

May 6, 2009

Registrar Constituency Position on IRT Draft Trademark Protection Report

BACKGROUND

In May 2009, the Registrar Constituency ("RC") was asked to provide feedback regarding the Implementation Recommendation Team Draft Trademark Protection Report ("IRT Draft Report"). This Position Paper captures the overall sentiment expressed by the RC Members who provided feedback about this matter. Due to time constraints, however, no formal vote regarding this Position Paper was taken.

RC POSITION

The RC commends the IRT for its balanced and thoughtful considerations of the various interests shared among ICANN stakeholders, including: trademark owners, registries, registrars, and registrants. RC Members have, however, share a variety of concerns regarding the proposals contained in the IRT Draft Report. Although those concerns are too numerous to fully address in this Paper, the RC wishes to call attention to several concerns that appear to represent some of the most common among RC Members who have shared their views. The RC also wishes to express its commitment to reviewing the next version of the IRT Draft Report, and possibly submitting more detailed comments at that time.

1. IP Clearinghouse, Globally Protected Marks List and associated rights protection mechanisms, and standardized pre-launch rights protection mechanisms.

RC Members are particularly concerned about the concept of a Globally Protected Marks List. Although some RC Members see how a Globally Protected Marks List may be useful, many RC Members are concerned about the possibility of non-fanciful marks (such as arbitrary marks with generic meanings like "apple" or "delta") receiving heightened IP protection without merit.

2. Uniform Rapid Suspension System ("URS").

Some RC Members generally support introduction of a URS System, while other RC Members object to it in its entirety. There are a number of specific concerns raised by RC Members. First, some RC Members are concerned, with the possibility that registrants may at times be responsible for paying fees to defend against complaints brought under the URS system.

Second, some RC Members seek clarification that in order for registrants to be subject to a URS proceeding, the registrant must have an active website that allegedly infringes a trademark owner's rights; the mere registration of a trademarked name should not be sufficient to trigger URS proceedings. Accordingly, in the view of these RC Members,

the proposed URS process has relatively low barriers for its use, and additional safeguards should be considered to ensure that the URS is not used for abusive purposes.

Finally, RC Members wish to further clarify the proposal that URS evaluators must review complaints under the same standard as the UDRP, but with a much higher burden of proof. It has been pointed out that the IRT Draft Report actually changes the UDRP standard in the following way:

IRT Proposal:

“. . . whether the domain name has been registered OR used in bad faith. ” (emphasis added).

UDRP Standard:

“. . . your domain name has been registered AND is being used in bad faith” (emphasis added).

RC Members do not believe that the IRT should change the UDRP standard, and suggest that the IRT consider the potential ramifications of this subtle change.

3. Post delegation dispute resolution mechanisms at the top level.

RC Members agree that this section of the IRT Draft Report deserves significant attention. In its current form, this section is overbroad and simply too ambiguous and indefinite.

4. WHOIS requirements for new TLDs.

Some RC Members generally support the requirement of a thick WHOIS data model, while other RC Members object to it in its entirety.

Some RC Members in favor of a thick Whois model suggest that it would provide for uniformity and consistency in the database, as well as would facilitate efficient transfers of domain names.

Some RC Members who object to the thick WHOIS data model suggest that its consideration by the IRT is merely an attempt to circumvent the standard process for WHOIS changes and the work performed by the GNSO. Accordingly, these RC Members believe that changes to or mandates concerning WHOIS should not be considered by the IRT. Others have raised concerns about privacy issues and potential misuse of thick WHOIS databases.

CONCLUSION

The RC is under time pressure to prepare this Paper for consideration by the IRT pursuant to the IRT's narrow timeline. Accordingly, the RC eagerly anticipates additional opportunities to more fully review and consider subsequent versions of the IRT Draft Report in the near future.

The opinions expressed by the RC in this Position Paper should not be interpreted to reflect the individual opinion of any particular RC member.