

Instructions:

This table was built to assist the Trademark Claims Data Review Sub Team in its analysis as to whether, and how, the previously collected Trademark Claims data (between December 2016 and March 2018) answer each of the final agreed Charter questions.

- In the **Trademark Claims Tab** of the [analysis tool](#), Staff have included excerpts, as well as the relevant page/slide reference, from the previously collected data that staff believe may assist in answering the final agreed Charter questions. Summaries of the excerpts are included in Column B.
- The excerpts cited by Staff are nonexclusive; Sub Team members are welcome to download and reference the actual documents, linked from the **Source Tab**, to cite relevant information that may help answer the final agreed Charter questions.
- When providing input, please note the source name and page/slide number of the previously collected data.

Claims Charter Question 1:

Is the Trademark Claims service having its intended effect? Consider the following questions specifically in the context both of a Claims Notice as well as a Notice of Registered Name:

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(b) Is the Trademark Claims service having any unintended consequences, such as deterring good-faith domain name applications?

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Kristine Dorrain	no		Not helpful to this charter question	RY responses to data subteam (Source #1)
Kristine Dorrain	yes	b	Some parties have alleged that the mark+50 list gives a right holder too much. Q16 indicates only 375 such labels have been added to the TMCH, suggesting that there is not as much deterrence as might have been expected.	Questions from RPMs to TMCH

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				provider
Kristine Dorrain	no		Not helpful to this charter question	TMCH report 2013-2017
Kathy	maybe	(b)	<p>Strange question: If Deloitte is not allowed to delete mark records, then wouldn't that have the unintended consequence of deterring good-faith domain name applications:</p> <p>Deloitte wrote: "As the TMCH is not allowed to delete any mark records, the total number of trademark records submitted to (the TMCH doesn't register trademarks) the Trademark Clearinghouse can be found under section 2.3. in the report provided to ICANN on a monthly basis and are indeed cumulative."</p> <p><i>Operational fix to allow reasonable deletions?</i></p>	<p>QUESTIONS FROM THE REVIEW OF ALL RIGHTS PROTECTION MECHANISM... TO THE TRADEMARK CLEARINGHOUSE PROVIDER, Ques 4.</p>
Kathy	yes	b	Deloitte's acceptance of design mark registration has been discussed in the WG as having enormous unintended consequences, including for TM Claims. Here's one area in which it is discussed briefly and Deloitte confirms this practice.	Same as above, Ques 10.
			Deloitte will allow registration of marks for "a registry's individual requirements" (even if not trademarks) into the main TMCH Database. The rules adopted by the	Same as above, Ques

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			<p>GNSO and Board allow such words to be added to secondary databases, but not the main TMCH database (out of worry for Claims and Sunrise).</p> <p>The idea here was to allow pre-registration, on registry request, of a whole series of non-registrable marks in a secondary database if clearly useful and applicable, e.g., in a .AUTOSHOPS, Jerry's AutoShop, Bill's AutoShop and Rebecca's AutoShop (my daughter does auto mechanics) would like not have trademarks, but could pre-register into a secondary database for special pre-registration as a registry might seek.</p> <p>These marks should never be co-mingled with the main TMCH database, that that possibility seems to distinctly exist.</p> <p>[quote from doc] How many marks in the TMCH fall under the following category: "Other marks that constitute intellectual property and meet a registry's individual requirements"? How would Deloitte keep these marks from being used in the Sunrise and Claims periods of other registries? As to date, no registry operator has pursued this option with the TMCH.</p> <p><i>Clarification in order?</i></p> <p>---</p> <p>Sub Team Comments:</p>	14

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			<ul style="list-style-type: none"> • Susan Payne: It isn't the case. An undeleted record in the clearinghouse does not mean it's active. There are multiple conversations about how this work. Just because records are not being deleted from the database doesn't mean they are continuing to be active when identified as being no longer legitimate. • Griffin Barnett: the TMCH is recording marks where there is a discernable textual component of the mark, even if the mark also includes design elements. This makes sense in terms of TM law because someone using just the text component of a mark, even without design elements, could be committing infringement based on the likelihood of confusion • George K: Supports the issues that Kathy K identified. The unintended consequences that Kathy K identified may be relevant to Claims Charter Q3. • Michael G: Agree with Griffin's point about discernable textual component. blocking the ability to record those in the TMCH would threaten the ability of SMEs to record in the TMCH (those that have design marks).TMCH isn't intended to be a TM search tool. • Rebecca T: Kathy is right about the consequence about design mark. And I think it's quite relevant that design marks interact with the language of the notice, which is misleading as to them. • Greg Shatan: Limited TM budget means you have to decide to register the stylized form, word, etc. Not all of the above. 	
Kathy	yes	b	We have talked about the TM Claims notice being something registrants should	FOLLOW UP

