

Editing by Kathy Kleiman, then Kristine Dorrain (KD), then Kathy again (KK) then Kristine again (KD). Circulated 5/17/2019 (for the first time, I believe, by Ariel)

QUESTION 4

Is the exact match requirement for Trademark Claims serving the intended purposes of the Trademark Claims RPM? In conducting this analysis, recall that IDNs and Latin-based words with accents and umlauts are currently not serviced or recognized by many registries.

- (a) What is the evidence of harm under the existing system?
- (b) Should the matching criteria for Notices be expanded?
 - (i) Should the marks in the TMCH be the basis for an expansion of matches for the purpose of providing a broader range of claims notices?
 - (ii) What results (including unintended consequences) might each suggested form of expansion of matching criteria have?
 - (iii) What balance should be adhered to in striving to deter bad-faith registrations but not good-faith domain name applications?
 - (iv) What is the resulting list of non-exact match criteria recommended by the WG, if any?
- (c) What is the feasibility of implementation for each form of expanded matches?
- (d) If an expansion of matches solution were to be implemented:
 - (i) Should the existing TM Claims Notice be amended? If so, how?
 - (ii) Should the Claim period differ for exact matches versus non-exact matches?

Proposed Answers & Preliminary Recommendations:

Q4

Answer: The Sub Team has differing opinions on whether the exact match requirement is serving the intended purposes of the Trademark Claims RPM.

Q4(a) What is the evidence of harm under the existing system?

Answer: The Sub Team has differing opinions on whether there is evidence of harm under the existing system of exact match.

Discussion:

Some Sub Team members point to their day to day experience that the existing system does not have a clear deterrence effect against registrations of confusingly similar matches, including typosquat variants and “exact trademark plus word” domain name applications. They believe that this system harms trademark owners’ ability to protect their trademarks in a cost-effective manner and increases their curative mechanisms burden after the harm has already taken place (especially the harm from cybersquatters). They also believe it harms the prospective registrants who may be unaware that some non-exact matches can be “actionable” under trademark laws or dispute resolution mechanisms for trademark infringement.

Other Sub Team members believed it relevant that none of the Subteam members in the paragraph above identified specific data (e.g., surveys or studies) that showed harm, and argued that “day to day experience” should not be considered “data.” Further, they pointed out that the exact match requirement for Trademark Claims already potentially harms some applicants, by potentially discouraging their registration of trademarked words that may also have non-trademark uses and be an

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otherwise legal usage. However, this would seem to be a criticism of the claims system generally, and not the exact match requirement.

Some Sub Team members noted that a) there is no proof of a specific pattern of correctable harm in the limited survey data available to the Sub Team and b) the URS is expressly designed to rapidly correct a wide range of activities involving registration of variants of trademarks which are a violation of ICANN's rules. There are no data known to the Sub Team about whether rates of cybersquatting on exact and non-exact matches differ in the new gTLDs compared to that in legacy gTLDs where there is no Notice for exact matches. Further, while no studies were undertaken to produce data showing a clear pattern of abusive variant registration, there is ample experience and evidence in the field that domains are being registered that are abusive variants of trademarks. In particular, there has been no development of data about the specific hypotheticals mentioned below (term indicating the product/service related to the business of the trademark owner; business descriptor indicating the type of an entity (e.g., INC, CO, CROP, LLC, GMBH, SARL); industry keyword related to the trademark; accent and umlaut). These members argue that to extend the protection of TM Claims Notices beyond exact matches would a) extend trademarks beyond their existing legal limits, b) create confusion for registrants and trademark owners alike should the trademark be a part of another word, e.g., THEater generating a confusing TM Claims Notice for registrants and a NORN to the trademark owner (assuming arguendo that non-exact-match would work in that fashion). Some Sub Team members note the oft-repeated discussion in the subteam that the 2009 rules were part of a careful balance – and that the exact match was a clear and express part of that balance.

NOTE: We don't have an ask on this question. We simply rambled on about our positions for over 1/2 page. What do we want people to comment on here?

Q4(b) Should the matching criteria for Notices be expanded?

