

**VIRTUALAW LLC**

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By E-Mail to

Board of Directors  
Internet Corporation for Assigned Names and Numbers (ICANN)  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601

Re: Proposed ICANN Process for Handling Requests for Removal of Cross-Ownership Restrictions for Existing gTLDs

Dear Members of the ICANN Board:

This comment letter is submitted by the Internet Commerce Association (ICA) in regard to ICANN's May 2nd Announcement (<http://icann.org/en/announcements/announcement-02may11-en.htm>) establishing a period for public comments on the Proposed ICANN Process for Handling Requests for Removal of Cross-Ownership Restrictions for Existing gTLDs. Although the official comment period closed two days ago, on June 1<sup>st</sup>, we ask ICANN's indulgence to allow submission of this comment so that we may respond to unanticipated comments of other parties that, if implemented by ICANN, could wreak substantial economic and other injury on our members as well as on millions of other registrants in incumbent gTLDs.

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.

**Executive Summary**

**Incumbent gTLD domain registrations presently constitute more than sixty percent of all domain registrations. Comments posted to date in regard to the proposed process for facilitating registry-registrar integration at incumbent gTLDs have largely focused on the**

overall terms of competition between them and potential new gTLD registries and have failed to consider the much broader public interest of the millions of registrants in existing gTLDs.

Allowing – much less requiring – incumbent gTLDs operators to adopt the proposed registry agreement for new gTLDs would expose millions of registrants to:

- Termination of existing price increase limitations in the .Net and .Com registry agreements.
- Being subject to the yet-untested “rights protection” mechanisms for new gTLDs, including Uniform Rapid Suspension (URS).

While new gTLDs may provide effective competition for existing gTLDs over time, the fact is that for now and the foreseeable future there will continue to be a substantial qualitative difference between them and that, for most registrants, a domain at an incumbent gTLD is and will remain highly preferred over the same domain name at a new gTLD. Existing registrants therefore do not have a viable option for switching registrations in the face of unlimited registration and renewal pricing increases at .Com and .Net.

Further, existing gTLD registrants conform their conduct to the requirements of the Uniform Dispute Resolution Policy (UDRP). If registrants at new gTLDs wish to be “guinea pigs” to test the operation of the URS it is their right to choose to do so in an informed manner – but registrants at incumbent gTLDs should not be involuntarily exposed to the possible loss of function of their domains as a byproduct of a registry’s decision to pursue an affiliation which benefits itself but may provide little or no foreseeable benefits to those registrants.

**Therefore, it is ICA’s view that no incumbent registry seeking to affiliate with a registrar should be allowed to simply elect to transition to the new gTLD Registry Agreement. Rather, the public interest of millions of registrants demands that all incumbent gTLD registry operators seeking such affiliation should be required to request and negotiate amendments to their present agreement, and that all such amendments must be open to public comment in advance of any consideration of their approval by ICANN. This requirement is “necessary and appropriate” to address the circumstances of registrants in incumbent gTLDs. We urge the Board to adopt such a position when it considers this matter at its June 20<sup>th</sup> meeting in Singapore.**

## **Discussion**

Incumbent gTLD registry operators are currently prohibited from being affiliated with an ICANN-accredited registrar under existing policies that mandate registry-registrar separation. On November 5, 2010 the ICANN Board adopted a Resolution to remove such cross-ownership restrictions for new gTLDs and, as described in the Announcement:

*ICANN will not restrict cross-ownership between registries and registrars for new gTLDs... "ICANN will permit existing registry operators to transition to the new form of Registry Agreement, except that additional conditions may be necessary and*

*appropriate to address particular circumstances of established registries." (Emphasis added)*

As further described in the Announcement, the rationale for the Proposed Process is as follows:

*Existing registry operators assert that they need their current restrictions on cross-ownership to be removed in order to be able to compete on a level-playing field with registrars that are planning to apply to operate new gTLDs. **Commencing a public comment period on the process at this time is intended to solicit community input so the Board may consider the process on 20 June 2011 along with the new gTLD Applicant Guidebook.** (Emphasis added)*

