

July 31, 2012

The Honorable Lawrence Strickling
Administrator
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, N.W., Room 4898
Washington, D.C. 20230

RE: Renewal of .com agreement between ICANN and Verisign

Dear Administrator Strickling:

We write to urge NTIA to recommend that the Department of Commerce reject the proposed renewal agreement for the operation of the .com registry, unless the agreement is modified to require Verisign to transition the registry to a thick Whois structure. Such a change is needed to make domain name registration data in .com publicly available in the same manner as now applies to virtually all other generic Top Level Domain registries, current or anticipated. Lacking such a requirement, we believe that approval of the renewal agreement falls short of serving “the public interest in the continued security and stability of the Internet domain name system and the operation of the .com registry,” the standard by which the Department must review the renewal agreement, as set forth in Special Award Condition 2(A)(ii) of Amendment 30 to NCR-92-18742. This letter sets forth the main reasons for our request.

A Thick Whois Structure for .Com Serves the Public Interest

The benefits of a thick Whois structure for public access to Whois data, and thus for accountability and transparency within the domain name system, are indisputable.¹ The advantages include promoting uniformity in Whois data submission and display; archival and restoration benefits; increased stability; enabling quicker response and resolution when domain names are used for malicious or illegal purposes; and improvements in data quality and in accessibility of Whois data.

Public access to registrant contact data is critical for intellectual property owners, law enforcement agencies, consumers, parents, and every Internet user who is entitled to know with whom they are dealing online. Studies commissioned by ICANN amply demonstrate that registrant contact data in the thick Whois model is more accessible and more accurate than in the

¹ Under “thick Whois,” a full set of registrant contact data is held by the registry and is accessible to the public through a single portal. Under “thin Whois,” the registry holds only minimal technical data, none of it directly enabling contact with registrants; all registrant contact data is dispersed among hundreds of accredited registrars.

thin Whois model.² Consumer research commissioned by ICANN's Whois Policy Review Team found that the "struggles" faced by consumers in "locating WHOIS services and interpreting WHOIS data" were "particularly pronounced with thin WHOIS services."³

The thin Whois model leaves public access to this data vulnerable to registrar technical failure, insolvency, or simply non-compliance with its contractual obligations regarding Whois data. As amply documented in the recent Whois Policy Review Team Final Report, as well as by many other sources, and consistent with the experience of the undersigned, ICANN's current contract compliance capabilities fall far short of being able to deal comprehensively and effectively with issues of registrar non-compliance. Bringing a thick Whois structure to the largest gTLD registry will significantly lessen the contract compliance burden. The impact will be magnified as Whois data becomes internationalized (available in non-Latin scripts); surely it will be easier to police the implementation of any successor to the Whois protocol at the registry level than among hundreds or thousands of disparate registrars.

The public interest benefits of thick Whois are so overwhelming that ICANN decided in 2009, following extensive public comment and discussion, to require thick Whois in all of the new gTLDs that will be delegated starting next year, for the stated reasons that "not only would thick Whois ensure reliable access to data on registrations in New gTLDs, but there would also be stability benefits that could accrue to registrants." See <http://archive.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf>, and an explanatory memorandum titled "Thick vs. Thin Whois for New gTLDs", at <http://archive.icann.org/en/topics/new-gtlds/thick-thin-whois-30may09-en.pdf>. These new gTLDs will join more than a dozen existing gTLDs – aero, asia, biz, cat, coop, info, mobi, museum, name, org, post, pro, tel, travel – that already operate under registry agreements with ICANN that require thick Whois.

