

GOING ROGUE: THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S TRANSFER OF IANA NAMING FUNCTIONS TO ICANN

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INTRODUCTION

Beginning in 1993 with the Clinton Administration, the federal government has continuously engaged in a process to privatize specific governmental functions that were traditionally administered by the State.¹ Over the last twenty-five years, more of these administrative functions have been contracted out to private organizations.² On January 6, 2017, the government relinquished its authority to regulate the Internet Assigned Numbers Authority (IANA) functions.³ The administration of the Domain Name System (DNS) root zone was a core IANA function that was passed on to the Internet Corporation for Assigned Names and Numbers (ICANN).⁴ Specifically, this function gives ICANN the power to receive and process root zone file change requests for top-level domains (TLDs).⁵

By transferring the IANA functions, the U.S. government has relinquished all meaningful control over the administration of the Internet. As a result, we are now entering a new era of Internet governance—characterized by the complete privatization of administrative Internet functions. However, while this transition has many practical benefits, it could be severely impeded by the fact that for the first time, ICANN is now almost completely unregulated by any meaningful “higher power.”⁶ This lack of regulation could lead to

1. See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 400, 417 (2006).

2. See *id.* at 399 n.2 (citing PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999) (asserting that when comparing the ratio of private contractors to public employees, the ratio is over six to one)); George Will, *‘Big Government’ is Ever Growing, on the Sly*, NAT’L REV. (Feb. 25, 2017, 5:00 AM), <https://www.nationalreview.com/2017/02/federal-government-growth-continues-while-federal-employee-numbers-hold/> (asserting that the number of public employees has not substantially increased in roughly fifty years as government favors private contractors).

3. See generally Memorandum from Lawrence Strickling, Assistant Sec’y for Comm. & Info. & Adm’r, Nat’l Telecomm. & Info. Admin., to Dr. Stephen Crocker, Chairman of the Bd. of Dirs., Internet Corp. for Assigned Names & Nos. (Jan. 6, 2017), <https://www.icann.org/en/system/files/correspondence/strickling-to-crocker-06jan17-en.pdf>.

4. See generally Contract Between the Internet Corp. for Assigned Names & Nos. & the Nat’l Telecomm. & Info. Admin. (Oct. 1, 2012), https://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf [hereinafter ICANN Contract].

5. *Id.*

6. See generally Paul Rosenzweig, *The Proposed Transfer of the IANA Function to ICANN*, HERITAGE FOUND., <https://www.heritage.org/government-regulation/report/the-proposed-transfer-the-iana-function-icann> (last visited June 5, 2018) (acknowledging the argument that the Internet Corporation for Assigned Names and Numbers (ICANN) is seen as largely unaccountable and that following the Internet Assigned Numbers Authority (IANA)

abuses of power by ICANN that could adversely affect the Internet marketplace and faith in the infrastructure that keeps the Internet functioning.

The focus of this paper will be to examine the transfer of the IANA functions from the National Telecommunications and Information Administration (NTIA) to ICANN and to recommend a regulatory framework that could prevent ICANN from using its new powers to the detriment of the multi-stakeholder system that the Internet is built on. One threshold issue that will not be addressed in this paper is whether the transfer between the NTIA and ICANN was legal.⁷ Instead, this paper will focus on the drawbacks that may follow the transfer of power from the NTIA to ICANN, which gave ICANN the authority to regulate the Internet like a federal agency without any meaningful oversight or restrictions from the government.

The paper is comprised of three distinct parts. Part I of this paper provides a brief outline of the history of the Internet and the DNS. This section lays out the early growth and administration of the Internet, beginning with the creation of the Advanced Research Projects Agency Network (ARPANET) in the 1980s. In addition, this section examines the events that led to the creation of ICANN and its administrative role in the DNS. Finally, this section demonstrates that through this administrative role, ICANN effectively operates as a private agency that regulates the Internet through both the DNS and root zone servers in the wake of the IANA transfer with the NTIA.

Part II outlines recent cases involving ICANN and its generic top-level domain (gTLD) delegation, as well as, disputes that arose from the expansion of the DNS and the addition of more gTLDs in 2014. These cases demonstrate a growing displeasure with ICANN and a distrust of its accountability processes that govern how it operates, demonstrating that ICANN is given deference rivaling that of *Chevron* from other government agencies and reviewing courts. The cases also demonstrate that many standard legal theories are insufficient to constrain ICANN and prevent abuses of ICANN's power to the detriment of the multi-stakeholder system.

Part III hypothesizes that antitrust law would be an effective method to check ICANN and prevent abuses of their administrative powers. Antitrust is well suited to combat the anticompetitive effects of agency capture on ICANN without undermining the multi-stakeholder system or the DNS's technical requirements. This is due in part to the fact that it will not force

transfer may be even more free to act as they please without the National Television and Information Administration (NTIA) there to check their behavior).

7. See generally *Arizona v. Nat'l Telecomm. & Info. Admin.*, No. 3:16-CV-274, 2016 WL 9307615, at *1 (S.D. Tex. Oct. 3, 2016) (denying a preliminary injunction and temporary restraining order to prevent the transfer from being finalized.)

ICANN to act, but instead will prohibit them from acting in an anticompetitive manner. Furthermore, under the essential utility theory, ICANN should be subject to additional scrutiny since their control over both the DNS and the IANA functions effectively make them the gatekeeper of the Internet and to some extent its content.

I. THE INTERNET AND THE DOMAIN NAME SYSTEM

The Internet in its current form is almost unrecognizable from its original construction in 1969. What we now refer to as the Internet began as a project funded by the Defense Advanced Research Projects Agency (DARPA), and was exclusively used by the government.⁸ That changed in 1974 with the creation of the first Internet Service Provider, Telenet, which granted private citizens access to ARPANET for the first time.⁹ In that same year, Vinton Cerf and Bob Kahn published their paper, *A Protocol for Packet Network Interconnection*, which outlined the design of a Transmission Control Protocol (TCP)¹⁰ and Internet Protocol (IP)¹¹ Suite.¹² The TCP program acts as a road map for data and ensures that said data is delivered from one end of the network to the other.¹³ Simultaneously, the IP program defines the logical

8. See Kal Raustiala, Editorial Comment, *Governing the Internet*, 110 AM. J. INT'L. L. 491, 492 (2016).

9. See Kim Ann Zimmermann & Jesse Ernspek, *Internet History Timeline: ARPANET to the World Wide Web*, LIVE SCIENCE (June 27, 2017, 10:46 AM), <https://www.livescience.com/20727-internet-history.html>.

10. See Vinton G. Cerf & Robert E. Kahn, *A Protocol for Packet Network Intercommunication*, 22 IEEE TRANSACTIONS ON COMM'NS 1, 4 (1974), <https://www.cs.princeton.edu/courses/archive/fall06/cos561/papers/cerf74.pdf> (defining the Transmission Control Protocol (TCP) as a program that handles the transmission and acceptance of messages of the process it serves. In other words, the TCP receives an incoming data packet and then determines where the packet should be sent).

11. See *id.* at 5 (describing the uniform process that allows the TCP program to accurately determine the host or gateway for incoming or outgoing data packets in an interconnected computer network).

