



Intellectual Property Constituency (IPC) Comment on the Draft Report on the Independent Review of the Trademark Clearinghouse

3 September 2016

A. Introduction

The GNSO Intellectual Property Constituency (“IPC”) appreciates this opportunity to comment on the Draft Report (“Draft Report”) on the Independent Review (“the Review”) of the Trademark Clearinghouse (“TMCH”) conducted by Analysis Group.

In the RFP issued for the purposes of appointing consultants to conduct this Review it states “this review will incorporate a thorough assessment of the effectiveness of the (a) Trademark Clearinghouse Guidelines and Verification process; (b) Sunrise Period; and (c) Trademark Claims Service in meeting their intended rights protection objectives.”¹

Looking back to the work of the Implementation Review Team and the overall intentions for the Trademark Clearinghouse (TMCH), these objectives could be summarized at their simplest as:

- (1) Reduce the cost and administrative burden for trademark owners wanting to participate in the Rights Protection Mechanisms (RPMs) and particularly in Sunrises; and
- (2) Thereby deter infringing domain name registrations.

This Review has not delivered results which demonstrate whether the TMCH, and the RPMs that it supports, has met those aims:

- Matters of cost have been treated as out of scope, whether this be the cost to take advantage of the RPMs or the impact that competition in the TMCH service provider market might be expected to have in reducing those costs; and

¹ Request for Proposal for Independent Review of the Trademark Clearinghouse, 7 August 2015, at s 6: Link to document available here <https://www.icann.org/news/announcement-2015-08-07-en>

- “Limitations of our data do not allow us to definitively conclude whether Claims Service notifications have a deterrent effect” (p2).

The Review is specifically intended to meet the GAC’s requirements. The GAC called for an Independent Review covering at a minimum:

- (1) whether the matching rules for both Claims and Sunrise services should be expanded to cover (a) key terms associated with the goods or services identified by the mark, and (b) typographical variations identified by the rights holder;
- (2) whether the time period for the Claims service should be extended, including (a) a consultation with registry providers, registrants and rights holders on the benefits or otherwise of extending the period of the Trademark Clearinghouse (TMCH) notifications beyond 60 days; (b) an analysis of the impact of the operation of the TMCH notifications on the commercial watch services market; (c) an assessment of the likely resource requirements for extending the operation of the TMCH notifications to potential registrants for the life of each new registry.

The Review fails adequately (or in some cases entirely) to meet those requirements:

- Whilst the Review has sought to consider the expansion of the matching rules, this analysis has related only to the Claims service; there has been no assessment of this with respect to the Sunrise;
- No assessment has been conducted in relation to the addition of key terms associated with the goods or services identified by the mark;
- There are failures in the scope of the Review and the data gathered, together with various apparently unsupported inferences, which make the conclusions regarding typographical variations highly questionable;
- No analysis has been conducted regarding commercial watch services;
- There is no assessment of the resource requirements;
- As with the matching criteria, there are failures in the scope and data gathered, together with the drawing of inferences apparently without evidentiary support, which make the conclusions regarding the extension of the Claims service equally questionable.

As a result, the Draft Report currently represents a disappointing wasted opportunity. Given that it was conducted by external consultants, for whom there will have been a substantial fee, it also appears to be of questionable value.

In our more detailed comments below on the Draft Report we will use the same order for the sections as are used in the Draft Report. References are to pages in the Draft Report, unless identified otherwise.

B. TM Claims Service

The IPC notes the following comments and concerns regarding the findings of the Draft Report with respect to the TM Claims Service.

1. Deterrent Effect

The Summary of Results in the Draft Report states “it is possible that the Claims Service may help deter rights-infringing registrations . . . [but] it is also possible that some good faith registrations are being deterred by the current Claims Service system.” (p13). However, the “data do[es] not allow [the Draft Report] to definitively conclude whether Claims Service notifications have a deterrent effect on either type of registration activity.” (p13).

This “inconclusive conclusion” is representative of the Report as a whole. In fact, the most concrete conclusion reached in the Claims Service section of the Report is that “[t]hese results should not be relied upon to make policy recommendations.” (p15).

In fact, as the Draft Report acknowledges (p15) its own metrics appear to demonstrate that the Claims Service has been successful in deterring rights-infringing registrations. “93.7% of the 1.8 million registrations attempts that received a Claims Service notification were abandoned.” (p16). This exceptionally high rate indicates the Claims Service is achieving its intended goal. Yet, without apparent evidence to support its inference, the Report gives equal weight to the idea that Claims Service notifications “may also deter good-faith registrations of domain names.” (p16).

