



April 1, 2010

To: ICANN (urs-15feb10@icann.org; tm-clear-15feb10@icann.org; PDDRP-15feb10@icann.org)

From: National Cable & Telecommunications Association (NCTA)

Re: Proposals for Trademark Protection Mechanisms for New gTLDs

Dear Mr. Beckstrom, Mr. Dengate-Thrush and the ICANN Board of Directors:

The National Cable & Telecommunications Association (“NCTA”) appreciates the opportunity to submit the following comments on ICANN’s current proposals for trademark protection mechanisms for the new gTLD process, specifically, the Trademark Clearinghouse, the Uniform Rapid Suspension (“URS”) Procedure and the Post-Delegation Resolution Procedure (“PDDRP”) that are under consideration by ICANN.

Introductory Statement

NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation’s cable television subscribers, more than 200 cable programming networks, and suppliers of equipment and providers of services to the cable industry.

NCTA’s program network members have invested literally billions of dollars to establish and promote some of the best-known and most trusted brands nationally and internationally in cable programming and broadband content. Moreover, the cable operator members of NCTA are the nation’s largest providers of high-speed Internet access. From 1996 to 2008, the cable industry invested over \$146 billion (and almost \$15 billion in 2008 alone) to build out a two-way interactive network with fiber optic technology.

Many of these products provide the means by which the new gTLDs under consideration would be able to function. Accordingly, many of NCTA’s members have a special expertise that enables them to appreciate some of the issues that would be presented by ICANN’s proposed [New gTLD Program](#) (the “Program”), if implemented.

It is well recognized that, along with its numerous benefits, the advent of the Internet has created many opportunities for various types of predatory practices. In particular, trademark owners have been the target of those who, among other things, have sought to make a profit by the use

and registration of domain names that trade off the goodwill of established trademarks. These bad actors have also sought to make various uses of well-known marks to deceive and defraud consumers. As a group, trademark owners have been forced to expend huge amounts of effort, time and money to prevent and to halt such practices, both to protect the goodwill and the integrity of their brands, as well as to prevent consumer confusion and fraud. Significantly, these expenditures do nothing to increase the bottom line for trademark owners or to otherwise improve their position in the market. Rather, these expenditures are almost entirely defensive in nature, in that they are required to avoid harm and maintain the status quo.

I. Background

In response to the concerns raised by trademark owners regarding the Program, by [resolution](#) dated March 6, 2009, the ICANN Board authorized the creation of an Implementation Recommendation Team (“IRT”) to develop and propose solutions to the overarching issue of trademark protection in connection with the proposed introduction of new gTLDs. The IRT issued its [Final Report on Trademark Protection in New gTLDs](#) on May 29, 2009. The report identified various proposed solutions to address issues for trademark owners in the implementation of new gTLDs and recommended the implementation of a number of them, including a Trademark Clearing House, a Globally Protected Marks List, a Uniform Rapid Suspension System, a Trademark Post-Delegation Dispute Resolution Mechanism and a “Thick” WhoIs model for new gTLDs.

After a comment period, on October 4, 2009, ICANN released a third revision of the Draft Applicant Guidebook (“DAG 3.0”). The portions of the [DAG](#) governing trademark rights mechanisms only incorporated aspects of the IRT’s recommendations for a Trademark-Post-Delegation Dispute Resolution Procedure (limited to providing relief against registry operators that act in bad faith, with an intent to profit from the systematic registration of infringing domain names) and a Thick WhoIs model. ICANN rejected the proposal for a Globally Protected Mark List in its entirety. No position was taken by ICANN regarding the proposed Trademark Clearinghouse or Trademark Watch Services. By [letter](#) dated October 12, 2009, ICANN asked the Generic Names Supporting Organization (“GNSO”) to determine whether these two proposed rights protection mechanisms are appropriate and effective options.

In turn, by [resolution](#) dated October 28, 2009, the GNSO created the Special Trademark Issues (“STI”) review team to provide recommendations. On December 11, 2009, the STI review team submitted its [Report](#) to the GNSO, recommending alternatives to ICANN’s proposed RPMs. The GNSO unanimously endorsed these recommendations. On December 17, 2009, ICANN [solicited public comments](#) on the STI report.

