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Re: Competition, Consumer Trust, and Consumer Choice Review Team (CCTRT) Final Report & Recommendations

The International Trademark Association (INTA) is pleased to submit the following comments in response to the “Competition, Consumer Trust, and Consumer Choice Review Team (CCTRT) Final Report & Recommendations” posted on October 8, 2018.¹ This Final Report is of great importance to brand owners as it goes to the heart of INTA’s mission of supporting trademarks and related intellectual property (IP) to foster consumer trust, economic growth, and continued innovation.

I. Introduction

INTA previously submitted extensive comments in May 2017² regarding the CCTRT’s Draft Report, and in January 2018³ regarding new sections of the Draft Report. Those prior comments are hereby referenced and incorporated into this comment on the Final Report. INTA is proud to contribute to ICANN’s multistakeholder policy development process through these comments and similar efforts and will continue to do so through its participation in the Intellectual Property Constituency (IPC) and relevant ICANN working groups and related processes.

INTA’s views on consumer choice, competition and trust are informed by its mission as an association “dedicated to supporting trademarks in order to protect consumers and to promote fair and effective commerce.” Inherent in this mission is a fundamental concern with preventing the abuse and misuse of trademarks in the domain name system (“DNS”) and the potential for increased abuse in the New gTLD Program. These matters not only affect trademark owners’

¹ <https://www.icann.org/public-comments/cct-final-recs-2018-10-08-en>

² <https://mm.icann.org/pipermail/comments-cct-rt-draft-report-07mar17/attachments/20170521/183107f2/INTACommentCCTRTInitialReportFINAL5-21.pdf>

³ <https://mm.icann.org/pipermail/comments-cct-recs-27nov17/attachments/20180112/7c8ca267/INTACommentCCRTNewSectionsReport1.12.18.pdf>

rights and interests but, most importantly, affect consumer trust and the healthy working of the domain name system and the Internet. The CCTRT's findings and recommendations are therefore of utmost interest to INTA.

Given that INTA is on record in the 2 previous comments noted above, this 3rd submission is confined to a few overarching points regarding the CCTRT Final Report:

- 1) No subsequent round of unrestricted new gTLDs should be launched until:
 - a) more data is collected and analyzed regarding the impact upon trademark owners and upon overall domain name system (DNS) competition resulting from the first round;
 - b) ICANN's Review of all Rights Protection Mechanisms in all gTLDs PDP Working Group ("the RPMs Review") completes and the Board approves its Phase I analysis of the effectiveness of the RPMs created as part of the new gTLD program;
 - c) any strengthening of RPMs recommended in Phase I of the RPMs Review has been considered and adopted by the GNSO Council and ICANN Board and is on track to be implemented.
- 2) Further, no subsequent round should be planned or launched until all program changes and safeguards recommended by the CCTRT have been fully implemented.
- 3) Consideration should be given to a subsequent round consisting primarily of .BRAND gTLDs, which by their nature do not pose substantial trademark infringement or domain abuse risks, along with other gTLD types comprising lower risk categories such as community gTLDs.
- 4) Consideration should be given to development of a new Domain Abuse Dispute Resolution Process (DADRP).

II. Timing of Any Subsequent Round

The Executive Summary of the Final Report's conclusions, while based upon limited data, is nonetheless disturbing. It states:

The CCT Review Team found that while the New gTLD Program is quite new and *the data are incomplete*...⁴the review team concluded that the New gTLD Program should be regarded only as a "good start," and that *a number of policy issues should be addressed before any further expansion of gTLDs.*

In particular, the review team found that *critical data were in short supply for the analysis of competition, the effectiveness of safeguards, and the promotion of consumer trust and geographic representation of applicants...Consequently, the CCT Review Team recommends that ICANN enhance its capabilities to gather and analyze data, in particular those used by ICANN's Contractual Compliance Department, prior to further increasing the number of gTLDs. We also identify certain policy issues that the community should resolve prior to the further expansion of the gTLD space....*

The CCT Review Team also sought to measure the cost impact of the New gTLD Program on intellectual property owners. *The early indicators are that there is proportionately more*

⁴ Italics added for emphasis by INTA.

trademark infringement in new gTLDs than in legacy TLDs...While one of the stated purposes of the New gTLD Program was to create greater choice, the primary consideration for domain registration by brand owners who participated in the survey appears to be defensive....The CCT Review Team could not definitively conclude whether the URS is a valuable RPM given its low usage compared to the UDRP....Conclusions from the RPM review currently underway may shed some more light on the issue in the near future....

