CC2 Section 2: Base Registry Agreement

2.1.1 Single Registry Agreement vs. multiple Registry Agreements

Jannik Skou, INTA, Nominet, BC, John Poole, Afilias, RySG, ALAC, and NCSG **support a single Base Registry Agreement** with specific sections for different TLD types.

Sample excerpts:

"Having different RAs increases the risk of having different interpretations for similar provisions, or create potential roadblocks for developing new models for registry operation. A single base RA provides flexibility for applicants to modify their applications as their business models change." – INTA

"Under such a framework, different operational models would still be taken into account, while the single RA would facilitate efficiency in development, implementation, and compliance. A single RA would also make it easier for a particular Registry Operator or a TLD to move between categories as business needs evolved." – BC

"With regard to efficiency in development, implementation, and operational execution, a single Registry Agreement is the most practical. Some factors considered include: time required to develop each of Registry Agreements for each of the categories; the ability of an Registry Operator or a TLD to move between categories; the complexity of an amendment process such as that being undertaken at present where there are multiple Registry Agreements; administrative burden for ICANN and Registry Operators; predictability for ICANN, Registry Operators and the internet using public. Further, strict categorisation and inflexible agreements may, in practice, stifle competition and innovation." -- RySG

Jim Prendergast and BRG **support multiple Registry Agreements**.

Sample excerpts:

"If the goal of the new gTLD program is to increase competition among registry providers, then forcing everyone into a standard contract runs counter to those goals. Even with the identified specification variances, there is a limit to what registries can achieve with the current contracts. ICANN argued in the 2012 round that managing multiple implementations of a contract would be burdensome. I disagree. ICANN has matured into a $100+ million per year organization. Contractual compliance is one of the bedrocks of the trust people place in the organization. If they need more resources to allow for multiple contracts, then a review of the existing allocations of resources should be under taken." – Jim Prendergast

"Where there is a significant difference between registry models and where these different models are a sizeable proportion of registry operators, the BRG recommends customised RAs to better reflect those models and their distinct nature. In this respect, the BRG favours a customised Registry Agreement (RA) for dotBrands, to reflect the distinct differences against a traditional open and commercial registry." – BRG

Some comments on this topic focused on high level goals rather than on the mechanisms of the solution.

Sample excerpts:

"The RrSG does not wish to comment on the mechanics of how this should be contractually dealt with by ICANN. However, regardless of the mechanism ICANN chooses, the process must be 100% clear and defined within the Application Guidebook or equivalent. There should not be any new "on the fly" exemptions made or new TLD types classified, once the applicant window is closed." – RrSG

"The notion of a single Registry Agreement that contains certain clauses that may or may not be triggered based on the applicant or the nature of the TLD, versus a suite of Registry Agreements is, in reality, the same concept. That is to say that in both models certain provisions will only ever apply to certain Registry Operators or TLDs, and the core provisions of the Registry Agreement remain the same. As such neither model should be more or less effective in recognising the different operational requirements of different TLDs." – RySG

"A number of Brands would have benefited from an application process and contractual provisions which better acknowledged the different drivers and priorities of a Brand TLD. Specification 13 goes some of the way here, but additional Brand-specific provisions or even a Brand-specific contract would be beneficial. An entirely separate contract for Brand TLDs requires careful consideration, however, as it has the potential to reduce the flexibility of registries." -- Valideus

2.1.2 Restrictions pertaining to sunrise periods, landrush or other registry activities

INTA, John Poole, Valideus, and Jannik Skou **support additional restrictions** pertaining to sunrise periods, landrush or other registry activities.

Sample excerpts:

"a) Premium Names and Sunrise Pricing: . . . INTA understands that ICANN does not actively regulate domain name pricing, but contends that the registry practice of creating "premium" names and charging excessive pricing for such names, and of charging substantially higher prices for Sunrise names generally than in GA, runs contrary to the intent and acts as an effective circumvention of the RPMs. The Sunrise period was created with the intention to protect, rather than to exploit, brand owners. It is important that consideration is given to how premium names schemes and Sunrises can be operated without undermining the RPMs and discriminating against brand owners.
b) Reserved Names: Many INTA members have reported that their trademarks have been withheld from registration by new gTLD registry operators, thereby being unavailable during the Sunrise period. . . In addition, ICANN has the authority to request lists of reserved

domain names but has refused to request and share such lists, which would allow brand-owners to police improper reservation of names.
c) Legal Rights Objection (LRO) Process: The LRO process currently set forth in the Applicant Guidebook is defective as it is based upon claims of infringement (which require use and it is not immediately clear how one can use a TLD they have not yet been awarded), rather than upon claims of bad faith application for a TLD and therefore does not meet the standard set forth under Policy Recommendation 3. . .” – INTA

