitted by Latin American Telecom LLC (LAT) in response to ICANN's notice of February 5, 2013 (http://www.icann.org/en/news/public-comment/closed-generic-05feb13-en.htm). That notice states:

> ICANN is seeking public comment on the subject of "closed generic" gTLD applications and whether specific requirements should be adopted corresponding to this type of application. Stakeholder views are invited to help define and consider this issue. In particular, comments would be helpful in regard to proposed objective criteria for:
>
> - classifying certain applications as "closed generic" TLDs, i.e., how to determine whether a string is generic, and
> - determining the circumstances under which a particular TLD operator should be permitted to adopt "open" or "closed" registration policies.

LAT is a Delaware LLC with offices in Pittsburgh, Pennsylvania and Mexico City. LAT is a participant in the new gTLD program and has submitted an application to become registry operator for .TUBE; LAT's operation of .TUBE would permit any third party registrant to acquire a .TUBE domain.

LAT finds itself in contention with Charleston Road Registry, which has submitted an application proposing that under its operation Google would be the only permissible registrant for .TUBE domains – it would appear to be a "closed generic" gTLD (an attempt to brand itself as .TUBE - a dictionary word for which it has no trademark rights). Google's attempt to run a closed registry for a word in which they hold no brand or trademark rights is impermissible.

Indeed, while it is beyond the scope of this submission Google is also conspicuously seeking an exemption that will trample LAT's pre-existing trademark rights. Conversely, LAT is the owner of a valid United States trademark for "TUBE" and has used its TUBE brand in commerce since at least 2008. So Google's proposal for a closed generic .TUBE is anti-competitive, contrary to general trademark law principles, and detrimental to the public interest -- and also infringes upon LAT's established trademark rights.

Our comment letter discusses the policy and other considerations relevant to the issue of "closed generics" in the context of Google's twin applications for .YOUTUBE and

.TUBE, which provide the perfect example of why exemptions to the Code of Conduct were meant for .brand applications but never for "closed generics".

Executive Summary

• Google's .YOUTUBE application is an appropriate candidate for a Code of Conduct exemption – while its .TUBE application is not.

• "Closed Generics" is not a new issue and addressing it sets no precedent for other potential amendments to the Applicant Guidebook

• The Code of Conduct's default position is an open registry, and exemptions should only be granted narrowly to protect the public interest

• Closed gTLDs are at fundamental odds with the competition and innovation goals of the new gTLD program

• Non-.brand Closed generics are in conflict with trademark law

• Closed generics are at odds with the Affirmation of Commitments and relevant GNSO Council advice pertaining thereto.

• Closed generics such as .TUBE distort and encourage gaming of the application process

• Closed generics are at odds with ICANN's long-term interests

Brand vs. Closed Generic Comparison -- .YOUTUBE and .TUBE

Charleston Road Registry (CRR), a subsidiary of Google, has submitted identical applications for both .YOUTUBE and .TUBE – the only difference is the name of the applied for "string". Both applications aim to extend the YouTube brand via the new gTLD program, and both seek exemptions from the standard registry operator Code of Conduct to allow for a "closed generic"/"single-registrant gTLD" in which Google will be the only permissible registrant.

These identical twin applications provide the perfect comparative tool to analyze the issue of .Brand vs. Closed Generic applications because they provide a minimum common denominator to which both types of gTLD's can be compared. By having this minimum common denominator we can compare apples to apples and oranges to oranges.

Google's .YOUTUBE application is perfectly appropriate and, as a trademarked term owned by Google, is exactly the type of gTLD as being eligible for a waiver of the Code of Conduct to permit single-registrant operation.

However, the identical application and request is completely inappropriate for .TUBE, a term associated with television and video as well as dozens of other meanings in which Google has no trademark rights. Alternative meanings of the term tube are used in physics, medicine, chemistry, architecture, consumer products, and even common expressions and slang that have nothing to do with video or television -- such as tooth

paste tube, test tube, optical tube, feeding tube, London tube, “down the tube”, for example.

A single-registrant .TUBE controlled by Google would not be a platform for competition and innovation by all kinds of registrants from any industry but rather a means by which Google can extend and consolidate its dominance of online video distribution.

As the identical twin applications clearly state, “registrations will be granted based on Google business needs”, “the sole purpose of the proposed gTLD, .TUBE, is to host select YouTube channels’ digital content”, and “The mission of the proposed gTLD is to strengthen the brand relationship between YouTube and its content partners and to simplify the YouTube user experience. Select YouTube content distributors will be able to register a branded .TUBE domain (e.g., brand.TUBE) which will be used to host short and simple URLs that point to the distributor’s YouTube page or specific offering”. In short, such ‘vanity registrations’ will be granted only to those domain operators who pose no competitive threat to Google or YouTube.

