

COALITION FOR ONLINE ACCOUNTABILITY

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The Coalition for Online Accountability (“COA”) appreciates this opportunity to comment on the proposed revision and renewal of the .tel registry agreement. See <https://www.icann.org/public-comments/tel-renewal-2016-08-04-en>.

Summary

COA commends ICANN and Telnic (the .tel registry operator) for including in their proposed renewal agreement the more up-to-date safeguards, found in the standard registry agreement for new gTLDs, to protect third party rights and to discourage abusive registrations in the .tel registry. However, we question the continuation of special limitations on the registry’s obligation to provide a registration data directory service that is fully accessible to the public, particularly in light of apparent changes to the .tel business model upon which the ICANN board’s approval of these limitations was based in the first place.

About COA

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners (listed below). COA and its participants have engaged actively in many aspects of ICANN’s work since the inception of the organization, including through the Intellectual Property Constituency of the GNSO. COA seeks to enhance online transparency and accountability by working to ensure that domain name Whois databases remain publicly accessible, accurate and reliable, as key tools against online infringement of copyright, as well as to combat trademark infringement, cybersquatting, and other forms of fraudulent or criminal misconduct. See <http://www.onlineaccountability.net/>. COA engaged actively in community discussions surrounding the initial .tel registry agreement in 2007.

1. Safeguards for Rights Owners and the Public

COA commends ICANN and Telnic for including in the proposed renewal agreement several provisions that reflect enhanced rights protection mechanisms for third party trademark owners, and enhanced responsibilities for the registry operator to prevent use of registrations for abusive purposes, including but not limited to violations of intellectual property rights.

In the first category, section 2 of Specification 7 of the proposed renewal agreement obligates the registry operator to comply with the Uniform Rapid Suspension system now in

21st Century Fox

Broadcast Music Inc. (BMI)

Entertainment Software Association (ESA)

Motion Picture Association of America (MPAA)

NBCUniversal

Recording Industry Association of America (RIAA)

Time Warner Inc.

The Walt Disney Company

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force in the vast majority of gTLD registries. We are puzzled, however, by the provision in the Addendum to the proposed renewal agreement that wipes out the registry's obligations under section 1 of Specification 7 to "implement and adhere to" URS and other RPMs, and to include such adherence in its registry-registrar agreements, confining the latter obligation only to additional RPMs "developed and implemented by the registry operator." This Addendum provision goes well beyond that document's stated objective of excising "certain provisions [of the Base Registry Agreement] that are not applicable to a top level domain that is already in operation, such as [.tel]." COA urges ICANN to correct what appears to be a drafting error in the Addendum's overbroad amendment to section 1 of Specification 7.

In the second category, Specification 11 brings into the .tel registry agreement the relevant Public Interest Commitments (PICs) taken on by the vast majority of gTLD registries. Most notably, this includes the section 3(a) obligation to pass through via registrars the prohibition on registrants using their .tel domain names to engage in a list of abusive activities, including piracy, trademark or copyright infringement, or counterfeiting. COA urges Telnic to actively enforce these obligations and urges ICANN to use its contract compliance authority to correct any pattern that might arise of Telnic's failure to do so.

The inclusion of both URS and the PICs in yet another gTLD registry agreement underscores the glaring omission of these minimum safeguards for right holders and the public from the registry agreements for the largest legacy gTLD registries, including the dominant competitors, .com and .net. COA fully supports the previous submissions of the Intellectual Property Constituency (among others) that this omission demands prompt correction, most immediately in any extension of the registry agreement for Verisign to operate .com. See <https://forum.icann.org/lists/comments-com-amendment-30jun16/msg00078.html>.

2. Registration data directory service (Whois)

On December 18, 2007, the ICANN Board approved amendments to the .tel registry agreement that significantly modified the registry operator's obligation to provide publicly accessible Whois data on some of its registrants. In so doing, the Board "conclude[d] that the requested modifications are justified by the unique business and legal circumstances of the .TEL top level domain, and the approval of these modifications should not be viewed as establishing a precedent that applies to other circumstances." See <https://features.icann.org/2007-12-18-tel-contractual-amendment>.

In essence, the modifications allow self-identified individual registrants in .tel to opt out of making Whois data beyond their names publicly available. In order to get more information about these registrations, members of the public have to sign up for a password-protected "Special Access Service" (SAS); specify (from a drop down menu) their reasons for seeking the information; and be subject to audit and loss of access if they misuse it. This system is laid out in some detail in Appendix S, Part VI of the current agreement. It represents a substantial retreat from the norm that applies (and has applied since the inception of ICANN) for virtually every other gTLD registry agreement, which is that registration data (including, in the case of thick Whois registries like .tel, registrant contact data) is generally made accessible to the public for lawful purposes.

The proposed renewal agreement appears to carry forward without substantive change the more restricted obligations of the .tel registry with regard to public disclosure of registrant contact data. The verbiage, which is now found in Exhibit A and Specification 4 of the proposed renewal agreement, is different, and is considerably less detailed for some reason, but the substance appears to be the same.

COA questions the decision to bring this regime forward into the proposed renewal agreement, and urges that it be re-examined, for two reasons. First, the unique business model of .tel, upon which the Board's decision was in great part explicitly based, seems no longer to be operative going forward. Second, even if the general framework of more limited public Whois obligations were carried forward, some flaws in that framework should be addressed in the context of the renewal of the .tel registry agreement.

