

Comments on the .net agreement

There are three policy issues, which I believe are policy issues where ICANN staff has inappropriately made policy decisions without proper consultation with the GNSO and the community at large.

1. The pre-determination of permissible action if Verisign is found to be in breach of certain subsections of the contract.
2. The blanket permission for Verisign to use Traffic Data in any manner it desires without any discussion of impact analysis of the effect on privacy and other rights.
3. The presumption of renewal

Issues from the contract:

- I. Section 2.1 (b) - consequence of breach of subsection 2.1

A violation or breach of this subsection shall not be a basis for termination, rescission or other equitable relief, and, instead shall only give rise to a claim for damages.

This is a new clause added to this version of the contract. Why would such a statement be made? Why wouldn't the seriousness of the breach not be the determinant of the consequences for the breach? It is unacceptable policy for ICANN to so limit the possible consequences of a breach a-priori. For Verisign to be given such a guarantee for an as of yet undiscovered breach is not reasonable and the appropriateness of such a restriction should be discussed by the ICANN community before it becomes the policy by which Verisign will be regulated.

- II. Section 3.1 (d) Use of Traffic Data

(f) Traffic Data. Nothing in this Agreement shall preclude Registry Operator from making commercial use of, or collecting, traffic data regarding domain names or non-existent domain names for purposes such as, without limitation, the determination of the availability and Security and Stability of the Internet, pinpointing specific points of failure, characterizing attacks and misconfigurations, identifying compromised networks and hosts, and promoting the sale of domain names; provided, however, that such use does not disclose domain name registrant, end user information or other Personal Data as defined in Section 3.1(c)(ii) for any purpose not otherwise

authorized by this agreement.

Such a blanket permission to use traffic data is a new addition to the contract. The policy for the use of traffic data has been frequently discussed within the GNSO and elsewhere. Without a Policy Development Process of what are acceptable uses of Traffic Data, agreeing to such a wide scope of permissible use is not appropriate. Not only does the community need to discuss this issue and come to a bottom-up decision of what limits are appropriate in a registry's use of Traffic Data, but an impact analysis of the effect of this on privacy would need to be done. It would also be necessary to ascertain whether this degree of data usage was permissible under all applicable national laws. Again this should not be approved without an adequate bottom-up policy process to determine whether this is an acceptable policy.

It is important to note that in the report from the [GNSO PDP on Contractual conditions \(doc. 2006/01/03.2\)](#) approved on [Aug 09 2007](#), the following Majority Recommendation was documented:

"In order to determine whether there is a need for a new consensus policy on the collection and use of registry data, including traffic data, for purposes other than which it was collected, there is first a need for a properly targeted study by an independent third party on the data collected and the uses to which it is put.

"The study should provide appropriate safeguards to protect any data provided for the purposes of the study, and the confidentiality of which registry, or other group, provides the data.

"The findings of the study should be published and available for public review. A Statement of Work should be developed by the GNSO Council, with appropriate public review, to cover an analysis of the concerns for data collection and use, the practice involved in collection and use of data - including traffic data, and the availability, when appropriate, for non-discriminatory access to that data.

"It is recommended that a current processes document be developed, describing the current registry practices for the collection of data and the uses of that data, for example, but not limited to, operating the registry; preparing marketing materials to promote registration of domain names; gathering of 'null' returns, ensuring the integrity of the Registry, or the DNS. This report should be available to the group doing the external study and should be made available to the public for comment.

"After examining the results of the independent study and public discussions recommended above, the GNSO Council should examine the findings and determine what, if any, further policy process is required. (TOR 5: Rec 5)"

Has this study been done? And have the results of that study been considered in the creation of this contract?

III. Article VI Presumption of renewal

Section 4.2 Renewal. This Agreement shall be renewed upon the expiration of the initial term set forth in Section 4.1 above and each later term, unless the following has occurred: (i) following notice of breach to Registry Operator in accordance with Section 6.1 and failure to cure such breach within the time period prescribed in Section 6.1, an arbitrator or court has determined that Registry Operator has been in fundamental and material breach of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3 and (ii) following the final decision of such arbitrator or court, Registry Operator has failed to comply within ten days with the decision of the arbitrator or court, or within such other time period as may be prescribed by the arbitrator or court

The presumption of renewal is a policy item on which the community has not yet reached agreement. Many argue that while there should be some advantage to a Registry who is not in breach, there should still be a chance for the community to review the performance of a Registry in respect to the manner in which it has served the global public interest of the Internet community: "how well has the Registry lived up to the obligation of running this gTLD"

In the report from the [GNSO PDP on Contractual conditions \(doc. 2006/01/03.2\)](#) approved on [Aug 09 2007](#), the following Recommendation was documented:

"The right of renewal should be standardized for all gTLD registry agreements. Two Constituencies supported this view and two abstained. (TOR 4: Rec 4A1)

"The right of renewal should be standardized for all registry agreements except when there is an exceptional situation. (TOR 4: Rec 4B1)

Until such time as an issue that splits the community in half is resolved, the presumption of renewal should be discussed by the community before it is

enshrined in a contract. At the very least a clause should be added that, should a Policy Development Process be held on the topic of presumption of renewal, the consensus view of such a PDP would be applicable to future considerations of renewal for this contract.