ICANN'S ESCAPE FROM ANTITRUST LIABILITY

The power to control the architecture of the Internet is the power to control communication, commerce, and vast quantities of personal data. That power is wielded primarily by an American non-profit organization called the Internet Corporation for Assigned Names and Numbers (ICANN). Although one of ICANN's professed purposes is to promote competition in the markets for domain names and domain name services,[1] it has failed to do so effectively.[2] On the contrary, many of ICANN's actions have harmed competition.[3]

This Note will examine ICANN's conduct through the lens of American antitrust law and evaluate why ICANN has largely escaped antitrust liability. Part I describes the technical background of the Domain Name System (DNS), the role that ICANN plays in the administration and governance of the DNS, and the basic principles of antitrust law that regulate the domain name marketplace. Part II details the antitrust allegations against ICANN and explains how ICANN's actions may be anticompetitive. ICANN has used its unilateral control over the DNS to restrict competitive bidding, influence prices, and maintain entry barriers in the domain name marketplace. Part III explains why ICANN's conduct has received little antitrust scrutiny. ICANN's unusual and complex decision-making process and its close relationship with the United States government each contribute to the reluctance of courts and antitrust enforcement authorities to examine ICANN's conduct. Unless ICANN receives closer attention, all participants in the domain name marketplace, from businesses to consumers, will continue to pay higher prices, and innovation will continue to be stifled.

I. DOMAIN NAMES AND THE LAW OF COMPETITION

The Domain Name System, or DNS, is the organizational backbone of the Internet. Without the shorthand of domain names, Internet users would be largely unable to communicate, transact, or share information.[4] This

1. *See* INTERNET CORP. FOR ASSIGNED NAMES AND NOS., ARTICLES OF INCORPORATION art. 4 (1998), *available at* http://icann.org/en/general/articles.htm [hereinafter ARTICLES OF INCORPORATION] ("The Corporation shall operate . . . through open and transparent processes that enable competition and open entry in Internet-related markets.").

2. *See infra* Part II.B.

3. *See infra* Part II.A.

4. *See* Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. ILL. L. REV. 1, 2 (2003) ("The Internet domain name system (DNS) is an addressing system that greatly facilitates

Part describes the DNS and relevant antitrust law. Section A describes the technology underlying the DNS and the domain name hierarchy. Section B describes ICANN and the role it plays in the administration of the DNS. Section C briefly summarizes American antitrust law.

A. The Domain Name System

The DNS allows users to easily navigate the Internet.[5] The Internet is a series of interconnected computers that exchange data using uniform communications protocols.[6] The standardized protocols guarantee that each computer connected to the Internet can communicate easily with all the others.[7] To facilitate this communication, each connected computer is assigned a unique number called an Internet Protocol (IP) address that identifies the computer's virtual location.[8] All connected computers have these addresses, from a terminal in a public library to smart phones to the servers of Google and Microsoft.[9]

IP addresses are randomly assigned, unwieldy, and difficult to remember.[10] The DNS solves these problems by replacing the numbers with a series of alphanumeric characters that typically use common words, names, or phrases to refer to the particular computer the user intends to access.[11] Thus, www.google.com stands in for an otherwise obscure

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Internet communication.").

5. *See* Lily Blue, Note, *Internet and Domain Name Governance: Antitrust Litigation and ICANN*, 19 BERKELEY TECH. L.J. 387, 387 (2004) (observing that domain names aid online communication because they make addresses easy to remember). Many commentators have recently argued that the importance of the DNS is declining. Now that a large percentage of web browsing begins with a search rather than a URL, the prominence of domain names will undoubtedly become less important. However, until the time comes when human-friendly email addresses and easily memorable domain names are no longer sought after by individuals and firms, the DNS's "hegemony of convenience" will continue. *See* A. Michael Froomkin, *Almost Free: An Analysis of ICANN's 'Affirmation of Commitments,'* 9 J. ON TELECOMM. & HIGH TECH. L. 187, 224 (2011).

6. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849–50 (1997) ("The Internet is an international network of interconnected computers.").

7. *See Glossary*, ICANN.ORG, http://www.icann.org/en/general/glossary.htm (last visited Mar. 15, 2012) (defining Internet Protocol as "the communications protocol underlying the Internet . . . [that] allows large, geographically diverse networks of computers to communicate with each other quickly and economically over a variety of physical links").

8. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET: ILLUSIONS OF A BORDERLESS WORLD 31 (2006); *see also FAQs*, ICANN.ORG, http://www.icann.org/en/faq (last visited Mar. 15, 2012) ("Every computer on the Internet has a unique address—just like a telephone number—which is a rather complicated string of numbers.").

9. *See FAQs*, *supra* note 8.

10. *See* Blue, *supra* note 5, at 388 (describing IP addresses as "nearly impossible to remember").

11. *See* GOLDSMITH & WU, *supra* note 8, at 31 (characterizing domain names as "shorthands for the numbers"); *see also* 15 U.S.C. § 1127 (2006) (defining domain names as "any alphanumeric designation . . . as part of an electronic address on the Internet").

number.[12] When an Internet user types a domain name into a web browser, a computer called a root server[13] matches the domain name with its corresponding IP address and directs the user's computer to the target.[14]

Domain names are organized in a hierarchical structure.[15] The familiar endings of domain names (the ".com" in www.google.com, for example) are called Top-Level Domains (TLDs).[16] These TLDs are further divided into second-level domains (the "google" in www.google.com).[17] Internet users and businesses can register and obtain a second-level domain name within a TLD, but only ICANN is able to create new TLDs.[18] ICANN's control over whether and how to add new TLDs derives from its authority to administer the root servers, the computers that match domain names to IP addresses.[19] Because the root servers contain the information that allows Internet users to get where they want to go online,[20] control of those servers grants ICANN nearly plenary power over the DNS.[21]

Only seven TLDs existed prior to the formation of ICANN in 1998.[22] Despite millions of second-level domains being registered in the past

12. On March 15, 2012, the IP address for www.google.com was 72.14.204.103, but the number changes frequently. *Google.com Who.is Lookup*, WHO.IS, http://www.who.is/whois/google.com/ (last visited Mar. 15, 2012). If typed into a web browser, this number would act identically to the alphanumeric code, but it is much more difficult to remember.

13. Root servers contain the information that matches IP addresses with domain names. *See* GOLDSMITH & WU, *supra* note 8, at 29 (describing the root server as "the master computer for the whole Internet"); *Glossary*, *supra* note 7.

14. *See* Blue, *supra* note 5, at 388.

15. *See id.*; *see also Top-Level Domains (gTLDs)*, ICANN.ORG, http://www.icann.org/en/tlds (last visited Mar. 15, 2012) ("The DNS forms a tree-like hierarchy.").

16. *Glossary*, *supra* note 7. There are two categories of TLDs: generic TLDs and country-code TLDs. Generic TLDs are few in number and, for the most part, consist of the most well-known TLDs such as .com, .org, and .edu. Country-code TLDs are much more numerous and are typically controlled by the nation to which they correspond; for example, the United Kingdom controls .uk, Germany controls .de, and so on. *See* Blue, *supra* note 5, at 389–90.

17. *See* Blue, *supra* note 5, at 388–89; *Top-Level Domains (gTLDs)*, *supra* note 15.

18. *See* Froomkin & Lemley, *supra* note 4, at 8 ("Whoever controls the root [ICANN] controls which, and how many, TLDs will be accessible to the vast majority of Internet users.").

19. *See* Memorandum of Understanding Between the U.S. Dept. of Commerce and Internet Corp. for Assigned Names and Numbers § III.B (Nov. 25, 1998), *available at* http://www.ntia.doc.gov/other-publication/1998/memorandum-understanding-between-us-department-commerce-and-internet-corporat. The original Memorandum of Understanding that established the relationship between ICANN and the federal government set out the purposes of ICANN. Its policy-development role is intimately bound up with its role as technical administrator of the DNS. *Id.*; *see also infra* Part III.B.2.

20. *See supra* note 13 and accompanying text.

21. *See* MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 47–48 (2002) (observing that the DNS root provides "a single, and therefore globally consistent, starting point for the resolution of domain names" and therefore that whoever controls the contents of the root zone file controls the network's uniformity).

22. The original TLDs were .com, .edu, .gov, .int, .mil, .net, and .org. *See Top-Level Domains (gTLDs)*, *supra* note 15.

decade and considerable consumer demand for additional name space, ICANN has added only thirteen new TLDs.[23] Finally, in 2008, ICANN decided to create a program for regularly adding new TLDs to the DNS.[24] The new program has only recently been implemented, with applications for new TLDs accepted between January and April 2012.[25]

B. ICANN and Its Registries

The Internet is older than it seems. The earliest research into the technology that would become the Internet was funded by the U.S. Department of Defense in the 1960s.[26] As networks became more complex and personal computers became more numerous, the administration of the Internet expanded beyond the Defense Department.[27] In 1990, the National Science Foundation took control of the Internet[28] and quickly awarded the first private contract for control of the DNS to a for-profit company called Network Solutions, Inc.[29] Conflicts arose continuously between Network Solutions and the technical managers of the DNS—the scientists and engineers who had developed and guided the technology for decades.[30] In

23. In 2000–2001, .aero, .biz, .coop, .info, .museum, .name, and .pro were added. In 2003, .asia, .cat, .jobs, .mobi, .tel, and .travel were added. *See Top-Level Domains (gTLDs)*, *supra* note 15; *see also* Froomkin & Lemley, *supra* note 4, at 23 (observing the "logjam" that prevented new TLDs from joining the DNS); *infra* note 131 and accompanying text.

24. ICANN formally approved the New gTLD Program in June 2008. *See New Generic Top-Level Domains Fact Sheet*, ICANN.ORG (July 2011), http://archive.icann.org/en/topics/new-gtlds/gtld-facts-31jul11-en.pdf.

25. *See id.* at 1. The rollout of new TLDs has been fraught with delay. The final version of the New gTLD Applicant Guidebook was finally published in September 2011, but applications themselves were not accepted until January 12, 2012. *Id.* As of March 19, 2012, 329 applicants had registered to apply for new TLDs. *See Program Statistics*, ICANN.ORG, http://newgtlds.icann.org/en/program-status/statistics (last visited Mar. 23, 2012); *see also infra* notes 134–37 and accompanying text.

26. *See* Christopher M. Bruner, *States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization*, 30 MICH. J. INT'L L. 125, 149 (2008) ("Today's Internet traces its origins to 1960s-era 'packet switching' research funded by the U.S. Department of Defense (DOD).").

27. Interest in the Internet grew among non-defense government agencies as well as in the commercial sector. *See* Barry M. Leiner et al., *A Brief History of the Internet*, INTERNET SOCIETY, http://www.isoc.org/internet/history/brief.shtml (last visited Mar. 15, 2012) (recounting the development of the Internet); *see also* Bruner, *supra* note 26, at 153.