12. See *id.* at 4–5 (describing the limits of the TCP program's ability to determine the correct location for packets that are being sent over the Internet); see also Bradley Mitchell, *Understanding Transmission Control Protocol/ Internet Protocol (TCP/IP)*, LIFEWIRE (Jan. 5, 2018), <https://www.lifewire.com/transmission-control-protocol-and-internet-protocol-816255>; Margaret Rouse, *TCP/IP (Transmission Control Protocol/ Internet Protocol)*, SEARCH-NETWORKING, <http://searchnetworking.techtarget.com/definition/TCP-IP> (last visited June 5, 2018) (discussing the purpose and functions of the Transmission Control Protocol/Internet Protocol (TCP/IP) protocols).

13. See *Transmission Control Protocol (TCP)*, TECHOPEDIA, <https://www.techopedia.com/>

locations of the ends of the network that are sending or receiving the data.¹⁴

While the TCP/IP suite was an efficient and effective way to transmit information over the Internet, it had limitations. The limitations required users to access information by recalling specific IP address for that section of the network, which is listed as a string of numbers separated by dots.¹⁵ These difficulties led to the development of the DNS in 1983,¹⁶ which allowed users to type in a domain name (i.e., www.example.com) instead of a long numeric IP address to access a specific website.¹⁷

The DNS is structured hierarchically and operates using an iterative query process to facilitate searches.¹⁸ The basic parts of the DNS hierarchy are the root zone servers (“.”), Top-Level Domain Servers (TLDs) (i.e., .com, .edu, .gov, etc.), and sub-domain servers.¹⁹ When viewed together, the entire structure resembles a tree with the root servers serving as the base, the TLDs serving as the branches, and the sub-domain servers acting as the leaves.²⁰ For the DNS to operate efficiently, a few operational procedures were included to ensure that all queries were directed to the correct end of the network and that a single domain name corresponds to a single IP address.²¹

definition/5773/transmission-control-protocol-tcp (last visited June 5, 2018) (defining the different function of the TCP program).

14. *See id.*

15. *See Internet Protocol Address (IP Address)*, TECHOPEDIA, <https://www.techopedia.com/definition/2435/internet-protocol-address-ip-address> (last visited June 5, 2018) (defining Internet Protocol Address (IP Address)).

16. *See* PAUL MOCKAPETRIS, DOMAIN NAMES—CONCEPTS AND FACILITIES, 2 (1987), <https://tools.ietf.org/pdf/rfc1034.pdf> (theorizing a method of easily recalling IP addresses through a hierarchical name space with “.” to mark the boundaries between the levels of the hierarchy and defining “Domain Names” as a name with structure indicated by dots); *see also* Zimmermann & Ernspek, *supra* note 9 (noting the introduction of the Domain Name System (DNS) as a better way to navigate online rather than relying on individual IP addresses).

17. *See* MOCKAPETRIS, *supra* note 16, at 6 (describing the three major components of the DNS).

18. *See id.* at 9–10 (explaining an example domain space and the preferred syntax for domain names in the hierarchy); *see also* *What Is DNS and the DNS Hierarchy*, INTERSERVER (Aug. 22, 2016, 11:04 AM), <https://www.interserver.net/tips/kb/dns-dns-hierarchy/>; *DNS Architecture*, TECHOPEDIA (July 2, 2012), [https://technet.microsoft.com/en-us/library/dd197427\(v=ws.10\).aspx](https://technet.microsoft.com/en-us/library/dd197427(v=ws.10).aspx) (discussing the function of the DNS’s hierarchic structure, the iterative query process, and the functional benefits that they provide).

19. *See* MOCKAPETRIS, *supra* note 16, at 9–10; *see infra* Figure 1: DNS Server Architecture (derived from *supra* note 18).

20. *See* MOCKAPETRIS, *supra* note 16, at 7–10 (describing the tree-like structure of the DNS and providing a figure of a hypothetical name space).

21. *See* A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. ILL. L. REV. 1, 6 (2003).

This is because if two locations were registered to the same IP address then the query could send the user to the incorrect location or simply respond with an error.²²

In other words, the DNS is a system where the root zone servers contain information about the network location of the TLD servers that are authoritative for the domain name being queried.²³ At the next level, the TLD servers register and maintain the authoritative information for all of the sub-domains that correspond to that given TLD.²⁴ So when a user is searching for google.com, their computer sends a query to the root server requesting the network location for the .com TLD.²⁵ Then, the computer will query the TLD server requesting the location of the sub-domain servers for google.com, which provides the user's computer with the correct IP address.²⁶ After receiving the IP address, the user's computer is able to establish where to request and send information using the TCP, which ultimately ends with the display of the webpage.²⁷

Due to the singular naming requirement, the function of assigning names and numbers to the root zone—a key part of the IANA functions—became an integral part of the ongoing operation of the DNS.²⁸ At first, this process was entirely handled by Dr. John Postel under the direction of the U.S. Department of Defense.²⁹ However, as the Internet continued to expand and become more of commercial marketplace, two things became clear: (1) some form of formal governance over these naming functions was required to keep the Internet incorruptible; and (2) no one knew what form that governance should take and who should have control over it.³⁰

A. ICANN and the Early Years of Internet Governance

The foundations of the movement that led to the creation of ICANN were set in 1995 when the National Science Foundation called a conference of interested parties in response to growing tensions among the most powerful organizations operating within the DNS.³¹ Ultimately, the conference never answered the ownership questions it sought to address, but the most notable

22. *See supra* note 18.

23. *See infra* Figure 2.1: User to Root Query.

24. *See infra* Figure 2.2: User to gTLD Query.

25. *See supra* note 18.

26. *Id.*

27. *Id.*

28. *See* Raustiala, *supra* note 8, at 493.

29. *Id.* at 494.

30. *Id.*

31. *Id.*

thing about it was the Department of Defense's position that *it* owned the name and address space; and that "any attempt to manipulate the root without the U.S. government's permission would be prosecuted as a criminal offense."³² A year later, the International Telecommunication Union (ITU), the World Intellectual Property Organization (WIPO), the Internet Society, and the International Trademark Association met to create a global framework that would rationalize Internet governance.³³ The result of this meeting was the creation of the "Generic Top-Level Domain Memorandum of Understanding" (gTLD MOU), which proposed assigning the DNS Naming Power to an entity within the ITU.³⁴ This agreement was sharply criticized by the Clinton administration, which reiterated that the United States possessed the power over this function of DNS Naming Power.³⁵

While the gTLD MOU had no legal effect, it sent a strong signal to the U.S. government that its position as arbiter of the IANA functions was untenable as the Internet continued to expand globally.³⁶ In the months that followed the meeting at the ITU, the Clinton administration published a *White Paper* advocating an approach to Internet governance involving a "more formalized, inclusive, and robust version of multistakeholderism."³⁷ This vision was achieved two years later with the creation of ICANN, which would administer the crucial IANA functions through a contract with the Department of Commerce and the National Telecommunications and Information Administration.³⁸ Pursuant to this agreement, the U.S. government retained a regulatory role with respect to these functions by requiring that NTIA approve any changes to the root zone that ICANN proposed.³⁹

The subsequent Memorandum of Understanding (MOU) also required that ICANN administer the IANA functions pursuant to certain standards that were codified in the organization's Article of Incorporation and By-laws.⁴⁰ The MOU also required that ICANN provide "sufficient appeal procedures for adversely affected" stakeholders who were dissatisfied with

32. *Id.*

33. *Id.* at 496.