Answer: The Sub Team has differing opinions on whether the matching criteria for the Claims Notice should be expanded.

Question: Please include any overarching comments on "expanded match" here, particularly any yes/no reaction to question 4(b) but note that we call for specific reactions in the subsections below. Our mandate, in the absence of clear evidence to make a change, is to maintain the status quo.

Discussion: Some members feel the additional effort could result in significant cost reductions to trademark owners, while others believe that the expansion goes beyond trademark protection into the legal use of dictionary words and common names and, further, the cost of false positives in expanded match will be borne by trademark owners as well as potential registrants and contracted parties (who others think are the primary beneficiaries of the new gTLD program). The WG has consistently been mindful of the balance the IRT and STI tried to strike and the trade-offs that were made at that time so, for this question, we note the primary arguments for and against and request community input on them, particularly on the concept of balancing costs and benefits to various parties of making changes versus maintaining the status quo.

Pros:	Cons:
Helps registrants understand that TM law actually is broader than exact matches and includes likelihood of confusion (swapping letters or	It's hard to communicate all the nuance of TM law in a single, readable, understandable notice presented to the customer at the point of sale for

Commented [4]: KD: I don't think it's helpful to refer to "the data" because what sparse data we have is limited at best and if we reference it, we should provide it so people know what we're referring to, and if we do that, we will lose folks. KK: Combined edits fine.

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Commented [5]: KD: Same comment as above. Also, we don't have a "a clear pattern" of anything. At all. We have a handful of random paid folks who were maybe turned away and likely confused, as Rebecca frequently points out. We have no data about actual people being turned away. This will confuse our readers (of the initial report). KK: ideally, I would like to find another way to say the same sentence – that our data does show potential registrants "are" being turned back even for exact matches (Analysis Group Final Report & Survey clearly show this data

Commented [6]: I think this paragraph is a really long, hard to read position statement of a fact that I don't think any person in the industry will argue with. I think the data is awful and doesn't tell us much, but I can tell you my common sense says some people probably didn't register domain names that might have been ok due to claims notices. If we want people to comment...

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<u>adding descriptors may not negate confusion if the intent is to trade off the goodwill of the mark</u>	<u>a \$10-25 transaction. This proposal adds to that complexity.</u> <u>Registrants are unlikely to actually have increased understanding.</u> <u>Separately, any expansion that involves non-exact matches such as “swapped” letters or similar changes will increase programming and other costs of identifying matches and has not been determined to be feasible.</u>
<u>May reduce cybersquatting</u>	<u>May stifle legitimate expression</u>
<u>It can reduce curative costs to TM owners if it lets registrants make more informed choices.</u>	<u>It can increase costs to registry operators and registrars through increased customer service inquiries and even potentially missed sales.</u> <u>It can increase barriers to entry to registrants with legitimate uses.</u>
<u>Could be automated or rely on TMCH functionality.</u>	<u>No evidence has been submitted that this is the case.</u> <u>The costs of developing this system are not defined and would have to be borne by someone.</u> <u>False positives would increase.</u> <u>Screening costs for NOC recipients would go up.</u>
<u>Example:</u> <u>TM+50 feature of the TMCH allows a brandowner to submit up to 50 labels that had already been adjudicated as abusive by a UDRP panel. Some suggestions for expansion add to that idea, while others do not.</u>	<u>Example:</u> <u>Many common words are already in the TMCH. Expanded match would mean that the owner of LOCALHOTEL.LONDON who runs a local hotel in London, or a location service for hotels in Longon, would receive a notice based on the registration of HOTEL for non-hotels. Likewise, a registered TM for “THE” which then would generate generating a claims notice for many non-exact potential domain names, including “THEater.[tld]”</u>

Commented [14]: Completely disagree. A well-crafted Notice & perhaps referral to additional info is quite likely to increase understanding

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Commented [16]: KD: I feel like this is just an internal comment, right? Deleted./KK—Kristine, tx for asking. This was not intended to be an internal comment, but a reflection of our fact-finding and data-driving analysis. I've put it back in because it seems a fair statement which sheds light on the discussion below.