Standing outside this mainstream adoption of thick Whois are just three gTLD registries, including the largest by far, .com. The expiration of the .com registry agreement this November provided ICANN with the opportunity to benefit .com registrants, consumers of .com Whois data, and the community at large, and to advance the public interest, by negotiating with Verisign a commitment to migrate .com to a thick Whois structure by a date certain. ICANN chose to forego this opportunity to act in the public interest, and approved a .com renewal agreement that maintains the thin Whois status quo in .com through 2018. This is precisely the scenario in

² In the detailed study of Whois accuracy carried out for ICANN by NORC, Whois data from both thick and thin registries was assessed. See <http://www.icann.org/en/compliance/reports/whois-accuracy-study-17jan10-en.pdf>. NORC found that Whois data was accessible 100% of the time from thick Whois registries, but in .com, no Whois data whatever could be accessed via the registrar 2.4% of the time. The NORC study also measured the prevalence of patently false or incomplete data as much higher in thin registries than in thick registries. NORC found that, even when Whois data was accessible at all in .com and .net, 5.9% of Whois data in both registries was patently false or obviously incomplete. The rates in thick registries were lower, ranging from 2.4 to 4.4%. Thick Whois is no panacea for the problem of Whois inaccuracy, but it is a step in the right direction.

³ See Whois Policy Review Team Final Report, <http://www.icann.org/en/about/aoc-review/whois/final-report-11may12-en.pdf>, at 15.

which the Department of Commerce should exercise the public interest review function it reserved in Amendment 30 in 2006, and insist upon an appropriate thick Whois provision in the .com renewal.

The Process By Which ICANN Approved the .Com Renewal Without Thick Whois Violates the Affirmation of Commitments

While the Department of Commerce should certainly proceed with care and due consideration before rejecting ICANN's decision to approve a .com renewal agreement that maintains the thin Whois status quo, such a rejection would be buttressed by the fact that ICANN's action was inconsistent with fundamental pledges that ICANN made to the Commerce Department in the Affirmation of Commitments signed in 2009. See <http://www.icann.org/en/about/agreements/aoc/affirmation-of-commitments-30sep09-en.htm>.

First, paragraph 3 of the AoC requires that "decisions made related to the global technical coordination of the DNS are made in the public interest." As explained above, the decision to renew the .com agreement on a thin Whois basis is inconsistent with the public interest and should be rejected for that reason.

Second, ICANN pledged in paragraph 7 of the AoC "to adhere to . . . responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration." It failed to fulfill that commitment in this case. The decision to renew the .com agreement without requiring migration to the thick Whois structure contradicted the reasoned and virtually unchallenged views of numerous public commenters. These included every recognized ICANN entity that chose to comment on this topic (the business and intellectual property constituencies of ICANN's Generic Names Supporting Organization, and the ICANN At-Large Advisory Committee, representing the interest of individual users), as well as several of the undersigned organizations. Despite the virtually unanimous support of public commenters for moving .com to thick Whois, the ICANN Board rejected this call, and did so, not only without a "detailed explanation" of why these views were rejected, but without any explanation whatsoever.⁴ The fact that the Board took its final action on the .com agreement behind closed doors, and five days prior to a long-scheduled public forum session on the topic at the ICANN Prague meeting, marks a further failure of the organization to meet the standards of accountability and transparency to which it committed itself in the AoC.

Third, ICANN pledged in paragraph 9.3 of the AoC to "adequately address" competition concerns (among others) in its roll-out of new gTLDs. An essential ingredient of an "adequate" approach to competition issues must be the creation of a level playing field between the entrenched, incumbent and dominant gTLD registry – .com – and the hundreds of fledgling new competitors to .com that will be delegated over the next couple of years. As noted above, all the

⁴ See <http://www.icann.org/en/groups/board/documents/resolutions-23jun12-en.htm#2> (stating "no revisions to the proposed .COM renewal Registry Agreement are necessitated after taking into account the thoughtful and carefully considered comments received," but omitting any substantive response to the comments).

new gTLDs are obligated to provide a thick Whois service; but the ICANN decision on the .com renewal ensures that the incumbent will be free from any such obligation through at least 2018. This is neither fair nor “adequate” to promote competition.