Such a proprietary use of a dictionary word in which the applicant holds no trademark rights is contrary to the aims of the new gTLD program and in violation of the “public interest’ standard applicable to granting such waiver requests. As a closed registrant gTLD controlled by Google and extending the YouTube business model, a Google-only .TUBE could become a source identifier and thereby provide a backdoor route for Google to extend the trademark rights it now has on YOUTUBE to the word TUBE in which it possesses no trademark rights. The new gTLD program is supposed to respect trademark rights, not become a means by which they are surreptitiously acquired.

These considerations are not applicable to .YOUTUBE where Google possesses trademark rights and it would be perfectly valid to expand the YouTube brand, functionality and usage solely for Google’s business needs. But to do so in a dictionary word that has dozens of alternative meanings without having trademark rights would be contrary to trademark law and public interest.

By way of contrast, even though LAT possesses a United States trademark in TUBE it intends to operate .TUBE as an open platform for innovative and competitive new services offered by registrants from around the globe, thereby acknowledging the term has various meanings and should be open to public use.

Allowing a single-registrant waiver for an applicant in a gTLD in which it holds no trademark rights would not only sanction anticompetitive use but also be at odds with ICANN’s promise of greater innovation. The history of the Internet teaches time and again that innovation comes from the edges, not the center. Allowing this type of single registrant usage in furtherance of an existing business model would deny the opportunity for innovative businesses to be established as they could be if .TUBE was an open, multi-registrant domain.

“Closed Generics” Is Not a New Issue and Addressing it does Not Set a Precedent for Amendment of the Applicant Guidebook

Lately, there has been heated debate over “closed generics”, especially since ICANN made a decision to solicit the submission and analysis of public comments from the community. Some parties have stated on public record that they believe that ICANN is setting a worrisome precedent in soliciting comments on this topic, and that any subsequent decision made by ICANN will set a worrisome precedent for significant post-application amendment of the Applicant Guidebook (AG).

We fundamentally disagree with that point of view, and we protest the fact that it is reflected in the notice posted by ICANN that accompanied the invitation to submit public comment. The Background portion of the notice states:

> Many of the communications link the issue of registration restrictions for a TLD with the Code of Conduct (Specification 9 to the gTLD Registry Agreement). However, it should be clarified that the Code of Conduct refers to registry-registrar interactions, rather than eligibility for registering names in the TLD. Rather than the Code of Conduct, the true issue of concern being expressed appears to be that in certain applications, the proposed registration policies are deemed inappropriate by some parties.
>
> The New gTLD Program has been built based on policy advice developed in the GNSO's policy development process. The policy advice did not contain guidance on how ICANN should place restrictions on applicants' proposed registration policies, and no such restrictions were included in the Applicant Guidebook.

That statement is mistaken in several respects and, using the identical twin applications by Charleston Road Registry for .TUBE and .YOUTUBE, we will demonstrate why. While the Registry Operator Code of Conduct (COC) found at Specification 9 of the Applicant Guidebook does address registry-registrar interactions, it also addresses a variety of additional subjects such as “front-running” and other misuse of proprietary data; disclosure of confidential registry data or confidential information about Registry Services or operations to third parties generally; and internal audits to ensure COC compliance. The Registry Operator Code of Conduct is a broad policy article that covers many aspects of gTLD registry operations and not merely “registry-registrar interactions”.

Most relevant to this comment letter, Section 1.b of the COC sets a default position for all gTLD registry operators to limit their own domain registrations in a gTLD under management, and Section 6 sets forth a procedure by which an applicant can seek an exemption that will allow a situation where “all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use”. Section 6 further states that in exercising its sole discretion to grant such an exemption ICANN must find that “application of this Code of Conduct to the TLD is not necessary to protect the public interest”, a critical term whose definition requires clarification by ICANN since it is embedded in the COC.

Every new gTLD program applicant submitted its application with clear notice that it would be subject to the COC and that if its design for the gTLD required an exemption that ICANN would be considering such requests under a public interest standard that had not yet been developed. LAT submitted its .TUBE application in full confidence that our open domain registration plan was consistent with the COC, while CRR submitted its

.TUBE application with full knowledge that its closed domain registration plan was inconsistent with the COC. It therefore stated in its application that “Charleston Road Registry intends to apply for an exemption to the ICANN Registry Operator Code of Conduct and to act as the sole registrar for the proposed gTLD. Given that the proposed gTLD is exclusively intended for use in connection with Google′s service, Charleston Road Registry believes that there is a reasonable case for such an exemption”.