34. *Id.*

35. *Id.* at 497.

36. *Id.*

37. *See id.* at 498; *see generally* Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,741-42 (June 10, 1998).

38. *See* Raustiala, *supra* note 8, at 498.

39. *See generally* Memorandum of Understanding Between the U.S. Dep't. of Commerce & the Internet Corp. for Assigned Names and Nos. (Nov. 25, 1998).

40. *Id.* at Part IV, Part V(C) & (D)(1) (equitability requirements for ICANN's powers to regulate the DNS).

ICANN's decisions regarding the DNS.⁴¹ The ultimate goal of this agreement was to separate the U.S. government from direct control over the IANA functions while simultaneously ensuring that ICANN could not act in a manner that would harm the interests of the other stakeholders and, more importantly, the interests of the U.S. government.

B. ICANN as an Agency in Form but Not in Name

Traditionally, through its role in Internet governance and administration, ICANN acts like an administrative agency. ICANN derived its power from an agreement from the MOU with the NTIA, which in effect allowed ICANN to act with the power of the NTIA with regard to the administration of the DNS root servers.⁴² However, this power was limited by the NTIA's oversight as the MOU required ICANN to check with the NTIA before making any changes to the root servers. One key feature of this role is that ICANN uses its authority to create the policies and procedures that governed its regulation of the IANA functions.

For example, ICANN created the Uniform Domain-Name Dispute Resolution Policy (UDRP) to outline the rules regarding the transfer of domain names from cybersquatters⁴³ in disputes involving the rights of trademark owners.⁴⁴ Specifically, the UDRP procedures permit ICANN to unilaterally transfer ownership of domain names when a preapproved arbitration panel⁴⁵ determines that the original domain name owner is violating the trademark owner's rights.⁴⁶ Thus, through these arbitration panels, ICANN determines whether a party has trademark rights in a domain name and can subsequently transfer that domain name from an infringing party.

However, one might argue that is not a meaningful regulatory role because parties who are displeased with a panel decision may appeal the ruling

41. *Id.* at Part V(A)(2).

42. *See supra* note 39.

43. *See* Joshua M. Borson, Note, *A World of Infinite Domain Names*, 58 WAYNE L. REV. 481, 481 n.3 (2012) (citing *Harrods Ltd. v. Sixty Internet Domain Names*, 157 F. Supp. 2d. 658, 665 (E.D. Va. 2001) (stating that cybersquatting occurs when a person registers a domain name incorporating a trademark with the bad faith intent to ransom the rights of the domain to the legitimate holder for a profit).

44. *See generally* *Uniform Dispute Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited June 5, 2018).

45. *See List of Approved Dispute Resolution Service Providers*, ICANN, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> (last visited June 5, 2018).

46. *See generally* 15 U.S.C.S. §§ 1125(d)(2)(A), (D) (2012); *Uniform Domain Name Dispute Resolution Policy*, ICANN, § 3(b), <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited June 5, 2018) [hereinafter *UDRP*].

in federal court.⁴⁷ The courts largely defer to the UDRP panel's decisions, and the United States Patent and Trademark Office's (USPTO's) own policy regarding trademarkability of domain names effectively mirrors the UDRP.⁴⁸ In addition, ICANN's regulatory authority is codified by its registration agreements that domain name registrants are required to sign.⁴⁹ Thus, through the UDRP, and approved arbitration panels, ICANN regulates the ownership rights of domain name registrants and determines the existence of trademark rights with respect to domain names, a function that is typically served by the USPTO in assigning trademark rights.⁵⁰

More recently, ICANN began exercising more direct, regulatory control over the Internet through the IANA functions when the Obama administration began drafting a plan by which the remaining control over the IANA functions could be transferred from the NTIA to ICANN.⁵¹ The transition was finalized on January 6, 2017, pursuant to the Memorandum signed by Lawrence Strickling, which consequently made ICANN the sole arbiter of the DNS root zone.⁵² This transfer amounted to the complete privatization of the administration of the Internet's authoritative root zone functions. As a result, ICANN changed from a government contractor acting as an arm of the NTIA into an Internet regulator possessing the power to manage the authoritative root zone as it saw fit.

One primary effect of this transition is that ICANN now resembles an independent administrative agency and no longer a contractor for an executive agency. Independent agencies are unique because they are delegated power and free to act largely without direct interference from the legislative or executive branches.⁵³ That independence allows the agency to make decisions

47. See *UDRP*, *supra* note 46, at § 4(k).

48. See generally U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1209.03(m) (2012), <https://tmep.uspto.gov/RDMS/TMEP/Oct2012#/Oct2012/TMEP-1200d1e7919.html>

49. See generally *Domain Name Registration Agreement*, NAME.COM, <https://www.name.com/policies/registration-agreement> (last visited June 5, 2018).

50. See Memorandum of Understanding Between the U.S. Dep't. of Commerce & the Internet Corp. for Assigned Names and Nos., *supra* note 39, at ¶ V(C)(9)(d) (granting ICANN the power develop uniform policies to resolve trademark/ domain name disputes, in conjunction with the World Intellectual Property Organization (WIPO)). See generally *Uniform Domain-Name Dispute Resolution Policy Information*, ICANN, <https://www.icann.org/resources/pages/help/dndr/udrp-en> (last visited June 5, 2018); *Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/schedule-2012-02-25-en> (last visited June 5, 2018).

51. See *supra* note 5.

52. See Memorandum from Lawrence Strickling to Dr. Stephen Crocker, *supra* note 3.

53. See CHARLES KOCH, ADMINISTRATIVE LAW AND PRACTICE § 7.1 (3d ed. 2010).

about topics falling within the scope of their expertise that are, in theory, apolitical.⁵⁴ Therefore, the basic effect of the IANA transfer in 2017 is that ICANN is now free to regulate the root zone as it sees fit and create the rules that govern its administration.

However, the transfer also has drawbacks. Chief among them is the fact that ICANN is a corporation, not a traditional independent agency that is still subject to some sort of government oversight such as the Administrative Procedure Act (APA). Thus, while this transfer has separated administration of the Root Servers from direct control of the executive, it has done so without providing many of the limitations that are imposed on similarly situated government agencies.⁵⁵ To correct this divestment from accountability, Congress could pass laws that regulate how ICANN accomplishes its mission or legislatively veto ICANN decisions.⁵⁶ In addition, Congressional interference in the functions of agency-like organizations, who perform privatized agency functions, is not a new phenomenon either. For example, Congress interceded in the operation of stock exchanges to prevent abuse of the securities market.

Specifically, these regulations took the form of the Securities Exchange Act of 1934, which regulates the rules and responsibilities of stock exchanges.⁵⁷ Congress realized that the exchanges needed some level of autonomy, but should not be left completely to their own devices.⁵⁸ Congress consequently regulated the exchanges to protect investors through the Securities and Exchange Commission (SEC).⁵⁹ In fact, the Act explicitly requires, among other things, that an exchange's rules be "just and adequate" to insure fair dealing and to protect investors.⁶⁰

There are some restraints on ICANN's authority. The 2012 contract with the NTIA limits ICANN's powers, but those limits do not rise to the level of congressional action because they were put in place by the 2012 contract between the U.S. Department of Commerce and ICANN.⁶¹ This becomes apparent when you consider that a would-be plaintiff could not bring a claim under that contract because they are not a party to that contract. In effect, ICANN has been granted new latitudes with respect to how it can exercise control over the IANA functions without meaningful regulation of those

54. *See id.*

55. *See id.* at § 7.21.

