

Proposal for Collection of Data Relevant to a Review of the Trademark Claims RPM
(Draft prepared by ICANN staff – 12 August 2017)

This document is a proposal from the RPM Working Group Co-Chairs that describes various methods and approaches that can be used to collect the data as recommended by the Trademark Claims Sub Team. It is being presented to the full Working Group for its review and feedback.

Preliminary Note:

This document was prepared using the same framework and assumptions as the collated data proposal for Sunrise data collection, including the principles developed by the GNSO's Data & Metrics for Policy Making Working Group in 2015. Please refer to the collated Sunrise proposal document for further details, including the use of a decision tree and prescribed form for requesting resources from the GNSO Council for data collection.

Proposals & Comments for Data Collection Correlated to Specific Trademark Claims Charter Questions

This section of the proposal lists the refined Charter questions specific to Trademark Claims followed by sources identified for possible data collection, suggested methodologies and additional comments.

With the exception of the factual data published on ICANN's New gTLD Startup Page (which is publicly available data), all the other data that has been identified for collection is external to ICANN. Some of these are to be collected from ICANN's Contracted Parties, and some may not be considered publicly available data.

In proceeding with the collection of data – and in particular with designing survey questions – the two aspects of the Claims Service (Claims Notice to a prospective registrant and a Notice of Registered Name to a trademark holder) should be clearly described and distinguished. In most cases, the same question will need to be asked of both types of notifications.

Question 1:

Is the Trademark Claims service having its intended effect? Consider the following questions specifically in the context both of a Claims Notice as well as a Notice of Registered Name:

- a) Is the Trademark Claims service having its intended effect of deterring bad-faith registrations and providing notice to domain name applicants?
- b) Is the Trademark Claims service having any unintended consequences, such as deterring good-faith domain name applications?

Source Suggested by the Sub Team	Possible approach/methodology	Comments
<p>1. For Question 1(a):</p> <ul style="list-style-type: none"> • URS cases corresponding to marks for which a Claims Notice was or would have been issued had the registration taken place during the notice period • URS cases not corresponding to registrations in the TMCH, which were not associated with the generation of a Claims Notice (to get a sense of the relative contribution of the marks in the TMCH to the overall set, though this may require further analysis to find non-TMCH marks to compare fairly) <p>Sub Team Note: Data collected should also include numbers of domain names that were registered and did not result in disputes (UDRP/URS), relative to the total number of domain names registered under any given gTLD</p>	<p>For data on URS disputes corresponding to marks for which a Claims Notice was issued (dispute rate), staff suggests a review of Analysis Group’s (AG) Revised Report.</p> <ul style="list-style-type: none"> • It may be possible to ask AG for more specific details about the data they collected, in order to calculate a dispute rate specific to URS cases and including the number of actual complaints filed in addition to the existing dispute rate from AG that reflects the total number of names disputed. • AG matched domains that appeared in the data for both Claims Notices and UDRP & URS disputes¹ in 2014 and 2015 	<p>Review of AG data, and follow up with AG, can be done immediately</p> <p>WG to assess which of the Sub Team’s suggestions for obtaining data on URS disputes that did <u>not</u> trigger a Claims Notice should be pursued – and if the selected route(s) need to be pursued via request for resources to the GNSO Council</p> <p>WG can also discuss how to use any overall data collected on URS disputes – e.g. match data on all URS cases filed with Whois registration dates and dates of relevant registry Claims periods, to determine the domains that did not trigger, or would not have</p>

¹ AG’s dispute data – and hence its reported dispute rate - seems to reflect the total number of domain names that were actually disputed (including multiple domains disputed in a single complaint) instead of the total number of complaints filed.

