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Mr. Akram Atallah, President, Global Domains Division akram.atallah@icann.org

Dear Mr. Chalaby,

Thank you for the opportunity to address the Board on this very important matter. On April 11th, the GAC published a “non-exhaustive” list of strings where certain Applicants had expressed their desire to run gTLDs with exclusive access, what is commonly known as a “closed generic.”

The CAT2 List was never intended to be a final, exhaustive list, nevertheless those in charge of the new gTLD program treated the list as a final list and issued change requests to Applicant’s affected by the Category 2 Advice. Change Requests were sent indiscriminately to many Applicants regardless of whether they applied to be open or closed. This process and the approach to CAT2 is flawed.

For example, DONUTS (through its related entities) does not have any exclusive access Applications, yet they received no less than 25 Change Requests. Amazon, with over 60 closed applications, received only 25 Change Requests, of which, 8 are for gTLD's with special characters. The Amazon Applications that did not receive Change Requests or are listed in Category 1 are all for generic terms and all are restricted, exclusive access gTLDs (.audible, .bot, .box, .buy, .call, .circle, .coupon, .deal, .dev, .got, .group, .hot, .jot, .joy, .like, .moi, .now, .pin, .read, .room, .safe, .secure, .smile, .spot, .talk, .wanggou, .wow, .you, .yun, .zero). Amazon believes they are able to proceed with these Applications. Similarly, other proponents of the closed generic registry model such as Google, Dish, Richemont, L'Oreal and Lifestyle. These 6 Applicants are responsible for 95% of all restricted access applications.

Many are left dissatisfied and concerned about how Category 2 feedback has been managed and addressed. At the Buenos Aires Meeting, the GAC requested written clarification of the criteria used by ICANN to define generics, in other words, answers as to why the CAT 2 List was never finalized, and answers as to why Change Requests were not sent to all restricted access applications not supported by trademark rights.

It is abundantly clear that the rush to market (pushed by some Applicants) created a scenario where the public is not protected from many potentially harmful closed generics. For instance, WALMART has a closed application for .GROCERY and CARTIER for .LOVE, yet those strings are not in the Category 2 List. Grocery has the potential to affect the distribution of food worldwide.

Latin American Telecom LLC (LAT), Applicant for .TUBE, is also concerned that its string (.TUBE) impacts the worldwide distribution of online video, and is a critical public interest string effecting free speech and dissemination of ideas, not yet in the CAT 2 List. This string should be re-evaluated because Google's Application to run .TUBE as an exclusive access TLD creates the potential to monopolize online all video strings .TUBE, .FILM .YOUTUBE, .MOVIE and .CHANNEL.

To effectively address the closed generic issue LAT prepared a model that explains very clearly the four types of gTLD models that exist: Brand, Closed, Community or Special Interest and Open, hoping that those in charge of the new gTLD program can finally produce a universally accepted definition of closed generics and as a by product, a much needed definition of public interest.

The Model has three variables, intellectual property (trademark or generic), usage (restricted or free) and ownership of the SLD's (private or public).

Brand gTLD's are trademarks, usage is restricted and all SLD are private, for the exclusive use of the owner.

Community or restricted gTLD's are generic terms such as doctor, but with eligibility criteria of who can own and develop SLD's within that gTLD and those SLD's have to be developed according to certain standards, but once a party is approved to own and develop an SLD it belongs to him, it is his property.

Open gTLDs are generic in nature, their development is unrestricted and ownership is also free and open to the general public.

Closed Generics are the aberration of the new gTLD program. Generics terms that belong in the public domain or for community benefit, but a handful of applicants (no more than 10) want to run for themselves, closed to the general public and for the private and exclusive use of those companies. This represents a deviation that needs to be dealt with to the satisfaction of the GAC and the entire gTLD community.

As can be seen from the attached presentation which contains the Model, it is a sincere exercise that provides a clear path for the definition of closed generics as demanded by the GAC. If this definition is accepted by the Board and those responsible for implementation of the new gTLD program, what proceeds would be to send Change

Requests to those Applications that want to operate as a restricted access gTLD and have no trademarks to support the exemptions.

This is not the only formula. An alternative path could be a “democratic definition” which is simply that if in a contention set there are 5 Applications and four of them are for open gTLD’s and one for restricted, then the entire contention set should be labeled “generic” and thus, the sole restricted application must fill a change request and become also open.

Another alternative is to hold applicants accountable for their statements. For instance, in the contention set for the generic term .TUBE there are two open Applications by DONUTS and LAT and a restricted application by Google. However in a public document submitted by Google as a response to a Legal Rights Objection interposed by LAT, Google insists that TUBE is a generic term and should be open to the general public yet they maintain their application restricted. (Click on the following links to view Google’s admission of the generic nature of the term TUBE. <http://www.wipo.int/export/sites/www/amc/en/domains/lro/docs/lro2013-0055.pdf>).

Based on its own acceptance of the genericness of TUBE, Google should be required to file a change request at least for this Application. These inconsistencies should not be ignored (and may indeed exist in other strings). For the sake of the public interest and program integrity these issues must be properly investigated and adequately addressed.

Finally, as stated above, a byproduct of a clear definition of genericness is a clear definition of “public interest.” Given the four models depicted above:

- It is clear how open generics benefit the public interest since every potential registrant can register a domain name.
- It is clear how registrant applications pertaining to regulated professions and industries serve the public interest since they are open only to certain verified applicants types to satisfy consumer protection, cybersecurity, and other concerns.

- It is clear how community and .geo applications serve the public interest when they restrict prospective registrants to relevant parties in keeping with their overall purpose.
- It is clear how .brand gTLD's benefit the public interest since protection of trademark rights is a countervailing public interest consideration that justifies granting of the COC exemption.

The public interest is not served when a company like Google, Amazon, Richemond or Dish takes a dictionary word (as a non-brand and non-community applicant) gTLD that is not their brand and an internal department in those companies proposes to close the string to the general public (or impose strict requirements) and other registrants for second level domain names.