After ICANN reviewed these comments, it issued revised proposals for a Uniform Rapid Suspension System <<http://www.icann.org/en/topics/new-gtlds/draft-urs-clean-15feb10-en.pdf>>, a Trademark Clearing House <<http://www.icann.org/en/topics/new-gtlds/trademark-clearinghouse-proposal-clean-15feb10-en.pdf>> and a Post-Delegation Resolution Dispute

Procedure (“PDDRP”) <<http://www.icann.org/en/topics/new-gtlds/draft-trademark-pddrp-clean-15feb10-en.pdf>>. ICANN also solicited comments on these proposals <<http://www.icann.org/en/public-comment/public-comment-201004-en.htm#urs>>, due by April 1, 2010.

II. Overview of Comments by NCTA

NCTA assumes that ICANN will adopt a Sunrise Procedure and will require new gTLD registries to incorporate the Uniform Domain Name Dispute Resolution Policy (“UDRP”) into their user agreements. As stated by the IRT and many others, however, the UDRP has been ineffective in deterring the registration and use of abusive domain names in the existing gTLDs or in limiting the substantial expense incurred by trademark owners in challenging the use and registration of such domain names.

The various additional trademark protection mechanisms proposed by the IRT approximately ten months ago have been reduced to three possible procedures, each of which will still require trademark owners to shoulder the burden and expense of challenging abusive domain name registration. Regardless of the possible virtues of the other options that were originally under consideration, NCTA assumes that these three are the only mechanisms that ICANN is still considering for adoption as protection for trademark owners against abusive registration of domain names in the new gTLDs. Given the likely magnitude of the problems that will come with approval of numerous gTLDs, NCTA supports the adoption of all three trademark protection mechanisms *only with appropriate changes*.

III. The Revised Proposal for a Uniform Rapid Suspension System

The URS is intended to provide a procedure similar to the UDRP for challenging abusive domain name registrations, with the added benefit to trademark owners that it would be both quicker and less expensive. Concomitantly, the URS would apply only to domain name disputes in which there is no genuine contestable issue as to infringement and abuse.

NCTA opposes many of the proposed changes to the URS. If adopted, these changes will make it significantly more difficult for a complainant to prevail in a URS proceeding, which already has a very high bar. As a result, the URS will not be an effective tool against abusive domain name registrations and it seems likely that it will go largely unused by trademark owners because the anticipated benefits from and the rationale for the URS would be severely weakened.

First, a number of the proposed changes run counter to the expressed goal of making an expedited procedure available. In particular, the current proposal:

- extends the time for a response to a URS complaint from 14 days to 20 days. Moreover, the proposal allows a registrant to request an additional seven days to respond with no requirement that cause be shown. *NCTA opposes this proposal.*

- states that the Registrant “should” be charged a fee if a response is filed more than 30 days after a determination. Any provision allowing for a late response after proper notice to the registrant is wholly inconsistent with the goal of creating an expedited process. There is no rationale for allowing a late answer if proper notice is given, much less an answer after a default determination. Indeed, the availability of such an option will encourage registrants not to file a response until after a decision is issued and it knows whether relief was granted. ***NCTA strongly opposes this proposal.***
- does not require that a fee be imposed for a late filing after the determination is made. If the registrant is not required to file a fee upon reexamination caused by its own delay, then either the examiner will have to do extra work without any additional remuneration or the complainant must pay the examiner for its additional work. Neither option is acceptable. As noted above, ***NCTA strongly opposes allowing late filings where proper notice is given and it opposes the lack of a requirement that the registrant pay a fee.***
- permits a registrant to obtain *de novo* review by filing an answer within two years after a decision is made against a defaulting registrant. It also requires the domain name in issue to resolve to its original IP address upon filing of an answer. There is no justification for allowing a late answer by a defaulting registrant who has notice after a decision is rendered, much less two years later. It would also allow a domain name to be restored to the original registrant even in the situation where a complainant has registered the domain name after the suspension ends and uses the domain name in connection with a website. The current proposal thus creates an incentive for the initial registrant to deliberately default and then threaten to file an answer within the two year period unless it receives a substantial payment from the trademark owner. ***NCTA strongly opposes this proposal.***

Second, many of the proposals would materially heighten the already daunting showing that a complainant must make in order to prevail on an URS complaint. In particular:

- The current proposal adds the following as factors that will support a defense that the registrant has not acted in bad faith:
 - the domain name is generic or descriptive and the registrant is making fair use of it.
 - the domain name site is operated solely in tribute to or in criticism of a person or business that is found to be fair use.
 - the registrant’s holding of the domain name is consistent with an express term of a written agreement entered into by the disputing Parties that is still in effect.
 - the domain name is not part of a wider pattern or series of abusive registrations because the domain name is of a significantly different type or character than the other domain names registered by the Registrant.

