



**COMMENTS ON THE COMPETITION, CONSUMER CHOICE, AND CONSUMER TRUST (CCT) REVIEW TEAM (CCTRT): NEW SECTIONS TO DRAFT REPORT OF RECOMMENDATIONS**

**January 8, 2018**

**Intellectual Property Constituency Comments**

The Intellectual Property Constituency (IPC) of the Generic Names Supporting Organization (GNSO) is pleased to submit public comments on the [CCTRT New Sections to Draft Report of Recommendations](#), published for public comment on November 27, 2017. Please find our comments below.

**Domain Parking**

**Specific Comments on the Recommendations:**

**Recommendation Chapter 3.4:** Collect parking data. The high incidence of parked domains suggests an impact on the competitive landscape, but insufficient data frustrates efforts to analyze this impact.

**IPC Comments:** The IPC supports this recommendation. We agree that ICANN should collect data on domain parking, and use the data collected to independently study and analyze the impacts of various forms of domain parking on competition, consumer choice, and consumer trust in the DNS. In particular, the IPC does not believe that such a study should be deferred to a future CCT Review Team, since the prevalence and potential impact of parked domains is not limited to new gTLDs. The study should focus on the correlation between domain parking and the occurrence of DNS abuse in its widest sense, including its correlation with cybersquatting and other forms of intellectual property infringement. Anecdotally, we have noted a strong correlation between malicious conduct and redirects performed by third party affiliate advertising services.

## Cost to Brand Owners

The recommendations in this section remain consistent with the original recommendations in the CCTRT Draft Report. We The IPC urges review of its comments relevant to these recommendations submitted to ICANN on May 22, 2017 on the initial draft report.<sup>1</sup>

## DNS Abuse

**General Comments:** The IPC agrees with the general conclusions of the CCTRT that existing safeguards are not sufficient to protect against DNS Abuse, and that further creative solutions need to be evaluated, which the CCTRT bases on conclusions presented by the Statistical Analysis of Domain Abuse in gTLDs (SADAG) Report. The IPC has previously noted its disappointment that the SADAG Report took a limited view of the abuse ecosystem by excluding from its review the overlapping and relevant incidences of intellectual property abuse occurring in the DNS.<sup>2</sup> At the same time, while the focus of the SADAG report may have been deficient in its exclusion of some IP-related abuse, its findings were helpful and a welcome addition to the discourse on this important subject. In its comments on the SADAG Report, the IPC noted, in part:

- To comprehensively study DNS abuse within the new gTLDs, additional research is needed to assess overlaps with trademark and copyright infringement, as well as unlawful privacy interferences and other types of abuse which implicate the illegitimate and misleading use of protected brands
- The omission of IP-related abuse from the SADAG study raised serious concerns for the IPC. This omission perpetuates the marginalization of IP-related abuse, instead of recognizing it as an issue that needs to be addressed and understood within the general rubric of ICANN’s mission to ensure the stable and secure operation of the DNS. The potential absence of IP-related abuse from the SADAG Report would eliminate the ability to correlate IP abuse with other types of abuse which are the focus of the study. The IPC regards the correlation between these species of abuse as significant, as evidenced by a growing body of research and the direct experience of IPC members. (The SADAG Report itself implicitly endorses this linkage by reference to the fact that phishing attacks often involve the malicious registration of strings containing trademarked terms.)
- The IPC recognizes that additional data is essential for further research. In this regard, we encourage ICANN to support and facilitate further studies to better understand malicious web infrastructures within new and legacy gTLDs. The IPC is concerned that excluding certain forms of abuse because they have been labeled as related to “Content” is myopic because on some level, phishing and malware are themselves content-driven, and there is

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<sup>1</sup> [http://www.ipconstituency.org/assets/ipc-position-papers/2017/2017\\_05May\\_23%20IPC%20Comments%20regarding%20CCTRT%20Draft%20Review.pdf](http://www.ipconstituency.org/assets/ipc-position-papers/2017/2017_05May_23%20IPC%20Comments%20regarding%20CCTRT%20Draft%20Review.pdf)

<sup>2</sup> <http://mm.icann.org/pipermail/comments-sadag-final-09aug17/attachments/20170928/0a4c9163/IPCCommentonStatisticalAnalysisofDNSAbuseingTLDsSADAGReport-0001.pdf>

a growing body of evidence demonstrating a correlation between parked pages and content theft and malware distribution.<sup>3</sup>

While welcoming the CCTRT's conclusions and several of its recommendations (as detailed below), we reiterate our concerns that the landscape presented by the SADAG Report is a limited one. We urge the CCTRT to resist blinding itself to the prevalence of IP-related abuse and its role within the broader abuse ecosystem. We acknowledge that there are differences of opinion regarding what might fall within ICANN's mandate when it comes to the adoption of policies or rules designed to address DNS abuse, but at the very least, that should not inhibit the CCTRT pursuing a robust understanding of the abuse ecosystem, which includes gathering and analyzing data on IP-related DNS abuse.