Frankly, we did not expect to be in contention against an applicant with a proposal for a closed registry because it was our understanding that the background and purpose of the exemption clause was to permit the operation of so-called .brand registries by entities holding a trademark in the string being sought. In the case of the twin application for .YOUTUBE, the exemption is justified because Google has relevant trademark rights in the proposed .brand string. The .YOUTUBE application states, “Because the sole purpose of the proposed gTLD is to associate domain names with the YouTube product, Charleston Road Registry intends to apply for an exemption to the ICANN Registry Operator Code of Conduct and operate the gTLD with Google as the sole registrar and registrant”. CRR acknowledges this brand extension purpose when it associates the requested exemption from the COC with the YouTube product and with Google offerings. That is perfectly understandable and acceptable for the gTLD .YOUTUBE -- but not for its identical twin .TUBE application

The issue being considered is misunderstood when it is cast as a debate on “closed generic” gTLDs. Its resolution does not require the creation of definition of that term “closed generic” because a “closed generic” application is nothing more than an application for a generic TLD (gTLD) that seeks an exemption from the restrictions on a registry operator’s self-registration of domains set by section 1.B of the COC.

Rather, the issue before ICANN, as illustrated by the identical twin applications for .TUBE and .YOUTUBE, is under what circumstances a new gTLD applicant should be granted an exemption from the COC that permits it to acquire a gTLD in which it holds no trademark rights and which it wishes to make unavailable to all third parties who might seek to register domains in it. If identical twin applications, one supported with trademark rights and the other without such support, are both granted an exemption from the COC that would indicate the existence of an unintended loophole that requires ICANN to set a general policy as to when granting of an exemption should be denied. This is because enforcement of the COC is required to protect the “public interest”. The debate is over what is the public interest and how does the public benefit from closed generics in which the registry operator holds no trademark rights? We believe ICANN has the obligation to enforce the COC to protect the “public interest” even if it presently an undefined concept that nevertheless is embedded in the COC. The debate here is what is the public interest and does the public benefit from or face potential harm from closed generics?

It is clear how open generics benefit the public interest since every potential registrant can register a domain name.

It is clear how restricted registrant applications pertaining to regulated professions and industries serve the public interest since they are open only to certain verified applicants types to satisfy consumer protection, cybersecurity, and other concerns.

It is clear how community and .geo applications serve the public interest when they restrict prospective registrants to relevant parties in keeping with their overall purpose.

It is clear how .brand gTLD's benefit the public interest since protection of trademark rights is a countervailing public interest consideration that justifies granting of the COC exemption.

But how will the public interest be served when a company like Google takes a dictionary word gTLD that is not its brand and an internal department in that company proposes to shut it off to the general public and other registrants for second level domain names? Is the interest of Google the same as the public interest and does ICANN have a mandate to protect it by granting an exemption to the COC? In our view that is inherently anti-competitive and therefore against the public interest, yet the new gTLD program was justified as introducing new competition.

It is the position of Latin American Telecom LLC that, other than for .brand gTLD applications, enforcement of the COC is necessary to protect the public interest and exemptions to it should not be granted. It is perfectly fine for GOOGLE to be the sole registrant at .YOUTUBE, but not at .TUBE in which it possesses no trademark rights. Do parties that have no trademark have the same right to build 'garden wall' gTLDs as parties who do? "Closed generic" gTLDs are inherently anti-competitive unless backed by trademark rights and are also at complete odds with the very trademark law and principles that ICANN has sought to protect through such new rights protection mechanisms (RPMs) as the Trademark Clearinghouse (TMC) and Uniform Rapid Suspension (URS).

The COC's Default Position is an Open Registry

The standard Registry Operator COC is found at Specification 9 of the New gTLD registry Agreement Specifications. Tellingly, a Revised New gTLD Registry Agreement was also issued for public comment on February 5th (http://www.icann.org/en/news/public-comment/base-agreement-05feb13-en.htm). A principal purpose of the revision is to add a Public interest Commitments Specification (PICS) as "a mechanism to allow registry operators to commit to certain statements made by the registry operator in its application for the gTLD, as well as to specify additional public interest commitments, in either case transforming such commitments into binding contractual obligations that may be enforced by ICANN through a new dispute resolution mechanism that will be available to any party harmed by a registry operator's failure to comply with such public interest commitments."

