

## Proposed Answers to TMCH Charter Questions & Proposals for Community Input Agreed by RPM PDP Working Group

[Draft as of 28 October 2019]

Table 1 is a snapshot of the overall status of the WG’s deliberation on each agreed charter question and development of proposed answers, preliminary recommendations (if any), and proposed questions for community input (if any).

Table 2 consolidates, in a clear and concise manner, the WG’s proposed answers and proposals for community input in relation to each agreed TMCH charter question. During its meetings in September and October 2019 the RPM WG reviewed the charter questions and related proposals (if any) and agreed to include the proposals in the Initial Report for Public Comment.

Table 1: Status of WG Deliberation

Question	Overall Status	Open Item
Q1	WG reviewed the charter question on <a href="#">16 October</a> ; there were no related proposals; discussion was closed and <b>the WG did not agree on an answer to the question.</b>	None
Q2	WG reviewed the charter question on <a href="#">16 October</a> and the proposal by <a href="#">Martin Silva Valent</a> ; <b>the WG agreed to include the proposal in the Initial Report for Public Comment.</b>	None
Q3	WG reviewed the charter question on <a href="#">16 October</a> ; there were no related proposals; discussion was closed and <b>the WG did not agree on an answer to the question.</b>	None
Q4	WG reviewed the charter question on <a href="#">16 October</a> ; there were no related proposals; discussion was closed and <b>the WG did not agree on an answer to the question.</b>	None

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Q5	WG reviewed the charter question on <a href="#">16 October</a> ; there were no related proposals; discussion was closed and <b>the WG did not agree on an answer to the question.</b>	None
Q6	WG reviewed the charter question on <a href="#">16 October</a> ; there were no related proposals; discussion was closed and <b>the WG did not agree on an answer to the question.</b>	None
Q7	WG reviewed the charter question and associated proposals on <a href="#">28 August</a> , <a href="#">04 September</a> , <a href="#">11 September</a> , <a href="#">18 September</a> , <a href="#">25 September</a> , <a href="#">02 October</a> , <a href="#">10 October</a> , and <a href="#">16 October</a> ; the <b>WG agreed to include the proposal from <a href="#">Kathy Kleiman and Zac Muscovitch</a> and the proposal from <a href="#">Greg Shatan</a> in the Initial Report for Public Comment</b>	None
Q8	WG reviewed the charter question and associated proposals on <a href="#">28 August</a> , <a href="#">04 September</a> , <a href="#">11 September</a> , <a href="#">18 September</a> , <a href="#">25 September</a> , <a href="#">02 October</a> , <a href="#">10 October</a> , and <a href="#">16 October</a> ; the <b>WG agreed to include the revised proposal from <a href="#">Rebecca Tushnet</a> and the proposal from <a href="#">Claudio di Gangi</a> in the Initial Report for Public Comment</b>	None
Q9	The WG Leadership proposed closing this question for discussion due to lack of data; staff has proposed a suggested answer (see below)	None
Q10	Both Sunrise and Trademark Claims Sub Teams deliberated on this question and developed the following recommendations that were endorsed by the RPM PDP WG (see below)	None
Q11	The Sunrise Sub Team deliberated on this question and developed the following recommendations that were endorsed by the RPM PDP WG (see below)	None
Q12	The WG reviewed the charter question on <a href="#">02 October</a> , <a href="#">10 October</a> , and <a href="#">16</a>	None

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	<a href="#">October</a> ; the WG agreed to include the revised proposal from <a href="#">Maxim Alzoba</a> in the Initial Report for Public Comment.	
Q13	WG reviewed the charter question on <a href="#">02 October</a> and <a href="#">10 October</a> ; there were no related proposals; discussion was closed and <b>the WG did not agree on an answer to the question.</b>	None
Q14	The WG Leadership proposed closing this question for discussion due to lack of data; staff has proposed a suggested answer (see below)	None
Q15	WG reviewed the charter question and associated proposals on <a href="#">02 October</a> , <a href="#">10 October</a> , and <a href="#">16 October</a> ; the <b>WG agreed to include the proposal from <a href="#">Michael Karanicolas</a> in the Initial Report for Public Comment</b>	None
Q16	WG reviewed the charter question on <a href="#">02 October</a> , <a href="#">10 October</a> , and <a href="#">16 October</a> ; there were no related proposals; discussion was closed and <b>the WG did not agree on an answer to the question.</b>	None

