

## Introduction

ICANN was originally created as a technical entity responsible for the day-to-day management of the DNS. We would like to draw the attention to Esther Dyson - first chairwoman of the ICANN Board - who stated:

*“The White Paper articulates no Internet Governance role for ICANN, and the Initial Board shares that (negative) view. Therefore, ICANN does not ‘aspire to address’ any Internet Governance issues; in effect, it governs the plumbing, not the people [emphasis added]. It has a very limited mandate to administer certain (largely technical) aspects of the Internet infrastructure in general and the Domain Name System in particular.”*

Domain names, however, often raise legitimate trademark concerns and ICANN, as the ‘ex machina deus’ of the Domain Name System (DNS), carries the responsibility to respond to these concerns and provide solutions. Responding though to such challenges is completely different to suggesting processes that fall outside ICANN’s scope, are biased and do not seek to nurture ICANN’s multi-stakeholder governance culture.

The Accountability and Transparency Review Team (ATR) ICANN established is a positive step towards ensuring an environment that sees ICANN adhering to its original mandate for openness and accountable procedures. It is in line with ICANN’s promise for bottom-up policy development within a multi-stakeholder environment for the management of the domain name system.

The IRT recommendations constitute a true testament and exemplify the problematic and non-inclusive way in which ICANN has approached trademark issues in the Domain Name System. In this context, ICANN sought to exercise some form of Internet “Regulatory Governance” by governing certain aspects of individual behaviour on the Internet. The Internet community never opposed trademark rights or their legitimate protection. They opposed the re-tasking of ICANN to expand trademark rights in ways trademark law itself does not support. Trademark rights are governed by laws, treaties, legislatures, parliaments and other democratic bodies that are appropriately authorized to protect those rights; they evolve incrementally, through judicial reasoning.

ICANN should not have set the precedent of inviting the introduction of new governance policies that cannot be obtained through legitimate means of existing legal regimes.

### **Formation of the Implementation Recommendation Team (IRT) took place in a non-inclusive and unrepresentative manner.**

The first official document informing the GNSO community of the formation of the IRT was in the form of an email, sent by the Intellectual Property Constituency on March 11, 2009. It provided a mere 36 hours for groups to express interest in adding members to the IPC-formed IRT committee. Timely responses by the ALAC to add well-known attorney Bret Fausett and by the Internet Commerce Association to add its president were rejected. Clearly, the views of registrants - be it noncommercial, individual or commercial- were considered irrelevant.

We note that such a focus on the needs of only one constituency, the IPC, is undemocratic and against the traditional values of diversity and multistakeholderism within ICANN. Noticeable absent were those who represent human rights coalitions, free speech and freedom of expression organizations and privacy groups. Also not invited to participate were representatives of domain name registrants - those who will actually be impacted by these new rules.

These organizations and individuals would have brought to the table valuable -critical - information about the balance of trademark law and its limits as regards fair use, free speech and freedom of expression.

### **A. The IRT Team Attempts to Rewrite GNSO Developed Policy**

When the Intellectual Property Rights Constituency did not get everything it wanted in the GNSO policy development process it created the IRT to re-open and re-negotiate the issue to its liking. The GNSO carefully considered the issue of protecting trademark rights in new top-level domains and included GNSO negotiated solutions in its final recommendations. In particular, the GNSO Working Group “Protecting the Rights of Others” Working Group was tasked with this objective of protecting trademarks. This working group was not able to come to agreement and support the proposals of the Intellectual Property Constituency that were re-opened by the IRT Team. Re-opening these issues and throwing out the negotiated consensus that was reached between all stakeholders, undermined ICANN’s claim of “bottom-up” policy-making that involved all stakeholders equally.

### **B. The IRT Team Operated without Transparency**

Contrary to the practices on which ICANN committees are based, the IRT Team provided no information about its meetings, and no proceedings of the development of its work. This ‘Masonic’ approach was worrying, put a big question mark to the way substantive policy issues have been approached, and set a precedent for a one-sided approach to policy which ICANN should never have followed.

### **C. ICANN Provided Travel Support and Expenditures for the World’s Largest Companies and IPC-Members**

It is the tradition of the GNSO that individual constituencies pay the cost of their representatives to participate in the ICANN process. At great cost and difficulty, the NCUC has sent its members to participate for years. During the IRT process, ICANN clearly signalled its support for a single constituency in the GNSO in the negotiation of this issue, a constituency comprising

the world's largest and wealthiest companies. Asking Internet users to foot the bill for the creation and sale of this one-sided policy proposal which benefits a single interest (large brand owners) to the detriment of all others simply isn't fair.

ICANN should ensure that such procedural mistakes are not repeated. ICANN should ensure that from now on and in the future it operates under a transparent, open, inclusive and bottom-up process of policy making and development.