AN ERROR COST APPROACH TO COMPETITION ISSUES IN CLOSED GTLDS

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Introduction

For 25 years, .com has been the top-level domain name (TLD) of choice for businesses in most parts of the world. How to deal with Verisign's alleged market power as operator of the .com registry has been a subject of intense debate. Now, as ICANN prepares to unleash competition from other generic TLDs (gTLDs), some are having cold feet about the very thing that made .com so successful in the first place: vertical integration and the business models it facilitates.

Critics forget that vertical integration was largely responsible for the success of .com, allowing Network Solutions (Verisign's predecessor) to reap the rewards of its significant investments in marketing the TLD.[2] Worse, they fail to appreciate just how important new business models (including closed TLDs) arising from closely controlled TLDs could be for new TLDs by giving their operators an incentive to invest not only in marketing the TLD, but also in innovative new business models that change the paradigm of what a TLD means. You can't beat today's market leader simply by copying it, no matter how much money you spend on ads; you have to offer consumers something new and different.

That, in short, is why companies like Amazon and Google have applied to run TLDs like .book or .blog. Their situation could be compared to developers building a new city in the middle of nowhere on virgin land. These new business models need not be weighed down with preconceived notions of how the web should look, just as a new city need not be tied to ancient design principles. To extend the metaphor, few will settle in the new, distant and untried city if it does not offer something radically different from the familiar cities of old.

Commenters express concern about the application fee acting as a barrier to entry that only incumbents can afford. But the application fee is only a small part of the investment it will take for these companies to overcome the dominance achieved by .com. The ICANN website acknowledges this and other realities when pointing out the risks and responsibilities of running a TLD.[3] Among these are the possibility of loss of investment during the application process, the technical ability required to run the TLD, the likelihood of competition, and that the TLD owner

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[2] For the first 7 years, Network Solutions (VeriSign's predecessor) ran .com as a vertically integrated domain name. Not until 1999 did ICANN mandate registry/registrar separation.

[3] ICANN, *Benefits and Risks of Operating a New gTLD*, <http://newgtlds.icann.org/en/about/benefits-risks>.

"will be pioneering on the cutting edge of technological innovation in a relatively new sector... [and] may have to find [its] way without other applicable business models for guidance."

We need to encourage companies to deploy their resources, not set up barriers preventing their entry into the TLD market. Innovation means allowing entrepreneurs to try out new business models, disciplined primarily by the market processes of profit and loss, so that they may discover the best way to serve consumers. Just as in any other market, the ability to deliver what consumers desire is a driving force of innovation, but also of business discipline. In the same way that helpful innovation will draw consumers, abuses or undesirable actions will drive them away, weakening the business.

Some of these new business models are very likely to rely on a business's ability to choose between running an open or closed TLD. There is no reason to deter them. There is also no indication that these business plans require that the TLD always remain closed. It is entirely possible that some will become open as a part of these business models. Without the free process of innovation and market discipline, there is very little chance that the full benefits of both open and closed TLDs will be reached.

Competitive Conditions and ICANN's Role as Competition Arbiter

Among the greatest threats to this new "land rush" of innovation is the idea that ICANN should become a competition regulator, deciding whether to approve a TLD application based on its own competition analysis. But ICANN is not a regulator. It is a coordinator. ICANN should exercise its coordinating function by applying the same sort of analysis that it already does in coordinating other applications for TLDs.

There may well be legitimate concerns about abuse of market power, but these types of concerns should be handled by those best positioned to evaluate them. Determining the circumstances under which a particular TLD operator should be permitted to adopt open or closed registration policies is a matter of competition, not coordination. This places the issue outside the role and expertise of ICANN. Balancing the costs and benefits of closed registration in particular circumstances is best done by various national and regional competition authorities. Rules that would lead to a ban or strong presumption against allowing closed registration policies run a serious risk of inhibiting the innovation and competition expected from new gTLD entrants.

