

MADE IN AMERICA

An expiring contractual arrangement offers a final opportunity for NTIA to set the right course for the Internet's Domain Name System (DNS). It must act - here's how.

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About the Author

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Twice, he was a key strategist for Verisign, from 2009-2010 and 2013-2016, advising the company's senior leadership on strategy as well as leading external affairs and U.S. Government Relations. This, combined with other roles in his career, has afforded him a unique, front-row seat at the three-ring circus (audience participation encouraged!) of Internet governance. This experience informs the opinions and perspectives contained in this submission. The views and opinions expressed here, including all errors and omissions, are solely the author's own. Nothing contained in this submission was developed for or provided by any other party, for compensation or otherwise. He can be e-mailed at greg@accountableconsumers.org.

Introduction – The IANA Transition Wasn’t the Final Vestige of Unique U.S. Stewardship of the DNS

It may be a question for the ages whether the tempest that punctuated the final days of the 2016 transition to the private sector of the Internet Assigned Numbers Authority (IANA) functions – the so-called IANA Transition - was confined to a teapot or a portent of something more. However, the controversy that has arisen surrounding alleged influence of the 2016 U.S. presidential election is a stark reminder of the consequential nature of the network of networks known as the Internet.

The IANA transition resulted from a nearly superhuman, multi-year effort by a global community of DNS stakeholders which culminated with the expiration of a procurement contract between the National Telecommunications and Information Administration (NTIA) and the Internet Corporation for Assigned Names and Numbers (ICANN). However, it was not the last remaining vestige of unique influence stemming from the U.S. Government’s legacy as the originator of the Internet. Another contractual arrangement - this time between NTIA and Verisign, Inc., and known simply as the “Cooperative Agreement” - is still in effect and confers to NTIA extraordinary and unique influence over a private corporation managing core components of the DNS. The agency is faced with deciding whether to extend this Agreement or allow it to expire in November of this year.

The Cooperative Agreement is a lengthy document, requiring a 2-inch binder, that has been amended many times since it was first signed by the U.S. Government and Network Solutions (whom Verisign acquired in the early 2000’s). However, the Agreement was comprised of three core components:

1. assignment of the authoritative “A” root server;
2. delegation of the Root Zone Maintenance function; and,
3. conferral to NTIA of the unilateral right to review and amend the .com registry agreement.

The first two are no longer relevant – for various technical reasons, the “A” root server is no longer authoritative and the Root Zone Maintenance function, though still performed by Verisign, is now governed by an agreement between ICANN and Verisign that was executed as part of the IANA transition completed in 2016. However, what remains is the powerful yet tightly scoped authority for NTIA to amend a single contract in order to regulate competition within a single market: the DNS. NTIA has exercised its’ prerogative only once, in 2012, when the agency unilaterally amended the .com registry agreement to restrict the wholesale price of an annual .com domain name registration to \$7.85 whereas, previously, Verisign had been permitted to raise the price by 7% in four of the six years of the concession.

A Rapidly Approaching Inflection Point

NTIA must soon decide what course of action it will take regarding disposition of the Cooperative Agreement. The agency has two obvious options: renew or allow to expire. There are several chief reasons for why it makes sense to allow the Agreement to expire:

- NTIA is not a competition authority. In the United States, the responsibility for overseeing competition is shared between the Antitrust Division of the Justice Department and the Federal Trade Commission - it should remain with those two entities.
- It is more than likely that the international community would perceive an extension of the Agreement as a continuation of privileged status by the United States. This is due to the reality that Verisign performs fundamental functions at the root of the Internet, including editing and publishing the DNS root zone file. Additionally, it operates registries comprising approximately 45% of the Internet's registered domain names and, by providing back-end registry services to other registry operators, provides the infrastructure for an even larger percentage of the approximately 333 million registered domain names in the DNS. By maintaining a chokehold on the company's ability to generate revenue provides enormous leverage to NTIA.
- Uncertainty surrounding the upcoming biennial plenipotentiary meeting of the International Telecommunications Union (ITU) seems to tip the scales in favor of not renewing the Agreement in another attempt to convince non-aligned countries to remain ambivalent about the U.S.
- If the IANA transition was completed in 2016 to finalize the privatization of the Internet and, in response to international pressure following the disclosures by Edward Snowden, to remove unique U.S. influence over the Internet, then it is logically impermissible, and more than a little hypocritical, to extend the Cooperative Agreement for another term.