Is the interest of these handful of companies is the same as the public interest and does ICANN have a mandate to protect them by granting an exemption to the COC? In our view that is inherently anticompetitive and therefore against the public interest.

LAT requests that, other than for .brand gTLD applications, enforcement of the COC is necessary to protect the public interest and exemptions to the COC should not be granted. It is perfectly fine for GOOGLE to be the sole registrant for .YOUTUBE where they posses trademark rights, but not for .TUBE in which it possesses no trademark rights.

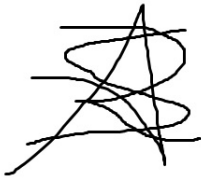
Do parties that have no trademark have the same right to build 'garden wall' gTLDs as parties who do? "Closed generic" gTLDs are inherently anti-competitive unless backed by trademark rights and are also at complete odds with the very trademark law and principles that ICANN has sought to protect through such new rights protection mechanisms (RPMs) as the Trademark Clearinghouse (TMC) and Uniform Rapid Suspension (URS).

We hope this work is useful and assist the ICANN board and those in charge of the new gTLD program to provide a satisfactory response to the GAC Category 2 Advice. Also to

clarify the definitions of Genericness and Public Interest have been subject to so much debate and confusion and have added so much uncertainty to the process.

It is essential that these points are clarified so in future rounds companies do not try to privatize generic terms and the Internet remains the greatest tool for competitiveness, innovation and income distribution in the history of mankind.

Thank you very much for your attention to this important matter.

A handwritten signature in black ink, appearing to be 'Rami Schwartz', with a stylized, somewhat abstract shape.

Rami Schwartz

CEO

Latin American Telecom LLC

Applicant for .TUBE



The gTLD Cube

The Tridimensional
language of domains

www.ucube.com

Introduction

- The purpose of this analysis is to methodically prove that “closed” gTLD’s are at odds with ICANN’s mission and core values of fostering competition and innovation.
- The public benefits from a world with “open” gTLD’s as opposed to “closed” gTLDs.
- “Open” gTLD’s allow private ownership of SLD’s which fosters wealth creation, competition and innovation while “closed” gTLD’s rob the public of valuable generic terms at the root level.
- This Presentation is to provide the ICANN Board, the GAC, R&SG and other constituencies within the ICANN Community arguments to fine tune the final phase of this historical process specially in regards to the Category 2 Safeguards and Closed Generics.

Executive Summary

- The default gTLD is the “open” gTLD. The Internet as we know it is built on “open” gTLD’s and some “community or restricted” gTLD’s
- To date, no “Brand” or “Closed” gTLD’s exist.
- GAC’s Category 1 Safeguards are a mechanism to prevent the abuse of the “Community or restricted” gTLD’s. Category 2 Safeguards to prevent the abuse of the “closed generic” model.

Executive Summary

- There are many gTLD applications that fit the definition of Category 2 but are not included on the List.
- Category 2 is being abused by large portfolio applicants or large corporations who have a market dominance which they want to extend to the gTLD space and surreptitiously acquire trademark rights over generic terms at the root level.
- Granting exemption to the CofC, to allow the existence of “closed” gTLD’s, seriously obstructs development of the Internet and limits the economic opportunities that have made the Internet the greatest tool for wealth distribution, power sharing and dissemination of information since the press or the industrial revolution.

The essence and variables of the model

- The three essences of the model are: Intellectual Property, Usage and Ownership.
- On the “x” axis we place intellectual property because gTLDs are words and the use of words is regulated by intellectual property laws. On the left side of the “x” axis we place trademarks opposite to generic terms. This is the body of the model, the rule, the material essence.
- On the “y” axis we place the usage of the gTLD because gTLD’s can be either white canvases like .COM or special purpose like .travel or .museum. On the left side of the “y” axis we place constrained usage and on the right side free usage. This is the mind of the model, the game, the rational essence.
- On the “z” axis we place the ownership because the new gTLD program now allows private ownership of gTLD’s and all the SLD’s created within that gTLD. On the left side we place private and on the right side public ownership. This is the soul of the model, the motive, the spiritual essence.

The variables of the model

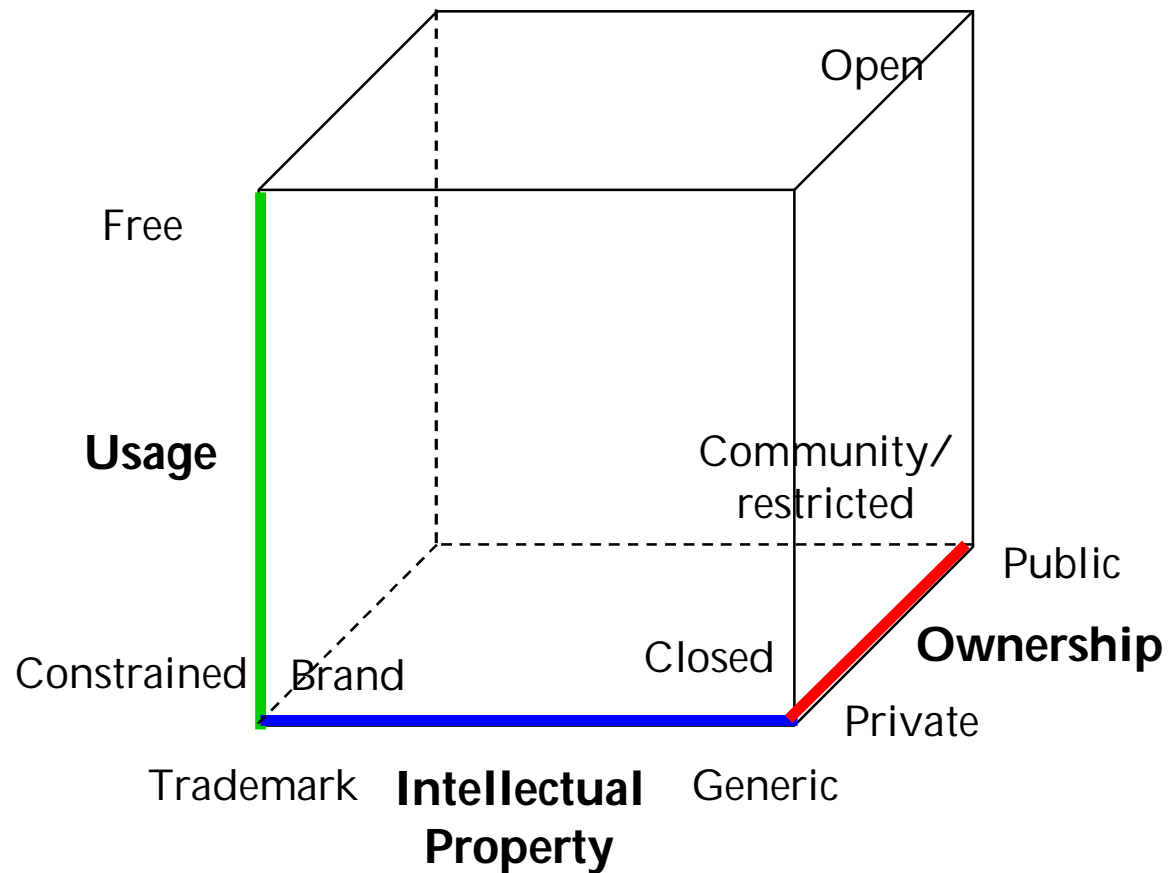
Trademark 0 ————— 1 Generic **RULE**
Intellectual Property (X)