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Table 2: Proposed Answers and Proposals for Community Input

Categories 1 & 2: Category 1: Education	
Proposed Answer	Proposal for Community Input
<p><b>Q1:</b> <i>Is the TMCH clearly communicating: (i) the criteria it applies when determining whether or not to accept marks for entry into the TMCH; (ii) options for rights-holders when their submissions are rejected; and (iii) options for third parties who may have challenges to or questions about records in the TMCH?</i></p> <p><b>Proposed Answer:</b> The Working Group considered this question but did not reach a conclusion.</p>	None
<p><b>Q2:</b> <i>Should the TMCH be responsible for educating rights-holders, domain name registrants and potential registrants about the services it provides? If so, how? If the TMCH is not to be responsible, who should be?</i></p>	<p>The Working Group recommends that the following <a href="#">proposal from Martin Silva Valent</a>: should be included in the Initial Report for Public Comment:</p> <p>The TMCH should be responsible for educating rights-holders, domain name registrants and potential registrants about the services it provides.</p>

Proposed Answer	Proposal for Community Input
<p><b>Proposed Answer:</b> The Working Group discussed this question and agreed to include the proposal from Martin Silva Valent, which argued that the TMCH should be responsible for educating rights-holders, domain name registrants, and potential registrants the services it provides, in the Initial Report for public comment.</p>	<p>First, the TMCH services are for the community, so for the TMCH to have a successful interaction with the community, the community needs to have a meaningful knowledge of the TMCH services.</p> <p>Second, the TMCH is the best place to explain its own services and correctly identify the stakeholders it interacts with.</p> <p>Third, the TMCH already provides some level of educational material and efforts toward trademark owners, and implementing these efforts to further develop education and outreach for current and potential registrants would serve the fuller community. Fourth, this proposal is aligned in the same direction as some of the new TM Claim notice.</p>
<p><b>Q3:</b> <i>What information on the following aspects of the operation of the TMCH is available and where can it be found?</i></p> <p>(a) <i>TMCH services;</i></p> <p>(b) <i>Contractual relationships between the TMCH providers and private parties; and</i></p> <p>(c) <i>With whom does the TMCH share data and for what purposes?</i></p> <p><b>Proposed Answer:</b> Deloitte, the TMCH Provider, provided information with respect to this question on 26 January 2017 (see Deloitte’s response <a href="#">here</a>).he Working Group concluded that no additional policy recommendation needs to be developed on this topic .</p>	<p>None</p>

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Categories 1 & 2: Category 2: Verification & Updating of TMCH Database	
Proposed Answer	Proposed Question for Community Input
<p><b>Q4:</b> <i>Should the verification criteria used by the TMCH to determine if a submitted mark meets the eligibility and other requirements of the TMCH be clarified or amended? If so how?</i></p> <p><b>Proposed Answer:</b> The Working Group considered this question but did not reach a conclusion.</p>	None
<p><b>Q5:</b> <i>Should there be an additional or a different recourse mechanism to challenge rejected submissions for records in the TMCH?</i></p> <p><b>Proposed Answer:</b> The Working Group considered this question but did not reach a conclusion.</p>	None
<p><b>Q6:</b> <i>How quickly can and should a cancelled trademark be removed from the TMCH Database?</i></p> <p><b>Proposed Answer:</b> The Working Group considered this question but did not reach a conclusion.</p>	None

