

COMMENTS OF COPYRIGHT COALITION ON DOMAIN NAMES In response to WIPO2 RFC-2

December 28, 2000

The Copyright Coalition on Domain Names (CCDN) appreciates this opportunity to respond to the Request for Comments on the Issues Addressed in the Second WIPO Internet Domain Name Process (WIPO2 RFC-2).

CCDN brings together ten major associations of copyright owners (listed at the end of this submission) with a common goal of preserving and enhancing free, unfettered, real-time public access to Whois and other directory services. These tools of the Domain Name System (DNS) are essential for combating online copyright piracy, and for facilitating the licensed use of copyrighted materials online. Robust and publicly available Whois services are also critical for advancing law enforcement, consumer protection, parental control, and other vital social goals in the online environment. All these objectives depend upon accountability and transparency in the DNS: the ability of Internet users to know with whom they are dealing when they visit a particular site. Whois provides this accountability and transparency and is thus a crucial tool for all Internet users.

Of course, many copyright owners are also trademark proprietors. CCDN participating associations and their members have been active advocates for the creation of a Uniform Dispute Resolution Procedure (UDRP) to deal with cybersquatting problems, and have been active users of the UDRP system since its inception.

These comments are directed primarily to the issue identified in RFC-2 as “Technical Solutions for Domain Name Collision Control.” We also offer some brief comments on the issue of expansion of the UDRP.

I. Whois as a Technical Solution for Domain Name Collision Control

A. Background

The first WIPO Process proposed mechanisms not only for the resolution of disputes between intellectual property owners and domain name registrants, but also for the prevention of such disputes. As noted in paragraph 25 of RFC-2, WIPO was fully aware, from the beginning of the first WIPO Process, of the critical role that databases such as Whois and other directories could play in dispute prevention. This perspective was reinforced by numerous written comments and input from public consultations during the first WIPO Process.

In chapter 2 of the Final Report that was the culmination of that process, WIPO made a series of recommendations on topics such as the collection of accurate and reliable contact details from domain name registrants; the real-time public availability of

such contact details; safeguards against misuse of this information; registration payment and procedures; representations required of registrants; and measures to deal with inaccurate and unreliable contact information. These thoughtful and practical recommendations have formed the basis for the requirements for free, real-time public access to Whois data that now apply throughout the generic Top Level Domain (gTLD) environment.

The WIPO2 process provides an opportunity for WIPO to reaffirm its earlier recommendations regarding the role of Whois data in dispute prevention. Such a reaffirmation would be particularly valuable in three areas.

B. ccTLDs

First, the operators of country code Top Level Domains (ccTLDs) should be encouraged to adopt policies for the collection, verification and public availability of contact details that parallel (or even improve upon) those now applicable in the gTLDs. Of course, such policies should also be incorporated in the model best practices recommendations that WIPO is now preparing for the ccTLDs.

C. New TLDs

Second, WIPO should strongly recommend to ICANN that the policy of free and unfettered public access to a full range Whois data be extended from the current gTLD environment into any new Top Level Domains. While this recommendation appears consistent with ICANN's publicly announced approach to the evaluation of proposed new TLDs, at least some of the applications approved by the ICANN Board last month for further negotiations in November 2000 do not conform to this approach. These applications, if implemented in their current form, would reduce the level of unrestricted public access to this data below the status quo that now applies to existing gTLDs. (In this regard, we call WIPO's attention to the criteria for new TLD Whois access and searchability proposed by the Intellectual Property Constituency of ICANN's Domain Name Supporting Organization [see http://ipc.songbird.com/New_TLD_Safeguards.htm,] and subsequently endorsed by both the Business and ISP constituencies of the DNSO.) New TLDs are unlikely to be successful in any of their legitimate objectives if they do not incorporate in their operations from the outset the well-established Whois policies needed to help prevent intellectual property conflicts, as well as to promote public confidence and accountability.

D. Cross-registry Whois

Third, while the existing gTLD regime regarding collection, verification, and availability of Whois data is acceptable as a baseline, it can and should be strengthened in order to improve its ability to prevent conflicts between intellectual property owners and domain name registrants. Paragraph 25 of RFC-2 succinctly summarizes a key ingredient of what is needed: "a searchable database that would operate on a variety of platforms and be compatible with all relevant DNS registration authorities" (emphasis added).

Within the gTLD world, this goal of a one-stop source for all Whois data from all registrars is reflected in the Registrar Accreditation Agreement (RAA); but so far there has been little progress toward it. In fact, with the introduction of competition among gTLD registrars and the allocation of responsibility for Whois services to the various registrars rather than to the single gTLD registry, public access to gTLD Whois data is more fragmented, less consistent, and less robust today than it was when the Final Report of the first WIPO Process was issued.

