

Staff Report of Public Comment Proceeding

Independent Review of Trademark Clearinghouse Services Draft Report																											
Publication Date:	26 September 2016																										
Prepared By:	Antonietta Mangiacotti/ICANN and Analysis Group																										
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Section I: General Overview and Next Steps																											
<p>This study is based on the Governmental Advisory Committee (GAC) recommendation in May 2011 for a comprehensive post-launch review of the Trademark Clearinghouse (TMCH). This review, conducted by Analysis Group, is intended to assess the TMCH services in meeting their intended objectives in conjunction with the GAC-specified topics for review. Specifically, this report analyzes TMCH and third-party data sources, as well as interviews and surveys of TMCH stakeholders, in order to understand the effectiveness of the matching criteria, the Trademark Claims service and the Sunrise period. The paper will be updated based on the feedback received and will be provided to the GAC for review and consideration. The input received on the report will help identify considerations for future application rounds of the New gTLD Program and to inform various reviews and activities within ICANN.</p>																											
Section II: Contributors																											
<p><i>At the time this report was prepared, a total of [number] (n) community submissions had been posted to the forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.</i></p>																											
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Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

ICANN's Summary

ICANN received feedback from six commenters who spoke to a range of issues related to the Trademark Clearinghouse (TMCH) services. Some of the comments received express that the report provides a comprehensive review of the TMCH services and that the findings support their experience with the TMCH. Other commentators, however, state that the report fails to adequately meet some of the GAC requirements for review, that it is too narrow in scope, and that it lacks the necessary data sources that might enable it to conduct a more meaningful cost-benefit analysis or a more thorough assessment of the TMCH services.

Within the comments received from various TMCH stakeholders, there are a number of recurring and overarching themes, and each of these themes is explained in more depth below.

1. Trademark Claims Service Notifications.
2. Matching Criteria.
3. Sunrise Period.
4. Other Matters.

1. Comments relating to the Trademark Claims Service Notifications.

Five commentators agree with Analysis Group that in order to more effectively measure the extent of the Claims Service notification's deterrent effect on rights-infringing registrations, it would have been helpful to obtain additional sources of data, such as registration abandonment rates outside of the Claims period that can be used as a base comparison. Thus, IPC, BC, and NIXI encourage Analysis Group to obtain this data, which may be available from registrars.

Whether the Claims Service notification has a chilling effect on non-infringing registrations, BC believes that "further study is required, including the gathering of survey evidence, to address whether providing prospective registrants with trademark-related information creates a chilling effect on good-faith registrations. BC questions "whether it is possible from the current data alone to directly correlate abandonment to receipt of the Claims Notice, as there may be a wide variety of other reasons for abandonment—price, comparison shopping with other registrars on price, etc."

With regard to the timing of potentially infringing registrations around the Claims Service period, BC and IPC disagree with Analysis Group's statement that registrations completed after the Claims Service period may be perceived by trademark holders as more infringing than registrations made during the Claims Service period. According to BC, "infringement either exists or does not exist, and whether or not the registration was made during the Claims Service rarely has any consequence. In practice, one distinction that may be considered for cybersquatting actions pertaining to domains registered during the Claims Service may be the fact that such registrants can be deemed to have received clear notice of the trademark owner's rights, even if the complainant did not directly reach out to the registrant."

IPC expresses that since the draft report's data shows that the Claims Service appears to have been

successful in deterring rights-infringing registrations, greater consideration must be given to extending the Claims Service period. Furthermore, M and IPC state that the report should have considered additional data to conduct a more meaningful cost-benefit analysis of extending the Claims Service period.

On the other hand, NCSG expresses deep concern with finding that 93.7% of the 1.8 million registration attempts that received a Claims Service notification were abandoned, and only 6.3% went on to complete the domain registration. According to NCSG, “this indicates a huge problem for ordinary registrants, and a further deep and pressing question: when nine of the top ten most accessed trademark strings in the TMCH are ordinary words, opening letters of the English alphabets, and the locations of millions of people - SMART, HOTEL, ONE, LOVE, CLOUD, NYC, LONDON, ABC, and LUXURY - should we really be granting monopolies to one or a few companies?”