Constrained 0 ————— 1 Free **GAME**
Usage (Y)

Private 0 ————— 1 Public **MOTIVE**
Ownership (Z)


With these three axis we can build the gTLD uCube and map with a great degree of clarity the different types of applications, the “open” gTLD, the “closed” gTLD, the brand gTLD or the community application. All have different ownership structure, usage policies and intellectual property protection.

The gTLD uCube would look like this:




Trademark 0 _____ 1 Generic **RULE**
.DELOITTE Intellectual Property (X) 

The X axis goes from trademark to generic. On one extreme we can place the application of .Deloitte which is a trademark and on the other extreme we place the application for .Music which is clearly a generic term not subject to trademark rights. .GOOGLE on the left, .SEARCH on the right, .GMAIL on the left, .MAIL on the right, .YOUTUBE on the left, .TUBE on the right. Trademark is 0 and Generic is 1. In between there are cases like .APPLE which is the most famous trademark in the world but also a generic term.

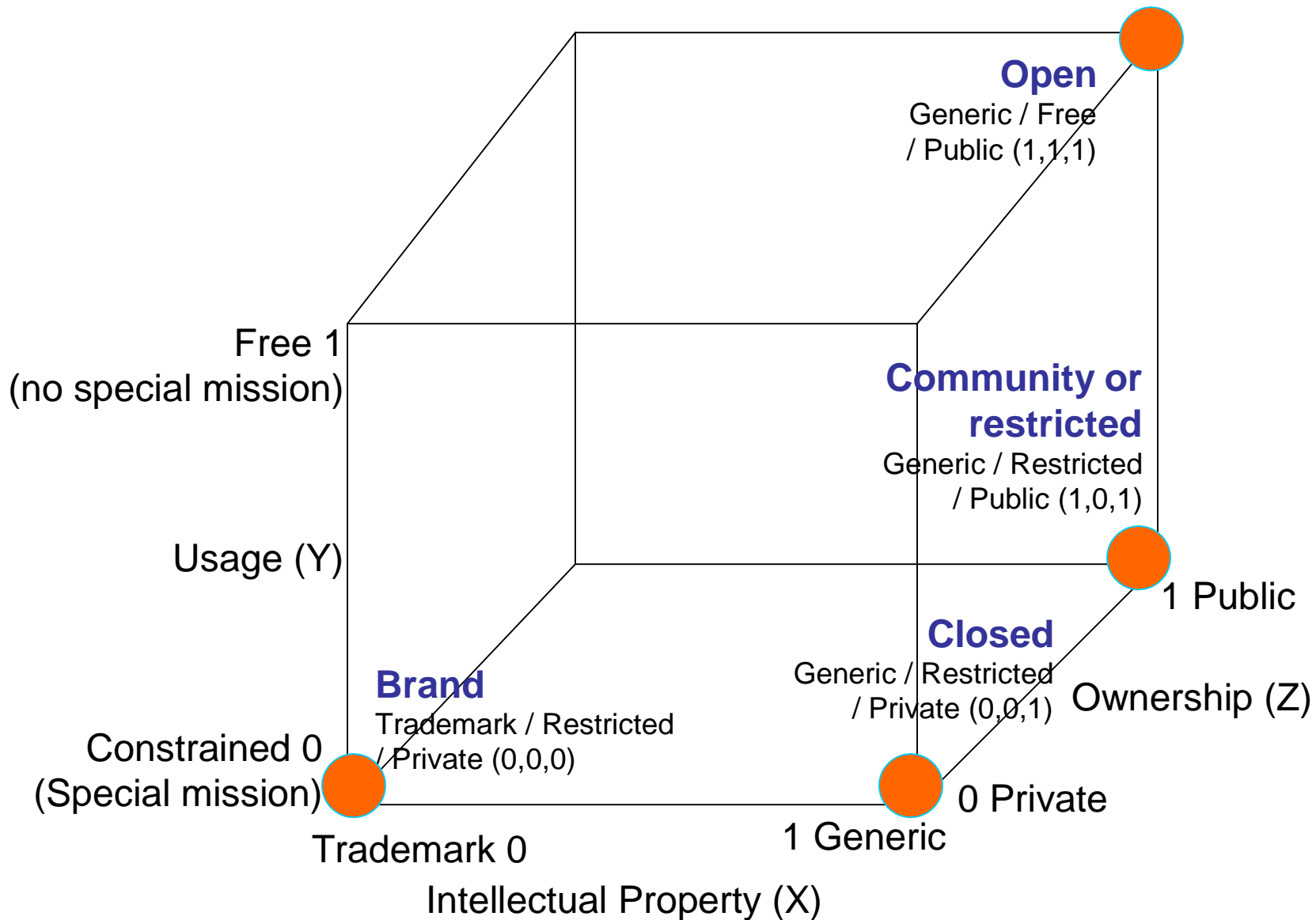
Constrained 0 _____ 1 Free **GAME**
.DELOITTE Usage (Y) 

The Y Axis goes from constrained usage to open usage. Can a group of friends from Stanford register Joojie.Club and create a scratch engine and change the world or will the SLD's in the gTLD have a special purpose and have to carry a certain content of format? Again, on the left side of the axis we can place .Deloitte who will have a specific purpose and in the opposite extreme .Tube who will be a white canvas.