For the record, LAT has submitted PICS to reinforce our commitment to operating .TUBE in a manner that recognizes and respects a wide variety of responsibilities while Google did not, at least not for its .TUBE application.

The revised Registry Agreement does not propose to change a single word of the COC. And Section 2.14 of the revised Agreement contains no substantive alteration, stating:

> 2.14 Registry Code of Conduct. In connection with the operation of the registry for the TLD, Registry Operator shall comply with the Registry Code of Conduct as set forth in Specification 9 attached hereto ("Specification 9").

We share the concerns expressed by many new gTLD applicants in regard to the extensive changes proposed in the Revised Agreement. Notwithstanding that concern, it would indeed be ironic if, at the same time that ICANN is proposing a new mechanism to better assure that new gTLDs are operated in a manner consistent with the public interest, it were to allow unfettered exploitation of a "closed generic" loophole that is at complete odds with ICANN's fundamental rationale for the new gTLD program – that it will foster competition and innovation. So, just as ICANN has made the PICS mechanism available to better protect the public interest it should also apply the Code of Conduct in a strict manner that protects the public interest in having non-.brand generic terms available to all potential registrants.

Section 1b of the COC is the relevant standard for considering CGs:

> 1. In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a "Registry Related Party"), to:
>
> … b. register domain names in its own right, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD, provided, that Registry Operator may reserve names from registration pursuant to Section 2.6 of the Registry Agreement; (emphasis added)

The standard rule articulated here is clear -- Registry operators and any parents, subsidiaries, or affiliates thereof that are in any way engaged in operation of the registry are barred from registering domain names in their own right – except for domains that are reasonably necessary for its management, operations, and purpose. So for example, a registry operator could arguably register such functional domains as search.gTLD, aboutus.gTLD, or contact.gTLD, as well as operational domains such as mail.gTLD and server.gTLD, without needing to seek an exemption.

A gTLD in which the applicant proposes to register every domain in its own right is therefore fundamentally at odds with the default position expressed in this Section of the COC and requires an exemption from the COC.

We are, unsurprisingly, seeing sophistic arguments advanced that where the applicant's "purpose" is to prevent all other parties from registering domains at the gTLD it meets the "reasonably necessary" standard and need not even apply for an exemption. But that would be a classic example of "the exception swallowing the rule" – and is so at odds with the standard practice for interpretation of a statute or contract, and so at odds with the fundamental purpose of the referenced portion of the COC (which is to assure that applicants do not monopolize most much less all of a new gTLD's domain registrations), as well as the program's overarching rationale of fostering innovation and competition – that it should be rejected out of hand. The COC would be meaningless if any applicant

could self-exempt simply by averring that its purpose requires it to be the sole registrant for all domains in the gTLD.

For purposes of this analysis, the fact that Google is proposing in its identical twin applications to let select registrants establish "vanity domains" for certain favored content providers is irrelevant as all those domains would be initially registered by the gTLD operator in its own name. Further, gTLDs for regulated industries and professions (commonly known as semi-restricted registrations) that propose to establish registrant standards are also irrelevant to this discussion, since such gTLDs would still consist of third party registrants from a defined class that serves the public interest in deterring consumer fraud and promoting cybersecurity,.

We move on to the question of whether a gTLD applicant could qualify for an exemption under the COC – noting that any argument that the word "purpose" in Section 1.b allows for self-exemption would render Section 6 a nullity, as that interpretation would permit any applicant to sidestep the ICANN exemption approval process for being the sole registrant in its gTLD simply by declaring that its purpose is to maintain a monopoly on gTLD registrations .

The relevant provision of the COC states:

> 6. Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) **all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use,** (ii) Registry Operator does not sell, distribute or transfer control **or use** of any registrations in the TLD **to any third party** that is not an Affiliate of Registry Operator, and (iii) **application of this Code of Conduct to the TLD is not necessary to protect the public interest**. (Emphasis added)

In this case, Google's identical twin applications are also at odds with the COC because, by Google's own application statement, "Should ICANN grant Charleston Road Registry's exemption to the Code of Conduct, and the proposed gTLD operate with Google as the sole registrar and registrant, members of the public will not be able to directly register domain names in this new gTLD. Select content distributors will, however, be given the opportunity to **make use** of a vanity second-level domain as a memorable identifier linked to content in .tube. Content distributors will be assigned a vanity domain name pursuant to Google's forthcoming user registration guidelines" (Emphasis added). The COC is clear that when granted an exemption only the Registry Operator can use any registration on the gTLD, yet Google is proposing that parties that are not the Registry Operator or its parent, Affiliates, or other related parties can do so. Such direct third party usage is strictly prohibited by the COC for exempted gTLDs. This is why ICANN should closely scrutinize and follow the COC and only grant exemptions when it is clearly justified by the public interest or when there are trademark rights that are a countervailing public interest to support such exemption.