Moreover, the practical difficulties in enforcing different rules for generic TLDs as opposed to brand TLDs likely render any competition pre-clearance mechanism unworkable. ICANN has already determined that .brand TLDs can and should be operated as closed domains for obvious and good reasons. But differentiating between, say .amazon the brand and .amazon the generic or .delta the brand and .delta the generic will necessarily result in arbitrary decisions and costly errors. To some extent, having already made the decision to permit closed brand TLDs, the same guidelines must be applied to generic TLDs.

As a preliminary matter, it is important to note the extent of competition that exists, and to be clear about the minimal threat that closed TLDs (like vertically integrated registries) present. Right now, competition takes place at both the TLD level and the Second Level Domain (SLD) level.

There can be no doubt that, at the TLD level, .com is the most significant player, but important competition exists from, for example, .net, .org and the various country code TLDs. Meanwhile, perhaps the most significant competition occurs at the SLD level, with entities scrambling for (and paying for) the most valuable real estate within these TLDs. As Jay Kesan and Carol Hayes point out:

> [C]ompetition occurs on multiple levels. Suggesting that competition only occurs between owners of second level domains (SLDs) on the same open gTLD takes too limited a view. On the Internet, there are many different entities that provide services that shape consumer experiences, from backbone services to registration services to TLDs.... We urge that to facilitate innovation, ICANN should foster competition between registries and between gTLDs, not just competition between SLDs sharing the same gTLD.[4]

No domain name has market power today,[5] and it is unlikely that any TLDs do, either.[6] A relevant antitrust market "can be broadly characterized in terms of the 'cross-elasticity of demand' for or 'reasonable interchangeability' of a given set of products or services."[7] Courts ask whether competing products are "reasonably interchangeable by consumers for the same purpose..., [and whether] the product's peculiar characteristics and uses, ...distinct customers, distinct prices, [and] sensitivity to price changes..." mitigate interchangeability between them.[8] TLDs and SLDs, especially, are clearly reasonably interchangeable, and there is no reason to think that closed TLDs or the domain names within them would be any different—if anything, as noted, the existence of new domain names would limit any market power that might currently exist.

While closed gTLDs might seem to some to limit competition, that limitation would occur only within a particular, closed TLD. But it has every potential to be outweighed by the dramatic opening of competition among gTLDs, including, importantly, competition with .com.

In short, the market for TLDs and domain name registrations do not present particular competitive risks, and there is no *a priori* reason for ICANN to intervene prospectively.

Therefore, this comment proposes that ICANN defer to competition authorities in their area of

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[4] Comments of Jay P. Kesan & Carol M. Hayes, Competitive Effects of Open and Closed gTLDs, *available at* <http://forum.icann.org/lists/comments-closed-generic-05feb13/msg00144.html>.

[5] *See, e.g.*, Smith v. Network Solutions, 135 F. Supp. 2d 1159, 1169 (N.D. Ala. 2001) (rejecting the notion that "each individual domain name is a relevant market unto itself for antitrust purposes, subject the entity 'controlling' the name at a particular time . . . to a charge of monopolization.").

[6] Although the DOJ and others have raised concerns (*see* Letter from Deborah A. Garza to Meredith A. Baker dated December 3, 2008, *available at* http://www.ntia.doc.gov/files/ntia/publications/icann_081218.pdf), the success of even a few existing TLDs (like .net, e.g.) in attracting registrations and making their SLDs accessible to users suggests these concerns are overstated. Moreover, the availability of these other TLDs, but their relatively low use compared to .com suggests that .com is not currently engaging in anticompetitive conduct (or else registrations can and would move to its competing TLDs).

[7] M.A.P. Oil Co., Inc. v. Texaco Inc., 691 F.2d 1303, 1306 (9th Cir. 1982) (quoting United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395 (1956)).

[8] *Id.*

expertise. Under the current gTLD Agreement, ICANN already has authority to disclose contracts and business arrangements to the competition authorities under 2.9(b) if there are cross-ownership concerns.[9] Similarly, ICANN should simply defer to competition authorities on the issue of closed registration policies.

