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

March 6, 2013

Re: Closed Generic Top-Level Domains (TLDs)

Dear Dr. Crocker and Mssrs. Chehadé and Chalaby,

On behalf of the Information Technology and Innovation Foundation (ITIF), I am pleased to submit these comments in response to ICANN's request for public comment on "Closed Generic TLDs."[1]

ITIF is a Washington, D.C.-based think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity internationally and in the United States. Recognizing the vital role of technology in ensuring prosperity, ITIF focuses on innovation, productivity, and digital economy issues. ITIF publishes policy reports, holds forums and policy debates, advises elected officials and their staff, and is an active resource for the media. It develops new and creative policy proposals to advance innovation, analyzes existing policy issues through the lens of advancing innovation and productivity, and opposes policies that hinder digital transformation and innovation.

ICANN has been accepting applications for new top-level domains (TLDs) (see Table 1). Some stakeholders in the Internet community have expressed concern about the potential for "closed generic" TLDs, i.e. TLDs using a generic word or phrase for which the TLD operator can exclude others from registering domains. A hypothetical example of a "closed generic" TLD would be if General Motors operated the TLD ".CAR" and only allowed GM-brand cars to have ".CAR" domains. (If, in this example, General Motors allowed other automakers to register ".CAR" domains then the TLD would not be considered "closed"; if the TLD was ".GM" instead of ".CAR" then it would not be considered "generic".)

Some stakeholders are concerned that "restricting common generic strings for the exclusive use of a single entity could have unintended consequences, including a negative impact on competition."[2] As a result, some stakeholders have suggested that ICANN "establish criteria for third-party access to the TLD" and that "these criteria should form part of any binding contract with ICANN, and be subject to clear compliance oversight by ICANN."[3]

Table 1: Proposed gTLDs with 5 or more applicants

STRING	# OF APPLICANTS	STRING	# OF APPLICANTS
APP	13	WEB	7
HOME	11	BABY	6
INC	11	CORP	6
ART	10	CPA	6
BLOG	9	GMBH	6
BOOK	9	LAW	6
LLC	9	NOW	6
SHOP	9	ONLINE	6
DESIGN	8	TECH	6
MOVIE	8	VIP	6
MUSIC	8	BUY	5
CLOUD	7	FREE	5
HOTEL	7	GAME	5
LOVE	7	GROUP	5
LTD	7	SALE	5
MAIL	7	SITE	5
NEWS	7	STYLE	5
STORE	7	TICKETS	5

As a result of these concerns, ICANN is seeking input on the following questions:

1. How should it determine whether the string of text used to identify a top-level domain (TLD) should be classified as "generic"?

2. How should it determine the circumstances under which a particular TLD operator should be permitted to adopt "open" or "closed" registration policies for these TLDs?

First, ITIF recommends that ICANN not attempt to classify certain strings as "generic." Instead, it should retain its policy of allowing public comment on all proposed TLDs and address any disputes that arise through this process. Just as ICANN has setup a process to resolve disputes arising from the use of certain strings for domain names in its Uniform Domain-Name Dispute-Resolution Policy (UDRP), it should use a similar dispute-resolution process for any conflicts over TLDs.[4] Indeed, ICANN has already established some rules and processes to resolve disputes arising from the use of strings that can lead to confusion with other TLDs, infringe on other internationally-recognized legal rights such as trademarks, violate international norms or human rights, or pose substantial opposition from a community that may be directly associated with the TLD.[5] In addition, ICANN's Government Advisory Committee (GAC) allows governments to submit preliminary objections to TLDs, such as for

those that relate to a specific country or geographic region which a certain community wishes to preserve for cultural reasons.[6]

If ICANN were to choose to distinguish generic strings from others, and create special rules for TLDs using generic strings, then it would have to establish a process for when some non-generic words become generic words over time. Trademark erosion is a well-known phenomenon whereby a word protected by trademark becomes a generic word after its use becomes commonplace. Examples of this occurrence include the generic use of words such as "escalator", "thermos" and "zipper" which were once terms protected by trademark. Terms that lose their protection under trademark law should similarly lose any special status granted to trademark terms by ICANN.

Second, ITIF recommends that ICANN not impose open registration policies on TLD operators for non-legacy TLDs (e.g., ".COM", ".ORG", etc.), including any "generic" TLDs. Open registration policies would allow any member of the public to purchase domains from the TLD operator; closed registration policies would allow the TLD operator to set its own rules for who, if anyone, could purchase domains for a particular TLD. Restricting TLD operators to only having open registration policies would limit them to only one business model, rather than allowing TLD operators to innovate and pursue different business models that might be achieved with closed registration policies. Currently, ICANN allows a number of sponsored TLDs with both open and closed elements. For example, the TLDs ".edu", ".museum", ".travel" and ".jobs" are only available to certain types of entities (in these examples, accredited post-second educational institutions, museums, travel companies, and employers, respectively). This has allowed TLD operators to "innovate to the right of the dot" and create specialized TLDs that serve a specific audience. Since ICANN is expanding the number of TLDs, it should allow companies to continue to innovate and choose the appropriate business model for their particular TLD rather than mandating a "one-size-fits-all" approach to TLDs.