56. *Id.*

57. S. REP. NO. 73-792, at 1–5 (1934).

58. *Id.*

59. *Id.*

60. *See* 15 U.S.C. § 78(f)(d) (2012).

61. *See generally* ICANN Contract, *supra* note 4, at C.2 Contract Requirements.

powers.

The possibility of discord stemming from ICANN's new role can be seen in their new program for the delegation of new gTLDs⁶² on the root zone. Around the same time that the aforementioned contract was created, ICANN began soliciting applications for gTLDs as part of their efforts to expand the Internet's domain space.⁶³ In order to facilitate this application process, ICANN released its gTLD delegation policies in their gTLD Applicant Guidebook (Guidebook).⁶⁴ The Guidebook regulates applicants' access to services, application standards, and conduct of admitted members.⁶⁵

Again, ICANN's powers were not unlimited. The primary limitation the NTIA placed on ICANN before the IANA transfer was that was required ICANN to create a conflict of interest policy for members and board of directors, as well as a dispute resolution policy for stakeholders who are dissatisfied with the outcomes of ICANN's decisions, which have been codified in ICANN's bylaws.⁶⁶ While this is a positive addition, unlike a government agency, ICANN's decisions are generally not reviewable by U.S. courts as dissatisfied parties are required to submit to mandatory arbitration.⁶⁷ In addition, ICANN's board of directors, which makes initial determinations on many issues, is also the body designated to issue final decisions regarding a dissatisfied party's request for reconsideration if ICANN does not rule in their favor.⁶⁸ While dissatisfied parties may seek a review by an independent review panel, the panel's decisions are not subject to precedent, nor do they possess the power to unilaterally overrule ICANN's board. Thus, while the

62. See *What is a Generic Top-Level Domain (gTLD)?*, TECHOPEDIA, <https://www.techopedia.com/definition/15673/generic-top-level-domain-gtld> (last visited Apr. 10, 2018) (generally defining what a generic Top-Level Domain (gTLD) is and ICANN's new gTLD program).

63. See generally *New gTLDs Update: Applications Accepted Today; New Guidebook Posted; Financial Assistance for Qualify Applicants*, INTERNET CORP. FOR ASSIGNED NAMES AND NOS. (Jan. 11, 2012), <https://www.icann.org/news/announcement-2012-01-11-en> (soliciting applications for gTLDs).

64. See generally *gTLD Applicant Guidebook: Module 6 Application Terms and Conditions*, INTERNET CORP. FOR ASSIGNED NAMES AND NOS. (June 4, 2012), <https://newgtlds.icann.org/en/applicants/agb> (explaining that ICANN has full discretion when assessing new applications for gTLDs).

65. *New Generic Top-Level Domains: Applicant Guidebook*, INTERNET CORP. FOR ASSIGNED NAMES AND NOS., <https://newgtlds.icann.org/en/applicants/agb> (last visited Apr. 9, 2018).

66. See ICANN Contract, *supra* note 4, at Conflicts of Interest Requirements, pp. 12–13; see also *Bylaws for ICANN* §§ 4.3, 7.6, 15.9, 18.8(b), 19.5(c), ICANN, (July 22, 2017), <https://www.icann.org/resources/pages/governance/bylaws-en> [hereinafter *Bylaws for ICANN*].

67. See *supra* note 64, at ¶ 6 (requiring applicants who are dissatisfied with ICANN's decisions to submit to mandatory, binding arbitration).

68. See *Bylaws for ICANN*, *supra* note 66, at § 4.2(r).

NTIA worked to limit ICANN's power with respect to the IANA functions, these limitations are largely nominal in nature because the majority of the remedies created are all governed internally by ICANN. In addition, the main remedy not governed by ICANN's internal procedures, bringing a claim in court, has likewise proven to be an insufficient check on ICANN. The next section explores the latter issue in more detail and specifically focuses on plaintiffs who attempted to bring claims against ICANN under the Lanham Act and trademark law.

II. THE IANA TRANSFER AND WHY IT MATTERS

As noted above, one of ICANN's powers with respect to the DNS and the IANA functions is its ability to adjudicate disputes about the existence of trademark rights in a domain name via the UDRP. This power was relatively uncontroversial because the UDRP's standard for determining the existence of trademark rights mirrored the USPTO's. However, ICANN's introduction of its new TLD program has created new problems because it permits trademark owners to purchase TLDs that mirror their trademarks. This is an issue because the prevailing policy of both ICANN and the USPTO was that TLDs are, generally, generic.⁶⁹ For example, under the Legal Rights Objections (LRO) period of the TLD application process, most trademark owners are unable to prevent the delegation of a TLD that matches their trademark.⁷⁰ These LRO decisions have since been supported by courts intent on maintaining the current policy. As a result, plaintiffs have been unable to successfully bring a case against ICANN regarding the delegations of gTLDs.

A. Image Online Design and the Trademark Perspective

The non-trademarkability of gTLDs was a primary issue in the case *Image Online Design, Inc. v. Internet Corp. for Assigned Names and Nos.*, which revolved around the delegation of the “.web” gTLD.⁷¹ Image Online Design (IOD) is the operator of a registry for the “.web” TLD on a non-authoritative DNS, which means that it is not readily searchable by users without preconfiguring

69. See *Image Online Design, Inc. v. Internet Corp. for Assigned Names and Nos.*, No. CV 12-08968, 2013 U.S. Dist. LEXIS 16896, at *21–24 (C.D. Cal. Feb. 7, 2013).

70. See generally Kate Dolinska, Note, *Trademark Protection in the New Internet Age: Template for Successful Legal Rights Objections in the gTLD Revolution*, 32 CARDOZO ARTS & ENT. L.J. 959 (2014) (studying the outcomes of four successful Legal Rights Objections (LRO) claims prior to gTLD delegation, which are compared with sixty-eight rejected LRO claims).

71. *Image Online Design*, 2013 U.S. Dist. LEXIS 16896, at *3, *20–21.

their web browser.⁷² However, this reconfiguration can be problematic because alternative DNS roots are not authoritative for ICANN-delegated TLDs, which could result in domain names that are identical to those on ICANN's root and a "naming collision" as discussed in Part I.⁷³

IOD's claim stemmed from the fact that ICANN did not consider IOD's 2000 application, and when ICANN moved forward with the ".web" delegation process, IOD sued for trademark infringement under their registered and common law ".web" trademarks.⁷⁴ In its defense, ICANN argued that: (1) the .web would not cause confusion because TLD registry services are a different class of goods than those protected by IOD's registrations and (2) that TLD's are not subject to trademark protection because they are generic.⁷⁵ Ultimately, the court ruled in favor of ICANN and summarily dismissed all of IOD's trademark claims.⁷⁶

The IOD's claim under 15 U.S.C. § 1125(a)(1)⁷⁷ and its common law trademark was the most important part of the court's ruling. In its opinion, the court reiterated a long-held standard of trademark law that "TLDs are not generally source indicators."⁷⁸ The court further supported its ruling by citing the official policy of the USPTO that states "[g]enerally, when a trademark . . . is composed, in whole or in part, of a domain name, neither the beginning of the URL ('http://www.') nor the TLD have any source-indicating significance."⁷⁹ The IOD attempted to refute this portion of the ruling by pointing out that the USPTO altered its position to require consideration of "any potential source-indicating function of the TLD."⁸⁰ In response, the court stated that the only marks available for protection as a TLD are famous

72. *Id.* at *2–3.

