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Submitted to: [comments-cct-rt-draft-report-07mar17@icann.org](mailto:comments-cct-rt-draft-report-07mar17@icann.org)

May 21, 2017

Ms. Margaret Milam  
Vice President, Multistakeholder Strategy and Strategic Initiatives  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Dear Ms. Milam:

The International Trademark Association (INTA) is pleased to submit the attached comments regarding the ICANN Competition, Consumer Trust and Consumer Choice Review Team (CCT-RT) Draft Report of Recommendations for New gTLDs ("the Draft Report").

INTA's comments are predicated on our mission to protect consumers and to promote fair and effective commerce. We believe that ICANN should adopt the recommendations of the Review Team to continue and complete the collection and analysis of data, and carry out the Recommendations it has identified as "Prerequisites" before proceeding to a new round of New gTLD applications and delegation. Doing so will allow ICANN to identify and take appropriate steps or develop new policies or proposals to address issues revealed by the before embarking on any further expansion. We address these concerns and respond to the Report in the attached.

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](mailto:lschulman@inta.org).

Sincerely,

A handwritten signature in blue ink, appearing to read "Etienne Sanz de Acedo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Etienne Sanz de Acedo  
Chief Executive Officer

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# **INTA Comment on the ICANN Competition, Consumer Trust and Consumer Choice Review Team Draft Report of Recommendations for New gTLDs**

**May 21, 2017**

The International Trademark Association (INTA) appreciates this opportunity to comment on the ICANN Competition, Consumer Trust and Consumer Choice Review Team (“CCT-RT” or “the Review Team”) Draft Report of Recommendations for New gTLDs (“the Draft Report”) prepared pursuant to the Affirmation of Commitments to assess the New Generic Top-Level Domain (New gTLD) Program in the following areas: competition, consumer trust and consumer choice. Two additional areas addressed by the Review Team as part of their review are the effectiveness of safeguards put in place to mitigate issues arising from the introduction of New gTLDs and the Program's application and evaluation process.

INTA's views on the information, issues and proposals outlined in the Draft Report are informed by its mission as an association “dedicated to supporting trademarks in order to protect consumers and to promote fair and effective commerce.”<sup>1</sup> 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, matters that affect not only trademark owners' trademarks and rights, but also affect consumer trust and the healthy working of the domain name system and the Internet. The Review Team's findings and recommendations are therefore of utmost interest to INTA

## **1. Introduction**

We understand and support the Review Team's goal of reviewing the impact of ICANN's New gTLD program on competition, consumer trust and consumer choice. We also appreciate the challenge the Review Team faced in considering how to design its review, identify information that would enable it to carry out its charter, and the extensive amount of work the Review Team has put in to define areas of inquiry and to commission and review reports, studies and surveys to assist in its review. We therefore applaud the Review Team for undertaking this work, and we believe it has made an extremely important start to understanding the effects of the New gTLD program on competition, consumer trust, and consumer choice.

However, we also agree with the Review Team's determination that, in order to accurately complete its chartered task, it requires additional information and data. We are therefore concerned that some of the Review Team's analysis and initial conclusions are due more to the pressure from other ICANN stakeholders to initiate a Subsequent Rounds than to the Review Team's completion of its review. For example, the perception that, although a substantial number of fundamental questions remain unanswered and rationales for further expansion of the Domain Name System have been contradicted by evidence or remain unsupported, ICANN should not delay Subsequent rounds before it expands and completes its data-collection.

While we believe the New gTLD program has had some positive effect in creating new opportunities for commercializing domain names, for example, the introduction of .brand top level domain names, it has had, on balance, either negative or at best neutral effect on consumer

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<sup>1</sup> <http://www.inta.org/About/Pages/Overview.aspx>

choice, consumer trust, and protection against consumer confusion and threats to intellectual property. Before proceeding to another round of New gTLD applications and delegation, we believe ICANN should adopt the recommendations of the Review Team and complete the collection and independent third party analysis of data, and either take steps to address issues the data reveals or suspend the plans for any further expansion until the complete review can be finalized.