In regard to the low dispute rates involving domain names subject to Claims Service notifications, IPC and BC express similar views. In particular, BC states that this may be due to the “dispute data being outdated by about eight (8) months, which could impact the conclusion, the costs associated with filing numerous complaints in a short time frame, the fact that domain registration alone may not be enough to warrant a dispute absent infringing use, such matters may also be resolved between the parties before a formal dispute is filed, or that there’s a need to acquire additional bad faith use evidence in view of mere passive holding of a domain.”

M and IPC also note that the report lacks an analysis regarding commercial watch services, which was identified by the GAC as a topic for review. According to IPC this analysis “might have assisted in assessing the percentage of potential bad faith registrations which are identified and enforced in other circumstances, as a comparator.” Furthermore, BC adds, “the average dispute rate figure obviously varies greatly between trademark owners depending on the company, size and budget, aggressiveness, and other factors” and both BC and IPC state that the report should take into account that the majority of domain name disputes are decided in favor of the complainant.

Input on the Ongoing Notifications Service was also provided. The BC requests additional clarification on “whether there is a correlation between the size and/or sophistication of the trademark owner and use of the Ongoing Notifications service, as well as whether there is any geographical or developing economy correlations to use of lack of use of the Ongoing Notifications service.” BC states that this “additional information could be useful in determining why the service is not being used by some trademark owners, and to correct the issue if it is merely a matter of certain trademark owners not being aware of the service rather than any true cost/benefit analysis.”

2. Comments relating to the Matching Criteria.

While D agrees with the conclusion provided in the report which found no clear evidence that expanding the matching criteria will outweigh the potential costs of doing so, M expresses that additional data should have been gathered to permit a meaningful cost-benefit analysis of expanding the matching rules.

The draft report also explains that the low dispute rate found in the Claims Service analysis indicates that expanding the matching criteria may not help to deter many bad faith registrations that would be disputed by trademark holders. However, IPC disagrees with the use of dispute rates to measure the usefulness of expanding the matching criteria, being that “variant registrations are at least as likely, if not more likely, to be in bad faith than exact match registrations as they may show a clear attempt to take advantage of typographical errors by Internet users seeking the legitimate domain of the trademark owner.”

In regard to the report’s characterization that registration activity is “disproportionately centered around

exact matches,” BC and IPC disagree somewhat with this given that the data in Table 8 and 9 indicates that variations of trademarks are registered fairly regularly, thus additional clarity regarding this data is desired. Even though BC does not “advocate for further expansion of such criteria beyond the existing Trademark-plus-Fifty option, we believe that more can be done to facilitate greater use of this existing previously abused label service.” Furthermore, BC states that “if the concept of matching were to more consistently include previously abused typo-variations, then prospective registrants of such domains would receive a Claims Notice, potentially deterring these kinds of registrations.”

While the review considers the expansion of the matching rules related to the Claims Service, M and IPC state that the report should have also incorporated an analysis of this with respect to the Sunrise period as well as assessment of expanding the matching criteria to include key terms associated with the goods or services identified by the mark. IPC believes “it should be possible to develop a methodology for analyzing a ‘mark plus industry keyword’ registration” and that “perhaps there may be another classification system more fit for this purpose, such as Standard Industrial Classification (SIC) Codes.” According to IPC, “additional resources that may be instructive in developing a means of testing this matching expansion might be previous UDRP or URS proceedings, or actions under the US Anti-cybersquatting Consumer Protection Act (ACPA).” IPC encourages Analysis Group to consider these or other possible alternative resources for developing this analysis.

3. Comments relating to the Sunrise Period.

While D and BC agree somewhat with Analysis Group’s conclusions on why few trademark holders utilize the Sunrise period, M, BC, IPC would be interested in an analysis of the Sunrise pricing structure of new gTLDs compared to general availability pricing to see if high Sunrise costs may have had an impact on the utilization rate of Sunrise periods.