### **Specific Comments on the Recommendations**

**Recommendation Chapter 5.A:** Consider directing ICANN org, in its discussions with registries, to negotiate amendments to existing Registry Agreements, or in negotiations of new Registry Agreements associated with subsequent rounds of new gTLDs, to include provisions in the agreements to provide incentives, including financial incentives, to registries, especially open registries, to adopt proactive anti-abuse measures.

**IPC Comments:** The IPC strongly supports the concept of incentives in relation to all existing Registry agreements, not just future agreements. While we note that the new clause 6.7 of the New gTLD Registry Agreement, as amended on 31 July 2017, gives ICANN wide discretion to apply fee reduction waivers, it is important that the views of the IPC be considered regarding their use. ICANN should give consideration to this as a vehicle for providing the recommended incentives, backed by future study of and discussion by the community. One avenue could be for Public Interest Commitments (PICs) that already exist in all registry agreements to be expanded to include additional anti-abuse measures as well as clear prohibitions against fraud and abuse perpetrated directly by registries and registrars. Registries should be obliged to monitor and address registration by repeat offenders, and use mechanisms to actively detect abuse rather than taking a passive stance and waiting for complaints to address. Registries should also be required to track and report all instances of abuse prohibited under the Registry Agreement, including illegal activity such as intellectual property infringement. We note that this is one area where an understanding of IP-infringement as a vector associated with abuse would be important to keep in mind. Programs that protect trademarks would also by logical extension protect consumers from being duped by phishing and other fraudulent and deceptive activities. The IPC supports, conditioned on further study and community discussion, the principle of rewarding good practices as discussed by the CCTRT that include voluntarily imposing anti-abuse measures, such as enhanced registration restrictions; increased registration fees; enhanced suspicious domain

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<sup>3</sup> See [https://www.securitee.org/files/parking-sensors\\_ndss2015.pdf](https://www.securitee.org/files/parking-sensors_ndss2015.pdf) and <http://www.digitalcitizensalliance.org/news/press-releases-2016/dangerous-partners-digital-citizens-investigation-finds-that-malware-operators-and-content-theft-websites-assisted-by-u.s.-based-tech-firms-are-targeting-millions-of-consumers/>

monitoring; repeat offender tracking and remedies; enhanced cooperation with local law enforcement, consumer protection, and/or cybersecurity authorities; and/or other forms of active abuse detection and response.

For the sake of completeness, the IPC would also like to highlight that closed registry models, such as closed brand registries subject to Specification 13, are generally considered to be inherently less at risk of abuse. Whilst we support the concept of incentives for the adoption of anti-abuse measures, therefore, this should not have the effect of financially disadvantaging closed brand registries.

The CCTRT notes the conclusions of the SADAG Report that much of the registry abuse detailed in the CCT report is linked directly to pricing issues (i.e. lower priced domain names lead to higher rates of abuse). ICANN should consider financial anti-abuse incentives suggested by the CCT Review Team. Before the suggested direction regarding negotiations and pricing is given to ICANN org, the IPC requests that further study and consultation with the community take place to ensure that price reductions do indeed incentivize proactive anti-abuse measures, and do not advance the identified correlation between lower prices and higher rates of abuse identified in the SADAG Report.

**Recommendation Chapter 5.B:** Consider directing ICANN org, in its discussions with registrars and registries, to negotiate amendments to the Registrar Accreditation Agreement and Registry Agreements to include provisions aimed at preventing systemic use of specific registrars for technical DNS abuse.

**IPC Comments:** The IPC strongly supports this recommendation, but we believe it is already within ICANN’s remit to act against bad-acting registries and registrars. The CCTRT should call on ICANN Compliance and ICANN Legal to ensure ICANN is adequately enforcing its existing contracts. In particular, the IPC supports the suggestion made by the CCTRT to “impose on registrars and their affiliated entities as resellers, a duty to mitigate technical DNS abuse, whereby ICANN may suspend registrars and registry operators found to be associated with unabated, abnormal and extremely high rates of technical abuse.”<sup>4</sup> The Registrar Accreditation Agreement (RAA) could more explicitly set performance thresholds with respect to malicious conduct in domains under management. For example, ICANN might set contractually mandatory minimum percentage levels for abusive domains under management, as monitored by Domain Abuse Activity Reporting (DAAR). With the launch of the new DAAR tool, it should be easier than ever for ICANN (and the community) to identify and address systematic abuse conducted through specific registries and registrars, including through de-accreditation. To ensure transparency, ICANN should regularly publish abuse rates of accredited registrars, and subject those above a certain threshold to a more rigorous review process. Registrars above a certain threshold should be included on a designated watch list, or trigger contractual enforcement against the party in appropriate circumstances. Before the suggested direction regarding negotiations is given to ICANN org, the IPC requests that further study and consultation with the community take place to

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<sup>4</sup> New Sections Report at 27.

ensure that the direction given to ICANN org best incentivizes proactive anti-abuse measures.