28. *See* Bruner, *supra* note 26, at 153.

29. *Id.* at 153–54; *see also* Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 55 (2000) [hereinafter Froomkin, *Wrong Turn*].

30. As the exclusive manager of the DNS, Network Solutions, Inc. (NSI) made hundreds of millions of dollars registering domain names during the 1990s. The engineers resented NSI's attempts to exercise greater control over the DNS, and viewed the firm as "greedy, controlling, and monopolistic." GOLDSMITH & WU, *supra* note 8, at 35–36.

1998, the U.S. government finally decided to consolidate the administration of the DNS in a single organization.[31]

The Clinton administration issued a statement of policy in June 1998, which solicited a private American non-profit corporation to take over management of the DNS.[32] This policy statement became known as the DNS White Paper.[33] Shortly thereafter, a group of scientists led by Dr. Jon Postel,[34] one of the most well-known and respected Internet pioneers, created ICANN as a California non-profit organization.[35] The United States quickly recognized ICANN as the organization that it had envisioned in the White Paper.[36] The U.S. Department of Commerce (DOC) contracted with ICANN to manage the technical aspects of the DNS,[37] and entrusted it with policy control over the future of the DNS pursuant to a Memorandum of Understanding.[38] DOC formally relinquished control over DNS policy when the Memorandum expired in September 2009, but the U.S. government retains significant control over the DNS.[39]

ICANN performs the central function of DNS management—registering and assigning domain names—by contracting with third parties.[40] Each of the Internet's Top-Level Domains (TLDs) is administered by a single entity called a registry operator.[41] Under contract with ICANN, these registries operate the authoritative domain name

31. *See infra* notes 32–33 and accompanying text.

32. A task force led by Senior Presidential Advisor Ira Magaziner directed the National Telecommunications and Information Administration at the Department of Commerce to "privatize" the DNS. *See* GOLDSMITH & WU, *supra* note 8, at 168 (opining that although the U.S. government had the authority to control the DNS, "it appeared uninterested in actually administering Internet naming and numbering"); Bruner, *supra* note 26, at 154.

33. Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998).

34. Dr. Postel single-handedly coordinated the DNS for much of its existence. He was a researcher at the Stanford Research Institute and then the University of Southern California, where he administered the DNS pursuant to U.S. government contracts. *See* GOLDSMITH & WU, *supra* note 8, at 29, 33–35 (discussing Postel's unique role in early Internet governance and referring to him as "the God of the Internet").

35. *See* Bruner, *supra* note 26, at 154.

36. *See* Froomkin & Lemley, *supra* note 4, at 10. The White Paper did not directly create a private corporation, which would have violated the Government Corporation Control Act, but instead invited private individuals to form one. *See* Froomkin, *Wrong Turn*, *supra* note 29, at 71.

37. *See infra* Part III.B.2.

38. *See* Memorandum of Understanding, *supra* note 19; *see also* Froomkin & Lemley, *supra* note 4, at 13–14 (summarizing the original Memorandum of Understanding).

39. *See infra* Part III.B.

40. *See* Blue, *supra* note 5, at 389 (noting that ICANN "oversees and governs the registries").

41. *See Glossary*, *supra* note 7 (defining "Registry").

database for their TLD.[42] For example, the lucrative .com TLD is administered by the private company VeriSign, Inc.[43] All domain names ending in .com must be registered with VeriSign.[44] These registry operators, in turn, contract with hundreds of organizations called registrars, which market and sell domain names to consumers.[45] While each TLD has only one registry operator, it may have hundreds of registrars.[46] Through its contracts with the registry operators, ICANN is able to set the terms for the registration and exchange of domain names and thereby exercise significant control over the domain-name marketplace.[47]

C. Antitrust Law

The U.S. Congress enacted the Sherman Act in 1890 to promote consumer welfare and efficiency,[48] counter the threat of antidemocratic political pressures from dominant corporations,[49] and protect small, independent businesses.[50] Section 1 of the Act makes illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."[51] Section 1's prohibition extends to horizontal agreements (those among competitors at the same level of the supply chain) and

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42. *Id.*; *see also* Froomkin & Lemley, *supra* note 4, at 7 (describing the registry database as "the authoritative source of information for that TLD").

43. *.com Registry Agreement*, ICANN.ORG (Sept. 22, 2010), http://www.icann.org/en/tlds/agreements/verisign/registry-agmt-com-22sep10.htm.

44. *See id*. § 3.1(d)(iii) (including among the Registry Services that VeriSign agreed to provide the maintenance of domain name registration data for .com and the dissemination of information "concerning domain name server registrations").

45. *See* Blue, *supra* note 5, at 389. Because registrars market directly to consumers, they are more well-known to the general public. They include companies such as GoDaddy.com and countless others. *See ICANN-Accredited Registrars*, ICANN.ORG, http://www.icann.org/registrar-reports/accredited-list.html (last visited Mar. 23, 2012).

46. *See ICANN-Accredited Registrars*, *supra* note 45.

47. *See, e.g.*, *.com Registry Agreement*, *supra* note 43, § 7.3(d) (prescribing the maximum price VeriSign may charge its registrars for each domain name registration); *see also* Froomkin, *supra* note 5, at 212 (arguing that because of its unique position, ICANN has the power to impose contract terms on registrars, determine business models, and alter the structure of the domain name market).

48. *See* ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 17 (Rev'd ed. 1993) (describing the primary goal of antitrust law as "the advancement of consumer welfare").

49. Some scholars argue that the enactment of the Sherman Act had little to do with economic efficiency and everything to do with the "fear that excessive concentration of economic power will breed antidemocratic political pressures." Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979); *see also* United States v. Aluminum Co. of America, 148 F.2d 416, 428–29 (2d Cir. 1945).

50. *See Alcoa*, 148 F.2d at 427 ("It is possible . . . to prefer a system of small producers, each dependent for his success upon his own skill and character . . . .").

51. 15 U.S.C. § 1 (2006).

vertical agreements (those between manufacturers and distributors).[52] Most agreements are analyzed under the "Rule of Reason," a level of scrutiny by which a court weighs an agreement's procompetitive benefits against its anticompetitive harms.[53] Only "naked" restraints such as price fixing are considered illegal per se and receive no benefit of the doubt, regardless of their effect on competition.[54]

While Section 1 targets agreements among multiple firms, Section 2 of the Sherman Act aims at the anticompetitive conduct of single firms in a given market.[55] "Every person who shall monopolize, or attempt to monopolize" a relevant market is guilty of violating the Act.[56] A violation of Section 2 has two elements: "(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."[57] This two-part test is meant to distinguish between monopolies that have acquired their market power through anticompetitive conduct and monopolies that have achieved success through vigorous competition.[58]

Because the Sherman Act is meant to encourage vigorous competition, courts are wary to punish monopolies unless their conduct has damaged competition.[59] The essential antitrust inquiry, therefore, is whether a firm has engaged in activity that has harmed competition in a relevant market.[60] Part II uses this antitrust analysis to determine whether ICANN's conduct has damaged competition in the domain name market.

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52. *See* Froomkin & Lemley, *supra* note 4, at 43–44.

53. *See, e.g.*, Standard Oil v. United States, 221 U.S. 1, 60 (1911) (identifying the "standard of reason"); *see also* Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

54. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se.").

55. *See* Froomkin & Lemley, *supra* note 4, at 42 ("Antitrust law treats unilateral conduct under the law of monopolization. The governing statute is § 2 of the Sherman Act . . . .").

56. 15 U.S.C. § 2 (2006).

57. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

58. *See* United States v. Alumnium Co. of America, 148 F.2d 416, 430 (distinguishing firms that acquired a monopoly through "superior skill, foresight and industry" from those that wrongfully obtained monopoly power).

59. *See* Froomkin & Lemley, *supra* note 4, at 43 (discussing the distinction between "natural" monopolies and harmful, anticompetitive monopolies).

60. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 50–51 (D.C. Cir. 2001) (defining the antitrust abuse of monopolization under § 2 of the Sherman Act).

II. ICANN'S ANTICOMPETITIVE CONDUCT

As the technical manager of the DNS, ICANN has a great deal of control over the domain name marketplace.[61] Some of ICANN's conduct, particularly as it relates to its contracts with registry operators, has harmed competition in the domain name market. Part II discusses three examples of ICANN's anticompetitive behavior. Section A describes ICANN's elimination of competitive bidding for registry contracts. Section B discusses ICANN's control over domain name prices in the .com, .net, and .org TLDs. Section C addresses ICANN's constrained rollout of new TLDs and the impact of the New gTLD Program.

A. Competitive Bidding

"Price is the 'central nervous system of the economy.'"[62] Agreements that interfere with the natural ebb and flow of prices are presumptively illegal.[63] Competitive bidding is an important method for ensuring that price is controlled by the market.[64] The Sherman Act does not affirmatively require competitive bidding,[65] but an unfair restriction on competitive bidding may restrain trade within the meaning of the Act.[66] ICANN has imposed unfair restrictions on competitive bidding and has therefore violated the Sherman Act.

Restrictions on competitive bidding are evaluated under the Rule of Reason because they do not restrain competition in the same way as a naked restraint like price fixing.[67] The Supreme Court applied the Rule of

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61. *See* Froomkin, *supra* note 5, at 212 ("ICANN has used its power to limit the number of new TLDs, pick winners (or, some would claim, play favorites), and determine business models and domain name market structure (in both pro- and anti-competitive fashions).").

62. Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940)).

63. *See Socony-Vacuum*, 310 U.S. at 223 (finding that market manipulation "distorts" prices and prevents "the determination of those prices by free competition alone").

64. Although the antitrust laws do "not require competitive bidding," *Professional Engineers*, 435 U.S. at 694, "concerted action between co-conspirators to eliminate competitive bidding for a contract is an actionable harm to competition." Coalition for ICANN Transparency v. VeriSign, Inc., 611 F.3d 495, 502 (9th Cir. 2010) (citing Harkins Amusement Enters., Inc. v. Gen. Cinema Corp., 850 F.2d 477, 487 (9th Cir. 1988)).

65. *Professional Engineers*, 435 U.S. at 694.

66. *See id.* at 695 ("Petitioner's ban on competitive bidding . . . must be justified under the Rule of Reason. . . ."); *see also* Cont'l Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater New York, 994 F. Supp. 133, 139 (E.D.N.Y. 1998) (finding that once competitive bidding is in place, its subversion by the parties is evidence of a conspiracy to violate the Sherman Act); *Harkins*, 850 F.2d at 487 ("Concerted action to eliminate competitive bidding violates the Sherman Act.").

67. *See Professional Engineers*, 435 U.S. at 693–96 (applying a Rule of Reason analysis to a ban on competitive bidding).