	<p>For data on URS disputes <u>not</u> corresponding to marks that triggered or would have triggered a claims notice, Sub Team suggestions include:</p> <ul style="list-style-type: none"> • UDRP/URS cases can be compiled and reviewed via academic participants in the PDP, law firms sponsoring a clerk to collect data or potentially have ICANN commission a study • ICANN monthly registry reports contains data that may be useful – study behavior/ratios of disputes resulting from registrations during the Claims Notice Period vs after the period is over • URS providers also have search functionality on their websites that can be used to obtain details on URS cases filed 	<p>generated, a Claims Notice. This can in turn (per Sub Team Note in Column #1) be compared against the total number of domains in a particular gTLD.</p> <p>To the extent the WG decides to proceed with a data gathering exercise relating to all UDRP and URS cases, this will likely require professional assistance and take a substantial period of time and resources. However, the results are likely to be useful for Phase Two of the PDP as well.</p> <p>Findings should also be analyzed along with the upcoming Final Report from the CCT-RT (due Aug/Sept 2017), as the CCT-RT is also considering dispute data² collected by ICANN staff as part of its use of metrics to inform its own review</p>
<p>2. For Question 1(b):</p> <ul style="list-style-type: none"> • Anecdotal data from registrants or domain name applicants who received Claims Notices. 	<p>Use survey for anecdotal data?</p> <p>Not clear how the “more granular data” in the second bullet point should be collected, and what the source of that</p>	<p>Note that a survey of registrants is also part of the Sunrise data collection exercise</p>

² The metrics being used by the CCT-RT in relation to RPMs can be found here: <https://www.icann.org/resources/pages/cct-metrics-rpm-2016-06-27-en#1.9.a>

<ul style="list-style-type: none"> • More granular data about the percentage of those who abandoned attempts in response to a notice based on dictionary terms versus those who abandoned attempts in response to distinctive trademarks. 	<p>data should be – possibly part of the registrant survey? (Note: any survey design must define what is “dictionary term” and what is a “distinctive trademark”)</p>	
<p>3. Consumer survey evidence, perhaps via Amazon Turk or online survey group, using existing Claims Notice and perhaps other alternatives to test comprehension of the Claims Notice among individuals likely to consider registering a domain name</p>	<p>Survey – this will probably require professional assistance</p>	<p>Will this be part of the same registrant survey as noted above and for Sunrise?</p> <p>Request for professional resources will need to be submitted to the GNSO Council</p>
<p>4. Survey of Registrars on the following questions:</p> <ul style="list-style-type: none"> • What is the abandonment rate associated with reasons other than only a Claims notice being triggered? What is the difference between abandonment rates between those that trigger Claims Notices, and those that don’t? • Is there anecdotal data explaining why potential registrants did not complete registrations? • At what point in the registration process is a trademark record downloaded? 	<p>Survey</p> <ul style="list-style-type: none"> ▪ Need to first develop appropriate survey questions ▪ Need to decide if professional assistance is required to design and/or carry out survey (as opposed to merely desirable – NOTE: If results are to be anonymized, does this mean ICANN staff should not conduct the survey?) 	<p>A survey of/outreach to registrars is also contemplated as part of the Sunrise data gathering effort. WG may therefore wish to first consider seeking feedback from registrars participating in the PDP as to the feasibility of such a large-scale survey (note: AG attempted to reach out to registrars and registries, but was not able to acquire adequate data on abandonment rates. Sub Team had also noted probable difficulty with obtaining data on abandonment rate.)</p>

<p>Does this happen when domain names are placed in carts, or does it happen when payment/attempted registrations are done later in the process?</p> <ul style="list-style-type: none"> • Many registrars take orders for domain names before general availability – pre-orders do not normally result in Claims notices being presented until within 48 hours of general availability – does this contribute to the abandonment rate? If so, to what extent are pre-ordered domain name registrations abandoned? • Would it be feasible for registrars to run surveys of domain name applicants during subsequent rounds of new gTLDs for anecdotal evidence on why registrations are being abandoned? Is this something ICANN should mandate? 		<p>If professional assistance is needed, the WG Co-Chairs will need to also submit a detailed request (with estimated costs) to GNSO Council</p>
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Question 2:

If the answers to 1.a. is “no” or 1.b. is “yes”, or if it could be better: What about the Trademark Claims Notice and/or the Notice of Registered Name should be adjusted, added or eliminated in order for it to have its intended effect, under each of the following questions?