And yet, allowing the Agreement to expire comes with its own set of real-world risks - most importantly, how NTIA will justify a decision to abruptly remove regulatory oversight for a company that currently is subject to price controls due to competition concerns. If the justification for the price cap was that Verisign was too powerful in 2012, then what has changed to indicate the situation has improved sufficiently to remove the price restriction? It most definitely is not any of the primary financial indicators for the company, which has seemed not just to survive, but actually to thrive in an environment of remedial austerity. Verisign's stock performance may be illustrative of how ineffective the price restriction has been: In November 2012 (prior to the price restriction being announced) Verisign's stock price was trading close to \$50. On Friday, July 13, 2018, after six years of operating under a wholesale price cap, Verisign's stock price was \$147.58.

Also, NTIA exercised its regulatory authority in full cooperation with the Justice Department's Antitrust Division, which assisted in developing the price restriction. The Antitrust Division's interest was centered on consumer protection, specifically on a concept called "elasticity" which holds that certain registrants are so invested in a .com domain name, such as Amazon.com or Overstock.com, that they cannot easily transition to a new domain name without suffering substantial harm and, in effect, are locked into a .com domain name. In a real-world example, Overstock.com tried to rebrand itself to o.co within the last few years. After investing an estimated more than \$100 million in re-branding, the company discovered that customers weren't buying it and abandoned the effort. Even for companies that aren't dot-com's, the cost associated with tasks such as migrating e-mail, web and other IT services and even reprinting stationary and business cards can make the seemingly simple change of a domain name into a daunting proposition.

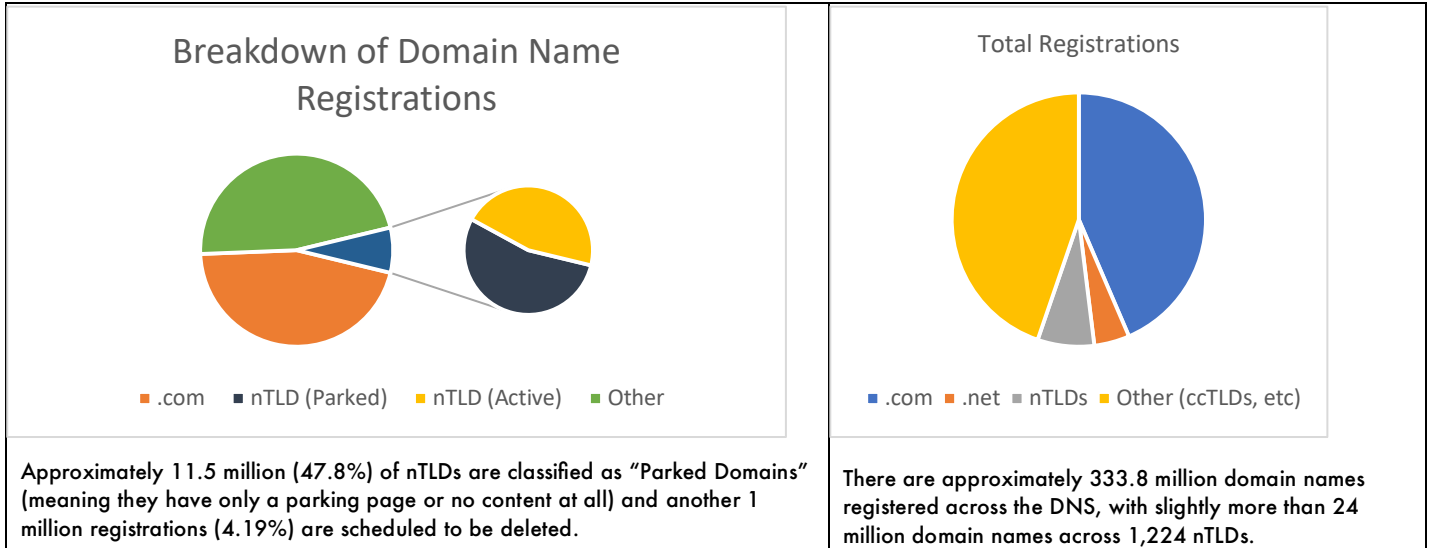
Other stakeholders include those who register and maintain large portfolios of domain names in .com, either for domain speculation, commercial use (i.e. companies with large brand portfolios such as Unilever or Disney), defensive purposes (anti-cybersquatting), or a combination of the above. Many large brands and intellectual property owners have .com domain name registrations that number in the thousands, or even tens of thousands, making them extremely vulnerable to even modest spikes in the annual registration price.

Nor has it appeared to stimulate competition in the domain name market – although the price restriction may have had a significant, though unintended, effect on the introduction of more than 1200 new generic Top-Level Domains (nTLDs). The stated purpose for this introduction of a vast amount of supply into an indeterminate-demand market was to increase consumer choice and market competition in the DNS. These are honorable motives, to be sure. But the “invisible hand” of the market for the private sector-led Internet may take little notice of honorable motives while caring very much about concepts such as supply-and-demand or profit-and-loss.