The Review Team itself notes the absence of data or the need for further study before it would be possible to draw a number of conclusions necessary for it to provide an accurate review of the effects of the New gTLDs on competition, consumer choice or consumer trust. These include the following: 1) need for more information on the extent of domain name parking; 2) benefits of expanded number of TLDs versus confusion to end users<sup>2</sup>; 3) absence of data related to consumer confusion<sup>3</sup>; INTA's Impact Study<sup>4</sup>; the Rights Protection Mechanisms Policy Development Process due January 2018<sup>5</sup>; and final report of Trademark Clearinghouse Independent Review in process.<sup>6</sup>

## **2. A Note about INTA New gTLD Cost Impact Study**

INTA notes that the results of the New gTLD Cost Impact Study ("INTA Study") were presented to the CCT-RT at its May 10, 2017 plenary. The INTA Study and presentation have been published on the review team wiki. The study was conducted in cooperation with ICANN and the CCT-RT had significant input into the survey questions. The results of the survey were completed after the publication of the CCT-RT Initial Report and INTA is currently assessing the results against the report. However, that assessment will be completed after the public comment closes for the initial report. We encourage the CCT-RT to carefully evaluate the findings and to incorporate them into its final report. The CCT-RT is welcome to present any questions or concerns to INTA in order to properly evaluate the conclusions. INTA welcomes the opportunity to continue our ongoing dialog on the important issues of consumer choice, competition and trust within the domain name system.

## **3. General Comments**

The Draft Report includes a number of analyses, conclusions and proposals that we believe will be important to other current ICANN reviews currently underway in considering whether to modify with subsequent rounds of New gTLD applications and if so, whether to change or adopt new procedures or policies to address issues which this and other Review Teams identify. However, in this Comment we will focus on several specific recommendations and areas of concern relating to the effect of the New gTLD program on trademark owners and on the potential for consumer confusion and resulting loss of trust.

Without engaging in extensive textual analysis and rhetoric, we are also concerned that several sections of the report and some of the recommendations appear to be either argumentative or fail

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<sup>2</sup> Draft Report at 57.

<sup>3</sup> Draft Report at 59.

<sup>4</sup> Draft Report at 99.

<sup>5</sup> Draft Report at 102.

<sup>6</sup> Draft Report at 104.

to include steps to ensure accuracy and fairness. For example, Recommendation 9 states that ICANN should conduct periodic surveys of domain name registrants similar to the Nielsen Registrant Survey relied on by the Review Team. While we agree that such a survey should be conducted, we note that an informal survey of INTA members did not reveal any members that were asked to respond to that survey. To provide an accurate survey, we believe that the survey should be conducted so that all stakeholder groups are clearly represented.

In addition, Recommendation 10 is presented in an argumentative manner that appears to advocate a position when it proposes that a study and the Review Team consider whether the costs related to defensive registration “for the small number of brands registering a large number of domains can be reduced”. This phrasing seems to discount entirely the experience of small and medium-sized enterprises (SMEs) that are forced to expend money on defensive registrations in amounts that are significant to them.

### **3.1 Recommendation 2-4: Price Analyses**

INTA agrees with the Review Team that there is a significant need for more and better data on pricing. As noted in the Draft Report, pricing in the wholesale and retail markets is critical for any competitive study. “Price variance not only allows us to measure the impact of increased competition, but also helps to define the market itself.” It is impossible to determine the need for and/or the possible effects of further growth of the DNS when there is insufficient data to even define the current market.

INTA also notes that the Draft Report’s price analysis ignores the perspective of brand owners who are regularly charged premium prices for registering their brands in New gTLDs, with prices being highest, unsurprisingly, in TLDs that pose the highest reputational risks to brands. The Draft Report states that on average, New gTLD wholesale prices are the same or higher than what certain legacy gTLDs are permitted to charge, but concludes that “the differences are not statistically significant”. However, the Review Team includes a caveat to this finding, namely that it does “not have access to transactional, premium or promotional pricing data for either new or legacy gTLDs.” In other words, the Draft Report reaches a conclusion on average pricing without having access to data that could substantially change its conclusion. Such data is critical to understanding the overall impact of New gTLDs on brand owners, as well as whether the New gTLDs have provided price competition for the legacy gTLDs. Without this data, we do not believe the Review Team can possibly provide an accurate analysis of the effects of the New gTLD program.

