



COMMENTS OF THE INTELLECTUAL PROPERTY CONSTITUENCY (IPC)

Competition, Consumer Choice and Consumer Trust (CCT) Review Team Final Report & Recommendations

December 11, 2018

The Intellectual Property Constituency (IPC) of the Generic Names Supporting Organization (GNSO) appreciates the opportunity to comment on the Competition, Consumer Choice and Consumer Trust (CCT) Review Team Final Report & Recommendations (the “Final Report”).

Executive Summary

These comments will focus on specific recommendations relevant to IPC. In general, the IPC applauds the introduction of additional metrics into the Final Report. We also support the overall approach suggested by the CCT Review Team (“CCT-RT”) in connection with achieving a healthier Domain Name System (DNS) environment. In particular, we support: (1) the suggestion for specific measurements of the DNS marketplace, ensuring statistical significance of data; (2) the suggestion of incentives for contracted parties to implement additional safeguards against DNS abuse; and (3) the suggestion of additional disclosure of compliance-related data by relevant parties.

The specific comments of the IPC as to each individual CCT-RT final recommendation, as relevant, are provided below.

Specific Comments on CCT-RT Final Recommendations

Recommendations 1 – 4:

1. Formalize and promote ongoing data collection.
2. Collect wholesale pricing for legacy gTLDs.
3. Collect transactional pricing for the gTLD marketplace.
4. Collect retail pricing for the domain marketplace.

The IPC supports Recommendations 1 - 4. Data-driven analysis and policy is always welcomed, including data demonstrating the impact on rights holders. In addition, more detail from ICANN Compliance (which has been requested for years) would be instructive, particularly as to how contractual compliance issues are actually resolved in practice.

Recommendation 5:

5. Collect secondary market data.

The IPC supports Recommendation 5, as the data could prove useful to inform and complement primary market data.

Recommendation 7:

7. Collect domain usage data to better understand the implications of parked domains.

The IPC supports Recommendation 7. This would be helpful data, particularly as it relates to the implications of parked domains on intellectual property rights holders (i.e. correlations between domain parking and infringing domains or domains otherwise being used to perpetrate other DNS abuses that leverage intellectual property assets, such as phishing).

Recommendation 8:

8. Conduct periodic surveys of registrants that gathers both objective and subjective information with a goal of creating more concrete and actionable information.

The IPC supports Recommendation 8 in principle, as this may be helpful information, but we agree it is a low priority for ICANN.

Recommendation 9:

9. The ICANN community should consider whether the costs related to defensive registration for the small number of brands registering a large number of domains can be reduced.

The IPC supports Recommendation 9. An analysis of marketplace mechanisms addressing defensive registrations should be conducted prior to, or as part of, any policy development on the issue of rights protection mechanisms. The IPC understands that the RPM Review policy development process examined or is in the process of examining both mandatory RPMs and voluntary marketplace RPMs that relate to defensive registration (e.g. Sunrise), but other efforts should focus on the broader ecosystem of defensive registration and associated costs for brand owners, with an eye toward attempting to reduce such costs.

Recommendation 10:

10. The GNSO should initiate a new Policy Development Process (PDP) to create a consistent privacy baseline across all registries, including to explicitly cover cases of privacy infringements such as sharing or selling personal data without a lawful basis, such as the consent of that person. The GNSO PDP should consider limiting the collection and processing of personal data within rules which are mandatory for all gTLD registries. It should also consider not allowing registries to share personal data with third parties without a lawful basis, such as the consent of that person or under circumstances defined by applicable law (e.g. upon requests of government agencies, IP lawyers, etc.).

Also, it is necessary to be aware of emerging, applicable regulations related to the processing of the personal data. For clarification, this recommendation does not relate to issues involving WHOIS or registration directory services data.

The IPC does not support the launch of a new PDP on this issue. There are too many areas of potential overlap with the current Expedited PDP on gTLD Registration Data, which has effectively been chartered for the suggested purpose in Recommendation 10. The IPC understands that ICANN and contracted parties must comply with applicable law, including privacy and data protection law, including through the implementation of domain name registration data processing related policies, and the IPC supports the notion that such data should be processed accordingly including disclosure for legitimate purposes including intellectual property and consumer protection, within ICANN's mandate to protect consumer trust in the DNS.