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Categories 3-6: TMCH Category 3: Breadth & Reach (Scope)	
Proposed Answer	Proposed Question for Community Input <sup>1</sup>
<p><b>Q7:</b> <i>How are design marks currently handled by the TMCH provider?</i></p> <p><b>Proposed Answer:</b> Deloitte, the TMCH Provider, provided information with respect to this question in 5 March 2017 (see Deloitte’s response to Q6 <a href="#">here</a>). In light of Deloitte’s response, the Working Group agreed to include two proposals -- <a href="#">one proposal from Kathy Kleiman and Zak Muscovitch</a>, and the other <a href="#">proposal from Greg Shatan</a> -- in the Initial Report for public comment.</p>	<p>The Working Group recommends that the following proposals should be included in the Initial Report for Public Comment:</p> <p><a href="#">Proposal from Kathy Kleiman and Zak Muscovitch:</a></p> <p>Some RPM PDP Working Group members have found a problem:</p> <ol style="list-style-type: none"> <li>1. The RPM PDP Working Group have learned that Deloitte is accepting the words of design marks, composite marks, figurative marks, stylized marks, mixed marks, and any similar combination of characters and design (collectively “design marks”).</li> <li>2. However, the rules of the <i>Applicant Guidebook (together with STI rules)</i> adopted by the GNSO Council and ICANN Board) expressly limits the acceptance of marks into the TMCH Database to “word marks”.</li> <li>3. Accordingly, Deloitte is not following the applicable rules adopted by the GNSO Council and ICANN Board for TMCH operation.</li> <li>4. Whether the current rules should be changed is a separate issue from whether Deloitte is currently complying with the applicable rules. The Working Group by Consensus can determine that the current rules should be changed and present the GNSO Council and ICANN Board with an expanded set of rules that Deloitte, or any future TMCH Provider, must follow.</li> </ol> <p><a href="#">Proposal from Greg Shatan:</a></p> <ol style="list-style-type: none"> <li>1. Section 3.2 of the Applicant Guidebook describes the marks that may be accepted into the TMCH Database as “word marks.” However, the term “word mark” is not defined in the AGB. This has created ambiguity and the potential for misunderstanding.</li> </ol>

<sup>1</sup> In the initial report, it should be noted that public commenters should respond with rationale and evidence wherever possible to all proposed questions for community input.