- a) Should the Claims period be extended - if so, for how long (up to permanently)?
- b) Should the Claims period be shortened?
- c) Should the Claims period be mandatory?
- d) Should any TLDs be exempt from the Claims RPM and if so, which ones and why?

e) Should the proof of use requirements for Sunrise be extended to include the issuance of TMCH notices?

Source suggested by the Sub Team	Possible approach/methodology	Comments
<p>1. Unless collected under Question 1, aggregated data on all new gTLD registered domains that were subject to URS (and UDRP?) complaints between 2013-present as well as comparisons of their registration date to the end of claims period does not yet exist. However, Sub Team noted that the AG Revised Report already contains data detailing exact-match registrations during and after Claims Period by non-trademark-holders (see Figure 1 on page 20 of the AG Revised Report).</p>	<p>Existing AG data can be used to address what Question 2 tries to address, e.g. by evaluating whether there is a spike in registrations that are ultimately subject to the URS after the Claims period ends</p> <p>One Sub Team member had suggested, in relation to Question 2(c) & (d): “Request for data from registry operators where Claims was irrelevant and unnecessary. Ask TM holders if there are some registry business models that make claims a hassle. Consider if there should be a mechanism to skip.”</p>	<p>This can be started immediately. Unless AG data is found to be insufficient for this purpose, no additional data collection required.</p> <p>Note potential limitation of existing AG data – does not include UDRP and URS filings made after February 2016 (which may be when the domain was actually used, as opposed to when it was registered)</p>

Question 3:

(a) Does the Trademark Claims Notice to domain name applicants meet its intended purpose?

- i. If not, is it intimidating, hard to understand, or otherwise inadequate?
 - If inadequate, how can it be improved?
- ii. Does it inform domain name applicants of the scope and limitations of trademark holders’ rights?
 - If not, how can it be improved?
- iii. Are translations of the Trademark Claims Notice effective in informing domain name applicants of the scope and limitation of trademark holders’ rights?

(b) Should Claims Notifications only be sent to registrants who complete domain name registrations, as opposed to those who are attempting to register domain names that are matches to entries in the TMCH?

Source suggested by the Sub Team	Possible approach/methodology	Comments
<p>1. Except for a brand owner/registrator survey (see #2 below), the Sub Team did not suggest specific sources; however, it developed the following questions that it believed would facilitate the WG's responses to Question 3 as having answers to these would enable the WG to determine if the registrant was on notice when the domain was registered, and subsequently resulted in a UDRP/URS filed:</p> <ul style="list-style-type: none"> • What is the correlation between domain names that were registered during the Claims Period, and subsequently subject to a UDRP/URS? • How many of the disputes filed in response to registrations during the Claims Notice Period were found to be in favor of the complainant³? 	<p>It appears from the Sub Team's suggestions that much of the work for Question 3 seems to be more analytical/deductive – it is possible that these conclusions can be based on data gathered for Question 1 (above), including the proposed registrant survey.</p>	<p>This data gathering can be performed per notes under Question 1 (above).</p> <p>Note that one Sub Team member had suggested that the Claims Notice should also be presented to average internet users and get their opinion (i.e. a survey) – presumably this is not the same as a registrant survey.</p>
<p>2. Survey brand owners and/or registrants regarding cease and desist letters sent/received</p>	<p>Survey</p> <ul style="list-style-type: none"> ▪ Need to first develop appropriate survey questions ▪ Need to decide if professional assistance is required to design 	<p>Note that a brand owner and registrant survey has been suggested as part of the Sunrise data gathering effort, and that INTA has provided feedback on</p>

³ AG reports the percentage of disputes filed that resulted in decisions in favor of the complainant – however, this figure did not distinguish between domains registered before and after the Claims Period.

	<p>and/or carry out survey (as opposed to merely desirable – NOTE: If results are to be anonymized, does this mean ICANN staff should not conduct the survey?)</p> <ul style="list-style-type: none"> ▪ Need to decide on the most effective and efficient method of reaching out to and surveying brand owners and/or registrants (consult brand owner representatives in the WG on feasibility and advisability?) 	<p>the difficulty and investment of time and resources that may be needed for such surveys.</p> <p>Note also that a Sub Team member had suggested that for Question 3(c) (translations), the survey should include registrants from different regions (presumably whose primary language is not English), using the TMCH’s translations.</p>
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Question 4:

Is the exact match requirement for Trademark Claims serving the intended purposes of the Trademark Claims RPM? In conducting this analysis, recall that IDNs and Latin-based words with accents and umlauts are currently not serviced or recognized by many registries.

