

Date: 2020 Feb 10

Comment re: [Proposed Amendment 3 to the .COM Registry Agreement](#)

Submitted by John Poole: .COM domain name registrant; Editor, [DomainMondo.com](#).

[ICANN org](#) states “The [proposed Amendment 3](#), along with the proposed [binding LOI](#), satisfy the party's agreement to negotiate certain terms described in the first amendment to the .COM Registry Agreement (Amendment 1), dated 20 October 2016.”

[Amendment 1](#) states: “The parties [ICANN and Verisign] shall cooperate and negotiate in good faith to amend the terms of the [.COM Registry] Agreement ... (b) as may be necessary for consistency with changes to, or the termination or expiration of, the Cooperative Agreement between Registry Operator [Verisign] and the [U.S.] Department of Commerce.

[Amendment 35](#) of the [Cooperative Agreement](#) states in part:

2. **Pricing Flexibility.** In recognition that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace, the parties agree that the yearly price for the registration and renewal of domain names in the .com registry may be changed in accordance with the following:
 - a. Without further approval by the Department, at any time following the Effective Date of this Amendment 35, Verisign and ICANN may agree to amend Section 7.3(d)(i) (Maximum Price) of the .com Registry Agreement to permit Verisign in each of the last four years of every six year period, beginning two years from the Effective Date of this Amendment 35 (i.e., on or after the anniversary of the Effective Date of this Amendment 35 in 2020-2023, 2026-2029, and so on) to increase the Maximum Price charged by Verisign for each yearly registration or renewal of a .com domain name up to seven percent over the highest Maximum Price charged in the previous calendar year.

ICANN org has not set out the **guiding legal principles** or **reasoning**, by which it, on behalf of the global internet community, reached an agreement with Verisign on the terms of the proposed Amendment No. 3 and LOI. **Such absence of information renders the proposed amendment and LOI fatally defective.** In the absence of such information, I offer the following legal principles and reasoning in support of my comments and objections to the proposed Amendment No. 3 and LOI:

All Top-Level Domains (TLDs), both generic (gTLDs) and country code (ccTLDs), are global public resources, not the property of ICANN nor any registry operator. See [RFC 1591](#) cited by the United States as authoritative in its [Amicus Curiae brief \(2015\) in the](#)

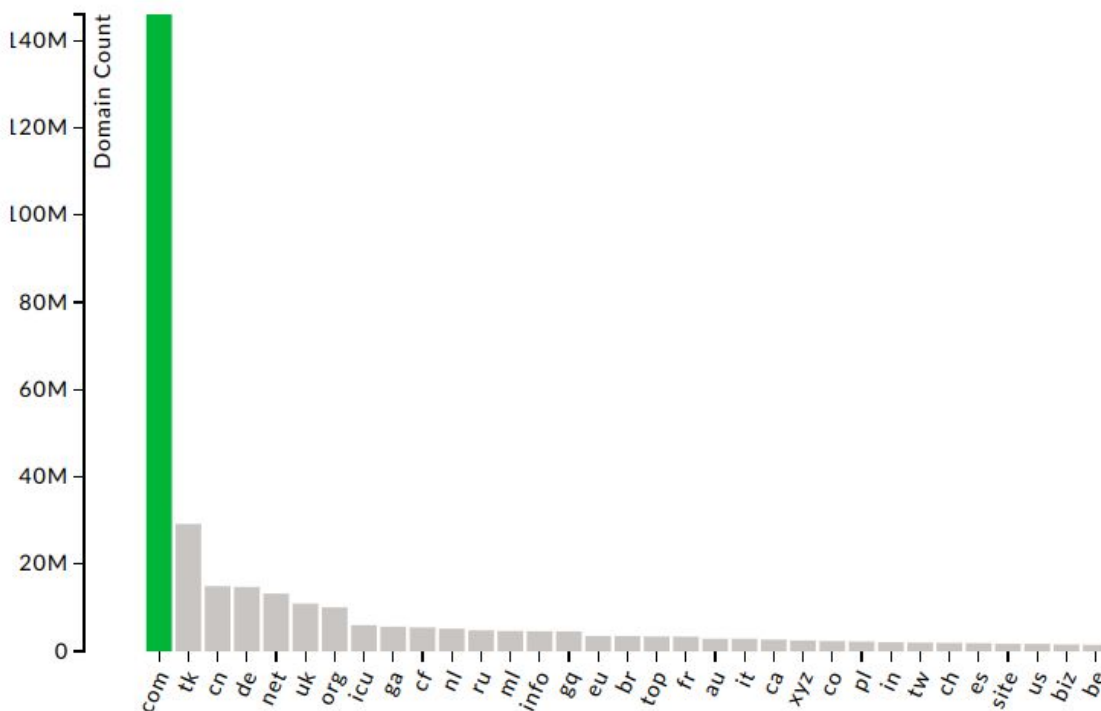
[Weinstein case](#) (which involved ccTLD .IR), at pages 11, 14, 15: “The designated manager [registry operator] is the trustee of the top-level domain.”

