January 22, 2013

Mr. Cherine Chalaby, Chair of ICANN Board New gTLD Committee
Mr. Akram Atallah, COO, ICANN
Dr. Steve Crocker, Chair, ICANN Board
Mr. Fadi Chehadé, President & CEO, ICANN
The New gTLD Committee & the ICANN Board

Dear Mr. Chalaby, Mr. Atallah, Dr. Crocker, Mr. Chehadé:

Last September, several members of the ICANN Community wrote to the Board expressing concerns about Closed Generic TLD applications. **Michele Neylon** urged ICANN to "increase competition and choice," not "segregate and close-off common words.[1] **Steve DelBianco** alerted ICANN that many Closed Generic applications came from companies with "a significant market presence as a competitor" in the business or industry of the closed generic term.[2] **Kathy Kleiman** observed that a number of applications seek to run "'generic word' strings in a completely closed and vertically integrated fashion."[3]

At the Toronto Public Forum, these individuals and others asked ICANN to resolve the ambiguity surrounding these applications, and provide clarity for New gTLD applicants. The central questions on this issue are: What are the exceptions to the New gTLD Registry Code of Conduct? What applications will qualify for this exception? How can applicants request this exception, and what if their request is denied?

For several years, community members have worked extensively on these questions. Some have signed below, others are cited with respect. We offer these proposals in the hope of advancing an exceptions process in a manner that is fair and consistent for applicants.

I.   Non-discrimination in New gTLDs

The default for new gTLDs is an "open" model. This is established in the Applicant Guidebook, which states that TLD registries commit to provide "non-discriminatory access to Registry Services to all ICANN-accredited registrars"[4] while ensuring that they will not "directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems."[5]

These principles are consistent with the obligations of most existing TLDs, including .COM, .NET, .ORG, and .INFO. Their Registry Agreements require that they provide equal and non-discriminatory access to ICANN-accredited registrars. This was also true in the initial draft of the Registry Code of Conduct, which had no exceptions: all new gTLDs were "open."[6] Notably, the concept of a "closed" TLD was advanced by the Business Constituency (BC), who noted that brand owners would not need registrars if their Brand TLD was operated for limited or internal

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[1] https://www.icann.org/en/news/correspondence/neylon-et-al-to-chehade-et-al-24sep12-en

[2] http://www.fhhlaw.com/TorontoPublicForumPresentationsonClosedGenericTLDConcerns10-18-2012.pdf

[3] https://www.icann.org/en/news/correspondence/kleiman-to-icann-25sep12-en

[4] Section 2.9(a), Base Agreement & Specifications, http://newgtlds.icann.org/en/applicants/agb

[5] Specification 9, Section 1(a), Base Agreement & Specifications http://newgtlds.icann.org/en/applicants/agb

[6] November 2010 draft of Applicant Guidebook, http://archive.icann.org/en/topics/new-gtlds/draft-agreement-specs-clean-12nov10-en.pdf

purposes.[7] Thereafter, the second version of the Registry Operator Code of Conduct included an exception to the equal access and non-discrimination provisions with clear comments noting its use for dot-brand TLDs.[8]

II.   Exception Procedures for the Registry Code of Conduct

A fair and consistent process for granting exceptions to the Code of Conduct is crucial for TLD applicants and the community. In general, such a process should include:

A. **Notice**: An advisory to all applicants that the default model is that of an "open" TLD. Applicants seeking a Registry Agreement that does not comply with this model must explicitly request an exception from ICANN.
B. **Procedure**: ICANN Staff must establish a procedure to evaluate exception requests, and process them according to criteria set by the Board.
C. **Criteria**: In keeping with the intent of the exception, we recommend that ICANN grant exceptions only to those applications meeting the requirements in the Registry Operator Code of Conduct:[9]
     i. *"all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use"*; and
    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. Proof that *"application of this Code of Conduct to the TLD is not necessary to protect the public interest."*

Requirements (i) and (ii) are evidence-based, and reference definitions of "Affiliate" and "control" already established in Section 2.9(c) of this Agreement. For requirement (iii), we propose that ICANN affirm this is met if the applicant can prove:

- "The trademark to which the .brand is an identical match must be the subject of trademark registrations of national effect in at least three countries in each of at least three of the five ICANN regions", and
- " For first round applicants, the registrations of national effect referenced in (a) above must have been issued on or before June 27, 2008", and
- the trademark is otherwise eligible for inclusion in the Trademark Clearinghouse.