73. *See generally* *DNS Architecture*, *supra* note 18.

74. *See Image Online Design*, 2013 U.S. Dist. LEXIS 16896 at *3–5 (Image Online Design claiming that by delegating the ".web" gTLD, ICANN would infringe their registered and common law trademarks).

75. *Id.* at *16, *20–21.

76. *Id.* at *21, *25–26.

77. *See* 15 U.S.C. § 1125(a)(1) (2012) (stating that any person who uses any word, term, name, symbol in commerce such that it is likely to confuse a prospective consumer about the source of that symbol shall be liable in a civil action by any person who believes that they are, or are likely to be damaged by said false designation of source.).

78. *See id.* at *21–23 (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173 (Fed. Cir. 2004)) (holding that a "domain name ending in .web does not indicate source to a web site customer. A consumer understands source as it relates to web sites through the second-level domain name. *Only second level domains indicate source.*" (emphasis added)).

79. *Id.* at *21–24. *See generally* U.S. PATENT & TRADEMARK OFFICE, *supra* note 48, at § 1209.03.

80. *See Image Online Design*, 2013 U.S. Dist. LEXIS 16896, at *24.

marks, such as .apple for Apple, Inc., and that some marks would continue to remain generic even if they are famous.⁸¹ In the court's view, ".web" fell under the latter category because it would indicate a genus of a type of website available on the World Wide Web and not a particular company or manufacturer.⁸²

Because of the court's decision in *Image Online Design*, corporate stakeholders are susceptible to competitive harm if ICANN uses its powers unfairly, particularly if the harm is propagated at the behest of another stakeholder. The effects of this limitation are particularly acute considering the ICANN's own regulatory policies, which take a similar position on the existence of trademark rights in gTLDs moving forward.⁸³ Both the UDRP and LRO, ICANN's current dispute resolution policies intended to protect the rights of trademark owners, reiterate the common proposition that gTLDs are generally ineligible for trademark protection.⁸⁴ However, both panels governing these decisions have articulated that this general rule may have an exception.⁸⁵

While this may indicate that the perception that gTLDs are generic is shifting, in application both policies strongly indicate that trademarkability is the exception, not the rule. The LRO decisions, for instance, demonstrate that to successfully assert legal rights in a gTLD, the trademark owner must either be particularly famous or be able to point to facts indicating bad faith on the part of the applicant.⁸⁶ While the UDRP has indicated a departure from this rule, panel decisions are not subject to precedent. This means that trademark owners should not expect any consistency between panel decisions, and that these decisions will be extremely fact specific.

B. The Consequences of *Image Online Design*

The presumably generic gTLDs, the uncertainty of how this rule will be applied, and the amount of fame a trademark owner must possess to state a claim have created an environment where only the largest private stakeholders can successfully assert a violation of their trademark rights against ICANN in court. Even then, the success of these claims remains in doubt, especially if ICANN's decisionmaking becomes clouded by undue influence from other stakeholders. For example, in a matter involving Amazon,

81. *Id.* at *24–25.

82. *Id.* at *25–26.

83. *See id.* at *24 (referencing the plaintiff's complaints about ICANN policies (Compl. at ¶¶ 36–37)).

84. *See generally id.* at *21–24; Dolinska, *supra* note 70.

85. *See Image Online Design*, 2013 U.S. Dist. LEXIS 16896, at *21–24.

86. *Id.*

ICANN denied delegation of the “.amazon” gTLD for reasons of “public policy” following strong objections by Brazil.⁸⁷ After failing to have the decision changed using ICANN’s appeal processes, Amazon challenged ICANN’s decision and requested an independent review that found ICANN caved to pressure from the Brazilian government and, more concerning, attempted to abuse its internal processes to the detriment of Amazon.⁸⁸

Based on the current view of trademark rights in gTLDs, it is likely that Amazon might have a valid claim against ICANN. Amazon would likely be considered a famous mark, akin to the court’s example of Apple in *Image Online Design*.⁸⁹ Furthermore, “.amazon” would likely convey the website’s source to consumers because many Internet users rely on Amazon’s online retail services and the TLD contains Amazon’s entire mark.⁹⁰ However, its case would likely fail because ICANN is not required to delegate TLDs.⁹¹ As such, it is likely that Amazon’s trademark claim would fail because, like IOD, an infringement claim is not ripe since the .amazon TLD is not being used by another party.⁹²

Overall, while theoretically applicable, trademark law would ultimately be an ineffective approach to regulating ICANN’s TLD delegation power. Only famous trademark owners could bring a claim against ICANN, which would inherently bar most trademark owners.⁹³ Even then, these famous trademark owners will be unable to bring a claim until, at the very least, ICANN chooses a registry to which to delegate the TLD.⁹⁴ However, if ICANN decides not to delegate the TLD, as is the case with the “.amazon” TLD, even famous trademark owners will be incapable of bringing a successful claim because ICANN is not required to delegate TLDs.⁹⁵

III. POLICING ICANN USING ANTITRUST LAW

Given the growing distrust that ICANN will follow the policies established by its Bylaws and Articles of Incorporation, it is inadvisable to allow it to

87. See *Amazon EU S.A.R.L. v. Internet Corp. for Assigned Names and Nos.*, Int’l Centre for Dispute Resolution, Case No. 01-16-0000-7056, at ¶¶ 60–61 (July 10, 2017).

88. See Kieren McCarthy, *Amazon May Still Get .amazon Despite Government Opposition – Thanks to a Classic ICANN Cockup*, THE REGISTER (July 19, 2017, 8:58 PM), <https://www.the-register.co.uk/2017/07/19/dot-amazon-icann/?page=1>.

89. See *Image Online Design*, 2013 U.S. Dist. LEXIS 16896, at *24–25.

90. See *id.* at *21–25.

91. See *id.* at *10–11.

92. See *id.* at *11–16.

93. See *id.* at *21–25.

94. See *id.* at *15–16.

95. See *id.* at *10–11.

remain largely unregulated in the wake of the IANA transfer. Therefore, something must be done to create a failsafe to protect consumers and stakeholders from an event that causes competitive harm in the Internet marketplace. In the following Part, this paper examines the applicability of Section 1 of the Sherman Act in policing collusion between ICANN and other stakeholders and the application of the Essential Facilities Doctrine enumerated in *MCI Communications Corp. v. AT&T*.⁹⁶ Both approaches would enable U.S. courts to limit ICANN's regulatory powers and limit the commercial harm if they are used improperly while not undermining the organization's ability to exercise its powers generally.