### **3.2 Recommendation 5: Parked Domains**

Although noting that there is still a large amount of important data that it lacks regarding the nature of parked domains, the Review Team notes in the Draft Report that there is an “abundance of ‘parked’ domains (those domains that have been registered but are not yet being used) among the New gTLDs.” In fact, it notes that, by one measure, about 63% of all domains in the New gTLDs are parked. (33) However, it draws the illogical conclusion that “disparate rates of parking may suggest that competition from New gTLDs is not as significant as indicated by the data

reported above.” (5) In fact, the Review Team notes that the role of parking “is not fully understood without further study.” (25) We believe that the prevalence of parked domains is a major consequence of the New gTLD Program resulting from at least two causes: First, trademark owners are engaging in defensive registration of domain names that they have no plans to use. Since even the strongest trademark can be damaged by the use of identical or confusingly similar trademarks for unrelated goods or services, this type of defensive registration may be necessary to prevent loss of distinctiveness or dilution. Second, domain name speculators are parking domains they intend to sell to trademark owners in order to avoid use or non-use that could be considered bad faith in a UDRP. The INTA Study contains information on parking as noted in the May 10, 2017 presentation.

### **3.3 Recommendation 10: Defensive Registrations**

The Draft Report states “[e]arly indications are that the new rights protection mechanisms have succeeded in minimizing the level of defensive registrations (i.e. registering a domain simply to prevent others from doing so) by most trademark holders without a significant increase in the number of trademark complaints lodged in the form of either Uniform Domain-Name Dispute-Resolution Procedure (UDRP) or Uniform Rapid Suspension (URS) filings.” It goes on to summarize state: “preliminary indications are that increases in defensive investment by trademark holders have been less than feared by some prior to the launch of the program.” (5) On the other hand, in discussing Consumer Choice, the Draft Report notes that, based on data regarding the registration of duplicate domain names, “it appears that ‘defensive’ registrations are a real phenomenon, apparently because the costs of challenging registrations by others can be considerably greater than the costs of registering their marks in multiple domains.” (53)

The Draft Report concludes that “while some registrants are motivated by defensive objectives in the New gTLDs, many registrants choose to register in New gTLDs to broaden the appeal or reach of their offerings even when similar options remain available in legacy gTLDs.” (55) We believe this conclusion is unsupported by the existing empirical data. While the number of UDRP actions may have decreased, there are too many possible alternative explanations for this development, for example, shrinking enforcement budgets for brand owners in an increasingly competitive economic environment.

### **3.4 Recommendation 15: Repeat Trustworthiness Reviews**

The Draft Report makes numerous recommendations for additional studies regarding measuring consumer trust. The recommended studies focus on identifying which New gTLDs have been visited the most; the reasons given by users as to why they visit certain New gTLDs more than others; the factors that consumers consider most in determining which gTLDs to visit; and how users’ behavior indicates their level of trust in the New gTLDs.

These questions are focused on evaluating consumers’ trust in one gTLD over another. Notably, however, they do not address consumers’ trust in the New gTLDs as a whole. Their level of trust will be affected by their experiences with specific sites across the DNS. In particular, their trust will be impacted by several factors, including, (1) the frequency of being misdirected to websites based on the mistaken belief that it is sponsored by a company or person in whom they have trust; (2) any fraudulent schemes that they may fall victim to; and (3) malicious abuses that they may experience (e.g., viruses). All three forms of confidence shattering events are only

heightened when the consumer trusts an untrustworthy domain name without realizing that a website is not sponsored or operated by the company or person that they believe it to be sponsored or operated by, based on the use of gTLDs and second level domain names in those gTLDs.

INTA suggests that these types of experiences may result from consumers being confused about the sponsor of a website based on the second-level domain. If consumers are frequently finding themselves visiting the wrong website and wasting time before they arrive at the destination that they seek, or if they engage with a website because they erroneously believe it is sponsored by a familiar source and become the victim of fraud or other abuses, their overall confidence in the New gTLDs will be effected and may result in them turning away from websites that are not in the legacy gTLDs.

Accordingly, INTA suggests that collecting data on the frequency of consumer confusion based on consumers' reaction to the second-level domain ("SLD") of websites in the New gTLDs, particularly when those SLDs are similar to established trademarks, and the impact of that confusion, is an important component of measuring consumer trust in the New gTLDs. A study to collect that data should be conducted along with the other types of studies recommended by the Review Team. Until all the relevant data is collected and evaluated, it would be premature to consider whether ICANN should move forward with accepting applications for additional New gTLDs.