In order to address any requests by incumbent gTLD operators to affiliate with an ICANN-accredited registrar, the following process was proposed:

***In order to lift co-ownership restrictions, existing gTLD registry operators could: elect to transition to the new form of Registry Agreement once it has been approved for the new gTLD Program; or they could request an amendment to their existing Registry Agreement to remove the cross-ownership restrictions.** Transition to the new form of Registry Agreement would be facilitated through a negotiation between ICANN and the registry operator upon written request by the registry operator. **Any proposed material amendments to gTLD registry agreements would be subject to public comment prior to ICANN approval.**(Emphasis added)*

ICA had not previously commented on this proposal in a belief that incumbent registries would choose the second of the two options in order to avoid many of the untested and complex requirements and restrictions that have become part of the proposed Registry Agreement for new gTLDs, and that therefore any request to affiliate with a registrar would be negotiated with ICANN, and proposed material amendments subject to public comment prior to approval.

However, three of the four comments submitted to date on this matter – by Momentous.com, AusRegistry, and the International Trademark Association (INTA) – take essentially the same ‘all or nothing’ position – that any incumbent gTLD wishing to realize the benefits of registrar affiliation must be required to adopt the new gTLD Registry Agreement in its entirety. While this “misery loves company” position may satisfy the competitive interests of potential operators of new gTLD registries, it utterly fails to take into account the public interest of millions of registrants in incumbent gTLDs – who are in fact the majority of registrants in all TLDs. Further, it is based on the false notion that a perfectly level playing field can be established by contractual fiat between long-established gTLDs and new registry entrants.

VeriSign’s Domain Name Industry Brief for May 2011 (<http://www.verisigninc.com/assets/domain-name-report-may2011.pdf>) reports:

*The first quarter of 2011 closed with a base of more than 209.8 million domain name registrations across all Top Level Domains (TLDs), an increase of 4.5 million domain names, or 2.2 percent over the fourth quarter. Registrations have grown by 15.3 million, or 7.9 percent over the past year.*

*The base of Country Code Top Level Domains (ccTLDs) was 81.7 million domain names, a 2.1 percent increase quarter over quarter, and a 5.1 percent increase year over year.*

*The .com and .net TLDs experienced aggregate growth in the first quarter, surpassing a combined total of 108 million names. New .com and .net registrations totaled 8.3 million during the quarter. This is a 9.2 percent increase year over year in new registrations, and 2.7 percent increase from the fourth quarter.*

Several important points derived from this Brief are:

- .Com and .Net registrations currently account for 51.5% - the majority – of all domain name registrations. (When other incumbent gTLD registrations are added in they account for more than 60% of all current registrations.)
- Incumbent gTLD registrations continue to increase at a faster pace than ccTLD registrations.
- .Com and .Net registrations continue to increase at a faster pace than the average for all other incumbent TLDs.

In particular, the above-average growth of .Com and .Net registrations, as well as the pricing premium they display over other gTLD domains available in the secondary market, provides strong evidence that they remain qualitatively different from other gTLD and most ccTLD domains. Registrants in .Com and .Net – that is, the majority of all present registrants – are currently protected from egregious increases in the pricing of registrations and renewals by clauses in the respective registry operator contracts between ICANN and VeriSign.

If ICANN were to adopt a policy that allows, much less compels, VeriSign to adopt the new gTLD Registry Agreement in full and without amendment as a condition of registrar affiliation it would provide a powerful incentive for VeriSign to seek such an affiliation even if there were no other compelling business reason to do so, simply as a means of voiding the current contracts' price caps. Further, as VeriSign is a publicly traded company, such a policy could well incite a hostile bid by a major registrar to acquire VeriSign because the potential acquirer would know that the consummation of the merger or acquisition would void the present pricing limitations and allow it to extract monopoly rents from the registrants in the two most desirable gTLDs. Either of these results would be adverse to the economic interests of millions of current registrants and therefore contrary to a public interest that is far more important than the competitive positions of any particular registry operators.