“YES—no warehousing, no gTLD registry operator can operate a registrar, no gTLD registry operator or any of its “affiliates” can purchase through registrars more than a total of 1000 domain names under the new gTLD for the first 12 months of general availability, and there can be no “premium pricing”—the same fee for each domain name in the gTLD. . .” – John Poole

“Many trademark holders have reported being offered names during the Sunrise at prices significantly higher than those for general availability, often prohibitively so. This is exacerbated where terms corresponding to the trademark, including examples where the trademark is a coined word, have been designated by some registries as Premium names, attracting even higher prices. We recognize that the matter of pricing raises difficult issues, and that all registries should not be constrained by overstrict rules to follow the same business and pricing models. Nevertheless, there is a point at which pricing ceases to be a legitimate business model in a competitive market and undermines the RPMs. . .
Another area of concern raised by Com Laude's brand clients is the scope that registry operators appear to have under the RPMS requirements to reserve an unlimited number of names, including names which may be recorded in the TMCH, until after the sunrise has finished. On later release from reservation these names are subject to a trademark claims process but not to the sunrise. This again has the capacity to undermine the intentions of the RPMs. We would welcome consideration by the working group of how holders of TMCH-recorded marks might be given first refusal where the name is released from reservation. . .” – Valideus

“Restriction on Sunrise – a maximum fee (General Availability plus a max fixed amount: 300 USD) should be requested.” – Jannik Skou

Nominet, BRG, Afilias, and RySG **support maintaining the status quo** with respect to restrictions.

Sample excerpts:

“The restrictions in relation to sunrise periods, landrush, and related activities are sufficient for the TLDs currently being delegated and will be sufficient for future TLDs. Specific launch plans, dates, and terms and conditions should continue not to be included into the Registry Agreements. Any restrictions on registry pricing in addition to that which is already contained within current Registry Agreement may stifle competition and innovation.” – RySG

“We do not feel that any further restrictions are necessary, and also that there shouldn’t be any ICANN restrictions on registry pricing.” – Nominet

BC supports **maintaining current restrictions but pursuing additional measures** regarding “predatory pricing.”

Sample excerpt:

“We believe the current restrictions are working well to protect registrants and Internet users. Regulations pertaining to pricing are generally outside of the scope of ICANN's remit. However, we are concerned about "predatory pricing" schemes by a couple of Registry Operators that have charged significantly higher fees for trademarked terms during Sunrise. Such practices could be potentially dealt with in the future through more explicit fraud provisions in PICs as well as regulations preventing use of TMCH data for purposes other than intended.” – BC (Staff note: this comment was written in response to 2.1.3, but appears to respond to 2.1.2)

2.1.3 Inclusion of all or part of the application in the signed Registry Agreement; Handling of changes prior to and following execution of the Registry Agreement

Jannik Skou supports incorporating all of the application into the Registry Agreement.

John Poole supports incorporating all of the application into the Registry Agreement, “as necessary.”

ALAC supports incorporating part of the application into the Registry Agreement.

Sample excerpt:

“Agree all relevant aspects of application should be incorporated into the Registry Agreement. This would ensure that what a proposed Registry Operator has undertaken to do is part of the agreement. Any changes should be the subject of notice with an opportunity for public comment.” -- ALAC

Nominet, BRG, Afilias, RySG oppose incorporating the application into the Registry Agreement.

Sample excerpts:

“The current registry agreement includes warranties to the effect that the application to ICANN was true and correct in all material respects and that would seem to be sufficient. This assumes that the public portions of the application disclose sufficient details as to the proposed use to enable whether legal rights objections etc should be filed. Post contract, ICANN already operates change control procedures.” -- Nominet

“The entire application should not be incorporated into the signed registry agreement (neither should the applicant guidebook). Registries must retain reasonable latitude and flexibility to adapt and innovate. Overburdening a contract with hundreds of terms is a poor way to conduct business and invites interminable wish lists of regulation. The voluntary PIC model has worked fairly well (though in the 2012 round it was rushed) and a similar procedure is more likely to bear fruit: an applicant could add voluntary PICs in its application, then have a period to add more in response to any GAC/community issues.” -- RySG

Additional comments regarding handling of changes:

“Changes requested by a registry operator, unless agreed to as a “universal” change in the Base Registry Agreement, would require ICANN to give notice, and allow any other registry operator to offer to take over the gTLD and continue operating the gTLD registry on the original terms. If no other operator was interested, changes would either be approved or denied by the ICANN Board in the global public interest, and if the registry operator did not accept the Board’s decision, the registry operator’s operation of the gTLD would terminate at ICANN’s earliest convenience.” – John Poole