**Comments on GAC’s April 11 Communiqué**

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The Governmental Advisory Committee (GAC) made a series of recommendations to ICANN in the communiqué dated April 11, 2013. These recommendations, many of which go much further than those involved in ICANN policy expected, deserve careful critique before ICANN decides whether these recommendations should be adopted. This comment is submitted in response to ICANN’s request for comments on these recommendations.

1. **Consumer Confusion and Singular and Plural gTLDs**

In March 2013, we submitted a comment to ICANN concerning the effect of closed gTLDs on competition. In the comment, we argued that allowing generic words that are synonyms of each other could foster competition between gTLDs. However, the GAC raises a very good point about the risk of consumer confusion if ICANN permits both singular and plural versions of words to be registered as different gTLDs. The use of alternative forms of words led to similar confusion in the context of SLDs. Under the current system, companies who are registering an SLD within .com and want to avoid that confusion might purchase the different forms of a particular word, and might also purchase common misspellings of that word. Cybersquatting legislation also emerged to address these sorts of issues.

In our view, the GAC has well-founded concerns about singular and plural versions of the same word being allowed as different gTLDs. In our earlier comment, we offered the hypothetical example of Google purchasing the .search gTLD and Microsoft purchasing the .find gTLD. Using distinct synonyms may in fact bring about sufficient competitive benefits that would outweigh any confusion caused. However, if Google registered .search, Microsoft registered .searches, and a new startup company registered .searching, that could arguably lead to excessive consumer confusion. Thus, while we still support the idea of permitting synonymous gTLDs, we think that prohibiting the registration of the plural form of the same word, as the GAC suggests, provides a good boundary.

1. **Restricting Exclusive Registry Access for gTLDs**

In the communiqué, the GAC urges ICANN to limit closed gTLDs to situations where a public interest is served by the exclusivity. However, the GAC does not define what it means by “public interest.” As a policy matter, one could argue that it serves the public interest to allow a for-profit company exclusivity for an otherwise “generic” term that has been trademarked. On the other hand, others might argue that such exclusivity would only serve the interests of the company’s shareholders, and thus would not serve a public interest.

The term “public interest” is vague and often undefined. A person who states that his or her line of work is in a public interest field likely means that the work is of a non-profit nature. In addition to this broadest understanding, the term is also used to refer to different ideas in different sectors. The U.S. Federal Communications Commission (FCC) has long used a public interest standard as the basis for many communication regulations, though the enabling statute does not define what it means for a regulation to be in the public interest.[[1]](#footnote-1) Whether a particular water use is in the “public interest” is also a common standard in water law in states where water is sometimes scarce.[[2]](#footnote-2) These two uses of the term are what we would describe as sector-specific standards. Whether it is in the public interest to promote or prohibit a particular type of communication would logically be decided under a different standard than whether a proposed use of water is in the public interest.

So, what does the GAC mean when it says that gTLDs should not be exclusive, which we also refer to as “closed,” unless the exclusivity serves a public interest goal? Since the GAC did not define this, we must interpret from the context. The first option is that the GAC meant for the term “public interest” to be understood in the broadest sense, with exclusivity being intended to benefit a non-profit organization or purpose. This interpretation might be consistent with the aspect of the communiqué that refers to special protection for intergovernmental organizations. Because the GAC already singles out IGOs for special treatment, it might follow that they meant for other types of non-profit organizations to receive special treatment in terms of whether exclusivity is permitted. However, because of the sheer breadth of such an interpretation and its possible effects, it is inadvisable to read the term so broadly without further clarification from the GAC.

A more reasonable interpretation is that the GAC means ‘public interest’ in a sector-specific sense. In the context of domain names, exclusivity might serve several public interest purposes, such as security and consumer protection. For example, it might be in the public interest, as justified by the consumer protection principle, to only allow approved firms to register SLDs in the gTLD “.antivirus.” In that situation, it would be more difficult for a malware distributor to acquire a domain in .antivirus to make their “product” appear legitimate.

As our previous comment implies, a public interest purpose requirement might hinder the development of vibrant competition in gTLDs. However, if ICANN chooses to accept the GAC’s recommendation concerning the public interest purpose requirement for closed or exclusive gTLDs, ICANN should enumerate specific categories of reasons for exclusivity that would be considered to be in the public interest. In addition to security and consumer protection concerns, ICANN might also declare the protection of intellectual property, such as trademarks, to be in the public interest.

As the above discussion indicates, the term “public interest” is unclear in the context of the communiqué. Similarly, the GAC’s use of the term “generic” is also unclear. “Generic” is not a term that can be universally defined in the context of Internet domain names. Genericness always relies on context. A term that is generic in one context may well be proprietary in another, thus it would be impossible to create a general rule identifying terms that must be subject to a “public interest goal” requirement. For example, depending on the context, “Delta” is a proprietary trademark (for airlines, hardware fixtures etc.) as well as a mathematical symbol, a Greek letter, and a word in the English language. “Spa”, which has actually been identified in the Beijing Communiqué as requiring special treatment under Clause IV.1.c.i, is the name of a city in Belgium, a proprietary trademark, and an English word.

