

The Case for Delegating Closed Generics

Overview and Recent Developments	1
Our Recommendation	1
Rationale	1
Summary	1
Difficult category to define and regulate	2
Difficult to define Public Interest	3
Single-registrant TLDs – a platform for innovation	3
There is no harm to be avoided	4

Overview and Recent Developments

The Applicant Guidebook (“AGB”) did not mention, nor bar the application for “closed generic” TLDs, however they might be defined today. Applications for “generic-word,” single-registrant TLDs were processed by ICANN in the typical fashion, because the AGB was written such that all prohibited or regulated TLD strings and business models were specifically identified, and all other strings would be freely permitted as legitimate and innovative uses. Closed generics were discussed and debated during development of the AGB, and were not prohibited or regulated by Board Resolution, GNSO Consensus Policy, GAC Communique, or within the AGB.

After the applications were submitted and revealed, the GAC provided advice to the Board that objected to the delegation of closed generics, and expressed concern that closed generics should only be permitted if they are to be operated in the public interest. The Board consequently decided to halt the processing of applications for “closed generics” for the current round, and sought additional policy recommendations from the GNSO on how closed generics should be treated in subsequent rounds. In the years that have followed, policy discussion has created a public record of proposals for handling closed generics and the rationale for them.

Our Recommendation

Permit the delegation of single-registrant TLDs for any string (including closed generics TLDs) so long as the application meets all other AGB criteria, for the reasons described below:

Rationale

Summary

In short, we think that a public-interest test is unworkable, precludes innovation, and prevents no harm. Any one of these three factors should preclude a policy that prohibits closed generics if they do not meet a public-interest test. As described below, all three factors are present here.

Creating a category and public-interest test for closed generics is unworkable. In creating policy, we owe a duty to ensure the policy is implementable and, as described below, that possibility is not present here.

The Case for Delegating Closed Generics

The closed-generic category is also difficult to define in the form of a bright-line rule, and therefore difficult to regulate. This will lead to costly, time-absorbing disputes that add no value, indeed, that undermine the entire new gTLD program.

Finally, even if a public-interest test is implemented, there is no certainty that the resulting TLD will provide the hoped-for benefit. Applicants can attempt to game the any public-interest test to obtain a TLD delegation, just as happened with Community TLDs in the current round.

However, there is significant benefit and little downside to permitting the delegation of closed generics without any gating test (such as a public-interest test).

- Closed TLDs provide an excellent platform for innovation. ICANN rules, and the perception of many that TLDs can only be operated in the classical sense, have been a bar to innovation. Roadblocks such as a public-interest test would deter some with innovative ideas from attempting to participate in subsequent rounds, particularly given the impossibility of defining “public interest” in advance and with respect to all potential applications.
- No real harm results even in cases where a single-registrant TLD fails to provide some hoped-for or planned benefit. *These are just domain names* and there are literally billions of choices. If a generic TLD is delegated and is not useful, the public will find a more useful domain, just as they have done at the second-level, with all “generic” word domains long taken in all major TLDs. The DNS got along for 35 years without the delegation of more than a handful of generic terms at the top-level. There is much to be gained by their delegation but there is little downside when compared to the DNS of the past many years.

Difficult category to define and regulate

A new category for closed generic TLDs would be difficult to define and regulate. There are clear examples of this from the previous round.

When ICANN amended the new gTLD regulations to address certain single-registrant applications, each such applicant was asked whether they wished to amend their application (abandoning their business model and operating as open), or abandon the application.

There are examples of applicants making both choices. Some applications were abandoned or put on hold. Other applicants resubmitted their application and changed the operating model from “closed” to “open.”

In one scenario, an open-TLD operator might allow one, two or very few outside registrants. In another, the TLD operator might allow registrations only for a narrowly defined set of agents that comply with criteria that serve the business model of the TLD operator. In these cases, the TLD operator might be hailed for its innovative approach, while effectively operating a closed TLD.

Are these open TLDs really closed generics by another name, with enough of a deviation to circumvent the prohibition on closed generics in the first round? Why has there been no appetite for pursuing redress? Is it because there is no harm and there is innovation?

The Case for Delegating Closed Generics

Addressing closed generics and *de facto* closed generics will lead to an additional labyrinth of policy debate and unworkable regulation. Ignoring “in-fact” closed generics is a policy failure.