Reason to a ban on competitive bidding in *National Society of Professional Engineers v. United States*.[68] A non-profit association of engineers banned competitive bidding for its members' projects.[69] The Court held that the practice restrained trade within the meaning of Section 1 of the Sherman Act, but as part of the Rule of Reason analysis explored the association's justifications for its ban.[70] The association contended that ensuring high prices guaranteed the quality of its members' work.[71] The Court rejected the association's argument because it necessarily assumed that competition itself is unreasonable—a conclusion inconsistent with the purposes of the Sherman Act.[72]

ICANN has eliminated competitive bidding for DNS registry contracts. VeriSign, Inc., the registry operator of the lucrative .com and .net TLDs,[73] was the beneficiary of a no-bid contract for operation of the .com TLD in 2006.[74] VeriSign is alleged to have publicly attacked ICANN in the media and through litigation to force ICANN to award it the .com contract without a competitive bidding process.[75] Beyond the no-bid contract awarded to VeriSign for .com, ICANN has contracts with each of its registry operators that all but guarantee a no-bid automatic renewal when their terms expire.[76] The contracts nominally provide for a competitive renewal process if the registry operator breaches certain terms,[77] but this provision has been called "illusory."[78] By eliminating competitive bidding

68. *Id.*

69. The association instituted a rule by which engineers who would have competed with each other under normal market conditions refused "to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer." *Id.* at 692.

70. *See id.* at 693–96.

71. *Id.* at 693–94.

72. *See id.* at 696 ("[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

73. As of March 2012, the .com and .net TLDs were by far the two largest. Together they contain over 115 million registered domain names, while the next most populous TLD, .org, contains just under 10 million. *Domain Counts & Internet Statistics*, WHOIS SOURCE, http://www.whois.sc/internet-statistics/ (last visited Mar. 23, 2011).

74. *See* Coalition for ICANN Transparency v. VeriSign, Inc., 611 F.3d 495, 500 (9th Cir. 2010) (finding that the contract between ICANN and VeriSign for .com was renewed in 2006 without competitive bidding).

75. VeriSign is alleged to have hired lobbyists to support its bid for automatic renewal, filled ICANN's meetings with its supporters, paid reporters and bloggers to support its position, planted news stories critical of ICANN, and brought suit against ICANN in state and federal courts. *See id.* at 505.

76. Each of ICANN's registry operation contracts contains a similar automatic renewal clause: the agreement "shall be renewed" upon the expiration of its term unless an arbitrator or court has determined that the registry operator has materially breached its obligations under the contract and the registry operator has failed to cure the breach. *See, e.g.*, *.com Registry Agreement*, *supra* note 43, § 4.2.

77. *Id.*

78. *See CFIT*, 611 F.3d at 502.

for the .com contract and competitive re-bidding for all other registry contracts, ICANN has arguably impeded "the ordinary give and take of the market place."[79]

Under a Rule of Reason analysis, a court would investigate any justifications for ICANN's elimination of competitive bidding.[80] Like the association in *Professional Engineers*, ICANN would likely argue that a restrictive bidding process stabilizes prices and ensures that the backbone of the DNS is managed by competent, experienced, and technically skilled organizations. This argument is not without merit, because the potential consequences of poor DNS management could cripple the Internet itself.[81] However, a competitive bidding process would still provide ICANN the opportunity to adequately vet and accredit potential registry operators to ensure the continued vitality of the DNS.[82] As the *Professional Engineers* Court held, "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."[83] ICANN, therefore, has likely violated the Sherman Act by eliminating competitive bidding.

B. Resale Price Maintenance

The Supreme Court has had difficulty applying the Sherman Act to pricing agreements between firms at different levels of the supply chain, overruling itself twice in the last fifteen years.[84] This type of agreement, known as Resale Price Maintenance (RPM),[85] has the potential to be as

79. United States v. Nat'l Soc. of Prof'l Eng'rs, 404 F. Supp. 457, 460 (D.D.C. 1975).

80. *See Professional Engineers*, 435 U.S. at 693–96 (applying a Rule of Reason analysis to a ban on competitive bidding).

81. An organization technically incapable of operating a root zone file could, *inter alia*, cause the connections between IP addresses and their corresponding domain names to be corrupted. As a result, Internet users would lose the ability to consistently connect with the websites they intend to visit, and third parties could intercept unwitting consumers. *See* Froomkin & Lemley, *supra* note 4, at 61 (discussing "cache poisoning").

82. VeriSign itself was chosen to manage the .net TLD through a competitive bidding process, which demonstrates that such a process would lead to the selection of a technically competent organization. *See CFIT*, 611 F.3d at 500 (noting that VeriSign's 2005 .net agreement was the result of competitive bidding).

83. *Professional Engineers*, 435 U.S. at 696.

84. Until recently, vertical agreements setting minimum prices were considered per se unlawful. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (finding that vertical minimum pricing agreements are analogous to horizontal pricing agreements). *Dr. Miles* and its progeny were much criticized by economists and lower courts, but were not overruled until 2007. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881 (2007). The Court also overruled itself with respect to agreements setting maximum resale prices in *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (overruling Albrecht v. Herald Co., 390 U.S. 145 (1968)).

85. *See* Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1487 (1983) (defining resale price maintenance as

procompetitive as it is anticompetitive, and so is judged under the Rule of Reason.[86] This was not always the case, however, and for a long period of time the Court considered RPM per se unlawful.[87] The Supreme Court announced a per se rule for agreements setting maximum resale prices in *Albrecht v. Herald Co.*[88] A newspaper publisher in *Albrecht* was prohibited from setting the maximum price at which its distributors could sell its newspapers to consumers.[89] The Court failed to recognize that consumers were likely to benefit from the newspaper publisher limiting the ability of its distributors to charge monopoly prices in their exclusive territories.[90] The *Albrecht* decision was roundly criticized,[91] and it was finally overruled in 1997.[92] In *State Oil Co. v. Khan*, the Court held that the Rule of Reason should be used to determine whether maximum RPM violates the Sherman Act.[93]

Like all conduct analyzed under the Rule of Reason, maximum resale price maintenance is unlawful when its anticompetitive effects outweigh its procompetitive benefits.[94] The *Khan* court identified some of the circumstances in which maximum RPM is actually beneficial to consumers, as when a manufacturer attempts to prevent a monopolistic dealer from setting prices above competitive levels.[95] In most markets, manufacturers have an incentive to discourage supracompetitive pricing by their distributors because it would decrease demand for their products.[96]

"vertical agreements between manufacturers, and dealers or distributors lower in the distribution chain, establishing the price at which the manufacturer's product may be sold").

86. *See Leegin*, 551 U.S. at 907.

87. *See Dr. Miles*, 220 U.S. at 408 ("[A]greements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.").

88. Albrecht v. Herald Co., 390 U.S. 145, 151–53 (1968).

89. *See id.* at 147–48.

90. *See Leegin*, 551 U.S. at 902 (finding that the *Dr. Miles* rule "hinders competition and consumer welfare"); *see also* Robert L. Steiner, *How Manufacturers Deal With the Price-Cutting Retailer: When are Vertical Restraints Efficient?*, 65 ANTITRUST 407, 446–47 (arguing that RPM enhances consumer welfare).

91. *See, e.g.*, Frank Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 889 (1981) (referring to the "shallowness of the reasoning in *Albrecht*").

92. *See* State Oil Co. v. Khan, 522 U.S. 3, 7 (1997) (overruling *Albrecht*).

93. *Id.* at 22.

94. *See State Oil*, 522 U.S. at 22; *see also* Easterbrook, *supra* note 91, at 900–04 (observing that a maximum fixed price could "simply be a euphemism for a cartel price").

95. The manufacturer's economic interests are best served by preventing a monopolist-dealer from charging monopoly prices because high prices would reduce demand and overall sales. *See* Khan v. State Oil Co., 93 F.3d 1358, 1362 ("A supplier might, however, fix a maximum resale price in order to prevent his dealers from exploiting a monopoly position"); *see also Albrecht*, 390 U.S. at 168 (Stewart, J., dissenting) (asserting that a maximum price fixing arrangement might protect consumers from monopolist-dealers).

96. *See Albrecht*, 390 U.S. at 159 (Harlan, J., dissenting) (arguing that price ceilings "prevent

For example, in the case of newspapers, decreased demand would drive down circulation and thereby decrease newspaper publishers' advertising revenue.[97]

However, the domain name market is different from the newspaper market. Maximum RPM does not have the same beneficial effect because demand is relatively inelastic; that is, consumer demand for domain names is largely unaffected by changes in price.[98] Under normal market conditions, the power of a seller to set prices "is determined by its buyers' responsiveness to changes in price."[99] In contrast, sellers have little incentive to offer low prices in a market where demand is inelastic. ICANN has no incentive to discourage or prevent individual registry operators like VeriSign from charging supracompetitive prices because consumers have nowhere else to turn.[100] With no viable alternatives to the ICANN-controlled DNS,[101] consumers will not alter their behavior in response to price fluctuations as they would in a typical market.

Buyers' responsiveness is a function of two factors: "buyers' preferences and the availability of suitable substitutes."[102] In the domain name market, both of these factors work to decrease buyers' responsiveness to changes in price. Because ICANN has added few new TLDs to the DNS, buyers' preferences have changed very little.[103]

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retailers or wholesalers from reaping monopoly or supracompetitive profits"). "Supracompetitive" prices are prices that are higher than could be sustained in a competitive market. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 245 (1993) (describing supracompetitive prices as "characteristic of a textbook monopoly").

97. *See id.* at 169 n.2 (Stewart, J., dissenting).

98. *See infra* notes 102–05 and accompanying text. The most well-known principle of economics is the law of supply and demand. An important measure of consumer demand is "price elasticity of demand," defined as the "proportionate change in demand given a change in price." *See* Patrick L. Anderson et al., *Price Elasticity of Demand*, MACKINAC CENTER FOR PUBLIC POLICY (Nov. 13, 1997), http://www.mackinac.org/article.aspx?ID=1247. Goods for which demand is not responsive to price changes are referred to as "inelastic." *Id.* Typically, items that have few substitutes or those for which the purchase cannot be delayed, such as staple goods or food, are inelastic goods. *Id.*

99. David Scheffman, *Statistical Measures of Market Power: Uses and Abuses*, 60 ANTITRUST 901, 902 (1992).

100. Because ICANN controls the DNS root, it is the only "manufacturer" of domain names for purposes of an antitrust analysis. *See* Froomkin & Lemley, *supra* note 4, at 51 ("ICANN controls access to the system by which the overwhelming majority of registrants obtain domain names.").

101. Alternatives to the ICANN-controlled DNS were created in the late 1990s. These so-called "alternate roots" at one time had high hopes of challenging the dominance of the legacy root. But the existence of multiple roots would cause serious confusion, with no authoritative source for the resolution of domain name queries. Primarily because of the impracticality of such a model, the alternate roots never truly rivaled the legacy root. *See* Froomkin & Lemley, *supra* note 4, at 21–22.

