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By E-Mail to comments-travel-renewal-12may15@icann.org

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

Re: Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement

Dear ICANN:

I am writing on behalf of the members of the Internet Commerce Association (ICA). ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers.

This letter addresses the Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement that was [published for public comment](#) on February 2, 2015.

Summary of Position

The ICA is strongly opposed to the inclusion of new gTLD rights protection mechanisms (RPMs), particularly Uniform Rapid Suspension (URS), in this renewal agreement (RA) for a legacy gTLD. We believe that this attempt by ICANN contracting staff to create de facto Consensus Policy via individual registry contract, absent a relevant Policy Development Process (PDP), is a glaring example of the type of top down, unaccountable action that should be targeted by enhanced accountability measures accompanying the IANA transition proposal. Contracts with legacy gTLDs can contain and enforce Consensus Policy, but it is an impermissible violation of ICANN's Bylaws for contracts to attempt to create Consensus Policy.

We strongly urge that Section 2 of Specification 7 of the Renewal Agreement (RA) for .Travel, which contains the URS as well as the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) be deleted in its entirety. Failure to take that action, and the resulting approval of a .Travel RA that contains these RPMs, will constitute a gross and unacceptable violation of ICANN Bylaws. We hope that contracting staff will promptly take the corrective action required on this matter.

However, if the decision is made by staff to retain these RPMs in the .Travel renewal RA following the close of the public comment period, we believe that the proposed final contract must be forwarded to, reviewed by, and voted upon by the ICANN Board. The potential addition of these RPMs to legacy gTLDs through this inappropriate avenue will have a substantial and deleterious effect on ICANN's policymaking process going forward, will create a new and dangerous precedent whereby de facto Consensus Policy can be created by contractual fiat in violation of ICANN Bylaws, and will substantially and adversely affect third parties around the world consisting of the existing registrants of more than one hundred million legacy gTLD domains.

Unaccountable and Uninformed Top Down Policymaking is Unacceptable

On May 13, 2015 I had the honor and privilege of addressing the Subcommittee on Courts, Intellectual Property, and the Internet of the Judiciary Committee of the U.S. House of Representatives. I spoke on ICA's behalf at the Subcommittee's [hearing](#) on "Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation".

In my oral statement before the Subcommittee I said the following:

While enhanced ICANN accountability measures are overdue they will operate best only if ICANN's Board and senior staff embrace a culture of accountability

that assumes responsibility for the fallout of ICANN decisions and encompasses early consultation with the multistakeholder community that provides organizational legitimacy.

The current situation regarding the proposed renewal RA for the .Travel gTLD is a perfect illustration that a 'culture of accountability' that includes proper deference to the multistakeholder community and to the letter and spirit of ICANN's Bylaws is presently lacking at ICANN. That is extremely dismaying and disheartening, especially for those who believe in the multistakeholder model (MSM) of governance for the unique experiment in technical DNS management known as ICANN.

When the Applicant Guidebook for the new gTLD program was being drafted I was extensively engaged on ICA's behalf in the vigorous community debate over its RPMs. Throughout their development by the IRT, STI-RT, and then the full community I repeatedly inquired of other stakeholders as well as ICANN senior staff whether adopting these RPMs as new gTLD program "implementation details" would in any way result in their automatic application to legacy gTLDs like .Com. I received repeated assurances that this would not occur – that the RPMs could be imposed on legacy gTLDs only after their impact and efficacy was fully assessed, and then only via a standard PDP to create new Consensus Policy in conformity with ICANN Bylaws.

The present proposal to impose the URS on .Travel is a betrayal of those assurances and a clear violation of ICANN's Bylaws. The rationale for this decision – "*With a view to increase the consistency of registry agreements across all gTLDs, ICANN has proposed that the renewal agreement be based on the [approved new gTLD Registry Agreement as updated on 9 January 2014](#).*" – is flimsy and unconvincing. ICANN staff possesses no legitimate authority to create and impose what amounts to Consensus Policy. Proposing that the RA take the new gTLD RA as its starting point is tantamount to creating Consensus Party given the overwhelming negotiating advantage that ICANN has in such a context.