The Error Cost Framework for Assessing Competition Policy

The sorts of beneficial uses for closed gTLDs are necessarily speculative; closed generic TLDs essentially don't exist today, so there is no experience to draw on to assess their value. But it is important not to stifle innovation, and even speculative benefits must be given great weight in assessing optimal policies, particularly as, of course, the costs are similarly speculative.

A robust body of literature establishes the contributions of innovation to economic growth and social welfare.[10] Indeed, one of the persistent lessons from this literature is that even apparently small innovations can generate large consumer benefits.[11]

> Robert Solow, who was awarded the 1987 Nobel Prize in Economics for his work on the sources of economic growth, noted in his Nobel Prize lecture that "the rate of growth...depends entirely on the rate of technological process." Following in this tradition, in their well-known book, *Innovation and Growth in the Global Economy,* Gene Grossman and Elhanan Helpman describe innovation as "the engine of long-run growth."[12]

Less obviously, but as important, business model innovations—innovations in organization, production, marketing, or distribution—can have similar, far-reaching consequences.[13]

Because the gains may be so large even as the innovations are uncertain, unanticipated or seemingly trivial, both the likelihood and social cost of erroneous interventions against innovation are increased:

> Innovation creates a special opportunity for antitrust error in two important ways. The first is that innovation by definition generally involves new business practices or products. Novel business practices or

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[9] gTLD Registry Agreement 2.9(b) ("If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such affiliation, reseller relationship or subcontract, as applicable, including, if requested by ICANN, copies of any contract relating thereto; provided, that ICANN will not disclose such contracts to any third party other than relevant competition authorities. ICANN reserves the right, but not the obligation, to refer any such contract, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, transaction or other arrangement might raise competition issues.").

[10] *See, e.g.*, Jerry Hausman, *Valuation of New Goods Under Perfect and Imperfect Competition*, *in* THE ECONOMICS OF NEW GOODS 209-67 (Bresnahan & Gordon eds., 1997) (discussing the consumer welfare gains from new product introductions and product line extensions).

[11] *Id.* at 67.

[12] DENNIS CARLTON, PRELIM. REPORT ECONOMIC WELFARE 17 (*citing* Robert M. Solow, Nobel Prize Lecture, December 8, 1987; Gene Grossman and Elhanan Helpman, INNOVATION AND GROWTH IN THE GLOBAL ECONOMY 18 (1993).

[13] *See* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrus*t, 6 J. COMPETITION L. & ECON. 153 (2010).

> innovative products have historically not been treated kindly by antitrust authorities. From an error-cost perspective, the fundamental problem is that economists have had a longstanding tendency to ascribe anticompetitive explanations to new forms of conduct that are not well understood. As Nobel Laureate Ronald Coase described in lamenting the state of the industrial organization literature:
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> > [I]f an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of understandable practices tends to be very large, and the reliance on a monopoly explanation, frequent.[14]

Premature claims of monopoly and other costs that might arise from closed gTLDs should be viewed with skepticism. There are a number of reasons why such claims are likely to be erroneous:

> When viewed through the error-cost lens, the combination of the anti-market bias in favor of monopoly explanations for innovative conduct that courts and economists do not understand, and the increased stakes of antitrust intervention against innovative business practices, is problematic from a consumer-welfare perspective.[15]

Moreover, a well-established literature illuminates the dangers when firms complain about their competitors' conduct and claim it is anticompetitive.[16] Competition by regulation, instead of by merit, is inefficient and does nothing to benefit consumers. Normally, a firm's ability to exercise monopoly power is a benefit to its competitors, as higher prices for the monopolist raise prices for all. Thus, complaints grounded in the monopoly rationale are more likely to be efforts by competing firms to hamstring not monopoly conduct but rather pro-competitive conduct that threatens to make competition more difficult for them.