While registrants in other incumbent gTLDs do not benefit from contractual price limitations they also have a major stake in this debate. Permissive or mandatory adoption of the new gTLD Registry Agreement would expose them to all of the new and untested “rights protection” mechanisms proposed for new gTLDs, including the URS. We have previously expressed our very substantial concern that a 500-word complaint accompanied by a \$300 filing fee cannot provide adequate due process protections to a domain registrant. Those concerns have been amplified as ICANN’s Board, under unrelenting pressure from a Governmental Advisory Committee (GAC) unduly influenced by large corporate brand owners, has continued to chip away at registrant rights in the URS. And, of course, the Final Applicant Guidebook has yet to be adopted – and even if it is adopted later this month in Singapore it has become clear that it may well be subject to continuing revision and that the URS could further deteriorate to provide even less due process to registrants.

**Registrants in incumbent gTLDs are aware that they must conform their activities to the UDRP and relevant national laws or risk loss of their domains – and they do so in 99.9 percent of all instances as measured by annual UDRP filings. They should not be involuntarily exposed to a yet-untested and still-evolving URS as a condition of a registrar affiliation which provides its principal benefits to the applying registry rather than its registrants.**

ICANN staff have just issued a Preliminary Issue Report on the Current State of the UDRP (available at <http://icann.org/en/announcements/announcement-2-27may11-en.htm>) which makes the following recommendation:

*While periodic assessment of policies can be beneficial to guard against unexpected results or inefficient process, the GNSO Council should consider the perspective of the ICANN community with regard to whether such review is necessary or warranted. **Although properly within the scope of the GNSO’s mandate, Staff recommends that a PDP on the UDRP not be initiated at this time.***

*However, if the GNSO Council nevertheless believes that the UDRP should be reviewed, Staff suggests an alternative approach for addressing this issue. After carefully evaluating the issues and concerns expressed by the ICANN community regarding the UDRP, Staff has concluded that many relate to process issues associated with the implementation of the UDRP, rather than the language of the policy itself. The GNSO Council should consider in lieu of commencing a PDP, convening a small group of experts to produce recommendations to improve the process or implementation of the UDRP policy as an initial step. If after consideration of such expert recommendations, there continues to be a desire to conduct a more thorough review of the UDRP, the GNSO Council could subsequently initiate a more focused PDP at that time. (Emphasis in original.)*

This Staff recommendation against a PDP on substantive aspects of the UDRP, while allowing for further recommendations on process or implementation issues, is based on the following findings:

*The UDRP has won international respect as an expedient alternative to judicial options for resolving trademark disputes arising across multiple national jurisdictions. This view was broadly shared during the UDRP Webinar by representatives of a broad cross-section of the Internet community... Many recognize the benefit of maintaining the current model, which has evolved over the last decade, through the processes that have been adopted by UDRP providers. Today’s UDRP reflects the collective wisdom developed by providers, panelists, complainants, and respondents, as reflected in the large body of published decisions, commentaries, and other educational materials maintained by providers for the benefit of the public... **The Internet community has come to rely on the transparency, predictability, and consistency associated with the UDRP.** (Emphasis added)*

**Included in the members of the Internet community who have come to rely upon the “transparency, predictability and consistency associated with the UDRP” are the millions of registrants in incumbent gTLDs. That reliance would be totally undermined if their domains were suddenly exposed to potential suspension under the untested and therefore**

**totally unpredictable URS simply as a byproduct of a registry operator's decision to affiliate with a registrar.**

General support for the UDRP has also been reflected in the UDRP user community. For example, a June 1<sup>st</sup> article in World Trademark Review (WTR) entitled "Break for trademark owners as ICANN tentatively drops UDRP review", reports, "*UDRP panellist [David Bernstein](#), partner at Debevoise & Plimpton, reports: "Virtually every stakeholder in the webinar thought the UDRP is a treasure that should be persevered. In the webinar, you had respondents, counsel, trademark owners, panellists – they all lined up the same way. All said that the UDRP is fair."*

ICA plans to comment on the Current State of the UDRP Report no later than the comment deadline of July 15<sup>th</sup>. Our support for UDRP reform has been publicly articulated many times. While we are reluctant to call it "a treasure" we do believe that it is generally fair, and certainly accords far superior due process protections to registrants than the proposed URS. We do have significant concerns about its predictability and consistency but there is great potential to address these and other process and implementation concerns, especially as accredited UDRP providers proliferate in coming years, through establishment of a standard contractual agreement between ICANN and these arbitration providers.