ICANN may grant Google the COC exemption for .YouTube but cannot do so for the identical twin application for .TUBE where Google possesses no trademark rights and Latin American Telecom does. Further, the creation and usage of vanity second level

domain names at .TUBE by unrelated third parties would not only violate the COC but also the basic trademark laws ICANN has vowed to protect. If ICANN wants to allow Google to build a garden wall gTLD at .YouTube it's entitled to do so, but it cannot grant Google permission to build a garden wall gTLD at .Tube.

There can be no question that Section 6 of the COC provides an exemption process by which a Registry Operator can operate a gTLD closed off to third party registrations – if ICANN reasonably determines that applying the COC is not necessary to protect the public interest. Those familiar with the origin of the exemption clause know that its purpose was to accommodate so-called .brand applications, and generally concede that there was to be no distinction between brands that consisted of a dictionary word (e.g., Apple) and those that were invented for branding purposes (Google). The public interest served by the exception was to allow an applicant to protect and promote the trademark rights encompassed by its brand at the highest level of the DNS.

So, Section 6, the exemption clause, does appear to permit ICANN to approve a closed registry that is not a .brand. The question is whether permitting an applicant for such a gTLD – such as Amazon's for .Book or Google's for .TUBE – serves or harms the public interest. LAT believes that granting such an exemption would be contrary to the public interest.

The Public Interest Standard Must Recognize Fundamental Differences Between Top and Second Level Domains – and That Closed gTLDs Are Fundamentally at Odds with Competition and Innovation

Some have argued that there is no fundamental difference between a second level domain such as book.com and a gTLD such as .book. Since a single registrant can operate at the second level what's the difference if they do the same at the top level of the DNS?

But there are fundamental differences. And the most fundamental is that a second level domain is a singularity, while an open gTLD is a platform for multiplicity.

A single domain registered at any gTLD or ccTLD can be operated by its registrant in any lawful manner for such diverse purposes as monetization through type-in traffic, providing original content, or engaging in e-commerce. When third parties interact with the domain – by clicking on an ad, posting a comment, adding their own content, or completing a purchase – they do so on the domain registrant's terms, not their own.

An open gTLD, by contrast, offers a platform for an unlimited number of third parties to pursue their own purpose, not one dictated by the Registry Operator. We know from .com, where domain registrations already exceed 100 million, that the potential number of domains at a given gTLD is limited only by its perceived desirability and the willingness of individuals and business entities to pay its annual registration fee.

A closed, single-registrant gTLD extinguishes its potential for such multiple innovative and competitive uses. An open .TUBE gTLD is a potential platform for video content providers as well as chemical, optical, physics, and architecture registrants, and any other party who believe that their domain registration purpose will be enhanced by a .TUBE

registration. LAT is not fluent in every language in the world but perhaps “tube” has additional meanings in other parts of the world that would appeal to registrants who would be best served by an open registry. To the contrary, the operation of .TUBE by GOOGLE as a closed gTLD, dedicated solely to video distribution and enhancing its relevant market dominance achieved through YouTube, makes .TUBE registrations unavailable to millions of potential registrants. It serves no discernible public interest -- especially since GOOGLE can readily operate .YOUTUBE in a closed manner consistent with the .brand-enabling purpose of the COC exemption.

Another important difference is that gTLDs, unlike second level domains, require the permission of ICANN to come into existence. Registry operators of gTLDs, unlike domain registrants, have a contractual relationship with ICANN and, by extension, the public purposes assumed by ICANN’s management of the DNS are delegated to approved registry operators. A closed gTLD is contrary to the public interest, as it suppresses innovation and competition. ICANN’s consideration of GOOGLE’s .TUBE gTLD application should be its rejection, as granting a COC exemption will bar all potential registrants at an open .TUBE gTLD from pursuing their innovative ideas, many of which may result in at least effective niche competition against YouTube and .YouTube.