Before analyzing the benefits of bringing an antitrust suit against ICANN, it is important to determine whether it is immune from antitrust liability. The general answer to this inquiry is no.⁹⁷ With respect to ICANN specifically, in *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*,⁹⁸ the Ninth U.S. Circuit Court of Appeals determined that ICANN was not immune from antitrust liability because of the way it negotiated the terms of the ".com" registry agreement.⁹⁹ This position was reiterated by the district court in *Manwin Licensing International S.A.R.L v. ICM Registry, LLC*,¹⁰⁰ where the court found that "ICANN's activities play[ed] an important role in the commerce of the [I]nternet and ICANN's actions could exert a restraint on that commerce."¹⁰¹

The applicability is also not affected by the fact that ICANN has been granted the power to self-regulate following IANA transfer with the NTIA. This is supported by the Supreme Court's decision in *Silver v. New York Stock Exchange*,¹⁰² where the Court held that self-regulating entities, such as

96. 708 F.2d 1081 (7th Cir. 1983).

97. See *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 507 (9th Cir. 2010); *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126 (C.D. Cal. 2010). See generally *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788 (1975) (stating that an organization could be liable for antitrust violations where it "play[ed] an important part" in commerce and its anticompetitive activities could exert a restraint in commerce); *Silver v. N.Y. Stock Exchange*, 373 U.S. 341 (1963) (ruling that an organization is not immune from antitrust immunity simply because it has been granted the power to self-regulate by the government).

98. 611 F.3d 495 (9th Cir. 2010).

99. See generally *Coal. for ICANN Transparency*, 611 F.3d 495.

100. 2012 U.S. Dist. LEXIS 125126 (C.D. Cal. 2012).

101. See *Manwin Licensing*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126 at *15 (citing *Goldfarb*, 421 U.S. at 788, for the assertion that an organization could be liable for antitrust violations where it "played an important part" in commerce and its anticompetitive activities could exert a restraint in commerce).

102. 373 U.S. 341 (1963).

ICANN, are not immune from antitrust liability.¹⁰³ Instead, such entities would be examined under the rule of reason to determine whether the conduct at issue is necessary to accomplishing the organization's mandate and, even then, only to the minimum extent necessary.¹⁰⁴

Based on the aforementioned cases, a court could find ICANN liable for an antitrust violation in the event that it impaired competition in the Internet marketplace by colluding with one or more actors or by impermissibly exercising its monopoly power. However, a court would also need to consider whether the conduct at issue was necessary to accomplishing the goals mandated by the agreement with the NTIA. In short, if the court finds that ICANN's actions were not "necessary" or were outweighed by their anticompetitive effects, then a court could find ICANN liable under an antitrust theory.

A. Defining the gTLD Market

Before a party can bring an antitrust claim, it must first "identify the markets affected by [a defendant's] alleged antitrust violations" and that "the defendant has power within that market."¹⁰⁵ That 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."¹⁰⁶ In other words, the outer boundaries of the market are defined by the extent to which there are reasonable alternatives for the good in question. In the Internet context, courts have found that a market exists in both defensive registrations of domain names¹⁰⁷ and expiring domain names.¹⁰⁸ In both instances, the court rejected ICANN's argument that each individual domain name constituted its own market, which is important because it shows that courts view different types of domain names as distinguishable from one another rather than as a single, unitary market.¹⁰⁹

Using this framework, it could be argued that ICANN created a new market in registerable gTLDs following its decision to expand the gTLD name

103. *Silver*, 373 U.S. at 360–61.

104. *Id.* at 360.

105. *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1104 (9th Cir. 1999).

106. *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 507 (9th Cir. 2010).

107. *See generally* *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, at *1 (C.D. Cal. 2010).

108. *See generally* *Coal. for ICANN Transparency*, 611 F.3d at 507–09.

109. *Id.* at 508.

space in 2012. This market is distinct from the previously mentioned markets because it conveys different rights. In the online hierarchy, gTLDs are the property of registries under which second-level domains can be registered.¹¹⁰ Ownership of a gTLD allows the owner to charge registrars and registrants for the right to register domain names under the gTLD in question. Previously, these prices were determined by the registry agreement between ICANN and the registry, but the new gTLDs are unique because they can be held privately by an organization. This means that a party awarded a gTLD can choose to allow others to register domains under their gTLD, or they can exclude other users from registering a domain name in their gTLD. Considering these benefits, businesses have spent vast amounts of money to expand their online presence and protect their interests by using gTLDs.¹¹¹

gTLDs are also non-substitutable, which means they are largely inelastic due to the DNS's uniform naming requirements. Once an organization is delegated a gTLD, it cannot be delegated to another entity because doing so would cause a "naming collision," which would undermine the stability of the DNS root zone. As previously noted, ICANN retains the right to refuse to delegate a gTLD, which means during any given delegation period there are only a limited number of gTLDs that are available.¹¹² Arguably, companies not delegated a gTLD could register identical gTLDs across the alternate DNS roots, which could make each gTLD substitutable for the purposes of antitrust analysis. However, this is a false distinction because the traffic on the alternate DNS roots is insignificant in comparison to ICANN's authoritative root.¹¹³ In addition, the gTLDs on the Alternate Roots are not as regulated, so they are not necessarily bound by the uniformity requirements. This means that multiple companies could operate the same gTLD which further limits their ability to compete with gTLDs delegated on the authoritative root.

ICANN created a market in gTLDs since they are a transferable good that has value as determined by both the price of applying and the final price of the Auctions of Last Resort, which occurs after applicants cannot agree amongst themselves. These gTLDs give the owners the right to operate as a domain name registry, to operate in the next layer of the DNS hierarchy, or

110. See *infra* Figure 1: The DNS Architecture (derived from *supra* note 18).

111. See Dolinska, *supra* note 70, at 968 (referencing the new domain registry company, Donuts, which invested over fifty-five million dollars and purchased over 300 gTLDs with the intent of licensing them out to different companies wishing to expand into the new domain space).

112. See *supra* note 85.

113. See *Image Online Design, Inc. v. Internet Corp. for Assigned Names & Nos.*, 2013 U.S. Dist. LEXIS 16896 *1, *3 (C.D. Cal. 2013) (noting 20,000 domains registered over seventeen years from 1996 to 2013).

to hold them privately. This feature makes them distinguishable from public gTLDs, such as “.com.” In addition, the cost of these domains is largely inelastic because they are limited in number since ICANN ultimately decides which gTLDs to delegate.

Having established that a market exists in gTLDs delegable on the Authoritative Root, it is important to illustrate that ICANN possesses a monopoly over it. ICANN's monopoly stems from the fact that it is the only entity allowed to make changes to the authoritative root because of its agreement with the NTIA. As such, companies seeking to become registries of these gTLDs are required to go through ICANN and must pay, at a minimum, the price that ICANN sets for each gTLD application. However, ICANN's monopoly is not per se unlawful under Section 2 of the Sherman Act¹¹⁴ by virtue of its agreement with the NTIA.¹¹⁵ Instead, any party seeking relief under antitrust law would need to prove that ICANN had impermissibly exercised its monopoly power over the gTLD market.¹¹⁶

B. ICANN and Section 2 of the Sherman Act

After demonstrating that ICANN created a new market in delegable gTLDs and that it possesses a monopoly in that market, it is now possible to examine how ICANN could violate the Sherman Act. In addition to having market power to successfully bring an antitrust claim for a violation of Section 2 of the Sherman Act, a plaintiff needs to prove that ICANN: (1) conspired with another registry or applicant, (2) that this conspiracy was meant to restrain trade, (3) the conspiracy actually harms competition, and (4) that the plaintiff was harmed by this conduct.¹¹⁷ Two courts have found that ICANN has violated these prohibitions in *Coalition for ICANN Transparency*

114. See 15 U.S.C. § 2 (2012) (stating every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.).

115. See Froomkin & Lemley, *supra* note 21, at 42 (citing *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 297 (D. Mass. 1953), which held that acquisition of monopoly power by “superior skill, superior products, natural advantages economic or technological efficiency,” and other means is not illegal” (internal quotation marks omitted)).

