NTAG Comment: IPC/BC Quest for New RPMs and the "Strawman Proposal"

The New gTLD Applicant Group (NTAG) submits these comments regarding ICANN staff's "strawman proposal," made in response to the IPC/BC quest for additional new rights protection mechanisms (RPMs).

NTAG is a group of applicants operating under the umbrella of the Registry Stakeholder Group. NTAG is a diverse group of over 90 members accounting for nearly half of all new gTLD applications. More than 50% of our members applied for only one TLD. Collectively we have paid ICANN in excess of $170 million in application fees and expect the timely resolution of the ICANN application review process.

As expressed in our previous letter on the RPM issue (http://gtldregistries.org/ntag/communications), a strong consensus of our membership does not support last-minute material changes to the RPMs in the Applicant Guidebook (AGB), which reflect a community-wide consensus. In addition, NTAG opposes any implementation of new RPMs that would apply only to new gTLDs and not to existing gTLDs.

The NTAG is supportive of a bottom-up policy development process that would review the costs and benefits of proposed RPMs that would apply to all TLDs. NTAG does not support layering on additional RPMs that apply only at the time of launch of a TLD. The existing and powerful RPMs in the AGB have been agreed to through the multi-stakeholder process and memorialized in the application agreement between ICANN and applicants. Absent strong and broad community support, these existing RPMs should not be tampered with by ICANN staff.

There can be no doubt that the strawman proposal represents changes to policy rather than implementation of decided policy. As such, community support through the GNSO, ICANN's gTLD policy arm, is required. Moreover, under the terms of the AGB, because the proposals would have significant impact on applicants, the applicant community should be supportive before ICANN attempts to change such agreements and any negative impacts must be mitigated by ICANN.

The Process

It is a mischaracterization to label the BC/IPC proposals as "community based." A small subset of the GNSO may have been consulted, but the proposals themselves were narrowly driven. Use of the word "consensus" to describe agreement between two of many GNSO groups is different from broad community support. Similarly, the strawman proposal was not agreed to or approved by the community at ICANN staff's consultation with representative

community members. It has come from the staff and not the community.

New and "enhanced" RPMs should have GNSO Council support to be considered at this stage and should apply to all TLDs. NTAG concurs with ICANN Chairman Steve Crocker's statement from the Toronto ICANN meeting[1] (emphasis added):

> "The rights protection in new gTLDs. The Intellectual Property Constituency and Business Constituency reached consensus on further mechanisms for new gTLD rights protection and agreed to socialize these to the rest of the GNSO and the Board looks forward to receiving input on these suggestions from the GNSO. So that is our plan, so to speak, which is we will continue to listen and wait for this to come up."

NTAG further agrees with NTIA Administrator Lawrence Strickling's letter to Chairman Crocker[2], which speaks in part to that issue and addresses appropriate methodology (emphasis added):

> "we encourage ICANN to explore additional trademark protections across all TLDs, existing and new, through community dialogues and appropriate policy development processes in the coming year."

Specific Proposals

Sunrise: notice requirement

NTAG does not object to either a 30-day notice to trademark holders regarding sunrise or a 60-day sunrise process, at the applicant's discretion.

The new requirement is a change to the AGB, but the introduction of a mandatory short (30 day) notice period to trademark holders about sunrise rules and opportunities should not cause a material hardship to applicants, especially when provided pre-launch.

Trademark Claims 1: extension from 60 to 90 days

NTAG believes there is no basis to extend Claims 1 from 60 to 90 days. Should the community want to consider an extension, it should be subject to GNSO support.