- a) What is the evidence of harm under the existing system?
- b) Should the matching criteria for Notices be expanded?
 - i. Should the marks in the TMCH be the basis for an expansion of matches for the purpose of providing a broader range of claims notices?
 - ii. What results (including unintended consequences) might each suggested form of expansion of matching criteria have?
 - iii. What balance should be adhered to in striving to deter bad-faith registrations but not good-faith domain name applications?
 - iv. What is the resulting list of non-exact match criteria recommended by the WG, if any?
- c) What is the feasibility of implementation for each form of expanded matches?
- d) If an expansion of matches solution were to be implemented:
 - i. Should the existing TM Claims Notice be amended? If so, how?

ii. Should the Claim period differ for exact matches versus non-exact matches?

Source	Possible approach/methodology	Comments
<p>1. For 4(a)(i): studies, reports or articles discussing the harm of typosquatting and other forms of non-exact-match cybersquatting, including all forms of consumer harm, not just traffic redirection.</p>	<ul style="list-style-type: none"> ▪ The Sub Team had suggested “research help” to identify these studies, reports or articles, and had the following specific question for the full WG: “What other sources of information should be used to explore the level of harm?” As such, the WG can consider seeking the assistance of brand owners/advisors participating in the PDP. 	<p>The information can be compiled immediately by ICANN staff following identification of the source material.</p>
<p>2. For 4(a)(i): Survey to determine actual experience of brand owners</p>	<p>Survey</p> <ul style="list-style-type: none"> ▪ Need to first develop appropriate survey questions ▪ Need to decide if professional assistance is required to design and/or carry out survey (as opposed to merely desirable – NOTE: If results are to be anonymized, does this mean ICANN staff should not conduct the survey?) 	<p>Noting that a brand owner survey has been suggested for Sunrise and other aspects of TM Claims (and that INTA has provided feedback on the scale of resources and time required for this), WG may wish to first consider seeking feedback from TM owners/advisors participating in the PDP as to the feasibility and possible scope of such a survey</p> <p>If professional assistance is needed, the WG Co-Chairs will need to also submit a detailed request (with estimated costs) to the GNSO Council</p>

<p>3. For 4(b)⁴: Contractor (possibly IBM) required to create semantics of programming that can be used to test the historical data to see how many Claims Notices may be generated</p>	<ul style="list-style-type: none"> ▪ Requirements for testing of historical data need to be identified (may be possible to use email from Maxim Alzoba as a starting point/reference) ▪ Professional assistance will be required to design and carry out the study 	<p>Professional assistance will be needed, hence the WG Co-Chairs will need to submit a detailed request (with estimated costs) to the GNSO Council.</p>
<p>4. For 4(c): ICANN, with assistance from a contractor (possibly IBM or Deloitte) can research the technological options for creating a non-exact match system, including the cost</p>	<ul style="list-style-type: none"> ▪ Requirements for technological options need to be identified to determine the scope and cost of designing, developing and operating a solution (can IBM and/or Deloitte assist?) 	<p>Professional assistance will be needed, hence the WG Co-Chairs will need to submit a detailed request (with estimated costs) to the GNSO Council.</p>

Question 5:

Should the Trademark Claims period continue to be uniform for all types of gTLDs in subsequent rounds?

Source	Possible approach/methodology	Comments
<p>1. [Suggested by one Sub Team member] Survey registry operators as to whether they think something about their business model should exempt them from claims and why.</p>	<p>Survey</p> <ul style="list-style-type: none"> ▪ Need to first develop appropriate survey questions, and identify likely registry operators for feedback 	<p>Will there be any business confidentiality issues?</p> <p>Will this be separate from any other registry outreach/survey?</p>

⁴ The Sub Team noted that Question 4(b) will require WG consideration of the Graham/Shatan/Winterfeldt proposal, and that the associated data gathering should facilitate that review.

