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Submitted to: comments-sadag-final-09aug17@icann.org

September 20, 2017

Brian Aitchison
Lead Researcher, GDD, Operations and Policy Research
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Statistical Analysis of DNS Abuse in gTLDs (SADAG) Report

Dear Mr. Aitchison:

INTA is pleased to submit the attached comments regarding the Statistical Analysis of DNS Abuse in gTLD's (SADAG) Report ("the Study"). While we applaud ICANN's data driven efforts to analyze the new gTLD program we are concerned that the report omits critical data regarding trademark abuse as a form of domain name abuse. As we have noted in earlier comments, we strongly believe that the definition of DNS abuse used to frame the report is too narrow as it omits cybersquatting, front-running and traffic diversion and other forms of abuse that perpetuate consumer fraud. While we believe that the Study will be useful to ICANN in its analysis of consumer choice, competition and trust, it is an incomplete picture of the state of DNS abuse. This is because millions of consumers are victimized by fraud and privacy breaches through the unauthorized and infringing use of trademarks in the DNS. Therefore, it is critical that ICANN recognize certain forms of trademark abuse as categories of DNS abuse in its analysis and we urge ICANN to supplement its report with more trademark related data.

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

INTA Comment
Statistical Analysis of DNS Abuse in gTLDs (SADAG) Report
September 20, 2017

The International Trademark Association (“INTA”) appreciates this opportunity to comment on the Statistical Analysis of DNS Abuse in gTLDs Report (the “Study”).¹ As INTA has noted in earlier comments, its interest in domain-name-related matters is informed by its mission as an association “dedicated to supporting trademarks in order to protect consumers and to promote fair and effective commerce.”² In support of that mission, INTA’s members rely on various provisions in the new gTLD Registry Agreement (the “New RA”)³ that protect trademark interests and, by extension, protect the consuming public. INTA has, therefore, closely followed the work of the Competition, Consumer Choice, and Trust Review Team (“CCTRT”) as it has worked to assess the effectiveness of a number of technical safeguards from the New RA intended to mitigate various forms of DNS abuse including abuse that relates to or relies on trademark misuse.

Specifically, in April of last year INTA reviewed and commented on the CCTRT’s “Draft Report: New gTLD Program Safeguards to Mitigate DNS Abuse” (the “Draft Report”).⁴ In that comment INTA agreed with the CCTRT that additional studies from outside vendors would be needed to provide reliable statistical analysis of the effectiveness of the New RA safeguards, and also supporting the proposition that trends and data relating to new gTLDs should be compared with trends and data from legacy gTLDs.⁵ Thus, on those high-level points, INTA welcomes the Study. But INTA also commented that the CCTRT seemed to be defining abuse too narrowly, and specifically had omitted discussion of certain forms of trademark abuse from its Draft Report.⁶ INTA offers this comment to note that the Study, like the Draft Report before it, defines abuse too narrowly and omits information related piracy and infringement which cause considerable harm to the consuming public.

The Study notes that its statistical comparison of rates of DNS abuse pertains to “spam, phishing, and malware distribution.”⁷ Notably absent is any reference to trademark abuse. Such a narrow definition is not consistent with ¶3(a) of Specification 11 of the New RA, which requires Registry Operators to include a provision in their Registry-Registrar Agreements that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from

¹ <https://www.icann.org/public-comments/sadag-final-2017-08-09-en>.

² <http://www.inta.org/About/Pages/Overview.aspx>.

³ <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>.

⁴ <https://forum.icann.org/lists/comments-new-gtld-safeguards-dns-abuse-15mar16/pdfRZwbLbM0kX.pdf> (the “INTA Draft Report Comment”).

⁵ INTA Draft Report Comment at 6.