102. Scheffman, *supra* note 99, at 902.

103. Between 2006 and 2007, for example, demand for registrations in .com, .net, and .org grew at roughly identical rates, notwithstanding the difference in price. *See 2007 Secondary Domain Market Study*, SEDO.COM, 6 (2007), http://www.sedo.com/press/domainmarketstudy2007.pdf (finding that

Moreover, suitable substitutes for most domain names do not exist. Domain names within the .com, .net, and .org TLDs, for example, have such unique profiles that demand for them has remained constant, notwithstanding wide price differences between TLDs.[104] ICANN and the registry operators of lucrative TLDs would see little decline in demand for domain names as a result of supracompetitive pricing,[105] but consumers would suffer by paying higher prices than they otherwise would.

As part of their renegotiated contract for operation of the .com TLD in 2006, ICANN and VeriSign agreed to set the maximum price VeriSign could charge its registrars at $6.00 per domain name, with a 7 percent annual increase.[106] The plaintiffs in an antitrust action against both ICANN and VeriSign offered evidence that VeriSign's competitors would have charged as little as $3.00 per domain name and still provide the same level of service.[107] This skewed result was a product of the lack of competitive bidding for VeriSign's services and further undermines the legitimacy of that process.[108] The .com agreement's allegedly supracompetitive price displays, at best, ICANN's complicity with the registry operators' pricing arrangements and, at worst, its active participation in a scheme to set prices above competitive levels.

Both minimum resale price maintenance and maximum resale price maintenance are potentially harmful to competition, but minimum RPM tends to receive closer scrutiny because of the greater probability that it

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between 2006 and 2007, the number of domain names sold through Sedo increased by 53 percent in .com, 57 percent in .net, and 54 percent in .org).

104. *See id.* (noting that the average price for domain names in .com, .net, .org, and .biz rose 54 percent, 37 percent, 27 percent, and 27 percent respectively, even though the increase in total domain names sold for all four remained relatively constant, at about 55 percent).

105. In the inelastic domain name market, price does not affect demand as it would in a competitive market. Between 2006 and 2007, after VeriSign was awarded the contract for .com, the demand for domain names in .com actually increased—unaffected by the price. *See .com Registry Report Monthly Reports—July 2006–July 2007*, ICANN.ORG, http://www.icann.org/en/tlds/monthly-reports/index.html.

106. *See .com Registry Agreement*, *supra* note 43, § 7.3(d). ICANN has also set maximum prices for the .net and .org TLDs, but those agreements were the product of a competitive bidding process and so presumably represent competitive prices. *See* Coalition for ICANN Transparency v. VeriSign, Inc., 611 F.3d 495, 504–05 (9th Cir. 2010).

107. *CFIT*, 611 F.3d at 503. Although these numbers seem small in the abstract, they become quite substantial when the sheer number of registered domain names is considered. VeriSign alone manages (and receives yearly fees for) over 95 million domain names, earning it over $600 million in revenue in 2009. *VeriSign Annual Report–2009*, VERISIGN, 5 (Apr. 2010), http://files.shareholder.com/downloads/VRSN/1564565037x0x365048/ea1e2339-4582-4149-bf73-5391991cc3c1/Verisign Annual_Report.pdf.

108. *See supra* notes 73–79 and accompanying text.

simply stands in the place of an agreement fixing prices.[109] Maximum RPM, on the other hand, is more rarely harmful to competition because of its tendency to keep prices low—one of the key purposes of antitrust law.[110] However, an agreement that establishes maximum RPM is suspect when it serves only as a screen to disguise a uniform supracompetitive price.[111] For example, when a manufacturer and a distributor agree on a maximum resale price in a market with little price elasticity, the distributor can use that maximum to conceal its decision to prevent prices from fluctuating as they should.

Because ICANN has no incentive to discourage VeriSign's charging supracompetitive prices,[112] it agreed to a maximum resale price higher than would have been set by a competitive market. Although nominally a maximum price, the contract price instead operates as a single uniform price.[113] While in theory this keeps the price of domain name registrations from exceeding a certain amount, in practice it prevents them from falling as well. VeriSign is able to charge more than the market would have allowed otherwise, to the detriment of consumers.[114] A court applying the Rule of Reason may therefore conclude that ICANN's maximum resale price maintenance in the .com TLD violates the Sherman Act.

C. Essential Facilities Doctrine

Under certain narrowly circumscribed conditions, a firm can violate Section 2 of the Sherman Act if it refuses to deal with a competitor.[115]

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109. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007) (finding that vertical agreements setting minimum resale prices are unlawful per se to the extent that they are "entered upon to facilitate [a] cartel").

110. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) (finding that price cutting is "the very essence of competition" and is the kind of conduct "the antitrust laws are designed to protect").

111. *See* Arizona v. Maricopa Cnty. Medical Soc., 457 U.S. 332, 348 (1982).

112. *See supra* note 105 and accompanying text.

113. The concern that maximum RPM could disguise minimum RPM animated the *Albrecht* Court's establishing a per se rule for maximum RPM. *See* Albrecht v. Herald Co., 390 U.S. 145, 153 (1968). When dealers always or almost always set their prices at the maximum price maintained by a manufacturer, the price functions as a floor rather than a ceiling. The agreement allows dealers to charge more than they would have been able to charge without the agreement, because their pricing is disguised by the existence of an illusory "cap." *See Maricopa Cnty.*, 457 U.S. at 348 ("[Maximum RPM] may be a masquerade for an agreement to fix uniform prices . . . .").

114. *See* Coalition for ICANN Transparency v. VeriSign, Inc., 611 F.3d 495, 504 (9th Cir. 2010) ("Harm to consumers in the form of higher prices resulting from competitive restraints has long been held to constitute an actual injury to competition in the Section 1 context . . . .").

115. *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600–602 (1985) (discussing the qualified nature of the right to refuse to deal); *see also* Philip Areeda, *Essential*

Typically, a manufacturer is under no obligation to deal with potential rivals and can refuse with impunity.[116] However, the Supreme Court controversially carved out a narrow exception to this general principle in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*.[117] The *Aspen Skiing* Court held that a firm violated Section 2 when it abandoned a prior course of dealing with a competitor, refused to deal, and elected to forgo short-term profits in order to force its competitor out of business and reap the resulting monopoly profits.[118] In *Aspen Skiing*, the Court obliquely referenced the "essential facilities" doctrine,[119] an invention never formally recognized by the Supreme Court that extends antitrust liability to a firm that has absolute control over a resource and refuses to provide access to a competitor.[120] The essential facilities doctrine has never received acceptance by legal scholars because of its tendency to discourage competition,[121] and even those who favor its existence acknowledge that "it is properly applied only in rare cases."[122]

The Supreme Court called its *Aspen Skiing* holding into question in *Verizon Communications v. Law Offices of Curtis V. Trinko*, calling it "at or near the outer boundary of § 2 liability."[123] The Court held that a firm will be liable under Section 2 only if it abandons a prior course of dealing with a competitor for anticompetitive reasons,[124] or if it is itself a competitor in the downstream market for its products—giving it a monopolistic incentive to refuse to deal with downstream competitors.[125] Although it refused to either adopt or repudiate the essential facilities

Facilities: An Epithet In Need of Limiting Principles, 58 ANTITRUST L.J. 841, 852–53 (defining the essential facilities doctrine as "requiring the creator of an asset to share it with a rival").

116. This principle is referred to as the Colgate doctrine, after *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.").

117. *Aspen Skiing Co.*, 472 U.S. at 585.

118. *See id.* at 610–11.

119. The Court focused exclusively on the jury instruction given by the trial court and addressed the essential facilities doctrine only to announce it would not consider the issue. *See id.* at 611 n.44.

120. *See* MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983) (establishing the elements for an essential facilities claim).

121. *See, e.g.*, Areeda, *supra* note 115, at 852 ("There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional.").

122. Froomkin & Lemley, *supra* note 4, at 46.

123. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

124. *See id.* at 409.

125. *See* Froomkin & Lemley, *supra* note 4, at 45 (observing that Supreme Court cases involving essential facilities claims typically require that the defendant "participate[] in a competitive downstream market").

doctrine,[126] the Court joined many commentators in severely limiting the doctrine's applicability.[127]

At first glance, ICANN seems like a prime target for the essential facilities doctrine because it unilaterally controls the DNS and limits access to it.[128] ICANN has greatly restrained the introduction of new TLDs to the DNS, and consequently, it has limited the number of registry operators that can compete with each other for registry services.[129] When ICANN was founded in 1998, only seven generic TLDs existed.[130] Twice—in 2001 and 2003—ICANN introduced new TLDs, but the number remains quite small despite consumer demand for more TLD competition.[131] Although millions of second-level domain names have been registered since ICANN's formation, in 2008 the number of TLDs had grown to just twenty.[132] "The most striking feature of the ICANN regime," writes one prominent author, "is its perpetuation of scarcity at the top level of the name space."[133]

In 2008, after a years-long consultation process that traversed numerous revisions and iterations, ICANN formally decided to implement a new program for regularly introducing new TLDs.[134] The New gTLD

126. *Trinko*, 540 U.S. at 411.

127. *See* Areeda, *supra* note 115, at 853 (criticizing the essential facilities concept and asserting that "[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise").

128. *See* Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers 2 (Sept. 30, 2009), http://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf [hereinafter Affirmation of Commitments] (defining ICANN's primary commitment as coordinating "the Internet DNS at the overall level"); *see also* Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 HASTINGS COMM. & ENT. L.J. 359, 390 (2003).

129. *See* Froomkin & Lemley, *supra* note 4, at 23–24; *see also* Blue, *supra* note 5, at 397.

130. *See supra* note 22 and accompanying text.

131. *See supra* notes 22–23 and accompanying text. During the first round of new TLD introductions in 2000, forty-seven applicants paid a nonrefundable $50,000 fee to be considered for a new TLD, but only seven were selected to be added to the DNS. Froomkin & Lemley, *supra* note 4, at 48–49. Froomkin and Lemley humorously refer to these as the "not-so-magnificent seven" because they have extremely limited appeal. *Id.* at 24 n.112. The TLDs added to the root during these rounds included ".museum, .coop, and .aero which are likely to be of only minor interest." *Id.*

132. Of these twenty-one generic TLDs, only sixteen are operated by ICANN. These are .aero, .asia, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, .org, .pro, .tel, and .travel. *See Top-Level Domains (gTLDs)*, *supra* note 15. The remaining four TLDs—.edu, .gov, .int, and .mil—are legacy TLDs from before ICANN's formation and are operated by other entities, but ICANN retains control over the root zone files for all TLDs. *Id.* In 2010, ICANN finally approved the .xxx TLD, which will bring the total number to twenty-one when it becomes active. *See infra* note 214 and accompanying text.

