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The GNSO Intellectual Property Constituency appreciates this opportunity to comment on renewal of the .com Registry Agreement. See <http://www.icann.org/en/news/public-comment/com-renewal-27mar12-en.htm>.

Summary

IPC's comments are focused on two serious omissions in the draft .com renewal agreement. First, the renewal agreement fails to require Verisign to migrate .com to a thick Whois environment. Second, it lacks any requirement for Verisign to implement any new rights protection mechanisms at any point in the projected 6-year life of the renewal agreement. These omissions must be remedied if ICANN is to carry out its obligation to act in the public interest; to fulfill its commitments to conform relevant provisions of the renewal agreement to those of the other major gTLD registry agreements; and to provide a more level playing field for competition of .com with new gTLDs.

The .com TLD is the most widely used and consequently the most widely abused Top Level Domain. The failure to require it to provide thick WHOIS and to adopt improved Rights Protection Mechanisms would not only perpetuate this problem, but potentially worsen it. The advent of new Top Level Domains, all of which will be subject to these anti-abuse requirements, would drive even more bad actors to .com, which will not. By expanding the domain name space, ICANN has made it even more important to ensure that *all* TLDs are required, with appropriate transitional mechanisms, to have uniformly thick WHOIS and the same array of minimum RPMs. The .com TLD should be no exception.

Thick Whois

The advantages of centralization of access to Whois data via a single portal, as the thick Whois model provides, are well documented. These include reducing the volume of transfer disputes; promoting uniformity in Whois data submission and display; archival and restoration benefits; increased stability; and improvements in data quality and in accessibility of Whois data.

IPC supports open access to accurate ownership information for every domain name in every top-level domain registry, to facilitate the resolution of legal and other disputes related to the registration and use of the domain name. Simplifying access to this information through thick Whois will help prevent abuses of intellectual property, and will protect the public in many ways, including by reducing the level of consumer confusion and consumer fraud in the Internet marketplace, and by aiding law enforcement. Thick Whois enables quicker response and resolution when domain names are used for illegal, fraudulent or malicious purposes.

Currently, in .com and the two other gTLD registries that follow a thin Whois model, all contact data associated with a particular domain name registration is decentralized and held by the registrar sponsoring that registration. This leaves public access to this data vulnerable to registrar technical failure, insolvency, or simply non-compliance with its contractual obligations regarding Whois data. As amply documented in the recent Whois Policy Review Team Draft Report, see <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf>, as well as by many other sources, and consistent with the experience of IPC members, ICANN's current contract compliance capabilities fall far short of being able to deal comprehensively and effectively with issues of registrar non-compliance. This problem will only worsen with the advent of new gTLDs. Centralization of this data via a thick Whois model would significantly lessen the contractual compliance burden, as well as providing a critical back-up when Whois data is simply not accessible from the sponsoring registrar.

Indeed, there is already evidence that registrant contact data in the thick Whois model is more accessible and more accurate than in the thin Whois model. In the detailed study of Whois accuracy carried out for ICANN by NORC, Whois data from both thick and thin registries was assessed. See <http://www.icann.org/en/compliance/reports/whois-accuracy-study-17jan10-en.pdf>. NORC found that Whois data was accessible 100% of the time from thick Whois registries, but in .com, no Whois data whatever could be accessed via the registrar 2.4% of the time. The NORC study also measured the prevalence of patently false or incomplete data as much higher in thin registries than in thick registries. NORC found that, even when Whois data was accessible at all in .com and .net, 5.9% of Whois data in both registries was patently false or obviously incomplete. The rates in thick registries were lower, ranging from 2.4 to 4.4%. To be clear, IPC is not advocating thick Whois as a panacea for the serious (and perhaps worsening) problem of inaccurate Whois data; but it is one step that, along with a number of other changes, could move us toward a solution.