⁶ INTA Draft Report Comment at 1-2. Specifically, INTA noted that the Draft Report omitted any discussion of pre-registration programs and allocation of domain names prior to trademark sunrise periods; pricing schemes targeting famous trademarks during sunrise periods and as part of premium names programs; the reservation by registries of coined and arbitrary trademarks making them unavailable during trademark sunrises; bulk premium name allocation to affiliated monetization platforms; circumventing trademark claims notice requirements; and promotional practices confusing consumers and encouraging cybersquatting.

⁷ Study at 1.

committing, among other things, piracy, trademark infringement, fraudulent or deceptive practices, and counterfeiting.⁸ Nor is it consistent with ¶3.18.1 of the 2013 Registrar Accreditation Agreement (the “2013 RAA”), which provides that accredited registrars “shall maintain an abuse contact to receive reports of abuse involving Registered Names sponsored by Registrar, including reports of Illegal Activity”, and in turn defines “Illegal Activity” as “conduct involving use of a Registered Name sponsored by Registrar that is prohibited by applicable law and/or exploitation of Registrar’s domain name resolution or registration services in furtherance of conduct involving the use of a Registered Name sponsored by Registrar that is prohibited by applicable law.”⁹ It also fails to cover those forms of trademark abuse that INTA noted in its April 2016 comment on the Draft Report, including cybersquatting, front-running, and traffic diversion, among others.¹⁰

As one possible explanation for the Study’s narrow definition of abuse, ICANN has asserted that abuse that is “focused on intellectual property violations” may be “interpreted differently not only in terms of substance but also in terms of available remedies depending upon the jurisdiction.”¹¹ Whatever the merits of this explanation for other forms of “intellectual property violations”, it cannot explain the exclusion of trademark abuse from the abuse examined by the Study, for several reasons. First, trying to distinguish between “spam, phishing, and malware” on the one hand, and trademark abuse on the other, overlooks the fact that criminals frequently use trademarks in their spam, phishing, and malware scams. In fact, it is common for criminals to use trademarks to create fake landing pages made to look like a company’s login page in phishing scams.¹² The Study recognized this reality when it noted that a single domain name registered for malicious purposes may be used in several phishing campaigns against different banks, and then provided as examples: bankofamerica.somedomain.com, us.hsbc.com.somedomain.com, and connect.secure.wellsfargo.somedomain.com.¹³ The Study also noted that 75 out of 88 abused .top domains in the fourth quarter of 2015 contained combinations or misspelled versions of Apple trademarks, suggesting that they were all used in the same phishing campaign against users of Apple products.¹⁴ The researchers behind the Study even created a list of keywords (including trademarks such as Yahoo! and Apple) that criminals most often incorporate in domain names intended to target unsuspecting victims in phishing scams.¹⁵ In addition to phishing, it is also common for criminals to use famous trademarks in fake news articles to spread malware.¹⁶ Thus, it is not accurate to state that “spam, phishing, and malware” are somehow distinct from

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

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

¹⁰ INTA Draft Report Comment at 1-2.

¹¹ <https://www.icann.org/public-comments/sadag-final-2017-08-09-en>.

¹² See, e.g., <http://www.bbb.org/boston/news-events/news-releases/2014/03/bbb-warning-netflix-phishing-scam/>.

¹³ Study at 6. As an aside: the effectiveness of the New RA safeguards to address this specific kind of phishing abuse – which relies on the misuse of a trademark in a third-level domain rather than a second-level domain – is especially relevant, given that other possible means of addressing misuse of trademarks in malicious second-level domain registrations may not be as available for third-level domains. See, e.g., <http://www.adrforum.com/ThirdLevel> (“Ordinarily, domain name dispute resolution policies do not apply to third-level domain names.”).

¹⁴ Study at 12.

¹⁵ Study at 8.

¹⁶ 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>.

trademark abuse. Rather, it is more accurate to state that the Study analyzed some forms of trademark abuse but not others.