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	<p>a. Specifically, it appears that marks may have been accepted into the TMCH Database where all of the words in the mark have been disclaimed.</p> <p>b. This ambiguity should therefore be clarified.</p> <p>2. The Working Group recommends that Section 3.2 of the Applicant Guidebook be revised to use the term “text marks” rather than “word marks.” “Text marks” would be defined to consist of:</p> <p>a. Marks consisting of text only, including marks where the text is portrayed in color, in a typeface (or typefaces), in a logo form, in a fanciful manner, and/or otherwise portrayed in a stylized fashion, as well as “standard character” marks.</p> <p>b. Marks consisting of text in combination with design elements or devices, sometimes referred to as, e.g., composite marks or figurative marks, except for marks where the text portion of the mark is disclaimed in its entirety.</p> <p>3. The Working Group recommends that the Trademark Clearinghouse Guidelines be revised as follows:</p> <p><b>An Applicant to the Trademark Clearinghouse must include in its application a sworn statement that the trademark registration does not include a disclaimer as to any portion of the mark, or if it does, the text portion of the mark is not disclaimed in its entirety. Where the text portion of a mark is disclaimed in its entirety, the mark is not eligible for registration in the Clearinghouse. For marks that are Text Marks that do not exclusively consist of letters, words, numerals, and/or special characters, the recorded name of the Trademark will be deemed to be an identical match to the reported name as long as the name of the Trademark includes letters, words, numerals, signs, keyboard signs, and punctuation marks (“Characters”) and all Characters are included in the Trademark Record submitted to the Clearinghouse in the same order they appear in the mark.</b></p> <p>In the event that there is any doubt about the order in which the Characters appear, the description provided by the Trademark office will prevail. In the event no description is provided, such Trademarks will be allocated to a Deloitte internal team of specialists with</p>
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Proposed Answer	Proposal for Community Input
	<p>thorough knowledge of both national and regional trademark law who will conduct independent research on how the Trademark is used, e.g. check website, or they may request that the Trademark Holder or Trademark Agent provide additional documentary evidence on how the Trademark is used.</p> <p>4. The Working Group recommends that the Trademark Clearinghouse Guidelines be revised as follows:</p> <p style="text-align: center;"><b>The Trademark Clearinghouse should not accept for inclusion marks where all textual elements are disclaimed and as such any Characters are only protectable as part of the entire composite mark including its non-textual elements.</b></p> <p>5. The Working Group recommends that a <b>new grounds to the challenge procedure be added to assess whether the underlying trademark registration was obtained in bad faith as a pretext solely to obtain a Sunrise registration.</b></p> <p>In preparing the grounds for such challenges, guidance may be drawn from the pre-delegation Legal Rights Objection consideration factors: <a href="http://www.wipo.int/amc/en/domains/lro/faq/#3a">http://www.wipo.int/amc/en/domains/lro/faq/#3a</a> and the judgement of the European Court of Justice in Case C-569/08 Internetportal und Marketing GmbH v. Richard Schlicht <a href="http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?isOldUri=true&amp;uri=CELEX:62008CJ0569">http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?isOldUri=true&amp;uri=CELEX:62008CJ0569</a>.</p>
<p><i>Q8. How are geographical indications, protected designations of origin, and protected appellations of origin currently handled by the TMCH provider?</i></p> <p><b>Proposed Answer:</b> Deloitte, the TMCH Provider, provided information with respect to this question in 5 March</p>	<p>The Working Group recommends that the following proposals should be included in the Initial Report for Public Comment:</p> <p><a href="#">Proposal from Rebecca Tushnet:</a></p> <p>Rationale:</p> <p>1. The TMCH Database is for trademarks: those that are registered as trademarks, confirmed by court decision as trademarks, or protected by statute or treaty that specifies the trademarks covered. Sunrise and TM Claims are for the protection of trademarks only. Geographical Indications/Appellations of Origin</p>

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<p>2017 (see Deloitte’s response to Q7 <a href="#">here</a>). In light of Deloitte’s response, the Working Group agreed to include two proposals -- <a href="#">one proposal from Rebecca Tushnet</a> and the other <a href="#">proposal from Claudio di Gangi</a> -- in the Initial Report for public comment.</p>	<p> (“GIs”) are not eligible for protection in the mandatory Sunrise or Claims periods, save where they also qualify as trademarks.</p> <p>2. Non-trademarks or other identifiers can be the subject of ancillary databases that may be voluntarily used by registries to provide additional services other than the Sunrise and Trademark Claims mandated under the existing RPMs Requirements. Other ancillary service providers may compete to provide these services.</p> <p>Required actions:</p> <ol style="list-style-type: none"> <li>1. GIs may not be registered in the TMCH Database used for Sunrise or Trademark Claims under the theory that they are marks protected by statute/treaty. If they are not also eligible for the TMCH Database as trademarks, any GIs presently in the TMCH Database should be removed.</li> <li>2. “Other marks that constitute intellectual property” are not eligible for Sunrise or Trademark Claims. If and when the TMCH provider adds ancillary databases covering “other marks,” it should revise its public-facing materials to make this dis[nc]on clear.</li> </ol> <p>3. Proposals for amended language in the Applicant Guidebook (new language in bold):</p> <p>“3.2.3 Any word marks protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion.” This language should be amended to read “<b>3.2.3 Any word mark protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion; the word mark protected by statute or treaty must be a trademark.</b>” An explanatory footnote to 3 should be added:</p> <p><b>The Clearinghouse is for word marks that are trademarks. “Trademarks” here includes trademarks, service marks, collective marks, and certification marks. Geographic indications (that are not also protected as trademarks) are not trademarks.</b></p> <p>“3.2.4 other marks that constitute intellectual property” should be amended:</p>

