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Submitted to: comments-net-renewal-20apr17@icann.org

May 21, 2017

Karla Hakansson
Director, Registry Services and Engagement
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Renewal of .NET Registry Agreement

Dear Ms. Hakansson:

The International Trademark Association (INTA) appreciates this opportunity to comment on the proposed agreement for renewal of the 2011 Registry Agreement for .NET, which was the result of bilateral negotiations between ICANN and Verisign, Inc. (“Verisign”).¹

As INTA has noted elsewhere, its interest in domain-name-related matters is informed by its mission as an association “dedicated to supporting trademarks in order to protect consumers and to promote fair and effective commerce.”² In support of that mission, INTA and its members rely on various provisions in the new gTLD Registry Agreement (the “New RA”)³ that protect trademark interests – and by extension protect the consuming public. INTA agrees with ICANN that the New RA has important “technical and operational advantages” and “benefits to registrants and the Internet community”⁴ over earlier, outdated versions. That is why INTA supports bilateral negotiations with legacy gTLD registry operators to transition (as much as is possible⁵) to the New RA as those legacy registry agreements cycle through their various renewals.⁶

¹ <https://www.icann.org/public-comments/net-renewal-2017-04-20-en>.

² <http://www.inta.org/About/Pages/Overview.aspx>.

³ <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>.

⁴ <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c>.

⁵ Obviously, some parts of the New RA that were developed for as-yet-to-be-launched gTLDs – such as the TMCH or RRDRP – are inapposite for a legacy gTLD like .NET.

⁶ See <https://forum.icann.org/lists/comments-com-amendment-30jun16/pdfvu531nAPPu.pdf>; <https://forum.icann.org/lists/comments-tel-renewal-04aug16/pdfuda8JEfz7p.pdf>; and <https://forum.icann.org/lists/comments-mobi-renewal-23dec16/pdfWtLI5HxLkI.pdf>.

Transitioning to the New RA has both substantive and procedural advantages. Substantively, provisions from the New RA such as the URS from Spec. 7 § 2(b), and the Public Interest Commitments from Spec. 11 §§ 3(a) and (b), are as helpful for protecting consumers in legacy gTLDs as in new gTLDs (if not more so, given the disparities in scale between legacy gTLDs and new gTLDs). Procedurally, transitioning to the New RA provides consistency across all registries, which leads to a more predictable environment for end-users.¹ Such consistency also levels the playing field for new gTLD registry operators, allowing them to compete fairly with their legacy gTLD counterparts. It makes no sense that the operational costs of New RA provisions like Specs. 7 and 11 should be borne only by new gTLD registry operators, but not by legacy gTLD registry operators (or at least, not by *all* legacy gTLD registry operators). Such barriers to entry distort free competition in the gTLD marketplace – which is why it is not surprising that at least some new gTLD registry operators have advocated for the adoption of at least some of the New RA provisions by legacy gTLDs.²

Despite these clear benefits, the recent history of ICANN's bilateral renewal negotiations with legacy gTLD registry operators has been uneven. In most cases, ICANN *has* bilaterally negotiated for transition to parts of the New RA – and has publicly touted the substantive and procedural benefits of doing so. That was true for the recent renewals of .MOBI, .CAT, .PRO, .TRAVEL, .XXX, and .TEL.³ But ICANN did not do so for .COM. INTA has already outlined its concerns on the specifics of the .COM renewal,⁴ and will not restate those here. INTA's point here is simply that ICANN's treatment of .COM is an outlier. Moreover, INTA is not the only one to raise this point as other commenters on the .COM renewal also found ICANN's "disparate treatment" of .COM "puzzling" and "mystifying."⁵

ICANN's disparate (and puzzling) approach to its bilateral negotiations with Verisign has apparently continued with .NET – although in different ways than with .COM. The proposed renewal of the .NET registry agreement is essentially a hybrid of the .COM approach (not transitioning to the New RA) and the .MOBI, .CAT, .PRO, .TRAVEL, .XXX, and .TEL approaches (doing so as much as possible). The proposed renewal of the .NET registry agreement does incorporate *some* terms of the New RA, including provisions related to WHOIS Specifications and data escrow, Zone File Access requirements, contractual compliance audit provisions, termination provisions related to bankruptcy, and indemnification obligations.⁶ But then, for no apparent reason, the proposed renewal does not incorporate other terms of the New RA, including the two most relevant to INTA: Spec. 7 § 2(b) and Spec. 11 §§ 3(a) and (b). Neither ICANN nor Verisign has provided any explanation as to why the proposed renewal of the .NET registry agreement would employ such a "pick-and-choose" approach toward the New RA. Nor have they explained

¹ <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c>.

² See <https://forum.icann.org/lists/comments-travel-renewal-12may15/pdfEHVlcScFrX.pdf> (Donuts Comment on Proposed Renewal of .TRAVEL) and <https://forum.icann.org/lists/comments-pro-renewal-28may15/pdfmilCgCI90i.pdf> (Donuts Comment on Proposed Renewal of .PRO).