Monopoly is not an innovation, and is not compatible with the public interest. The history of the Internet is that new competition and innovation are introduced from the end points, as they would be if .TUBE were an open gTLD. ICANN can hardly respond that it’s no significant problem if these potential third party registrants can’t register a .TUBE domain since other gTLDs may be available – the entire foundation of the new gTLD program is a belief that generic labels do matter in the next stage of the Internet’s evolution, and that registrants should be offered broad new choices of relevant, right-of-the-dot genetic terms.

Closed gTLDs Are in Conflict with Trademark Law

As noted above, ICANN has devoted considerable attention to the maintenance and protection of trademark rights in the new gTLD program through such new RPMs as the TMC and the URS. However, ICANN’s work in this area will be largely undercut if it permits closed gTLDs as they are at fundamental odds with global trademark law and practice. ICANN has repeatedly stated that it will enforce existing rights and refrain from creating new trademark rights – but approving a COC exemption for closed gTLDs would undercut trademark rights and provide closed generic applicants with a quasi-intellectual property right they could not obtain under law.

No less an authority than J. Thomas McCarthy has recently informed ICANN of this problem. Professor McCarthy’s credentials in the field of trademark law are unrivaled –

> McCarthy is the author of the seven volume treatise McCarthy on Trademarks and Unfair Competition, which has been relied upon as authority in over 3000 judicial opinions. (http://en.wikipedia.org/wiki/J._Thomas_McCarthy ; emphasis added)

Professor McCarthy's statement submitted to ICANN is unequivocal on the fundamental violation of trademark law posed by closed 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. (http://forum.icann.org/lists/comments-closed-generic-05feb13/pdffImtkWYnof.pdf)*

We concur with Professor McCarthy's views. Trademark law is often characterized as having consumer protection as a primary focus. Even setting aside the inherently anti-competitive nature of "closed generics', they are also at fundamental odds with established trademark law. Therefore, imposition of the Code of Conduct – and rejection of "closed generic" gTLD applications such as Google's for .TUBE – is necessary to protect the public interest.

"Closed Generics" are Incompatible with ICANN's Public Commitments

On September 30, 2009, in conjunction with the termination of formal U.S. oversight of ICANN, both parties entered into an Affirmation of Commitments (AOC) in which ICANN pledged to "promote competition, consumer trust, and consumer choice in the DNS marketplace". Article 9.3 of the AOC commits ICANN to address a variety of issues – including competition, consumer protection, and rights protection – and also commits ICANN to perform a review one year after the first new gTLD is delegated to "examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice".

On December 20, 2012 ICANN's GNSO Council approved "Advice requested by the ICANN Board regarding definitions, measures, and targets for competition, consumer trust and consumer choice" (http://gnso.icann.org/en/issues/cctc/cctc-final-advice-letter-05dec12-en.pdf). This Advice is intended to fulfill commitments made by ICANN to the United States in fall 2009.

The GNSO's Advice contains these definitions:

- Consumer is defined as actual and potential Internet users and registrants.
- Consumer Trust is defined as the confidence Consumers have in the domain name system. This includes (i) trust in the consistency of name resolution (ii) confidence that a TLD registry operator is fulfilling the Registry's stated purpose and is complying with ICANN policies and applicable national laws and (iii) confidence in ICANN's compliance function.
- Consumer Choice is defined as the range of options available to Consumers for domain scripts and languages, and for TLDs that offer meaningful choices as to the proposed purpose and integrity of their domain name registrants.
- Competition is defined as the quantity, diversity, and the potential for and actual market rivalry of TLDs, TLD registry operators, and registrars. (Emphasis added)

The Advice also contains these relevant notes of explanation:

- Note 5 – "Competition is closely related to the idea of Consumer Choice. ...Competition is evident when multiple suppliers are competing in terms of the quality, price, and diversity of TLDs they offer." (Emphasis added)

We can see here and now, without waiting years, that "closed generics" such as Google's proposed .TUBE fail to meet ICANN's commitment to competition that provides actual marketplace rivalry among gTLD registry operators, and registrant choice among multiple suppliers of gTLDs. Closed generics introduce no domain marketplace rivalry and no new choices for registrants.

"Closed Generics" Introduce Distortions and Gaming of the Application Process

As an applicant for an open gTLD competing in the same contention set against a closed registry we have experienced the many distortions that the ambiguity and lack of clear guidance from ICANN on this subject has created. We can account for at least five distortions that demonstrate that closed and open generics do not belong in the same ballpark, do not play the same league, and are not even the same sport. Yet ICANN's process throws them into the same evaluation and contention sets to compete against each other.