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			<p>understand. One aspect of the TM Claims, for those who drafted it, was the ability of third parties to review it -- including the TM attorneys of small businesses and non-profits. This was part of the "due diligence" vision in 2009 -- that third parties could review, consult and advise.</p> <p>Note: the third party investigative/preparatory/advising role was envisioned in the original TMCH rules and asked about in our Ques 2: "the TMCH Dispute Resolution Procedures appear to contemplate the possibility of third party (i.e. not a trademark holder or agent who has recorded trademark labels in the TMCH),"</p> <p>Deloitte responds: "It is correct that the Trademark Clearinghouse database is not publically available and therefore third parties cannot retrieve information regarding what trademark records are recorded in the TMCH. However, a third party is informed of a record in the TMCH through the claims notice which is presented prior to registration. The claims notice holds the Mark name, Registrant and registrant contact and the Jurisdiction and goods and services of the mark recorded in the TMCH." [sorry, spacing problems in the cut-and-paste]</p> <p>Accordingly, arguably, the TMCH is having unintended consequences on the</p>	<p>QUESTIONS FOR DELOITTE FROM THE GNSO'S REVIEW OF ALL RIGHTS PROTECTION MECHANISMS (RPM) REVIEW POLICY DEVELOPMENT PROCESS WORKING GROUP Updated 5 March 2017 Ques 2</p>

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			<p>Trademark Claims service by deterring good-faith domain name applicants, with their attorneys, counsels and clinics, from researching and understanding sound domain name choices prior to registration -- because research and preparation cannot be done in traditional and well-established manner.</p>	
kathy	yes	b	<p>Question 6, bullet point 2, indicates a very broad scope of protection for trademarks that are registered for design mark purposes -- with resulting implications and unintended effects for Claims service and recipients of notices.</p> <p>Deloitte responds: "These are mentioned in the TMCH guidelines: For those marks that do not exclusively consist of letters, words, numerals or special characters, the verification agents will verify the trademark name based upon the image on the trademark certificate. In the event that there is any doubt about the order in which the characters appear, the description provided by the Trademark office will prevail. In the event no description is provided, such Trademark records will be allocated to a Deloitte internal team of specialists with thorough knowledge of</p>	Above, Ques 6

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			both national and regional trademark law who will conduct independent research on how the trademark is used, e.g. check web site, or they may request that the trademark holder or agent provide additional documentary evidence on how the Trademark is used."	
George Kirikos	Yes		(no for first 4 documents, will adjust this later on as we go through the other 8) I can understand the points that Kathy is making above re: figurative marks, though. (I was making the same points in the Sunrise preamble document, with regards to "abuses" as these all don't belong in the TMCH at all) I don't know whether we should put a separate question about "inclusion in TMCH", as all these overlap in some way) 93.7% abandonment rate (p. 16, 17-18, Table 4) in Analysis Group report, combined with 113.2 million unique download requests (p. 8), suggests large negative impacts on registrars/registries and public). 113,338 non-disputed registrations, 346 disputed, and 1,696,862 abandoned registrations (p. 18). Fees and costs too high for registries and trademark holders (p. 64-65).	AG Report, p.16, 17-18, 8, 64-65

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			<p>For the INTA Survey Final Report, an overarching concern (for all charter questions) is the small and unrepresentative sample, that is likely to have overlapped with other past input from the Analysis Group report and survey respondents (which aren't necessarily independent surveys of different groups, but often the same groups making their statements repeatedly). E.g. on page 6, 39% had 5,000-24,999 employees, 39% had 25,000+ employees; 27% had \$1B to \$5B in revenues, 52% had \$5B+ in revenues, so these are mostly very large companies; also, 67% based in North America and 21% in EU; thus, not very representative of all trademark holders.</p> <p>Pages 15 & 51 of the INTA Survey Final Report asserted that 36% of respondents felt that Trademark Claims helps. On page 52, there were a handful of free form responses: "Trademark Claims are merely another form of Monitoring and are useful in perhaps 20% of cases where an inadvertent application is filed"; For Trademark Claims, Trademark registration is higher and more difficult than obtaining domain names. The owner of the registered trademark in any jurisdiction might be considered to be authorized by the Trademark Office to use the mark. Therefore, I feel that Trademark Claim has mitigated the risks."</p>	INTA Survey Final Report, p. 6, 15, 51, 52
Griffin Barnett	Yes	(a) – (b)	<p>Deloitte Responses:</p> <ul style="list-style-type: none"> - Based on our customer support team experience, most of the questions relate to the actual trademark management such as ... 3) I have received a claims 	Listed in Prior Column

