

ICANN call for public comments re: "closed generic" gTLD applications

Comments submitted by Istituto Bruno Leoni

Founded in 2003, Istituto Bruno Leoni is an Italian-based think-tank which provides research and analysis on economic policy at large. Over the years, we have frequently dealt with internet governance issues as part of our digital policy research program. IBL is grateful for the opportunity to contribute to this consultation.

The matter under discussion – the feasibility and proper regulation of closed-generic-TLD arrangements – requires us to answer two different preliminary sets of questions: a) Is the concept of “closed generic” TLDs in itself desirable? b) If so, how best to implement such an idea?

1.

By referring to “generic” TLDs, as opposed to brand-specific ones, we mean that their strings match words drawn from common language, and not a particular trademark or other distinctive name associated with the TLD operator. The “closed” classification refers to the business model chosen by the assignee: a closed TLD would be operated on a one-registry one-registrant basis, while an open TLD would accommodate third-parties requests for second-level domains, either directly or through independent registrars. Let us clarify through an example: if Nike controlled the .shoes TLD and only allowed for its own products to acquire .shoes domain names, that would be considered a closed gTLD; if it allowed competitors (say, Adidas) to register domains under the .shoes TLD, then it would be operating an open gTLD. (If Nike operated the .nike TLD, of course, that would not qualify as “generic.”)

2.

As clear as such definition may seem, a closer look finds it to be pretty elusive, as professor Cedric Manara of EDHEC Business School has observed. Some TLDs just don't fit well with either the generic or brand-specific side: take .apple, for instance, which could be relevant for both the computer maker and producers in the agribusiness. Also, the perception of names evolves over time: some

words will exit the intellectual property realm, a phenomenon known as “trademark erosion” (“Vaseline,” “Escalator,” “Jacuzzi,” “Walkman:” all come to mind); some other have or will enter it, following the opposite trajectory. Furthermore, the generic vs. specific distinction ultimately relies on context: what is generic in a particular area of the world or culture or language, ceases to be in others. Thus, the notion of “generic” is both too wide and too narrow. The bottom line is, there is no way in which ICANN could design a consistent definition of “generic” and apply it smoothly in a diverse international setting.

3.

“Closed” vs. “open” is clearer in principle, but then again the dividing line can get blurry. This is clearly not a dichotomy, but rather a matter of degree. For instance, one registry could issue second-level domains to its own products only, or to its customers (say, a social network or blogging platform), or to its competitors within the industry, or even lift each and every limitation on third parties. In any case, this distinction is not fixed; closed and open also vary in time and business models may adjust to new market conditions or a different economic landscape.

4.

Closed gTLDs are common already, we should also point out. Sponsored TLDs (.edu, .gov, .mil., .mobi...) are controlled by agencies or organizations and are restricted to particular categories of registrants. Other gTLDs, such as .name, .biz or .pro, also require proof of eligibility under the the relevant guidelines. Even ccTLDs are, in some cases, restricted (.mc or the especially valuable .tv would be examples of that). Why should we treat the existing gTLDs and the new ones differently? Even among new gTLDs, virtually no one disputes that brand-specific registries could, and indeed should, adopt closed policies. Again, how to justify such differences?

5.

There’s one more example of existing closed domain names: second-level domains. They represent an interesting case study for the new gTLDs, as they went through a similar “privatization” process in the early 1990s and were surrounded by pretty much the same concerns which are now raised by the new gTLDs. Still, they fared pretty well. Of course they were closed, they were in many cases “generic,” and yet they provided relatively very little, if any, competitive edge to their owners.

6.

One could point out that there is a relevant difference between top-level domains and second-level domains: the latter are virtually countless, while the former will still be relatively limited in number, even after the delegation

process is over. There are several objections to this line of reasoning. First of all, ICANN has already expressed its willingness to open up further rounds of application for gTLDs in the coming future. More importantly, we do not know what web addresses will look like ten or twenty years from now: just as previously unforeseen technological solutions arose which allowed for the DNS to accommodate a much larger number of TLDs than was originally expected, it is well possible that those may be perfected to such a point that the top-level vs. second-level distinction be rendered meaningless.

7.

Those who make the closed generic issue an antitrust problem seem to forget this basic truth: there is no evidence that controlling a gTLD would provide any significant boost in the respective market. This didn't happen with second-level domain and it is unclear why it should happen now. Consumers are much more sophisticated than some commentators believe them to be: they shop on the basis of price, selection, and overall quality of service. Of course domain names play an important role, but they certainly can't make a monopolist out of a sloppy business. In any case, ICANN should not be concerned with the competitiveness of any market, except that for domain names: this is the job of antitrust regulators. And if it were the ICANN's job, by the same token, all TLDs, generic or specific, open or closed, would show the same potential impact on associated markets: we should worry about them all.

8.