Meanwhile, just as there is a cost from lost innovations, there is a commensurate cost from deterred entry of new, potentially robust competitors that can constrain the market power of powerful incumbents. As Dennis Carlton notes:

> Requiring entrants to justify entry on cost/benefit basis, however, is likely to result in significant consumer harm because the competitive benefit of new business methods or technologies facilitated by entry can be very hard to predict *a priori*.
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[14] *Id.* at 164-65 (citing Ronald Coase, *Industrial Organization: A Proposal for Research*, *in* POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION (Victor R. Fuchs ed., 1972)).
[15] *Id.* at 167.
[16] *See, e.g.*, Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & ECON. 247 (1985); Richard Posner, *The Federal Trade Commission*, 39 U. CHI. L. REV. 47 (1969).

> [R]estrictions on entry are likely to promote consumer welfare under only limited circumstances that are not apparent here. The imposition of such restrictions, however, is likely to benefit existing market participants by limiting competition from firms offering innovative services and new business models. Actions that protect any market power that .com and other gTLDs may possess are unlikely to benefit consumers.[17]

And these incumbents are not only the existing TLDs. As Kesan & Hayes point out:

> [D]uring the dotcom boom, the emphasis was on .com as being an unrestricted gTLD, and a rule of first occupation determined the allocation of domain names, like car.com. As a result, it was common for entities to "cybersquat" on desirable generic SLDs (gSLDs) and later sell these SLDs for a substantial profit.
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> We thus respectfully pose this question to ICANN: why should the competitive effects of closed gTLDs be viewed with more suspicion than the competitive effects of closed gSLDs? If Dr. Postel's initial intention to create a large number of gTLDs had been realized, what happened within .com in the late 1990s and early 2000s could very well have been gTLDs instead. Now, with the possibility of new gTLDs so close on the horizon, another explosion of growth could occur, but with the benefit of hindsight as investors apply the lessons learned during the dotcom boom and bust.[18]

In other words, gTLDs present a possible—indeed, likely—competitive constraint not only on existing TLDs, but on SLDs, as well, opening up an enormous range of competing domain name options for entities shut out of the most valuable SLDs within .com.

The proper stance to take, then, is one of license—encouraging innovations. As we will discuss, this doesn't mean there are no mechanisms available for the policing of possibly anticompetitive conduct. The current registrant agreement allows exceptions from the Code of Conduct regarding nondiscrimination.[19] Utilizing this authority, ICANN may allow applicants for new gTLDs to employ closed registration policies.

Closed Registration Policies have Costs *and* Benefits

Efforts to constrain businesses and entry must be justified by showing that the costs of closed policies outweigh the benefits, and the burden is properly on those who would constrain entry and innovation.

> Restricting ICANN's ability to expand the number of gTLDs is economically efficient only if costs from new gTLDs, including increased consumer

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[17] CARLTON, *supra* note 11, at 18.

[18] Comments of Jay P. Kesan & Carol M. Hayes, *supra* note 3, at 3.

[19] ICANN, gTLD Applicant Handbook (June 4, 2012), Specification 9, Section 6, Base Agreement & Specifications, *available at* <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

> 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.[20]

Among other things, critics of the status quo (those advocating restraints on the ability of registries to operate closed generic TLDs) have pointed to the possibility that this will increase market power held by particular market participants.[21] This market power could then be abused, leading to outcomes that hurt competitors and consumers alike.

As noted above, establishing abuse of market power is not easy. Most of the difficulties stem from the dilemma of determining the competitive effects beforehand in a market that has never existed and will not exist until the closed TLD is granted. The first will be in defining the relevant market. If a market can be defined as the use of a particular gTLD, then the market is so small as to be meaningless. It would be senseless to bring a case against Coke for monopolizing the market for Coca-Cola products.

The second difficulty will be in showing abuse, at least in the US, because the Supreme Court has recognized that even a monopoly has a right to profit and this is what incentivizes competitors to enter into the market.[22] The existence of market power is not actionable; only its abuse is. Unless and until that occurs, there is no basis for constraining closed gTLDs.

In Manwin v. ICM,[23] a case currently proceeding in the U.S. District Court for the Central District of California, the court permitted the case to proceed on Sherman Act grounds in part because it accepted that a "market for defensive registrations" was sufficiently well-pleaded. While the court correctly noted that there was no proper "*affirmative* registration market" because of clear substitution between domain names, and while perhaps as a matter of civil procedure it was even correct in allowing the offensive market, Manwin will be unable to prove the elements of a Sherman Act violation.