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Deleted: As of 14 May, the Trademark Claims Sub Team has not yet developed a preliminary recommendation, but has discussed some related issues.

Commented [19]: KD: Deleted the internal note below because it's my understanding that these items are all staff meeting notes, not actually recommendations. KK: Agreed

Deleted: [We would respectfully ask how one sub team members “mentioning” an issue or “commenting” on issue can possibly rise to the level of a recommendation of the sub team? We don't think it is fair that it would.] 2) One Sub Team member mentioned the issue of registrars selling domain names to registrants who are not allowed to own them due to potential trademark infringement. Another Sub Team member commented that it is impossible for a registrar to know the registrant's intent to register/use a domain name, hence registrars cannot be held responsible for the registrant's subsequent infringement.¶

There has been no analysis of data about the prevalence of different types of domain names in cybersquatting cases to correlate with extended match proposals.

Recommendation (Staff Note):

1) The Sub Team acknowledged the usefulness of the Abused Domain Name Labels service (“50 Plus”), which allows rights holders to register up to 50 abused labels related to a registered trademark in the TMCH. However, 50 Plus is limited to abused labels that have already been adjudicated, and those labels will unlikely be reregistered.

3) Some Sub Team members discussed the **Ongoing Notification** service provided by the TMCH. It will notify the trademark owner, following the 90 day Trademark Claims Period, when someone has activated a domain name in a new gTLD that contains the exact match or additional variation labels of the registered trademark in the TMCH.

4) Some Sub Team members note the oft-repeated discussion in the Sub Team that the 2009 rules were part of a careful balance – and that the exact match was a clear and express part of that balance. They note that in survey responses Registries, Registrars and Registrants have opposed the expansion of the TM Claims notice match.

Q4(b)(i) *Should the marks in the TMCH be the basis for an expansion of matches for the purpose of providing a broader range of claims notices?*

Proposed Answer: While there is no consensus that the matching criteria should be expanded, most members generally assume that the TMCH would be the likely implementation for any expansion because contracted parties are already integrated with, and querying, the TMCH for claims notices today, though we have no idea of how it would technically work. We invite community comments on:

1. Feasibility (including technical pros and cons) of using the TMCH.
2. Alternatives to the TMCH.

Question: Are we missing anything in our consideration?

- **Q4(b)(ii)** What results (including unintended consequences) might each suggested form of expansion of matching criteria have?

Answer: Because the WG is deeply divided on this, we summarized the potential positive and negative results in Q4(b), above.

Question: We invite community members to further explicitly list results and consequences that we haven't yet identified here. Ideally, community members should quantify their opinions with data.

Discussion: Some Sub Team members believe that expansion of matching criteria, in general, might help trademark owners better protect their trademarks in a cost-effective manner. Otherwise, some Sub Team members say that trademark owners will be forced to "engage in curative mechanisms for the variants that skirt the exact-match notice rules"; other Subteam members note that there is very little if any data on this topic in New gTLDs, and no data analysis that attempts to identify types of potential expansion and correlates that with numbers of actual cybersquatting instances. Other Sub Team members further note that expansion would increase false positives, to the detriment of both domain name applicants and trademark owners forced to sort the wheat from the chaff.

In a previous study, the Analysis Group had concluded that the unintended consequences may include an increase of the implementation costs for registries and registrars. This conclusion was based on extensive research of UDRP and interviews by this professional research group, but some Sub Team members are concerned that it was not based on any cost-benefit analysis. One Sub Team member

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[Ditto to objection raised above that one Sub Team members "suggestion" does not a recommendation make.] One Sub Team member suggested that the Sub Team may consider discussing whether the Ongoing Notification service for additional variation labels should also be provided during the Trademark Claims Period. This would raise several follow-up questions:¶
● Will domain name applicants also receive notice?¶
● Should there be any cost for the service during the Trademark Claims Period?¶
● How do the specific variations accepted by the Ongoing Notifications service stack up against the ideas for expanded match currently being discussed in the Sub Team?...