116. See *id.*

117. See *Paladin Assoc., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003).

(CFIT) v. VeriSign, Inc.¹¹⁸ and *Manwin Licensing International S.A.R.L. v. ICM Registry*.¹¹⁹ Both courts found that CFIT and Manwin had successfully argued that domain names were capable of being divided into distinct markets.¹²⁰ This is important because, although domain name markets are distinct from the gTLD market, it supports the assertion that a court could find that there is a separate domain name market for delegable gTLDs, which satisfies one of the threshold requirements of the Sherman Act.

In both *Coalition for ICANN Transparency* and *Manwin Licensing*, the courts found that ICANN had succumbed to pressures from both ICM and VeriSign, which led to the creation of the registry agreements that impaired competition online.¹²¹ This means that although the anticompetitive effect occurred downstream between the registry and registrar/registrants, ICANN was liable because it created that anticompetitive environment. In other words, the court found that the negotiations and subsequent creation of the registry agreements constituted a conspiracy to constrain trade and an actual impairment of trade for the purposes of Section 1 of the Sherman Act.¹²²

These cases show that ICANN's actions meet the third and fourth requirements of Section 1 regarding a dispute over who should be awarded the gTLD. The courts specifically relied on whether other companies were able to bid for the gTLDs either during the initial delegation, which was the case in *Manwin*, or subsequently once the registry agreement had expired, as in *Coalition for ICANN Transparency*.¹²³ In *Manwin*, the court took exception to the fact that ICM was the only company permitted to bid for the .xxx gTLD, and was unmoved by ICANN's assertion that this process was "entirely

118. See 611 F.3d 495, 502 (9th Cir. 2010) (reciting the Coalition for ICANN Transparency's (CFIT's) allegation that VeriSign and ICANN conspired to artificially set domain name registration prices in favor of VeriSign).

119. See CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, *1, *29–31 (C.D. Cal. 2010) (reciting CFIT's allegation that ICANN conspired with ICM by agreeing to delegate the ".xxx" gTLD to ICM without setting price caps or restrictions on the prices ICM could charge for .xxx registry services and an unlimited term of ownership, which was contrary to industry practices involving registry contracts).

120. *Coal. for ICANN Transparency*, 611 F.3d at 509 (finding there was a market in expiring domain names, because these domains possessed value of their established user bases); *Manwin Licensing*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, at *19–21 (finding there was a market for ".xxx" domain names registered because trademark owners would need to register those domain names to protect their trademark rights).

121. See generally *Coal. for ICANN Transparency*, 611 F.3d at 507; *Manwin Licensing*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, at *29–31.

122. *Manwin Licensing*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, at *16 & n.2.

123. *Id.* at *29; *Coal. for ICANN Transparency*, 611 F.3d at 499–500.

open.”¹²⁴ Similarly, in *Coalition for ICANN Transparency*, the court determined that the agreement with VeriSign created a de facto monopoly, since the term was practically unlimited.¹²⁵ In both instances, ICANN acted to directly eliminate other competitors from entering the market or helped the defendant monopolize the gTLD in question and prevented other competitors from entering the market once that agreement expires.

These cases are also important because both plaintiffs allege that ICANN was captured by the interests of a stakeholder through their predatory conduct. In *Coalition for ICANN Transparency*, the court found that VeriSign engaged in predatory harassment, such as threatening to sue in an effort to coerce ICANN into maintaining its monopoly on the .com gTLD.¹²⁶ Similarly, in *Manwin*, ICM engaged in a coercive campaign meant to force ICANN to approve the .xxx gTLD and establish a monopoly for ICM.¹²⁷

Overall, these cases also show that a court could find that by deciding to delegate additional gTLDs, ICANN created a new market consisting of all the gTLDs available for delegation. Within this market, these cases demonstrate that antitrust could be an effective means to regulate ICANN's actions regarding gTLD delegation in the event of an agency-like capture of their decisionmaking bodies. Furthermore, both cases show that ICANN's interest must be trapped through some form of predatory conduct, whether financially or administratively.¹²⁸ If all of these factors are present, it is possible that a court could find that ICANN's actions were in violation of Section 1 of the Sherman Act.

C. The DNS as an Essential Facility

In addition to holding ICANN liable via its conduct as the monopolist in the gTLD delegation market, antitrust law can also require ICANN to provide applicants with the gTLD they applied for under the essential facilities doctrine.¹²⁹ This doctrine is supported by a number of cases,¹³⁰ but the most analogous case is *MCI v. AT&T*, which dealt with Bell System's refusal to

124. *Manwin Licensing*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, at *27–28.

125. 611 F.3d at 504.

126. *Id.* at 505–07.

127. *Manwin Licensing*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, at *30.

128. *See id.* at *29–31.

129. *See generally* Froomkin & Lemley, *supra* note 21, at 45 (describing the Essential Facilities Claim as an instance where a competitor has monopoly power of an “essential facility” for competition, who must then give competitors access to that facility in a reasonable and nondiscriminatory fashion).

130. *See id.*

allow MCI to connect its long distance calls to Bell South's local phone exchanges.¹³¹ In its decision, the Seventh U.S. Circuit Court of Appeals laid out a four-part test for an essential facilities claim: (1) control of the facility by the monopolist; (2) competitor's inability to practically or reasonably duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.¹³²

After concluding that ICANN would not be immune, Froomkin and Lemley examined a variety of antitrust claims, including the essential facilities doctrine.¹³³ They determined that it would be difficult for a party to succeed on such a claim because "it lacks the clear self-dealing incentive . . . because ICANN gets no direct financial benefit from choosing one registry over another [when delegating gTLDs]."¹³⁴ Also, Froomkin and Lemley theorized that it would be difficult to meet the fourth *MCI* element because of the architectural requirements of the root zone would lead courts to defer to ICANN's expertise regarding the stability of the DNS.¹³⁵

However, the Internet and ICANN's powers have changed drastically since Froomkin and Lemley first explored this topic. The Auction of Last Resort now gives ICANN a direct financial gain from the sale of gTLDs, typically for values at least double the cost of the initial application.¹³⁶ In addition, it would be more difficult for ICANN to defend its decision not to delegate a gTLD on the grounds of DNS stability. If adding gTLDs was going to destabilize the DNS, then it seems unlikely that ICANN would have solicited 1,930 applications from various organizations seeking to own their gTLD on the authoritative root, and subsequently delegated 1,230 of those applications.¹³⁷

Today, a court could find in favor of a party bringing an Essential Facilities Claim if it could prove that ICANN was impermissibly discriminating against them by unreasonably refusing to delegate a gTLD. For example, in the case of Amazon's gTLD application, Amazon could argue that ICANN violated the essential facilities doctrine when Amazon decided not to delegate

131. See generally *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

132. *Id.* at 1132–33.