Thus, because the determination of whether a particular string is truly “generic” is unclear, and because the GAC did not adequately define what would constitute a public interest, at this time ICANN should not adopt the GAC’s recommendation that the exclusivity of closed gTLDs should serve a public interest.

1. **The GAC and Proprietary Names**

Because of its role in increasing ICANN’s understanding of the impacts that its actions can have on public policy, the GAC provides an important link between ICANN and national governments. Understandably, the GAC’s positions are more focused on the interests of governments than on the interests of the private sector. In Clause IV.1.g, the GAC encourages ICANN to afford special protections to intergovernmental organizations (IGOs), specifically by affording extra protection to the names and acronyms of these IGOs in the DNS. This recommendation would foreseeably prevent an anti-NATO group from securing the .nato TDL, or the Washington Teachers Organization from securing the .wto TDL. However, ICANN as a whole must consider the effects of its actions on both the private sector and the government sector. Sometimes, these interests are in conflict.

The GAC has suggested that applications for a series of strings including several valuable trademarked terms (such as .amazon, .spa, and .patagonia) should not proceed past Initial Evaluation. This recommendation is likely drawn from the GAC’s focus on the concerns of national governments, because most of these terms also refer to geographical regions, in addition to being brands. Several business entities have expended significant resources in developing these brands and applying for the corresponding gTLDs in good faith under existing guidelines. It would be unfair to effectively veto their efforts at this stage when no specific harm has been articulated by the GAC with respect to the possibility of granting the applications. While the Beijing Communiqué may reflect genuine concerns about conflicts between a trademark and another interest in a new gTLD space, there are already procedures in place – including under national laws – to deal with such challenges. There is no justification for removing applications for these gTLDs from consideration at this point in ICANN’s process.

Even though this string may be reconsidered after the GAC’s meeting in Durban, this “hold” acts as a de facto block to a string otherwise permitted for registration by the AGB, and does not encourage an even playing field for negotiation. The GAC’s attempt to place on hold an application because of a government’s potential conflict destroys the premise of providing stability in the application process. Additionally, it allows a government to supersede the trademark and free expression rights granted by other governments and obtain global rights over applicants that the government would not otherwise have. Thus, the Board should reject the GAC advice on geographic names and allow the applications like the .amazon application to proceed.

1. **The GAC’s Advice for Safeguarding New gTLDs**

The arguably most significant portion of the communiqué is the GAC’s inclusion of recommendations for safeguarding new gTLDs. These recommendations appear to be inspired by a growing awareness of online threats ranging from malware and botnets to copyright infringement and counterfeiting. Currently, governments around the world are struggling to keep up with cybersecurity threats and determine which threats might implicate national security concerns. The GAC’s recommended safeguards impose significant duties on registry operators, including semiannual verification of WHOIS data for gTLDs, a duty to proactively investigate domains in its gTLD for security risks, and a duty to produce and maintain reports of these inquiries.

These safeguards raise a number of interesting questions. Is ICANN the right entity to fix the security of the Internet through its control of the DNS system? Is the technology of botnets and malware such that oversight by ICANN might be more effective than government intervention or the efforts of private computer security firms? Should registry operators be held liable if they do not detect abuses in a particular domain name? And if so, what are the limits of this liability?

There are already existing legal regimes that address liability issues. Under the law of the United States, the public policy has generally been in favor of *not* holding a service provider liable for the actions of third parties using the service. The Communications Decency Act, for instance, is generally understood as granting immunity to service providers for communications published by users of the service.[[3]](#footnote-3) Similarly, the Digital Millennium Copyright Act (DMCA) includes a safe harbor provision that prevents the service provider from being held liable for copyright infringement perpetrated by its users.[[4]](#footnote-4) By requiring registry operators to actively monitor the activities of domains within the gTLD, the GAC is proposing a regime that circumvents established public policy positions that service providers should not be responsible for the activities of third party users. We thus recommend that ICANN not adopt the GAC’s recommendations for safeguarding the new gTLDs.

Nonetheless, because of its status as the *Governmental*Advisory Committee, the GAC’s suggestions for safeguards may reflect a desire on the part of national governments to have more collaboration with ICANN as these governments try to reduce cyber threats around the globe. While we do not support the GAC’s proposal, which would place virtually all of the responsibility for policing cyber risks on the registry operators, this proposal does indicate that further collaboration between ICANN and national law enforcement agencies may be both desired and appreciated.

1. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 Fed. Comm. L.J. 427 (2001). [↑](#footnote-ref-1)
2. *See* Amber L. Weeks, *Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to the Statutory Silence of Water Codes*, 50 Nat. Resources J. 255 (2010). [↑](#footnote-ref-2)
3. Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). [↑](#footnote-ref-3)
4. 17 U.S.C. § 512 (2012). [↑](#footnote-ref-4)