**VIRTUALAW LLC

Philip S. Corwin, Founding Principal
1155 F Street, NW Suite 1050
Washington, DC 20004
202-559-8597/Direct
202-559-8750/Fax
202-255-6172/Cell
psc@vlaw-dc.com**

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By E-Mail to net-agreement-renewal@icann.org

Board of Directors

Internet Corporation for Assigned Names and Numbers (ICANN)

4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601

Re: Proposal for Renewal of the .NET Registry Agreement

Dear Members of the ICANN Board:

This comment letter is submitted by the Internet Commerce Association (ICA) 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.

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**

* **Rights protections mechanisms developed for the new gTLD program, especially Uniform Rapid Suspension, should not be imposed on .Net through the contract renewal and revision process. The .Net registry is far too important to be a “guinea pig” for these incomplete, controversial, and thoroughly untested mechanisms.**
* **We do not oppose allowing VeriSign to make commercial use of .Net traffic data so long as ICANN rigorously enforces the contract restrictions on reintroduction of SiteFinder or other wildcard services and such data is made available on a nondiscriminatory basis. We also have no objection to .Net’s transition to a thick WHOIS model under the applicable contract requirements.**
* **While we do not object to the provision that would allow ICANN to better serve the Internet community through the provision of marketing and incentive programs by VeriSign to “underserved geographies”, we believe that a tight definition of that term as well as additional safeguards should be written into the registry agreement to prevent potential abuse of these programs by registrars or registrants, as well as potential cross-subsidization by registrants residing in the developed world. In addition, ICANN should disclose how it has utilized the $6.8 million annual excess transaction fee (as of 2010) that .Net registrants already pay into a restricted fund that is intended to benefit “developing country Internet communities”.**

**Discussion**

Application of URS and other New gTLD RPMs to .Net Via the Contract Renewal Process

While we had intended that our comments focus solely on proposed alterations of the .Net registry agreement we feel compelled to address an extraneous issue that has been injected into this discussion by others. On May 3rd ICANN’s Business Constituency posted a proposed draft of a Constituency comment letter on the .Net contract advocating that VeriSign be required to implement Uniform Rapid Suspension (URS) and the Trademark Claims Service (TCS) through additional amendments to the registry agreement. As a member of the BC, ICA strenuously raised its concerns in regard to requiring incumbent gTLDs to adopt the Rights Protection Mechanisms (RPMs) developed for the new gTLD Applicant Guidebook (AG) at this point in time, and our fellow members of the BC heard our concerns and graciously dropped these provisions from the latest version of the Constituency comment letter.. However, since other parties may make the same suggestion – and we note that the Intellectual Property Constituency has in fact done so today -- we feel we must recite our deep concerns and strong opposition to it.

We are not opposed in principle to the long-term goal of having all gTLD registry agreements be as uniform as possible (while recognizing the inherent differences of certain legacy gTLDs), and throughout the new gTLD policy development process we have consistently advocated that the legitimate concerns of rights holders be addressed through a UDRP reform process that established uniform rules across all gTLDs. The ICANN community chose a different path, the establishment of new RPMs for new gTLDs, but never in the course of the long discussions of these measures was it ever suggested that they be applied to incumbent gTLDs simultaneous with the opening of the new gTLD application process. Yet that would be the effect of the proposed and withdrawn BC position and the filed IPC position, to impose these requirements on .Net through a contract that takes effect just a few weeks from now as of July 1, 2011.