Recommendation 14:

14. Consider directing ICANN organization, in its discussions with registries, to negotiate amendments to existing Registry Agreements, or in consideration of new Registry Agreements associated with subsequent rounds of new gTLDs, to include provisions in the agreements to provide incentives, including financial incentives for registries, especially open registries, to adopt proactive anti-abuse measures.

The IPC supports Recommendation 14. Such an initiative, with appropriate market-based incentives, has the potential to bring contracted parties and others together in alignment toward a common goal, namely to prevent and mitigate DNS abuse for the benefit of all Internet users globally.

Recommendation 15:

15. 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. In particular, 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.

The IPC strongly supports the proposed initiative to sharpen the ICANN Compliance department's ability to crack down on actors that have been a problem for the DNS historically. A DADRP is an intriguing idea and will need additional consideration by the community; we encourage such a discussion of this idea as well as development of a more concrete definition of "Security Abuse."

Recommendation 16:

16. Further study the relationship between specific registry operators, registrars and DNS Security Abuse by commissioning ongoing data collection, including but not limited to, ICANN Domain Abuse Activity Reporting (DAAR) initiatives. For transparency purposes, this information should be regularly published, ideally quarterly and no less than annually, in order to be able to identify registries and registrars that need to come under greater scrutiny, investigation, and potential enforcement action by ICANN organization. Upon identifying abuse phenomena, ICANN should put into place an action plan to respond to such studies, remedy problems identified, and define future ongoing data collection.

The IPC strongly supports this recommendation and has long been interested in more in-depth and frequent collection and publication of such data and actionable responses to problems identified.

Recommendation 17:

17. ICANN should collect data about and publicize the chain of parties responsible for gTLD domain name registrations.

More information is required for assessment of this recommendation, but in concept, the IPC supports it.

Recommendation 20:

20. Assess whether mechanisms to report and handle complaints have led to more focused efforts to combat abuse by determining: (1) the volume of reports of illegal conduct in connection with the use of the TLD that registries receive from governmental and quasi-governmental agencies; (2) the volume of inquiries that registries receive from the public related to malicious conduct in the TLD; (3) whether more efforts are needed to publicize contact points to report complaints that involve abuse or illegal behavior within a TLD; and (4) what actions registries have taken to respond to complaints of illegal or malicious conduct in connection with the use of the TLD. Such efforts could include surveys, focus groups, or community discussions. If these methods proved ineffective, consideration could be given to amending future standard Registry Agreements to require registries to more prominently disclose their abuse points of contact and provide more granular information to ICANN. Once this information is

gathered, future review teams should consider recommendations for appropriate follow-up measures.

The IPC supports Recommendation 20. The additional information it identifies would be helpful in measuring and addressing DNS abuse issues at a systematic macro level. We also support the proposed solicitation of input from registry operators regarding their experiences in combating DNS abuse.

Recommendation 21:

21. Include more detailed information on the subject matter of complaints in ICANN publicly available compliance reports. Specifically, more precise data on the subject matter of complaints, particularly: (1) the class/type of abuse; (2) the gTLD that is target of the abuse; (3) the safeguard that is at risk; (4) an indication of whether complaints relate to the protection of sensitive health or financial information; (5) what type of contractual breach is being complained of; and (6) resolution status of the complaints, including action details. These details would assist future review teams in their assessment of these safeguards.

The IPC supports Recommendation 21.

Recommendation 22:

22. Initiate engagement with relevant stakeholders to determine what best practices are being implemented to offer reasonable and appropriate security measures commensurate with the offering of services that involve the gathering of sensitive health and financial information. Such a discussion could include identifying what falls within the categories of “sensitive health and financial information” and what metrics could be used to measure compliance with this safeguard.

The IPC supports Recommendation 22.

Recommendation 24:

24.
a. Determine whether ICANN Contractual Compliance should report on a quarterly basis whether it has received complaints for a registry operator’s failure to comply with either the safeguard related to gTLDs with inherent governmental functions or the safeguard related to cyberbullying.
b. Survey registries to determine: 1) whether they receive complaints related to cyberbullying and misrepresenting a governmental affiliation; and 2) how they enforce these safeguards.

The IPC supports Recommendation 24.