Proposed Answer	Proposal for Community Input
	<p><b>Marks not eligible for inclusion in the Trademark Clearinghouse: Other marks or identifiers that constitute intellectual property may not be used for the purposes of Sunrise or Claims under the existing RPMs, as set forth in Section 7. Such marks or identifiers may be collected to support the services any given registry operator chooses to provide, solely for the purpose of providing ancillary services as set forth in Section 3.6.</b></p> <p>3.5 should be amended for consistency with the revisions to 3.2.3.</p> <p>Finally, 3.6 should itself be amended to clarify: <b>“Data supporting entry into databases that are separate from the Clearinghouse and used to provide ancillary services of marks that constitute intellectual property of types other than those set forth in sections 3.2.1-3.2.3 above shall be determined by the registry operator and the Clearinghouse, or other provider chosen by the registry operator, based on the services any given registry operator chooses to provide, consistent with 4.1.”</b></p> <p>For reference: Current 4.1: ... There shall be no bar on the Trademark Clearinghouse Service Provider or other third party service providers providing ancillary services on a non-exclusive basis.</p> <p><a href="#">Proposal from Claudio di Gangi:</a></p> <p>1.0 The main database function of the Trademark Clearinghouse Database (TMCH) is for trademarks, specifically: trademarks registered at the national or regional level; trademarks protected under common law which are confirmed by court decision(s); and trademarks protected under national or international laws by Statute or Treaty.</p> <p>1.1 The main database function of the Trademark Clearinghouse Database (TMCH) shall be solely used for supporting the Mandatory RPMs, including TM Claims and Sunrise.</p> <p>1.1.2 The TM Claims and Sunrise mechanisms are mandatory RPMs for the protection of trademarks; other signs or source identifiers, such as "Geographical Indications" or "Appellations of Origin" shall not</p>

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	<p>be eligible for protection in the mandatory Sunrise or Claims periods, unless such "Geographical Indications or Appellations of Origin" are also independently registered as trademarks.</p> <p>Section 3.2.3 of the Applicant Guidebook should be amended as follows: "3.2.3 Any word mark protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion, and which is identified within the Statute or Treaty as a mark that functions as a trademark/source-identifier."</p> <p>2.0 The Trademark Clearinghouse Service Provider may provide Ancillary Services, including the creation of Ancillary Database(s), as long as those services and any data used for those services are kept separate from the main Clearinghouse database.</p> <p>2.1 Ancillary Services may be used to support Voluntary RPMs, including the Limited Registration Period, and/or other mechanisms that may be designed by the Registry Operator at the sole discretion of the Registry Operator, and as permissible under the terms of the New gTLD Registry Agreement.</p> <p>2.2 Ancillary Services, and Ancillary Database(s), may be used for the recordation of trademarks, Geographical Indications, Appellations of Origins, or other identifiers, at the discretion of the Registry Operator and TMCH Provider, or other Provider(s), and as permissible under the terms of the New gTLD Registry Agreement. There is no prohibition on multiple Registries using the same database for Ancillary Services.</p> <p>2.3 Data supporting entry into databases that are separate from the Clearinghouse and used to provide Ancillary Services of marks that constitute intellectual property of types other than those set forth in sections 3.2.1-3.2.3 above shall be determined by the Registry Operator and the TMCH Operator, or other Provider(s) chosen by the Registry Operator, based on the services any given Registry Operator chooses to provide. There is no prohibition on multiple Registries using the same database for ancillary services.</p>
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Proposed Answer	Proposal for Community Input
<p><b>Q9:</b> <i>Should the TM+50<sup>2</sup> be retained as is, amended or removed?</i></p> <p><b>Proposed Answer:</b> In the absence of wide support for a change to the status quo, the Working Group recommended that the TM +50 should be retained as is.</p>	None
<p><b>Q10:</b> <i>Should the TMCH matching rules be retained, modified, or expanded, e.g. to include plurals, ‘marks contained’ or ‘mark+keyword’, and/or common typos of a mark?</i></p> <p><b>Proposed Answer:</b> In the absence of wide support for a change to the status quo, the Working Group ultimately recommended that the current TMCH matching rules should be maintained, noting that members of the Working Group had diverging opinions on this matter.</p>	None
<p><b>Q11:</b> <i>Should the scope of the RPMs associated with the TMCH be limited to apply only to TLDs that are related to the categories of goods and</i></p>	None