None of these defenses are included in the UDRP, but they are non-exclusive factors that may be considered as evidence that a domain name is not abusive under Nominet's Dispute Resolution Policy for .uk domain names. Notably, however, the current proposal fails to include the following presumptions supporting a finding of abuse that are also present in Nominet's Dispute Resolution Policy:

- the registrant provided false contact information.
- the registrant's holding of the domain name is consistent with an express term of a written agreement entered into by the disputing Parties and the complainant has been using the domain name exclusively and has paid for the registration or renewal of the domain name.
- the registrant is found to have made an abusive registration in three or more cases in the two years before the complaint was filed.

The decision to add any defenses in favor of registrants, but not to include any additional presumptions in favor of trademark owners, may be reasonably viewed to reflect a bias against trademark owners. Such an inference is further supported by the second and fourth proposed defenses. The second defense adopts what NCTA believes is the minority view under the UDRP. The fourth defense provides an exception to one of the factors favoring a finding of bad faith, namely that the registrant has engaged in a pattern of abusive domain name registrations, but for which no justification has been or could be offered. For example, if it shown that a registrant has registered in bad faith a hundred domain names that correspond to the marks of companies in one industry, but the domain name in issue corresponds only to a mark of a company in a different industry, the single domain name could be viewed as being of a different nature or character to the others registered by the registrant, but allowing such a defense should not be allowed. ***NCTA strongly opposes this proposal.***

- Similarly, the current proposal would provide that the following situations should not be sufficient in and of themselves to establish bad faith:
 - trading in domain names for profit, and holding a large portfolio of domain names; and
 - the sale of traffic (i.e. connecting domain names to parked pages and earning click-per-view revenue).

These provisions arguably seek to adopt views that may have been applied in the majority of UDRP proceedings, but they are views that **only** favor domain name registrants. If ICANN is going to take this approach, it should also add factors that have been found to support a finding of bad faith in the majority of UDRP decisions. ***NCTA opposes this proposal.***

- In discussing examination standards, the current proposal includes new requirements

regarding when a URS must be rejected. The proposal itself is not phrased clearly, but presumably was meant to require that the complaint be rejected unless the examiner has a clear belief that (1) there is some evidence that use of the domain name is infringing or is not a fair use (where a response was filed) or (2) some defense can be imagined to show the domain name is non-infringing or a fair use of the trademark (where a response was filed).

Assuming that NCTA has correctly understood the intent here, neither of these proposals is warranted. The first, at best, is redundant with the basic requirement that there are no genuine issues of fact as to the elements of the URS and, at worst, creates a higher standard of proof. The second circumstance requiring dismissal appears to require a complainant to prove a negative, namely, that there is no conceivable defense to the complaint. Simply because a defense can be imagined does not warrant dismissal of a complaint. Indeed, this burden of proof is so high that any complaint would have to be dismissed. ***NCTA strongly opposes this proposal.***

The proposal also goes on to state that the URS is only for “the most clear-cut blatant case of infringing conduct” and “only clear cases of trademark abuse.” This language also is, at best, redundant with the basic requirement that there be no genuine issues of fact as to the elements of the URS and, at worst, creates a higher standard of proof. Indeed, the language would appear to preclude a decision in favor of a complaint for a blatant case of infringing conduct, unless it is also a “clear-cut” blatant case of infringing conduct. ***NCTA strongly opposes this proposal.***

Third, given the extremely high burden of proof that must be met, NCTA believes that suspension of the domain name is an insufficient remedy, which allows opportunities for abusive registration of domain names at a later time. In particular, the current proposal:

- allows successful complainants to pay for one additional year of registration after the current registration period expires, during which time the domain name will remain suspended. Suspension remains no more than a temporary solution. Indeed, once the registration expires, the complainant will have to compete with any other entity that seeks to register the domain name, including the party that lost the URS or other cybersquatters. Given the high standard for prevailing on an URS complaint, transfer is a far more equitable and reasonable remedy. ***NCTA strongly supports a requirement that the domain name be transferred to the prevailing URS complainant.***

Fourth, the standard for imposing penalties on complainants has been lessened. In particular, the current proposal:

- eases the requirement for imposing a penalty against complainants from three abusive complaints either to two abusive complaints or to one complaint containing a “deliberate material falsehood.” No definition or guidance as to what constitutes an “abusive

complaint” has yet been provided. No rationale for these changes has been offered, particularly as there is no comparable provision for domain name registrants who have been found to have made repeated abusive registrations. Moreover, the proposal is completely silent as to the burden of proof that would be placed on the examiner before finding that a complainant filed an abusive complaint or one containing a deliberate material falsehood. If this proposal is adopted in any form, in light of the severe consequences of such a finding, the burden of proof placed on the examiner should be extremely high. Moreover, examiners are not well-situated to find there was a “deliberate material falsehood” because it goes to the complainant’s intent, which can only be inferred. The difficulty in ascertaining intent is exacerbated by the fact that the complainant is not given the opportunity to respond to such an allegation or finding. ***NCTA opposes this proposal.***

Finally, the current proposal makes additional changes to the appeal procedure that are inconsistent with the goals underlying the creation of an URS. In particular, the proposal:

- changes the standard of review from the requirement that the decision be found to have been “arbitrary, capricious or abuse of discretion” based upon the record to a *de novo* appeal on the record. Rather than providing any deference to the decision of the examiner, the proposal allows the unsuccessful appellant to simply hope for a different decision by a new reviewer. A *de novo* appeal will also take longer to resolve because every element of the URS must be considered anew. ***NCTA strongly opposes this proposal.***
- allows for submission of additional evidence by either party upon payment of a fee and permits the appeals panel to require additional evidence or statements. On the one hand, this procedure would allow a party to submit evidence on an issue where the examiner may have reached a conclusion without any evidence that related to the issue at hand. On the other hand, it will lengthen the time for a final decision. ***NCTA takes no position on this proposal. NCTA believes, however, that adoption of the proposal should be considered only in the event that the standard on review is changed to a de novo review (the adoption of which is opposed by NCTA). In addition, any such evidence should be limited to evidence that (1) was not available at the time of the initial proceeding or (2) relates to an issue that was not raised by the parties, but formed part of the basis for the decision.***

IV. The Revised Proposal for a Trademark Clearinghouse

In large measure, NCTA has no objection to most of the proposed changes for the Trademark Clearinghouse. They do not manifestly weigh in favor of either trademark owners or domain name registrants. NCTA also supports some of the changes and opposes some others. Notably, the current proposal:

- provides that the Clearinghouse is not prohibited from authenticating rights other than trademarks and service marks, so long as the data is kept separate from the Clearinghouse database. Assuming that this expansion would not diminish the ability of the Clearinghouse to perform its primary function and that, absent consent from the trademark owner, the use of the Clearinghouse database is limited to the purposes for which it was created, ***NCTA has no objection to this change.***
- expands on various specific criteria for Clearinghouse Service Providers. ***NCTA has no objection to this change.***
- amends the type of marks that can be authenticated from “registered and unregistered trademarks” to “registered and court-validated marks.” The inclusion of purported unregistered marks would defeat the purpose of the Clearinghouse because there would not seem to be any objective and cost-effective way to verify that such marks are valid. ***NCTA strongly supports this proposal.***
- requires all new gTLD registries to use the Trademark Clearinghouse for pre-launch mechanisms, including, at a minimum, either a Sunrise or a Trademark Claims service. ***NCTA strongly supports this proposal.***
- requires that a Trademark Claims notice provide the proposed domain name registrant with notice of the scope of the trademark owner’s rights and, if possible, the notice should include links to the Clearinghouse data on the trademark owner’s mark. Providing a proposed domain name registrant with such information may convince the registrant not to proceed with the registration of the domain name and thereby avoid the need for any adversarial proceeding, which is a benefit to all concerned. ***NCTA strongly supports this proposal.***
- eliminates the requirement that the recipient of a Trademark Claims notice must make an express representation to that effect that the party understands the notice and believes that the requested domain name will not infringe the trademark owner’s rights. Instead, the decision to proceed would be viewed as an implicit representation to that effect. If the proposed registrant must make an affirmative response, it is more likely that the notice was, in fact, understood and that the registrant is making a knowing and informed decision. ***NCTA opposes this proposal.***
- provides that, in order for a trademark to be validated and be eligible for either a Sunrise or Trademark Claims service, the registration must reflect that the mark was used or the Clearinghouse must make that determination. This formulation also rejects the GNSO-STI proposal that would exclude marks from countries where there is no substantive review of the application. There are, however, numerous countries where there is a substantive review of applications, but use need not be proven to obtain a registration. In those countries, after a set number of years, a registration may be cancelled based upon

