

Position statement of gTLD Registry Constituency, 23 May 2007

Re: Recommendation to the GNSO Council Regarding Policy Work on Protection of IGO Names and Abbreviations in line with WIPO 2

INTRODUCTION

The Intellectual Property Constituency (IPC) has prepared a statement regarding next steps with respect to the request from the World Intellectual Property Organization (WIPO) for ICANN to consider "Protection of IGO Names and Abbreviations in line with WIPO 2".

[available at: <http://gnso.icann.org/mailing-lists/archives/council/msg03368.html>]

The IPC has recommended:

"The GNSO Council should request an Issues Report from ICANN staff to further explore the issues involved in introducing a separate dispute resolution procedure (DRP) specifically for addressing disputes involving IGO names and abbreviations. Based on this Issues Report, the GNSO Council may then consider launching a PDP on the topic. "

The Registry Constituency (RyC), for the reasons set forth in this statement, disagrees with the IPC recommendation, and urges the GNSO Council not to request an Issues Report on this subject.

There is an extensive background to this statement. In brief summary, after ICANN adopted the Uniform Domain-Name Dispute Resolution Process (the "UDRP") in 1998, there was a Second Internet Domain Name Process (WIPO-2), commencing in 2003, that evaluated whether the UDRP should be expanded or amended to provide procedures for dealing with trademark related issues that were not covered by the UDRP. These included questions whether there should be new processes to address domain-name issues arising in connection with personal names; International Nonproprietary Names for Pharmaceutical Substances; names of international intergovernmental organizations (IGOs); geographical indications; indications of source or geographical terms; and tradenames. An ICANN working group was formed, and, after more than a year of deliberations, the group was unable to reach a conclusion and failed to agree on the text of a Final Report. (See: <http://www.icann.org/committees/JWGW2/final-report/>)

After various consultative processes within WIPO, the WIPO member states, in February 2003, recommended that two categories of identifiers should be protected against abusive registration as domain names, namely, (a) the names and acronyms of IGOs and (b) country names (being one particular type of geographical identifier). Some member states, including the United States, Canada, and Australia, formally disassociated themselves from one or both of these WIPO recommendations.

After further deliberations within the GAC and WIPO, the recommendation relating to country names was dropped, and the current proposal from WIPO relates exclusively to the names and acronyms of IGOs. The current proposal is for the establishment of a new

DRP, separate from and in addition to the existing UDRP. The proposed new DRP would vary from the UDRP in some very significant ways. The UDRP does not implement a treaty, and UDRP decisions have no legal status under national law. By contrast, the proposed new DRP would require binding arbitration, with legal status in national courts, and would implement a treaty that has not been adhered to by many nations.

The IPC was asked by the GNSO Council to make a recommendation on the current proposal, and on April 5, 2007, the IPC made the recommendation set forth above.

DISCUSSION

In May, 1903, the Business Constituency (BC) submitted a statement to Paul Twomey on WIPO2, including a discussion of the proposal to protect IGO names and abbreviations. [available at: <http://www.icann.org/correspondence/cbuc-to-twomey-cerf-21may03.htm>]

The BC analysis poses questions that have still not been answered. The failure to answer these questions is a strong argument against support of the current IPC recommendation.

According to the BC statement:

Has WIPO identified a real problem?

– International Organisations (IGOs)

WIPO identifies the problem as the claim of a false association with an IGO and/or the possibility of user deception as a result: i.e. bad faith confusion.

How many actual problems of bad faith confusion have there been?

- The BC understands there have been very few. There are only 91 registered IGOs in the world. The target problem is often free-speech sites set-up by entities with a political message related to the IGO: while this is irritating, confusion as to ownership is unlikely to be lasting. Moreover, content regulation is not within ICANN's mission.
- If there is a real need, the correct solution, as recognized in §168 of the WIPO report², should be a new WIPO treaty because the solution would create new international law: but WIPO was not prepared to go that far. This implies that the need for any change is uncertain.

What existing protection is there?

- IGOs already have a privileged domain space .int. If a bona fide registrant sets up in say .com with an identical name, would there really be confusion?
- Certain IGOs have trademark registration: the existing UDRP works for them already.

Is the solution proportional to the problem?

- WIPO seeks protection not only for the names but the acronyms of IGOs. The protection would not require the UDRP's cumulative tests for bad faith: the fact of registration could be enough for a successful challenge. This goes too far and, as the WIPO report showed, may involve unnecessary disputes over names such as *who*. Is this the World Health Organisation, the pop group or the cult sci-fi figure Dr. Who? The off-line world differentiates by being context specific. These proposals are context neutral.

Is there a better solution?

- IGOs can only register once in [the domain] .int. ICANN should allow IGOs to have multiple registrations (such as the name and the initials) in the .int space.

The Registry Constituency finds these arguments persuasive.

The fundamental question about the current proposal remains - whether or not ICANN should become a global law making body. The WIPO 2 recommendations are tantamount to asking ICANN to become an "enforcer of treaties", which is not its proper role. The treaties in question are not enforced in every signatory nation in the same way, and a globally uniform enforcement system will impinge on national law to some extent. This is "mission creep" and the establishment of a dangerous precedent.

There are limits on what ICANN can do. The technical administration of the Internet does not give it the power to establish binding arbitration as a means for deciding all controversies that may arise from use of or administration of the Internet. For example, it could not force the IETF to use arbitration in lieu of its "rough consensus" procedures.

The establishment of the original UDRP was justified as an extension of technical administration for a variety of reasons, including the widespread concern that the proliferation of cyber-squatters and their extortionate demands threatened the stability of the DNS. The UDRP became the solution to the above problems, but only on the condition that UDRP decisions did not supersede the jurisdiction of any national court.

CONCLUSION

RyC urges the GNSO not to accept the IPC recommendation. There is no sound basis for requesting an Issues Report on this subject. The proposed DRP is far from ICANN's mission of technical coordination of the domain name system and the protection of security and stability of the Internet. It would be a radical departure from the current globally accepted understanding of ICANN's role.