Beyond the obvious brand-recognition and marketing-related implications, closed generics can actually provide value to the customers. They could, for instance, enhance security, or accommodate easily recognizable social media services, or provide for better shopping experiences... A light-touch regulatory approach, like the one which has traditionally assisted the growth of the internet market, is most indicated to allow for competing business models and provide ample room for experimentation. It should not be up to ICANN to dictate which business models will best serve the market.

9.

It has been contended that closed generic TLDs had not been foreseen at the time when the relevant framework was being drafted. This is a highly questionable assertion. Although it is true that no mention of "open" and "closed" gTLDs appears in the Applicant Guidebook, closed business models were clearly anticipated and are fairly uncontroversial with regard to brand-specific TLDs. However, no language was included in the Guidebook or accompanying materials, which expressed any concerns with closed gTLDs. On

the contrary, the Application FAQs (see questions # 9.3 and 9.4) explicitly authorized one-registrant models for gTLDs, with no further specifications:

Q. If I want to register a gTLD solely for my own use, for example, solely for use by my company, partners, consultants, shareholders, auditors, etc., can I limit the issuance of second level domains to those individuals? Can I refuse to accept applications for second level domains from members of the public in general?

A. Yes. The applicant is responsible for setting the business model and policy for how they will use their gTLD, so long as the registry is in compliance with the terms of the registry agreement.

Q. If I want to register a gTLD solely to promote my own brand and undertake my own marketing plans, can I refuse applications for second level domains from my competitors? Can I also refuse applications for second level domains from individuals who appear to be cybersquatters or scammers?

A. The applicant is responsible for setting the business model and policy for how they will use their gTLD, so long as the registry is in compliance with the terms of the registry agreement.

Similarly, the Application FAQs (see question # 9.5) provided room for later changes in the applicants' business model, meaning that a gTLD operator could open up a closed gTLD or even switch to a closed model after having secured a gTLD on the basis of an open business model.

Q. After delegation, if the applicant's business plan for the new gTLD were to change from the mission/purpose originally stated on question #18, would the now-gTLD operator be penalized?

A. One of the reasons ICANN is opening the top-level space is to allow for competition and innovation in the marketplace. ICANN recognizes that business models may evolve as the market matures. ICANN will only hold TLD operators responsible for complying with the terms of the registry agreement.

10.

It needs to be stressed-out that a change of direction at this point in time would gravely impact the credibility of ICANN itself, as well as the legitimate expectations of those who applied for gTLDs. Such entities invested huge amounts of money – we are talking hundreds of millions of dollars in the aggregate – to engage in a process that was supposed to lead to a specific outcome. They trusted the ICANN-administered DNS and expect to get what they applied for. Besides the credibility issue, there's a possibility that costly as

well as time-consuming litigation could arise if the rules governing gTLDs were to be reverted now.

11.

In fact, as we showed, the requests for closed generics were entirely compatible with the devised Application framework – and, as such, should not come as a surprise. The outburst of opposition to closed gTLDs, it appears, should rather be attributed to the belated realization by some operators that their competitors had been quicker and more thorough in seizing the opportunity offered by new gTLDs and ICANN rules. ICANN should resist political pressures and lobbying efforts to affect the delegation process as a way to make up for misguided entrepreneurial judgement.

12.

However, from an efficiency standpoint, the number and original assignment of gTLDs doesn't bear much influence when the TLD operators are free to trade and exchange them as they see fit, provided that they meet a minimal set of technical requirements put forward by ICANN to avoid any service disruptions. Allowing for a secondary market in gTLDs would be the best way to ensure that resources are allocated to their highest valued uses and to correct any mistakes or shortcomings of the delegation process.

13.

The latter could also be improved by enforcing economic principles and market mechanisms. In this regard, ICANN's decision to use auctions as a tool to sort out competing bids is an encouraging sign: alas, this only appears to be employed as a last resort solution, or a tie-breaker, the priority being given to qualitative beauty-contest criteria, which leave too much room for discretion and inefficiencies.

14.

To conclude our remarks, we'd like to explicitly address the two questions which inform the present call for comments.

a) How to determine whether a string is generic?

ICANN should refrain from engaging in such a burdensome task, which is likely doomed to fail in any case. Generic vs. specific domain names should not command any special treatment and should be regarded to in a neutral way.

b) Under what circumstances should operators be permitted to adopt "open" or "closed" registration policies?

Again, ICANN should not affect the choices of TLD operators beyond the minimal scope that should be attributed to technical arrangements. New gTLDs are all about innovation and innovation only comes through competition. If ICANN determines and enforces its ideal one-size-fits-all business model for registries, we will forego the opportunity to let the market devise new ways to use the DNS to enhance the consumer experience. There certainly is room for different sorts of operators in the TLD arena: old-style domain reseller aren't going away, but more creative arrangements should also be explored. Let internet entrepreneurs do their job. All compliant parties should be free to operate their top-level domains as they see fit, thus unleashing the kind of competition that ensured the success of the internet economy up until now.