As support, the Draft Report references the brief Section III, which states: “However, the over-regulation of domain name registration activity can also harm non-trademark holders who have legitimate intentions behind domain name registrations that are identical or similar to trademarked strings.” No reference is made to any source or data that supports the inference that Claims Service notifications may deter good-faith registrations. Further, use of the term “over-regulation of domain name registration activity” without supporting data connotes a troubling inherent bias in this already flawed report.

The Claims Service notifications may be an effective rights protection mechanism, and there is an absence of evidence to the contrary, but the Draft Report fails to present data from which the community can draw more certain conclusions regarding the efficacy of the Claims Service in deterring bad faith registrations versus good faith registrations.

If the potential deterrent effect on good-faith registrations is to be given equal weight to the substantiated results of the Claims Service notifications, there should have been further investigation to determine whether that potential deterrence was in fact occurring. Mere conjecture is not enough. This failure is all the more disappointing since the Draft Report does identify additional sources of data which might have assisted in this task, but

which have not been pursued, including information on the domain names which were attempted in abandoned registrations and registration abandonment rates for domains outside of the Claims period in order to get a base for comparison.

In conducting a “thorough assessment of the effectiveness”² of the TM Claims service (as one of the suite of TMCH Services) in meeting its intended rights protection objectives, an assessment of whether the service has a deterrent effect on rights-infringing domain registrations, and conversely whether it has any chilling effect on non-infringing registrations, is fundamental. Since this review does not seek the data that might enable it more fully to answer that fundamental question, it is seriously flawed. Providing that conclusion without data or significant qualification appears to be a further indicator of bias.

2. Extending the Claims Notices Period

Despite professing that the available data is insufficient to reach reliable conclusions, the Draft Report nevertheless draws strong inferences about the potential ineffectiveness of the Claims Service for rights holders. See, e.g., (p16): “This indicates that an extension of the Claims Service period would result in a declining marginal benefit to trademark holders while potentially increasing the monitoring and administrative costs of registrars.” This apparent bias against the current TMCH brand protection safeguards in favor of other stakeholders continues throughout the Draft Report.

Importantly, the data gathered for the purposes of the Review does not permit a cost-benefit analysis of extending the Claims Service period, despite the Draft Report purporting to draw such conclusions, and despite this being a key question the Review was meant to consider. The GAC’s advice and recommendations with respect to this Independent Review³ require that the review should include:

- “a) a consultation with registry providers, registrants and rights holders on the benefits or otherwise of extending the period of the Clearinghouse notifications beyond 60 days;
- b) an analysis of the impact of the operation of the Clearinghouse notifications on the commercial watch services market;

² Request for Proposal for Independent Review of the Trademark Clearinghouse, 7 August 2015, at s 4: Link to document available here <https://www.icann.org/news/announcement-2015-08-07-en>.

³ GAC Comments on the Applicant Guidebook (April 15th, 2011 version)” at 6-7 (26 May 2011), available at <https://archive.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf>.

c) an assessment of the likely resource requirements for extending the operation of the Clearinghouse notifications to potential registrants for the life of each new registry.”

It does not appear that the Draft Report has adequately addressed any of these requirements, and indeed it does not appear that there has been any attempt to gather data to address (b) or (c). In relation to (a) the Draft Report states “[w]e are also unable to determine how trademark holders value the Ongoing Notifications Service relative to the Claims Service,” (p 21), but fails to explore further the means by which that information could have been obtained. Nor does the Draft Report explore the cost of extending the Claims Service period to potential domain registrants beyond summarily concluding that “an extension of the Claims Service period would . . . potentially increas[e] the monitoring and administrative costs of registrars.” (p16).

The Draft Report must give greater consideration to extending the Claims Service period because, as pointed out in the section above, by the Draft Report’s own metrics the Claims Service appears to have been successful in deterring rights-infringing registrations.

If the success of the Claims Service notifications were as positive as the data suggests, the Draft Report should have considered the costs and benefits of extending those notifications to potential domain registrants beyond the initial ninety-day period. By not conducting an adequate cost-benefit analysis of extending the Claims Service period, Analysis Group has failed to accomplish one of the Review’s main goals. By present an “off-the-cuff” cost-benefit conclusion (p16) without data or analysis, Analysis Group has further undermined the credibility of this Draft Report.