Our reasons for opposing the imposition of URS or other new RPMs on .Net or other incumbent gTLDs in the near term through the contract renewal process are:

* It is not yet clear what the final form of the URS will be. In particular, it remains unclear whether the URS will be further amended to reduce the burden of proof on a complainant, and to provide a complainant with first option to acquire a suspended domain. The transfer option in particular would make this proposed $300, 500-word complaint, single examiner URS procedure the functional equivalent of the UDRP – which, despite its flaws, offers a far higher level of procedural and substantive due process to domain registrants. Further, it remains unclear whether the AG will be approved by the ICANN Board next month in Singapore or whether that decision will be deferred to permit further discussions with the Governmental Advisory Committee (GAC), which in turn continues to press the Board for additional concessions on RPMs that favor complainants at the expense of registrant rights. We also do not yet know which arbitration organization(s) will be selected to administer the URS or what quality of decision will be provided for such a low fee. And, regardless of the final details of the URS, it will take several years of experience to adjudge whether it is an effective tool against the most egregious types of cybersquatting and, most importantly from our perspective, whether it is prone to complainant abuse and if the notice and appeals process available to registrants is meaningful.
* There is no foundation of support in past ICANN policy processes for any such proposed contract amendment. The last ICANN body to examine better means to address cybersquatting and other rights and consumer abuses was the Registration Abuse Policy Working Group (RAPWG). Its final report was issued one year ago, in May 2010 (available at <https://st.icann.org/reg-abuse-wg/>). The RAPWG specifically considered whether new RPMs should be made applicable to incumbent gTLDs and did not adopt any position in support of that. The relevant portion of their Final Report (p. 33) reads as follows –

***Recommendation #2:***

***The RAPWG was evenly split regarding a second recommendation.*** *The two opposing views are below.*

*Seven members supported* ***View A:*** *The RAPWG recommends the initiation of a Policy Development Process by requesting an Issues Report to investigate the appropriateness and effectiveness of how any Rights Protection Mechanisms that are developed elsewhere in the community (e.g. the New gTLD program) can be applied to the problem of cybersquatting in the current gTLD space.*

*In favour of View A (7): Cobb (CBUC), Felman (MarkMonitor), Queern (CBUC), Rasmussen (Internet Identity), Rodenbaugh (CBUC), Shah (MarkMonitor), Sutton (CBUC).*

*Seven members supported* ***View B:*** *The initiation of such a process is premature; the effectiveness and consequences of the Rights Protection Mechanisms proposed for the new TLDs is unknown. Discussion of RPMs should continue via the New TLD program. Experience with them should be gained before considering their appropriate relation (if any) to the existing TLD space.*

*In favour of View B (7): Aaron (RySG), Amadoz (RySG), Bladel (RrSG), Neuman (RySG), O’Connor (CBUC), Seltzer (NCSG), Young (RySG).*

**In short, half the members of the RAPWG favored initiation of a PDP to investigate whether it would be appropriate and effective to impose new RPMs developed elsewhere in the ICANN community on incumbent gTLDs, while the other half said it would be premature to even initiate such a process until experience was gained with the effectiveness and consequences of new RPMs. No members of the RAPWG advocated the immediate imposition of new gTLD RPMs on incumbent gTLDs, which would be the result of any .Net contract amendment requiring such action.**