### **3.5 Recommendation 17: Gather Data Regarding WHOIS-related complaints**

Comparing the level of WHOIS complaints in the Legacy gTLDs and the New gTLDs is not a sufficient or appropriate basis for analyzing whether additional steps are needed to improve the accuracy of WHOIS for the New gTLDs. The Draft Report notes that WHOIS accuracy is the largest category of complaints to ICANN Contractual Compliance. It further recommends that data be developed regarding the percentage of complaints arising from the accuracy of the information provided in the WHOIS directory and then those numbers should be compared to data based on consumer experiences in the legacy gTLDs. The Review Team suggests that this data should then be used to help determine whether additional steps are needed to improve WHOIS accuracy.

INTA agrees with these recommendations, but believes that placing a "medium priority" on such studies is insufficient. Accurate information on domain name registrants is frequently needed by government authorities and consumers, as well as trademark owners. The WHOIS directory is the only source for such information and therefore this Recommendation and other reviews conducting studies on problems with WHOIS should be classified as a prerequisite.

In addition, the recommended approach will only compare the level of complaints arising from the accuracy of WHOIS data in the legacy gTLDs and the New gTLDs. Such a comparison would not shed much light on whether additional steps are needed to improve the accuracy of WHOIS data because it assumes that the level of complaints arising from WHOIS accuracy in the legacy gTLDs is acceptable when it isn't. For example, it may well be that the level of complaints for each is comparable, but, since the accuracy of WHOIS data for the legacy gTLDs already requires improvement, it does not follow that no additional steps are needed to improve WHOIS accuracy in the New gTLDs.

Accordingly, INTA suggests that a comparative study such as that proposed in Recommendation 17 would be insufficient alone to enable the Review Team to adequately identify or measure

consumer confidence in the New gTLDs. Rather, a quantitative and qualitative analysis is required as well, to evaluate whether WHOIS accuracy needs to be improved for the New gTLDs, as well as for the legacy gTLDs. It may well be that the Next-Generation gTLD Registration Directory Service (RDS) to Replace WHOIS (Next-Gen RDS) PDP Working Group will provide this analysis. If so, then ICANN should await their report before determining whether additional steps are needed to improve the accuracy of WHOIS for the New gTLDs. The Review Team should also be tasked with reviewing the work and proposals of the Next Generation RDS PDP, Safeguards Review and INTA Cost Impact study, as well as the comparison of the rates of abuse of domain names under the new Registry Agreement and Registrar Agreement to Legacy TLDs as part of its review.

### **3.6 Recommendations 19: Gathering Data on Rates of Abuse**

INTA agrees with Recommendation 19 of the Draft Report in so far as it goes.<sup>7</sup> However, INTA does not think that it goes far enough, and does not understand how it follows from the analysis that precedes it in the Draft Report.

The analysis that precedes and informs Recommendation 19 in the Draft Report focuses on two contractual provisions that were aimed at mitigating abusive activity in New gTLDs, namely, Spec. 11 of the New gTLD RA, and ¶ 3.18 of the RAA. As the Draft Report notes, Spec. 11 requires New gTLD registries to include provisions in their Registry-Registrar agreements that prohibit registrants from distributing malware, abusively operating botnets, phishing, engaging in piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the registrant's domain name.<sup>8</sup> In addition, ¶ 3.18 imposes on registrars a duty to promptly investigate and respond appropriately to reports of abuse.<sup>9</sup> Any attempt to determine whether those two contractual safeguards have been effective at mitigating abusive activity in New gTLDs would have to answer at least three questions:

- 1) Does the ICANN multi-stakeholder community share a consensus understanding as to what those terms mean, and what they require of registrars and registries?
- 2) If so, are registries and registrars complying with those terms?
- 3) If so, has that compliance led to measurable results in terms of lower abuse rates?

Obviously, better metrics are needed to try to answer Question (3). To that end, Recommendation 19 correctly notes that data comparing rates of abuse between those gTLDs that are operating under Spec. 11 and ¶ 3.18 and those that are not would be helpful to “better measure” the

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<sup>7</sup> *Recommendation 19: Repeat data-gathering efforts that compare rates of abuse in domains operating under new Registry Agreement and Registrar Agreements to legacy gTLDs as future review teams deem necessary. Although we recommend a periodic data-gathering exercise, we anticipate that these studies will change over time as a result of input from the community and future review teams.*

<sup>8</sup> <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>.