133. MUELLER, *supra* note 21, at 255.

134. The primary policy development work on the New gTLD Program was done by one of ICANN's subcommittees, the Generic Names Supporting Organization, with the assistance of the Governmental Advisory Committee, the At-Large Advisory committee, and a host of other supporting

Program creates a mechanism for adding new TLDs to the DNS,[135] but significant barriers to entry remain. For example, applicants for new TLDs must pay a nonrefundable evaluation fee of $185,000, and there is no set timeline for evaluation and approval.[136] ICANN warns any potential applicants that they may encounter additional fees, that the process may take up to twenty months, and that each applicant's operating plans will be closely scrutinized.[137] Nevertheless, the New gTLD Program represents a substantial step toward increasing competition in the domain name market.

Because of the questionable contemporary relevance of the essential facilities doctrine and ICANN's recent steps to increase TLD competition, it is unlikely that ICANN would be subject to antitrust liability under such a theory. Despite ICANN's exclusive control over the DNS root, it does not meet the *Aspen Skiing* conditions for two reasons. First, it has no prior course of dealing with registry operators that it has now excluded for no legitimate reason.[138] Second, ICANN is not a registry operator itself and so has no economic incentive to exclude competitors from the downstream TLD market.[139] Moreover, the New gTLD Program represents ICANN's attempt to increase TLD competition.[140]

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committees and constituency groups. For a detailed history of the development process, *see GNSO Policy Work on New gTLDs*, ICANN.ORG, http://gnso.icann.org/issues/new-gtlds (last visited Mar. 15, 2012). The process has been plagued by delays for years. The final version of the New gTLD Applicant Guidebook was made available in September 2011, but applications themselves were not accepted until January 12, 2012. *See New Generic Top-Level Domains Fact Sheet*, *supra* note 24. These applications will be evaluated after April 12, 2012, with approvals coming "as little as 9 months" later. *New Generic Top-Level Domains—Frequently Asked Questions*, ICANN.ORG, http://newgtlds.icann.org/en/applicants/customer-service/faqs/faqs-en (last visited Mar. 23, 2012). However, applicants are warned that "the evaluation process could take up to 20 months to complete." *Id.*

135. The New gTLD Program prescribes a procedure for applicants to propose new TLDs, such as .nyc and .sport, and have them evaluated based on objective criteria. *See* Carolyn Duffy Marsan, *ICANN Nears Expansion of Domain Names*, PC WORLD (Nov. 3, 2010), http://www.pcworld.com/article/209620/icann_nears_expansion_of_domain_names.html (describing the New gTLD Program).

136. *See New Generic Top-Level Domains—Frequently Asked Questions*, *supra* note 134; *see also* Casey Johnston, *ICANN Set to Open Top-Level Domain Floodgates*, ARS TECHNICA (Nov. 3, 2010, 4:07 PM), http://arstechnica.com/web/ news/2010/11/icann-to-open-top-level-domain-floodgates.ars.

137. *See New Generic Top-Level Domains—Frequently Asked Questions*, *supra* note 134.

138. Because of ICANN's relatively short history, there are no spurned former registry operators in the mold of *Aspen Skiing*.

139. *See* Froomkin & Lemley, *supra* note 4, at 48 ("ICANN acts as neither a registrar nor a registry . . . ."). Because ICANN receives fees from each of its registry operators, it seems in its interest to create as many TLDs as possible in order to increase its revenue from the registry operators that manage those TLDs. *See id.* at 49. Indeed, under the New gTLD Program, ICANN collects a nonrefundable $185,000 evaluation fee for each new applicant. *See supra* note 136.

140. The purposes of the program are overtly aligned with the purposes of the Sherman Act: to "pav[e] the way for increased consumer choice by facilitating competition among registry service providers." *See New Generic Top-Level Domains—Frequently Asked Questions*, *supra* note 134.

The barriers to entry erected by the New gTLD Program would likely be considered valid justifications because of the need to enforce technical standards and preserve the security of the DNS.[141] While the $185,000 application fee and the lengthy and invasive evaluation process for new TLD applicants will deter some competitors from entering the marketplace, those restrictions are likely necessary to ensure that new TLD operators possess the financial solvency and technical expertise to successfully administer their TLD.[142] The reasonable nature of these conditions, coupled with the narrow scope of the essential facilities doctrine, will likely lead a court to conclude that ICANN has not violated Section 2 of the Sherman Act under an essential facilities theory. However, ICANN has damaged competition by eliminating competitive bidding for registry contracts,[143] and possibly by maintaining maximum resale prices in the .com TLD.[144] Despite these abuses, no court has ever seriously examined ICANN's anticompetitive activity. Part III explores the possible reasons for the reluctance of courts and antitrust enforcement authorities to investigate ICANN's conduct.

III. WHY ICANN HAS ESCAPED ANTITRUST SCRUTINY

ICANN is "an unusual organization."[145] Because of its unique character, ICANN has been ignored by American antitrust enforcement authorities[146] and remains largely resistant to antitrust scrutiny.[147] Antitrust enforcers and the courts have likely tolerated ICANN's competitive abuses because the organization has no obvious analogue.[148] Moreover, its

141. *See* Froomkin & Lemley, *supra* note 4, at 51 (predicting that courts would accept ICANN's technical expertise on matters of DNS stability and security, giving it the benefit of the doubt in order to avoid a potential DNS failure).

142. *Id.*; *see also gTLD Applicant Guidebook: Version 2011-09-19*, ICANN.ORG, 2–21 to –22 (Nov. 12, 2010), http://www.icann.org/en/topics/new-gtlds/rfp-clean-19sep11-en.pdf (describing the technical and financial evaluation procedures for new TLD applicants).

143. *See supra* Part II.A.

144. *See supra* Part II.B.

145. VeriSign, Inc. v. Internet Corp. for Assigned Names and Nos., No. CV 04-1292 AHM, 2004 WL 2095696, at *2 (C.D. Cal. Aug. 26, 2004).

146. Neither the Antitrust Division of the Department of Justice nor the Federal Trade Commission's Bureau of Competition has taken any action against ICANN. In fact, the Antitrust Division regularly advises the Commerce Department in its oversight of ICANN. *Antitrust Division Update: Spring 2009*, U.S. DEP'T OF JUSTICE, 3 (2009), http://www.justice.gov/atr/public/244014.pdf.

147. Private antitrust actions against ICANN have proven remarkably unsuccessful. *See, e.g.*, *VeriSign*, 2004 WL 2095696, at *8 (dismissing claim because plaintiff could not demonstrate a conspiracy in restraint of trade).

148. *See* Is ICANN's New Generation of Internet Domain Name Selection Process Thwarting Competition: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm.

relationship with the U.S. government is structurally and politically unique.[149] ICANN is at once public and private,[150] technical and political,[151] national and global.[152] This Part discusses how ICANN's uniqueness confounds the application of the antitrust laws. Section A describes how its decision-making procedures obscure the source of its decisions. Section B argues that ICANN's uncertain relationship with the U.S. Government makes application of the antitrust laws difficult.

A. Multistakeholder Model of Governance

ICANN's opaque and confusing decision-making process obscures the sources of and rationales for its decisions. By muddying the water, ICANN confounds antitrust scrutiny. ICANN was founded "for the benefit of the Internet community as a whole."[153] To embody and reflect the democratic ideals of the early Internet, ICANN adopted a multistakeholder model of governance,[154] in which private constituencies contribute to a "bottom-up" policy-making process with little or no direct government involvement.[155] The constituency groups consist of commercial and non-commercial Internet users, registries and registrars, Internet Service Providers, and intellectual property owners.[156] Significant policy decisions are made by a sixteen-member Board of Directors,[157] the members of which are chosen by the various constituency groups through a myriad of

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on Energy & Commerce, 107th Cong. 15 (2001) (statement of Vinton G. Cerf, then-Chairman of the Board, ICANN) (describing ICANN as a "unique entity").

149. *See* A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93, 94–95 (2002) ("[T]he form of the U.S. government's relationship with ICANN is unusual, and the substance unique.").

150. *See* Bruner, *supra* note 26, at 132.

151. *See* Jay P. Kesan & Andres A. Gallo, *Pondering the Politics of Private Procedures: The Case of ICANN*, 4 ISJLP 345, 386 (2008) ("ICANN is not only a technical organization concerned with the technical management of Internet addresses and numbers, but also a political organization with the power to create policies for the functioning of the Internet domain name system.").

152. *See* Milton Mueller et al., *Internet and Global Governance: Principles and Norms for a New Regime*, 13 GLOBAL GOVERNANCE 237, 238 (2007).

153. ARTICLES OF INCORPORATION, *supra* note 1, art. 4.

154. *See* Slavka Antonova, *Deconstructing an Experiment in Global Internet Governance: The ICANN Case*, 2008 INT'L J. COMM. L. & POL'Y 1, 13–14 (2008). The multistakeholder model was championed by neoliberals in the United States and Western Europe as an experiment in global governance for a post-nation-state globalized world. *Id.* at 14.

155. *Id.* at 3; *see also* Bruner, *supra* note 26, at 156 ("Government officials, meanwhile, are explicitly barred from board [of directors] membership.").

156. *ICANN Bylaws*, ICANN.ORG, art. VII, § 2 (Dec. 8, 2011), http://www.icann.org/en/about/governance/bylaws (describing the various groups that send delegates to the Nominating Committee, which in turn selects members of ICANN's Board of Directors).

157. *Id.* art. II; *see also* Bruner, *supra* note 26, at 155 (noting the dominance of "an all-powerful board").

subgroups, advisory committees, and supporting organizations according to an impenetrable web of rules and procedures.[158]

With such a large group of potential decision makers, all with different and sometimes contradictory interests, ICANN's complicated decision-making process makes antitrust analysis problematic. The multistakeholder model, and the complex procedures put in place to implement it, obscure both *who* makes decisions,[159] and *why* those decisions are made.[160] The confusing nature of the multistakeholder model frustrates the application of the antitrust laws.

1. Who Makes Decisions

ICANN's procedures obscure the source of its decisions. ICANN purports to seek and accept "broad, informed participation" and often professes its accountability "to the Internet community."[161] However, its decision-making process allows for little democratic involvement.[162] Critics have noted that ICANN's Board of Directors is dominated by commercial interests,[163] as are the review panels meant to ensure ICANN's transparency and accountability.[164] ICANN's governance structure favors those interests that possess the resources, time, and money to participate in its complicated procedures.[165] The Nominating Committee, which chooses

158. *See* Lawrence B. Solum, *Models of Internet Governance* 59 (Ill. Pub. L. Research Paper No. 07-25, Sept. 3, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_*id*=1136825 ("ICANN has an organizational structure that is almost baroque in its complexity."), *cited in* Bruner, *supra* note 26, at 155 n.172.