The resulting distortions and process gaming are illustrated by five examples explained below:

1) Google's use of the prioritization draw.
2) Distortion of the auction mechanism as the ultimate tie breaker in a contention set
3) The barriers to negotiations between contending parties
4) The difference in financial obligations
5) The lack of a level playing field

1) Google's use of the prioritization draw.

Applicants for open gTLDs want to get to market as soon as possible and make unlimited domains available to third party registrants. Applicants for closed generics, whose primary motivation is to deny gTLD registrations to third parties, have entirely different priorities.

On December 17, 2012 ICANN held a prioritization draw in Los Angeles to determine the evaluation order for new gTLD applications. Participation in the draw required the purchase of what was essentially a private lottery ticket at a cost of $100.

Of the 1917 applications still active on the day of the draw, tickets were purchased for the vast majority of application – 1776. While some applicants elected not to purchase tickets for the remaining 141, of that "non-lottery ticketed" segment, 24 – just over one-sixth of the total, far in excess of their proportion of all gTLD applications -- were for applications submitted by Google subsidiary Charleston Road Registry. One application for which Google chose not to purchase a ticket was for .TUBE.

The Prioritization Results for .TUBE were:

- 806 – Latin American Telecom (LAT)
- 1266 – Boss Castle, LLC (Donuts)
- 1880 – Charleston Road registry (Google)

While NTAG members and the entire ICANN community are rightly concerned about program delays caused by ICANN, one of the most significant causes of future delays for multiple contending applicants for .TUBE and 21 other gTLDs was a deliberate decision by Google to not purchase prioritization draw tickets for these applications. While the vast majority of other gTLDs for which lottery tickets were not purchased were presumably defensive .brand applications, all of Google's non-ticket gTLDs were generic words in which it holds no trademark rights -- while they did buy tickets for all their .brand applications.

Google's deliberate decision to forego the purchase of a prioritization ticket for twenty-four (24) of its generic gTLD applications is indicative of an approach to the new gTLD program that is very different from most competing applicants. By doing so, Google delayed 78 applications of competitors which represent more than 10% of the applications in contention. Google showed it is far less interested in introducing new competition than in protecting and consolidating its position.

Google's application for .TUBE is quite frank that its intended use is to simply be a closed generic, single-registrant extension of .YOUTUBE, and therefore having its .TUBE application evaluated in an expedited matter is probably a lower priority than forestalling the competition to YouTube that might occur if another applicant secured the .Tube gTLD. In that context, its decision to refrain from purchasing a prioritization ticket for its .TUBE application is quite understandable as a deliberate strategy to delay competing applications and, as noted above, is most probably a function of being a closed generic that it is in no hurry to have added to the DNS. Competing applicants for .TUBE must waste time and money waiting on Google's application to be evaluated, and during that period of delay Google can hope that they drop out as it still has the ultimate option of prevailing at auction given its $50 billion cash hoard.

2) The distortion of the auction mechanism as the ultimate tie breaker in a contention set

Let's now turn to the ultimate tie breaker devised by ICAAN for this process, the Auction. Market dynamics are quite different in an auction when one party seeks to be a gTLD registry operator to open a new section of DNS to all potential registrars and registrants, and the other seeks to operate the registry for the identical string solely to extend and protect its existing business model by preventing new domain registrations by potential competitors. The open gTLD applicant must consider marketing and other costs and is bound by a break-even point that limits its bid to an amount that makes economic sense. By contrast, the closed registry applicant can base its bid on the value of securing a monopoly position that safeguards its profits from business activities that have no relationship to registry operation. One has to bid in consideration of market forces while the other is seeking to secure a monopoly position. One is bidding for apples, the other one for oranges.

3) The barriers to negotiations between contending parties

While ICANN encourages negotiation between applicants in the same contention sets to foster collaboration rather than resort to auction, such negotiations are almost impossible when one applicant has proposed to bar all registrants but itself from having domains in the gTLD at issue, and the other one wants to sell as many second level domain names as possible.

4) The difference in financial obligations

While open gTLD applicants must secure substantial letters of credit (LOC), closed gTLD applicants have much lower financial obligations. All they have to do is state that they will create a limited amount of second level gTLD's and then they only need to secure a LOC for the minimum amount of $18,000. But open gTLD's, who have to assume thousands of registrations to break even, have to secure letters of credit for substantially higher amounts. This is hardly a level playing field for open and closed registries in contention.

