

**Noncommercial Users Constituency
Submits its**

**COMMENTS ON PROCEDURAL ASPECTS OF THE IRT FINAL REPORT—
A SUGGESTED ROADMAP FOR MOVING FORWARD**

These are the comments of ICANN'S Non-Commercial User Constituency (NCUC), a group which dates back to ICANN's founding and has actively and fully participated in all policy-making proceedings at ICANN involving domain names and domain name disputes.

NCUC has 102 members in 40 different countries, including 37 individuals and 65 organizations as members. We represent a wide array of noncommercial groups, including human rights organizations. Our members, and those they represent, often risk their lives and their livelihoods to post information about politics, corruption, revolution and the pursuit of free and democratic rights by individuals and organizations. In addition, our members use the Internet, their domain names and their websites to post free and fair critiques of large companies, their products, services and practices to the world for lawful discussion and debate.

Our members, and those we have worked with over the 10 years of ICANN, are often the target of overbroad trademark claims, abusive cease and desist letters, invalid UDRP filings and a pattern of practices to shut down their speech by challenging their right to the domain names (often well-known, well-linked and well-bookmarked domain names). To shut down the domain name is to shut down the speech, the competition and the criticisms. It is an abuse we call "trademark lawyer abuse," and in the David v. Goliath battles of small noncommercial organizations and individuals vs. large companies, "trademark lawyer abuse" is, unfortunately, rampant. (See the website www.chillingeffects.org for thousands of examples of such abuse documented by the public.)

It became very clear in the NCUC/IRT Team meeting in Sydney, that the issue of "trademark lawyer abuse" had not been addressed by the IRT Team – and was, rightly, considered a valid and necessary counterweight to the domain name registrant abuse upon which so much of the IRT Report is premised. Since the IRT Report was drafted behind closed doors by a group of trademark attorneys who represent the world's largest trademark owners and without any representation of domain name registrants, it comes as no surprise that the report is one-sided and unbalanced in its treatment of issues.

We renew our claims that the IRT process was imbalanced and unfair, and repeat our concerns below. At the same time, we recognize that even the worst processes sometimes move forward. ***Should the IRT process continue to move forward, the NCUC has strong recommendations to ensure that a similar imbalance of views, experiences and concerns does not continue to the next level of use of these materials.***

I. **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 multi-stakeholderism 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 <<http://forum.icann.org/lists/gnso-pro-wg/>>. This working group was not able to come to agreement and support the proposals of the Intellectual Property Constituency that are now re-opened by the IRT Team. Re-opening these issues and throwing out the negotiated consensus that was reached between all stakeholders undermines ICANN’s claim of “bottom-up” policy-making that involves 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 is worrying, puts a big question mark to the way substantive policy issues have been approached, and sets a precedent for a one-sided approach to policy which ICANN should not follow going forward.

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. We continue to raise an objection to ICANN's singling out 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.

Rather than an IRT Presentation in NYC, London and Hong Kong, the public forum should provide a balanced presentation of "pro and con" views of the IRT Report - with attorneys experienced in trademark law, and its limits - with support from ICANN.

II. There is no need to go forward with the IRT Report.

The IRT Report has been roundly rejected by large segments of the ICANN community, including NCUC, ALAC, and a significant number of members of the Business and Registrar Constituencies. Even a member of the IPC rose at the Sydney Public Forum to exclaim that trademark infringement is not "one of the four horsemen of the Apocalypse" (!). Further, GAC members, including those of France and Brazil are questioning the IRT Report findings, and the IRT Team composition and process.

Notably, in all 3 straw polls taken by Bruce Tonkin during the Sydney IRT Report consultation, the stated consensus from the community was *against* the proposals. The overwhelming number of comments during the Public Forum in Sydney raised objections and concerns to the IRT Report, and many more commentators were not able to take the floor to raise their objections because time had been called before they could reach the microphone. The overwhelming number of public comments submitted thus far in the public comment period weigh against this one-sided proposal. If the general public and non-commercial users are to have any say in policy development at ICANN, the IRT Report should be rejected since it has failed to provide a solution acceptable to the majority of Internet users.

The IRT Report need not go forward. It can stop here. Clearly, the IRT Team did not fulfil its mandate - to provide to the ICANN Board and the ICANN Committee a report that is reasonable, balanced and fair. To that end, the ICANN Board is free to thank the group for its work and continue forward with the rollout of new gTLDs.

III. Should the IRT/IPC process go forward, ICANN needs to ensure that the mistakes are corrected – the IRT process needs balance and equity among those who review the comments, and incorporate future changes into proposals.

The UDRP process of 10 years ago gives us a baseline and a precedent. At the Santiago meeting in 1999, instead of adoption of the UDRP, it was clear that deep divisions continued over the UDRP recommendations and procedures. Esther Dyson, then Chairman of the ICANN Board, created a diverse committee tasked with creating fair and balanced UDRP wording. The task was difficult, but the group was diverse with now well-known representatives of the NCUC, IPC and Registrars Constituencies. The result included the then-new UDRP Section 4(c), rights of registrants, for much greater balance, fairness and equity.

For the sake of new gTLDs and the ICANN process, should the IRT process move forward, ICANN should:

- A. Make the public consultations a debate or at least a briefing by two sides, not one.

The IRT report, and its now well-known pitfalls, should be fairly and openly presented to those gathered in the Public Consultations meetings. This presentation should be by both IRT Committee members and those representing views excluded from the IRT Report.

Attorneys for domain name registrants should be given the floor, prior to the opening of the public comment period, to present PowerPoint slides and widely-agreed upon points of concern and dissent with the report.

ICANN should, of course, provide travel support to both sides in the interest of fairness and fair presentation.

- B. Create a “Comments-Review Team” with attorneys from registrant groups only, or both registrant and trademark groups

As the UDRP process showed, we can only move forward if the reviewing group is fair and balanced. Given the IRT Committee’s history of rejecting any comments to the IRT Draft Report with which it did not agree (see IRT Final Report), it is incumbent on ICANN to bring into the process those registrant attorneys with years of experience in dealing with “trademark lawyer abuse.” We cannot allow any new processes to be gamed, misused and abused by trademark attorneys – and the opportunity for such misuse is clear within many of the proposals now within the IRT Report. The best way to limit abuse – by both sides—is to have both sides represented in the discussion.

IV. Implementation of the IRT recommendation falls outside ICANN's technical mandate and scope.

ICANN was originally created as a technical entity responsible for the day-to-day management of the DNS. The IRT Report does not fall within day-to-day management activities; instead, it is nothing but clear policy-making, which may produce future regulatory repercussions. 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.”

The IRT recommendations contradict this structural restraint. It seeks to exercise some form of Internet “Regulatory Governance” by governing certain aspects of individual behaviour on the Internet. NCUC does not oppose trademark rights or their legitimate protection. We oppose 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 set the precedent of inviting the introduction of new governance policies that cannot be obtained through legitimate means of existing legal regimes.

These NCUC Comments on Procedural Aspects of the IRT Final Report are complemented by a set of NCUC Comments on Substantive Aspects of the IRT Final Report, separately submitted in this proceeding.