There are other reasons why ICANN's explanation for the exclusion of trademark abuse from the scope of the Study does not withstand scrutiny. First, it is not clear that legal proscriptions against "spam, phishing, and malware" – or available remedies for spam, phishing, and malware – are entirely consistent and uniform across all jurisdictions (or, at least, are any more consistent and uniform across jurisdictions than are interpretations and available remedies for trademark abuse).¹⁷ Second, it is not clear why consistency of interpretations or remedies across jurisdictions is relevant to the definition of abuse for purposes of the Study. Again, the abuse being examined by the Study is that which is proscribed by the safeguards in the New RA. But the New RA applies equally to any contracted Registry Operator regardless of jurisdiction, and regardless of whatever non-contractual legal remedies may exist in different jurisdictions. Finally, given the role of trademarks in protecting consumers and promoting efficient markets by enabling quick, confident, and safe purchasing decisions¹⁸, including online, trademark abuse goes to the heart of the CCTRT's mandate under ICANN Bylaws §4.6(d) to "examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice."¹⁹ In other words: to ignore trademarks in a study on how to promote competition and consumer trust is akin to ignoring seat belts in a study on how to promote vehicle safety.

None of this is to say that the methodology, or analysis, or conclusions of the Study are somehow flawed, or even to suggest that the Study will not be useful for the CCTRT.²⁰ It will be. Rather, INTA offers this comment simply to note the limitations of the Study, and to suggest that any conclusions or recommendations that the CCTRT draws from the Study should be narrowly tailored. In other words, the risk here is not that the CCTRT will rely on the Study as one data point of many. Rather, the risk is that the CCTRT will over-rely on the Study as more comprehensive than it actually was. For example, INTA does not agree that the Study fills "the absence of a comprehensive comparative study of DNS abuse in new and legacy gTLDs that would allow [the CCTRT] to assess the effectiveness of New gTLD Program safeguards."²¹ For

¹⁷ Taking just spam: while a comprehensive comparative analysis of the various laws on spam is beyond the scope of this comment, we do want to point out that neither the United States CAN-SPAM Act, nor the UK Privacy and Electronic Communications Regulations 2003 (just to name two) ban the sending of unsolicited bulk email, though both do put (different) restrictions on it.

¹⁸ See, e.g., 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 2:33 ("[P]rotection of trademarks is merely a facet of consumer protection. The plaintiff in trademark litigation could be characterized as a 'vicarious avenger' of consumer interests. . . . By insuring correct information in the marketplace, the trademark laws reduce losses caused by misunderstanding and deceit and thus permit consumers and merchants to maximize their own welfare confident that the information presented is truthful.") (citations omitted).

¹⁹ See <https://community.icann.org/pages/viewpage.action?pageId=56135383>.

²⁰ While the Study's methodology was sound for the narrow scope of abuse that it analyzed, INTA notes that a broader definition of abuse could have led the Study to consider additional data from additional sources. Specifically, the Study relied on data from 1) eleven blacklists representing malware, phishing, and spam; 2) WHOIS data; 3) DNS zone files; 4) web crawls/scans; 5) active DNS scans; and 6) passive data for registries provided by ICANN. There are notable omissions from that list. The Study could have examined UDRP decisions, data from ICANN's Compliance Department, data from the TMCH, data from Registry Operators or Registrars, data from INTA or data from trademark owners themselves.

²¹ <https://www.icann.org/public-comments/sadag-final-2017-08-09-en>.

the reasons mentioned above, the Study is not “comprehensive” nor does it allow the CCTRT to assess the effectiveness of New RA safeguards with the most robust data.

INTA also does not agree that the Study should “serve as a baseline for future studies focused on explaining the variation in abuse rates in different gTLDs.”²² The Study ably accomplishes its narrow aim: namely, to make a comprehensive descriptive statistical comparison of rates of spam, phishing, and malware in new and legacy gTLDs. And that is a useful tool for the CCTRT to have. But it is only one tool and not the complete toolbox. Given the importance of trademarks for promoting competition and consumer trust, no study on DNS abuse that systematically excludes some forms of trademark abuse could be considered comprehensive.

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. 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 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.

²² <https://www.icann.org/public-comments/sadag-final-2017-08-09-en>.