<sup>9</sup> <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

effectiveness of those terms at mitigating abusive activity.<sup>10</sup> That is why INTA agrees with Recommendation 19 in so far it goes.<sup>11</sup>

However, Recommendation 19 does not go nearly far enough, in part because it ignores Questions (1) and (2) altogether. Taking Question (2) first: while the Draft Report notes that ICANN has concluded that 99% of New gTLD registries had included the requisite language from Spec. 11 in their Registry-Registrar agreements (as of the end of 2014), it also notes that ICANN's 2015 audit of registrars indicated that 74% had deficiencies related to ¶ 3.18 – and that that number had only “improved” to 60% by the 2016 audit.<sup>12</sup> Those numbers beg several obvious questions, notably, in the face of such poor compliance, what exactly does the Review Team expect the metrics that it requested in Recommendation 19 to prove? If more registrars than not have thus far failed to comply with ¶ 3.18, those numbers cannot prove anything as to its effectiveness.

The most basic problem with the Draft Report's attempt to analyze the effectiveness of Spec. 11 and ¶ 3.18, however, is that it does not even attempt to address the problem identified by Question (1): namely, that there is not a consensus understanding as to what Spec. 11 and ¶ 3.18 require. The Draft Report at least acknowledges this problem for ¶ 3.18, conceding that it is “not clear what constitutes reasonable and prompt steps to respond appropriately to reports of abuse.”<sup>13</sup> Nevertheless, it offers no solution to that problem. Two possible solutions might be: 1) for ICANN to amend the RAA to address any ambiguity in ¶ 3.18; or 2) for the community to develop a framework outlining what constitutes an “appropriate” response to an abuse report. Certainly, the Review Team could have offered either of those recommendations. Indeed, it made comparable recommendations elsewhere. For example, it recommended possible contractual amendments in its Recommendations 4<sup>14</sup> and 21<sup>15</sup>, and it recommended further community discussions to clarify the scope of existing contractual provisions in its Recommendations 20<sup>16</sup> and 24<sup>17</sup>. But it did not do either for ¶ 3.18. There is no apparent reason why the Review Team treated ¶ 3.18 differently.

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<sup>10</sup> Draft Report at 80.

<sup>11</sup> One caveat though: while such comparative data may be *helpful* to inform future policymaking and reviews, and is certainly *relevant* to evaluating the effectiveness of Spec. 11 and ¶ 3.18, it cannot be *dispositive* by itself. As the “Rationale” for Recommendation 19 itself notes, there are multiple “potential causal factors that explain the variation in rates of abuse in TLDs.” Spec. 11 and ¶ 3.18 may be two of those. But they are not the only ones.

<sup>12</sup> Draft Report at 79.

<sup>13</sup> Draft Report at 79.

<sup>14</sup> Draft Report at 50 (recommending possible amendment to the Registrar Accreditation Agreement to ensure availability of retail price data).

<sup>15</sup> Draft Report at 82 (recommending possible amendment to the Registry Agreement to require registries to provide certain information to ICANN).

<sup>16</sup> Draft Report at 81 (noting that the community will be in a better position to evaluate the effectiveness of this safeguard once a specific framework has been proposed that specifies how registry operators should respond to security threats).

<sup>17</sup> Draft Report at 84 (recommending that ICANN initiate discussions with relevant stakeholders to determine what constitutes reasonable and appropriate security measures commensurate with the offering of services that involve the gathering of sensitive health and financial information).



That said, at least the Review Team spotted the problem for ¶ 3.18. For Spec. 11, the Draft Report did not even do that. To the contrary, the Draft Report concluded that “the plain language of [Spec. 11] does not obligate the registry operator to monitor and enforce this provision beyond requiring the inclusion of the provision in the downstream Registrar-Registrant agreement.”<sup>18</sup> Even if we set aside questions of interpretation and assume *arguendo* that Spec. 11 as written merely requires registries to require registrars to include certain “magic words” in their downstream agreements with registrants – why did the Review Team not then examine or recommend whether Spec. 11 should be amended to make it a more effective abuse-mitigation safeguard and to meet the objectives of the GAC Beijing Communique on which it was based? Again, it is not clear why the Review Team assumed that the magic words interpretation of Spec. 11 was “plain” – and assumed that Spec. 11 as written was inviolate – without asking whether such a narrow interpretation has limited the effectiveness of Spec. 11 as a safeguard.

### **3.7 Recommendation 23: Need for detailed information on the subject matter of complaints in ICANN**

Again, INTA agrees with Recommendation 23 of the Draft Report in so far as it goes. But, again, INTA respectfully suggests that Recommendation 23 go farther than it does.

