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The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on the proposed extension of the .com Registry Agreement. See <https://www.icann.org/public-comments/com-amendment-2016-06-30-en>.

Summary

While IPC is not opposed in principle to extension of ICANN's .com registry agreement with Verisign, the agreement needs significant modification to meet modern standards. Whatever the merits of the argument that the extension is needed in order to align the expiration date of the .com registry agreement with the expiration date of the proposed Root Zone Maintainer Agreement with Verisign, there is no justification for keeping the outmoded terms of the existing registry agreement in place unchanged for six additional years beyond the date of its currently scheduled expiration (2018), i.e., eight more years from now.

The proposed 6-year extension should be accompanied by steps to promptly bring the .com registry agreement into closer harmonization with ICANN's other registry agreements, including those entered into with new gTLDs and many legacy gTLDs since 2013 in accordance with the multi-stakeholder process in furtherance of ICANN's mission. These steps would enable ICANN to provide a more level playing field for gTLD registry competition, and would serve the public by making available more advanced tools for dealing with continued unacceptable levels of abusive registrations in the dominant gTLD. Such changes would advance ICANN's specific commitments to promote competition in the field of gTLD registry services, and its overarching commitment to coordinate the Domain Name System in the public interest. IPC urges ICANN and Verisign to publicly commit to making these changes within the next two years as part of the "future amendments" provision of the .com registry agreement extension.

1. .com dominates the gTLD landscape – including in abuses

More than fifteen years after ICANN began to accredit new gTLD registries, .com remains the colossus dominating the landscape. With 126.6 million registrations at the end of Q1 2016, .com is home to 71% of all generic Top Level Domains in the world – more than twice as big as all its gTLD competitors combined.¹ But .com also remains the home of the lion's share of domain name registrations used to carry out abusive activities.

¹Verisign, Domain Name Industry Brief (July 2016) at <http://www.verisign.com/assets/domain-name-report-july2016.pdf>, providing estimates at the end of Q1 2016 of 126.6 million .com domain names out of 178.2 million total gTLD domain names. See also www.registrarstats.com/TLDDomainCounts.aspx, (126.6 million .com of 183.7 million gTLD total, or 69%).

For instance, .com was the locus of 82% of new phishing reports across the gTLD space during May 2015.² SURBL, the leading aggregator of spam, malware, and other abuse lists, places .com domains far atop its list of “most abused TLDs,” with more unique counts than the next 9 gTLDs on the list combined.³ In the sphere of abuses related to intellectual property, .com domains account for more than 3/4 of all domain names that have been the subject of cybersquatting complaints to WIPO under the UDRP.⁴ In addition, two-thirds of leading gTLD websites worldwide dedicated to copyright piracy, as identified by 4 leading copyright industry associations in public filings, had domain names registered in .com.⁵

2. The .com agreement must be updated to incorporate the improved anti-abuse tools which are already part of the Base Registry Agreement.

The continued prevalence of abusive registrations in the world’s largest TLD registry is an ongoing challenge. The terms of the .com registry agreement should reflect that reality, by incorporating the most up-to-date features that will aid in the detection, prevention and remediation of abuses. But the .com registry agreement with ICANN has not kept pace with the challenge.

ICANN and the community spent years developing the ground rules for the 1000+ new gTLDs that have come online. Enhanced safeguards to combat abusive registrations and protect users was a key feature of this effort. Since the .com registry agreement was last revised, in 2012, ICANN has entered into many hundreds of agreements with these new registries. In these agreements, all of the new registries have taken on greater responsibilities to prevent and remedy abuses involving their domain names. These responsibilities include, among others:

- A Thick Whois architecture, to ensure the accessibility of registration data across the registry, a key factor for the investigation of a wide range of abuse cases, and to enable quicker response and resolution when domain names are used for illegal, fraudulent or malicious purposes;⁶

²See <http://domainnamewire.com/wp-content/Architelos-StateOfAbuseReport2015.pdf> at p 7.

³<http://www.surbl.org/tld> (as viewed 7/28/16 – updated hourly)

⁴http://www.wipo.int/amc/en/domains/statistics/gtlds_yr.jsp?year=

⁵See submissions by Motion Picture Association of America, Entertainment Software Association, Recording Industry Association of America, and Association of American Publishers in response to 2015 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments, 80 Fed. Reg. 54651 (September 10, 2015), available at <https://www.regulations.gov/docketBrowser?rpp=25&po=0&D=USTR-2015-0016>.

