Ms. Meltzer,

I write to inform the Patent and Trademark Office of a similar study of a variety of issues surrounding intellectual property protection in multi-jurisdictional digital networks. The scope of this study includes but is not limited to "the official insignia of federally and/or State

recognized Native American Tribes."

This study is undertaken in the contexts of the ICANN process, which includes participation by WIPO, at the request of Commerce, and that of UN HRC Working Group on Indigenous Peoples, and is an activity arising out of the Tribal Law mailing list, as well as related lists and institutions.

I have the honor to be the point of contact for this work, and as an individual I offer the following response. The technical contact for ICANN, Professor Froomkin, and the Tribal Law list are cc'd. Blind cc'd is a group interested in both IP and ICANN.

For reference, the PTO RFC is:

http://www.uspto.gov/web/offices/com/sol/notices/f990316a.htm

(1) The PTO should adopt the designation, which may be plural, of any indigenous group or institution, whether presently federally, state, or otherwise "recognized". Limiting the PTO's framework to the BIA's BAR momentary snapshot simply invites revisiting the isssue indefinitely via the granting and/or removal of federal, and 50+ states equivalent agencies, forms of recognition, which inevitably invite jurisdictional shopping.

Further, such a framework excludes groups and institutions which arose from BIA policy during the relocation period, and from non-policy (economic opportunity) relocatees, migrants, and trans-national indigenous peoples settlement patterns.

I can provide the PTO examples of adjacent states recognition, and federal recognition variances for the same group offering identical facts in support of their status claims. I also wish to point out to the PTO that overlooking the capabilities of municipalities and other jurisdictions in the broad area of "recognition" invites more problems.

(2) Fundamentally the PTO needs access to registries of insignia, and not exclusive control over such registries. Registries in the form of data bases

exist now within the context of the DNS, and in the near future, within the context of the international system, if only via quasi-private law (see below), at least initially.

The “insignia registry” model should be consistent with the “name registry” and subsequent models, as these are likely to simply be different schema and views of equivalent data bases, with shared and cooperative operation and maintenance agencies and practices.

It wouldn’t be shortsighted of the PTO to fund some portion of the North American Tribal Registry within the context of the International Name System (Domain Name System). The DARPA contract with the NIC (SRI) in the mid-1980’s should offer a likely upper limit on cost and complexity, contractual and technical.

(3) I’m going to offer a response to the allocation and release issues at a later date. This issue, or a reasonable variation of it, stands at the core of the ICANN WIPO trademark debate, and Murry Froomkin’s comments to the WIPO RFC3 draft, read together with the WIPO draft, explore the issues with vigor, in the context of marks and the DNS.

The jurisdictional issue is, in my opinion, the most profound of all the issues surrounding intellectual property in the international system, and it is complicated by various doctrines unique to the US Federal Indian Law system.

(4) See the response to (3), above.

(5) The feasibility of pre-conditional allocation, or post-allocation revocation, is constrained by the registry O&M model, discussed in (2). Again, I refer the PTO to the mid-80’s contract for O&M of the NIC, which included the O&M task of an equivalent scope registry.

The enforcement cost, as the WIPO RFC3 authors went to considerable effort to explore, is highly variable, with the key distinguishing characteristic being ADR vs conventional litigation as the dominant modality of revocation and allocation conflict resolution. My guess at the cost for conventional litigation resolution is six figures per case, just for costs, as patents average in the mid-six to seven figures range. A penny-wise approach is likely to be pound foolish.

(6) My response to (1) above, offers a means to substantially reduce the latent areas of conflict. However, there will be conflicts. The general

problem is allowing owners (Tribes, groups, institutions) to engage in contractual transactions with non-owners for use-rights to "insignia" where use-patterns do not reflect contractual relations. The "impact" to non-owners is likely to be within the control of the non-owners, who may license rights, or modify their mark, and find a basis for recovery of good-faith from a prior posture of no Tribal right.

It might help if the PTO suggested example conflicts, are we talking about all license plates in a state, or some sweatshirts?

(7) I'm not qualified to offer a response to the suggested statutory changes question. I hope the trademark practitioners for groups now subject to predatory practices—gaming Tribes, and for groups the targets of cultural appropriation—the "romantic" Tribes, have placed their litigation histories on the subject at your disposal.

Were the Rosebud Tribal Council to make a representation of "Crazy Horse", especially in written form, the "insignia" of their Tribe, then I suspect that the PTO could derive benefit from the attorney for the Estate of Tasunke Witko. He is a contributor to the similar study I mentioned in my opening paragraph.

As in (3) above, I'm going to offer a response to the statutory changes issues at a later date. As with (3), this issue received some attention in the ICANN WIPO trademark debate.

(8) The ICANN process, presently quite active and international in both scope and in its tentative legal framework, though in fact a California 501©(3) non-profit engaged in the erection of a private-law basis for resolution of very similar fact issues, with a larger jurisdictional range, is relevant to the PTO study.

Additionally, the UN HRC Working Group on Indigenous Peoples and the WG-WIPO and WIPO e-commerece activities are also relevant to the PTO study.

I thank the PTO for the opportunity to respond, as an individual, to a problem within a class of problems which have been vexing me for some time. At the last Internet Engineering Task Force meetings (IETF-43 and 44), in the "human friendly names" discussions I've been uncomfortably aware that the space of "marks" so vigorously fought over in the "DNS wars" is about to spill over into glyphs (images), and in fact I expect the

charter of the relevant working group will explicitly restrict the scope of "things which have meaning" (marks) in the DNS will be limited to scripting systems (words and phrases) -- but this polite form of separation of semantics won't endure forever.

Sincerely,
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