There are typically three ways in which a gTLD registry achieves economic viability:

1. **The registry achieves scale.** This is what was pioneered with .com and .net and Verisign benefits from today. The cost of operating the domain are tightly managed and scale is achieved in volume of registrations. This business model places the greatest value on the number of registrations because the expense model is, generally speaking, fixed. Which means that once a registry reaches the break-even point with its number of registrations then everything else is profit.
2. **The registry offers additional value.** This is the value proposition that registries like .film and .bank are trying to offer. They focus on servicing a particular segment of the market that is willing to pay higher registration cost for some sort of benefit, either business-critical like security for .bank, piracy-free for .film, extortionate like .sucks, etc. This can also be targeted at the “vanity” buyer where an operator has an extension for which people are willing to pay a premium – i.e. .ninja or .guru.
3. **The registry is overhead.** This applies when companies maintain a brand name (or similar) TLD that is operated as a cost center and/or a line item expense in their budget.

52% of nTLD registrations are parked/scheduled for deletion - nTLDs increase consumer choice without meaningful competition.



These statistics seem to indicate a structural defect in a market that aspires to go beyond offering variety to consumers in order to be truly competitive. In the current environment, it is extremely difficult to imagine any registry offering a meaningful challenge to .com’s DNS dominance.

A Possible Solution: A Deal That Is Both Art and Science

A third path may be possible, whereby NTIA allows the Cooperative Agreement to expire, but only after Verisign and the Department of Justice present a bilateral agreement that has been certified by the federal judiciary and transformed into a consent decree.

As a practical matter, a consent decree can consist of anything, provided that both parties request judicial certification. It is similar to a contract but carries the force of law. After reaching agreement on terms, both parties file a lawsuit at the same time and request an entry of judgment, which turns the agreement into a judicial decree. It does not require findings of fact, admissions of guilt or liability, and is more binding than a judgment against an unwilling party, which can be modified or reversed by the same or higher courts. A consent decree can only be modified by consent of both parties.

A consent decree would return oversight of competition to the DOJ’s Antitrust Division, which has the expertise and experience to ensure wholesale pricing of .com registrations helps promote meaningful competition in the DNS – and not just consumer choice. Further, they can ensure that any modifications to the current regime are implemented on a gradual glide path in order to avoid causing shocks to the market that would be associated with sudden changes in price.

A consent decree also provides an avenue for resolving some of the outstanding issues that are legacies of the Internet's organic, dynamic, and sometimes messy development. It allows for commitments to be obtained from an American company, subject to U.S. jurisdiction, that don't require ICANN's Policy Development Process or upsetting the apple cart of consensus within the global community of DNS stakeholders. In this scenario, the Justice Department acts as the negotiating counter-party, rather than ordinary stakeholders. The consent decree can create requirements that function the same as public interest commitments and rights protection mechanisms, etc. This may even be an avenue for helping to address the challenge of upgrading the WHOIS database in a newly-GDPR world.

Conclusion

The Cooperative Agreement anticipates the possibility that the registry operator (or its successors) might, at some point, grow dissatisfied with an arrangement where one party has a "presumptive right of renewal" and allows for the registry operator to terminate its' obligations, with notice and in its' sole discretion. But there's a catch: if that option is exercised then the .com Registry Agreement is concurrently terminated and the concession for operating the .com registry of the Internet must be put out to bid. This recourse is also a historical artifact, and envisions a public tender overseen by the U.S. government. It is almost certain that extensive litigation would be required before a definitive outcome were to emerge – a wrinkle that most - but not all – parties would prefer to avoid.

Lastly, use of the word "agree" in this submission is a term of art – because of the possibility for re-bid of the .com registry agreement as well as NTIA's unilateral right to extend the Cooperative Agreement, it isn't necessary for the incumbent registry operator to agree with all, or any, of the terms presented. However, all parties gain material benefits with a consent decree such as the one proposed here. If NTIA allows the Cooperative Agreement to expire, then Verisign will eventually gain pricing flexibility, and under terms much more favorable to their shareholders than to the global public interest. But right now, NTIA holds all the cards, including (pardon the expression) a trump card or two. Chief among these is the ability to simply extend the Cooperative Agreement for another six years, leaving the price restriction unchanged, while placing culpability for the international fallout squarely on the company's shoulders. It isn't hard to imagine that the Justice Department, feeling slighted, might also take a greater interest in the activities of the company that jilted it at the altar. A wrinkle that most – but not all – parties would prefer to avoid.