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commented that the expanded matching criteria still cannot usefully capture the “bewildering variety” of non-exact matches.

Q4(b)(iii) What balance should be adhered to in striving to deter bad-faith registrations but not good-faith domain name applications?

Answer: The balance is between generating match criteria that cover as many applicable scenarios as feasible and avoiding a potential overflow of false positives due to “bad matches”. Prospective registrants should be appropriately notified by a well-crafted Claims Notice regarding a potential problem with their chosen domain names.

Question: Do you agree with the balance suggestion above? Do you have additional suggestions?

Discussion: There is consensus that the current Claims Notice does not fulfill this requirement for exact matches. There is no consensus on whether or how the Claims Notice could adequately explain an expanded match. Some members of the Sub Team argue that the current process should not be expanded until there is reason to believe that it is effective as to exact matches, because if it doesn't work now then expansion is even more likely to be unjustified.

Q4(b)(iv) What is the resulting list of non-exact match criteria recommended by the WG, if any?

Answer: The Sub Team has not approved the concept much less developed a proposed list of non-exact match criteria, if the matching criteria for the Claims Notice were to be expanded, but seeks community input in case the result of the public comment period suggests it as a path forward.

Discussion: Some community members believe that the data do not support expanded matches. However, for completeness, we note the following criteria that have been suggested by some Subteam members to date (noting that we also have no solution for how the expanded matches are identified or validated). Those subteam members who supported an expansion contended that the expansion of match criteria, if any, should not be limitless and should be narrowly based on real work experience with infringement, as well as technical implementability by the TMCH. They include:

- term indicating the product/service related to the business of the trademark owner;
- business descriptor indicating the type of an entity (e.g., INC, CO, CROP, LLC, GMBH, SARL);
- industry keyword related to the trademark;
- accent and umlaut.

No consensus was achieved on these proposals.

Recommendation (Staff Note): As of 14 May, the Trademark Claims Sub Team has not yet developed a preliminary recommendation, but has discussed some initial ideas/concepts/proposals for the expanded match, if the matching criteria for the Claims Notice were to be expanded.

[possibly a comment, but does not belong in Recommendation section] Other Sub Team members commented that the URS is underutilized due to the limitations of the remedy, hence it is not an appropriate basis upon which to discern the “pattern” of problematic new gTLD registrations. Other

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Prospective registrants should be appropriately notified by a well-crafted Claims Notice regarding a potential problem with their chosen domain names. There is consensus that the current Claims Notice does not fulfill this requirement for exact matches. There is no consensus on whether or [17]

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Sub Team members noted that no other sources of data about patterns had been identified, and that the process is supposed to be evidence-based. The burden of providing evidence is on those who would propose an expansion.

3) One Sub Team member suggested that the Claims Notice be issued for a domain name where the string contains the exact match of the trademark registered in the TMCH. This idea did not receive wide support from the Sub Team because of the significant problems of false positives.

4) One Sub Team member suggested that the "Proposal for Smarter Non-Exact Matches" submitted during the TMCH discussion in 2017 should be reconsidered. The Sub Team has not yet discussed this proposal.

Q4(c) What is the feasibility of implementation for each form of expanded matches?

Answer: The Sub Team team has differing opinions on the advisability much less the feasibility of implementing expanded matches.

Discussion: Some Sub Team members believe it is feasible due to the existence of the 50 Plus service. One Sub Team member explained that the 50 Plus service is still technically based on exact match.

Some Sub Team members believe that the feasibility is low due to the difficulty of amending the Trademark Claims Notice in order to effectively explain the issue of non-exact matches to prospective registrants. They believe that there is a likelihood that the Claims Notice may become even more intimidating, hard to understand, or otherwise inadequate. Furthermore, these Sub Team members believe it is difficult to strike a balance between generating a comprehensive non-exact match criteria that covers many applicable scenarios and avoiding a potential overflow of false positives due to "bad matches".

Q4(d)(i) If an expansion of matches solution were to be implemented:
(i) Should the existing TM Claims Notice be amended? If so, how?

Answer: If an expansion of matches solution were to be implemented, the existing Trademark Claims Notice should be amended.

