



19 May 2017

Competition, Consumer Trust and Consumer Choice Review Team (CCTRT) Draft Report

Com Laude is a corporate registrar which provides domain name management and online brand management services to businesses. Com Laude's clients consist of brand owners as well as law firms and service providers to brand owners. As part of its brand protection services, Com Laude also acts as an official Trademark Clearinghouse (TMCH) agent. Com Laude recorded over a thousand trade marks in the TMCH for clients from a variety of sectors. Com Laude has also received Trademark Claims notices on behalf of its clients and made extensive use of Sunrise Periods and registry-specific RPMs in managing the clients' domain name registrations in new gTLDs.

Com Laude's sister company, Valideus provides new gTLD consultancy and registry management services to prospective and existing new gTLD registry operators. We co-ordinated over 120 applications for new gTLDs on behalf of a number of applicants, all of whom are owners of global brands, for Brand TLDs which qualify for Specification 13, TLDs which have been awarded an exemption to the Specification 9 Code of Conduct, and TLDs which will be operating a more open registry model. Valideus also works with Geo and Community registries to "get the right names into the right hands" through the provision of registrant validation services.

Com Laude and Valideus welcome the opportunity to comment on the recommendations contained in the Draft Report of the Competition, Consumer Trust and Consumer Choice Review Team (CCTRT).

High Level Comments

We would like to congratulate the CCTRT on the substantial effort involved in the production of this Draft Report, and commend the report's data-driven approach.

We note the investigations of the CCTRT generally excludes Brand TLDs on the basis that its foci are not always relevant to them. While this would appear to be a sensible methodological approach, a number of the findings in the Draft Report are relevant to Brand TLDs.

Below, we offer some comments on particular findings of interest, although we would also welcome the opportunity for a second public comment window once the CCTRT have had the opportunity to consider and address the outcomes of the two outstanding research projects, i.e. the study of DNS abuse and the Impact Study of trademark owners. We note in particular that the CCTRT is awaiting more information on costs related to trademark enforcement before coming to more specific conclusions in this area, and believe that any recommendations based on such conclusions ought to be open to public comment.

Comments on Specific Recommendations

Recommendation 1 (High Priority) – Data-driven analysis

We support the CCTRT's commitment to making the review an empirical, data-driven exercise. We would welcome the inclusion in the CCTRT's Final Report of the results of the INTA Impact Study (carried out by Neilson). The outcomes of this Impact Study indicate that the New gTLD Program has resulted in increased costs incurred by brand owners – irrespective of company size – who make a number of registrations for consumer protection and defensive purposes.

We support the CCTRT's recommendation for targeted ongoing data collection and analysis in relation to new gTLDs, provided that adequate safeguards for confidential data are built in, for example by means of anonymization, and see merit in ICANN allocating resources toward a dedicated data scientist. We would like to see such data collection reflecting all new gTLDs, in particular Brand and restricted TLDs, where appropriate. We anticipate that some of this data could be of real value to the community, such as data on perceptions of familiarity and consumer trust of a Brand TLD. Other data, on the other hand, such as that relating to DNS Abuse in Brand registries, is likely to be of limited relevance or usefulness.

Recommendation 10 (Prerequisite) – Reducing the cost of defensive registrations

As a registrar service provider to brand owners, we support the CCTRT's recommendation that the community considers whether the costs for defensive registrations can be reduced for brand owners. We believe that this recommendation does not go far enough, however, in apparently being limited to the identified "small number of brand owners" registering a large number of domains. We would make the following observations:

1. The analysis of defensive registrations is based on a sample of marks recorded in the TMCH, and on exact matches only. Feedback from brand owners indicates that not only do they make strategic decisions about which marks to record in the TMCH, but also that defensive registration strategies may include domains which are non-identical matches, such as "Mark + keyword". It does not appear that the CCTRT has data at its disposal which considers the full range of defensive registrations, and this consequently impacts on the conclusions which can be drawn as to the extent of such registrations. In keeping with the overall theme of the Draft Report that better and better-quality data is required, we would encourage the CCTRT to be cautious in its conclusions where full data is not available, and to identify with specificity the data which would be necessary for future reviews. Comments below on the CCTRT findings are made subject to this.
2. Although only 4% of the trademarked terms considered were found to have been registered in more than 100 new gTLDs as exact matches, it appears that 90% of the terms which were registered were registered across up to 17 new gTLDs. It would appear that the CCTRT do not consider this 90% to represent the class of brand owners for whom the increase in cost is material. Indications from the INTA Cost Impact Report and our own client feedback would dispute that conclusion.
3. The CCTRT finds that of approximately 50% of TMCH-recorded trademarks which are registered in at least one new gTLD, the median number of new gTLDs domains registered is 3. While this might be considered a relatively low number in relation to the total number of new gTLDs launching, if one considers the maximum number of gTLDs in which a brand owner might have been protecting themselves before the New gTLD Program launched then an increase of 3 is proportionately quite significant. The costs of registering defensively in the new gTLDs are also compounded by the costs of recording and renewing trademark records in the TMCH.
4. It is noted in the Draft Report that data relating to registry operator-specific Protected Marks Lists (i.e. registry blocks) is not presently available. Since some of the largest portfolio registry operators, including Donuts, Rightside and MMX, offered registry blocks, the utilisation of these defensive mechanisms is likely to have had a very significant impact on the numbers of defensive registrations purchased. An assessment of defensive activity and costs must factor this in.
5. While the study acknowledges that there have been material levels of defensive registrations, it concludes that many registrants choose to register in new gTLD registries to broaden the appeal of their offerings, finding that some registrants are registering names that they could register exactly in the legacy gTLDs, in particular, in .com. It would be helpful to know whether this research takes account of the meaningful attributes of many new gTLD strings versus the perceived meaninglessness of the legacy gTLD strings. This difference necessitates a defensive registration strategy that is more complex than simply transposing existing second

level domain registrations into new gTLD registrations. It may well be the case that the parameters of the research have not taken this into account.

6. We would welcome clarification in the Final Report of whether the research noted any temporal trends, for instance whether the number of defensive registrations was higher in TLDs that launched earlier in the process. Additionally, we would suggest examining the renewal rates of such registrations, to evaluate longer-term stability of this trend.
7. The section “CCTRT Analysis: Trademarks” beginning on page 55, and notably the second paragraph, is extremely unclear, particularly the references to percentages of strings registered across multiple TLDs. We would encourage the CCTRT to redraft this for meaning.

Recommendation 13 (Prerequisite) – Study into trust in New gTLDs

Given that Brand TLDs account for a significant proportion of new gTLDs, we believe that it would be beneficial for any study in this area to address the question of whether familiarity with and trust of an existing brand translates into trust of its equivalent Brand TLD.

Whilst we believe that such a study, in respect of all TLDs, could provide useful insight we do not consider that this should be a prerequisite for any subsequent procedures. Trust is likely to be something which develops with time and familiarity,

Recommendation 14 (Prerequisite) – Incentives for registries to meet user expectations regarding implied registration restrictions.

Valideus’ experience as a verification service provider to new gTLDs with registration restrictions aligns with the CCTRT’s findings to date regarding the increased trust in certain TLDs which are subject additional verification of registrants. We therefore support recommendation 14 insofar as it relates to encouraging restrictions as to who can register a domain name in certain gTLDs based upon implied messages of trust conveyed by the name of the gTLD, i.e. particularly in sensitive or regulated industries.

Recommendations 25 – 30 & 33 - 36 (High Priority) – Relating to highly regulated strings

We agree with the questions and information gaps the CCTRT identifies with respect to Safeguards for Highly Regulated Strings and broadly agree with its recommendations regarding desired data gathering to inform conclusions about the effectiveness of measures introduced to deal with such strings.

Recommendations 37 – 39 (Prerequisite) - PICs

We agree with the deficiencies, the cause of such deficiencies and the recommendations identified by the CCTRT. Whilst we appreciate the rationale behind the proposed recommendation that all voluntary PICs should be submitted during the application phase to ensure they are available for review by the GAC and wider community, we consider this to present significant practical difficulties and to risk unintended consequences. Not all of the “voluntary” PICs adopted in the first round were truly voluntary, many were adopted in response to concerns expressed, generally by the GAC. It would be counter-productive if a recommendation intended to ensure the protection of the public interest were to deprive registry operators of the opportunity to respond to and address public interest concerns raised after application.