³ See, e.g., <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c>.

⁴ <https://forum.icann.org/lists/comments-com-amendment-30jun16/pdfvu531nAPPu.pdf>.

⁵ <https://forum.icann.org/lists/comments-com-amendment-30jun16/pdfPZIfNIGTd2.pdf>.

⁶ <https://www.icann.org/public-comments/net-renewal-2017-04-20-en>.

why, under such an approach, they would have chosen to incorporate the specific terms of the New RA that they did, while excluding others.

Whatever the reason for this disparate treatment, the effect is detrimental for end-users. ICANN has publicly stated that consistency across all registries will lead to a more predictable environment for Internet end-users. Yet, through its bilateral renewal negotiations for .COM and now .NET, ICANN has in fact made registry agreements less consistent, not more so. If consistency leads to predictability for end users, then presumably the inconsistency that the renewal of .COM and .NET has fostered will lead to unpredictability. INTA does not understand why such unpredictability is an ill that is generally to be avoided in the DNS except for in .COM and .NET.

This inconsistency is more problematic given the scale that .COM and .NET command. As of the most recent release of public figures, those two TLDs represent ~143.6 million domain name registrations.¹ By comparison, *all* 1,218 new gTLDs *combined* only total ~28 million domain names – less than one-fifth of the .COMs and .NETs.² Even that comparison understates the significance of .COM and .NET when it comes to consumer protection on the Internet: If we look not at simple registration statistics, but rather at traffic-related statistics (which are a better indicator of what Internet consumers are doing), the highest-ranked new gTLDs do not crack the top 200.³ Thus, when viewed simply in terms of scale and reach, the effectiveness of Specs. 7 § 2(b) and Spec. 11 §§ 3(a) and (b) is limited for protecting the billions of consumers who conduct business online, and for ensuring a safe and efficient online marketplace. Relying on those provisions to protect consumers in new gTLDs (and several lower-profile legacy gTLDs), but not in .COM or .NET, is akin to a chess player leaving his queen and king exposed while he works feverishly to protect his pawns.

Such an illogical approach also is not justified by the argument that some ICANN stakeholders have proffered that bilateral negotiation to adopt the URS (for example) somehow circumvents the ongoing Policy Development Process (PDP) to Review all Rights Protection Mechanisms (RPMs) in all gTLDs.⁴ The flaw in that argument is that it confuses “ceilings” and “floors.”⁵ Whatever comes out of the ongoing PDP may or may not move the RPM “floor” from its current level. But that has nothing to do with a registry bilaterally negotiating to go above the current RPM “floor.” To put it another way, if the outcome of the ongoing PDP is that a certain RPM becomes mandatory for both legacy as well as new gTLDs, then there will be nothing left for registries and ICANN to negotiate on that score. But until that happens, there is. INTA’s position is simply that for as long as ICANN is still negotiating an issue, it should do so consistently or should at least explain its inconsistency.

¹ <https://investor.verisign.com/releaseDetail.cfm?ReleaseID=1023360>.

² <https://ntldstats.com/>.

³ According to <https://ntldstats.com/tld>, the highest is com-web.support according to quantcast (ranked 648), and kinogo.club according to Alexa (ranked 210).

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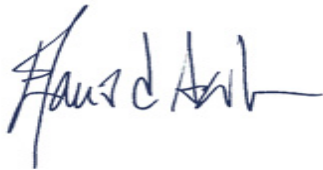
[https://community.icann.org/display/RARPMRIAGPWG/Review+of+all+Rights+Protection+Mechanisms+\(RPMs\)+in+all+gTLDs+PDP+Working+Group+Home](https://community.icann.org/display/RARPMRIAGPWG/Review+of+all+Rights+Protection+Mechanisms+(RPMs)+in+all+gTLDs+PDP+Working+Group+Home).

⁵ <https://forum.icann.org/lists/comments-mobi-renewal-23dec16/pdfWtLI5HxLkl.pdf>.

If Spec. 7 § 2(b) and Spec. 11 §§ 3(a) and (b) from the New RA are helpful for protecting consumers then the more legacy gTLD registry operators who transition to them, the better. It is not clear why ICANN would publicly tout such “technical and operational advantages” of the New RA but then not bilaterally negotiate to obtain those advantages for the ~143.6 million .COM and .NET domain names. Considering that omission, INTA cannot support the proposed renewal of the 2011 Registry Agreement for .NET.

Should you have any questions about our submission, I invite you to contact Lori Schulman, INTA’s Senior Director of Internet Policy at 202-261-6588 or at lschulman@inta.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Etienne Sanz de Acedo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Etienne Sanz de Acedo
Chief Executive Officer

About INTA

INTA is a 139-year-old global, not-for-profit association with more than 7,000 member organizations from over 190 countries. One of INTA’s goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA’s Internet Committee is a group of over 200 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.