



**COMMENTS OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON
THE PHASE II ASSESSMENT OF THE COMPETITIVE EFFECTS ASSOCIATED WITH THE NEW gTLD
PROGRAM'S COMPETITIVE EFFECTS: PHASE II RESULTS**

The Intellectual Property Constituency (IPC) of the GNSO appreciates the opportunity to provide comments on the Phase II Assessment of the Competitive Effects Associated with the New gTLD Program,¹ which explores whether the New gTLD Program has affected competition in the domain name marketplace (the Phase II Report).

Background: In its initial report published in September of 2015 (the Phase I Report), ICANN established a baseline description of metrics that can be used to assess the competitive conditions in the marketplace for domain names; made preliminary observations on the state of this marketplace; and committed to, in a Phase II report, update ICANN measures of those metrics to assess the extent to which the New gTLD Program has affected competition in this marketplace over the past year. Finally, the Phase I report noted that while it was not able to draw conclusions about whether the New gTLD Program has caused a change in competition in the domain name marketplace, some changes were described as consistent with the conditions of an increasingly competitive marketplace.

The IPC represents the views of the intellectual property community within ICANN, and is focused on trademark, copyright, and related intellectual property rights and their effect and interaction with the DNS. These intellectual property rights issues are all foundational to competition and consumer trust in the DNS, and are key to the advancement of the domain name industry, particularly the success of the New gTLD Program.

Comments: As an initial matter, the IPC appreciates ICANN's efforts to develop and apply rigorous metrics to measure the competitiveness of the domain name marketplace. While drawing concrete conclusions about the New gTLD Program's impact on the competitiveness of the domain name marketplace is difficult at this stage in the program's existence, the report contains indications of increased competition in the DNS marketplace as a result of the New gTLD program, and we appreciate the Phase II Report's exploration of this topic as the Program continues to unfold. These efforts are integral to the future of the New gTLD Program, the domain name marketplace as a whole, as well as increased consumer confidence and trust in the DNS.

The Phase II report contains new and useful data that will contribute to a well-rounded evaluation of the New gTLD Program. Below, we offer suggested improvements for this study's methodology and analysis:

- While the Phase II Report concludes that there are indications of increased competition in the domain name marketplace as a result of the New gTLD Program, the IPC notes that, particularly in this arena, rights holders bear many of the costs after domain registration fees are paid, such

¹ See Economic Study on New gTLD Program's Competitive Effects: Phase II Results Available for Public Comment (Oct 11, 2016), *available at* <https://www.icann.org/news/announcement-2016-10-11-en>.



as those associated with enforcement against infringing registrations by third parties. A wide array of factors will offer insight into (or skew) economic evaluations regarding the competitive impacts of the New gTLD program. We urge that evaluations of DNS competitiveness incorporate these wide-ranging costs into their methodologies and analyses in the future as much and as holistically as possible. We do not believe these factors fall outside of the scope of this study, which is to “assess the extent to which the release of new gTLDs has resulted in changes in competition in the domain name marketplace as part of ICANN’s Affirmation of Commitments with the U.S. Department of Commerce.”² Incorporation of these considerations would create a more comprehensive picture of competition in the domain name marketplace.

- IPC is pleased to see that the Phase II assessment broadens the scope of its inquiry beyond Phase I’s narrow focus on price. Retail price of a domain name registration might be important, or even determinative, for someone seeking to amass a large portfolio of domain names for investment or speculation; it is of relatively little importance to an individual or company whose main goal is to offer innovative products or services, reach new markets, better serve communities, establish safer and more secure online spaces, globalize its operations, personalize his or her online presence, or any other such productive use. For most of these uses, the cost of domain name registration (at least in the primary market, which is the only market the study assesses) is usually a trivial percentage of the overall cost of the use. In order to get a fuller picture of the impact of new gTLDs on competition, the scope should be broadened further, to look at how the registered domain names in the new gTLDs are being used, not just at how many of them have been registered.
- The IPC supports the Phase II Report’s sample expansion, and acknowledges the difficulty in grouping TLDs generally. In some places, the report relies on registration pricing and the number of registrations to determine whether new gTLDs are supplanting legacy TLDs, but this analysis included the grouping of new and/or “low-cost” gTLDs with others. Further, the report lumps legacy TLDs into the categories that exclude others³ without providing a clear rationale for doing so. While defining the edges of a market is difficult, the community would benefit from additional reasoned rationale for the grouping choices made in the Phase II Report. Such an exercise may also enable the community to identify additional commonalities and differences between TLDs that could be helpful in developing new and innovative metrics to measure competition. Work on the issue of categories of gTLDs is currently underway in the PDP on Subsequent Procedures and we encourage cross-pollination within the ICANN Community on this important topic.
- While ccTLDs factored into the Phase I Report, the Phase II Report does not adequately factor ccTLDs into its methodology or analysis. The Phase II Report does address regional- and country-specific developments, but the IPC believes that any conclusions drawn about competition in

² See Phase 2 Report at pg. 2.

³ See Phase 2 Report at FN 17.



the domain name marketplace must also factor in ccTLDs. Otherwise, the conclusions would not represent a holistic picture of the entire marketplace.

- Future data should include registration metrics and should contemplate the interaction of New gTLDs, legacy gTLDs, and ccTLDs, but not in isolation; the IPC urges future research into realistic marketplace effects and practices, such as domain name ‘parking’ and rates of UDRP (gTLD) or UDRP-like mechanisms (ccTLDs, where applicable) complaint per TLD, in order to ensure that ICANN’s analysis is one that is comprehensive.

In sum, the IPC notes that ICANN should continue to conduct further research and analysis regarding the full effects of the New gTLD Program on competition in the domain name marketplace, particularly to explore data that may present the potential of skewing or distorting evaluations regarding the competitive impacts of the New gTLD program. While the Phase II Report does not discuss the possibility of such continued study, we believe that further research in this area is crucial and should include even more rigorous analysis and increasingly granular metrics, consistent with the above comments. Such an approach will benefit the Internet community as a whole, as ICANN considers possible policy changes for future new gTLDs.

Respectfully Submitted,

Intellectual Property Constituency