The theme that “critical data were in short supply for the analysis of . . . the effectiveness of safeguards”<sup>19</sup> is a common one throughout the Draft Report. Relatedly, but more specifically, the Draft Report repeatedly notes that one challenge to evaluating the impact of safeguards was the “lack of granular information about the subject matter of complaints” in publicly available ICANN Contractual Compliance data.<sup>20</sup> INTA agrees with that point, as well as the Draft Report’s Recommendation 23 that ICANN include in public records more detailed information and data on the subject matter of complaints. While a good start, INTA does not believe that Recommendation 23 goes far enough.

To begin with, it is not clear why Recommendation 23 is limited to the protection of sensitive health or financial information. Greater transparency and granularity as to ICANN Contractual Compliance data would be essential to enable the Review Team to assess safeguards that are relevant to those risks. However, it would also be helpful to assess safeguards that are relevant to other risks.

INTA believes that contractual safeguards intended to mitigate the risks of and damage from trademark misuse are as relevant to consumer trust as those related to other forms of abuse - if only because trademark owners are among the consumers in the DNS. This approach is especially warranted given the extent to which trademarks are used to perpetrate pharming or

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<sup>18</sup> Draft Report at 79.

<sup>19</sup> Draft Report at 4.

<sup>20</sup> See, e.g., Draft Report at 7, 8.

phishing scams, where criminals create a fake landing page made to look like a company's login page,<sup>21</sup> or in fake news articles intended to spread malware.<sup>22</sup>

Moreover, even if Recommendation 23 is applied across the board, it does not specify the complaint data that ICANN Contractual Compliance should publicly disclose to enable the community to assess the efficacy of contractual safeguards. It is, in a way, not granular enough in its request for more granularity. To that end, and in response to the request from ICANN's SVP for Contractual Compliance & Consumer Safeguards for input on how to improve ICANN's Contractual Compliance function,<sup>23</sup> INTA's recommendations follow. These recommendations are not meant to be exhaustive. Nor are they meant to contradict the Joint Recommendations proffered by members of the RySG and IPC (in which INTA is a member) – though they may supplement those.<sup>24</sup> They are also not meant to require ICANN Compliance to collect new data, or to disclose confidential data – in fact, they assume that the relevant data would be disclosed “in nondisruptive and nonconfidential form,” as the Draft Report contemplates.<sup>25</sup> With those caveats in mind, INTA recommends that the Review Team expand its recommendation and propose that ICANN Compliance disclose data and provide details on:

- The type of abuse that is the subject of a complaint. To the extent that a particular complaint addresses multiple types of abuse, that fact should be noted as well to help inform analysis of the correlation of certain abuses, such as phishing and trademark infringement.
- The particular contractual safeguard, if any, that is the subject of an abuse report.
- The gTLD that is the subject of a complaint.
- The duration of ICANN Compliance's investigation of a complaint.
- The resolution of a complaint. Further, as noted by the RySG and IPC, if the resolution of a complaint is that it is closed due to “insufficient evidence,” ICANN Compliance should explain what standard was applied for sufficiency.

These recommendations do not seek to require “micro-transparency” – for example, INTA is not asking for public disclosure of any of the parties to a complaint (the party submitting the complaint, the contracted party, the registrant, etc.). Rather, INTA is interested in “macro-transparency” –to be able to assess ICANN's Compliance-related data at a high level to identify trends and evaluate the effectiveness of contractual safeguards. Recommendation 23 should be revised and enhanced, consistent with that objective.

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<sup>21</sup> See, e.g., <https://www.cl.cam.ac.uk/~rnc1/leet09.pdf> (cited in Draft Report at 75, n.246); see also, e.g., <http://www.bbb.org/boston/news-events/news-releases/2014/03/bbb-warning-netflix-phishing-scam/>.

<sup>22</sup> See, e.g., <http://www.dailymail.co.uk/news/article-3810733/Brad-Pitt-death-hoax-actually-malware-destroy-phones-computers-expose-sensitive-information-hackers.html>.

<sup>23</sup> <https://www.icann.org/news/blog/improving-contractual-compliance>.

<sup>24</sup> <https://www.icann.org/en/system/files/correspondence/rysg-ipc-to-compliance-28mar17-en.pdf>.

<sup>25</sup> Draft Report at 8.