The first two points above were defined by the Intellectual Property Constituency, during the Vertical Integration Working Group's discussion of the dot-brand exception, to create a "balance of fairness and seeking to ensure that there is no gaming."[10]

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[7] BC Position on Registry-Registrar vertical separation September 2009, https://community.icann.org/display/gnsovertint/Initial+Report+Vertical+Integration+PDP+WG+Posted+For+Comment+23+July+2010
[8] April 2011 draft of Applicant Guidebook, http://archive.icann.org/en/topics/new-gtlds/draft-agreement-specs-redline-15apr11-en.pdf.
[9] Specification 9, Section 6, Base Agreement & Specifications, http://newgtlds.icann.org/en/applicants/agb
[10] IPC Proposal, Initial Report Vertical Integration PDP WG Posted For Comment 23 July 2010, https://community.icann.org/display/gnsovertint/Initial+Report+Vertical+Integration+PDP+WG+Posted+For+Comment+23+July+2010

As an alternative, we propose that a test determining whether a TLD string is a brand could be designed to mirror that of the proposed Trademark Clearinghouse with appropriate safeguards to prevent gaming.

Once ICANN has determined that an application has satisfied the criteria set out above, the exception request should be granted. If the application fails to meet these requirements, ICANN should (i) notify the applicant that they do not qualify for the exception; and (ii) permit the applicant to either modify its application to conform to an "open" model, or withdraw the application and receive a refund of all fees paid in accordance with program rules. In all cases, the process to evaluate and grant or deny the exception request must be fair and expeditious, and provide applicants with the necessary certainty to develop their business plans with confidence.

III.   The Alternative: A Difficult, Confusing, and Lengthier Process

However, ICANN might adopt a different approach. Qualifying brand owners would still request and receive an exception according to the expedited procedure defined above. But other applicants might also request an exception if they can demonstrate that their application will "protect the public interest" by proving that it is:

A. Not a "significant market presence as a competitor" in the market or industry characterized by the TLD string;[11]
B. Not "seeking exclusive access to a common generic string that relates to a broad market sector";[12] and
C. Not likely to engage in any number of activities or abuses that the non-discrimination and equal access provisions of the Registry Operator Code of Conduct were created to prevent.

These proceedings must be open and public, allowing stakeholders in the ICANN Community, including Governments, to provide comment and evidence. We anticipate that this process would be lengthy, inconsistent, and that few applicants would pass.

We are well in to the application evaluation process, and most TLD applicants cannot risk any further delays due to program uncertainty. With this in mind, we thank you for consideration of these proposals, and offer our assistance in any manner that can benefit this task.

Thank you,
Michele Neylon, CEO, Blacknight, Ireland
Kathy Kleiman, Fletcher, Heald & Hildreth, US
Nigel Roberts, CEO, CI Domain Registry Ltd., Guernsey
Alex Gakuru, Chair, ICT Consumers Association of Kenya
Frederic Guillemaut, Mailclub, France
Paul Andersen, CEO, Artic Names, Canada
Gerardo Aristizábal P., Managing Director, CCI REG S.A., Colombia
Luc Seufer, Chief Legal Officer, EuroDNS, Luxembourg
Benny Samuelsen, Registry manager, Nordreg AB, Sweden
Jordan Carter, Acting Chief Executive, InternetNZ (.nz)
Jay Daley, Chief Executive, .nz Registry Services (.nz)
Debbie Monahan, Domain Name Commissioner, Domain Name Commission (.nz)

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[11] Comments of Steve DelBianco,
http://www.fhhlaw.com/TorontoPublicForumPresentationsonClosedGenericTLDConcerns10-18-2012.pdf
[12] Australian GAC Early Warnings of 82 Closed Generic TLDs, see e.g.,
https://gacweb.icann.org/download/attachments/22938690/Autoinsurance-AU-86372.pdf?version=1&modificationDate=1353381252000