The basic argument in that case was that competing entities (in that case, adult content sites) have no choice but to register at .xxx in order to defend their domains; registration of a domain on other TLDs is not a substitute. The problem with the antitrust case built on this claim (and similarly the problem with antitrust criticisms of closed TLDs in general) is that, at least until any of the new TLDs actually establish their market power, the threat is purely speculative. The existence of a

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[20] CARLTON, *supra* note 11, at 17.

[21] *See* Phil Corwin, New gTLDs: Competition or Concentration? Innovation or Domination?, Domain Name News (June 19, 2012), <http://www.domainnamenews.com/new-gtlds/new-gtlds-competition-or-concentration-innovation-or-domination/11833>.

[22] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004) ("[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is … an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period– … induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

[23] Manwin Licensing Int'l v. ICM Registry, No. 2:11-cv-09514 (C.D. Cal. Aug. 14, 2012), *available at* <http://scholar.google.com/scholar_case?case=13406729837769432713&hl=en&as_sdt=2&as_vis=1&oi=scholarr>.

mere opportunity for anticompetitive conduct is insufficient to make out an antitrust case; rather, doing so requires proof of anticompetitive harm. But there is no reason to believe that defensive registration will be required on any particular gTLD unless and until it is demonstrated that there is value in it.

As others have noted, establishing the value of a new gTLD will require significant marketing by registrars: Amazon can only turn .book into a valuable property if it finds a way to attract users there. It is difficult to imagine how it will accomplish this without entwining its own brand with that of the gTLD. By putting its own reputation and brand value significantly at stake, it is unlikely then to squander that investment by defeating users' expectations by, say, directing barnesandnoble.book to its own site.

Two other concerns, although plausible at first, are already accounted for by either ICANN or regulators. First, there is the issue of defensive purchases by brand owners and economic waste. A brand owner, to defend its brand against look-alikes, may waste money on all sorts of possibly related names in a transaction that creates no value; having .fordtruck, .fordcar, and .buyford add no real value. However, the ICANN guidelines already incorporate several mechanism for dealing with this sort of cyber-squatting.[24]

Second, there is the concern that consumers will be unaware that, under a closed system, they may be dealing with a single private company and not the market at large. For example, they may not be aware that .laptop is run by only one of the manufacturers from whom they could buy a laptop. However, the same issue could arise with the owner of laptop.com and any deception is already under the jurisdiction of the FTC or consumer protection regulators in other countries. Moreover, while there may be some risk arising from this, the most likely use of closed domains would be either for further brand or product marketing by their owners, or else the creation of a robust platform aimed at drawing in—not alienating—consumers. In either case, the risk is minimal and the potential benefits substantial. Regardless, it is clear that the costs of closed registration policies have been considered.

What has not received substantial attention, though, is the potential benefits of allowing closed registration policies. Registrars that intend to employ such policies have offered pro-competitive reasons for doing so, and these shouldn't be minimized or disregarded.

Applicants and supporters of closed gTLDs have offered various rationales for their support. Closed generic TLDs make possible a range of business model innovations consistent with ICANN's interest in encouraging innovative business models. Moreover, they offer novel new constraints on the power of incumbents.

> [The] competitive environment for registries would be further aided by permitting closed gTLDs, because competing companies could purchase thematically similar gTLDs. For example, if Google obtained .search as a closed gTLD for its search engine, Microsoft could obtain .find as a closed gTLD for its search engine. Thus, the intra-gTLD competition that

[24] gTLD Applicant Handbook, *supra* note 18, at § 1.21, § 2.1.