There can be no doubt that this is a staff attempt to create de facto Consensus Policy, as is clearly documented by the fact that the same objectionable provision appears in the proposed renewal RAs for [.Cat](#) and [.Pro](#), both released for comment on May 28th. This evidences a deliberate and illegitimate attempt by contracting staff to create a series of precedents that would lead inevitably to the imposition of the URS on major legacy gTLDs such as .Org, .Net and .Com when they come up for renewal, despite the fact that the URS is not an ICANN [Consensus Policy](#). Acting in a manner that is consistent with ICANN's Bylaws is far more important than consistency of RAs – if that latter principle had been paramount then there would be no RPMs at new gTLDs to begin with because they are inconsistent with the Consensus Policy in effect at legacy gTLDs.

This staff decision is all the more troubling because it was made in an irresponsibly uninformed manner without waiting for a full evaluation and identification of issues concerning the new gTLD RPMs. On May 1st the public comment period on “Draft Report: Rights Protection Mechanisms Review” (<https://www.icann.org/public-comments/rpm-review-2015-02-02-en>) closed, and on May 29th ICANN staff issued a “Report of Public Comments” (<https://www.icann.org/en/system/files/files/report-comments-rpm-review-29may15-en.pdf>) based upon community input. The Background on that Draft Report states that it “is intended to be available to inform the Issue Report requested by the GNSO as well as the independent review of Trademark Clearinghouse recommended by the GAC. In addition, this paper will serve as input to the Review Team on Competition, Consumer Trust, and Consumer Choice to be convened under Section 9.3 of the Affirmation of Commitments, charged with assessing the effectiveness of the safeguards developed for the New gTLD Program.”

None of these additional reviews have been completed. Further, one of the major reasons that the GNSO requested the referenced Issue Report was so that GNSO’s stakeholders could decide whether those RPMs should become Consensus Policy for all gTLDs. And that Issue Report will not even be delivered until late September because policy staff requested a six-month extension of the delivery date so that additional studies and analysis could be conducted – and the GNSO Council granted that request on January 29th of this year. Yet this near-total lack of evaluated data regarding the performance of the RPMs seems not to have mattered to contracting staff.

Policy and Implementation Considerations

The recently published Final Report on Policy and Implementation (P&I) (<https://community.icann.org/display/PIWG/Final+Report+Redline+Version>) is also germane to this discussion. That Report, issued with the full consensus support of its working group, defines a “**GNSO Consensus Policy**” (p.9) as “A Policy established (1) **pursuant to the procedure and required minimum elements set forth in ICANN's Bylaws**, and (2) covering those topics listed in Section 1.2 of the consensus policies and temporary policies specification of the 2013 RAA (see Annex I) or the relevant sections in the gTLD registry agreements (see Annex II). **GNSO Consensus Policies, adopted following the outlined procedures, are applicable and enforceable on contracted parties as of the implementation effective date.**” (Emphasis added)

The PDDRP and URS both fit within the cited topics but have not been adopted pursuant to the outlined procedures for establishing Consensus Policies. Therefore, their imposition by contractual fiat on legacy gTLDs is clearly in violation of the procedural path and required minimum elements set forth in the Bylaws.

In addition, the P&I Report adopts as its first principle that ***“Policy development processes must function in a bottom-up manner. The process must not be conducted in a top-down manner and then imposed on stakeholders”***. Yet in this instance we have ICANN staff engaged in imposing policy from the top down, first on registries and through them onto registrars and registrants. This is absolutely unacceptable. The one exception to that first principle, *“emergency cases such as where there are risks to security and stability”*, bears no relationship to the RPMs at issue.

Finally, the P&I Report states a first standard, which is *“As outlined in the ICANN Bylaws, the GNSO is responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains. **As such, gTLD policy development should not take place outside of the GNSO.**”* (Emphasis added) That standard has been grossly violated by the proposed RA as it imposes staff-dictated policy decisions on legacy gTLDs absent any GNSO involvement.

Unfair Impact on Registrants

Registrants at new gTLDs had clear notice that they would be subject to the new RPMs. Registrants at legacy gTLDs expect that they shall only be subject to Consensus Policy adopted in accordance with ICANN’s Bylaws. The proposed RA is a complete betrayal of that legitimate expectation and is totally at odds with ICANN rhetoric in support of registrant rights. It is also likely to raise legality of enforceability issues if there is any attempt to enforce new gTLD RPMs against registrants at legacy gTLDs absent their adoption via Consensus Policy.

The danger for legacy gTLD registrants is compounded by the fact that the URS that staff is trying to impose today may differ materially from what the URS becomes in the next few years. In this regard, the [Report of Public Comments](#) on the “Draft Report: Rights Protection Mechanisms Review” was released on May 29th.