159. *See* Froomkin, *Wrong Turn*, *supra* note 29, at 160 ("[ICANN] proved [to] be corporatist in form, but not in spirit, as substantial interest groups remained unrepresented while ICANN took critical decisions."). ICANN has successfully covered its tracks by professing to accept input from all interested parties, while allowing commercial interests to "entrench themselves." *Id.*

160. *See id.* at 24 n.17 (noting the "mind-boggling complexity of ICANN's internal structures"); *see also* Bruner, *supra* note 26, at 155 ("ICANN has been strongly criticized for failing to achieve open and transparent governance of the DNS.").

161. *E.g.*, *ICANN Bylaws*, *supra* note 156, art. I, § 2.

162. *See* Kesan & Gallo, *supra* note 151, at 354 ("[M]any critics complain that ICANN's decisions are far from democratic because democratic institutions . . . have no role in ICANN governance."). Structural changes within ICANN in 2002–2003 further limited the role of democratic groups like the at-large constituencies in ways that "diluted" democratic representation "through a series of mechanisms and committees." *Id.* at 388.

163. Bruner, *supra* note 26, at 155.

164. *See* Anja Kovacs, *The ICANN-US DOC 'Affirmation of Commitments'—A Step Forward?*, NONCOMMERCIAL USERS CONSTITUENCY (NCUC) (Oct. 6, 2009, 7:43 PM), http://ncdnhc.org/profiles/blogs/the-icannus-doc-affirmation-of (arguing, on behalf of one of ICANN's constituent groups, that the review panels will be populated with insiders and, like ICANN as a whole, "dominated by large businesses").

165. Froomkin, *Wrong Turn*, *supra* note 29, at 71 ("ICANN had adopted a Byzantine structure that privileged some interests, primarily corporate and commercial."). Froomkin notes the oddity of an

eight of the sixteen voting members of the powerful Board of Directors,[166] is comprised almost entirely of individuals chosen by commercial interests or by other parts of ICANN itself.[167] One critic has thus called ICANN "a servant of the intellectual property and domain name registry interests."[168] These commercial interests are separated from the Board by the Nominating Committee and other supporting organizations within ICANN, but their influence is nonetheless substantial.[169]

The exact nature of the influence exerted over ICANN by these powerful interests is shielded by ICANN's bureaucracy. ICANN's complicated organizational structure makes it difficult for an antitrust plaintiff to demonstrate an anticompetitive conspiracy because the groups that take part in any given ICANN decision cannot be clearly identified.[170] As an organization in which competitors work together to craft policy, ICANN should be scrutinized for the relationships it creates between those competitors.[171] When erstwhile competitors collaborate to harm competition—even as part of a lawful association—they violate the antitrust laws.[172] The Supreme Court has repeatedly prevented professional associations from influencing prices when the active participants in the

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Internet regulatory body requiring physical presence at meetings, for example, to demonstrate the greater influence wielded by interests with the time and money to devote to ICANN. *Id.* at 160–61.

166. *ICANN Bylaws*, *supra* note 156, art. VI, § 2. Six of the other eight directors are chosen by the three supporting organizations—the Address Supporting Organization, the Country-Code Names Supporting Organization, and the Generic Names Supporting Organization—one by the At-Large Community, and the final voting member is ICANN's Chief Executive Officer. *Id.*

167. *Id.*

168. Comment of Karl Auerbach, 6 (Feb. 6, 2008) (in response to *The Continued Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System: Midterm Review of the Joint Project Agreement*, NAT'L TELECOMM. & INFO. ADMIN., Docket No. 071023616-7617-01), *available at* http://www.ntia.doc.gov/legacy/ntiahome/domainname/jpacomments 2007/jpacomment_030.pdf.

169. Bruner, *supra* note 26, at 155; *see also* Anatkova, *supra* note 154, at 14 (observing that a failure to properly balance commercial and non-commercial interests in ICANN's organizational structure led to the "detriment of the non-commercial and end-user representatives.").

170. *See* Bruner, *supra* note 26, at 155 ("[N]otwithstanding ICANN's non-profit legal status, one essentially finds an all-powerful board dominated by commercial interests."); *see also* Viktor Mayer-Schönberger & Malte Ziewitz, *Jefferson Rebuffed: The United States and the Future of Internet Governance*, 8 COLUM. SCI. & TECH. L. REV. 188, 192 (2007) (opining that "a combination of differently aligned economic interests" work to maintain ICANN's power over the DNS).

171. *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 352–53 (1982) (finding a price-fixing scheme by a physician's association unlawful, in part because the prices were fixed by the doctors themselves).

172. *See generally* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978). In *Professional Engineers*, the Supreme Court established that lawfully created professional associations may collaborate to set industry-wide standards, but may not set prices without violating Section 1 of the Sherman Act. *Id.* at 695–96.

associations are the competitors themselves.[173] When independent economic actors collaborate on price, they "fit squarely into the horizontal price-fixing mold."[174]

Within ICANN, multiple potential competitors (registrars, registries, Internet Service Providers, etc.) take part in the decision-making process.[175] A court evaluating antitrust concerns would attempt to determine whether a group of competitors compelled the association to harm competition in the market in which they participate.[176] Typically, the answer is obvious because trade associations are usually controlled by a single group of professionals, creating little doubt as to the source of the association's decisions.[177] The commercial interests that exert so much influence over ICANN's Board of Directors are largely hidden behind its complicated bureaucracy.[178] Indeed, a federal district court has dismissed one of the legal challenges to ICANN's antitrust abuses because the plaintiff could not demonstrate that competing interests exercised sufficient control over ICANN's decisions.[179]

However, the challenges faced by plaintiffs are not insurmountable. While ICANN's procedures obscure the source of its decisions, relevant information is available to those who thoroughly investigate ICANN's decisions and follow its public meetings.[180] Plaintiffs who can devote the

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173. *See Maricopa Cnty.*, 457 U.S. at 349. The Court has rejected the argument that the unique requirements of certain organizations merit different treatment under the antitrust laws. In *Maricopa County*, the Court found that an agreement among doctors to influence prices did not alter the antitrust analysis. *Id.*

174. *Id.* at 357.

175. *See supra* notes 166–69 and accompanying text.

176. If competing economic entities—registries, registrars, domain name owners, etc.—exert enough influence over ICANN to "control" its decisions, those competitors have conspired in violation of the Sherman Act. *See* Hahn v. Oregon Physicians' Serv., 868 F.2d 1022, 1028–29 (9th Cir. 1988) (finding that a physicians' association could set prices so long as the "relevant group of competitive providers . . . do not control the health care plan.").

177. The Supreme Court addressed just such an organization in *Professional Engineers*, 435 U.S. at 681–82.

178. *See supra* note 169.

179. One of only two antitrust actions filed against ICANN was dismissed because the plaintiff failed to plead enough facts to demonstrate that competitors exerted "control" over ICANN's decisions. VeriSign, Inc. v. Internet Corp. for Assigned Names and Nos., No. CV 04-1292 AHM, 2004 WL 2095696, at *5–6 (C.D. Cal. Aug. 26, 2004). The current ICANN Bylaws require the Board to accept the decisions of both the ccNSO and GNSO under certain conditions, giving rise to the inference that in some circumstances, competing interests do exercise "control" over ICANN. *ICANN Bylaws*, *supra* note 156, at Annex A, § 13, Annex B, § 15.

180. ICANN holds three public meetings per year in locations throughout the world. Anyone may participate, either in person or remotely via chat rooms. *About ICANN Meetings*, ICANN.ORG,http://meetings.icann.org/about (last visited Mar. 15, 2012). Although ICANN purports to discuss "contractual issues with the retail and wholesale arms of the Domain Name System" at these meetings, its controversial 2006 renewal of its contract with VeriSign, *see supra* Part II.A, was never discussed

considerable resources necessary to properly present this information to a court may succeed in advancing past the pleading stage, as did the plaintiffs in *Coalition for ICANN Transparency v. VeriSign, Inc*.[181] In this case, the Ninth Circuit reversed a lower court's decision dismissing the action for failure to state a claim and remanded the case for further pretrial proceedings.[182]

2. How and Why Decisions Are Made

The opacity of the decision-making process obscures how and why ICANN's decisions are made. All policy decisions are made by the Board of Directors, but the Directors are chosen and advised by multiple subgroups, committees, and constituencies.[183] For example, two Directors are chosen by the Generic Names Supporting Organization (GNSO)—one of three primary supporting groups.[184] The GNSO consists of Stakeholder Groups, which themselves are made up of various interested parties, and is organized into a bicameral council that makes recommendations to the ICANN Board.[185] The sources of the recommendations are buried under this mountain of bureaucracy.[186] ICANN's complicated procedures make it difficult for potential plaintiffs to prove antitrust abuses.

Antitrust analysis often hinges on whether business decisions were motivated "not by competitive zeal but by anticompetitive malice."[187] Because ICANN's decision-making process is hidden behind a shield of bureaucracy, courts may find it difficult to determine the underlying motivations that drive its actions. Although antitrust scholars are

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at a public meeting. *See Archives of the ICANN Meetings in São Paulo, Brazil*, ICANN.ORG (Dec. 2–8, 2006), http://www.icann.org/en/meetings/saopaulo/archives.html.

181. Coalition for ICANN Transparency v. VeriSign, Inc., 611 F.3d 495, 499 (9th Cir. 2010). Although ICANN itself was dropped from this litigation at an early stage by consent of the parties, the conduct at issue is the alleged conspiracy surrounding the 2006 contract renewal between VeriSign and ICANN. *See supra* Part II.A.

182. *CFIT*, 611 F.3d at 509–10. This action was subsequently dismissed by the district court for lack of standing. *See* Coalition for ICANN Transparency v. VeriSign, Inc., 771 F. Supp. 2d 1195, 1203 (N.D. Cal. 2011). The district court thus never reached the question of VeriSign's, and by implication ICANN's, alleged antitrust violations.

183. *ICANN Bylaws*, *supra* note 156, art. VI, § 2.

184. *Id.*

185. *Id.* art. X, § 2–3.

186. *See* Solum, *supra* note 158, at 59–60 (observing that ICANN's "international bureaucracy" has a "complex organizational structure" with numerous interested parties).

187. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

increasingly skeptical of the use of intent to evaluate antitrust abuses,[188] the Supreme Court continues to invoke anticompetitive intent, particularly in cases under the so-called essential facilities doctrine.[189] If ICANN's decision-making process were more transparent, antitrust enforcement authorities could more easily determine whether ICANN has intended to harm competition or has merely pursued a "valid business strategy."[190] As long as information about ICANN's complicated decision-making process remains difficult to obtain, proper application of the antitrust laws will remain difficult.[191]

B. ICANN's Relationship with the Department of Commerce

ICANN's ties to the U.S. Department of Commerce make antitrust analysis difficult because of the well-established principle that the antitrust laws do not apply to the government or its instrumentalities.[192] Although it is far from a federal agency, ICANN's relationship with the United States government deters antitrust scrutiny, particularly by federal antitrust enforcement authorities.[193] The relationship between ICANN and the federal government has changed significantly over ICANN's twelve-year lifespan, but the precise contours of that relationship remain "murky."[194] Between its formation in 1998 and 2009, ICANN was largely a creature of the Department of Commerce (DOC), and its power was "derivative of the

188. *See* ABA SECTION OF ANTITRUST LAW, INTELLECTUAL PROPERTY AND ANTITRUST HANDBOOK 314–15 (2007) (quoting two prominent antitrust scholars, Philip Areeda and Herbert Hovenkamp, who criticized the *Trinko* Court's reliance on intent and its search for malicious purpose).

189. *See supra* Part II.C. In *Trinko*, the Supreme Court characterized its earlier holding in *Aspen Skiing* as one based on a finding that the defendant's conduct was driven by an intent to harm competition. *Trinko*, 540 U.S. at 409. Before *Aspen Skiing* and *Trinko*, there was a trend in the lower courts to abandon an analysis of intent, but after *Trinko*, the lower courts have followed the Supreme Court's lead. *Compare* Olympia Equip. Leasing v. W. Union Tel., 797 F.2d 370, 379 (7th Cir. 1986) (finding malicious motivation "irrelevant") *with* Am. Cent. E. Tex. Gas v. Union Pac. Res. Group, 93 F. App'x 1, 9 (5th Cir. 2004) (interpreting *Trinko* to contemplate antitrust liability based on "anticompetitive motives").

190. *East Texas Gas*, 93 F. App'x at 9. The Fifth Circuit affirmed an arbitrator's finding that the defendant's conduct was not grounded in a "valid business strategy" based on considerable testimony from the parties. *Id.* at 9–10. Such evidence would be difficult to gather from ICANN because of its structure.

191. Only two antitrust actions have been filed against ICANN as of March 23, 2012. The first was dismissed at the pleading stage. *See supra* note 179. In the second, the plaintiffs dropped ICANN as a defendant, but the litigation has proceeded. *See supra* note 181.

192. *See* Parker v. Brown, 317 U.S. 341, 351 (1943) ("The Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state.").

193. Neither the Department of Justice nor the Federal Trade Commission, the two agencies with primary responsibility for enforcing the antitrust laws, have pursued or investigated ICANN. *See supra* note 146.

194. Manheim & Solum, *supra* note 128, at 374.

U.S. government's own authority."[195] However, in response to intense international pressure, ICANN and DOC signed a new agreement in September 2009—an Affirmation of Commitments that greatly relaxed DOC's policy oversight over ICANN.[196] Notwithstanding this new agreement, DOC retains ultimate authority over Internet naming and addressing.[197]

Government action has long been immune from antitrust liability,[198] but the waters become muddied when a private actor claims to be acting at the government's behest or in furtherance of public policy.[199] Although incorporated as a non-profit, ICANN would undoubtedly argue that it should be immune from antitrust liability as a state actor.[200] Under the state actor doctrine, a private party may claim the government's antitrust immunity when two conditions are met: first, they must act pursuant to a "clearly articulated and affirmatively expressed" state policy; and second, their conduct must be "actively supervised" by the State itself.[201] The Supreme Court has been extremely reluctant to find antitrust immunity for private actors under this test and will do so only when "the State has played a substantial role in determining the specifics of the economic policy."[202] "Absent such a program of supervision," the Court reasoned, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the private party's individual interests."[203]

ICANN is unlikely to be given antitrust immunity under the state actor doctrine, but because of the still-uncertain nature of ICANN's relationship with DOC, courts may find it challenging to faithfully apply the Supreme Court's test. DOC's authority over ICANN has two different but important

195. Bruner, *supra* note 26, at 156.

196. The change was largely in response to political pressure from the international community. *See infra* notes 215–16 and accompanying text.

197. *See infra* notes 228–36 and accompanying text.

198. *See Parker*, 317 U.S. at 351.

199. *See* Froomkin & Lemley, *supra* note 4, at 31 ("A closer question is presented when the defendant is a private actor who claims to be acting in accordance with state policy.").

200. *See* Froomkin, *Wrong Turn*, *supra* note 29, at 113–25 (discussing the reasons why ICANN might be considered a state actor).

201. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). The Supreme Court in *California Retail* narrowly applied the state action doctrine and found that a wine dealers' association was not immune from the antitrust laws, even though it was acting according to a clearly articulated California state policy, because the state did not actively supervise the association. *Id.* at 105–06.

202. F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992); s*ee also* Froomkin & Lemley, *supra* note 4, at 32 ("[T]he clear articulation and active supervision requirements of late have proven difficult hurdles to clear.").

203. Patrick v. Burget, 486 U.S. 94, 101 (1988); *see also* Froomkin & Lemley, *supra* note 4, at 32.

aspects: DOC's oversight of the direction of DNS policy,[204] and DOC's control over whether ICANN continues in its role as administrator of the DNS.[205] To determine whether ICANN deserves antitrust immunity, courts would examine DOC's relationship with ICANN under the two prongs of the state actor test.

1. Policy Oversight

Under the first prong of the test, a court would evaluate whether ICANN operates according to a "clearly articulated" government policy.[206] The DNS White Paper, the government's policy proposal that spurred ICANN's creation in 1998, prescribes numerous specific policy directives that ICANN, for the most part, has carefully implemented.[207] However, the White Paper is long on policy goals and short on specifics.[208] A court may find that the White Paper is sufficiently ambiguous to fail the "clearly articulated" prong of the state actor test. Moreover, the White Paper specifically rejected the notion that the new organization it envisioned would have antitrust immunity.[209]

After ICANN was formed, it operated pursuant to a series of agreements with DOC.[210] The original Memorandum of Understanding was amended numerous times until the Affirmation of Commitments finally replaced it in 2009.[211] During the operation of the Memorandum of Understanding,[212] ICANN was formally required to submit various

204. *See infra* Part III.B.1.

205. *See infra* Part III.B.2.

206. *See California Retail*, 445 U.S. at 105.

207. *See* Froomkin & Lemley, *supra* note 4, at 36–37 ("[T]he White Paper also contained a number of policy directions for NewCo, instructions that ICANN has on the whole faithfully followed."). For example, the White Paper specified the need for a mechanism to secure the rights of trademark holders, and ICANN quickly developed its much-maligned Uniform Dispute Resolution Process, which DOC subsequently praised as being precisely what it had envisioned. *Id.* at 37–38.

208. *Id.* at 37 ("[T]he White Paper had relatively little to say about the details.").

209. Management of Internet Names and Addresses, 63 Fed. Reg. at 31,747. In response to several commenters who suggested that the federal government specifically immunize NewCo from the antitrust laws, the White Paper states: "Applicable antitrust law will provide accountability to and protection for the international Internet community." *Id.* The "clearly articulated" government policy seems to be that ICANN should *not* be exempt from the antitrust laws. Froomkin & Lemley, *supra* note 4, at 37.

210. *See* A. Michael Froomkin, *Almost Free: An Analysis of ICANN's 'Affirmation of Commitments,'* 9 J. ON TELECOMM. & HIGH TECH. L. 187, 191–94 (2011).

211. *See supra* note 38 and accompanying text.

212. Later in its life, the Memorandum of Understanding was rebranded the Joint Project Agreement (JPA). *See ICANN's Major Agreements and Related Reports*, ICANN.ORG, http://www.icann.org/en/general/agreements.htm (last visited Mar. 15, 2012).

progress reports to DOC on a regular basis.[213] Additionally, DOC exercised a great deal of informal control over the direction of DNS policy. For example, DOC effectively vetoed the addition of the .xxx TLD, a domain for adult websites, even though it had been approved by ICANN.[214] DOC's hostility to .xxx, and its success at preventing its addition to the DNS, illustrates the federal government's considerable residual policy control over ICANN.

The Affirmation of Commitments altered DOC's policy oversight of ICANN in several important ways. Most significantly, ICANN is no longer accountable exclusively to DOC.[215] Before the Affirmation, ICANN's internal reviews and audits were submitted only to DOC; after the Affirmation, those reviews are submitted to "an international committee of parties . . . who represent[] 100 countries around the world."[216] By signing the Affirmation, ICANN and the United States transformed the tone of U.S.-international relations over Internet policy.[217] The international community, which had been highly critical of what it viewed as the United States' heavy-handed control over ICANN,[218] was optimistic at the change.[219] The Affirmation of Commitments formally

213. Amendment 6 to Memorandum of Understanding Between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers (Sept. 16, 2003), http://www.ntia.doc.gov/page/2003/icann-ammendment-6 (requiring ICANN to provide "a status report to the Department on its progress towards the completion of its tasks under this Agreement" every six months).

214. *See* Scott P. Sonbuchner, Note, *Master of Your Domain: Should the U.S. Government Maintain Control over the Internet's Root?*, 17 MINN. J. INT'L L. 183, 199–200 (2008). DOC's action came under heavy criticism. *See* Steve DelBianco & Braden Cox, *ICANN Internet Governance: Is It Working?*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 27, 41 (2008) ("[C]ritics complain that the U.S. abused its oversight role by overriding a DNS management decision that rightly belongs under ICANN's purview."). The .xxx TLD has since been fast-tracked to approval after an ICANN Independent Review Panel questioned the Board's denial of the TLD. *See ICANN Publishes Draft Agreement on .XXX*, ICANN.ORG (Aug. 24, 2010), http://www.icann.org/en/announcements/announcement-24aug10-en.htm.

215. *See Statement of Rod Beckstrom, ICANN CEO*, ICANN.ORG (Sept. 30, 2009), http://www.icann.org/en/announcements/announcement-30sep09-en.htm ("[I]n the past under the JPA [Joint Project Agreement] those reviews [of accountability and transparency] were simply submitted to the U.S. government.").

216. *Id.*

217. ICANN's CEO Rod Beckstrom, in reaction to the agreement, said: "One world, one Internet, everyone connected—this is our goal at ICANN. This agreement gives international stakeholders an even more powerful voice in our activities moving forward." Vineetha Menon, *United States lets go of ICANN*, ITP.NET (Oct. 1, 2009), http://www.itp.net/577791-united-states-lets-go-of-icann.

218. The European Union, among others, had been insisting that ICANN be completely "delinked from the U.S. government and made fully independent to allow for a more global participation." John Poirier & Richard Change, *US Government signs pact with Internet domain body*, REUTERS, Oct. 1, 2009, *available at* http://in.reuters.com/article/idINN3021700320090930.