Recommendation 40 (High Priority) – Impact Study of brand owners should be repeated

We strongly support the CCTRT’s comment regarding the pivotal need for data. As participants in the RPMs PDP working group, we believe that the work of that group is hampered by inadequate data, with the much anticipated Independent Review of the Trademark Clearinghouse by Analysis Group having proved to be a disappointing missed opportunity due to the limited scope adopted for the review and the data challenges encountered.

We support the recommendation to repeat the Impact Study on the cost to brand owners at regular intervals. Having assisted a client in gathering information to complete the Impact Study, however, we

would encourage that this be simplified. Our client spent in excess of 10 person-hours completing the survey. This is a very substantial time commitment, is undoubtedly a factor in the response level which was achieved, and is simply not sustainable for an ongoing study.

The first Impact Study provides some useful insights and indications that the New gTLD Program has increased brand owner costs and that new gTLD registrations are almost exclusively defensive, whilst the anecdotal comments about the impact felt by brand owners must also be taken into account.

Whilst a number of factors have impacted the cost to brand owners, feedback from Com Laude's clients, and supported by the Impact Study, has highlighted certain pricing practices of some new gTLD registries as being a particular concern, namely the issues of Sunrise pricing and the treatment of Premium and Reserved names. Many trademark holders have reported being offered names during the Sunrise at prices significantly higher than those for general availability, often prohibitively so. This is exacerbated where terms corresponding to the trademark have been designated by some registries as Premium names, attracting even higher prices. We recognize that the matter of pricing raises difficult issues, and that all registries should not be constrained by over-strict rules to follow the same business and pricing models. Nevertheless, there is a point at which pricing ceases to be a legitimate business model in a competitive market and undermines the RPMs. This is particularly so, given the finding from the Impact Study that there is no substitutability of names in practice for brand owners because of their defensive nature.

Recommendation 41 (High Priority) – Full review of the URS and its interoperability with the UDRP

Although the CCTRT acknowledge that they are awaiting additional data before finalising their recommendations in relation to the UDRP and URS, the draft Report does comment that the currently available data suggests a small decrease in the number of UDRP cases, and in combined UDRP and URS cases, compared to a pre-New gTLD Program high in 2012. We believe that the following considerations ought to be taken into account:

1. The first new gTLD was the Shabaka IDN, which launched in October 2013, with a Sunrise running until 29 December 2013. Sunrises for those handful of new gTLDs which launched later in the year did not end until early 2014. Domain registrations were therefore not open to non-trademark owners during 2013. Based on data from ntlidstats.com, as at 2 February 2014 only 5063 second level domains in total had been registered in new gTLDs. Whilst it does appear that 2012 may represent something of a high-point for the number of UDRP cases, any slight reduction during 2013 cannot reasonably be attributed to the impact of new gTLDs. We would argue that 2012 is not the correct baseline date, therefore, the correct date should be 2013.
2. Cases may involve multiple domain names. In considering trends, therefore, we believe that an assessment based on the number of domains involved would also give valuable insights.

We would like to encourage the CCTRT to make a recommendation that there be standardisation amongst the dispute resolution service providers (DRSPs) in the presentation and reporting of statistics relating to UDRP and URS cases, and that ICANN should consolidate such statistics in a single location to ensure that cumulative data is readily available. Currently it is extremely difficult to review statistics based on all decisions because these have to be sourced from the individual providers who do not make the same information available and do not report using the same terminology or in the same format.

Based on the feedback from Com Laude's clients, we support the draft recommendations relating to the review of the URS and its interoperability with the UDRP. Brand owner client feedback is that they generally have found the URS less useful due to the limitations in the available remedies. In particular, the lack of transfer of the name is viewed by our clients as a major drawback. Other improvements that our clients have cited would be some form of judgment in default or summary judgment, and a number have expressed support for the URS becoming effectively the first stage in a UDRP. It is notable, however, that the URS is not currently significantly quicker than the UDRP, so simply linking the two together is prima facie problematic. Some registry-specific policies may serve as precedents for better solutions: for example the Rapid Evaluation Service Policy of .XXX is an interesting model to address

the risk of immediate harm, since it allows for a name to be suspended after 2 days, pending a full review.