3. Domain Dispute Data

The Review relies on data relating to UDRP and URS filings on domains which had previously been subject to a Claims notice in order to infer whether the registered domain name infringes trademark rights or not.

The Draft Report notes that “6.3% of registrations 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.” (p17). The Draft Report then proceeds to explore why “the dispute rate on Claims Service notifications is so low.” (p18).

The Draft Report assumes that a lack of disputes means the domain names were not registered in bad faith and are not viewed as trademark-infringing. Whilst the converse would be true (i.e., the domains for which a DRP is brought are considered to be infringing, at least by the trademark owner in question), and whilst some of these domain names may

indeed not be considered infringing, there may also be a number of other factors in play. These could include:

- (a) The Draft Report only considers URS and UDRP filings in reaching the 0.3% dispute rate. The Draft Report does not consider or collect data on how many potential disputes have been resolved pre-action, for example as a result of cease and desist letters;
- (b) The URS and UDRP are also not the only form of action that might be taken. The Draft Report does not gather data or consider objections brought by means of court actions;
- (c) Where no action is taken, this does not necessarily mean that the domain is not considered a potential concern. While the Draft Report does mention that rights holders have to prioritize disputes, it assumes without any obvious evidence that “exact-match registrations made in new gTLDs may be less threatening to trademark holders than registrations in legacy TLDs.” (p18). In reality, rights holders are forced to make tough decisions about which bad-faith registrations to pursue. Rights holders must consider a number of factors in making these decisions, including whether the domain names currently resolve to live websites and, if so, what the nature of the website is. This imposes extensive costs on rights holders, which has not been explored in this Review. Of the almost 114,000 completed exact-match registrations, rights holders only have so much bandwidth to police and protect their trademarks and brands. Nevertheless, rights holders should be allowed to use their judgment to determine whether a domain registration infringes their rights that further action is necessary. Rather than viewing the 0.3% dispute rate as “low,” the Draft Report should consider that rate is the result of a focused, targeted effort by rights holders to protect their rights in a domain space that now presents hundreds of new venues for bad-faith registrants. Data from commercial watch service providers might have assisted in assessing the percentage of potential bad faith registrations which are identified and enforced in other circumstances, as a comparator.

When considering dispute rates the Draft Report does note that “domain disputes are not definitively bad faith registrations: they represent domains that trademark holders perceive as a trademark infringement.” (p28 n.62). The IPC agrees, in principle, that the existence of a domain dispute does not automatically mean the domain name(s) at issue were registered in bad faith, but in practice where a dispute is brought the overwhelming majority are held to be registered and used in bad faith. *See e.g. WIPO, Case Outcome (Consolidated): 2015* (visited Aug. 15, 2016) (Only 8.67% of UDRP Complaints were denied in 2015, and the vast majority -- 91.33% -- resulted in cancellation or transfer). Based on data such as this (which the Draft Report does not appear to have taken into account, trademark holders’ “perceptions” would appear to be quite accurate.

C. TMCH Matching Criteria

The IPC notes the following concerns and points of clarification with respect to Analysis Group's methodology and conclusions regarding TMCH matching criteria.

1. Goods/Services versus Industry Keywords

As noted in the Draft Report, Analysis Group "would have liked to also incorporate the goods or services sold by trademark holders into another set of permutations (e.g., 'apple-computer' for the trademark string 'apple' registered by Apple, Inc.). However, due to the lack of detail in the Nice classification codes available in the TMCH data, we were unable to include these types of variations in our analysis." (p24). Yet the Draft Report identifies one viable example of a "mark plus industry keyword" permutation, apple+computer, and the IPC believes it should be possible to develop a methodology for analyzing this form of registration that would circumvent the protections afforded by the TMCH.

The IPC notes that Nice codes are designed to identify broad categories of goods and services, not "industries" – perhaps there may be another classification system more fit for this purpose, such as Standard Industrial Classification (SIC) Codes. Alternatively, identification of goods and services varies widely based on national jurisdiction. For example, within the United States class headings by themselves are never acceptable for registration purposes, rather specific types of goods and services must be listed. To this end, the United States Patent and Trademark Offices publishes an Acceptable Identification of Goods and Services Manual to serve as a guide to applicants and trademark examining attorneys. For example, sampling goods and services identifications (available in the TMCH) from United States registrations for the APPLE trademark presently owned by Apple Inc. reveals such specific keywords as "computers", "computer programs", "hardware and software", "maintenance and repair", "social networking", "security", "photographs", "printing", etc. See e.g. U.S. Trademark Registration Nos. 1,078,312, 2,808,567, 3,038,073 and 4,913,886.