⁶See generally Base Registry Agreement, specification 4. In theory, this safeguard will automatically become incorporated into the .com agreement as a consensus policy, once the thick Whois requirement that the ICANN board unanimously adopted as a consensus policy more than thirty months ago, on February 7, 2014, actually comes into force. But that date continues to recede further into the distance. The most recent timetable generated by ICANN staff projects a “policy effective date” for thick Whois in .com in February, 2019: five full years after the consensus policy was adopted. See

<https://community.icann.org/display/TWCPI/IRT+Meetings?preview=/48348893/60494329/IRT-2016.07.26.pdf#IRTMeetings-26July2016>, slide 3. Given this glacial pace of implementation, it is obvious that .com will remain predominantly (if not entirely) a thin Whois registry well past the expiration date of the current agreement.

- Enhanced post-registration rights protection mechanisms for trademarks, notably the Uniform Rapid Suspension process, an important supplement to the UDRP for the most clear-cut cases of cybersquatting;⁷
- Requiring registrars of domain names within the TLD to impose and enforce anti-abuse obligations on their registrants;⁸
- Technical analysis and reporting requirements for specified forms of abuse.⁹

Every new gTLD registry has taken on these and other obligations in their agreements with ICANN, including a number of new gTLD registries operated by Verisign. Even some “legacy” gTLDs have taken on many or all of these safeguards as their registry agreements have come up for renewal.¹⁰ But the .com agreement includes none of these safeguards. It remains a 20th century agreement that is outmoded and insufficient to meet 21st century challenges. Now is the time to fix that problem.

3. The outlier status of the .com agreement creates an unlevel playing field for gTLD registries.

All the registries that have signed more up-to-date agreements with ICANN have incurred some additional expenses and responsibilities in order to contribute to a safer and more secure Internet. For its part, ICANN has repeatedly stated and sought to achieve the goal of seeking “to increase the consistency of registry agreements across all gTLDs,”¹¹ and has taken steps to “provide consistency across all registries leading to a more predictable environment for end-users.”¹² ICANN also remains fully subject to the Affirmation of Commitments pledge to deal effectively with competition issues in the rollout of all new gTLDs.¹³

Anomalously, the .com agreement exempts the dominant gTLD registry from responsibilities and costs that all of its much smaller competitors must meet. To this extent, the gTLD playing field is unfairly tilted in favor of the dominant operator. The proposal to extend the .com agreement is an opportunity to correct this anomaly, to the benefit of the public interest in a safer DNS and of fair competition in the gTLD marketplace.¹⁴

⁷See Base Registry Agreement, specification 7, section 2.

⁸See Base Registry Agreement, specification 11, section 3(a).

⁹See Base Registry Agreement, specification 11, section 3(b).

¹⁰See, e.g., .jobs (agreement between ICANN and Verisign), at <https://www.icann.org/sites/default/files/tlds/jobs/jobs-agmt-pdf-20feb15-en.pdf>; .travel, at <https://www.icann.org/resources/agreement/travel-2015-10-09-en>; .pro, at <https://www.icann.org/resources/agreement/pro-2015-10-01-en>.

¹¹See, e.g., <https://www.icann.org/public-comments/travel-renewal-2015-05-12-en>.

¹²Rationale for Board Resolution 2015.09.28.05, at <https://features.icann.org/renewal-travel-registry-agreement>.

¹³See <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>, para. 9.3.

¹⁴As the gTLD landscape continues to evolve, relationships between ICANN and dominant players such as Verisign should be afforded heightened scrutiny to avoid the possibility of any particular player receiving favorable treatment, which may result in an anti-competitive DNS environment, and place consumers at a disadvantage. For example, Verisign’s recent purchase of .Web has raised these concerns. This is an additional reason why ICANN

4. The .com extension should accommodate the needed improvements.

Under its terms, the current .com registry agreement expires in 2018. At that time, Verisign has a contractual expectation of renewal, which IPC considers appropriate. However, the contract expiration also provides a window for updating the agreement, in order to incorporate the more modern features reflected in the vast majority of other gTLD registry agreements. The extension proposal keeps that window closed until 2024.

However, section 2 of the proposed extension (entitled “Future Amendments”) opens a separate and potentially more productive window for updating and improving the agreement. Under this provision, ICANN and Verisign commit to “cooperate and negotiate in good faith” by 2018 on further amendments to “preserve and enhance the security and stability of the Internet or the TLD.”¹⁵ IPC urges the parties to the agreement to use this window to correct the anomalous status of the .com agreement. By including in these amendments key provisions of the Base Registry Agreement — the same best-in-class provisions which the multi-stakeholder community agreed on most recently — ICANN and Verisign would improve the ability to prevent and remediate abusive behaviors using .com domain names, and would enhance competition in the gTLD registry marketplace. Such reforms could make a significant contribution to “preserving and enhancing the security and stability of the Internet [and] of the TLD.” However, because the “future amendments” provision speaks in such general terms about the subject matter of amendments to be negotiated, and in order to enhance the transparency of the process, we urge ICANN and Verisign to commit now to advancing this goal in negotiations during the 2-year window, and to providing a timely opportunity for public comment on proposed amendments.

