

INTA Internet Committee Comments on  
Draft Advice Letter on Consumer Trust, Consumer Choice, and Competition  
April 17, 2012

**I. INTRODUCTION**

The Internet Committee of the International Trademark Association appreciates this opportunity to comment on the draft “Advice requested by ICANN Board regarding definitions, measures, and targets for competition, consumer trust and consumer choice” (“the Advice”) prepared by the Consumer Trust Working Group (“CTWG”). As an initial matter, we applaud the fact that the ICANN Board has sought to develop “definitions, measures, and targets that could be useful to the Affirmation review team that will convene one year after new gTLDs are launched.” Further, we appreciate the CTWG’s hard work and efforts to develop measurable tests and to provide objective metrics to assess whether the new gTLDs and ICANN’s performance meet the stated goals of the new gTLD program.

The importance of such an analysis was recognized by ICANN’s consultants in the Second Economic Report, *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names* (the “Second Economic Study”), which in their conclusion stated “it is difficult to analyze or predict the costs and benefits of any particular new gTLD”; however, studies after implementation of the new gTLD program “would lead to recommendations on how ICANN could craft its application process and ongoing rules to lessen the likelihood of delegating gTLDs that will have negative net social benefits and to enhance the net social benefits from gTLDs that are designated.” It is further noted that the “Affirmation review team” is mandated by Article 9.3 of the Affirmation of Commitments (AOC or Affirmation) committing ICANN “to perform a review one year after the first new gTLD was delegated to ‘examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice’”.

To be able to make a meaningful comparison ICANN must take a snapshot of the gTLD system at the appropriate time prior to the launch of new gTLDs. The Advice should make clear that in order to analyze any of the measures set forth in this Advisory, it is essential that ICANN staff determine the baseline figures required for the comparisons BEFORE the delegation of new TLDs, and that this should be accomplished as soon as possible, with a complete and clear statement of the means for deriving the various baselines so that the same procedures and formulas can be applied at a one year and three year interval to develop the suggested metrics. If the Review Team adopts different metrics, these baselines should provide a foundation for its analysis.

## **II. DEFINITIONS**

Definition of “Consumer Trust”. We believe the definition of this term is fundamentally sufficient. However, in order to clarify its meaning, we suggest changing the word “its” in “its proposed purpose” – which could refer to “confidence” or “name resolution” or “TLD registry operator” – to “the registry’s” so that it is clear that the purpose being reviewed is the one set forth by the registry as part of its application and operating agreement with ICANN

Definition of “Consumer Choice”. We believe the definition of “consumer choice” should be expanded. “Consumer” is defined in the Advice as “actual and potential Internet users and registrants.” We understand this to mean not only parties which register or may register domain names, or users of the new gTLD program, but the entire range of users of the Internet itself. This includes companies, consumers, children, and others. However, the proposed definition of “Consumer Choice” appears not to relate to the experience of or choice enjoyed by users. The Advice defines “Consumer Choice” as “the range of options available to registrants and users of domain scripts and languages, and for TLDs that offer choices as to the proposed purpose and integrity of their domain name registrants.” Contrary to the definition of “Consumer” then, this definition does not relate to the experience of or choices of “users” in the scope of domain names, but only to the availability of domain names to potential registrants and the integrity of registries to their contracted-for purposes.

We do not believe that it is enough to consider whether the new gTLDs give users a greater choice of domains and sites within domains to turn to. In order to determine whether the expected expansion of the number new gTLDs provides a meaningful choice, we believe metrics should be considered that measure the positive and negative aspects of presenting users with a broader selection, their ability to determine trustworthy domains as opposed to others, and the ability to find the sites and resources that they are seeking. This would inevitably include consideration of the ability of search engines to find and link consumers to the sites and resources for which they are searching.

From a trademark standpoint, we believe this search engine analysis should include an analysis of the accuracy of search engine results both before and after the new gTLDs are introduced, along with an analysis of the ability of search engines to discriminate between sites which meet the proposed purposes for which they were established as opposed to those that do not. Another possible area of inquiry might be whether new gTLDs provide a greater range of sites, registrants, and resources than existed prior to the program.

Definition of “Competition”. Similar to our concern with the definition of “Consumer Choice”, we are concerned that the definition of “Competition” focuses solely on the diversity of and

marketplace for TLDs, and not competition on the Internet itself. The proper focus for competition is more than just an increase in domain names and registries. The quality of competition resulting from the new gTLDs should also be taken into consideration in the proposed analysis. For instance, there should be an analysis of the number of deadlinks and redirects of second-level domain names in newly delegated TLDs.

Development of baseline values. The CTWG Advice requests that the ICANN staff “develop baseline values for any measure that applies to the pre-expansion gTLD space, so that future targets can be stated in terms of improvements relative to present performance.” First, we are somewhat concerned that the request only refers to staff developing a baseline which can be used to show “improvements relative to present performance.” This presupposes that there must be improvement and could be taken at a later time as evidence of bias in both the metrics and baseline values. We believe it would be better if “improvements” were changed to read “changes” or some similar, non-biased term. Second, in order to be meaningful, both the baseline values and the statistics used in the metrics must be based on empirically similar data and utilize the same means for determining and comparing the data. This should be expressly noted in both the request to the staff and advice.