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), many of which involve mark plus generic industry terms, as currently implemented through inclusion of previously abused labels within the Trademark Clearinghouse.

The IPC encourages Analysis Group to consider these or other possible alternative resources for developing a possible "mark plus industry keyword" analysis. The potential infringement threat to brand owners from the expansion of the opportunities for registering "mark plus industry keyword" domains was highlighted repeatedly by brand

owners and those who represent them when the TMCH was being developed. It was also identified as an ongoing concern in public comments⁴ on the Draft Staff Report: Rights Protection Mechanisms Review (“Draft Staff Report”).

Indeed, addressing the question of “mark plus industry keyword” is a prerequisite for satisfactorily meeting the GAC’s advice and recommendations with respect to this Independent Review:

“The GAC therefore recommends that the request for proposal (RFP) that ICANN will issue to potential Clearinghouse providers includes a requirement that the candidate assess whether domain names that include a mark at the beginning or the end of an applied for second level domain could be included in the services. Secondly, the GAC advises the Board to direct the post-launch **review to establish whether the automated system should be enhanced to include key terms associated with the goods or services identified by the mark**, and typographical variations identified by the rights holder” (emphasis added).⁵

The failure to address this issue during the Independent Review means that it fails to meet one of its key purposes and significantly diminishes the value of the work.

2. Permutations Data and Matching Conclusions

The Draft Report states as follows with respect to expanding the matching criteria:

“We find no clear evidence that expanding the matching criteria will outweigh the potential costs of doing so. Registration activity by trademark holders and third-party registrants is disproportionately centered around exact matches of trademark strings rather than variations of trademark strings. . . . If a string variation is disproportionately common among registrations, then it may be useful to consider including that string variation in the matching criteria. In Table 8, we find that exact-match registrations account for a disproportionately large share of registrations in our Whois data compared to their relative share in our Whois data request.” (p24-25).

⁴ See Report of Public Comments, in particular p10: <https://www.icann.org/en/system/files/files/report-comments-rpm-review-29may15-en.pdf>

⁵ GAC comments on the Applicant Guidebook (April 15th, 2011 version): <https://archive.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf>

The IPC finds these conclusions, and the underlying data purporting to support them, confusing at best. The data in **Table 8** appears to suggest that exact matches are targeted 17.9% of the time, while “fat finger” typos account for 42.6%, character removal typos account for 23.2%, character swap typos account for 10%, and other forms of variation account for lesser percentages. It would seem, based on these figures, that parties do intentionally target variations on a regular basis in order to capitalize on typographical errors made by Internet users seeking the legitimate trademark owner site.

Ultimately, it makes sense that cybersquatters and legitimate trademark owners would first seek to register the exact match of a trademark, and only if it is unavailable would they seek to register a variation. This might account for the “disproportionately” high rate of exact match registrations, but clearly registration of variations remains prevalent and could be addressed by expanded matching rules. Indeed, **Table 9** shows a disproportionate targeting of variations by non-trademark owners as compared to targeting of exact matches. To this end, additional clarity regarding this data and its meaning is necessary.

3. Dispute Rate Data and Matching Criteria

The Draft Report notes, “Although it is difficult to make a statistical comparison of the dispute rates in Table 10 to the 0.3% dispute rate found in our Claims Service analysis, this result indicates that expanding the matching criteria may not help to deter many bad faith registrations that would be disputed by trademark holders.” (p28). The IPC questions this conclusion.

If matching were expanded to include the kinds of variations outlined in the analysis, then prospective registrants would receive a Claims Notice when attempting to register them, potentially deterring these kinds of registrations in addition to any deterrent effect shown with respect to exact matches. 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. Using dispute rates as a measuring stick regarding the usefulness of expanded matching is inappropriate; deterrence rates are more informative, and previous data suggests that the Claims Notice may be having a strong deterrent effect on bad faith registration (based on abandonment rates) although this data is also inconclusive absent a baseline of registrant abandonment rates in the absence of a Claims Notice.

4. Deterrent Effect and Matching Criteria

The Draft Report states that Analysis Group is “unable to distinguish the deterrent effect of Claims Service notifications on potentially infringing registrations from a deterrent effect

on legitimate registrations. To the extent that a deterrent effect on registrations does exist, extending the Claims Service period would likely reduce good-faith registration activity.” (p28). If it is not possible to discern the deterrent effect on bad faith versus legitimate registrations during the Claims Service, then the same should hold true upon any extended Claims Service. Either a registration is infringing or it is not infringing; whether or not the registration was made during the Claims Service rarely has any consequence, apart from establishing notice to the registrant, which if anything tends to better demonstrate intentional targeting and bad faith.