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			<p>notification, what do I do now [this suggests some confusion regarding the meaning of Claims notices, and the TMCH role in administering them]</p> <p>Deloitte Responses to Follow-Up Questions:</p> <ul style="list-style-type: none"> - When a trademark holder informs the TMCH that a mark has been cancelled the mark will be deactivated and the Sunrise and Claims services will be cancelled within 24 hours 	<p>Comment from Kathy Kleiman: Page number? Tx</p>
KKleiman	Yes	1a and b	<p>"We find that although it is possible that the Claims Service and matching criteria may help deter rights-infringing registrations that are exact matches to trademark strings recorded in the TMCH, it is also possible that some good-faith registrations are being deterred by the current Claims Service system, which may be detrimental to the registration activity of non-trademark-holder domain registrants."</p>	<p>Independent Review of Trademark Clearinghouse (TMCH) Services Revised Report, p.2</p>
Susan Payne	Only to a limited extent	1a and b	<p>"We note that our data and analyses are descriptive in nature, and we are only able to draw conclusions regarding whether the results of the evaluation are consistent with what one would expect to see if the TMCH services were effective (or not) at helping to deter domain name abuse. Our data also do not quantify the costs and benefits associated with the present state of the TMCH services, nor the potential</p>	<p>AG Report p6; C IV Data</p>

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			costs and benefits of expanding or altering the way the services function, making concrete cost-benefit analyses outside the scope of this report"	
Susan Payne	Limited - limitations on data	1a and b	"Limitations of our data do not allow us to definitively conclude whether Claims Service notifications have a deterrent effect on either type of registration activity."	AG Report p3 - continuation of the section quoted by KK above (starts on p2)
Susan Payne	Limited - limitations on data	1a and b	"These data provide a way to measure which trademark strings are included in registration attempts during the Claims Service period and how often claims notifications result in registration or abandonment. However, due to limitations of the data (discussed in more detail below), our analyses of the data require an assumption that each download is associated with a registration attempt (and was not downloaded by a registrar for a purpose unrelated to domain name registrations). If this assumption is incorrect, then our results will exaggerate the size of any observable registration-deterrent Claims Service effect."	AG Report p 7
Susan Payne	Limited - limitations on data	1a and b	"In conversations with IBM, we learned that downloads in the Claims Service data are an imperfect measure of Claims Service notifications. In particular, the measure would be perfect if every download from the TMDB was associated with a domain name registration attempt. However, registrars may download records from the	AG Report p8

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			TMDB, even when no registration attempt has been made and can download multiple records at one time."	
Susan Payne	Limited - limitations on data		"To answer these questions, we examined the extent to which Claims Service notifications appear to deter registration activity (i.e., how often registration attempts that trigger Claims Service notifications are not completed) and assist trademark holders in monitoring domain name registrations. These analyses involve determining how often registration attempts that trigger Claims Service notifications are abandoned and, of registrations that are completed, how often they are disputed relative to registrations that are completed without having triggered a Claims Service notification. There is unfortunately no way for us to determine the intent (i.e., bad faith or not) behind a registration attempt; we interpret dispute as a signal that a registration may have been considered to be trademark-infringing by the trademark holder. We also examine how trademark holders value Claims Service notifications by measuring adoption of the Ongoing Notifications Service. Finally, we evaluate whether potentially-infringing registrations are made immediately after the Claims Service period ends."	AG Report p15
Susan Payne	Limited - limitations on the data	1a and b	"Our findings are consistent with what one might expect to see if the Claims Service was helping to deter bad faith registrations that would otherwise be disputed. However, the results may also indicate that many legitimate domain registrations may be deterred by Claims Service notifications. These results should not be relied upon to make policy recommendations. We find that the vast majority of registration	AG report p16