As basis for this position, NTAG notes:

1. Fadi Chehade's letter to United States Congressional leaders of 19 September 2012, which states in part:

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[1] http://toronto45.icann.org/meetings/toronto2012/transcript-public-forum-18oct12-en.pdf, p.12

[2] http://www.icann.org/en/news/correspondence/strickling-to-crocker-04oct12-en

> "For the first round of new gTLDs, ICANN is not in a position to unilaterally require today an extension of the 60-day minimum length of the new trademark claims service. The 60-day period was reached through a multi-year, extensive process with the ICANN community."[3]

NTAG concurs that ICANN should not—by interpreting an extension as "implementation''—unilaterally require extension of the 60-day minimum. NTAG further agrees the 60-day period is the result of a multi-year process and should not be arbitrarily changed without Council action.

2. The Special Trademark Issues Review Team's (STI) unanimous consensus that claims should be a pre-launch RPM (Sec. 5.1), and the STI's rough consensus that post-launch claims should not be required at all (Sec 7.1: IPC voted to approve, BC offered a minority statement on this point).

3. The ICANN Board's ratification of claims timing (GAC-Board Scorecard 6.1.2)

4. The STI's and GNSO Council's unanimous votes to require either Sunrise or trademark claims, but not both.

NTAG believes these community-based outcomes should stand as agreed to. Changes at this late date can come credibly from GNSO Council action only, and must consider any potential material hardship that can arise from changes to the Applicant Guidebook (AGB).

Trademark Claims 2: new RPM

Claims 2 is a new RPM proposal, not previously considered by the GNSO community, that requires community review, input and approval before it could be implemented. This proposal is a longer-term RPM with potentially significant impact, not merely implementation of an agreed-to RPM. Such a proposal requires exploration of the complex issues it entails and, if adopted, should apply to all gTLDs. By trying to implement Claims 2 without a fair community review, ICANN would be circumventing the very bottom-up multi-stakeholder process that is at the core of the ICANN model.

Beyond the issue of policy, there are many unanswered questions about a Claims 2 function itself. Further clarity is required on issues such as registrant impact, technical system configuration, risk assumption, payment and compensation methods, cost recovery, and registry and registrar technical commands. The purpose of the PDP process is to be the forum for the community to collaboratively answer questions such as these before recommending policy.

If the Claims 2 proposal is not removed from the strawman, it would apply only to

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[3] http://www.icann.org/en/news/correspondence/chehade-to-leahy-et-al-19sep12-en

new gTLD registries and would present an untenable outcome. As a new RPM, Claims 2 is clearly a change to policy, as well as a material change to the AGB. If implemented, it would present material harm to new registries working to compete with incumbent registries. Registrars could also be impacted if they elect not to build complicated Claims 2 systems and sell only incumbent gTLDs, unfairly disenfranchising their customers (registrants entitled to registration of non-infringing names) and negatively impacting new registries at the most vulnerable period of their existence.

Extension of Trademark Claims Scope

NTAG concurs with staff that an expansion of trademark claims scope (beyond exact match) is a matter of policy. It is further consistent with the following section of Fadi Chehade's letter to Congress:

> "It is important to note that the Trademark Clearinghouse is intended to be a repository for existing legal rights, and not an adjudicator of such rights or creator of new rights. Extending the protections offered through the Trademark Clearinghouse to any form of name would potentially expand rights beyond those granted under trademark law and put the Clearinghouse in the role of making determination as to the scope of particular rights. The principle that rights protections 'should protect the existing rights of trademark owners, but neither expand those rights nor create additional rights by trademark law' was key to work of the Implementation Recommendation Team…"

NTAG notes:

1. The STI voted with "Broad Consensus" to limit trademark claims to only identical match (See STI Sec. 4.3. The BC was the only dissenter, while the IPC approved).

2. The ICANN Board stated in no uncertain terms that the TC service should be limited to only identical match trademarks.

Again, applicants have relied on these long-settled community-based agreements. Their reversal now should appropriately come only from the entire community.

Blocking

Consistent with its stance on scope expansion, NTAG strongly believes any effort to block registrations, including the IPC/BC "Limited Preventative Registration," represents a change in policy and therefore should be referred to the GNSO Council if it is to be considered.

NTAG appreciates the opportunity to provide comment on this important matter.