Further, the Draft Report states that “[a]lthough expanding the matching criteria may assist trademark holders in monitoring registration activity that could be related to their trademarks, an increase in Claims Service notifications may act as a deterrent to a large number of legitimate registration attempts.” (p28). Again, if it is not possible to discern the deterrent effect on bad faith versus legitimate registrations during the Claims Service, then the same should hold true upon any extended Claims Service. There is either infringement or no infringement, and the inclusion of expanded matching criteria, such as APPLECOMPUTERS.TLD, if anything, tends to better demonstrate intentional targeting and bad faith. Engaging in conjecture as to a potential conclusion without data or analysis, and in particular conjecturing that a “large number legitimate registration attempts” could be involved, is yet another indicator of both the flaws and bias throughout this Draft Report.

5. Costs

The Draft Report states that it “could also be costly to registries and registrars to implement the additional matching criteria.” (p28). In reality, registries and registrars regularly attempt to pass through costs to trademark owners through either fair market or exploitative sunrise fees, as well as putative trademark validation fees that are superfluous compared with verification and validation of marks through the Trademark Clearinghouse.

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. No such quantitative data is identified in the Draft Report, leading one to assume that this conclusion is based solely on anecdotal evidence from registry and registrar interviewees and survey respondents. To the extent that it is considered appropriate to base conclusions on such anecdotal evidence, seemingly without quantitative data to support it, the same should hold true for anecdotal evidence from brand owners, for example as to the benefit they would gain from being able to rely on their records in the TMCH to deliver more flexible protection.

Further, the technology necessary to implement previously abused labels (which frequently consist of trademark + keyword or typographical variations) already exists. Thus, it is important to understand how additional matching criteria, simply adding new records corresponding to an underlying trademark plus keywords, might differ qualitatively?

D. Sunrise

With respect to the Sunrise period required of new gTLDs, the Draft Report concludes that even though trademark holders expressed seeing value in such Sunrise periods and many trademark holders applied for Sunrise eligibility by submitting proof of use when recording their marks in the TMCH, only 20% of such trademark holders utilized the Sunrise period for new gTLD domain name registrations. The Draft Report authors speculated that the lack of use is due to the expense of Sunrise registrations or because the protections of the Claims Service reduced the need for trademark holders to utilize such Sunrise registrations.

However to be more precise, we believe that the Draft Report correctly posits that use of the Sunrise period should be interpreted as an analysis of the overall value to trademark holders of being able to register domain names matching their trademarks in the new gTLDs before the general availability period, as compared to the cost differential between Sunrise registration prices and general availability prices for a given new gTLD. As such, the Draft Report's conclusions on this topic are meaningless in absence of an analysis of the cost differential. The pricing structure of all new gTLD Sunrise periods is data that should be made available to the authors of the Draft Report and this data must then be analyzed to see if high costs of domain name registrations in the Sunrise period may have had an impact on the utilization rate of such Sunrise periods by trademark holders.

In addition, the Draft Report notes that trademark holders that do register during Sunrise periods are selective, ultimately making Sunrise registrations during only 7.2% of the Sunrise periods for which they are eligible. The IPC would be interested in better understanding how Analysis Group determined which Sunrise periods were "eligible" for registrations (including assurances that .Brand TLDs were not included in this calculus given that they are not required to run a Sunrise period).

A proper review of the Sunrise procedure must study the correlation between the various factors that impact domain name registration levels, including eligibility requirements, the level of organic demand, the perceived risk of infringement and associated harms, and the costs imposed on trademark owners to participate in Sunrise.

The level of brand owner demand for second-level registrations within new gTLDs, correlates to the number of domain names that will be registered during the Sunrise period. A high-level of

demand will produce a corresponding level of Sunrise registrations. Conversely, a lower level of demand will produce a corresponding lower-level of Sunrise registrations. Finally, whether a new gTLD registry implements other more expansive RPMs, at a lower cost, such as blocking-mechanisms, will reduce the need for a trademark owner to protect their brands during the Sunrise procedure.

Indeed, registration in the Trademark Clearinghouse was a prerequisite to take part in certain registries' global blocking programs, such as the Donuts Domain Protected Marks List (DPML). Since blocks such as these would not show as domain name registrations and prevented the need to register domain names within hundreds of new TLDs, the Draft Report's data is skewed to an unknown degree. Data on these programs needs to also be analyzed and taken into account.