Additional reasons related to why few trademark holders purchase Sunrise registrations as well as suggestions are also provided by some of the commentators. According to IPC, “Sunrise periods may have been impacted by a general lack of knowledge on the part of trademark holders about new gTLD launches and their corresponding Sunrise periods.” IPC also recommends that Analysis Group “look at the percentage of Sunrise registrations by trademark holders within a statistically significant sampling of the most popular open and unrestricted new gTLDs (e.g., the new gTLDs with the most Sunrise period registrations or the most registrations generally).”

According to BC, Sunrise periods may have been affected as a result of “Registry Operators placing trademark strings on their Reserved or Premium Lists during the Sunrise period thereby discouraging Trademark owners from registering, Sunrise registrations in gTLDs may be irrelevant to their businesses and that trademark owners may also simply opt to boycott gTLDs featuring exploitative sunrise or administrative fees.” BC suggests that obtaining “additional feedback from brand owners may be informative as to why there have not been more Sunrise registrations.”

Furthermore, M, BC, IPC encourage Analysis Group to take into account data on registries’ global blocking programs, such as Donuts’ Domains Protected Marks List (DPML), which also reduce the need for trademark holders to protect their brands during the Sunrise period. Such blocking programs use Signed Mark Data (SMD) files thus trademark holders interested in taking advantage of DPMLs need to register with the TMCH. According to BC and IPC, these blocking mechanisms prevent the need to register domain names within hundreds of new TLDs and thus would not show as domain name registrations.

BC also adds that another reason why larger trademark holders may pursue more Sunrise registrations is because “such companies may have more resources to cover the cost of extensive Sunrise registrations, whereas smaller trademark owners may not. Smaller trademark owners may depend on reduced fees during the general availability period, or may simply lack the funds to take a preemptive

approach to enforcement within all new gTLDs.”

In addition, both IPC and BC request clarification on how Analysis Group determined which Sunrise periods were “eligible” for registrations by trademark holders. BC is also interested in knowing whether .Brand TLDs were excluded, given that they are not required to run a Sunrise. Lastly, D expresses that the report does not demonstrate that “both a Sunrise and a Claims period in concurrence are significantly beneficial to mark holders, thus the industry should be permitted to choose between Sunrise and Claims, but not be further mandated to provide both.”

4. Comments relating to other matters.

While M, INTA, and IPC acknowledge that this study is intended to focus on the services of the TMCH and that matters of cost are out of scope for this review, the commentators nevertheless express that the draft report should have included an analysis of the impact of introducing competition to the current operators of the TMCH. According to some of the feedback received, competition may drive down prices and improve cost-effectiveness of the protection for trademark holders. Furthermore, IPC suggests “it may be helpful to explain whether any quantitative data was collected or analysis performed by Analysis Group on the costs of implementing TMCH services by registries and registrars.” Lastly, NCSG expresses that “questions remain about whether this kind of preemptive protection offered by the TMCH services is really needed as it is expensive for all stakeholders.”

In regard to the portion of registrations made by registrants using a Whois privacy screen, IPC suggests that “most domain names registered through privacy and proxy services, are not registered by trademark owners” and that “removing such registrations had an unknown effect on the data pool and subsequent analysis” Thus, IPC recommends “trying to obtain underlying registrant data from privacy and proxy service providers so that these registrations can be included in the Final Report.” BC also provides feedback on this topic and expresses that “it is important that the draft report not conflate privacy and proxy services when assessing their impact” thus, BC appreciates clarification as to “whether both were taken into account in coming to these figures.”