* The imposition of URS on .Net is not a trivial technical detail of the proposed contract but a major policy change for one of the leading gTLDs. According to VeriSign’s February 2011 Domain Industry Brief (<http://verisigninc.com/assets/domain-name-report-feb-2011.pdf>), .Net is the third largest TLD overall (trailing only .Com and .De) and the second largest gTLD. It is our further information that approximately 13.6 domains were registered at .Net as of the end of 2010, and it is almost certain that the total number of .Net registrations has increased since then. **In other words, the total number of domain registrations at .Net probably exceeds any reasonable estimate of the combined total registration at all new gTLDs over the next several years.**
* It is fundamentally unfair to impose the possibility of URS actions on .Net registrants absent additional policy development work and several years’ experience with URS at new gTLDs. Potential registrants at new gTLDs will acquire domains there with clear advance notice that they will be subject to the URS and other new RPMs and have the opportunity to make the decision to register, or not, on an informed basis. Registrants at .Net, on the other hand, have acquired their individual .Net domains or portfolios thereof with the understanding that they could only lose the use of their domains, or see them involuntarily transferred, if they registered and used their domains in violation of the Uniform Dispute Resolution Policy (UDRP). These domains are valuable intangible assets, and in many cases they have been acquired not through a relatively low registration fee (as will be the case for new gTLD domains initially) but in the secondary domain marketplace for substantially higher prices**. The rights of .Net registrants require just as much respect as the rights of trademark holders, and it is unacceptable that they should be exposed to the substantial new risk of losing access to or even possession of their domains through adoption of a yet-to-be-finalized and thoroughly untested URS supplement to the UDRP without the benefit of a balanced and considered policy process preceding any such decision.**
* Imposition of URS on .Net at this time through the contract renewal process has the potential to derail the UDRP reform process that ICANN has embarked upon. It is important to note that this UDRP reform effort is being initiated as a result of the unanimous RAPWG recommendation for “*the initiation of a Policy Development Process by requesting an Issues Report to investigate the current state of the UDRP, and consider balanced revisions to address cybersquatting if appropriate*”. If URS can be incorporated within the .Net contract this year it will certainly set a powerful precedent for the inclusion of URS in the .Com registry contract when it comes up for renewal in 2012. If trademark interests are able to achieve this result through the gTLD contract renewal process we suspect they will have considerably less incentive to participate in a meaningful and balanced UDRP reform process that addresses the legitimate concerns of all parties, and may even work to subvert it. We reach this conclusion based upon the very current example of trademark interests’ refusal to accept the balanced community consensus RPMs included in the last iteration of the new gTLD AG and to instead lobby members of the GAC to press for additional “protections” that go substantially beyond the original recommendations of the Implementation Recommendation Team (IRT).

As for the imposition of the TCS on .Net via the contract renewal process, while that prospect raises less concerns than the URS we must also oppose it based on the principle that no new RPMs should be imposed on incumbent gTLDs until we have had sufficient experience to judge their effectiveness, potential for abuse, and impact on registrant rights, and then only after balanced and deliberative policy consideration. Also, of course, we have no idea what the final form of the TCS will be until the AG is finally adopted by ICANN’s Board. Finally, based upon the recent Board notes on the GAC new gTLD “scorecard”, (<http://icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf>), it seems entirely inappropriate to impose TCS on .Net.

The relevant Board note (at Section 6.1.2) states:

*After discussion with the GAC and some other community members, including those representing trademark interests, the Board has determined to make both a limited Trademark Claims service, and Sunrise service, mandatory. All registries will be required to offer: (i) a Sunrise program, and (ii) for at least 60 days from launch, a Trademark Claims service using the Clearinghouse database.* ***Thereafter, utilization of Trademark Claims services will be at the registry’s discretion.*** *(Emphasis added.)*

As is clearly noted, a registry’s use of TCS becomes entirely discretionary 61 days after launch, so it would be entirely inconsistent to require .Net to use the TCS service on an unlimited, non-discretionary, going-forward basis. In addition, as the TCS will only, quite properly, provide notice to registrants of exact matches to marks listed in the Trademark Clearinghouse, it is highly unlikely that it would receive much use or provide much benefit at .Net given the 13 million-plus domain registrations at that gTLD and the high probability that any exact match to a valuable mark has already been challenged in a UDRP if registered or used in violation of it.

Commercial Use of Traffic Data and Possibility of Transition to “Thick” WHOIS

Section 3.1(f) of the revised agreement allows the registry operator (VeriSign) to make commercial use of traffic data regarding existing or non-existent domain names for unlimited purposes provided that it does not disclose domain name registrant and end user information and other personal data; and also subject to the limitations that it does not reintroduce the SiteFinder service previously introduced in 2003 or of any other service employing a universal “wildcard” function and that traffic data is made available on a non-discriminatory basis. This would not prohibit the provision of a domain nameservice or other non-registry service for a domain or zone used for other than non-registration services to unaffiliated third parties by a single entity (including its affiliates) for domains registered through an ICANN-accredited registrar.

Our understanding is that the above listed changes arise from the application of Section 4.2 of the current .Net agreement which states that, upon renewal, terms that are not similar to those generally in effect at the 5 largest gTLDs (by number of domain name registrations) shall be made similar – except in certain areas including the price of registry services, standards for consideration of proposed registry services and their definition, and terms and conditions for the renewal and termination of the agreement.