5. An extension without modernization commitments has not been justified.

Unless ICANN and Verisign can commit to productive use of the 2-year “window”, there is a real risk that the proposed extension will mean that, for another 8 years, competing gTLD registries will be forced to take on significant anti-abuse obligations that their dominant and incumbent competitor is free to ignore (and does ignore); and that consumers, intellectual property rights holders, law enforcement, and other members of the public will continue to lack adequate, up-to-date tools for detecting, investigating and remedying abusive registrations in .com, the dominant gTLD registry and locus for most of that abuse. This outcome would represent a substantial missed opportunity for ICANN to promote the public interest in a safer Internet and in an improved competitive environment across the gTLD registry marketplace.

ICANN argues that a .com agreement extension is needed now to align with the proposed new Root Zone Maintainer Agreement with Verisign, on the grounds that “much of the root zone

and Verisign should commit to embracing the improved safeguards which are the baseline for the vast majority of other gTLD operators.

¹⁵<https://www.icann.org/sites/default/files/tlds/com/com-amend-1-pdf-30jun16-en.pdf>, section 2 (“Future Amendments”).

infrastructure itself is ‘inextricably intertwined’ with Verisign’s TLD operations for .com.”¹⁶ But even to the extent that technical requirements justify extending the .com registry agreement now, more than two years prior to its expiration date, neither ICANN nor Verisign has provided any explanation as to why that extension is incompatible with a commitment to modernize the agreement to meet, or at least to approach more closely, the contemporary anti-abuse standards applicable to .com’s competitors.

6. What is and is not at stake.

This is not about whether Verisign should continue to operate (and profit from) .com: it should. Nor is it about ICANN unilaterally imposing any new requirements on Verisign. Rather it is about —

- ICANN living up to its commitments to act in the public interest, by seeking to include in its contracts modern best practices for combating abusive domain name registrations;
- ICANN living up to its commitment (in the Affirmation of Commitments) to address competitive issues by providing a level playing field among legacy and new gTLDs;
- Verisign demonstrating its commitment to be an industry leader, not just in terms of its size and bulk in the market sector that it dominates, but also in terms of the practices and policies it follows to minimize the level of abuses occurring in that sector.

Nothing in modernizing the .com agreement would require Verisign to undertake any responsibilities which it is not already committed to fulfilling in the operation of the numerous new gTLD registries that it owns, or for which it provides the back-end registry services.¹⁷ Nor should anything in the improvements IPC proposes discourage Verisign from taking the initiative to institute more responsible anti-abuse policies and practices in .com on a voluntary basis. Some of its competitors among the legacy gTLD registries have already done so, even where their contracts with ICANN have not required it.¹⁸ Verisign should be encouraged to take voluntary steps to preserve and enhance the integrity and trustworthiness of the domain name space for which it is responsible. A public commitment, with ICANN, for the negotiation of improved safeguards and their incorporation into the registry agreement could provide added impetus for such voluntary arrangements.¹⁹

Conclusion

¹⁶<https://www.icann.org/news/blog/root-zone-management-transition-update-preservation-of-security-stability-and-resiliency>.

¹⁷As noted above, most of the needed improvements have already been made part of the registry agreement for .jobs, which Verisign operates.

¹⁸See, e.g., safeguards listed in sections 28 and 29 of application for .club (via <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1856>), which describe safeguards also applied in Neustar’s legacy gTLD registry, .biz.

¹⁹As IPC has previously noted, ICANN should also consider requiring all gTLD registry operators to designate a chief compliance officer who will be accountable for compliance with contractual obligations to ICANN. Whether or not applicable across the board, this requirement certainly seems appropriate for the largest registry operator with which ICANN is in contractual relations. It should be made a feature of the extension of the .com agreement.

IPC urges ICANN and Verisign to commit to using the 2-year window provided by section 2 of the proposed extension agreement to —

A. Bring the .com registry agreement up to date with current best practices for dealing with abusive registrations; and

B. Phase out the differential treatment of .com, and provide a more level playing field between it and other gTLD registries by adopting more consistent contractual rules to discourage and remedy abusive registrations.

Respectfully submitted,

INTELLECTUAL PROPERTY CONSTITUENCY

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