Lastly, the effectiveness of the 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. We recommend that the authors of the Draft Report look also 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).

E. Other Matters

1. Privacy/Proxy Registrations

According to the Draft Report, "A non-trivial portion of registrations (13%) are made by registrants using a Whois privacy screen, which screens the registrant's information from the Whois data. Due to the Whois privacy screen on these registrations, we are unable to be certain whether the registration was made by a trademark holder or a third-party registrant." (p12-13). While Analysis Group effectively removed any such registrations from its analysis, the IPC would suggest that most domain names registered through privacy and proxy services, and in particular commercial services like Domains By Proxy (affiliated with GoDaddy) or Whois Privacy Protection Service (affiliated with eNom), are not registered by trademark owners (who generally do not use such services at all, or use the services of their preferred corporate registrar or law firm to conceal their ownership of a domain name). Removing such registrations had an unknown effect on the data pool and subsequent analysis; if IPC's suggestion is correct, the effect would have been to remove a large number of third-party registrations from consideration. It may be useful to try and obtain underlying registrant data from privacy and proxy service providers so that these registrations can be included in the Final Report.

2. False Whois Data

On a related note, 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. Did Analysis Group come across any registrations potentially using falsified data, and, if so, how were these treated in the analysis? This is unknown.

3. Interviews and Questionnaires

It is difficult to comment in detail on the information provided to Analysis Group via interviews and questionnaires, since the information gathered from these sources is not annexed to the Draft Report. The IPC would however make following general points:

- (a) It appears that only five interviews in total were conducted with "stakeholders and the TMCH services providers" (p13), in only one round of interviews conducted during the ICANN meeting in Marrakech. This is a very small number. At that meeting, Analysis Group informed stakeholders that there would be a second phase of interviews which were not, in the event, conducted. It is possible that some who were either not in Marrakech, or did not have free time during the meeting, may have been under the impression that they would have a later opportunity to speak with Analysis Group.
- (b) Only 38 completed questionnaires were submitted following the Marrakech meeting. This is a disappointingly small number. The Review would benefit from wider communication, leading to greater participation.
- (c) It is not clear from the Draft Report how information gathered from interviews and questionnaires has been treated by Analysis Group. Greater clarity would be appreciated, as would the publication of the data gathered (anonymized as necessary).

4. Effectiveness and Value for Money of the Service Providers

It is extremely disappointing that, in conducting what ought to be a "comprehensive review of the TMCH" issues relating to the performance of the TMCH providers themselves in delivering the services, and in particular matters relating to the cost of those services for brand owners have been treated as out of scope: "Although interest has also been expressed by the ICANN community and TMCH stakeholders in assessing the possibility of allowing other TMCH providers to compete with Deloitte and IBM, our review is focused on the services of the TMCH and not its service providers." This distinction ignores the fact that the cost and performance of services being delivered by these monopoly providers has

a very real impact on the cost versus benefit of the “services of the TMCH” for trademark owners.

F. Conclusion

For all the reasons identified above the Draft Report, and the Review on which it is based, currently represent a very disappointing lost opportunity to conduct a genuinely comprehensive and independent review of the TMCH. The Draft Report acknowledges that deficiencies in the data gathered prevent conclusions being drawn on the key questions that this Review was supposed to answer. In some cases additional potential data was identified, but has not been sought. Nevertheless, despite data deficiencies, a number of assumptions appear to have been made which lack evidentiary support. These include conjectures that could easily be confused for genuine conclusions by readers of the Report. Matters which were identified by the GAC, and those referred to in ICANN’s RFP have not been covered by the Review, and despite clear calls from members of ICANN community and TMCH stakeholders, competition (or the lack thereof) in the provision of the TMCH services has been deemed out of scope.

In light of this, we would urge Analysis Group to re-engage in data-gathering, review and analysis, in order to deliver a genuinely comprehensive review of the TMCH service. We would urge Analysis Group to seriously consider the concerns expressed in this comment and to call on IPC if clarification or further information would be helpful to the Analysis Group’s work. Absent this, if the Final Report is only going to be a polished-up version of the Draft Report, with its gaping data holes and unsubstantiated conclusions, it will only be of very limited (if any) value. It must be treated with extreme caution and should not be relied upon – or even cited – when considering any changes to policy.

Respectfully submitted,

Intellectual Property Constituency