Concerning the portion of third-party registrants used in the draft report, BC requests clarification on “whether the analysis considered the possibility that sophisticated cybersquatters may register a domain name using false Whois information” and “whether the analysis considered the possibility that trademark owners might register domain names during the general availability period through a third-party affiliate or authorized agent.” Similarly, IPC expresses that “many sophisticated domain name registrants seeking to conceal their true identity or present the appearance of an official affiliation with a trademark owner will use falsified Whois information, often drawn from the trademark owner’s own domain name registration data” thus IPC is interested in knowing whether Analysis Group came across any registrations potentially using falsified data, and, if so, how were these treated in the analysis.

With regard to stakeholder interviews and questionnaires, IPC notes that a second phase of interviews was not conducted and requests additional clarity on how the information collected during the first round was treated as well as suggesting that the updated report include a publication of the data gathered in an anonymized form. BC also requests more information on “the set of stakeholders—presumably predominantly brand owners—elected for interviews and selection process” as well as additional clarification on “whether questionnaire respondents were selected for interviews, or the interview process was conducted entirely without regard to questionnaire submissions.” If the latter, BC states that “it may have been helpful to interview a representative sample of questionnaire respondents to the extent it could help flesh out responses and any gaps in the questions asked.”

On the topic of cybersquatting in the context of the TMCH, BC would like to add that “selling counterfeit goods of the legitimate trademark owner through the cybersquatted website is another means that cybersquatters use to generate income.” In addition, the draft report explains that “the services that are

put into place to protect trademark holders, like those provided by the TMCH, impose costs on various stakeholder groups, such as registries, who must pay a fee to the TMCH for each gTLD operated, and registrars, who must develop software systems to query the TMCH.” However, BC states that “this does not account for the fact that business users must also participate significantly in the cost of protecting their trademark rights online, including the submission costs of the Trademark Clearinghouse and Sunrise registration fees.”

NIXI submitted a comment suggesting that in order to “help stakeholders in understanding existing or proposed architecture and technical implementation of the processes and interactions amongst TMCH services, Registries, Registrars etc.,” it may be useful to mention in the draft report the “IETF technical specification counterpart i.e. RFC or an Internet draft that will become a standard for ICANN TMCH services. For example, the following Internet draft written by ICANN’s Gustavo Lozano seems to be a candidate: draft-ietf-regext-tmch-func-spec-01 (<https://datatracker.ietf.org/doc/draft-ietf-regext-tmch-func-spec/>).”

Furthermore, NIXI expresses that the draft report should specify, “whether ICANN TMCH services cater to just trademarks or other IP rights also (like copyrights, patents etc.), whether TMCH services cater to or will cater to legacy gTLDs (.com, .net etc.) or not, the procedure by which the Analysis Group was chosen as the agency to assess the effectiveness of TMCH services, the organizations considered apart from Analysis Group, the procedure by which IBM and Deloitte were chosen as the organizations to maintain TMCH database/validate TMCH records, the other organizations considered apart from IBM and Deloitte, and which technology was utilized for doing data analysis on various records (TMCH records, WHOIS records, surveys etc.) for TMCH review (i.e. big data analytics etc.).”

Finally, NCSG recommends that the TMCH report should “not be edited as this is the independent report of an independent group” and that the “3 key findings be highlighted in the delivery of the report” which should be delivered to “both the GAC and the RPM PDP WG so the results can be used to inform their work.”

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

Analysis Group’s analysis of comments

We appreciate and agree with many of the comments noted above. We remind readers that the purpose of this report is to provide an assessment of the strengths and weakness of the TMCH services and not to provide policy recommendations. As such, we will strive to address these comments in the revised version of the report to the extent it is possible to do so.

1. Comments relating to the Trademark Claims Service Notifications.

With regard to the analysis of registration abandonment rates, we agree and note in our report that it would have been ideal to analyze abandonment rates outside of the Claims Service period. We will therefore explore the possibility of attaining such information from registrars. We did attempt to collect survey information regarding the reasons for registration abandonment, however we unfortunately received too few responses from non-trademark holder registrants to inform our analysis. Comments on the draft report offered several additional explanations for our results as well as potential shortcomings of the data that we relied upon, which we will consider incorporating into the discussion of our findings. Among these comments it was pointed out that most disputes are decided in favor of the complainant. We will incorporate this relevant information into our description of the complaint data.