133. See Froomkin & Lemley, *supra* note 21, at 44–52.

134. See Froomkin & Lemley, *supra* note 21, at 51.

135. *Id.*

136. See *New gTLD Auction Proceeds*, ICANN, <https://newgtlds.icann.org/en/applicants/auctions/proceeds> (last visited June 5, 2018); *New gTLD Auction Results*, ICANN, <https://gtdresult.icann.org/application-result/applicationstatus/auctionresults> (last visited June 5, 2018).

137. See *New gTLD Program Statistics*, ICANN, <https://newgtlds.icann.org/en/program-status/statistics> (last visited June 5, 2018).

its gTLD following Brazil's objections.¹³⁸ With respect to the first *MCI* factor, ICANN is the only party capable of delegating gTLDs on the authoritative root which makes it a monopolist in that market. Second, Amazon is unable to reasonably duplicate the essential facility because it cannot access the authoritative root without ICANN's approval. Third, by denying Amazon access, ICANN is prohibiting Amazon from competing in the gTLD market. Lastly, ICANN cannot defend its decision on the grounds of feasibility because it instituted the gTLD program to expand the DNS and solicited thousands of applications without fear of destabilizing the rest of the DNS.

Under this analysis, Amazon could argue that ICANN conspired with the Brazilian government to constrain trade in the gTLD market when it refused to delegate the .amazon gTLD based on the latter's objections. In addition, unlike a trademark infringement claim, under an antitrust claim Amazon would not need to wait to file its complaint until after ICANN delegated the ".amazon" gTLD to a third party. This is important because it prevents ICANN from shielding itself from liability by electing to not delegate the gTLD in question. Furthermore, by using antitrust law, Amazon's claim is not dependent on ICANN's gTLD Application Guidebook or the organizations bylaws. This means that ICANN cannot simply remove Amazon's claim from a U.S. court and into an arbitration proceeding. It is because of these benefits that antitrust law is better suited to check ICANN's powers over the IANA functions than trademark law.

CONCLUSION

Since it was created and commercialized, the Internet, and more specifically the domain name space, has been a place for free thought and open competition. This environment was successfully maintained through quasi-governmental regulation by ICANN in conjunction with the NTIA. This model was problematic as the United States became increasingly pressured to relinquish its oversight role.¹³⁹ This pressure led to the NTIA relinquishing its control over the IANA functions and transferring them to ICANN, which was already administering them on a day-to-day basis.¹⁴⁰ Following this transfer, ICANN became uniquely positioned to control the DNS through one of these functions, specifically the power to delegate gTLDs to

138. See generally *Amazon EU S.A.R.L. v. Internet Corp. for Assigned Names and Nos.*, Int'l Centre for Dispute Resolution, Case No. 01-16-0000-7056 (July 10, 2017).

139. See Klint Finley, *The Internet Finally Belongs to Everyone*, WIRED (Oct. 3, 2016), <https://www.wired.com/2016/10/internet-finally-belongs-everyone/> (stating that the fact that the U.S. government had the final say over the DNS never sat well with the rest of the world).

140. See Memorandum from Lawrence Strickling to Dr. Stephen Crocker, *supra* note 3.

DNS registries in the authoritative root zone.¹⁴¹ These functions made ICANN both the judge and jury regarding the delegation of gTLDs.

This transition also marks the beginning of an era in which ICANN behaves like a regulatory agency and creates the potential for abuse by ICANN and its Board. Potential abuses would be difficult to prevent because ICANN has removed itself from U.S. courts by requiring disputes to be handled through arbitration.¹⁴² In addition, with respect to trademark owners, trademark law would be an ineffective deterrent because of the USPTO's position that gTLDs are generic and inherently incapable of denoting source.¹⁴³

Antitrust law, under Section 1 of the Sherman Act or the essential facilities doctrine, could effectively regulate ICANN's power without undermining ICANN's authority to regulate the DNS. First, ICANN is not immune from antitrust liability because its actions play an important role in Internet commerce.¹⁴⁴ ICANN is also not immune from liability because of its agreement with the NTIA. Instead, a reviewing court must determine whether the actions at issue were necessary to meet the needs of that agreement.¹⁴⁵ Second, a review of relevant case law shows that a court could find that agreements involving the delegation of gTLDs could constitute an illegal restraint of trade under Section 1 of the Sherman Act.¹⁴⁶ Finally, although it has not been attempted, this paper theorized that ICANN could also be found liable under the essential facilities doctrine provided that a plaintiff could prove the factors laid out in *MCI v. AT&T*.¹⁴⁷

In addition, though a court can stop the delegation of a gTLD, it cannot force ICANN to award the gTLD to the complaining party. This means that an antitrust claim would only prevent stakeholders from abusing ICANN's authority, not usurping it. Thus, ensuring that a U.S. court does not simply replace the NTIA in its oversight capacity. Furthermore, it would not open ICANN to unnecessary lawsuits from corporate stakeholders seeking to unnecessarily challenge ICANN's authority at every turn.

Overall, the Internet is entering a new era of DNS regulation. This era

141. See ICANN Contract, *supra* note 4.

142. See *UDRP*, *supra* note 46.

143. See *Image Online Design v. Internet Corp. for Assigned Names & Nos.*, No. CV 12-08968 DDP, 2013 U.S. Dist. LEXIS 16896, *1, *23–26. (C.D. Cal. 2013).

144. See *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, *13–14 (C.D. Cal. 2012).

145. See *generally* *Silver v. N.Y. Stock Exchange*, 373 U.S. 341 (1963).

146. See *generally* *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 507 (9th Cir. 2010); *Manwin Licensing*, CV 11-9514 PSG, 2012 U.S. Dist. LEXIS 125126, at *29–32.

147. See *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983) (listing the factors).

was entered suddenly and haphazardly, but that does not mean that it will yield negative results. There are upsides to having DNS management out of the hands of the United States government, although they are not discussed here. It would be foolish to allow this transfer to occur without examining possible regulatory alternatives in the absence of a body capable of overseeing ICANN's use of its authority. Thus, this paper concludes that one form of regulation would be through antitrust law to ensure that the DNS continues to be a place of open communication, commercialization, and innovation into the future.

Figure 2.1: User to Root Query

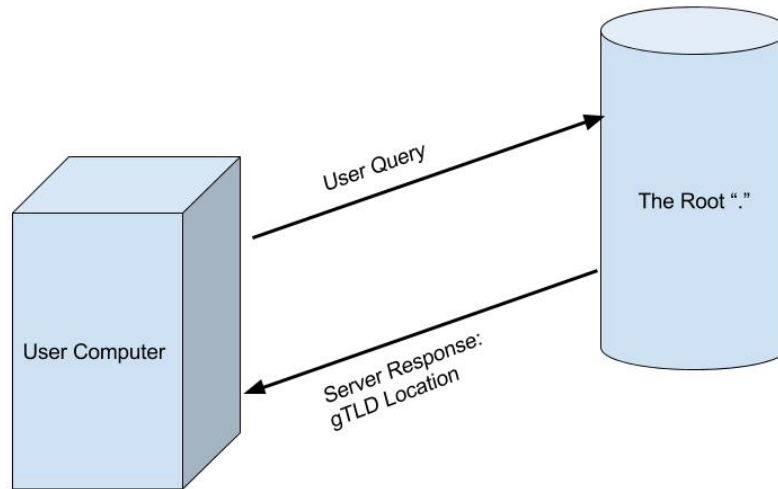


Figure 2.2: User to gTLD Query