5) The lack of a level playing field

Finally, if one of the applicants in a contention set is granted an exemption to the COC and the others have not sought exemptions – because they are seeking to foster the program's goals through creation of an open gTLD -- there cannot be an equal playing field for all applicants and ICANN would fail to uphold its own mission, principles and core values. Therefore, it is especially important that exemptions to the COC be granted to an applicant within a contention set solely when the applicant's request is supported by strong, previously acquired trademark rights. The COC exemption was created for .brand applications such as .Google and .YouTube and therefore contemplated that there would be no applicants in contention with such unique .brand gTLDs. Granting an exemption would not unlevel a playing field if it is a single palyer.

For all the above reasons we maintain that the game that open and closed generics are playing is not in the same ballpark, is not in the same league, it's not even the same sport.

Approval of Closed Generics will Damage ICANN's Reputation

The new gTLD program has been subject to substantial criticism in regard to potential negative externalities such as facilitating an increase in cybersquatting and requiring significant expenditures by brand owners for defensive domain registrations and trademark protection monitoring. Substantial concerns have also been raised about increased potential for consumer fraud, malware distribution, and other harms. While we do not agree that these criticisms require a halting of or substantial new conditions on the new gTLD program, we do believe they argue for a cautious approach by ICANN as it manages the rollout of more than one thousand new gTLDs. ICANN must not just act in the public interest but must be perceived as doing so if it is to defend its multi-stakeholder Internet Governance model against competing ideas.

We believe that if ICANN fails to declare that closed generics are inconsistent with its public interest protection obligations expressed in the exemption provision of the COC it will seriously harm its own reputation and may even cause more delays to the program because of the avalanche of complaints from trademark bodies, companies in established markets, and governments from all over the world. We have already discussed how closed generics are inherently anti-competitive and contrary to established trademark law. But they are also crass commercial exploitation of a program meant to benefit the global public of Internet users. ICANN's public interest responsibilities are furthered by open

gTLDs that provide new platforms for competition and innovation through focused vertical search. But they are negated by closed gTLDs.

ICANN has no mandate to auction off the most significant words in all major languages for the exclusive use of private parties as if they were selling naming rights to a municipal sports stadium. Such examples as L'Oreal's .beauty, Richemont's .jewelry, Amazon's .book and Google's .TUBE are incompatible with the new gTLD program's stated commitment to innovation and competition. If ICANN fails to find closed generics incompatible with protection of the public interest in this first round of the program, it can expect to be deluged with such applications in the second round as global corporations seek to lock up key generic words before their competitors do. This will pervert a program that was meant to expand and open the DNS into one that permanently closes off large and significant sections. We cannot envision how such a result will benefits Internet users – or how it is compatible with ICANN's own long-term interests.

Conclusion

LAT appreciates ICANN's consideration of our views in this critically important matter. We urge ICANN to take a general position that maintaining the COC for single-registrant gTLDs other than .brands is necessary to protect the public interest as well as to preserve the overall goals of competition, innovation, and adequate preservation of trademark law and rights. For that ICANN must not create a new definition of what is a closed generic but rather be clear on what is the public interest, a term embedded in the COC and therefore deserving clear definition.

ICANN should reject Google's request for a waiver of the COC in regard to .TUBE – as it should accept it for .YOUTUBE. The same principles that should guarantee Google protection over .YOUTUBE should guarantee that .TUBE stays available to the public. The same should be true for all applications for new gTLDs in which the applicant lacks relevant trademark rights. Further, ICANN should make clear that any registry operator of such a generic word gTLD cannot, if denied the requested waiver and thereby compelled to make domains available through third party registrars, limit the usage of such gTLD to "premium members", "select content distributors who meet their eligibility criteria", or other vague qualified registrant criteria that will be determined and revealed only after the registry operator contract is signed. Such restricted uses would also be off-limits to a closed generic, as the exemption provision of the COC permits single-registrant operation only where "Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator".

Under such selection criteria and usage restrictions even eligible registrants would lack the full scope of registrant rights that are universally available at open gTLDs so long as they operate their domain in conformity with applicable law and ICANN policies. Such restricted usage would effectively subordinate the activities of registrants to 'terms of service" imposed by the registry operator that are designed to further its own business model and limit new competition against it, and is therefore at odds with the public

interest in fostering competition and innovation. Google cannot be permitted to become a mini-ICANN establishing second class registrant rights.

Sincerely,

Rami Schwartz, CEO

Latin American Telecom LLC