In general, the review team's work was hampered by insufficient data on pricing of domain names, including wholesale, retail, and secondary market prices.... Furthermore, the lack of data regarding DNS abuse and lack of more granular information about the subject matter of complaints received by ICANN Contractual Compliance also created obstacles to assessing the effectiveness of the safeguards and the trustworthiness of the new gTLDs. Some of this additional data collection will require changes to registry and registrar contracts, which will take some time, but the review team believes that it is necessary for proper evaluation of reforms to the New gTLD Program.

While the Final Report attempts to put the best possible face on the results of the first round of new gTLDs, the above quoted sections make clear that the data required to support the responsible launching of a subsequent round, including necessary adjustments of application and operational rules, does not yet exist. INTA knows, both from its own survey of trademark owners (extensively referenced in the Final Report), and from subsequent feedback from its members, that new gTLDs have imposed substantial defensive costs upon the brand community without providing adequate offsetting benefits – and that its members have been victimized by trademark infringement and associated domain abuse.

Regarding the new RPMs created for the program, INTA members have advised that:

- Uniform Rapid Suspension (URS), intended to be a faster and less expensive alternative to the Uniform Dispute Resolution Policy (UDRP) for taking down clearly infringing domains, has fallen short due to inadequate remedies and other flaws;
- Sunrise registration opportunities are often thwarted by exorbitant premium pricing and other questionable registry practices; and
- The Trademark Claims Notice has failed to effectively thwart infringing domain registrations of names matching or confusingly similar to trademarks registered in the Trademark Clearinghouse.

The jury is still out on whether these defects in the new gTLD RPMs will be adequately addressed by the RPMs Review. INTA cannot support a subsequent round of broad gTLD categories unless that occurs, including full implementation of strengthening measures.

INTA further notes that, although not addressed in the Final Report, the introduction of the European Union's General Data Protection Regulation (GDPR), ICANN's adoption of the Temporary Specification for gTLD Registration Data, and the subsequent changes in the publicly available WHOIS data have substantially reduced the effectiveness of the WHOIS system and the RPMs. These changes and the difficulty or inability of obtaining domain name registrant

information are making it difficult for law enforcement and affected owners of trademarks and other forms of intellectual property to effectively identify and combat illegal and infringing activities that threaten the safety and trust of internet users. INTA therefore strongly urges the ICANN Board, in considering the Final Report as a prerequisite for any subsequent round of domain registries, to also require that a Uniform Access Model for domain name registrant information be in place before approving such rounds.

III. Benefits of .BRAND gTLDs

Unlike new gTLDs available to the global public, .BRAND gTLDs are under the sole control of a single brand owner for its own benefit and the benefit and use of its distributors, dealers, authorized representatives, staff and consumers. A June 2018 report⁵ released by Corporation Services Company (CSC), “CSC Dot Brand Insights Report”, documents the growing utilization of .brand gTLDs that, by their very nature, virtually eliminate trademark infringement concerns while minimizing the possibility of DNS abuse activities.

The Report notes that, in the space of six months, there were “20 additions to the number of .BRAND domain names with an Alexa ranking (an Amazon.com® company). This means 135 live .BRAND sites activated in the past months have attracted high levels of traffic to their sites”. It also observed that, “More .BRAND TLDs have started to activate, making up 74% of all .BRAND domain names registered. This is an increase of 2.3% since our previous report in November 2017”.

Additionally, “68% of new .BRAND TLD sites implemented secure sockets layer (SSL) certificates, a 5.2% increase since our last report”. Recent .BRAND activations included those of the American Association of Retired Persons (AARP), BMW automotive, and Aetna insurance. While .BRAND utilization remains in its earliest stage, the report observes that implementation, while slow, will likely be fully considered and planned, observing, “Large companies typically do not move at breakneck speed. When major corporations make changes, the changes are consequences of months or years of planning, research, iterations, and testing. These changes may lead to the start of a trend or signal a position in the adoption curve...When major corporations move forward with executing changes, they do so with thorough planning that involves input and ownership from multiple stakeholders, and after every task behind the scenes is complete and approved.”

Finally, the CSC Report notes a fundamental difference between .BRAND and general purpose gTLDs:

“Most .BRAND TLD registry operators do not monetize domain names in the same way generic TLD registry operators do. It is infinitely more appropriate for .BRAND TLD registry operators to ascertain use of their .BRAND digital assets to derive the incumbent value. Oftentimes, the more these digital assets are utilized, the greater the value they bring to the registry operators.”