Recommendation 25:

25. To the extent voluntary commitments are permitted in future gTLD application processes, all such commitments made by a gTLD applicant must state their intended goal and be submitted during the application process so that there is sufficient opportunity for community review and time to meet the deadlines for community and Limited Public Interest objections. Furthermore, such requirements should apply to the extent that voluntary commitments may be made after delegation. Such voluntary commitments, including existing voluntary PICs, should be made accessible in an organized, searchable online database to enhance data-driven policy development, community transparency, ICANN compliance, and the awareness of variables relevant to DNS abuse trends.

The IPC supports Recommendation 25 in principle, but ICANN should not needlessly restrict the self-imposition by registries of PICs to only the application period. It may be in the community's interest for such commitments to be added after the application is submitted but prior to delegation.

Recommendation 26:

26. A study to ascertain the impact of the New gTLD Program on the costs required to protect trademarks in the expanded DNS space should be repeated at regular intervals to see the evolution over time of those costs. The CCT Review Team recommends that the next study be completed within 18 months after issuance of the CCT Final Report, and that subsequent studies be repeated every 18 to 24 months.

The CCT Review Team acknowledges that the Nielsen survey of INTA members in 2017 intended to provide such guidance yielded a lower response rate than anticipated. We recommend a more user friendly and perhaps shorter survey to help ensure a higher and more statistically significant response rate.

The IPC agrees it is critical to the credibility of any study to have a statistically significant set of data. That said, anecdotal data, or survey data that may fall short of achieving true statistical significance, can still be useful to inform policy discussions, and should not necessarily be dismissed out of hand.

Recommendation 27:

27. Since the review team's initial draft recommendation, the PDP "Review of All Rights Protection Mechanisms in All gTLDs (RPM WG)" has started reviewing the Uniform Rapid Suspension system in detail and this is currently ongoing. Given this ongoing review, the CCT Review Team recommends that the RPM WG continues its review of the URS and also looks into the interoperability of the URS with the Uniform Domain Name Dispute Resolution Policy (UDRP). Given the current timeline, it would appear that the appropriate time to do so will be with the UDRP review is carried out by the PDP WG and at this time consideration be given to how it should interoperate with the UDRP.

The review team has encountered a lack of data for complete analysis in many respects. The RPM PDP WG appears to also be encountering this issue and this may well prevent it drawing firm conclusions. If modifications are not easily identified, then the review team recommends continued monitoring until more data is collected and made available for a review at a later date.

The IPC agrees that the appropriate forum for discussion regarding URS and UDRP related issues, including interoperability of the UDRP with the URS, is the ongoing RPM Review PDP. The RPM Review PDP working group has successfully collected some data to inform its discussions regarding the URS, and will likely have a similar level of success with respect to the UDRP. Thus, an assessment as to the need to conduct any further analysis or review of data regarding the URS and UDRP should await the completion of the RPM Review PDP, although basic relevant data on URS and UDRP cases will presumably continue to be collected voluntarily by dispute resolution service providers and third parties.

Recommendation 28:

28. A cost-benefit analysis and review of the Trademark Clearinghouse (TMCH) and its scope should be carried out to provide quantifiable information on the costs and benefits associated with the present state of the TMCH services and thus to allow for an effective policy review. Since our initial draft recommendation, the RPM PDP has started reviewing the TMCH in detail and ICANN has appointed Analysis Group to develop and conduct the survey(s) to assess the use and effectiveness of the Sunrise and Trademark Claims RPMs. Provided that the RPM PDP has sufficient data from this survey or other surveys and is able to draw firm conclusions, the CCT Review Team does not consider that an additional review is necessary. However, the CCT Review Team reiterates its recommendation for a cost-benefit analysis to be carried out if such analysis can enable objective conclusions to be drawn. Such cost-benefit analysis should include but not necessarily be limited to looking at cost to brand owners, cost to registries, and cost to registrars of operating with the TMCH now and going forward and look at the interplay with premium pricing.

The IPC supports the notion that analysis and review of the TMCH is within the purview of the RPM Review PDP, and notes that the PDP working group will likely engage in the kind of cost-benefit analysis regarding the TMCH envisioned by the CCT-RT in developing its final recommendations on this mechanism.

Thank you for the opportunity to comment on this important topic.

Respectfully submitted,

Intellectual Property Constituency