<sup>2</sup> Trademark owners can add up to 50 variations that are similar to each valid submission in the TMCH—within the notification process—provided that the variant of the mark was awarded to the trademark holder in a prior UDRP case.

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<p><i>services in which the dictionary term(s) within a trademark are protected.</i></p> <p><b>Proposed Answer:</b> The Working Group had diverging opinions on this matter and in the absence of wide support for a change to the status quo, the Working Group did not recommend that the scope of the RPMs associated with the TMCH be limited to apply only to TLDs that are related to the categories of goods and services in which the dictionary term(s) within a trademark are protected.</p>	
<b>TMCH Category 4: Costs &amp; Other Fundamental Features</b>	
Proposed Answer	Proposed Question for Community Input
<p><b>Q12:</b> <i>Are there concerns about operational considerations (such as cost, reliability, global reach, service diversity and consistency) due to the TMCH Database being provided by a single Provider? If so, how may they be addressed?</i></p> <p><b>Proposed Answer:</b> Some working</p>	<p>The Working Group recommends that the following <a href="#">proposal from Maxim Alzoba</a> should be included in the Initial Report for Public Comment:</p> <p>It is critical that the Trademark Clearinghouse database remains available for access by registries and registrars in order to provide the mandatory Sunrise and Trademark Claims services and, in some cases, additional services such as extended claims periods.</p> <p>The Working Group recommends that the Trademark Clearinghouse database provider(s) be contractually bound to maintain, at minimum, industry-standard levels of redundancy and uptime.</p>

Proposed Answer	Proposal for Community Input
<p>group members had concerns about the operational considerations due to the TMCH Database being provided by a single provider. The Working Group agreed to include the proposal from Maxim Alzoba in the Initial Report for public comment.</p>	<p>To further ensure the effective delivery of the Sunrise and Trademark Claims services, the Working Group also provides the following implementation guidance to the Implementation Review Team that will be formed to advise ICANN org on implementation of those policy recommendations that are ultimately approved by the GNSO Council and the ICANN Board:</p> <ul style="list-style-type: none"> <li>• Consider the advisability of requiring that more than one provider be appointed; and</li> <li>• Review the work of the Implementation Advisory Group that was formed for the 2012 New gTLD Program to assist ICANN org with developing the specifications for and design of the Trademark Clearinghouse.</li> </ul>
<p><b>Q13:</b> <i>Are the costs and benefits of the TMCH reasonably proportionate amongst rights holders, registries, registrars, registrants, other members of the community and ICANN?</i></p> <p><b>Proposed Answer:</b> The Working Group considered this question but did not reach a conclusion.</p>	<p>None</p>
<b>TMCH Category 5: Access &amp; Accessibility</b>	
Proposed Answer	Proposed Question for Community Input
<p><b>Q14:</b> <i>How accessible<sup>3</sup> is the TMCH Database and RPM Rights Protection Actions and Defenses to individuals, organizations and rights-holders; as</i></p>	<p>None</p>

<sup>3</sup> This word is used in the sense of asking whether the TMCH (its existence, purposes and how it is to be used) is known to the types of stakeholders mentioned.