M and IPC suggested that we analyze commercial watch services to assess the impact of TMCH

Claims Service notifications on the use of commercial watch services and to assess the presence of bad faith registrations. While it may be difficult to obtain data on the customers of commercial watch services and which services are purchased by particular users, we will work to obtain data on commercial watch service offerings and pricing to acknowledge their presence in the domain name marketplace. Detailed information on enrollment in commercial watch services would primarily have been helpful in determining adoption of those services and which string variations are of primary interest for trademark holders who are attempting to monitor registration activity.

BC suggested that we perform additional analyses of which trademark holders are enrolled in Ongoing Notifications. As suggested, we will explore how enrollment varies across the geographic locations of trademark holders. Because nearly all TMCH strings are enrolled in Ongoing Notifications (93%) and enrollment is strongly associated with a TMCH user's size (i.e., users with more registered strings in the TMCH are more likely to be enrolled in Ongoing Notifications), it is likely that any analysis related to trademark holder location will reflect where the largest and smallest TMCH users are located.

2. Comments relating to the Matching Criteria.

There were several comments regarding the interpretation and necessary caveats related to our analyses of the Claims Service matching criteria, such as the results represented in Tables 8 and 9 of the report. We will incorporate more discussion to clarify these aspects of our analyses. We will also expand our discussion of the costs associated with expanding the matching criteria, as suggested by M and others. While it is not possible for us to perform a quantitative analysis of the costs of expanding the matching criteria due to lack of available data on the financial costs (i.e., explicit costs) of doing so and data regarding the economic (i.e., implicit) costs of doing so, we can utilize survey responses to enrich our explanation of what types of costs would be faced by various stakeholder groups.

Several respondents made suggestions for how we could examine a "mark plus keyword" matching criterion. We agree that a mark plus keyword criterion is relevant to the analysis and will revisit the possibility of using other data sources to identify the industries associated with trademark holders in the TMCH. However, we stress that doing so will involve a manual and subjective review to determine the product keywords most relevant to various trademark holders. As discussed in the draft report, industry information available in the trademark holder database of the TMCH did not allow us to develop a meaningful algorithm for identifying keywords likely to be incorporated into a domain name. We will explore third-party sources of SIC industry information that could be linked to TMCH users, however it is likely that identifying keywords associated with the specific goods and services offered by a TMCH user will require a manual and subjective decision process. We would also like to remind commenters that our review of the UDRP and URS data led to some of the string variations ultimately incorporated into our analyses, such as the "cheap" and "buy" typos. We investigated the possibility of incorporating other generic keywords such as "store" and "shop," but these were less prevalent in the dispute data than the "cheap" and "buy" typos. Unfortunately, the dispute data were too limited in size for us to find many recognizable industry-specific keywords. However, we will review additional dispute records from 2016 to determine whether that can assist us in identifying key words.

3. Comments relating to the Sunrise Period.

With regard to the analyses of the Sunrise period, M, BC, and IPC suggested that we compare Sunrise prices to general availability prices. While registry pricing is not specifically a TMCH issue, to the extent that we can collect data on Sunrise and general availability prices for a sample of new gTLDs, we will perform an analysis to illustrate the difference between the two prices. However, without developing a much more sophisticated economic model of demand for domain name registrations, it will be difficult for us to use such an analysis to explain how Sunrise prices affect the utilization of Sunrise periods. To fully understand this issue, we would require detailed transaction-level data from both Sunrise and

general availability periods of numerous gTLDs for registrations made by many trademark holders, which would allow us to examine the factors that affect a trademark holder's decision to make a domain name registration. We have been engaged by ICANN to perform an economic analysis of the new gTLD program and have previously requested such data as part of work on that project, but have not received adequate data to perform this type of analysis.