Recommendation 42 (Prerequisite) – A review of the Trademark Clearinghouse (TMCH) and its scope should be carried out to provide us with sufficient data to make recommendations and allow an effective policy review

We strongly support this recommendation. The Independent Review of the TMCH by Analysis Group was a disappointing missed opportunity, in part due to data limitations, but also due to the adopted scope of the review, for example:

1. No consideration was given to expansion of the matching rules for Sunrise at all;
2. The consideration of the matching rules in respect of Claims did not include an assessment of “mark + keyword”;
3. No cost-benefit analysis was conducted in relation to expansion of the matching rules or extending the Claims service, albeit that the Report expresses opinions without the benefit of such analysis;
4. Data did not allow conclusions to be drawn as to the deterrent effect on trademark-infringing domains or on registrations in good faith, although again the Report expresses opinions without the benefit of such data;
5. No assessment of the impact of high Sunrise costs on utilisation of this RPM;
6. No consideration of the impact of Protected Marks Lists.

It is important that the data which would be required to permit a full and meaningful review in future is clearly identified and that steps are taken to enable such data to be compiled.

Regarding the expansion of the matching rules, Com Laude client feedback indicates that the “identical match” requirement is too rigid as it denies protection for plurals, terms that contain the trade mark and an article such as “the” or “a” and “mark + keyword”. Trademark holders with a strong core brand which is used in combination with a variety of descriptive terms will frequently seek to rely on trade mark registrations of the core mark alone since the added descriptors add little to the strength of the trade mark protection. Limiting the RPMs to identical matches means that such trademark holders are unable to protect their wider suite of brands by Sunrise registrations. Since it is common to register a brand name together with an additional descriptor for the purposes of cybersquatting, trade mark holders are thus also denied substantial potential benefit from the Trademark Claims service. The registration of “mark plus” by third parties as domain names could be equally confusing to consumers as the registration of the exact trademark term. We therefore support a review which considers greater flexibility on the matching rules.

Recommendations 47 (Prerequisite) – Regarding the nature, process and timings for GAC advice

The GAC’s processes for filing formal advice – including objections to specific applications – and its rationale need to become more transparent and accountable. If there is to be a presumption that the Board will accept that advice, this should not be done blindly, without the Board first having reviewed, clarified, and agreed with the supporting rationale.

A formal Government Objection process (currently available under the Formal Objection mechanism managed by ICANN’s DRSPs) should be considered as the appropriate venue for individual GAC members to file objections to specific applications. Errors of fact made by GAC members should be open to challenge.

A clearer process should be applied to the identification of regulated and safeguard TLDs. Issues of definition and scope for such categories of TLDs, as well as whether terms identified by the GAC as

falling under these lists are non-exhaustive or not, cannot be repeated in a future round, let alone under the unpredictable timelines that became a feature of the first round.

The determination of such lists by the GAC should be transparently reasoned and founded on clearly established guidelines for applicants. It is imperative that this area of new gTLD policy is settled in advance of a future round, dictated by existing laws related to TLD strings, rather than by who is applying for those strings. The GAC should not be used as a vehicle for applicants to gain a competitive advantage over others.

Recommendations 48 & 49 (Prerequisite) – Objection processes

We support these recommendations, and support the CCTRT giving them prerequisite priority. We accept that a balance is necessary between subjecting DRSPs to strict rules on the one hand, while giving them room for operational flexibility on the other. However, a number of applicants experienced shortcomings in the service provided by DRSPs which cannot be repeated in a future round. This applies in particular to the lack of transparency over the International Chamber of Commerce (ICC) timelines for releasing decisions. It also applies to the unfortunate number of inconsistencies in decisions made by the International Centre of Dispute Resolution's (ICDR) on String Confusion cases.

In future, Objections should be put through a compliance review that actually does ensure that the Objection has been timely filed, in its entirety, to both the DRSP and the applicant; and that the Objection is properly stated (so that at least the Objection ground, and the targeted new gTLD application, are both made clear).

We believe there would be a benefit to ICANN appointing a single DRSP agent to manage Formal Objections and exercise contractual oversight over DRSPs. In addition, consideration should be given to the implementation of an appeal mechanism to address the substantive review of clearly inconsistent Expert decisions.

The role of – and criteria for – each Formal Objection ground (Legal Rights, Community, String Confusion and Limited Public Interest) should be reviewed in light of the first round. Clearer criteria should be provided to guide Experts where required, in particular, for String Confusion and Community Objections. Thresholds for qualifying as a community should be more clearly defined, for the benefit of communities as both objectors, and as applicants (who may apply for Community Priority Evaluation).

Thank you for considering these points.

Com Laude and Valideus