Question: Do you have suggested language for the TM Claims Notice that you would like to propose?

Discussion: Since there was no consensus to expand matches, the Sub Team did not consider this question in detail. The Sub Team did not conclude additional Implementation Guidance should be included besides those outlined in the Sub Team's recommendations for Question 3 with regard to revising the language of the Claims Notice (above).

Q4(d)(ii) (ii) Should the Claim period differ for exact matches versus non-exact matches?

Answer: N/A. Since there was no consensus to expand matches, the Sub Team did not consider this question in detail.

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Commented [44]: KD: I think these points deflect from the question and will derail the community by drawing them into our conflict. I propose we stick as closely as possible to the questions, recommendations, and description of our questions/sticking point. We don't need to re-litigate every point in our issue report. Even WT5's initial report didn't do that.
KK: The public should have the benefit of our analysis and data, which includes the findings of these two sentences.

Commented [45]: KD: These appear to be staff notes?
KK: Kristine, if your recommendation is to delete, I support.

Commented [46]: Yep

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Sub Team Discussions:

[2 May 2019](#) , [8 May 2019](#) , WG Mailing List ([8 May 2019](#))

Page 2: [1] Commented [6]	Dorrain, Kristine	5/28/19 8:36:00 PM
I think this paragraph is a really long, hard to read position statement of a fact that I don't think any person in the industry will argue with. I think the data is awful and doesn't tell us much, but I can tell you my common sense says some people probably didn't register domain names that might have been ok due to claims notices. If we want people to comment we need to keep our statements as neutral as possible.		
Page 2: [2] Commented [7]	Author	5/28/19 8:36:00 PM
KK: I support deletion here. There is no recommendation of the sub team on this list of possible match criteria expansion ideas. We've barely even delved into them. As Staff notes, this is a suggestion of "Some Sub Team members" – and that does not a recommendation make...		
Page 2: [3] Commented [8]	Dorrain, Kristine	5/28/19 8:36:00 PM
I only meant to delete the preamble and restored this deletion for discussion. I also don't recall discussing this but if there is going to be a proposal put to the community, we can't have them comment on an idea, it needs legs. We can delete later if we disagree, but flagging this for now.		
Page 2: [4] Commented [10]	Author	5/28/19 8:36:00 PM
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Page 2: [5] Commented [11]	Dorrain, Kristine	5/28/19 8:36:00 PM
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Page 2: [6] Commented [12]	Rivka T	5/29/19 1:55:00 PM
Process note: Kristine was generally of the opinion that we should stick to where there's consensus. I think that's fine, but it seems to me that violating that rule where (and only where) one constituency is seeking basic changes to expand the Notice system is misguided and potentially biased. If we add this in, why should we not add in all the points on which we are in disagreement?		
Page 3: [7] Commented [15]	Author	5/28/19 8:36:00 PM
KD added new paragraphs and table KK added "the expansion goes beyond trademark protection into the legal use of dictionary words and common names, and further, ..."		
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Page 4: [12] Deleted	Dorrain, Kristine	5/28/19 1:19:00 PM

Page 4: [13] Commented [27] Author 5/28/19 8:36:00 PM

KD: I don't understand this. It's stating the status quo. KK: It's a little hard to see with the edits, but if the suggestion is to delete: "Otherwise, some Sub Team members say that trademark owners will be forced to 'engage in curative mechanisms for the variants that skirt the exact-match notice rules,'" I could live with that.

Page 4: [14] Commented [28] Author 5/28/19 8:36:00 PM

KD: Propose deleting this. See my suggested alternative. KK: I think most of this is a fair summary of the two sides of the Q4(b)(ii) question, our discussion and what we found in our data and outreach.

Page 4: [15] Commented [29] Dorrain, Kristine 5/28/19 8:36:00 PM

KD: In the interests of a shorter, readable doc, my suggestion is not to repeat what's been said, instead direct folks to the table that contains all of this.

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KK: I added this line, but then deleted it with the above.

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KK deleted but KD restored it so we can discuss it.

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