

Julie Bisland:Welcome to the New gTLD Subsequent Procedures Sub Team – Track 2 – Legal/Regulatory Issues on Thursday, 28 September 2017 at 15:00 UTC

Julie Bisland:Agenda wiki page: https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_x-5FxfkB&d=DwIFaQ&c=FmY1u3PJp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=QIF-05YzARosRvTYd84AB_UYInlydmFcjNmBM5XgySw&m=YHQNiHRkp7twdu2kKWWU4JSS01zUgw1IsEgkB-rpP2I&s=CNnhd4yNg90iePTqBeVsZ61DlinGfXk81CD-Q8yoeqU&e=

Liz Brodzinski:I hear you both!

Michele Neylon:audio is loud and clear

Karen Day:hello & happy Thursday/Friday everyone

Julie Bisland:yes

Michele Neylon:.office + .play are both trademarks though

Alexander Schubert:Almost every premium keyword is trademarked in MULTIPLE TM registries!

Jeff Neuman:.office itself is not a trademark that qualifies under Spec 13

Mike Rodenbaugh:I suspect Microsoft would disagree with that

Jeff Neuman:The point is that we need to all understand and agree that the current rules are that if you have a valid trademark registration for a string that COULD have a generic connotation, but the trademark registration is for a use that is NOT for the use of the mark in connection with the potential generic connotation, that IS allowed as a closed gTLD

Jeff Neuman:So the string apple, food, or any other term can be used as a closed TLD provided that the use of the TLD is consistent with the goods/services for which the string is trademarked

Mike Rodenbaugh:There is NO definition whatsoever of "public interest" in ICANNland. It is whatever anyone wants to say it is on any given day and any given issue.

Michele Neylon:Mike - yeah - it's a wonderfully fluffy term :)

Mike Rodenbaugh:It's a ridiculously vague term

Karen Day:IF you had a trademark REGISTRATION PRIOR TO THE DATE OF FILING THE TLD APPLICATION ONLY.

Mike Rodenbaugh:The so-called "rule against closed generics" is not one devised by the community. In fact, we came up with the opposite rule (that they should be allowed) in the run-up to 2012.

Michael Flemming:Karen is correct.

Michael Flemming:So pre-2012

Cheryl Langdon-Orr:sorry to be late

Cheryl Langdon-Orr:late

Jim Prendergast:Is there standing GAC advice against closed generics? and where does overcoming that come into this.

Mike Rodenbaugh:yes, so that GAC advice somehow became the new "rule"

Michele Neylon:+1 Greg

Alexander Schubert:The TM should be at least X years old (e.g. 5 years), and USED in at least X nations (not just registered, e.g. 25 nations). A simple 1 year old TM registration is not good enough.

Michele Neylon:the term is generic the usage in the case of apple isn't

Michele Neylon:Apple using .apple doesn't bother me

Kurt Pritz:The RPM Working Group uses the term "dictionary word" rather than "generic"

Michele Neylon:IBM (for example) closing off .cloud just for their own use would bother me

Trang Nguyen:@Jim, GAC category 2 advice says: "For strings representing generic terms, exclusive registry access should serve a public interest goal."

Jim Prendergast:thx trang

Mike Rodenbaugh:the Board then acted on this post 2012 applications

Karen Day:@Alexander - and how will that foster innovation?

Alexander Schubert:If a generic term is snacked up by a brand and "closed" - then it is inaccessible to the public. And that should not be!

Michele Neylon:New TLDs to date haven't fostered much innovation unless you consider price gouging to be innovative

Mike Rodenbaugh:@Alexander -- doesn't the same logic apply at the 2d level?

Michele Neylon:the last innovative TLD I've seen was .tel and that was a roaring success

Alexander Schubert:Industry giants will snoop up their industry related killer keywords - and shut them down. At about US \$300k that is a STEAL!

Michele Neylon:Alexander - exactly

Mike Rodenbaugh:same thing has happened at 2d level

Michele Neylon:and that bothers me

Karen Day:@Michele that depends on your definition of success. For a brand, success has nothing to do with sales.

Alexander Schubert:+1

Susan Payne:@Alexander I don't think this is the place to unpick fundamentals of TM law

Susan Payne:companies can register TMs, they have to persuade the relevant TM office that it is valid and acceptable registration.That's it

Jim Prendergast:<http://domainincite.com/22114-loreal-is-using-closed-generic-makeup-in-an-interesting-way>

Susan Payne:and no-one is stopping you applying first for the purpose of running the TLD in a generic rather than a non-branded manner. There have been plenty of examples of that in round 1. Coach for example

Jeff Neuman:Validated TLDs are not closed because they offer third party registrations

Alexander Schubert:It is lawful to use a generic keyword for a TM - but not really advisable. Do it on your own risk. Don't tell the world that now that you use a generic term as a TM you need also to shut down the matching TLD. Doesn't fly with the general public, sorry. In TM law there are goods and service classes; in the DNS not! Therefore in the DNS generic keyword terms need to be accessible to the public!

Jeff Neuman:That is very different than what we are talking about

Mike Rodenbaugh:@Alexander the same argument can be made as to .com?