> previously led to cybersquatting in a "first to occupy" system could be converted into inter-gTLD competition that could create a more vibrant and innovation-based market.[25]

The ability to operate even generic TLDs as closed, controlled environments presents the incentive and opportunity for investment (and new avenues of competition) from which the entire ecosystem will benefit. As several commenters observe, "the chance that a new gTLD and/or its sponsor could provide an innovative, heretofore unimagined business model is an important reason to consider expanding gTLDs."[26] Such a model could "put direct competitive pressure on established gTLDs or could expand the market in new directions."[27]

In order to successfully compete with the established TLDs (particularly .com), registries with the new gTLDs will want to engage in product differentiation. A vertically integrated registry may want to have a TLD known for providing a particular good or service. Or, a registry may want to control registrations under the TLD to maintain a reputation for high-quality goods or high-level service. Another possible reason to prefer a closed gTLD would be that an online business may want to use it to enter into a market and compete against established businesses. Or an entity may wish to create a curated, topic-specific platform. All of these possible reasons would be pro-competitive and barriers to such use would prevent the benefits of competition and innovation from accruing to consumers. Most likely, the most valuable uses of closed gTLDs are not yet known; novel innovations are by definition unknowable in advance. This is all the more reason to facilitate rather than constrain new entry.

Options to Deal with Closed Registration Policies

An antitrust plaintiff must show a defendant has acted in a way that is anticompetitive. This means that the defendant's actions harm consumer welfare, and not just competitors.[28] Under Section One, a plaintiff must show there is an agreement between more than one entity that has resulted in an unreasonable restraint on trade—meaning the anticompetitive effects from the agreement outweigh the procompetitive effects—and that this has an effect on interstate or foreign commerce.[29] Under Section Two, a plaintiff must show the defendant has "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[30] Under either Section, the court or competition authority must balance the benefits and harms to determine whether the defendant's agreement or business practice violates the antitrust laws.

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[25] Comments of Jay P. Kesan & Carol M. Hayes, *supra* note 3, at 3.

[26] MICHAEL L. KATZ, GREGORY L. ROSSTON AND THERESA SULLIVAN, AN ECONOMIC FRAMEWORK FOR THE ANALYSIS OF THE EXPANSION OF GENERIC TOP-LEVEL DOMAIN NAMES 20 (June 2010), *available at* <http://archive.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf>.

[27] *Id.*

[28] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (stating that the antitrust laws were enacted for "the protection of *competition*, not *competitors*").

[29] *See* Hanno F. Kaiser, A PRIMER IN ANTITRUST LAW AND POLICY 20 (2009).

[30] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Similarly, determining whether a particular use of a closed gTLD is pro-competitive or anti-competitive involves balancing these costs and benefits. To the extent that it decides it (and not competition authorities) should make this determination, ICANN has three main options it can take to deal with this issue: (1) a per se rule against closed registration policies, (2) a presumption against closed registration policies with the burden upon an applicant to show why it should be allowed, (3) a presumption to allow otherwise approved applicants to use closed registration policies, with competition concerns referred to national authorities on competition policy.

The most extreme option ICANN could adopt would be a *per se* rule against the use of closed registration policies. A *per se* rule against a practice is justified only if the likely costs to society will always outweigh the benefits.[31] Such a rule would be very costly to society if the Type 2 error of voiding a pro-competitive arrangement is more likely than a Type 1 error of allowing an anti-competitive arrangement to continue. Here, the possible pro-competitive reasons for adopting closed registration policies and the uncertainty as to whether the costs will outweigh those benefits make it a poor candidate for a per se rule.

A second option, advocated by several commenters, would be for ICANN to adopt a presumption against closed registration policies which can be overcome by an applicant in only certain circumstances.[32] This would place the burden upon an applicant to show a pro-competitive reason for its choice, such as trademark protection. One problem with this approach is that it may not allow all of the possible pro-competitive justifications to be asserted. For example, not all forms of competition are known beforehand and, therefore, cannot be asserted as a pro-competitive basis.

Another problem, possibly more serious, is that ICANN is not well-suited to be a competition regulator. Competition regulators develop expertise over time and are better suited to determining the systemic market effects of a proposed model. Moreover, requiring an entity to prove to ICANN, and self-interested competitors, how their use of gTLDs will promote competition before being afforded an actual opportunity to do so will certainly raise a barrier to that same sought-after competition.