This unacceptable trend must be reversed. As the world of domain names grows and diversifies, with the rapid expansion of ccTLDs and the introduction of new TLDs, the dispute prevention function of Whois could be drastically compromised unless the technical and business impediments to comprehensive cross-registry Whois services are removed as quickly as possible. While some work is underway within the ICANN environment to address this issue, the effort would receive a substantial boost were WIPO to reaffirm the crucial role of accurate, reliable and publicly accessible Whois data for the prevention of disputes in every TLD. Of course, WIPO should take into account the output of the current effort within ICANN to promote the prompt and full implementation of the existing Whois obligations of registrars under the RAA.

II. Expansion of the UDRP

Turning from dispute prevention to dispute resolution, CCDN urges WIPO to approach with care the issue of expanding the Uniform Dispute Resolution Process (UDRP) to deal with new subject matters.

A. Personal Names

With particular regard to personal names, WIPO should study the degree to which the abusive registration of names may already be actionable within the UDRP as it now exists. Whenever the registration being challenged is either identical or confusingly similar to a personal name that sufficiently serves as an identifier of source or sponsorship to qualify as a trademark or service mark, and when the other elements required under the UDRP can be established, a remedy for abusive registration and use already exists.

A number of cases have been initiated under the UDRP concerning the registration of a particular domain name that takes the form of a personal name. In some cases, the elements required for obtaining cancellation or transfer of the domain name have been established; other cases raising such claims were not successful. Whether or not WIPO ultimately concludes that the UDRP should be expanded to cover abusive registration and use of personal names generally, it certainly must give careful consideration to the fact that some instances of such abuse are already actionable under the UDRP.

Furthermore, any proposal to extend the UDRP to disputes involving personal names that do not also qualify as trademarks or service marks must take into account the

relative lack of uniformity among the laws of various nations on this topic. Although the existing UDRP addresses only a small subset of the trademark disputes that could arise in the DNS environment, it benefits from the fact that most countries have adhered to the same international minimum standards for trademark protection. This common underlying legal framework helps to minimize (although it certainly does not eliminate) the problems faced by dispute resolution panelists in deciding questions of confusing similarity, prior rights, bad faith and the like. This pre-existing global framework is much weaker with respect to rights in personal names outside the sphere of trademark law. In the United States, these rights are not even uniform within the nation as a whole, since rights of publicity are entirely a creature of state law.

B. Impact of the proposed .name TLD

CCDN notes that one of the new TLDs provisionally approved by the ICANN Board last month is ostensibly targeted at the registration of personal names by individuals as domain names. Our examination of the relevant application materials leads us to conclude that, for all practical purposes, the proposed new .name TLD will function as an unrestricted and open TLD, similar to .com, .net or .org. While domain names would be registered in the new TLD only at the third level (e.g., “xxxx.yyyy.name”), there is no meaningful requirement that the characters arrayed in this fashion correspond to a given name and surname, nor, if they do, that this name correspond to that of the registrant.

At this point it is difficult to predict what impact the introduction of the .name TLD will have on the prevalence of abusive registration or use of personal names as domain names, and thus impossible to say what changes to the UDRP, if any, should be made in response. It is clear, however, that there is no justification for diminishing the role of Whois in providing transparency and accountability, or for hobbling its dispute prevention function, in the .name environment. Especially since the new TLD appears functionally indistinguishable from the existing gTLDs, it must provide at least the same level of real-time and unfettered public access to Whois data on .name registrants.

C. Other anticipated demands on the UDRP system

Finally, with regard to all the matters to which it is proposed to expand the scope of the UDRP, WIPO should consider the new demands already likely to be imposed upon the existing system. CCDN fully supports the efforts of WIPO to encourage ccTLDs to submit disputes arising in their domains for resolution under the UDRP. To the extent these efforts are successful, the workload of the dispute resolution providers can be expected to rise accordingly. Furthermore, the addition of new Top Level Domains which employ the UDRP will also bring more cases into the UDRP. This flow of new cases may be reduced somewhat to the extent that the new TLDs implement strong dispute prevention mechanisms such as “sunrise” periods for the pre-registration of domain names identical to registered trademarks. On the other hand, the UDRP mechanism may be asked to take on new responsibilities, such as adjudication of disputes arising between “sunrise” claimants, or even enforcement of other restrictions contained

in the charters of new TLDs. All these developments should be taken into account in the second WIPO Process.

III. Conclusion

The copyright industry organizations participating in the CCDN appreciate this opportunity to share their perspectives on the important questions addressed in this process. Please feel free to contact me if there are any questions.

Respectfully submitted,

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