### 3.8 Recommendation 40: Study of the Cost Impact of the New gTLD Program

As noted in the Draft Report, one of the studies the Review Team had not received prior to the issuance of the initial report was the INTA Study. This study was designed and conducted by Nielsen to ask questions specifically suggested by the IAG CCT and the Review Team, as well as several developed by INTA's Internet Committee. As stated in the May 10, 2017 presentation, INTA believes the results of the INTA Study will help answer some of the Review Team's questions regarding the impact and effectiveness of RPMs in protecting trademarks in the New gTLD program.

We believe the preliminary statements of the Review Team regarding the effects of the New gTLD program on trademark owners – for example the extent of defensive registrations in the New gTLDs, the amount spent on protective actions and litigation, etc. can only be considered preliminary placeholders until the INTA Study data is fully assessed and understood by the CCT-RT.

However, INTA notes data from WIPO that will shed light of the effects of the New gTLD program on disputes. According to WIPO, since the New gTLDs were introduced, the percentage of WIPO UDRP disputes involving .com domains has been decreasing overall (and, by implication, a higher percentage have involved New gTLDs).

In addition, in 2016, .xyz domain names ranked **second** for the number of UDRP disputes submitted to WIPO, higher than any of the other Legacy TLDs.

Finally, WIPO UDRP disputes involving .com domains totaled 66.89% of the total and those involving New gTLDs were somewhere between 18.75 and 23% of the total. Significantly, however, as of the end of 2016, there were 126.9 million .com domains and there are currently fewer than 29 million New gTLD registrations. Thus, although there are approximately 4.375 more .com domains than New gTLDs, in 2016, there were only 2.9 to 3.7 times more .com WIPO UDRP disputes than those involving New gTLDs. In other words, disputes over New gTLDs represented a disproportionately high percentage of the total number of UDRP complaints submitted to WIPO.<sup>26</sup>

The Review Team should delay release of any Final Report until after it has had the opportunity to review and incorporate the results of the Cost Impact Survey and of the DNS Abuse Study into its analysis and recommendations. We therefore submit that the Review Team should revise its schedule to provide a) an interim report incorporating these studies' results sometime after the completion of the DNS Abuse Study projected for June 2017, b) provide for public review and public comments on the interim report, and c) prepare a final report only after consideration of

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<sup>26</sup> [http://www.wipo.int/pressroom/en/articles/2017/article\\_0003.html](http://www.wipo.int/pressroom/en/articles/2017/article_0003.html)

[http://www.wipo.int/export/sites/www/pressroom/en/documents/pr\\_2017\\_805\\_annexes.pdf#annex1](http://www.wipo.int/export/sites/www/pressroom/en/documents/pr_2017_805_annexes.pdf#annex1)

See also <http://www.gigalaw.com/2017/04/26/dot-com-is-still-king-of-domain-name-disputes/>

these comments, and those relating to any of the other “Prerequisite” studies noted in the recommendations.

The necessity for this step back is supported by our understanding that the INTA Study results may contradict or force modification of several initial findings. For example, contrary to the Draft Report, preliminary findings from the INTA Study appear to show that, by far, the principal reason why trademark owners are registering domain names in the New gTLDs is defensive.<sup>27</sup> The need for information sought in that survey is reflected in Recommendation 40. This Recommendation places high priority on obtaining a full impact study to ascertain the impact of the New gTLD Program on the cost and effort required to protect trademarks in the DNS, to be repeated at regular intervals. We would also agree that the next Impact Survey be completed within 18 months after issuance of the Review Team’s Final Report, and that subsequent studies be repeated every 18 to 24 months.

### **3.9 Recommendations 41 and 42: Review and Analysis of the URS and the TMCH**

Recommendations 41 and 42 propose that review of the URS and of the Trademark Clearinghouse be deemed Prerequisites that must be completed before the launch of subsequent rounds of New gTLDs. We agree; more specifically, we agree that (a) Phase 1 of the Review of All Rights Protection Mechanisms PDP (RPM PDP) should be completed prior to the launch of subsequent rounds of New gTLDs and (b) Phase 2 may also need to be completed prior to any such launch, depending upon whether RPMs are weakened or strengthened in the Phase 1 review.

We also note that the Review Team draws numerous conclusions based on the admittedly insufficient data available. Based on this, for example, the Draft Report concludes that the URS is a “fairly effective” and “cheap” rights protection mechanism, and that it is “much faster” than the UDRP in taking down infringing websites “as well as in fighting cybersquatting.”<sup>28</sup> While the URS may initially be faster and less expensive than the UDRP, INTA believes that without more information, it is impossible to determine whether the URS is cheaper and more effective for rights holders in the long run.