Fourth, while not explicitly addressed in the AoC, it is fundamental to the success of the ICANN multi-stakeholder model for management of the Domain Name System that ICANN live up to all its contractual commitments, especially those that substantially impact third parties. In entering into the .com renewal in 2006, ICANN committed that the terms of any renewal of the agreement would be “similar to the terms generally in effect under the Registry Agreements of the 5 largest gTLDs,” with certain exceptions not applicable here. See <http://www.icann.org/en/tlds/agreements/verisign/registry-agmt-com-22sep10.htm>, Section 4.2. Today, of the five largest gTLDs other than .com, all but one (.net) operates under an agreement with ICANN requiring use of the thick Whois structure.⁵ It was thus incumbent on ICANN, under the terms of its existing agreement with Verisign, to insist that any renewal of the .com agreement require migration to the same model. Its failure to do so sets an extremely disturbing precedent. In many other situations, just as in the case of the .com renewal, many parties with a vital interest in the outcome of ICANN contract negotiations – including organizational, business and individual domain name registrants, and the millions of users of publicly accessible Whois services – are not at the negotiating table, and depend upon ICANN, with its obligation to act in the public interest, to safeguard their interests. If the contracting parties here are permitted to ignore the clear mandate of their existing contract -- to conform the terms of the .com renewal to those of the other 5 largest gTLD registries – then ICANN’s credibility, and its capacity to act as an effective surrogate for the broader community in other contract negotiations, will be seriously undermined.

The Policy Development Process is not a Viable Alternative

We recognize that a Policy Development Process (PDP) on thick Whois is getting underway within the ICANN GNSO. Of course we will be participating in that process and doing what we can to expedite its conclusion. But we know from considerable experience within the ICANN process over the past decade that the PDP route is extremely slow and readily vulnerable to obstruction. There is no reason to wait years for a thick Whois consensus policy to emerge from an ICANN PDP, when the reasons for requiring a migration to thick Whois in the largest outlier registry – .com – are so compelling, and when the mechanism for ensuring that this occurs – the Department’s public interest review of the .com renewal agreement – is at hand.

⁵ Although to our knowledge ICANN has not publicly specified which are the five largest gTLD registries to which the .com agreement should be conformed, according to publicly available sources, they are .net, .org, .biz., .info and .mobi. <http://www.registrarstats.com/TLDDomainCounts.aspx>. The latter four of these five are thick Whois registries.

Thank you for considering our views on this important review. We would welcome the chance to meet with you or your staff to discuss this issue. We have asked Steve Metalitz, counsel to COA, to follow up on our behalf to seek to arrange such a meeting.

Sincerely yours,

Alan Drewsen, Executive Director – *Email: adrewsen@inta.org*
International Trademark Association (INTA) - www.inta.org

Robert C. Barchiesi, President – *Email: rbarchiesi@iacc.org*
The International Anti-Counterfeiting Coalition (IACC) – www.iacc.org

Herbert C. Wamsley, Executive Director – *Email: herb@ipo.org*
Intellectual Property Owners Association (IPO) - www.ipo.org

Steven J. Metalitz, Counsel – *Email: met@msk.com*
Coalition for Online Accountability (COA) - www.onlineaccountability.net

cc: The Hon. Victoria Espinel, U.S. Intellectual Property Enforcement Coordinator
The Hon. David Kappos, Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office (USPTO)
The Hon. Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate
The Hon. Charles E. Grassley, Ranking Member, Committee on the Judiciary, U.S. Senate
The Hon. Lamar Smith, Chairman, Committee on the Judiciary,
U.S. House of Representatives
The Hon. John Conyers, Ranking Member, Committee on the Judiciary,
U.S. House of Representatives
The Hon. Bob Goodlatte, Chairman, Subcommittee on Intellectual Property, Competition
and the Internet, Committee on the Judiciary, U.S. House of Representatives
The Hon. Mel Watt, Ranking Member, Subcommittee on Intellectual Property,
Competition and the Internet, Committee on the Judiciary, U.S. House of
Representatives
Fiona Alexander, Associate Administrator, Office of International Affairs, NTIA
Akram Atallah, CEO, Internet Corporation for Assigned Names and Numbers (ICANN)
Shane Tews, Verisign, Inc.