Likewise, ICANN in its [response brief](#) to the U.S. Amicus brief, also cited RFC 1591, stating. at p. 4: “[c]oncerns about ‘rights’ . . . are inappropriate” . . . a ccTLD manager [registry operator] “is a trustee for the delegated ccTLD, and has a duty to serve the local Internet community as well as the global Internet community.”

The [U.S. Court of Appeals in the Weinstein case](#) found at p. 32: “the ICANN-administered DNS is the beneficiary of substantial network effects” explaining in footnote 31 (p. 32):

“In markets characterized by network effects, one product or standard tends towards dominance, because the utility that an end user derives from consumption of the good increases with the number of other agents consuming the good.” United States v. Microsoft Corp, 253 F.3d 34, 49 (D.C. Cir. 2001) (internal quotations omitted).

In the global DNS, the one “product,” or TLD, that is dominant, above all others, is the gTLD .COM with over 146 million domain name registrations according to statistics published by registry operators and <http://research.domaintools.com/statistics/tld-counts/> (Feb 9, 2020):



This dominance or “market power” was acknowledged by the **U.S. Department of Justice Antitrust Division** in its [advice and recommendations](#) (pp. 4-11) given to the U.S. Department of Commerce (NTIA) and [transmitted to ICANN](#) in December, 2008,

stating, “the creation of additional gTLDs is unlikely to constrain the exercise of **market power** by existing TLDs, especially the **.com registry operated by VeriSign.**”

There is nothing in the record presented by ICANN org in this request for public comments, to support ANY fee increase in .COM registration and renewal fees, or that challenges or negates the above facts of .COM market power and dominance, or changes any of the findings, recommendations and advice of the U.S. Department of Justice Antitrust Division in 2008, **nor has there been any showing by VeriSign** of a need for increases in .COM registration and renewal fees (see Verisign’s [financial information](#) and [SEC filings](#)), and therefore the increase in fees for .COM registrations and renewals allowed in the proposed Amendment 3, is completely unsupported and should be disallowed in the global public interest, and accordingly, **paragraph 17 should be stricken in its entirety from the proposed Amendment 3.**

Likewise the proposed Letter of Intent should be stricken as there is no justification or reason for .COM registrants to pay increased .COM registration and renewal fees so that Verisign can pay ICANN \$20 million dollars (LOI paragraph 2), and further the following section of the proposed LOI (paragraph 1.B.), appears to give Verisign unilateral rights to amend the .COM registry agreement in the future with terms that have not been approved in accordance with ICANN articles and bylaws, nor are compliant with ICANN public policy making requirements:

B. Within a reasonable period of time following the approval and promulgation by ICANN of the enhanced contractual provisions developed as a result of the work performed pursuant to Section 1A above into the new gTLD base agreement, **Verisign will adopt in the .com Registry Agreement such promulgated provisions in a form reasonably appropriate for the .com TLD.**

This proposal (Amendment No. 3 and LOI) is indicative of a continuing pattern of monopoly abuse of domain name registrants by both ICANN and its contracted parties, in this case Verisign, and a continuing breach of their respective fiduciary duties owed to registrants throughout the world.

Finally, I note and incorporate by reference: [ICANN's Betrayals and its Opportunity to Act Now in the Public Interest](#); and [News Review Postscript | DomainMondo.com](#), as well as my [.ORG comment](#), and:

[The Sherman Antitrust Act of 1890](#): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

cc: State of California Department of Justice, Office of the Attorney General; US Department of Justice Antitrust Division; Federal Trade Commission (FTC); US Department of Commerce (NTIA); Margrethe Vestager, EU Commissioner for Competition; European Commission Antitrust Registry.