

May 10, 2011

Re: Proposal for Renewal of the .NET Registry Agreement

Dear Members of the ICANN Board:

This comment letter is submitted by Telepathy, Inc in regard to ICANN's April 11th notice (<http://icann.org/en/announcements/announcement-11apr11-en.htm>) establishing a period for public comments on the proposed renewal of the .Net generic top level domain (gTLD) registry agreement between ICANN and VeriSign.

Telepathy, Inc. has invested millions of dollars in developing Internet businesses, including purchasing many prime generic dot-com and dot-net domains in the open market. Several of these domains now serve as the foundations of operating businesses that provide the livelihood for the employees of the companies formed to develop these domains.

Telepathy supports the comment letter submitted by the Internet Commerce Association (ICA).

Telepathy also submits the following comments.

1. The .NET registry as a legacy extension with a 20-year history is essentially different from the proposed new gTLDs. A policy regimen that may be appropriate to the new gTLDs is not necessarily appropriate for .NET.
2. Potential registrants of domains in the new gTLDs will know the rules and regulations governing the new gTLDs before spending a single dollar to register a domain in the new gTLD space. To change now well-established policies that govern the .NET space would pull the rug out from under all current registrants of .NET domains after .NET domain registrants have already invested untold sums in acquiring and developing .NET domains.
3. The URS is a highly controversial, untested, and unproven procedure. As many critics have pointed out, it is ripe for abuse and undermines the limited safeguards offered by the UDRP to registrants who wish to protect against overreach by covetous trademark holders.
4. The UDRP suffers from many well-known flaws that facilitate attempts by trademark claimants to abuse the process to acquire without compensation domains that are valuable independent of any goodwill due to the trademark use. ICANN has delegated responsibility for implementing the UDRP to various organizations (UDRP groups) that are under no contractual obligation to ICANN. These UDRP groups receive payment from and are selected by the Complainants, which leads to forum shopping and encourages pro-Complainant bias, just as lack of integrity due to competition between the bond rating agencies for bond issuer dollars was a key cause of the financial

crisis. Certain panelists substitute their own ‘interpretations’ in place the clear language of the UDRP, in effect rewriting the UDRP according to their own preferences. They do so with impunity, and studies have shown that certain UDRP groups appear to reward these activist panelists with more assignments than those who take a more balanced approach. It is commonplace for UDRP groups to allow active members of the trademark bar to appear as neutral panelists, and then later appear as advocates when they can then quote their own decisions as precedent. My views of the flaws in the UDRP can be found at <http://directnavigation.com/2010/01/udrp-a-guest-post-every-domainer-must-read/>.

5. Rather than fix the flaws in the UDRP that undermine domain registrant protections, some propose a URS process that makes it even easier for a domain registrant to lose control of his or her domain name. A review of UDRP decisions demonstrates that even with the limited safeguards offered to domain name registrants trademark holders have managed to seize domains on the flimsiest of pretexts. A survey of egregious decisions from 2009 can be found at <http://udrpwallofshame.com/2009-udrp-wall-of-shame-announced/>. With certain panelists all too eager to seize inherently valuable domains from their rightful owners and turn them over to covetous trademark holders, the registrant protections in the UDRP need to be strengthened, not further weakened as proposed in the URS.
6. No compelling case has been made that the current UDRP system needs to be shifted even further in favor of trademark holders. There are now over 200,000,000 registered domains. Yet the daily WIPO report of UDRP decisions averages only a dozen or so dispute proceedings. In spite of fear-mongering about widespread abuse, the rate of UDRP disputes demonstrates that the domain space is remarkably free of abusive registrations that rise to the level that a UDRP is considered necessary. The rate of WIPO disputes is equivalent to the entire adult population of the United States committing only a dozen misdemeanors each day across the United States. That does not demonstrate a crime wave that requires drastic remedies. That demonstrates an incredibly safe operating environment for trademark holders.
7. The fear-mongering perpetrated by the IP community has gone to ludicrous heights. IP interests are concerned about brand protection. There are already dozens of gTLD and ccTLD extensions, yet brand owners rarely feel the need to register their brands in all the currently available extensions. Most of the action is in the dot-com space, because that is where most brands operate. That is where most of the typo-squatting occurs, because that is where the traffic is. IP interests make a false analogy that because there is typo-squatting in dot-com, that there must be typo-squatting or brand-squatting in the new gTLD extensions. Similar reasoning would be that because there is a pick-pocketing problem in Times Square that ICANN should adopt heightened levels of enforcement to prevent pick-pockets descending on a newly built residential development in the middle of nowhere that gets no foot traffic. Typo-squatting is primarily a dot-com phenomenon and it is already under control. Established trademark holders have had over ten years to use

the UDRP to obtain commercially relevant infringing domains. At this point, if there are still infringing domains held by typo-squatters, the reason is likely lack of interest or concern on the part of the trademark holder, not because the UDRP process makes it difficult to secure an infringing domain.

8. It is also worth noting that even though IP interests claim the problem of abusive registrations is huge, and in spite of the small number of UDRP complaints that are brought each day, a portion of these complaints are over-reaching and even abusive. There is no penalty for a trademark holder in bringing an abusive complaint. The respondent incurs the burden, expense and effort of defending its legitimate registration and the abusive complainant suffers at most a slap on the wrist. The penalties in the UDRP are inequitable. One stray advertising link placed by a third party can lead to the loss of a long-held domain name. Yet the Complainant suffers no penalty for bringing a blatantly abusive complaint.
9. For all of the above reasons, the URS is inapplicable to the .NET registry, is fatally flawed in its conception, and is unnecessary.
10. The Trademark registry that some favor is also fatally flawed in its conception. The essence of a trademark is that it is restricted to a particular use. This is why many companies can have a trademark on an identical mark, since their uses are different. Aside from a few famous marks, no one company can claim exclusive commercial use for any particular mark. Many companies choose to trademark everyday words, rather than invent new made-up words. Just using terms related to water, there are trademarks on Tide, Current, River, Pond, Stream, etc. No trademark holder on these marks has the right to prevent other non-infringing commercial uses, yet the trademark registry suggests that a trademark holder has a presumptive right to any domain incorporating these common, everyday words. This has a chilling effect on commerce, attributes rights to trademark holders that they do not have, in addition to being cumbersome to implement and unnecessary.
11. The presumptive renewal provisions of the .NET registry are also fatally flawed, as they conflict with ICANN's mission to enhance competition and to act for the benefit of the Internet community as a whole. As George Kirikos eloquently states in his comment letter, presumptive renewal imposes monopolistic costs on the entire Internet by allowing prices to rise in an environment of falling costs.
12. ICANN should separate .NET pricing from the presumptive renewal provision. Even if ICANN cannot change the presumptive renewal provisions, ICANN should incorporate a price discovery mechanism into the process so that, as with a regulated utility that is granted a limited monopoly, the prices charged are tied to a reasonable return on invested capital. Price discovery can occur through expert consultants who can advise on the actual cost of running the .NET registry, or by opening up the .NET registry to competitive bid while allowing Verisign the right to match the lowest bid.
13. ICANN has not justified the aberrantly high \$0.75 surcharge it imposes on every .NET domain name. ICANN makes a mockery of its own mission by burdening the Internet with excessive and unnecessary costs. The one

immediate step that ICANN should take is to lower the \$.75 surcharge to match the \$.18 charged on .COM domains.

I appreciate the opportunity to make these comments and appreciate your consideration of them.

Regards,

Nat Cohen
President
Telepathy, Inc.