A. .Tel's unique business model has changed.

While the ICANN Board resolution does not explicitly specify the "unique business and legal circumstances" that led it to approve limitations to the registry's public Whois obligations, a review of the record leading up to the Board resolution sheds considerable light on the facts. As summarized in the comments that COA, jointly with the Whois subcommittee of the International Trademark Association (INTA), filed in 2007, when the proposed modifications were under consideration by the Board, see <https://forum.icann.org/lists/telnic-whois-proposal/msg00009.html>, "the unique business plan of .tel" can be found in the registry operator's own representations: the registry's

stated purpose is to "allow anyone to publish and control, in real time, how they can be reached." To accomplish this goal, "customers of the .Tel sTLD will store their contact details in the delegated domain space in the form of NAPTR [Naming Authority Pointer] records, which can be accessed by client software tailored to use these."....Tel is intended "to enable businesses and individuals to safely publish and manage their contact information in real time directly in the domain name system." <http://www.telnic.org/press/20070129-Telnic.pdf>. Since, essentially, registrant contact information will be the only records accessible via the .tel TLD, and since those records will be accessible to any member of the public who obtains the client software, the necessity for using Whois to obtain registrant contact information from the registry may be diminished by comparison to other TLDs. Since no other TLD follows this approach, this innovative business model may constitute the "unique business and legal circumstance" justifying modification of the contract."

The COA/INTA joint comments went on to say:

It follows from this that the approval of any such modification should be conditioned upon Telnic's continued adherence to its stated plan of storing only NAPTR records in the DNS for its registry. If in the future it changes course and adopts a new business model, under which the registry is no longer exclusively devoted to the presentation of contact information to the public in the form of NAPTR records, it should be required to notify ICANN, so that any modification allowed to the registry contract with regard to Whois can be automatically terminated, or at least subject to immediate review and reconsideration. In other words, as the Board noted when it approved the modifications

for .name, if any modifications are considered for .tel they “should not be viewed as establishing a precedent that applies to other circumstances.” Any such modification should cease to apply if .tel becomes like any other kind of domain name registry, in terms of the use to which registrations are put. (emphasis added)

The future is here: that change of course has now occurred, and is reflected in the proposed renewal agreement. In Appendix S, Part 1 of the existing .tel registry agreement, the .tel charter states, “The .tel sTLD will serve individuals, persons, groups, businesses, organizations or associations that wish to store and publish their contact information using the DNS.” Part I of Specification 12 of the proposed renewal agreement begins with the same sentence, but with the word “primarily” inserted between “sTLD” and “will serve”. The clear meaning is that entities that wish to use the registry for purposes other than storing and publishing their contact information are now also eligible to register .tel domain names.

Furthermore, the following two paragraphs of the charter found in the existing agreement spell out the exclusive use of NAPTR records, and conclude that “each registrant will be required to agree to an Acceptable Use Policy (AUP) that states that their delegated domain will not include user-defined A, AAAA, or A6 resource records.” In the corresponding paragraph (2) in Specification 12 of the proposed renewal agreement, all references to NAPTR records have been eliminated; and while the new provision continues to state that registrants must agree to an AUP, it is completely silent on what that AUP will contain.

Because the Board’s agreement to relax the .tel registry’s obligation to provide publicly accessible Whois data depended upon the registry’s unique business model, and because that model has now apparently changed, COA urges the Board to “review and reconsider” its decision in light of these new realities. Put another way, by comparison to the situation obtaining in 2007, the current circumstances have changed, and thus the Board’s prior approval of the Whois modifications, in the words of the Board resolution itself, “should not be viewed as establishing a precedent that applies to [today’s] circumstances.”

B. Flaws in the .tel Whois regime should be corrected.

Even if the Board decides to deviate from the position it took in 2007, and to extend the special treatment of .tel Whois obligations even though the “unique circumstances” which it said “justified” the 2007 decision have significantly changed, it should take this opportunity to correct some defects in the .tel Whois framework that COA and INTA pointed out nine years ago. These include:

- Whether requesters who are qualified to obtain access to the contact data of self-identified individual registrants should be barred from any sharing of that data with any non-subscriber to the “Special Access Service.” As COA and INTA noted in 2007, “to be actionable, Whois information must be shared with other parties who would not themselves be subscribers to the SAS (e.g., it must be shared by lawyers with clients; by clients with lawyers; by vendors of online brand or copyright monitoring services with their clients; by anti-fraud investigators with law enforcement, to give just a few examples). It should be clarified that this sharing is permissible in furtherance of the purpose for which access was obtained.”

- The arbitrary limitation of SAS queries to five per 24 hour period. Telnic should have the flexibility to increase this level should circumstances warrant it, without having to gain ICANN approval for a further revision of its registry contract.
- Handling of records of SAS queries. As COA and INTA noted in their 2007 comments, “while it may be appropriate to require SAS subscribers to acknowledge that Telnic will record information about SAS searches, the revised proposal lacks any undertaking by Telnic about how it will handle this information. This gap should be filled.”

Thank you for considering the views of COA.

Respectfully submitted,

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