### **III. MEASURES**

The proposed targets are given as “3-year targets.” These targets and the analysis of data relating to them will only be relevant if, in addition to the status at the 3 year mark empirical studies are made prior to the delegation of new gTLDs and 1 year after delegation.

As noted above, we believe that the definition of “Consumer Choice” should include consideration of the experience of Internet and DNS users. The CTWG should consider including the following description of a survey measure in the section on “Consumer Choice” metrics:

Survey of consumer experience and ability to locate sites offering information, products, or services for which they have searched the Internet, relative to their ability to do so before the gTLD expansion. The survey could measure consumers’ ability to locate sites utilizing domain name searches rather than keyword searches.

Although the measures include several that analyze the quantities of TLDs using IDNs or languages other than English, these do not provide a satisfactory measure of the relative success of the opening of the DNS to IDNs. Clearly, by permitting the establishment of new gTLDs using non-English, and non-Latin characters and scripts the DNS is offering a greater choice. However, in addition to demonstrating that such domains are being registered, we believe the relative success of allowing such domains should be tested as part of the analysis. We therefore propose that another measure be included which compares the percentage of IDNs in each script or language to the

percentage of people who speak or utilize each particular language or script. These percentages should converge over time.

Determining whether new gTLDs actually provide for greater consumer choice or merely a proliferation of new domain names is an important measure. Thus, the measure of the number of defensive registrations is an important metric for consumers who rely on trademarks and trademark owners who protect their respective marks. In this regard, we note that the “defensive registration” measure includes not only top level domains, but second level domains. We do not, however, believe that privacy/proxy registrations should be excluded from the numerator in this calculation.

As for the measure of duplicate registrations in new gTLDs, we note that this measure is to be based on a survey of registrations of second level domain names in both a new gTLD and in legacy TLDs to determine a relative percentage of domains which do not increase the amount of consumer choice. Although described as a survey, we believe a better measure could be obtained by suggesting that the Review Team develop online searches and analysis of actual online sites rather than relying on a survey of site owners. Additionally, similar studies have already been undertaken, including several relied upon by ICANN's economic experts.<sup>1</sup> This may be the intent of the measure, but this is not clear from the draft Advice.

We also suggest that, in addition to determining whether registry websites “clearly disclose benefits and restrictions” of the particular registry, there should be an empirical determination made whether such community-based websites actually meet the proposed purpose of the registry. Only if they meet their proposed purposes by providing the disclosed benefits and restrictions should they be considered as increasing consumer choice.

#### **IV. CONCLUSION**

The INTA Internet Committee hopes that the CTWG will review and consider its input to better create an independent, rigorously empirical, and broad review of the effects of the new gTLD utilizing unbiased metrics. Only by so doing, can ICANN's Board adequately conduct a "review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and

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<sup>1</sup> See e.g., Second Economic Study (June 2010) at pp. 42-44 and studies cited therein: Jonathan Zittrain and Benjamin Edelman (2002), “Survey of Usage of the .biz TLD,” mimeo, available at <http://cyber.law.harvard.edu/tlds/001/>; Paul Stahura (2009) “Analysis of Domain Names Registered Across Multiple Existing gTLDs and Implication for new gTLDs,” CircleID, available at [http://www.circleid.com/posts/20090202\\_analysis\\_domain\\_names\\_registered\\_new\\_gtlds/](http://www.circleid.com/posts/20090202_analysis_domain_names_registered_new_gtlds/)

evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion." AoC Section 9.3. As suggested in the Second Economic Study, we also urge ICANN Board and the CTWG to support a parallel economic study of the effects of the new gTLD program.<sup>2</sup> A redline of the Measures of Consumer Trust, Consumer Choice and Competition Chart showing suggested revisions, comments, and where appropriate our support, is attached hereto.

Thank you for considering our views on these important issues. Should you have any questions regarding our submission, please contact INTA External Relations Manager, Claudio DiGangi, at: [cdigangi@inta.org](mailto:cdigangi@inta.org).

### **About INTA & the Internet Committee**

The International Trademark Association (INTA) is a more than 131-year-old global organization with members in over 190 countries. One of INTA's key goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has served as a leading voice for trademark owners in the development of cyberspace, including as a founding member of ICANN's Intellectual Property Constituency (IPC).

INTA's Internet Committee is a group of over two hundred 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.

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<sup>2</sup> See Second Economic Study at pp. 62-64 (suggesting that ICANN should commission, among other analyses, Phase III studies that "would examine the rules of registration, costs to register, and value-added services as possible impediments to, or stimulants of, demand, [as well as] examine the effectiveness of rules to protect intellectual property, e.g., sunrise registration rules"; and with respect to community domains study "the business models used, how the registry restricts domain name registrants and serves its community of interest, how domain name registrants and users benefit from the gTLD, and the effectiveness of—or need for—intellectual property protection.")