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Governmental Advisory Committee
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
United States of America

Object: Regulatory concerns regarding the application # 1-1302-1511 for the string MAKEUP by L'Oréal.

Dear Chair, Vice Chairs and Executive Secretary of the Governmental Advisory Committee,

Laboratoires de Biologie Végétale Yves Rocher S.A. (Yves Rocher) would like to express its concerns to the GAC about the application for the TLD MAKEUP applied for by the company L'Oréal.

Since 1959, Yves Rocher, one of the leaders in cosmetics market and well-being industry in France, is a family-run group, profitable and independent. Controlled at more than 96% by the founder's family, the Group is animated by an "entrepreneurial & creative" spirit and proactive in environmental respect and sustainable development. Yves Rocher is well established in the world with a presence in more than 80 countries with almost 2,000 retail outlets and well-known in several countries with about 40 million customers worldwide. Moreover, Yves Rocher is :

- **No. 1 Beauty Care in France** (Source : Kantar Worldpanel Beauty 2011, All Individuals Panel, Total Hygiene and Beauty Market share volume and brand value).
- **No. 1 Make-up in France** (in volume in 2011 among women. Source : Kantar Worldpanel Beauty 2011, Individual Women's Panel)
- **No. 1 e-commerce Website in France** for Hygiene, Health & Beauty, Fragrance, Skin Care and Make-up (Source : Barometre FEVAD – Mediametrie//NetRatings - 3221 persons, representative of Internet users, 15 years and older - May 2011). In 2012, Yves Rocher also won the "Best e-commerce website of the year" award in France, category Beauty website (Source: FEVAD).

The Internet is with no doubt one major channel of sales, from information to the purchase of a product. According to the website Statistic Brain, online sales in the US have reached \$255,600 billion in 2011 and \$763,200 billion worldwide (<http://www.statisticbrain.com/total-online-sales/>). 83 % of online users have made an Internet purchase, and 56% have made a purchase multiple times.

As the sale of cosmetics online is common practice, Yves Rocher is very attentive to any unfair e-commerce practice which could harm him both in terms of economic revenue and image of the company. Yves Rocher is also extremely concerned by the "Closed Generic" TLD Applications, in particular the MAKEUP Application from L'Oréal.

The Applicant, L'Oréal (hereinafter referred to as the Applicant) belongs to the L'Oréal Group, worldwide leader in cosmetics with expertise in hair care, hair color, skincare, make-up and fragrance.

MAKEUP Application: an attempt to extend limited trademark rights

It is well known that the term "Make-up" is a generic word which is broadly used in relation with make-up products and is consequently essential to all entities operating in the cosmetics industry.

The Applicant is looking for an exclusive right to the TLD MAKEUP, despite the fact that this term is a common word referring to make-up products and that its direct competitors also use this term to designate their own products, most of them adding this word to their trademarks.

The Applicant is trying to capture a generic term in order to use it as a marketing tool for its products.

A similar application in the real world would be denied: Trademark regulations including the Lanham Trademark Act or the EU Directive 2008/95/EC forbid the registration of trademarks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade. If the Applicant were to file a MAKEUP trademark registration, it would be refused for lack of distinctiveness. Trademark rights are compatible with free competition rules in as much as registration of a trademark does not confer an exorbitant right to its holder, preventing its competitors from using a generic and necessary term in their business. The same regulations should apply to new gTLDs.

Generic words used in a generic way cannot be reserved by and in favor of a single organization. Words as parts of language are our common heritage. It is obvious that language, and its specific uses, have to be protected as public domain that is equally accessible to all.

The applicant's purpose is to have exclusive operating rights for the TLD rather than leaving registrations open. In so doing, it seeks to capture the sole use of this generic term for its own business. If the MAKEUP TLD were delegated to the Applicant, a single stakeholder would control and prevent others from registering domain names under .MAKEUP.

MAKEUP Application: a Closed Generic TLD Application

The "Closed Generic" TLD Applications have the following characteristics:

- the TLD applied-for is a generic term, a word of common language that may be closely linked to an economic sector;
- the Applicant is a major stakeholder and is closely linked to the TLD, either because it represents its economic sector or the TLD is used in its commercial offer;
- the Applicant plans to restrict the registration of domains under the TLD to itself or to a limited number of partners (subsidiaries, affiliates, business partners).

Yves Rocher noted in the MAKEUP Application the intent of L'Oréal to appropriate the generic term MAKEUP for its exclusive benefits. The application is structured in a way that the registration of domain names will be completely controlled by L'Oréal and used to ensure the promotion of its products and services.

Yves Rocher has identified the following statements in the MAKEUP Application (Q18):

- *"L'Oréal does not intend to apply for a community designation under ICANN's Application Guidebook criteria".*

- *“L’Oréal is committed to operating the .MAKEUP gTLD with a narrow focus and charter which L’Oréal will take the lead in establishing. It is intended that this restrictive charter/membership criteria will be developed in accordance with the standards set forth in L’Oréal’s Code of Business ethics (...).”*
- *“generic (“trends”, “face”, “winter”, “tools” “authors”, “partytime” etc.) (...) domain names would initially be reserved/allocated to L’Oréal.”*
- *“Once successful testing has been completed, L’Oréal existing business units and select licensees and partners would be allowed to register domain names in the .MAKEUP gTLD. (...) Any third party would be required to have a prior commercial or membership agreement with L’Oréal.”*
- *“Any decision to expand the gTLDs beyond corporate, licensee, and partner use would likely be predicated by a L’Oréal market analysis (...).”*

This application raises many issues:

- The delegation of a generic term, a word of common language to a rights owner will lead to establishing a monopoly by excluding de facto other stakeholders that would have a legitimate interest to register domain names in this TLD, including direct and indirect competitors;
- This monopoly will lead to a distortion of competition between stakeholders and will eliminate any competition in the online market. Consumers will be directed straight away to L’Oréal’s offers, eliminating de facto offers from competitors.
- Delegation of the generic term MAKEUP will have the opposite effect to that sought by ICANN (e.g. promotion of competition, differentiation and innovation).
- The use of a generic name by the Applicant for its own benefit may lead to consumer confusion at best, misappropriation of clients at worst.

On a legal point of view, such applications may be viewed as infringing international treaties and national anti-trust laws, and in particular:

- Article 10bis of the Paris Convention for the Protection of Industrial Property which states:
 - (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
 - (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
 - (3) The following in particular shall be prohibited:
 - (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.
- Article 102 of the Treaty on the Functioning of the European Union which states: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.”
- The Sherman Act which outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." The Federal Trade Commission Act which bans "unfair methods of competition" and "unfair or deceptive acts or practices."

Yves Rocher will inform the governments of several nations as well as officials of the European Union who we believe would be concerned by these issues related to free trade and consumer safety.

We recommend the GAC to issue a statement to the ICANN Board to reject this application which can misguide the information of the public.

Best regards,

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