However, we must express concern about the apparent decision by trademark interests to scuttle any substantive UDRP reform, as also reported in the WTR article:

*ICANN has published a report proposing that full-scale review of the UDRP is not recommended. Trademark owners who already feel beleaguered by new gTLD policy development and forthcoming expansion will no doubt breathe a sigh of relief at the news.*

*WTR understands that the strategy of ICANN's IP Constituency was to request, in the case of a full policy review, a very long wishlist of amendments that would tighten up the UDRP in favour of trademark owners. This would result in a protracted and contentious policy development process at a time that ICANN is busy pushing through the new gTLD programme and under severe criticism for its handling of the rights protection issue. So another far-reaching and problematic process with regard to IP rights may not have looked too appealing to ICANN... **Opposition to the review... appears to be the decisive factor in the staff recommendation not to review the UDRP.** (Emphasis added)*

**While trademark interests are entitled to oppose substantive UDRP reform that might result in balanced modifications that benefit both complainants and registrants, it is the height of cynicism for them to do so and then immediately urge ICANN, through INTA, to impose the URS on 60-plus percent of all current domain registrants if and when incumbent gTLD registries seek a registrar affiliation. Their apparent viewpoint is that the UDRP is a "treasure" which requires no substantive revision through an open, transparent, and balanced policy development process – but that it is just fine to supplement this "treasure" by imposing a totally one-sided substantive alteration of incumbent gTLD rights protections as an automatic byproduct of registry-registrar affiliation.**

**We can think of no greater substantive change in rights protection requirements for incumbent gTLD registrants than involuntary exposure to URS complaints, and such a**

**result should clearly be regarded as a major substantive amendment of the present UDRP policy. ICA's position is that any substantive alteration of the UDRP at incumbent gTLDs, including in particular its supplementation through a low-cost, rapid suspension mechanism such as the URS, should only be considered after a minimum of several years' experience with the URS at new gTLDs – and then only through a standard PDP that assures that all affected members of the ICANN community have a say in the outcome.**

As a final note, the antipathy of current gTLD registrants to the URS was amply demonstrated during the recent comment period on renewal of the .Net registry agreement. In response to an Intellectual Property Constituency (IPC) suggestion that the contract be amended to include all new gTLD rights protection mechanisms, including the URS, there was a large outpouring of comments filed in opposition to that position (comments at <http://forum.icann.org/lists/net-agreement-renewal/>). The same outcry can be expected in regard to any imposition of URS at any incumbent gTLD as a byproduct of registry affiliation with a registrar – and the public outcry will probably be far louder if it is accompanied by the lifting of pricing limitations at .Com and .Net.

## **Conclusion**

**For all of the reasons stated above, ICA urges ICANN to adopt a policy that no incumbent registry seeking to affiliate with a registrar be allowed to simply elect to transition to the new gTLD Registry Agreement, much less be compelled to do so. Rather, the public interest of millions of registrants demands that all incumbent gTLD registry operators seeking such affiliation should be required to request and negotiate amendments to their present agreement, with all such material amendments open to public comment in advance of any consideration of approval by ICANN.**

**Registrants at .Com and .Net rely upon contractual pricing limits for protection against unwarranted registration and renewal increases at these two highly desirable and qualitatively different gTLDs. And registrants at all incumbent gTLDs who conform their conduct to the requirements of the UDRP should not be involuntarily exposed to an untested and unbalanced URS, especially through an automatic and one-sided process that precludes any substantive rights protection reform of benefit to registrants. Allowing or mandating such results could spark an unprecedented public outcry against ICANN policies.**

Thank you for your consideration of our views on this matter.

Sincerely,

Philip S. Corwin

Counsel, Internet Commerce Association