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Comments from Tom Barrett
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Priority: P4

Issue: Community Audit/Logging/Compliance Requirements

Most of the disputes and complaints arising from TMCH activities will likely come from decisions made during the authentication and validation processes, since these can involve inconsistent outcomes based on human interpretation.

This is where the logging and audits will be most important. Subjective decisions can be minimized through careful process design that breaks a process down into a series of discrete fact-checking steps.

In addition, we all know that authentication involves checking an application against an authoritative source. These would be official government trademark databases and perhaps some private sources too.

But we need to be explicit in defining the conditions under which the authenticator can over-ride the authoritative source. We are familiar with conflicts with the owner-of-record, due to outdated filings, assignees or licensees. What other exceptions exist?

For example, there is a requirement that there must be a textual component for semi-figurative trademarks. Is the authenticator allowed to disagree with the word text published by the trademark office? Or, are they obligated to follow the decision of the trademark examiner? (this is an actual issue one of our clients faced in a recent sunrise) . Setting a clear rule here will reduce later conflicts and clarify logging and compliance.

I would propose that there be two principles to determine the logging for the TMCH.

1. Reproducibility
2. Traceability

Reproducibility (according to Wikipedia) is the degree of agreement between measurements or observations conducted on replicate specimens in different locations by different people. Reproducibility is part of the precision of a test method.

Reproducibility means that, a decision made by the TMCH can be easily reproduced at a later date simply by reviewing the same information used in the original decision. In order for this to be true, decisions should primarily be of the fact-checking variety, rather than a subjective decision by a person.

Traceability (according to Wikipedia) refers to the completeness of the information about every step in a process chain. The formal definition of traceability is the ability to chronologically interrelate uniquely identifiable entities in a way that is verifiable.

With a robust Traceability discipline, transparency and accountability of the TMCH is enhanced, which will build trust in the community. In order to ensure transparency and accountability, the

policies for the TMCH should be as explicit and detailed as possible. The TMCH policies should avoid situations where humans need to interpret data because absolute decision criteria has been defined. This causes inconsistencies. Instead, its role should be of fact-checker.

For example, if special characters in a trademark can be transcribed into the literal spellings, then let's identify the literal spellings beforehand and not leave it to the judgment of the authenticator, as has been the practice in past sunrise periods. This topic is to be addressed by the IAG in February.

Traceability, as it relates to the TMCH, might mean logging the following:

Authentication Process

- Recording a copy of the full trademark record used to authenticate a TMCH application
- Recording the source of the trademark data used to authenticate a trademark. Not all sources maintain the complete trademark record for a jurisdiction
- Recording the effective date of the data source used to authenticate a TMCH application. This is important since some sources could lag several months behind the official government databases
- Recording the identity of the authenticator who processed the application
- Recording the date of when the record was authenticated
- If the authenticator makes a decision that is not supported by the official trademark record, this needs to be supported with a rationale and documentation. These type of decisions should receive extra attention during audits.

Validation Process

Criteria for validation have not been defined yet. But this process may be far more subjective than the authentication process, which leads to inconsistencies. Ideally, the decision criteria is detailed as much as possible to minimize subjectivity in this process.

Sunrise

All events during sunrise processing are automated and therefore are simple fact-checking. The logging here should not be controversial

Claims

All events during claims processing are automated and therefore are simple fact-checking. The logging here should not be controversial

Best regards,

Tom Barrett
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