⁵ https://www.cscglobal.com/cscglobal/pdfs/DBS/CSC_Dot_Brand_Insights_Report_Jun2018.pdf

While INTA believes that additional data and improvement of RPMs must precede any subsequent round of new gTLDs available to the general public, the restricted availability of .BRAND domains and the generally higher level of security measures they adopt means that they do not pose the same risk to brand owners or consumers. Unlike more open, unrestricted TLDs, in the case of a .BRAND, the registry operator will be either directly responsible for activity at the second level (itself or through its group companies) or indirectly responsible, if it permits second level domains to be used by its trademark licensees. Even in this latter scenario, the reputation of the .BRAND registry operator would be impacted by any abuse or infringing activity occurring through a second level name and thus there is a strong incentive for the .BRAND registry operator to act swiftly in the face of such unwelcome activity. Therefore, we believe that ICANN should consider restricting any near-term new gTLD application window to .BRANDS and other categories that pose lower risk, such as community gTLDs.

IV. Development of a DADRP

The Final Report's Recommendation 15 introduces the possibility of a Domain Name System Abuse Dispute Resolution Policy (DADRP) which INTA endorses. The recommendation specifically states:

ICANN Org should, in its discussions with registrars and registries, negotiate amendments to the Registrar Accreditation Agreement and Registry Agreements to include provisions aimed at preventing systemic use of specific registrars or registries for DNS Security Abuse. With a view to implementing this recommendation as early as possible, and provided this can be done, then this could be brought into effect by a contractual amendment through the bilateral review of the Agreements. ICANN should establish thresholds of abuse at which compliance inquiries are automatically triggered, with a higher threshold at which registrars and registries are presumed to be in default of their agreements. If the community determines that ICANN org itself is ill-suited or unable to enforce such provisions, a DNS Abuse Dispute Resolution Policy (DADRP) should be considered as an additional means to enforce policies and deter against DNS Security Abuse. Furthermore, defining and identifying DNS Security Abuse is inherently complex and would benefit from analysis by the community, and thus we specifically recommend that the ICANN Board prioritize and support community work in this area to enhance safeguards and trust due to the negative impact of DNS Security Abuse on consumers and other users of the Internet.

Section 9 of the Report, "Safeguards", elaborates on this recommendation, noting:

The widespread availability and relative accessibility of domain names as unique global identifiers have created opportunities for innovative technologies as well as for a multitude of malicious activities. *Bad actors have misused these universal identifiers for cybercrime infrastructure* and directed users to websites that enable other forms of crime, such as child exploitation, intellectual property infringement, and fraud. Each of these activities may constitute a form of DNS abuse....*consensus exists on what constitutes DNS Security Abuse, or DNS Security Abuse of DNS infrastructure, as demonstrated by community*

findings associated with the development of the new gTLD Program. *These forms of abuse include more technical forms of malicious activity, such as malware, phishing, and botnets, as well as spam when used as a delivery method for these forms of abuse.*

The Report goes on to discuss ICANN's own investigation analyzing the history of DNS abuse safeguards tied to the new gTLD Program, which observes that "some metrics suggest that a high percentage of new gTLDs might suffer from DNS Security Abuse". It further notes the connection between DNS abuse and trademark infringement, stating, "The Study concluded that domain names registered for malicious purposes often contained strings related to trademarked terms". This makes clear that implementation of effective means to deter or, if necessary, substantially reduce trademark infringement are directly tied to the maintenance of a secure Internet, particularly for online commerce.

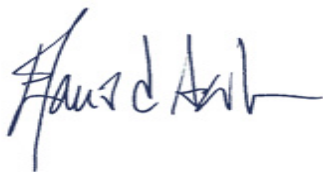
In light of these findings, INTA endorses the recommendation that, "ICANN Org should, in its discussions with registrars and registries, negotiate amendments to the Registrar Accreditation Agreement and Registry Agreements to include provisions aimed at preventing systemic use of specific registrars or registries for DNS Security Abuse or, in the alternative, consider development of a DNS Abuse Dispute Resolution Policy (DADRP) as an additional means to enforce policies and deter against DNS Security Abuse". At a minimum, such new safeguards and associated remedies should be developed and made applicable to any subsequent round of new gTLDs with domains made available to the general public.

V. Conclusion

INTA appreciates this opportunity to submit its views regarding the CCTRT's Final Report. As discussed above, extreme caution in the initiation of any subsequent round, and additional data-gathering accompanied by strengthened safeguards, are required to assure adequate protection of not just brand holders but the global public they serve daily.

Should you have any questions about our comments, I invite you to contact Lori Schulman, INTA's Senior Director of Internet Policy at 202-261-6588 or at lschulman@inta.org.

Sincerely,



Etienne Sanz de Acedo
Chief Executive Officer

About INTA

Founded in 1848, INTA is a global not-for-profit association with more than 7,200 member organizations from over 191 countries. One of INTA's goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last two decades, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA's Internet Committee is a group of over 175 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.