As the Draft Report notes, a significant limitation of the URS is that the infringing domain is only suspended rather than transferred to the rights holder or placed on a reserve list. Once the registration expires and is released, another infringer may register the same domain name. The rights holder is then placed in the position of either attempting to defensively purchase in the aftermarket and, if successful, maintaining the infringing domain or incurring the costs of repeated URS proceedings. In addition, as noted in the Draft Report, the URS is only intended for “obvious cases of infringement.” If the infringement is determined to not be “obvious” and the URS proceeding is unsuccessful, the rights holder may still be faced with the additional cost and delay of a UDRP proceeding. These other explanations and factors include; a decrease in the number of domain name applications and registrations for names that are confusingly similar to

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<sup>27</sup> INTA Study at slide 9.

<sup>28</sup> Draft Report at 62.

trademarks, consolidation of actions against several domain names in single UDRP complaints, the increased burden of proof required in URS proceedings, and the reluctance of trademark owners to utilize the URS process insofar as the suspension remedy is insufficient. In addition, it is premature to base any conclusion on the number of UDRP actions filed against domains in the New gTLDs insofar as only a small number of websites have gone active using these domains and there is therefore insufficient data related to bad faith use to support these actions at this time.

In short, INTA believes that it is far too early and that there is not enough information to conclude that the URS is an “additional value” to the system or that it provides an “effective” or “cheaper” way for rights holders to fight cybersquatting. INTA disagrees with any conclusion that the URS is or can be a suitable substitute for the UDRP. It has clearly not been used by complainants to the degree that the UDRP has due to its perceived shortcomings, nor was it designed by the IRT as a substitute to the UDRP.

Regarding the TMCH, the Draft Report opines that, while the Claims Service and matching criteria “may be helping deter domain name registrations that infringe rights holders, ... [i]t also seems that some good-faith registrations are being deterred by the Claims Service system, which may be detrimental to the registration activity of non-trademark-holder domain registrants.”<sup>29</sup> However the Draft Report goes on to assert that data restrictions prevent “any definitive conclusion.” In fact, there has been no evidence whatsoever submitted or cited that support the conclusion that any good-faith domain name applications have been deterred due to the success of the TMCH Claims Service. The use of a 94% abandonment claim for domains which received Claims Notices fails to take into the account possible alternative reasons for those figures, including pinging, and the like. Since registrars did not collect data at the time of abandonment, it is also impossible to tell if the 94% reflects alternative reasons for abandonment, cybersquatters abandoning their efforts after receipt of notice, or some other factor(s). In such a data-impooverished environment, the opinions contained in the draft report are on thin empirical ice indeed.

Although the Draft Report does seek to address the effectiveness of the various Rights Protection Mechanisms<sup>30</sup>, it does not offer any evidence or discussion of these RPMs or their cost to trademark owners. They necessarily also fail to apply any benefits and burdens analysis: comparing the cost to protect the domains against the cost of litigation.

One important conclusion in connection with Consumer Trust is that there are “two primary factors relevant to the public’s trust of gTLDs: familiarity and security.”<sup>31</sup> The Draft Report, however, focuses exclusively on the familiarity of domain names. It should also have considered consumers’ familiarity with trademarks and recognized that their protection is essential to the protection and enhancement of consumer trust.

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<sup>29</sup> Draft Report at 102

<sup>30</sup> Draft Report at 95.

<sup>31</sup> Draft Report at 63.

#### **4. Conclusion**

Although we believe the Review Team's work and the resulting Draft Report represent an admirable milestone in the New gTLD process, we believe its most important and clearly supported conclusion is that ICANN and the Review Team lack sufficient information and empirical data to complete its work. We therefore encourage ICANN to commission qualified survey companies to conduct additional or revised surveys identified in the Recommendations or these Public Comments. We also ask that the Review Team refrain from making its Draft Report final until it can review and consider the results of the INTA Cost Impact Study and the DNS Abuse Study, and that it then produce an interim Draft Report incorporating these findings and recommendations.

We further encourage the Review Team to recommend to ICANN that no Subsequent Rounds be planned or carried out until after completion of the Review Team's work including implementation of any changes it recommends to the policies and procedures of the New gTLD program.

#### **5. About INTA**

INTA is a 139-year-old global, not-for-profit association with more than 7,000 member organizations from over 190 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 decade, 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 200 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.