Private 0 _____ 1 Public **MOTIVE**
.DELOITTE Ownership (Z) 

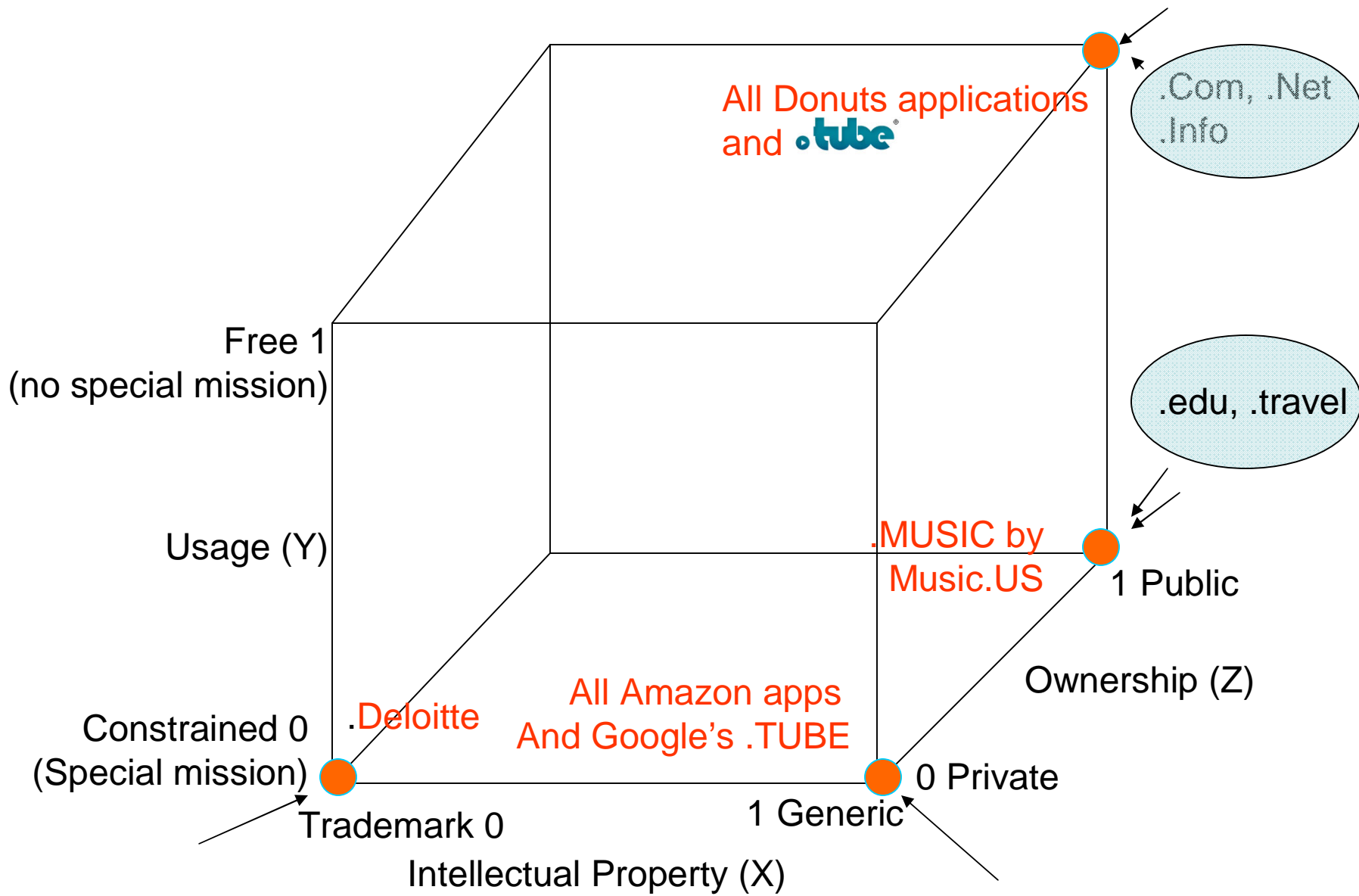
The Z Axis goes from private to public ownership. This is the motive of the model because it determines whether the public will be allowed to own virtual real estate or not in a given gTLD. Domain names are virtual real estate and public ownership allows wealth and income creation, competition and creativity (like in .COM).

We join the three axis and we have the gTLD Cube with the four most common models