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			<p>attempts are not completed after receiving a Claims Service notification (94% abandonment rate). This abandonment rate seems quite high, however there are several caveats to this result, which include our inability to determine the abandonment rate that would occur if no Claims Service notifications were sent and limitations of our data set, which require us to assume that every registrar download from the TMDB represents a registration attempt.⁵⁴ We therefore cannot determine whether Claims Service notifications are the direct cause for the abandonment rate that we observe. We also find a very low dispute rate (0.3%) among registrations that receive Claims Service notifications (i.e., new gTLD registrations of domain names that are exact matches of trademark strings recorded in the TMCH). Although we are unable to say exactly why this dispute rate is so low, it is possible that Claims Service notifications are effective at deterring bad faith registrations that would otherwise be disputed, or that trademark holders are not very concerned about registrations made in new gTLDs (i.e., they are more concerned about registrations made in the .com legacy TLD) or have not yet submitted a dispute on these infringing registrations."</p>	
Susan Payne	Limited - limitations on the data	1 a and b	<p>"As shown in Table 4, 6.3% of registration attempts that trigger a Claims Service notification complete the registration process. Of the nearly 114,000 completed registrations, only 0.3% resulted in domain disputes as of December 2015. The registrations in the Claims Service data account for approximately 5% of 2.2 million registrations made in new gTLDs during Claims Service periods that occurred between October 2013 and February 2016 (i.e., the time period covered by the Claims Service data)." Subject to the limitations in the data, this suggests that where domain</p>	AG Report p18-19

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			registrations do proceed they may be viewed as non-infringing by brand owners since the vast majority are not then challenged, ie some good faith registrations are proceeding	
Rebecca Tushnet	Yes	1a&b	<p>The most frequently downloaded trademarks tend to be common words. Table 1 shows the ten most commonly downloaded trademark strings. Because of limitations on our ability to understand the underlying data (some of which could be remedied by clearer contractual obligations on Deloitte’s part), we can’t tell the proportion of legitimate versus illegitimate attempts, but given the multiple noninfringing uses for strings like “cloud,” deterrence of legitimate uses is an obvious risk. The ubiquity of legitimate uses of “cloud,” “hotel,” etc. online and the lack of any fame for any particular non-generic use for these popular terms raises the chances that users are seeking legitimate registrations, and the high abandonment rate raises the chances that users are illegitimately deterred.</p> <p>From the table on p. 9:</p> <ul style="list-style-type: none"> smart 15,198 Smart Communications, Daimler AG forex 14,823 Forex Bank AB hotel 14,690 Hotel Top Level Domain GMBH one 14,205 American Academy of Ophthalmology love 13,912 Cartier International AG, The Conde Nast Publications cloud 13,821 Individual nyc 13,622 City of New York, NYC & Company london 13,343 London & Partners 	Analysis Group Revised Report, p. 8-9, 16-17

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			<p>abc 13,331 LV Insurance Management Limited luxury 13,125 ILUX Holdings</p> <p>P. 16: "We also find a very low dispute rate (0.3%) among registrations that receive Claims Service notifications (i.e., new gTLD registrations of domain names that are exact matches of trademark strings recorded in the TMCH).</p>	
Sub Team Discussion			<ul style="list-style-type: none"> ● Susan P: Take into consideration the AG's statements about the poor data they have, so don't know if we can rely on their conclusions. ● Rebecca T: Don't know about the proportions of bad-faith registrants. Don't have evidence of how the policy is working and affect on bad-faith registrants. ● Griffin Barnett: I think AG later admitted, or ICANN later found, that the cited 93.7% abandonment rate was actually flawed because it included a very high and disproportionate number of "abandonments" from a particular registrar doing automated queries of the system. I think that was related to this report, but I could be thinking of something else. ● George Kirikos: that 93.7% is already an adjusted figure (they removed 2 registrars; it was 99%+ unadjusted). So, they already removed those disproportionate abandonments. (page 17, footnote 55) ● Brian B:: From an email on list 9-June-2017 on abandonment: "See https://www.godaddy.com/garage/smallbusiness/market/effective-strategie 	

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			<p>s-to-boost-abandoned-cart-email-conversion-rates/ and https://www.godaddy.com/garage/industry/retail/ecommerce/want-to-increase-sales-reduce-shopping-cart-abandonment/. There are many articles on this topic with varying figures, but they tended to generally note abandonment rates upwards of 60%."</p>	
Sub Team Comments			<ul style="list-style-type: none"> • Kristine D: Whose marks are we trying to protect? If we are talking about really big companies having more brands to protect, that might explain the response -- as to whether the data is biased. • Rebecca T: Not sure that there is evidence that the claims of large TM owners and small TM owners are the same. 	

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