Greg Shatan:Maybe we need to clearly define "closed", if there's any doubt....

Alexander Schubert:Mike: Please specify!

Mike Rodenbaugh:to be clear, I think it's a silly argument. why is DOTmakeup any worse to public interest than makeupDOTcom?

Michele Neylon:Mike - I disagree - an entire TLD is the online equivalent of a country

Mike Rodenbaugh:ok, then makeup.DE

Michele Neylon:while a single domain is the equivalent of a bit of real estate

Alexander Schubert:ICANN's mandate are TLDs - not the 2nd level namespace.

Karen Day:Are we talking about GeneriPICS?

Alexander Schubert:We are discussing the DNS evolution, on TOP-LEVEL!

Michael Flemming:I Karen, I am not going to say no to that, but neither yes.

Greg Shatan:@Alexander, I think Mike is saying we don't need any more regulation at the top level than there is at the second level, which is none.

Karen Day:My question was to Michael - in the same way we are discussing GeoPICS

Michael Flemming:Which Michael

Karen Day:Thanks, Michael

Michael Flemming:?

Michael Flemming:Ok

Karen Day:Flemming

Mike Rodenbaugh:I see the public interest as the same. Frankly, generic.COM names are much more valuable than genericTLDs in many, many cases.

Greg Shatan:Third parties have bought .makeup domain names. It's no more exclusive than .luxury.

Mike Rodenbaugh:and nobody screams about that

Susan Payne:@Jeff, the names aren't really free for L'oreal - they paid 185k for the registry

Greg Shatan:So .makeup is a form of innovation....

Alexander Schubert:Greg: EXACTLY! That's why we ought to secure "equal access" - INSTEAD of enabling industry leaders to shut down generic keyword based namespaces.

Greg Shatan:No one is "shutting down" anything.

Mike Rodenbaugh:@Alexander you mean like CentralNIC with us.com, etc.?

Kurt Pritz:@Michele: are you disagreeing with Jeff N's assertion that the restrictions on closed 'generics' can be gamed?

Alexander Schubert:Mike: We can only regulate the top-level..... that's our only mandate.

Mike Rodenbaugh:there is no mandate to regulate anything

Michele Neylon:Kurt - I don't think so

Alexander Schubert:Mike: We DO regulate the evolution of the DNS evolution, that's why we are in this call.

Greg Shatan:ICANN is not a regulator.

Mike Rodenbaugh:+1 GG

Greg Shatan:Regulating innovation is an oxymoron.

Jeff Neuman:ok, to clarify. Michele, you are saying as a general rule, you can not have an exclusive use TLD. However, you can have an exclusive use TLD, if you make it nearly impossible for every third party to register a name, but make it easy for you to register a name. For example, if I want .phone (and really just use it for myself), I can't say I am an exclusive use registry, but I can say that everyone else has to pay me \$10,000,000 for a name, but I can give second level names to myself for free.

Michele Neylon:Jeff - that's one way of summarising my thoughts

Trang Nguyen:@Alexander, ICANN's stated Mission in its Bylaws specifically says that ICANN is not a regulator: "ICANN shall not regulate ... For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority."

Jeff Neuman:Overall the point is that the rule against closed generics to me (personally) does not make any sense when it can be so easily gamed. We have to choose one way or the other. If we allow closed generics, let's allow them. If we do not want to allow closed generics, then we need to make sure it is not gamed. Right now, we have huge inconsistencies

Alexander Schubert:So when we deny ISIS to apply for .isis then that is NOT "regulation"?

Alexander Schubert:Maybe ISIS wants to "innovate"?

Alexander Schubert:We do not want that - hence regulate the DNS in a way that they can't do it.

Mike Rodenbaugh:This was very widely and publicly debated prior to 2012 and there was no consensus to preclude 'closed generics'; so they were explicitly allowed. I have still never seen any real explanation as to harm caused by them.

Alexander Schubert:Maybe the term "regulate" is wrong here - we issue "policies"

Karen Day:Why any special objections other than what is already in place

Michele Neylon:I don't think it's coming from my line anyway

Karen Day:lots of beep beeps

Julie Bisland:Reminder: please mute when not speaking :)

Jeff Neuman 2:I personally believe an objection process needs to focus on the harms to end users (as opposed to harms to competitors, registrars, registrants, etc).

Mike Rodenbaugh: before we consider an objection process, don't we need to agree on some substantive basis to object?

Greg Shatan: Exactly, Mike.

Greg Shatan: I want to clarify that I'm not "in favor of" closed generics. The question is whether there is an objective basis within ICANN's remit to restrict them.

Jim Prendergast: Jeff - I'm not so sure the ALAC would agree with your position on addressing registrants' comments but they have to speak for themselves (and internet users)

Michael Flemming: Just remember, everyone, that today's call is for 90 minutes.

Jeff Neuman 2: objections by competitors should not be "ignored" -> They should be handled by existing competition laws with existing competition authorities

Jeff Neuman 2: It's not about "domain names".....

avri doria: even if .cloud was taken for the private use of a meteorological society?

Michael Flemming: Steve, could we get the list of proposed cons up?