**Recommendation Chapter 5.C:** Further study the relationship between specific registry operators, registrars and DNS abuse by commissioning ongoing data collection, including but not limited to, ICANN Domain Abuse Activity Reporting (DAAR) initiatives. For transparency purposes, this information should be regularly published in order to be able to identify registries and registrars that need to come under greater scrutiny and higher priority by ICANN Compliance. Upon identifying abuse phenomena, ICANN should put in place an action plan to respond to such studies, remediate problems identified, and define future ongoing data collection.

**IPC Comment:** We strongly agree with this recommendation. ICANN should act more forcefully against bad acting registries and registrars. Specifically, accreditation agreements with ICANN should feature thresholds for abusive domains under management, as identified by DAAR, with commensurate escalated remedies up through de-accreditation. The IPC also reiterates its concerns that data collection should be undertaken with a view to better understanding the overlap and correlations between different types of DNS abuse, including abuse related to intellectual property infringement. DAAR is a good start, but ICANN should seek to include a broader set of data in research efforts if DAAR falls short. Community input may be helpful in filling the gaps.

Further, the IPC urges for transparency into how the DAAR is works (e.g., what feeds are included and how they are selected, how feeds are aggregated considering that they may not all have the same methodologies, etc.). Without this transparency, the effectiveness of community input in the identification of a broader set of data may be put at risk, and will give rise to concerns from the community regarding DAAR output.

**Recommendation Chapter 5.D:** A DNS Abuse Dispute Resolution Policy (DADRP) should be considered by the community to deal with registry operators and registrars that are identified as having excessive levels of abuse (to define, e.g. over 10% of their domain names are blacklisted domain names). Such registry operators or registrars should in the first instance be required to a) explain to ICANN Compliance why this is, b) commit to clean up that abuse within a certain time period, and/or adopt stricter registration policies within a certain time period. Failure to comply will result in a DADRP, should ICANN not take any action themselves.

**IPC Comment:** We support continued discussion and consideration of a DADRP as an additional tool to supplement existing dispute resolution procedures within ICANN. However, if the DADRP is a remedy designed to fill a gap or gaps which ICANN Compliance is not addressing, the more important question may be why such a gap or gaps exist. If ICANN Compliance is performing its own independent and rigorous review regarding enforcement of its contracts, a DADRP should not be necessary to address a gap which ICANN already holds the responsibility to fulfill. However, the DADRP may be useful as a supplementary remedy, which may exist in parallel with ICANN's own efforts, provided that ICANN Compliance has clear primary responsibility for addressing

abusive behavior that falls within its remit. If designed and implemented properly, a DADRP could be a complimentary tool to fight abuse.

We note that the recommendation to consider a DADRP did not achieve full consensus within the CCTRT, and we would further welcome discussion on certain of the points raised by the minority views such as:

- The community should not be required to shoulder the burden of compliance, as a substitute for ICANN’s own efforts. In this regard, we are concerned that any DADRP should not unreasonably pass responsibility from ICANN to an “affected party,” a term which does not appear to have been defined. For example, who would be the affected party when an individual or company has fallen victim to a phishing scam or other abuse? It would seem unfair to pass the burden of policing compliance from ICANN and onto such a victim; and
- How can registries mitigate DNS abuse, including via a DADRP? Registries could influence abuse through such means as eligibility criteria and pricing models, as well as enforcement of specific terms via agreements with registrars.

### **Rights Protection Mechanisms (RPMs)**

We note that in its draft Report the CCT-RT refers to various metrics relating to RPMs. While useful, there are various gaps in this data, and it would be extremely beneficial for ICANN to turn its attention to how best to fill those gaps, including working with third parties such as DRS providers, as necessary to encourage the voluntary supplying of data in a standardized format (even where there is no obligation to do so). By way of non-exhaustive example:

- While the total numbers of UDRP and URS cases filed is useful, this data alone presents an incomplete picture since not all DRS providers report on the number of domains involved (e.g., a single case may involve multiple domains).
- ICANN does not have metrics which break down the relative use of the UDRP in new gTLDs versus legacy TLDs because not all providers have reported on this. Consequently, the CCT-RT relied on data from only one provider, albeit the largest, WIPO. This is unsatisfactory.
- ICANN has no figures for the numbers of registry-specific blocks (e.g., Domains Protected Marks Lists). Such blocks clearly have an impact on the uptake of Sunrise registrations and the generation of claims notices in the registries to which they apply.
- The ICANN-commissioned Independent Review of the Trademark Clearing House (TMCH) made repeated reference to lack of available data. Notwithstanding this, a number of assumptions were made in that review for which there was little or no evidence, which are repeated in the CCT-RT draft report. For example, the Draft states that “[w]ith regard to the possibility of extending the Claims Service period or expanding the matching criteria used for triggering the Claims Service notifications, the report found that this may actually be of limited benefit to trademark holders. Indeed, such an extension would potentially be associated with increased costs to other stakeholder groups”; and “trademark holders appeared less concerned about variations of trademark strings and thus felt that an expansion of the matching criteria may in fact bring little

benefit to trademark holders”. We refer to the IPC’s detailed comments on the Analysis Group draft report cited to above.

**Recommendation 40:** An Impact Study in order to ascertain the impact of the New gTLD Program on the cost and effort required to protect trademarks in the DNS should be repeated at regular intervals to see the evolution over time as the New gTLD Program continues to evolve and new gTLD registrations increase. We would specifically recommend that the next Impact Survey be completed within 18 months after issuance of the CCTRT final report and that subsequent studies be repeated every 18 to 24 months. The CCTRT acknowledges the fact that this was carried out in 2017 by Nielsen surveying INTA members and we encourage that to continue noting that the study needs to be more user-friendly.

**IPC Comment:** The IPC appreciates the CCTRT’s efforts to address costs to trademark holders based on the insightful INTA survey, the CCTRT’s agreement with its conclusions, and the CCTRT’s recognition of areas that need further study. We support ICANN regularly repeating an Impact Study on this important topic and would strongly encourage ICANN to fund such periodic studies and to make efforts to ensure that they produce statistically significant results that will help quantify the impact of the New gTLD Program on the cost and effort required to protect trademarks in the DNS, thereby informing policy changes. The effectiveness of the work during phase 1 of the PDP Review of All RPMs in All gTLDs (“RPMs PDP”) is hampered by lack of data.

**Recommendation 41:** A full review of the URS should be carried out and consideration be given to how it should interoperate with the UDRP. However, given the PDP Review of All RPMs in All gTLDs, which is currently ongoing, such a review needs to take on board that report when published and indeed may not be necessary if that report is substantial in its findings and if the report fully considers potential modifications.

**IPC Comment:** The IPC supports this new Recommendation. As the Draft notes, the RPMs PDP is an ongoing process that includes a review of the URS, and that community output should be recognized and appreciated if its findings are substantial.

The CCT-RT does make assumptions about the lack of popularity of the URS as an RPM which we consider to be somewhat unfair. It is important when looking at the total number of URS cases, when compared to UDRP cases, to bear in mind that the URS does not apply to all TLDs but only to new gTLDs (together with a few legacy TLDs who have later adopted it). Domain registrations in new gTLDs are a small fraction of the overall number of domains. By way of example, if one considers the figures cited for 2014, then by the end of Q4 2014 only 478 new gTLDs had been delegated into the root, of which not all would yet have launched. 3.6 million domains<sup>5</sup> were registered, equating to only 1.25% of the total domains. During 2014, however, the URS accounted for 5.4% of total URS plus UDRP cases. Even with a relative reduction in subsequent years, this would still suggest that a reasonable number of domain disputes, proportionately, are

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<sup>5</sup> <https://www.verisign.com/assets/domain-name-report-march2015.pdf>

dealt with via the URS. Whilst the URS may not be used as frequently as the UDRP, therefore, some brand owners clearly appear to have viewed the URS as a useful additional weapon in their arsenal. A more detailed analysis, based on more complete data, would be beneficial before questioning the value of the URS.

With regard to the priority level of this recommendation, the “prerequisite” status may not be necessary. Any future new TLD launches would not result in domain names which might be subject to a future URS action for some time, bearing in mind implementation work on any policy recommendations, followed by the application, evaluation, contracting and launch processes for any new TLDs.

**Recommendation 42:** A cost-benefit analysis and review of the [TMCH] and its scope should be carried out to provide quantifiable information on the costs and benefits associated with the present state of the TMCH services and thus to allow for an effective policy review.

**IPC Comment:** The IPC supports this new Recommendation. We consider that it would be beneficial to this exercise for the CCT-RT to identify types of data which they would have found useful in carrying out their review but which was not available to them. It must be recognized that, in the absence of such data, it may not actually be possible to carry out such a cost-benefit analysis effectively at this time, and that efforts need to be put in place to improve the access to usable, relevant data.

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Thank you for your consideration of these comments.

Respectfully submitted,

Intellectual Property Constituency