Finally, with the increasing internationalization of the gTLD registrant pool and concomitantly of gTLD registration data, the Whois system faces difficult challenges about how registration data should be collected and displayed when provided by registrants whose primary languages use a script that does not employ Latin characters. Those challenges are currently under study within ICANN and in other fora; but however they are resolved, the outcome will almost certainly be better if Whois data is centralized at the registry level, rather than being held exclusively by hundreds or thousands of registrars, who may apply data collection or display standards inconsistently, and who will face little if any realistic prospect of enforcement to require them to follow a uniform approach.

These facts clearly demonstrate that ICANN's public interest mandate requires that the .com registry be migrated to a thick Whois system. In addition, ICANN is obligated under the terms of the expiring .com agreement to insist upon such a migration in the renewal. Under the agreement now in force, the terms of any renewal of the agreement are required to be "similar to the terms generally in effect under the Registry Agreements of the 5 largest gTLDs," with certain exceptions not applicable here. See <http://www.icann.org/en/tlds/agreements/verisign/registry-agmt-com-22sep10.htm>, Section 4.2. Since all but one of these gTLDs (.net) already operates

under a thick Whois model, .com thus should be required to migrate to the same model upon renewal of its registry agreement.¹

The “Executive Summary” document posted by ICANN² states four justifications for the changes proposed to the existing .com agreement. Three of these would strongly support the requirement to migrate .com to a thick Whois system:

- It would “assure consistency across registries with respect to certain standard terms and conditions.” Of all the gTLD registries in operation, only three – .com, .net, and .jobs – still employ a thin Whois model. (The outlier status of these three will soon become more pronounced, as hundreds or more new gTLDs, all built on the thick Whois model, come online.)
- It would “update the agreement to reflect changes that have occurred since the current .com Registry Agreement was signed.” Not only have several new thick Whois gTLDs launched since 2006; ICANN also made the decision, following extensive public comment and discussion, to require thick Whois in all the new gTLDs to be recognized starting this year.
- Thick Whois would “allow the registry operator to better serve the internet community and protect consumers.” See the discussion above about the public interest imperative for migrating .com to thick Whois.

The only purpose cited in the Executive Summary document that would not dictate migration to thick Whois is the desire to “align” the .com and .net registry agreements, since .net remains a thin Whois operation. Clearly this stated preference must give way to the contractual obligation to revise the .com agreement to bring it into conformance with the overwhelming majority of the five largest gTLD registries.

In sum, the failure of the draft .com registry agreement to require a migration of .com to thick Whois is inconsistent with ICANN’s public interest obligations, violates its commitments regarding conformance of the renewal contract to those of the next 5 largest gTLD registries, and conflicts with most of the stated purposes of the amended agreement. On the other side of the ledger, the only contrary argument put forward in the Executive Summary document is that such a transition “raises operational and other issues that require further discussion and consideration.” This is no doubt true, which is why it may not be feasible for Verisign to transition its system to the thick Whois model by the end of November, when the current agreement expires. IPC could certainly support a provision in the renewal agreement that gives Verisign a reasonable grace period after the effective date of the amended agreement before it

¹Oddly, although the materials posted by ICANN make frequent references to this conformance requirement, they do not anywhere seem to specify which are those “five largest gTLDs” (excluding .com of course). According to at least one source, they are .net, .org, .biz., .info and .mobi. <http://www.registrarstats.com/TLDDomainCounts.aspx>. The latter four of these five are thick Whois registries.

²This document can be found at <http://www.icann.org/en/news/announcements/announcement-27mar12-en.htm>. It is not paginated.

must put a thick Whois system into operation. But the proposal under consideration does not include any requirement to move to a thick Whois system at any point during the 6-year life of the agreement. For the reasons stated above, this is unacceptable.