The divine comedy

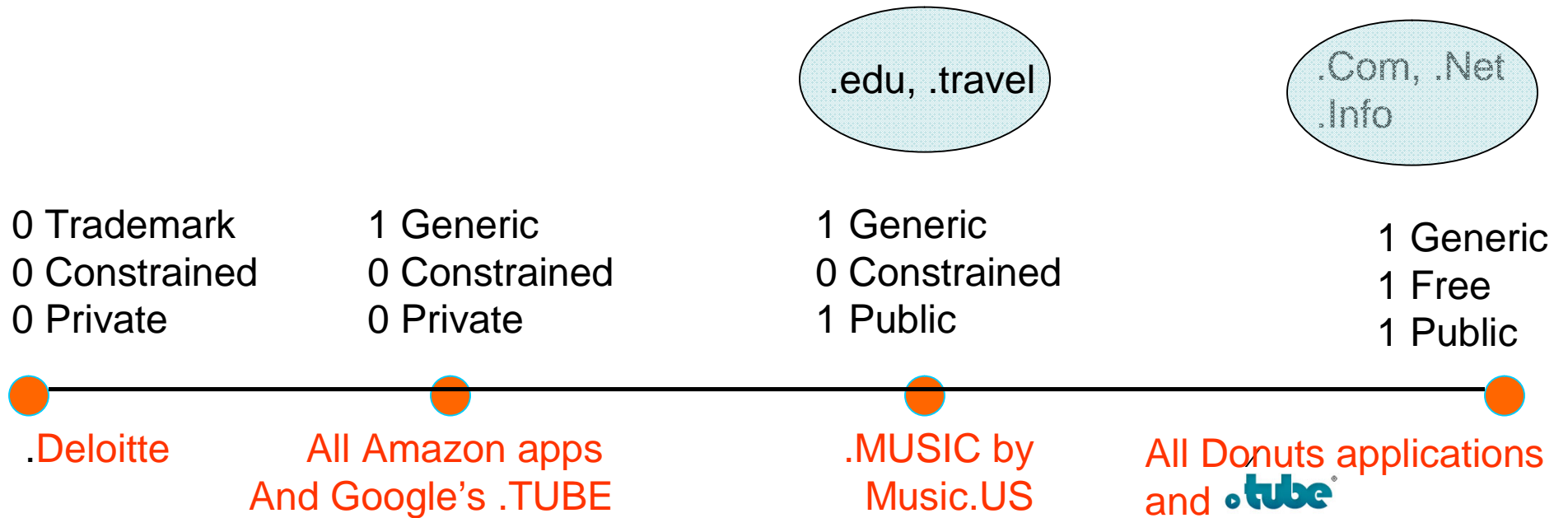
- ((0,0,0)) - **.Brand** – Trademarked word, restricted usage, privately owned. **..DELOITTE, .CITI**. This form of gTLD was designed to provide accommodation to trademarks
- ((0,0,1)) – **Closed** (garden wall) – Generic word, restricted usage, privately owned. **.TUBE by Google, .BOOK by Amazon**. Those embracing this type of gTLD are trying to rob the general public of generic terms for private ownership and restricted usage.
- ((1,0,1)) – **Community or restricted-** Generic word, restricted usage, publicly owned. **.BASEBALL by MLB, .TRAVEL, .MUSEUM**
- ((1,1,1)) – **Open-** Generic word, free usage, publicly owned. From here the **.Com's** of the future will emerge. **.TUBE by LAT, all Donuts and Famous Four apps.**



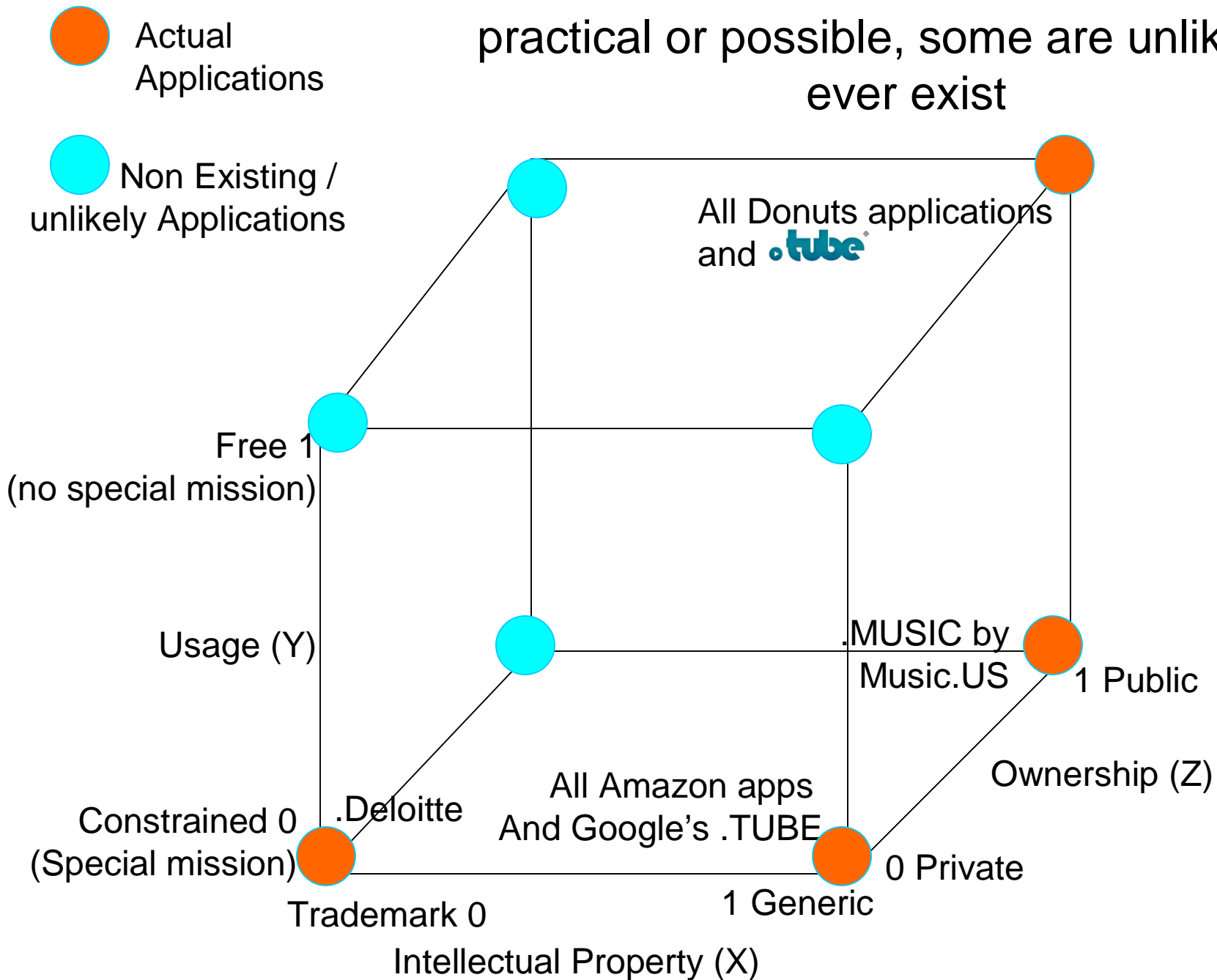
A Private Internet?