M, BC, and IPC also suggested that we consider analyzing registries' global blocking programs to determine the extent to which enrollment in such programs reduces the need for trademark holders to engage in Sunrise periods. We suggest caution for any analysis that examines the relationship between enrollment in global blocking programs and use of the Sunrise period. There are numerous other factors that may affect enrollment in blocking programs (such as the broad protections gained during general availability periods) and the use of the Sunrise period (such as the relevance of specific gTLDs to a trademark holder's goods or services), which limit how such an analysis can be interpreted to indicate a relationship between usage of blocking programs and usage of Sunrise periods. We will incorporate a discussion of how the availability of global blocking programs may interact with use of TMCH services, including the Sunrise period, and how such services may have developed as a result of the TMCH.

IPC also suggested that we analyze the use of Sunrise periods associated with the most popular new gTLDs as a potential way to determine if lack of awareness regarding Sunrise periods can explain the apparent low Sunrise registration rate. We will perform this analysis and incorporate the results into the report. BC suggested that low Sunrise registrations may be due to some names being placed on reserved lists. We can incorporate this as a potential explanation for our results, however, a detailed analysis will be dependent on our access to this data from registries.

We also received several comments suggesting explanations for the results of our empirical analyses, which show that few trademark holders utilize the Sunrise period and that those that do utilize the Sunrise period tend to be larger trademark holders. Other comments suggested areas for clarification, such as explanation of how we treated Sunrise eligibility and .Brand TLDs in our analyses. We will revisit the discussion of our analyses and results and incorporate these suggestions.

4. Comments relating to other matters.

Some commenters expressed an interest in an analysis of competition among TMCH operators. We will incorporate a theoretical economic discussion of the issues surrounding entry and competition among TMCH providers, which will allow us to note potential competitive and welfare effects. We note that the marketplace for TMCH services is quite unique and may not reflect a market where competition among many providers is appropriate or efficient (i.e., competition among many providers may not necessarily result in lower prices). While we understand the motivation for an empirical analysis of how competition among TMCH providers would affect the prices for TMCH services, such an analysis requires data collected from past events that mimic that event being studied (i.e., entry of providers for TMCH services or a meaningfully similar marketplace). Because the market for TMCH services is unique and relatively new, our ability to observe meaningfully similar past events for such an analysis is severely restricted.

It was also suggested that we perform additional analysis of Whois registrant information to try to determine the prevalence of false Whois information and to determine the true identities of registrants who use privacy or proxy services. Our attention was also called to the distinction between privacy and proxy services when determining whether a domain name was registered by a third party or a trademark holder. With regard to falsified Whois information, our methodology for identifying registrations made by trademark holders relies upon the registrant name closely matching a trademark holder's name in the TMCH (based on an approximate text string matching algorithm). We are concerned that developing a method for identifying false Whois information may rely on subjective

criteria given that our algorithm for identifying trademark holder registrations may, by construct, be including false Whois data (where the registrant name is falsely made to closely resemble a trademark holder's name), causing any conclusions of such an analysis to be speculative. It was also suggested that we investigate the possibility of attaining data that would reveal the true identity of registrants using privacy and proxy services. We will investigate the possibility of obtaining underlying privacy and proxy service data to potentially expand the number of registrations that we can identify as third-party registrations. If we cannot obtain such data, we can analyze how the results of our analyses change if we treat all registrants who cannot be identified as trademark holders, including privacy and proxy service users, as third-party registrants. We also acknowledge that work has been done to define the distinction between privacy and proxy services, however we do not feel that distinction affects the interpretation of our results.

Additional information was also requested regarding the selection of parties who were interviewed, which we will work to incorporate into the report text. Further transparency of questionnaire responses was also requested in the form of anonymized, complete survey responses, however due to the confidentiality associated with the interviews and surveys, we will provide a summary of the responses received. NIXI asked that we incorporate information about the IETF technical specification counterpart; we will cite that information. While we also acknowledge NIXI's interest in how Analysis Group was chosen to perform this study and how Deloitte and IBM were chosen as the TMCH providers, that information is not immediately relevant to the study and is available on ICANN's website.