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Internet Corporation for Assigned Names and Numbers
Implementation Recommendation Team

Re: Comments on IRT Final Draft Report on Behalf of Playboy Enterprises International, Inc.

To Whom It May Concern:

These comments are submitted on behalf of Playboy Enterprises International, Inc. ("Playboy"), which owns an extensive portfolio of distinctive trademarks in nearly 200 countries. Playboy objects to the implementation of the proposals set forth in the IRT Final Report on the grounds set forth below.

Playboy recognizes and applauds the considerable work and analysis that have gone into the IRT's proposals. However, no set of rights protection measures (RPMs) merits any consideration until ICANN conducts threshold economic and other studies evaluating the necessity of a new gTLD regime. Specifically, ICANN should evaluate: (a) the market need and/or demand for new gTLDs, and (b) the effects on the safety and stability of the internet; including the problems of malware, phishing, and fraud. The Carlton Report—the only preliminary economic report commissioned by ICANN does not measure any economic demand for or benefits produced by the new domains (much less the ".trademark" gTLDs that are most problematic) nor does it contains any data on user behavior on the internet.

In fact, the Carlton Report acknowledges that "[r]estricting ICANN's ability to expand the number of gTLDs is economically efficient … if costs from new gTLDs, including increased consumer confusion and/or higher costs of monitoring and enforcing trademarks, exceeds the potential benefits to consumers from new gTLDs, which include lower prices for domain names, increased output, and increased innovation." During this comment period, Playboy and fellow brand owners identify the enormity of the costs of new gTLDs. It is now up to ICANN to show a market need for this new regime.

If, however, ICANN does not carry out such a study, Playboy has the following specific objections to the RPMs set forth in the IRT Final Report:

- The proposed structure of "Globally Protected Marks" (GPMs) needs to be re-evaluated insofar as it will provide protection for only a limited number of marks and will leave many highly valuable marks without protection. The criteria for GPMs should be expanded to afford protection to trademarks based on an objective set of criteria beyond worldwide registrations and the extent of the online presence.

- The IRT's proposed top-level standards should be refined to better balance the competing rights of trademark owners, internet users, and applicants. The IRT's proposed requirement of a "probability" of confusion or deception is out of place in the internet domain context and is inconsistent with standards embraced in the UDRP and by trademark law in many countries. Similarly, the proposed rebuttal upon a showing of a "legitimate interest" is far too liberal in the top level context, given the high stakes and significant interests of the parties.

- Finally, the IRT's second-level mechanisms are also insufficient. If a second-level domain is a clear case of trademark abuse and there is not even a plausible right or legitimate interest on the registrant's part, the domain should be blocked at the registration phase—whether the mark is a GPM or not. None of the IRT's RPMs (the IP Clearinghouse, IP Claims Service, Sunrise Registration, or Uniform Rapid Suspension (URS) system) is adequate, and each must be adapted and changed before implementation. The IP Clearinghouse should be jointly funded (not balanced on the backs of trademark owners) and its data of expressly limited use. The IP Claims Service's notices are an inadequate substitute for a blocking right, and they should not replace it. Sunrise registration cannot be an alternative RPM; it is a profit-centered churning mechanism requiring defensive registrations. The URS should be made much more streamlined and a transfer remedy is essential to its effectiveness.

Sincerely,

Gregory D. Phillips