



VIA E-MAIL

January 31, 2013

Dr. Steve Crocker, Chairman of the Board
Mr. Fadi Chehadé, President & CEO
Mr. Cherine Chalaby, Chair of the New gTLD Committee
Internet Corporation for Assigned Names and Numbers (ICANN)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Closed Generic Top-Level Domains (TLDs)

Dear Dr. Crocker and Messrs. Chehadé and Chalaby:

We are writing to express our concern, similar to concerns expressed by Australia and Germany in their respective Early Warnings, regarding private, exclusive ownership of closed generic TLDs. As you are aware, a small number of companies have applied for TLDs that consist of generic industry categories and seek to control them in closed fashion. Examples of generic TLDs that are being pursued as closed include .insurance, .app, .jewelry, .search, and .book, among others.

This situation threatens the openness and freedom of the internet and could have harmful consequences for internet users worldwide. These applications also present a competitive threat to other companies. In addition to these policy concerns, closed generic TLD applications merit close scrutiny because the applicants are attempting to circumvent ICANN's Code of Conduct and New Registry Agreement through exemptions that were not intended for them. We ask the Board to consider requiring applicants for closed generic TLDs to either open the TLD or withdraw for a full refund.

Anticompetitive Impact

When ICANN announced its plan to increase the number of TLDs available on the Domain Name System, one of the stated goals was to enhance competition and consumer choice.¹ As a result of ICANN's decision to expand the number of TLDs, over 1900 applications

¹ See <http://newgtlds.icann.org/en/about/program>.

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were filed.² A majority of these applications conformed to ICANN's goals and fell into two groups: (1) closed brand TLDs and (2) open generic TLDs.

However, certain applicants filed new TLD applications for generic categories in the very industries in which they compete, with the stated goal of controlling those TLDs as closed registries.

If ICANN allows closed generic TLDs to proceed, competition will suffer. The companies at issue will be positioned to gain unfair advantage in direct navigation and online search; will become associated with the very genus of products they offer; and will likely control their generic TLDs perpetually since the registry agreements permit unlimited automatic renewal in ten-year terms. Additionally, the companies at issue will likely be able to prevent substantially similar TLDs from being registered in the future, such as .apps or .jewelrystore. Needless to say, this will result in steep barriers to entry for would-be competitors. As the governments of Australia and Germany noted during the GAC Early Warning Process, there will be a significant "negative impact on competition"³ by barring other entities, especially competitors, from using those generic TLDs.

As noted above, some of the closed generic TLD applications include .insurance and .jewelry. In the respective applications, these companies have expressed their intent to exclude competitors through the use of generic TLDs. For example, in the application for .insurance, Progressive specifies its intent to "simplify Internet user navigation to insurance content" and "provide a platform for Progressive . . . to market to and acquire new customers."⁴ Richemont is equally transparent in its desire to leverage 'jewelry' to gain a competitive edge, stating in its application that "[u]sers of .Jewelry names must utilise their domains solely for purposes that enhance Richemont's strategic or commercial interests."⁵

² See <http://www.icann.org/en/news/announcements/announcement-13jun12-en.htm>.

³ See GAC early warning from the government of Australia for .search by Amazon at <https://gacweb.icann.org/download/attachments/22938690/Search-AU-13549.pdf?version=1&modificationDate=1353432052000> and by Google at <https://gacweb.icann.org/download/attachments/22938690/Search-AU-50966.pdf?version=1&modificationDate=1353432170000>, and the GAC Early Warning from the government of Germany for .hotels by Priceline.com, <https://gacweb.icann.org/download/attachments/22938690/Hotel-DE-57874.pdf?version=1&modificationDate=1353452994000>.

⁴ Application of Progressive Casualty Insurance Company for .insurance, Appl. No. 1-1269-14573, at 18.a.

⁵ Application of Richemont DNS for .jewelry, Appl. No. 1-1253-11362, at 18.b.

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Ownership of generic industry categories as closed TLDs by industry players is likely to have anticompetitive impacts and limit consumer choice across the internet. A proposed solution is to deny applications for these closed registries or to require that they operate as open registries, allowing free access to competitors.

Harm to the Public

Part of what has contributed to the vibrant growth of the internet is the ability of consumers to transcend physical boundaries to share information and find economic opportunity worldwide. Until now, people and companies have freely registered domain names in TLDs of their choice, whether the traditional .com, ccTLDs, or more specific TLDs such as .net and .org. This has been critical to the success of the internet.

If ICANN allows closed generic TLDs to proceed, the internet will change from its current fluid form to an assortment of “walled gardens.” This privatization of the internet does not benefit consumers. Consumers who are searching for songs, books, blogs, apps, insurance, or jewelry want choice, not solely the product or service of a single company.

ICANN’s Code of Conduct and New Registry Agreement

In addition to the policy concerns detailed above, applications for closed generic TLDs should be denied because they are inconsistent with ICANN’s Code of Conduct and New Registry Agreement. Specifically, Section 1 of the Code of Conduct dictates that registries may not “register domain names in [their] own right. . .” and Section 2.9 of the New gTLD Registry Agreement requires all registries to “provide non-discriminatory access to Registry Services to all ICANN accredited registrars. . . .” Since applicants of closed generic registries would register domain names in their own right and would not provide open access to all registrars, they need ICANN to grant them the following exemption found in Section 6 of the Code of Conduct:

“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 . . . application of this Code of Conduct to the TLD is not necessary to protect the public interest.”

However, as indicated by the requirement that exemptions be consistent with the public interest, the exemption in Section 6 was intended for companies applying for branded TLDs, not industry-wide generic categories.

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In light of the foregoing, we respectfully ask the Board to consider requiring applicants for closed generic TLDs to either open the TLD or withdraw for a full refund.

Thank you for your consideration. If you have questions or wish to discuss any of the points raised herein, please contact Russell Pangborn at russpang@microsoft.com.

Very truly yours,

A handwritten signature in black ink, appearing to read "Russell Pangborn". The signature is written in a cursive, flowing style.

Assistant General Counsel – Trademarks
Microsoft Corporation