Michael Flemming: I think Emily did a sheet for that.

Cheryl Langdon-Orr: perhaps we need to proactively engage with end users to do so, then Jeff not seeing a slew of their representatives in this call for example

Steve Chan: @Michael, let me try and dig that up

avri doria: even if .book was taken by the antique bookbinders of the world?

Michael Flemming: I can send it to you.

Greg Shatan: As a recovering antitrust lawyer, I don't see an antitrust concern that would arise.

Jeff Neuman 2: Harm in competition law is ONLY assessed after the harms are realized....not in order to prevent theoretical harms

Michael Flemming: Greg, if I don't all on you after Jeff, please go ahead.

Steve Chan: @Michael, I just grabbed the document from the Wiki

Michael Flemming: Need to send a sheet to Steve

Michael Flemming: Alright

Michael Flemming: Nvm

Steve Chan: Ready to go whenever you're ready

Michael Flemming: I will stay here.

Michael Flemming: Let's put it up

Jon Nevett: Don't think Jeff correctly stated US competition law

Karen Day: +1 Jeff

Jeff Neuman 2: Greg said that better than I did

Jeff Neuman 2: Having an advantage by virtue of having a TLD is not anticompetitive in and of itself

Mike Rodenbaugh: Thanks for putting this doc up; some real good laughs in here. "The impact is greater" of TLDs over 2d level names?

Mike Rodenbaugh: "search engines are likely to give priority...."

Jeff Neuman 2: Mike - these are all drawn from comments we have received

Jeff Neuman 2: NO value judgement by the WT leadership is exercised in putting this chart together

Mike Rodenbaugh: "closed generics will put entire cultural identities at risk"!

Jon Nevett: I'm not taking a position on this issue at all, but US competition law will look at some conduct before it occurs

avri doria: the problem with a rule is that it excludes names that would not be a competitive problem as well as those that might.

Jon Nevett: neither here nor there, but that point was typed in the notes

Jeff Neuman 2: Conduct yes.....theoretical conduct no

Greg Shatan: Antitrust authorities will block mergers before they happen.

avri doria: ie. clouds for meteorologists and books for bookbinders

Jon Nevett:yes theoretical -- happy to take it offline Jeff
Greg Shatan:But that is a very specific legal construct under a specific arm of competition law.
Jon Nevett:correct Greg -- the whole HSR process is pre-conduct
Jeff Neuman 2:HSR is for business consolidations where the result of which is having true market power.
avri doria:is no compromise position possible? have we explored the middle space?
Susan Payne 3:some of these proposed harms are ludicrous, so no
Greg Shatan:I filed over 150 HSRs prior to "recovery".
Julie Bisland:avri, cannot hear you
Julie Bisland:no audio for you, Avri
Michele Neylon:Can't decipher that noise
Jon Nevett:@jeff just correcting the record -- you just went a bit too far in your statement -- no biggie
avri doria:i was trying to speak.
avri doria:will call in.
Greg Shatan:And the economic/legal analysis to get a merger blocked is intense.
Julie Bisland:ok, thank you
avri doria:but there is always a middle space, just have to look for it/
Mike Rodenbaugh:why aren't we looking specifically at the 'closed generics' that are now in the market? what harm has been caused by DOTmakeup?
Gg Levine (NABP):Shouldn't the objector have to demonstrate harms?
Julie Bisland:haha, you sound great Avri
Phil Buckingham 2:...so how do we move this forward . do we say that every TLD is open unless
Jeff Neuman 2:@Phil - no we cant say that. That would be setting a policy that top level domains can only have one business model - that of selling second level domains
Greg Shatan:I think we say every TLD is free to operate as it sees fit with regard to third party second level domains (or not), unless.... And the "unless" needs to meet a very high bar.
Greg Shatan:But Jeff, if people and companies can't buy and sell any domain name they want, how will anyone make any money?
Cheryl Langdon-Orr:@Avri good point there is often reaction to the who holds a generic name
Jeff Neuman 2:@greg - I assume that was sarcasm
Greg Shatan:From me -- yes.
Mike Rodenbaugh:I've got lots more sarcasm where that came from
Jeff Neuman 2:ICANN needs to be neutral. It can not make determinations based on "who" applied for a string.
Greg Shatan:WTF is harm to the public interest?
Mike Rodenbaugh:I wonder how every other cosmetics company has managed to stay in business despite L'Oreal owning and effectively closing DOTmakeup for so long now
Susan Payne 3:@Mike - LOL
Jeff Neuman 2:@Greg - arent you the chair of that accountability subteam :)
Greg Shatan:No, just the Jurisdiction subgroup....
Jon Nevett:@greg -- looking for a deal on .WTF?
Mike Rodenbaugh:none of these purported harms are legitimate. period.
Mike Rodenbaugh:where is the proof, based on what has happened in the market?
Greg Shatan:@Jon -- LOL.
Jon Nevett::-)
Trang Nguyen:Implementation of GAC category 2 "exclusive access" advice is here:
https://urldefense.proofpoint.com/v2/url?u=https-3A_newgtlds.icann.org_en_applicants_advisories_gac-2Dcat2-2Dadvice-2D19mar14-

