

## **ICANN ISPCP Constituency**

### **Comment on proposed Verisign Settlement and New.COM Agreement**

The ISPCP has considered the proposed settlement agreement posted on the 24<sup>th</sup> October <http://www.icann.org/tlds/agreements/verisign/settlement-agreements.htm> and the subsequent information paper posted on 21<sup>st</sup> November <http://www.icann.org/tlds/announcements/anouncement-21nov05.htm>, and hereby submits the following views for consideration by the ICANN board and community at large...

The ISPCP welcomes some specific aspects of this proposed settlement, none more so than the end of the six year litigation process which has proved to be a major distraction from the core business of ICANN and has done little to enhance the standing of either party with the outside world. The benefits to ICANN from this settlement are clearly recognisable, including the ending of the substantial costs this action has, and would continue to incur. However, despite the foregoing and the additional clarifying information provided in by ICANN staff at <http://www.icann.org/tlds/announcements/anouncement-21nov05.htm> there remain important questions and fundamental aspects of the settlement which give serious cause for concern.

#### Settlement of the Verisign Lawsuit

The ISPCP is pleased to see that as part of this proposed settlement, Verisign will be advocating for the private sector solution to the coordination of Internet names and addresses. Of course, Verisign's agreement to do so begs the question that but for this settlement, does Verisign intend to advocate against a private sector solution of which it is such a vital participant? Likewise, in the absence of this settlement, is Verisign's intent to encourage and support third party activities that undermine ICANN's role in the technical coordination of the domain name system (DNS). Because if these questions are answered in the affirmative, it seems to the ISPCP that it is not appropriate to craft a settlement with a party whose goal it is to undermine and destabilize the greater ICANN community. Putting that issue aside, the ISPCP is most concerned about the wisdom of linking the lawsuit settlement with a decidedly unrelated renewal of the .COM registry agreement.

#### The New Registry Agreement

The .COM domain is, by far, the largest registry operation within the DNS. Whilst accepting that the stability of such an important part of the system is essential, the guaranteed long term dominance of one supplier in that space runs counter to the principles of competitiveness, innovation, and accountability. These are core principles which are not only important to all ICANN stakeholders, but are the very measures on which ICANN will be judged by the outside world.

In the view of the ISPCP it is inappropriate to link the settlement agreement with a new registry agreement. By agreeing to include a new registry agreement as part of the settlement, it seems that ICANN is bowing to unwarranted pressures to resolve this dispute;

and in so doing, it is compromising its core mission and responsibility to the Internet community.

A bilateral agreement between the two parties which result in a non-competitive arrangement, whereby one party has the right to a presumptive renewal, coupled with the guaranteed potential to increase prices annually runs counter to ICANN's responsibility to the greater community at large. This is particularly damaging as it comes at a point in time where competition within the market place is driving prices down, not up. One of the aims of ICANN is to promote and sustain a competitive market environment that will result in benefits for providers and users alike. The above situation contradicts this goal and goes against ICANN's own stated values.

Although it has been stated that the presumptive right of renewal already exists in the current .COM agreement, in fact the reality is that the current renewal terms are not comparable to the ones in the proposed agreement. The conditions that would allow ICANN to re-bid the .COM contract are so limited by the proposed agreement, that they essentially guarantee Verisign's control over the .COM domain in perpetuity.

This provision is tantamount to a guarantee that Verisign is handed total dominance of more than 50% of the name space, together with a guaranteed and continual increase return on capital. It is the view of the ISPCP that perpetual renewal of any gTLD registry contract raises policy issues that should be considered within the gNSO prior to inclusion in a proposed agreement.

Likewise, the notion of exclusive rights to data obtained from the operation of the .COM domain needs to be clearly defined and qualified so that any associated policy aspects are adequately understood and dealt with in the appropriate forum, i.e., the gNSO. The lack of clarity in the potential uses and effects of such data raises serious concerns to the ISP community. Without additional specificity in paragraph 3.1(f), there is large scale potential for abuse.

#### [ISPCP Recommendations](#)

- 1) [The Board should not adopt the proposed settlement at this time; but rather, a decision should be reserved at least until the next ICANN meeting in Wellington. The ISPCP has heard broad consensus within the community that there are grave concerns with this proposed settlement and it is not appropriate to adopt this settlement without adequate deliberation accompanied by major revisions.](#)
- 2) [The Board should exclude the presumptive right of renewal as currently drafted in the proposed registry agreement. As currently drafted, the terms under which the contract would be rebid are so extreme that they are actually meaningless, and that is not appropriate. To the extent there is some automatic renewal process, it should be accompanied by guaranteed investment levels, improvements and/or other assurances that continued control of the .COM space by Verisign is infact in the continued best interest of the Internet community. If Verisign is unwilling to sign a](#)

contract under such terms, there is no shortage of other organizations that would be eager to bid for the contract and make the appropriate commitments to ICANN.

- 3) It is not the view of the ISPCP that all contract negotiations are subject to the PDP process. However, some provisions of the proposed registry agreement are so different from agreements currently in effect with any other registry, as well as the current .COM contract in effect with Verisign, that they in fact represent changes in policy. The language surrounding treatment of new registry services is one example of a contract term that may translate into new policy, and as such, should not be included in any agreement until and unless the gNSO has gone through its policy development process. New policy is not the domain of negotiations conducted by staff, but rather, the domain of the gNSO process.
- 4) There should be no granting of exclusive use or intellectual property rights in traffic data associated with operation of the .COM domain. There is not sufficient clarity in the types or uses of data included in this provision, nor is there a sufficient explanation of the policy outcomes resulting from such grant.

#### Conclusion

The terms of this settlement and the superfluous inclusion of an unrelated issue, the .COM agreement, leads to the perception that ICANN is bending to the demands of one party over the interest of the greater community. This can only cause harm to ICANN's long term viability and provide ICANN's detractors with additional arguments to support their case. For the foregoing reasons, the ISPCP strongly urges the ICANN Board not to adopt the proposed settlement and to adopt the proposals above.