The third option is the approach advocated here: ICANN should allow otherwise sufficient applicants to adopt closed registration policies and refer competition concerns to the relevant competition authorities. The advantage of this approach is that it would allow experimentation and innovation to occur and preserve the ability of regulators to stop behavior that damages consumer welfare if it arises. A case-by-case approach which balances benefits and costs after development by competent competition authorities is likely the best way to deal with this issue. The per se rule and presumption approaches would prevent this gradual and tested development.

This approach also avoids putting ICANN in the position of performing a competitive analysis of each application. As an initial point, avoiding this step will speed up the application review:

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[31] Thomas A. Lambert & Joshua D. Wright, *Antitrust (Over-) Confidence?*, George Mason Law and Economics Research Paper Series 07-50, at 6 ("For example, the error-cost approach justifies application of per se rules to naked horizontal price-fixing because the conduct almost always has pernicious effects on consumers, rendering it preferable to condemn the occasional example of benign price-fixing in order to prevent socially harmful false acquittals.").

[32] *See, e.g.*, Microsoft Letter to ICANN, Jan. 31, 2013; Neylon Letter to ICANN, Jan. 22, 2013.

Creating an unnecessary bottleneck in the application process will hamper the innovation that this move to gTLD is meant to foster. More importantly, though, ICANN does not have the expertise or resources to make informed competition policy. ICANN's role is as a global coordinator, not as a regulator. While their studies are helpful, even GAC lacks the institutional capacity to act in place of the FTC or DOJ.

National competition authorities, on the other hand, have institutions specifically designed to do the complex analysis necessary to balance the costs and benefits of new business practices. If ICANN recognizes the benefits of adopting an option where closed registration policies are allowed and only checked for anti-competitive results if they arise, then it is especially important that it rely upon the considered judgment of those well-placed to give it.

Antitrust law in the United States clearly applies to agreements made with ICANN and attempts at monopolization by parties dealing with ICANN.[33] In ICANN Transparency v. Verisign, a panel for the 9th Circuit overturned the District Court and found both Section One and Section Two of the Sherman Act apply against registrars in their dealings with ICANN. ICANN is likely subject to antitrust liability as well; the state action doctrine wouldn't shield its actions from review,[34] and it cannot rely on its nonprofit status to avoid liability.[35] As mentioned above, the ability to bring such claims against most registrars may be limited by the fact that there is not likely market power over the gTLDs, but this is a reason for ICANN to forbear from intervention, not embrace it.

Conclusion

Significant competitive and consumer benefits are likely to flow from allowing the registration of closed gTLDs. The fact remains that it is not possible, at this point, to accurately determine what innovative business models will arise, but these unanticipated or uncertain innovations should be encouraged. Other plans set barriers, some greater than others, to procompetitive use of closed TLDs. The plan that poses the least barriers is for ICANN to allow otherwise sufficient applicants to adopt closed registration policies. It can then refer competition concerns to the relevant competition authorities. The advantage of this approach is that it allows experimentation and innovation to occur and at the same time preserves the ability of regulators to stop behavior that damages consumer welfare if it arises.

The future of the domain space will inevitably be messy and unpredictable in the best sense, but it is precisely that messiness, that unpredictability, that constant shifting of basic paradigms that most benefits consumers—not trying to replicate the paradigm of .com on other gTLDs.

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[33] ICANN Transparency v. Verisign, 611 F.3d 495 (9th Cir. 2010); *see also* the discussion above.

[34] *See* Justin T. Lepp, *ICANN's Escape from Antitrust Liabilit*y, 89 WASH. U. L. REV. 931 (2012); A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrus*t, 2003 U. ILL. L. REV. 1 (2003).

[35] Manwin Licensing Int'l v. ICM Registry, No. 2:11-cv-09514 (C.D. Cal. Aug. 14, 2012), *available at* <http://scholar.google.com/scholar_case?case=13406729837769432713&hl=en&as_sdt=2&as_vis=1&oi=scholarr>