219. *See US loosens its control over the internet*, THE SYDNEY MORNING HERALD (Oct. 1, 2009), http://news.smh.com.au/technology/technology-news/us-loosens-its-control-over-the-internet-200910

recognized the conclusion of the Memorandum of Understanding between DOC and ICANN, and professed to usher in a new era for ICANN—independent of DOC and the U.S. Government.[220]

Despite the lofty internationalist rhetoric, the Affirmation of Commitments does not clearly sever the ties between DOC and ICANN. During the months leading up to its signing, several prominent U.S. legislators conveyed their belief that the relationship should become a permanent one.[221] ICANN CEO Rod Beckstrom acknowledged that the Affirmation created exactly that—a "perpetual agreement" between ICANN and the United States.[222] DOC remains an active participant in ICANN's Government Advisory Committee and it secured a position for itself on a committee that will review ICANN's accountability and transparency.[223]

Although the Affirmation is viewed largely as a step away from U.S. control over ICANN and global Internet policy, it remains unclear what DOC would do if it strongly disagreed with the direction of ICANN policy.[224] The Affirmation leaves unaffected DOC's final authority to alter the root zone file.[225] DOC would likely find it politically unfeasible to take such action, but in theory it retains the power to add (or, more alarmingly, subtract) domain names and even entire TLDs from the root.[226] Even with this ultimate authority, ICANN would likely fail the first prong of the state actor test because the government's policy is not "clearly articulated."

01-gcww.html ("The European Union welcomed what it called 'a significant positive move towards a new and more open 'working environment' for ICANN.'").

220. *See* Affirmation of Commitments, *supra* note 128, § 2.

221. *Key Members of Congress Call for Permanent ICANN-US Tie*, CIRCLEID (Aug. 5, 2009), http://www.circleid.com/posts/key_members_of_congress_call_for_permanent_icann_us_tie/. Commerce Secretary Gary Locke received a letter from key members of the House Committee on Energy and Commerce, the congressional committee that oversees DOC, urging that the relationship between ICANN and the U.S. "be made permanent and strengthened." *Id.*

222. *See Statement of Rod Beckstrom*, *supra* note 215; *see also* Press Release, Nat'l Telecomms. And Info. Admin., Commerce's NTIA and ICANN Establish a Long-Lasting Framework for the Technical Coordination of the Internet's Domain Name and Addressing System (Sept. 30, 2009), *available at* http://www.ntia.doc.gov/press/2009/ICANN_Affirmation_090930.html (stating that the Affirmation of Commitments "reinforces a long-standing relationship between ICANN and the Department of Commerce").

223. *See* Affirmation of Commitments, *supra* note 128, § 9.1.

224. For example, Congress and DOC have expressed serious reservations about the New gTLD Program, citing concerns over the rights of trademark holders. This concern made its way into the Affirmation itself. *See* Affirmation of Commitments, *supra* note 128, art. 5.

225. *See* Froomkin, *supra* note 5, at 203–06 (discussing DOC's residual authority over the root zone file itself, which is maintained pursuant to a separate contract with VeriSign).

226. *See id.* at 204 ("[B]efore the Affirmation, if ICANN wanted to add, change, or remove a TLD, it needed DOC's permission, or at least acquiescence. Nothing in the Affirmation changes that . . . .").

However, the combination of formal and informal controls retained by DOC does nothing but complicate that analysis and confound the test's application.

2. Active Supervision: The IANA Contract

Under the second prong of the state actor test, a court would evaluate whether ICANN is "actively supervised" by the federal government.[227] While uncertainty persists as to DOC's oversight of ICANN's policy decisions, there is little doubt as to DOC's ultimate control over *whether* ICANN continues to be the administrator of the DNS. Pursuant to a contract with DOC, ICANN "maintain[s] the continuity and stability of services related to certain interdependent Internet technical management functions, known collectively as the Internet Assigned Numbers Authority (IANA)."[228] The IANA function consists of the technical and administrative work of operating the DNS, including management of the root zone file and the allocation of IP addresses.[229]

The IANA function is distinct from ICANN's broader policy-making responsibilities, but ICANN's ability to make DNS policy essentially derives from its control over the IANA function and the nuts and bolts of Internet naming and addressing.[230] DOC's contract with ICANN for the performance of the IANA function gives DOC significant input into ICANN's technical decisions.[231] Whether a court determines that DOC "actively supervises" ICANN for purposes of the state actor test depends on whether that court finds that DOC's control over the IANA function gives it parallel control over ICANN's policy-making functions.

The IANA contract permits DOC to inspect "premises, systems, and processes,"[232] requires ICANN to submit monthly performance progress reports,[233] prohibits ICANN from changing its methods for performing the

227. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

228. *ICANN/U.S. Government Contract for Performance of the IANA Function*, ICANN.ORG, § C.1.1 (Aug. 14, 2006), http://www.icann.org/general/iana-contract-14aug06.pdf.

229. *Id.* § C.2.2.1.2-3.

230. *See* Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, *supra* note 19, § III.B. The original Memorandum of Understanding sets out ICANN's four primary purposes. Only one of those involves policy development while the other three are purely technical. ICANN's policy-development role is intimately bound up with its role as technical administrator of the DNS. *Id.*

231. *See infra* notes 232–38 and accompanying text.

232. *ICANN/U.S. Government Contract for Performance of the IANA Function*, *supra* note 228, § C.2.1.

233. *Id.* § C.3.1.

IANA function without prior DOC approval,[234] and permits DOC to terminate the agreement at its convenience.[235] The Affirmation of Commitments left the IANA contract completely untouched.[236] Although the United States has never indicated any willingness to grant the IANA contract to another organization, the mere fact that it could, if it wanted, overshadows ICANN's mandate and authority.[237] DOC's continued control over the IANA function gives the United States a huge amount of power—the power to literally "turn off" the Internet for a given TLD.[238] The IANA contract, with its unambiguously favorable terms for DOC, suggests a great deal of active supervision of ICANN's technical and administrative functions.

Although the IANA contract gives DOC a great deal of power over ICANN and the DNS, a court is nevertheless unlikely to find that DOC actively supervises ICANN in a manner that would satisfy the second prong of the state actor test.[239] There is no evidence that DOC has used its significant technical oversight of ICANN to achieve parallel oversight of ICANN's policy-making.[240] The Supreme Court requires that the State be intimately involved in crafting the details of economic policy to find that a private actor is entitled to antitrust immunity.[241] While ICANN could demonstrate DOC's intimate involvement with its performance of the IANA function,[242] it likely could not show a concomitant involvement

234. *Id.* § C.4.2.

235. *Id.* § I.1.

236. Froomkin, *supra* note 5, at 206 ("The IANA agreement is unaffected by the Affirmation."); *see also* Grant Gross, *ICANN freed from US gov't oversight*, REUTERS, Sept. 30, 2009, *available at* http://www.reuters.com/article/idUS220287397120090930.

237. *See* Bruner, *supra* note 26, at 157 (observing that the termination provision in the old Joint Project Agreement, similar to the one in the IANA contract, "most clearly reflects the U.S. government's assertion of regulatory power over the DNS, and, through it, the Internet.").

238. *See id.* at 159; *see also* Sonbuchner, *supra* note 214, at 203 (observing that some of the harshest critics of ICANN are "countries with poor relationships with the United States" who could theoretically see their online presence altered or deleted by an overzealous Commerce Department).

239. *See* Froomkin & Lemley, *supra* note 4, at 38 ("[ICANN's] chances of prevailing on the 'active supervision' requirement look slim.").

240. This assumes that DOC's policy oversight authority discussed in Part III.B.1, *supra*, is not sufficient, by itself, to satisfy the "active supervision" prong of the state actor test. *See* Froomkin & Lemley, *supra* note 4, at 36 ("[ICANN] would have a very hard time showing the necessary degree of active government supervision and involvement in its implementation of that policy.").

241. F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 634–35 (1992) (finding that the purpose of the active supervision inquiry "is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention").

242. *See supra* notes 232–38 and accompanying text.

with its policy-making function.[243] This is especially true since the signing of the Affirmation of Commitments, under which both DOC and ICANN profess to operate independently of one another.[244]

The actual relationship between ICANN and DOC remains uncertain, particularly after the signing of the Affirmation of Commitments.[245] While ICANN's public statements suggest that the United States exercises little control over its decisions,[246] no court has ever examined the issue. Because of the significant role retained by DOC even under the Affirmation of Commitments, and DOC's substantial control over ICANN through the IANA contract, ICANN could plausibly demonstrate that it deserves antitrust immunity.[247] More likely, however, is that ICANN is sufficiently independent from the federal government to preclude any such immunity.[248] This uncertainty will only be resolved if ICANN's conduct is subjected to antitrust scrutiny.

IV. CONCLUSION

Despite the difficulties in applying antitrust law to ICANN, courts and antitrust enforcement authorities should more closely scrutinize its activity to preserve and promote competition in the domain name marketplace. ICANN has potentially harmed competition by conspiring with its registry operators to eliminate competitive bidding; by setting maximum prices for domain name registrations in the .com, .net, and .org TLDs; and by limiting the introduction of new TLDs. As a result of ICANN's anticompetitive conduct, consumers pay more for domain name

243. *See supra* Part III.B.1. Although a combination of formal and informal controls over ICANN's policy-making process gives DOC more authority over ICANN than any other outside entity, it is likely insufficient to meet the strict requirements of the "active supervision" prong of the Supreme Court's test. *See* Froomkin & Lemley, *supra* note 4, at 38–39 (describing the loose control exercised by DOC and the public statements of the two organizations professing their independence from each other).

244. *See, e.g.*, *The Affirmation of Commitments—What it Means*, ICANN.ORG (Sept. 30, 2009), http://www.icann.org/en/announcements/announcement-30sep09-en.htm ("[The Affirmation] declares ICANN is independent and is not controlled by any one entity.").

245. *See* Bruner, *supra* note 26, at 163 (observing the "uncertainty about the nature and legitimacy of a post-JPA ICANN").

246. *See The Affirmation of Commitments—What it Means*, *supra* note 244.

247. *See* Froomkin & Lemley, *supra* note 4, at 36 ("[I]t is always possible that ICANN would be able to demonstrate that the government has had a far greater behind-the-scenes involvement in ICANN's decision than either the DOC or ICANN has admitted.").

248. In a recent article, Professor Froomkin expressed the opinion that ICANN would almost certainly not be considered a state actor. "ICANN's growing independence from the U.S.—even if it is not yet complete—weakens, I think fatally, the case for labeling ICANN a state actor under U.S. law in the future." Froomkin, *supra* note 5, at 208.

registrations than they otherwise would, and innovation is discouraged. The antitrust laws were designed to remedy exactly these problems. Courts should look past ICANN's maze-like organizational structure and its complicated relationship with the U.S. government and examine its conduct like any other private entity. If scrutinized properly, ICANN will be more likely to effectively promote competition in the domain name market—an objective it shares with the antitrust laws.

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