non-use. Under this proposal, many marks from those countries would not be protected by the Clearinghouse.

The prior GNSO-STI proposal that would deny protection to registrations from countries where there is no substantive review makes it more likely protection will not be allowed for marks where there was no basis for the trademark registration at all. Moreover, the proposal does not explain how the Clearinghouse would confirm use of a registered mark, which would be an onerous exercise with results that would likely be questionable and inconsistent. *NCTA opposes the current proposal and supports the prior GNSO-STI proposal.*

- provides that all costs would be borne by the parties using the service because they are the beneficiaries of the service and should not be funded by ICANN from its fees. The fees paid to ICANN in connection with new gTLD applications will be substantial. Therefore, ICANN will also benefit from the approval of the proposal for new gTLDs and, in turn, the elements that will enable the proposal to be approved. Thus, it is eminently reasonable that ICANN also share in the costs that will inevitably be incurred by virtue of approval for new gTLDs registries. *NCTA opposes this proposal.*
- eliminates the express statement that trademark rights holders will pay a registration and renewal fee and that registry operators will pay an access fee. It is unclear if the current proposal is inconsistent with the prior proposal. If so, the decision regarding “who pays” will still need to be made eventually and it is preferable that all parties know as early as possible the details of the Clearinghouse. *NCTA opposes this proposal.*

V. The Revised Proposal for a Post-Delegation Resolution Procedure (“PDDRP”)

Although NCTA does not agree with many of the elements of the current PDDRP proposal, it only has strong concerns as to two of those proposals. Specifically, the current proposal:

- states that the PDDRP applies both to the new gTLD and to the Second Level Domains (SLDs) issued by the gTLD registry. For SLDs, however, the current proposal adds the requirement that the complainant establish the registry operator’s bad faith through “affirmative conduct.” The current proposal states that it would be insufficient to show that the registry operator had notice by virtue of the registrations themselves. Rather, a complainant would have to show, for example, that the gTLD registry has engaged in a pattern or practice of *actively encouraging* registration of SLDs that take advantage of the trademark with bad faith.

The current proposal offers no guidance as to how to distinguish between promoting the registration of SLDs in general and doing so in bad faith. Promotional materials concerning the registration of domain names are typically facially neutral and do not explicitly invite bad faith registrations. Indeed, presumably, no registry operator will expressly encourage abusive registrations.

Moreover, the proposal offers no guidance as to or examples of the types of evidence that would suffice to make the required showing. For example, the proposal should state whether any of the following be acceptable evidence that a gTLDs operator has been acting in bad faith:

- a failure to act after being put on express notice of abusive registration of domain names;
- a failure to require complete and accurate WhoIs information, either on a frequent or a regular basis;
- name-spinning, that is, providing prospective registrants with alternatives to domain names; or
- non-trademark related abuse such as failing to take action after notice of domain names used for spamming, phishing, distribution of malware, illegal access to other computers or, distribution of child pornography or fraudulent schemes.

Absent clarification as to the types of evidence that will support the required showing, NCTA strongly opposes this proposal.