- To date, there are no “closed” or trademark gTLD’s, only open and community/restricted. The shape of the Internet as we know it is the result of generic, free and public gTLD’s, free for all to own and enjoy.
- Fortunes have been made, a technological revolution has rooted in the open DNS Model.
- Had .COM usage been restricted and all domain names privately owned by Verisign, Larry Page and Sergey Brin couldn’t have made Google nor Jeff Bezos Amazon. It is an irony that these companies are leading the push to a closed, privately owned and restricted Internet, an exclusive usage of generic terms with the clear intention to surreptitiously acquire trademark rights over them.

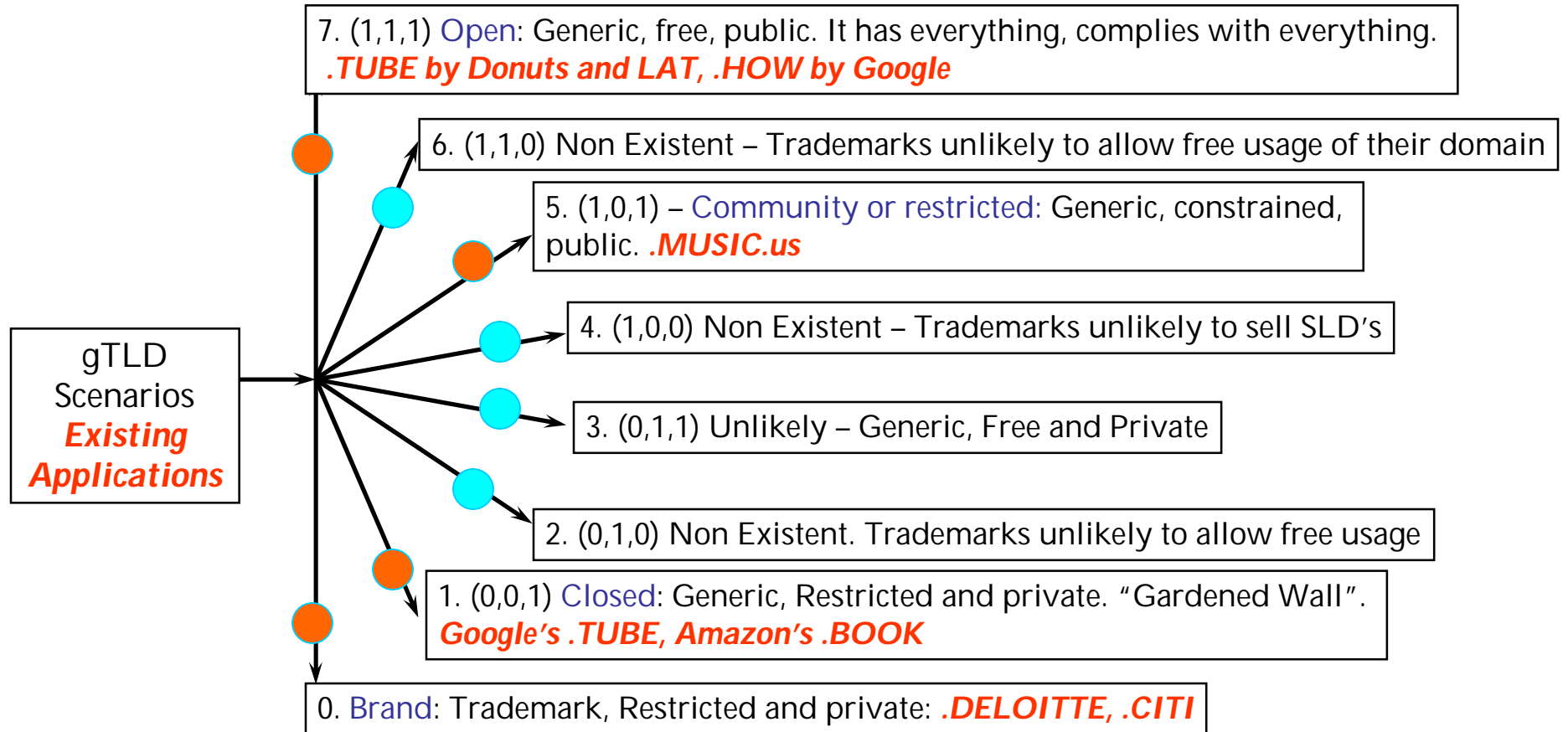
The four gTLD models – a linear view



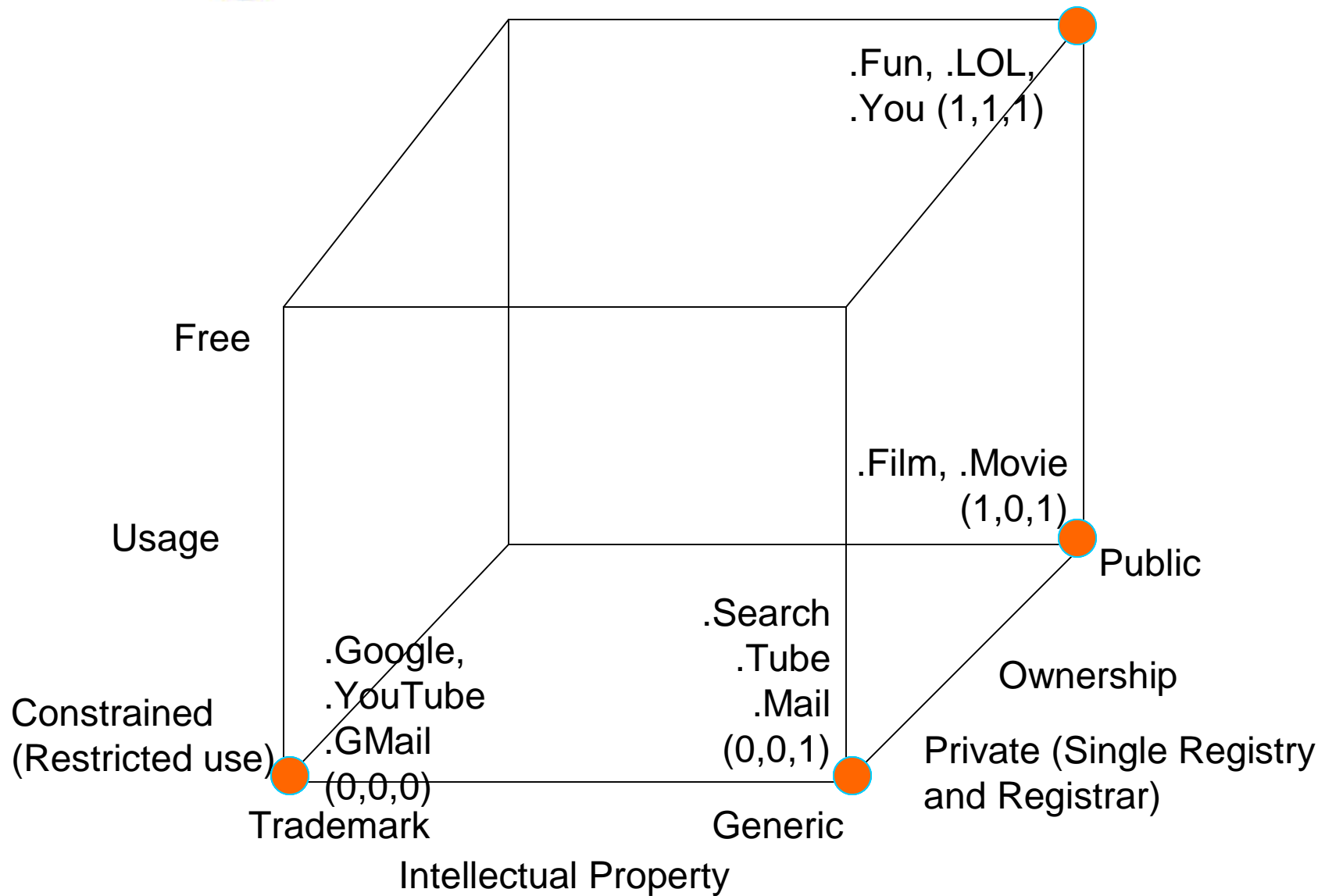
Not all models are practical or possible, some are unlikely to ever exist



gTLD paradigms and scenario construction



Google's 4 types of applications



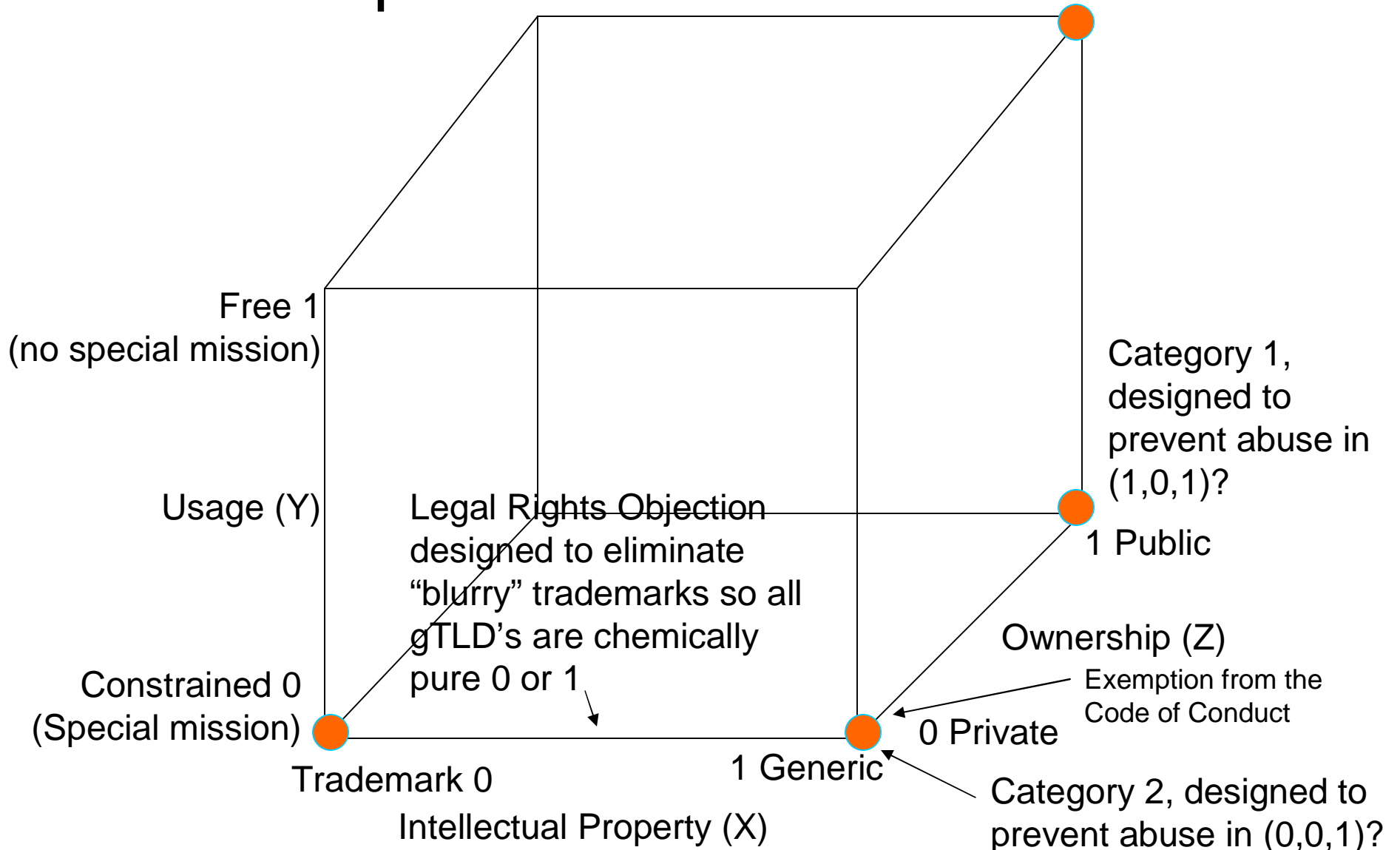
Google's push to control it all from the source