Nor has the definition of “generic” words been settled; this presents another unworkable aspect of this test. The policy discussion seems to have left this aspect behind – compounding the difficulty of implementing a public-interest test.

Difficult to define Public Interest

In one incarnation, ICANN is a public-private partnership created to serve the public interest. ICANN was asked to define “public interest.” They have not been able to do that.

The development of such a definition will be convoluted and contentious. For example, if the definition discussion occurs within the SubPro team, support for a certain definition would be dependent on whether one does or does not support the idea of closed generics.

To provide an example, one definition might be, “an activity serves the public interest if society as a whole is any better off.” That means that a closed generic that provides any benefit not outweighed by some calculable detriment should be delegated, i.e., because the world (however slightly) is a better place. How do you feel about that? The answer is probably correlated to your position on closed generics.

Any vagueness in the definition, which is certain, will make it difficult to implement and be the subject of litigation later.

Put another way, in order justify the substantial costs, uncertainty, and detriment to the gTLD program that would spring from a “public-interest test,” we should make sure that such a test:

1. would prevent substantial detriment, and
2. would not be a bar to the substantial benefit that might accrue from the delegation of closed TLDs.

As described above, we think a public-interest test is impossible to competently implement. Based on the discussion below, we think a public-interest test would not prevent material detriment and the reasonable delegation of single registrant TLDs are likely to provide substantial benefit. That benefit can only be realized so long as these applications are not deterred by difficult to implement tests and other impediments such as *ex post facto* GAC advice.

Single-registrant TLDs – a platform for innovation

If a category definition and public-interest test for closed generics is unworkable, should closed generics simply be barred? No. Firstly because, as described earlier, it is difficult to define the category, i.e., to draw a bright line around the definition – or any bright-line rule might be gamed by allowing a few or particularly allegiant registrants.

The Case for Delegating Closed Generics

More importantly, single-registrant TLDs provide the most fertile bed for domain-name innovation. Much of the meaningful innovation to date has been with closed, nearly closed or tightly restricted TLDs. It is likely that we have missed significant additional innovation by barring closed generics.

There are other bars to innovation, such as the classical TLD pay-per-registration business model, the ICANN fee, and contractual requirements in general (which are outside the scope of this particular policy discussion), but allowing generic, single-registrant TLDs would be a good first step.

There is no harm to be avoided

Those wishing to bar closed generics or filter the applications via a public-interest test worry that valuable name spaces such as .book might be operated at the sole whim of a company or individual. That concern is overblown.

As an initial matter, because the ICANN Board halted processing of applications for closed generic strings in the first round we have no data that the operation of closed generic strings will cause, or is even likely to cause harm to any part of the Community. The only data that is available to us is in the form of second-level names where registration and use of generic domain names has not resulted in any marketplace or other measurable harm.

The DNS is full of naming options. There are many millions of words and word combinations available. If a firm acquires .book and makes great use of it (and by “great” we mean great usefulness), then the internet-using population will flock to it. If the innovation or deployment is not particularly useful, the public will find a more useful domain – even if it is not named .book.

Some years ago, because book.com was taken, a company registered amazon.com with a better idea of how to sell books. Do we miss book.com and did the monopoly over the book.com name-space bar competition? Of course not. By similar reasoning, the delegation of a closed generic TLD provides an opportunity but does not grant a monopoly over all use of that generic term in domain names or otherwise in the same way that registration of a generic second-level domain does not.

Some are concerned that a TLD delegation is forever, but nothing is forever. A closed generic (perhaps .book), might initially dominate a market, but over time, competition rises up, dominant players sink, and the market changes. There will be a new, fanciful name that can and will compete with .book. The closed generic, or the company owning it, might be acquired. The new company might make use of it or return it to ICANN. The DNS will evolve. Those making the best use of their domain will rise. We will not miss the ones who do not.

Many of us were thrilled when Amazon applied for .book. Participation by Amazon validated the whole program and the world’s largest book seller was well disposed to use the platform for innovation. Yet, we decided to get in the way of that. What harm was avoided by cancelling the incalculable benefit staring us right in the face?

These things, that are the topic of our discussion, are just domain names and have no intrinsic value – only the value that the owner imputes to it. There is little to be lost in the delegation of closed generics, but we stand to gain, finally, real innovative use of the DNS.