- requires the complainant to establish (a) a bad faith pattern or practice of registering trademark infringing domain names ***and*** (b) a bad faith intent to profit from the systematic registration of domain names within the gTLD that are confusingly similar ***to the complainant's mark***. The latter requirement goes beyond requiring the complainant to show some specific harm, but rather requires proof that the gTLD registrar has a pattern of registering domain names that specifically infringe one of the complainant's marks. As a result, despite the degree of abusive conduct, there would be no basis for a PDDRP complaint against a gTLD operator where no one trademark owner has one mark that is specifically affected by abusive registrations. ***NCTA strongly opposes this proposal.***

NCTA's views on this issue are consistent with the comments submitted by WIPO on March 26, 2010, namely, that (a) the requirement that the gTLD registrar has engaged in affirmative conduct, as currently proposed, would cause the utility of the PDDRP would be extremely limited and (b) the requirement for a "substantial pattern" of or "systematic" trademark abuse does not take into account registrations that infringe the rights of numerous trademark owners. As to the latter, WIPO has suggested that the PDDRP allow for some form of joinder or class status for aggrieved trademark owners. ***NCTA agrees with WIPO's proposal.***

In addition to the two primary areas of concern described above, the current PDDRP proposal also:

- adds a provision that a finding of default can only be set aside for good cause. This requirement is fair. ***NCTA supports this proposal.***
- requires that default cases be determined on the merits. Requiring defaults to be

decided on the merits will stretch out the process unnecessarily. Registries are sophisticated businesses and can easily avoid this result simply by filing a response. Moreover, there would not be any good reason for a gTLD registry operator to ignore a PDDRP complaint. ***NCTA opposes this proposal.***

- provides that Panel decisions should be made within 45 days, absent good cause, 60 days is the maximum allowable time. As PDDRP proceedings have the potential of being complex, this is a reasonable proposal. ***NCTA supports this proposal.***
- provides that remedies against registry operators can be graduated including imposing remedial measures to ensure against future infringing registrations (new provision), monetary sanctions, suspension of accepting new gTLD applications (until there is a cure or for a set period of time) and, in extraordinary circumstances, termination of registry agreement. Assuming that the relief awarded will apply to all registrations in the gTLD and is not limited to future registration of domain names that are confusingly similar to the complainant's mark, ***NCTA supports this proposal.***
- provides that, instead of permitting PDDRP Decisions against a registry operator to be implemented, the proposed remedies are only a recommendation that must be approved or amended by ICANN. As there is no ICANN review of decisions denying relief, this second tier of review by ICANN only benefits the operator. Moreover, there is no time frame within which ICANN must make a decision and there is no stated standard of review to be applied by ICANN when reviewing the remedies. Moreover, there are no limitations concerning to whom the ICANN Board can delegate the review. ***NCTA opposes this proposal.***

Again, most of the proposed changes raise the bar for trademark owners who wish to object to practices engaged in by gTLD operators. Most importantly, the procedure, as recommended, may be all but useless to address the type of abuses suffered by trademark owners because (a) the unchanged requirement for standing protects abusive registrars that do not have particular trademark owners damaged by domain name registrations in their gTLD and (b) the requirement for affirmative action does not offer realistic examples of what behavior, if any, may qualify as affirmative conduct by the registry operator.

Conclusion

NCTA and its members appreciate the opportunity to provide their comments to ICANN on the foregoing trademark protection mechanisms, which are extremely important. If the Program is put into effect, there will be a potentially unlimited number of new gTLDs, each presenting the same problems engendered by the existing gTLDs. The threat of these adverse consequences has led many in the trademark and business community to oppose the Program in its entirety. Trademark protection mechanisms have been proposed to try to make the Program more palatable.

The current proposals, however, fall far short of the mark. We are extremely concerned that the

revised proposals will diminish any realistic prospect that these mechanisms will provide trademark owners with any practical remedies. The failure to explain the reason for most of the proposed changes also limits the ability to comment on the changes. If ICANN does not provide practical solutions to address these concerns, its promises to consider and balance the interests of all interested constituencies will have little, if any, meaning.

We believe that much more consideration must be given to the specifics of these proposals. NCTA also believes that there should be an opportunity for the exchange or “give and take” of views regarding the rationale for and the “pros and cons” of various proposals, as opposed to the current procedure consisting of a request for comments by ICANN, followed by the submission of comments by interested parties.

Finally, the anticipated problems from the creation of new gTLD registry operators already exist in the DNS, as currently constituted. Thus, NCTA also proposes that the current gTLD registry operators and their registrars should be subject to any new trademark protection mechanisms that may ultimately be adopted.

Respectfully submitted,

/s/ Jill Luckett

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