**We have no objection to the above listed changes so long as ICANN engages in rigorous enforcement of the contractual restrictions, particularly the prohibition of SiteFinder reintroduction or any other “wildcard” service, as well as the availability of traffic data on a non-discriminatory basis.**

This Section also provides that, if .Net becomes a “thick” registry (WHOIS data residing with the registry rather than registrars), the traffic data that may be accessible to and used by the Registry Operator (RO), VeriSign, will be limited to the data that would be available under a “thin” model; and, further, that the process for the introduction of new registry services will not apply to such traffic data. **Again, we have no objection to this standardization provision so long as the restrictions are rigorously enforced.**

Support for Internet Development in “Underserved Geographies”

Section 7.1(b) would allow VeriSign to offer .Net marketing or incentive programs to registrars in underserved geographies. It appears that, in practice, it would allow the availability of lower registration and renewal pricing to registrars in developing nations, quite possibly in conjunction with IDN domain names. Our reading of that provision is reinforced by revised provisions of Section 7.3(a), which state that programs explicitly permitted by Section 7.1(b) shall not be in violation of otherwise applicable uniform pricing requirements. ICANN has characterized this provision as being “designed to allow VeriSign to better serve the Internet community”.

Specifically, this Section would permit VeriSign, for purpose of supporting the development of the Internet in underserved geographies, to provide training, technical support, or marketing or incentive programs based upon the unique needs of registrars located in such geographies, so long as the .Net Registry treats similarly situated registrars the same and does not apply such programs arbitrarily. It further stipulates that Geographic regions must be defined broadly enough to allow the participation of multiple registrars, and may not favor any registrar in which VeriSign may have an ownership interest.

We have no general objection to the proposition that VeriSign should be permitted to undertake initiatives that facilitate the utilization of the Internet in the developing world. However, we believe that the present language needs to be substantially tightened to prevent potential abuse.

In this regard, we would suggest that –

* The term “underserved geographies” be tightly defined so that marketing and incentive programs in particular are targeted solely at those regions of greatest technical and economic need.
* The agreement set a “floor” limit on .Net prices made available in such underserved geographies for the purpose of assuring that they reflect the actual cost of provision and that the incentive program does not result in further cross-subsidization of developing world registrants by developed world registrants. In this regard, we must note that existing Section 7.2(a) of the agreement requires VeriSign to pay ICANN an annual Registry-Level Transaction fee of $.75 for each annual increment of an initial or renewal domain name registration, or for a domain name transfer -- which is $.50 more than the fee charged at most gTLDs. This elevated fee is in turn referenced in Section 7.3(a), which states that ICANN “intends to apply this fee” to special restricted funds for the participation of developing country Internet communities in ICANN; enhancement of the Internet’s security and stability; and general operating funds**. In short, existing .Net registrants already paid an additional $6.8 million (2010) through VeriSign to ICANN into a special fund that is intended to benefit “developing country Internet communities” first and foremost. We believe that ICANN should disclose to the community through a transparent accounting exactly how these restricted funds have actually been utilized in the past several years.**
* That registrars located in such underserved geographies be restricted to making below-standard price domains available solely to registrants domiciled within such geographies, to prevent gaming of the incentive pricing system by either registrars or registrants.

**Conclusion**

We appreciate the opportunity to comment on the proposed revisions to the .Net registry agreement. It appears that VeriSign is entitled to presumptive renewal of the agreement under the terms of the existing agreement and that the proposed revisions are generally reasonable and consistent with other gTLD agreements. Our comments on the proposed revision are few and minor save for our adamant opposition to any suggestion that new gTLD RPMs be imposed on .Net as part of this contract renewal process. Finally, our positions on .Net revisions should not necessarily be viewed as indicative of our views on any proposed revision of the .Com agreement when it is up for renewal in 2012, as we reserve the right to review that agreement de novo when it becomes available for comment.

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

Sincerely,

Philip S. Corwin

Counsel, Internet Commerce Association