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<p><i>well as trademark agents in developing countries?</i></p> <p><b>Proposed Answer:</b> The Working Group considered this question but did not reach a conclusion.</p>	
<p><b>Q15:</b> <i>What concerns are being raised about the TMCH Database being confidential, what are the reasons for having/keeping the TMCH Database private, and should the TMCH Database remain confidential or become open?</i></p> <p><b>Proposed Answer:</b> The Working Group had diverging opinions on whether the TMCH Database should remain confidential or become open. The Working Group agreed to include the <a href="#">proposal from Michael Karanicolas</a>, which advocated for an open and searchable TMCH Database, in the Initial Report for public comment. The Working Group also agreed to include the opposing opinions on the proposal and the reasons for having/keeping the TMCH Database private, including: (text pending - check transcripts of the working group meeting on 2 October</p>	<p>The Working Group recommends that the following <a href="#">proposal from Michael Karanicolas</a> should be included in the Initial Report for Public Comment:</p> <p>That in order to foster robust accountability, and in order to ease operational and commercial challenges flowing from a dearth of information about what is in the TMCH, the TMCH should transition from a closed database to an open and searchable database.</p> <p>Background &amp; Rationale:</p> <p>1. Transparency is essential in order to monitor for abusive registrations, as well as to facilitate broader oversight over how the database is operating.</p> <p>Throughout our review process, among the key challenges that this working group has faced has been a lack of data regarding what, exactly, is in the TMCH. What little information we have has come from the small number of journalists who are engaged enough on this issue to take a “trial-and-error” approach to dig up some particularly egregious registrations, as well as general information provided by Deloitte regarding their overall approach to vetting marks.</p> <p>Neither of these very limited insights into the TMCH database provides anything close to a complete picture of how the TMCH is operating, and the overall landscape of marks which it contains. This lack of information makes effective oversight vastly more difficult, both by this working group and by interested third parties who otherwise might be keen to audit the operations of the TMCH, such as academics and</p>



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<p>and 10 October and mailing list archive)</p>	<p>civil society watchdog groups. Accountability would be vastly improved by a shift to a transparent database.</p> <p>It is also worth noting that transparency is fundamental to ICANN’s broader legitimacy as steward of a global public resource. Article 3 of ICANN’s bylaws, which focuses specifically on transparency, opens with a statement that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner”. Maintaining the TMCH as a secret database is incongruent with the organization’s broader commitment to and interest in promoting transparency and openness in its operations.</p> <p>2. The commercial information contained within the TMCH is already effectively public.</p> <p>In order to register a mark in the TMCH, it must already be registered in a national trademark database, almost all of which are open by default. In other words, trademarks are not secret or commercially confidential information, since the companies have already publicly identified their commercial interest in the marks by submitting them to a national database. Any party who is interested enough to track a party’s commercial strategy will already be able to obtain a complete picture of their portfolio by studying registrations in major national databases. However, while it is relatively easy to obtain information about a particular company through surveying the different databases, these databases do not provide a complete or consolidated picture of the state of trademark claims in the domain name space. For example, existing public information would not allow a potential new entrant to differentiate between claims which are not actively enforced online. In other words, while the commercially sensitive aspects of this data are minimal, there is a significant utility in its publication for legitimate uses.</p> <p>3. There are important public interest reasons why trademark databases are open.</p> <p>Beyond merely promoting accountability, there are important public interest reasons why trademark databases are kept public which apply equally to the TMCH. For starters, letting the public see which marks have been “claimed” builds greater reliability and consistency into the system, allowing start-ups to build their brand in a way that will avoid future conflicts. A trademark database which is kept secret also</p>
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	defeats one of the core purposes of trademark law, namely in allowing consumers to associate a particular product with its commercial source. The public nature of this association is the entire point, as there would be little consumer benefit from a “secret” trademark.
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<b>TMCH Category 6: Balance</b>	
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<p><b>Q16:</b> <i>Does the scope of the TMCH and the protection mechanisms which flow from it, reflect the appropriate balance between the rights of trademark holders and the rights of non-trademark registrants?</i></p> <p><b>Proposed Answer:</b> The Working Group ultimately concluded that the current balance between the rights of trademark holders and the rights of non-trademark registrants, as reflected in the scope of the TMCH and the protection mechanisms which flow from it, be maintained, noting that members of the Working Group had diverging opinions on this matter.</p>	None
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