The Executive Summary document goes on to state that “this has been recognized by the GNSO, as that body recently agreed to undertake a formal Policy Development Process (PDP) in the matter. . . . Such a change can be implemented separately from the renewal process.” This statement is at best incomplete and obsolete, and at worst misleading. In fact, the GNSO on April 12 decided to postpone any further steps on a thick Whois PDP until November 30, not coincidentally the date on which the current .com agreement expires. The intention of the GNSO to leave this issue to contractual resolution (and thereby potentially narrow the scope of any needed PDP thereafter) could hardly be clearer.

In any event, while the Executive Summary statement is theoretically correct that Verisign could be required to migrate to a thick Whois system as the end result of a Policy Development Process, the likely practical impact of choosing this non-contractual path would be to delay the achievement of the goal for at least two to three years beyond what could be accomplished through an amendment to the .com renewal agreement now. The case for migrating .com to thick Whois is sufficiently compelling now that such a delaying tactic should be rejected. Instead, Verisign should be required in the renewal agreement to bring a thick Whois service into operation by a date certain.

Rights Protection Mechanisms

The IPC is concerned that the proposed renewal makes no provision for adoption of any of the new Rights Protection Mechanisms (RPMs) adopted by ICANN for deployment in connection with the new gTLDs. The IPC, among others, has labored over several years, including substantial “bottom-up” consultations involving all stake-holder groups, to develop these RPMs, which were refined after extensive discussion far too protracted to detail in this comment. Although these RPMs are all slated to be used in all new gTLDs, the renewal agreement makes absolutely no provision for their adoption in the .com TLD.

As noted in the Executive Summary, some allowance for the fact that ICANN has not yet articulated all rules applying to those TLDs or identified the service providers to be responsible for administration of the RPMs makes immediate application of the RPMs on the renewal agreement’s effective date unreasonable. However, it would appear equally unreasonable to defer any and all implementation of these RPMs for the full six-year duration of the renewal term. To say that the RPMs should undergo a “ramp up” period in the new gTLDs before they should be required in legacy gTLDs should not equate to a six-year free-pass for the largest gTLD registry from compliance with the extensively debated and finally approved RPMs.

In this regard, it is never explained in the Executive Summary why it is appropriate to require Verisign to implement in .com a number of the obligations to which new gTLD registries are subject, but to draw the line at requiring any implementation of the new RPMs in .com, even after a suitable “ramp-up” period in new gTLDs. Quite similar arguments could be made against requiring the .com operator to support IPv6 access to the Shared Registration System; to support

DNSSEC; to comply with IDNA and IDN guidelines; and many other features which have been imported from the new gTLD registry agreements into the proposed amended .com agreement. Like the RPMs, “when creating [these] new gTLD rules, existing registrants (and registries) were not consulted with the idea that those [new rules] would be implemented in existing gTLDs without further community discussion.” See Executive Summary, “Background” section, point 4. If this argument does not present any obstacle to inclusion of these provisions in the revised .com agreement, the same logic would apply to a requirement to implement the relevant RPMs once they have been instituted in the new gTLDs.

Contrary to assertions made in the Executive Summary, the failure to include any provision for implementation of these RPMs in .com until after 2018 threatens to undermine competition within the registry space by permitting one registry (Verisign) to operate in a materially different environment and subject to different rule sets than at least hundreds of other registries coming online in the next few years. It is also at odds with the stated goal of “assuring consistency across registries with respect to certain standard terms and conditions,” or at the least will guarantee that this goal will recede ever further into the distance as the number of new gTLDs – all of them obligated to implement the new RPMs – grows dramatically in the next few years.

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. This requirement should be reflected in the revised .com registry agreement.

Conclusion

For the reasons stated above, IPC urges that the .com renewal agreement not be approved until it is amended to require Verisign:

1. To migrate the registry to a thick Whois model, either by the effective date or by a date certain thereafter that reflects a reasonable grace period for addressing operational and transition issues; and
2. To implement applicable Rights Protection Mechanisms required of new gTLDs, after a stated “ramp-up period” for those RPMs in new gTLDs.

Respectfully submitted,

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