The value of both the "closed" and "open" models can also be seen in the way that subdomains have been used on the ".COM" TLD. The ".COM" TLD allows domain name owners to set the rules by which someone can purchase or use subdomains of their domain names. Some domain name owners choose to make subdomains openly available to others. For example, services like Wordpress.com and Tumblr.com allow users to host blogs on subdomains of their respective domains. However, many (if not most) of the ".COM" domain owners do not have open subdomains policies even though there might be some community benefit from such a policy. The reason domain name owners are not required to have "open" subdomains policies is that doing so could reduce the branding and reputation of a particular domain (not to mention that some domain name owners do not want to be in the business of selling subdomains).

Since domain names owners can use both a "closed" and "open" model for subdomains, and this flexibility has been highly successful, why should the rules for TLDs be different?

Allowing each domain name owner to decide what subdomain model is best has allowed for different business models and innovation in the types of online services available to users. Just as ICANN should not try to determine when it would be best for a given domain to use an open or closed model for subdomains, neither should it try to determine when a particular TLD should have open or closed registration policies for domains.

As noted earlier, some stakeholders have objected to "closed generic" TLDs because of concerns about a potential negative impact on competition. For example, one challenge has been issued for the ".YACHTS" TLD because it may be too generic of a word. Similar objections have been issued for a number of proposed TLDs such as ".APP" and ".UNIVERSITY." The argument of these stakeholders is that some words are so important that allowing one entity to control the domain registration policies would unfairly hurt competitors.

Yet how important is a particular string for a TLD? If the string itself had intrinsic value, it is reasonable to expect that an important string for a TLD would also have a relatively important domain name associated with that string. And since ".COM" is the most popular TLD used on the Internet, we would expect to see a .COM domain name. After all, there are presumably only a relatively small set of important "generic" words.

So what does the data show for the string "YACHTS"? It turns out that the Yachts.com domain name seems to have relatively little competitive value. Yachts.com has an Alexa rank of 4,138,256, whereas YachtWorld.com has a much higher rank of 16,522 (a higher number means a lower rank) and is the first search result for "Yachts" on Google.[7]

While there does appear to be competitive value in having a short, easy-to-remember domain name, there does not appear to be much competitive advantage in having a domain name consisting of a "generic" word. This fact should not be too surprising. Amazon has succeeded as a bookseller even though it does own Books.com. Netflix has succeeded as a movie distributor even though it does not own Movies.com. And Zappos has succeeded as a shoe seller even though it does not own Shoes.com.

The success of a particular company has had much less to do with whether the string of its domain name was a generic or non-generic word and much more to do with the associated business model and branding for the company operating that domain name. In fact, of the top 25 websites for the United States, only four might be considered as having "generic" strings for their domain names (Live.com, Go.com, Ask.com, and Weather.com).[8] We should expect the similar to hold true for TLDs.

There is no reason to expect that if a TLD such as ".APP" or ".SEARCH" was closed that this would restrict competition. Competitors could simply choose another TLD, using a generic word (e.g. ".FIND"), a protected trademark (e.g. ".IPHONE" or ".ANDROID"), or some other string. Or, if the value of the TLD was worth more to the competitor than the existing

TLD operator, the competitor could purchase the TLD. In addition, any potential anti-competitive actions by the operator of a closed TLD against competitors could be addressed through the existing legal system.

Many potential conflicts over domain names have been resolved using the market and the same potential exists for TLDs. By creating property rights for domain names, even if there is a relatively inefficient initial allocation (such as a process that gives some actors a first-mover advantage), we should expect that the market outcome will be generally efficient if transaction costs are low.[9] Indeed, part of the reason that the "closed" model for domain names has worked is because owners are able to relatively easily buy and transfer domain names. While there is a scarcity problem for both TLDs and domain names (given the finite number of well-known words and phrases in existence), the relative scarcity of TLDs and domain names has not yet reached the point requiring market intervention. To the extent that ICANN is concerned about efficient outcomes, it should work to minimize the transaction costs involved in the registry transfer process and registry accreditation process.

In summary, ICANN should avoid choosing one business model over another by allowing both open and closed generic TLDs.

Sincerely,

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Information Technology and Innovation Foundation

References

1. "'Closed Generic' gTLD Applicantions," ICANN, February 5, 2013, http://www.icann.org/en/news/announcements/announcement-2-05feb13-en.htm.
2. See, for example, "GAC Early Warning – Submittal Search-AU-13549," November 20, 2012, https://gacweb.icann.org/download/attachments/22938690/Search-AU-13549.pdf?version=1&modificationDate=1353432052000.
3. Ibid.
4. ICANN, "Uniform Domain-Name Dispute-Resolution Policy," n.d., http://www.icann.org/en/help/dndr/udrp.
5. For details, see Applicant Guidebook, Module 3 at http://newgtlds.icann.org/en/applicants/agb.
6. See, for example, GAC Early Warning and Advice, https://gacweb.icann.org/download/attachments/4817665/EarlyWarning.pdf.
7. Site rankings based on data from Alexa.com collected by author on February 27, 2013.
8. See Alexa Top Sites listing at http://www.alexa.com/topsites/countries;1/US.
9. This is the basic premise of the Coase theorem. See Ronald Coase, "The problem of social cost," 1960, *The Journal of Law and Economics*, 3: 1-44.