- Google filed 101 applications and they cover the whole spectrum.
- They have .brand applications (.GOOGLE, .YOUTUBE, GMAIL), they have closed applications (.TUBE, .SEARCH, MAIL, CHANNEL), they have community or restricted applications (.MOVIE, .FILM) and they have open applications (.HOW, .LOL, .YOU).
- Of particular concern are their closed applications for .SEARCH, .TUBE, .MAIL and CHANNEL, specially since they also applied for .GOOGLE, .GMAIL and .YOUTUBE. Of these Google's .TUBE application demands special attention...

Google's .TUBE

- There is a YouTube channel called Awesomeness TV accessible via www.youtube.com/awesomenesstv
- Google wants the “trusted content providers” of Awesomeness TV to also “use” www.awesomenesstv.youtube, www.awesomenesstv.tube and www.awesomenesstv.channel. These three applications are by the way IDENTICAL.
- Four doors for the same content of which two are generic gTLD's. They requested exemption from the registry Code of Conduct to run restricted, private registries on all.
- This is perfectly fine with .YOUTUBE where Google posses trademark rights, but its wholly inappropriate for .TUBE and .CHANNEL that are generic terms where they have no such rights. In .TUBE they are in contention with two open applications but no other party applied for .CHANNEL meaning Google will win custody of this gTLD and close it.
- Granting Google the gTLD .TUBE is bad for everyone except Google.
 - How is this compliant with public interest and ICANN's mission and core values? How can this redundancy be considered innovative and foster competition?
 - Does ICANN have the mandate to protect Google's business model and disqualify legitimate ownership of .TUBE sld's by the general public?
- .TUBE deserves to be an open string, the general public should not be proscribed from registering .TUBE SLD's, the DNS system cannot be deprived of an open .TUBE and .TUBE should be given the chance to become the .COM of the age of video.

LRO's, category 1 and 2 and exemption to the Code of Conduct



GAC's Advice

- In order to prevent abuse of the closed and community/restricted models the GAC issued early warnings and classified some gTLD's in category 1 and 2 safeguards.
- The problem is that the GAC doesn't have the manpower to assess all applications, and let the analysis to ICANN; ICANN then said that GAC only listed 183 specific strings and won't extend those lists. Policy is not being equally applied.
- For instance .cars is included in category 2 but .autos is not despite the fact that both are generic terms that have the same meaning and that both have "closed" applications from the same company, Dominion Enterprises.
- Without clear guidelines many gTLD applications that fit the definition of Category 2 were not included in the list, such as .TUBE, and others that are included should not be there. That is why the original list was labeled "non-exhaustive".
- ICANN and the GAC should consider revisions to the list and edit it if the argumentation in favor of listing or delisting a gTLD is compelling and fits the definition of closed: "generic, constrained and private". This to analyze it separately and determine compliance with the "public interest"

GAC's Advice

- .TUBE was also not included in Category 2 despite the fact that it's a generic, even by Google's own admission¹ and that there is a "closed" application by Google competing vs two open applications by Donuts and LAT.
- The GAC needs to fine tune the process to prevent abuses by the applicants for "closed" generics and shut the door to those large corporations like Google (or Amazon), who already control the lion's share of online video distribution (or book distribution) to gain de facto trademark rights over generic terms like .TUBE (or .BOOK or .MUSIC).
- Not wait for the gTLD's to be delegated and then contested after delegation by filling a PICDR. ICANN staff says that this change to the contract that created this mandatory PIC is enough to counter closed generics that were not identified by the GAC list but a preferable solution is to make the Category 2 list exhaustive and include all the gTLD's that fit the definition of "closed" and clean up the process.

1. See e.g. Latin American Telecom, LLC v. Charleston Road Registry, Inc., acknowledging that Applicant (Google) intends to use the term in a generic sense, and not to acquire intellectual property rights in the gTLD.
<http://www.wipo.int/export/sites/www/amc/en/domains/lro/docs/lro2013-0055.pdf>. Indeed, the case appears to turn on the "fact" that Applicant made a powerful argument in favor of "Tube" as a purely generic word.

Conclusion

- These are the main findings thoroughly explained throughout the paper:
 - The default gTLD is the “open” gTLD. The Internet as we know it is built on “open” gTLD’s and some “community or restricted” gTLD’s
 - To date, no “Brand” or “Closed” gTLD’s exist. The “brand” category was created to accommodate trademarks but it created a loophole that some applicants exploited to filter “closed” generics.
 - “Closed” gTLD’s depend on ICANN’s exemption from the Code of Conduct in order to obtain private ownership of a generic term
 - GAC’s Category 1 safeguards are a mechanism to prevent the abuse of the “Community or restricted” gTLD’s. Category 2 safeguards to prevent the abuse of the “closed” model.

Conclusion

- There are many gTLD applications that fit the definition of Category 2 but are not included in Category 2.
- Category 2 is being abused by large portfolio applicants or large corporations who have a market dominance which they want to extend to the gTLD space and surreptitiously acquire trademark rights over generic terms.
- Granting exemption to the Code of Conduct, to allow the existence of “closed” gTLD’s, is anti-competitive, seriously obstructs development of the Internet and limits the economic opportunities that have made the Internet the greatest tool for wealth distribution, power sharing and dissemination of information since the press and the industrial revolution.