"STATEMENT ON THE IRT FINAL REPORT ON TRADEMARK PROTECTION ISSUES"
June 16, 2009

Dear ICANN Board, Members and Participants,

The trademark community may seek to convince you that the Internet of 2009 is different from that of 1998; sure we talk about maximization in usage and a technologically more advanced network, however, social and legal issues remain essentially the same. The principles upon which ICANN was established and speak about representative and transparent procedures that promote competition and bottom-up coordination also remain the same. Today, you are asked to respect these principles and to seriously contemplate upon and reject the recommendations of the Implementation Recommendation Team (IRT).

The genius decision of Jon Postel to replace numbers with names ensured the Internet's popularity and transformed the DNS into a space of limitless alternatives: names, like "Amazon", "Google" or "Facebook", constitute examples of the language's autonomy to progress and were the results of the efforts by unknown domain name entrepreneurs. Current vision for the expansion of the Root and the addition of new gTLDs suggests that this trend will continue. Whereas early studies demonstrate that users believe that the introduction of new gTLDs can cause 'trademark chaos (see the Guardian article available at http://www.guardian.co.uk/media/pda/2009/jun/09/internet-digital-media), it is now that we have a social responsibility to act in a balanced and fair manner and demonstrate to the Internet community that all these years we have been paying close attention to their concerns.

From its early years, aspects of the DNS have been overshadowed by the polemic concerning the balance of rights between trademark owners and domain name registrants. Imagine, for example, an Internet where 'Google' or 'Amazon' did not exist because they were infringing valid trademarks somewhere in the world and you will begin to understand where the heart of the problem lies.

Ten years ago, a compromise was struck through the UDRP. The idea was to create a mechanism that would complement the technical limitations of the DNS and provide answers to the 'first-come, first-served' restriction in domain name registrations. The problems the original UDRP drafting team was asked to address are the same as the problems of today: we need to create policies that aim at finding the correct balance between the rights of domain name registrants (present and future) and trademark owners (and the limits of their rights under existing law).

The expansion of the DNS truly depends on this balance; the addition of new gTLDs should not come with a corresponding need to dramatically increase the rights of trademark owners. The IRT recommendation seeks to transmogrify the DNS into an exclusive territory, where trademark interests will determine entry

according to highly undemocratic criteria. This is not only contrary to trademark law, but it can also inhibit the incremental progress of the DNS.

The IRT report is problematic in two major ways: it fails to consider values of justice and does not take into account the normative limitations of trademark law. I would like to turn your attention to what the IRT recommends in respect of the confusing similarity analysis ("the confusing similarity analysis […] [should] include the aural and commercial impression […] in addition to the visual similarity"). Under this arbitrary rule, it would be possible for 'Starbucks' to block the word 'Stareback' as a commercial name or the word 'Starsucks' as a parody site. As the administrators of the DNS, you have the social responsibility to protect free speech and incentivize domain name registrants.

Contrary to what trademark owners might tell you, you need to realize that trademarks are not victimized through such registrations – the same way they are not victimized in the offline world. Trademark law operates in parallel with other legal instruments, which exist to complement it and fill its gaps where necessary. Defamation and anti-competitive laws, for instance, can ensure that registrations of parody and commercial use respectively are not hindering the value of the trademark. Accepting the IRT recommendation means not only disregarding these aspects of law but also silencing the voices of individual registrants and impeding the evolution of the DNS.

Aristotle says that the "virtue of justice consists in moderation as regulated by wisdom", meaning that policy initiatives should promote a self-disciplined and an intellectually-balanced framework. The IRT recommendation fails on both accounts. Whereas the IRT report should have sought to propose policy, which adheres to the limitations of trademark law, it instead suggests policy that conveniently expands the rights of trademark owners through the creation of the much-controlled IP Clearinghouse and the formation of a list consisting of marks worthy of global protection. Given the fact that neither of these establishments constitutes part of trademark law's culture, the IRT's propositions envision a DNS controlled by trademark constituencies, seek to re-define the conceptual basis of trademark law and promote a set of unbalanced and arbitrary criteria. *Similarly and despite what the IRT report states, the proposal attempts to indirectly prioritize trademark rights over domain name registrations through the creation of an additional adjudication mechanism, which lacks any conceptual basis or procedural reasoning.*

The problem of cybersquatting is essentially the same as it was back in the UDRP days; suggesting, therefore, the creation of a supplementary mechanism to deal with the same problem as the existing one has simply no justification. It only signals towards an additional protection mechanism for trademark interests. If the IRT were truly interested in fighting cybersquatting, they would propose a review and analysis of the UDRP and its case law. Ten years of UDRP practice provide evidence of how the system is procedurally flawed, biased, inconsistent, non-uniform, and restricts the legal rights of registrants – so what else does the trademark community want?

I urge the members of the Board to **STOP**, **THINK** and **RE-VISIT** the IRT recommendations; to the wider ICANN community – registries, registrars and technologists – that has invested financial and intellectual resources in the Root expansion, I ask you to reconsider how the IRT proposal threatens your vision of technological evolution and innovation.

When filed in the comment process, NCUC will provide you with additional details how the IRT recommendation is neither fairly balanced nor does it promote justice. I understand the Root expansion; this need, however, should not be sacrificed to decisions that in the years to come can have a detrimental effect upon the use of the Internet. I appeal to you to consider carefully this policy initiative and its potential implications

Thank you and good luck.

Yours Faithfully,
Dr. Konstantinos Komaitis