

February 27, 2012

Comments of the Non-Commercial Users Constituency (NCUC)

re: Defensive Applications for new gTLDs

The Non-Commercial Users Constituency (NCUC) is pleased to submit its comments regarding the issue of Defensive Domain Name Registrations in the new gTLD process. The Non-Commercial Users Constituency (NCUC) consists of more than 250 members – individuals, small and large organizations – and represents a wide range of civil society interests within ICANN.

The Non-Commercial Users Constituency (NCUC) is very concerned with this initiative, which attempts to reconsider the scope and breadth of the Rights Protection Mechanisms (RPMs) in the new gTLD programme. Our objections to this reconsideration of the RPMs are based on issues of justification and timing.

NCUC believes that the current framework for the protection of trademarks in the domain name space is more than adequate. ICANN's policies and rules are the only existing framework in the Internet that provides so many safeguards to the intellectual property community at various levels of the process. We count five (5) different RPMs that seek to protect trademarks and brand names both at the top and second levels. To be more specific, the current framework of RPMs includes:

- 1) A formal Objection and Dispute Resolution Process administered by the World Intellectual Property Organization;
- 2) An Objection Process through ICANN's Governmental Advisory Committee;
- 3) The Uniform Rapid Suspension System (URS);
- 4) The Post Delegation Dispute Resolution Mechanism (PDDRP); and,
- 5) The Uniform Domain Name Dispute Resolution System (UDRP).

On top of all this, there is the availability of court proceedings in every country. Together, these measures are more than sufficient to provide adequate protection to the rights of intellectual property holders.

The call by certain parties for additional protection at the top and second level domain names is unjustifiable. Nowadays, it has almost become a standard practice for defensive registrations to be part of the 'brand management' portfolio of various brand and trademark owners, but we have yet to see conclusive data – or any data at all – supporting the actual need for defensive registrations and whether actual costs of such registrations are excessive. Defensive registrations have been based on the mistaken presumption that trademark owners must 'own' all terms matching or close to their trademark in the domain name space. However, there is not enough evidence to suggest whether defensive registrations are necessary or the true impact they have within the registration culture. Moreover, there is not enough evidence to suggest that defensive registrations are primarily aimed at consumer protection, as is normally the justification, or they are conducted in a manner that seeks to establish control over terms in the domain name space.

The second and very important issue is one of timing. At the end of last year, the Generic Names Supporting Organization (GNSO) Council has been discussing and debating about a possible review of the Uniform Domain Name Dispute Resolution Policy (UDRP) – an issue that the majority of the ICANN community felt had to be addressed. Concerns were expressed over the potential impact of such a review upon the roll out of the new gTLDs. The decision of the GNSO Council to postpone the review of the UDRP has signalled the general understanding that interfering with any of the RPMs at this time is not advisable and, therefore, the ICANN community should wait and start evaluating them after the new gTLDs have rolled out. NCUC, therefore, finds it very disconcerting that this same justification is not used for these current discussions. This is a double standard.

We all have witness the recent Congressional and Senate Hearings on ICANN's new gTLD programme and, in particular, the concerns of certain intellectual property entities regarding the existing and newly-established RPMs. However, there is no evidence as of yet to suggest that ICANN needs to reconsider at this early stage of the program additional provisions to these RPMs or even to seek to create new ones. The application period is not concluded yet and we have yet to experience the effects (positive or negative) of the existing RPMs.

Given the fact that both the URS and the UDRP are meant to be reviewed at different times after the launch of the new gTLD programme, we strongly suggest that any reconsideration of additional RPMs should be postponed until after such reviews have been conducted and have established that there is a tangible need that warrants the re-evaluation of the existing RPMs and their substantive provisions.

NCUC believes that the timing of this issue is bad and can distract the ICANN community from other important issues such as IDNs, Support for Applicants in the Developing World and the smooth roll out of the programme in general.

Respectfully submitted,

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On behalf of the Non-Commercial Users Constituency (NCUC)