The Report’s URS section makes clear that some parties would like Uniform Rapid Suspension converted into Uniform Rapid Transfer, with additional tweaks that would put domain registrants at a substantial disadvantage in URS proceedings.

Among the ideas suggested for the URS by various commenters were:

- Adding various forms of domain transfer options, either at the time of the decision or when the domain registration expires.
- Lengthening the term of the domain suspension beyond the initial registration period.

- Lowering the “clear and convincing evidence” burden of proof standard to the “preponderance of the evidence” burden used in UDRP actions – combined with changing what needs to be proved from ‘registration and use’ in bad faith to ‘registration or use’.
- Making the URS a “loser pays” procedure.
- Eliminating or shortening the current one-year post-decision time period in which a defaulting registrant can file for de novo appeal.
- Requiring the registrant to pay a response fee in all filings, rather than only in those cases involving 15 or more domains, as set in the current URS rules.

Taken collectively, these suggestions would undo whatever rough balance between rights holders and registrants was achieved in the creation of the URS. They make clear that the URS could be changed in the future to become an accelerated, lower-cost version of the UDRP, with the same burden of proof plus a domain transfer option. Those two changes alone would probably cause a mass shift from UDRP filings to URS by trademark owners – thereby converting the URS from its intended use as a narrow supplement to the UDRP to a complete substitute for it. Registrants would have less time to respond, shorter word limits in which to state their replies, and be denied the option of requesting a three member expert panel. Other potential changes could be adoption of a loser pays requirement, requiring registrants to pay a response fee in all cases, and changing what must be proved by complainant to bad faith registration or use.

ICA is sensitive to some legitimate concerns of trademark owners regarding the effectiveness of the URS and we have suggested means to address those concerns without undermining registrant rights. But proposals such as those listed above illustrate that the staff attempt to put the URS in place at legacy gTLDs via contractual fiat puts the cart far before the horse. We must know what the URS is going to be before we can consider its impact on legacy gTLD registrants and debate whether it should be adopted as Consensus Policy.

It is also a dangerous and destructive approach. If staff can succeed in this effort, and if the URS is then modified for new gTLDs through a non-PDP “implementation” route, that modified URS would automatically take effect at legacy gTLDs with contract provisions such as the one that staff is attempting to impose on .Travel . The result would be a radically different URS effectively put in place at legacy gTLDs absent any compliance with ICANN Bylaws pertaining to Consensus Policy.

Consensus Policy regarding RPMs must be vetted within the community to assure a proper balancing of the interests and rights of both trademark owners and domain registrants.

In order to assure that balance two indispensable steps are necessary:

- **The attempt to impose new gTLD RPMs on legacy gTLDs by contract must be withdrawn in recognition that such action is in violation of ICANN Bylaws. If staff is unwilling to retreat on this initiative then ICANN's Board must assume responsibility and review all the issues at play, including compliance with the Bylaws, before any legacy gTLD RA with such a provision is made final.**
- **Any further modification of the new gTLD RPMs must be considered within the context of a full PDP. We are far past the implementation phase of the new gTLD program. Further, it is clear that the applicability of the RPMs to legacy gTLDs is now primed for discussion. Unless both RPM modifications and legacy gTLD applicability are considered within the PDP framework there is a substantial risk of a bait-and-switch policy process, in which RPMs are made applicable to legacy gTLDs and then substantially altered via a backdoor, non-PDP process.**

In addition, any suggestion that legacy gTLDs can “voluntarily” adopt new gTLD RPMs that have been proposed by ICANN staff in the course of renewal RA negotiations should be rejected as specious, given the differential in bargaining leverage between a registry operator in need of a RA and ICANN staff with the power to approve or deny it.

Conclusion

We appreciate the opportunity to provide these comments on the proposed renewal RA for .Travel.

For all the reasons outlined above, the attempted imposition of new gTLD RPMs on this legacy gTLD are absolutely unacceptable and in gross violation of ICANN Bylaws. They must be stripped out of the RA and reserved for consideration in a future PDP by the full ICANN multistakeholder community.

While much is at stake for legacy gTLD registrants, ICANN's own credibility is also on the line in this instance. At a time when enhanced accountability measures are being designed, a successful end run around the PDP requirements for establishing Consensus Policy would suggest the need for even stronger accountability measures

than those presently under consideration. Fortunately, the accountability process will still be ongoing when ICANN decides whether to withdraw this illicit action or double down in its pursuit.

Sincerely,

Philip S. Corwin

Counsel, Internet Commerce Association