

Trademark Owners Question Efficacy Of ICANN's Domain Registration Fee Scheme

Imposing a small fee on all domain registrations, as recently recommended by the board of the Internet Corporation for Assigned Names and Numbers, may act as a first step to curbing domain tasting, but it is not an adequate solution to the tasting problem, trademark owners and cyberlaw attorneys say.

The ICANN board Jan. 29 recommended a budgetary amendment that would allow the ICANN fee to apply to all domain names registered, including those registered during the traditionally free five-day “add-grace” period. The ICANN fee is just 25 cents, however, and may not be enough of a deterrent to large-scale tasters who stand to recoup far more than would likely be lost paying this fee.

Domain tasting occurs when a person registers a domain name, sets up pay-per-click ads on the associated Web site, and waits to see if the site generates ad income. Domains that are not profitable are dropped, a function of domain registration's “add-grace” period, which is a part of all registry contracts. Trademark owners in particular feel harmed by the practice, as it appears common for “tasters” to target established trademarks and variants of registered brand names.

Board Recommends Imposing ICANN Fee.

The board's resolution acknowledged the problem presented by tasting, and recommended a limited fee as a remedy.

“The practice of 'domain tasting,' by which names are registered and then deleted during the AGP, has grown at a very great rate since 2005, with tens of millions of domains registered and deleted each month,” the board said in its resolution. “The Board believes that the withdrawal of ICANN's waiver of ICANN's non-refundable transaction fee to the deletion of names within the AGP will substantially end the practice of abusing the AGP.”

ICANN's transaction fee is separate from the fees assessed by registrars and registries. ICANN's recommendation will not affect those fees, which remain inapplicable during the add-grace period. Registrar and registry fees range in price, but the ICANN fee is 20-25 cents per name.

The board resolved “to encourage ICANN's budgetary process to include fees for all domains added, including domains added during the AGP, and encourages community discussion involved in developing the ICANN budget, subject to both Board approval and registrar approval of this fee.”

Fee May Not Solve All Tasting Woes.

“This is a great first step, but it's not going to completely eliminate the problem,” Kristina Rosette, an attorney with Covington and Burling LLP in Washington, D.C., told BNA. Rosette serves as the intellectual property constituency's North American representative on the Generic Names Supporting Organization council.

“The Board's resolution to encourage imposing the ICANN fee is not going to have an immediate effect on tasting, and additional measures will be needed.”

Mike Rodenbaugh, a San Francisco attorney and the business and commercial users constituency's GNSO councilman, agreed. Tasting will continue despite this resolution, he told BNA, because the incentives are still too strong.

“Domains identified through 'tasting' practices will continue to get registered beyond the 5-day add-grace period,” Rodenbaugh said. “Traffic to direct navigation sites--branded typos or generic words--continues to thrive, so there is ample incentive for speculators and trademark infringers to sample names even for .25.”

Speaking on behalf of The Coalition Against Domain Name Abuse, Josh Bourne, one of CADNA's founders, speculated that the fee was going to become no more than a minor cost of doing business.

“Tasting is still going to happen. The volume and profitability of these names outweighs a 20 cent fee,” he told BNA. “The fee is like a tax, like the price you pay to enter into these 'investments': it's a kind of call option to identify potentially profitable sites.”

Bourne does expect the fee to have an impact on “kiting,” however. Kiting is the process through which domain names are churned after being tasted but before being returned. “Kited names are riskier investments,” Bourne said, and speculated that this practice will drop off, should the board's resolution come to fruition.

In any event, the effects of ICANN's resolution will not be known until next fall. The budget committee must consider the recommendation, and it will come back to the board with an amended budget--should it choose to take the board's advice--at ICANN's Paris meeting, June 22-27, 2008. If the board then accepts that amendment, the earliest the fee collection could go into effect is July 1.

Registries' reports and statistics concerning domain name registries, including evidence of tasting, are kept confidential for three months. This means that actual registry numbers showing whether the fee has impacted tasting activity will not be publicly available until October or November 2008.

GNSO Still Actively Considering Other Remedies.

Meanwhile, the GNSO continues to study tasting within the policy development process that launched during ICANN's Los Angeles meeting in October 2007. PDPs consist of focused research aimed at producing resolutions that the GNSO can approve and forward to the ICANN board for official action.

At least the business users constituency and the intellectual property constituency are pushing within the GNSO for new policy to further curb commercial tasting. This may include a recommendation to do away with the add-grace period entirely or to significantly restrict it, Rosette said.

The propriety of the add-grace period has been a topic of serious contention in past domain tasting discussions, with trademark owners arguing to drop the period because of its instrumentality in abusive registrations, but with individual registrants and others calling the period beneficial for its the error-forgiveness and anti-fraud potential.

A GNSO design team is currently working on the tasting issue, and Rosette said that a new policy recommendation may come out of ICANN's upcoming New Delhi meeting, Feb. 10-15. “Anything that the GNSO does should have a more immediate effect” than ICANN's proposed fee application, Rosette said. “We need additional measures, and we need them quickly.”

By Christine Mumford