Bloomberg Law Reports®

December 7, 2011

Technology Law

Antitrust

Restraint of Trade

Antitrust Implications of New Community-Based Top-Level Domain Names

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Ever since the Internet opened to commercial traffic, businesses have been limited to using a handful of top-level domains, such as .com and .biz, and various country-specific designations like ".uk" and ".us." This changes in January 2012 when the Internet Corporation for Assigned Names and Numbers ("ICANN") – the organization that controls the Internet domain name space – begins accepting applications for almost any imaginable top-level domain. For the first time, industry organizations will be able to obtain a top-level domain tailored specifically for their industry. A record company association could register a top-level domain like ".music;" a financial industry group could register ".bank;" and a builders' association could register ".construction." Industry organizations can then dole out second-level domains to their members, making possible web addresses like "Sony.music," "WellsFargo.bank," and "California.construction."

These kinds of industry-controlled top-level domains have many potential benefits for consumers and industry. If a well-known, reputable organization controls ".construction," consumers in California can go to "California.construction" and be assured they are dealing with a reputable California builder. This is a significant improvement over the current system, where domain name registrations are open to reputable business and serial fraudsters alike.[1]

Despite their benefits, industry-controlled top-level domains raise the potential of antitrust harm and liability. If, for example, only Universal Music Group, Sony Music, and Warner Music Group are allowed to register second level domains on the ".music" domain, they may face antitrust suits from independent record labels who want to register domains like "IndependentMusicCo.music." Fortunately, industry organizations considering a community top-level domain can take steps now to limit their risk of antitrust liability. Moreover, businesses and organizations that are not considering a top-level domain registration can and should take steps now to limit the risk of an organization shutting them out from an important part of the market.

Antitrust Scrutiny of Domain Names May Increase as Consumers Become Accustomed to the New Top Level Domain Landscape

In analyzing whether a domain name registration can cause antitrust harm, courts and regulators evaluate the likelihood that the registration will give the registrant market power. Courts and regulators have found little risk of antitrust harm in second-level domain registrations (such as the "pets" in "pets.com"), but have been more concerned about VeriSign, the entity that controls the entire ".com" top - level domain. Whether new industry-controlled top-level domains face antitrust liability is likely to depend on whether they function in the market more like second-level domain names or more like the ".com" top - level domain.

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For example, in *Weber v. NFL*,[2] the court addressed an antitrust challenge to the control of two second-level domain names. There, the plaintiff, a professional buyer and seller of second-level domain names, registered "dolphins.com" and "jets.com." After receiving trademark infringement complaints from the NFL teams of the same names, the registrar cancelled the plaintiff's domain name registrations. *Id.* The plaintiff sued the NFL teams, claiming the teams had "monopolized" the market for the two domain names.[3]

The court dismissed the suit, finding that the relevant market was not just the individual domain names, "but rather [defined] in terms of domain names in general."[4] The Court found that because "the number of domain names is essentially limitless, [the football teams'] actions could not possibly be seen as an attempt to control or monopolize that market."[5] Because no business could obtain a great advantage over another business simply by registering a domain name, the court refused to find any possibility that second-level domain registrations could give businesses market power.

By contrast, the Department of Justice has opined in communications with ICANN that VeriSign, which controls the .com top level domain, may possess market power in the context of whether business will feel compelled to apply for a .com registration.[6] According to the DOJ, the reason VeriSign has such market power is that the ".com" top level domain has such "high brand awareness" that registrations in other top level domains are not seen as reasonable substitutes.[7] In other words, because in the current landscape many businesses cannot effectively compete in the marketplace without a ".com" registration, the entity that controls the ".com" top-level domain is seen as having market power.

In the near term, industry-controlled top-level domains are more likely, for antitrust purposes, to be treated similar to second-level domains like "dolphins.com" and "jets.com." If Universal, Sony, and Warner Music keep ".music" for themselves, the independent label's remedy will not be the courts, but registering "IndieRecordCo.com," "IndieRecordCo.org," ".IndieRecord," or any other of the countless available domain name variations.

However, in the future, some industry-controlled top-level domains may become more akin to the ".com" top-level domain in importance and therefore develop sufficient market power to be subjected to antitrust scrutiny. Indeed, given the significant investment of the $185,000 fee for the top-level domain application itself, as well as the ongoing costs of administering a new top-level domain that could reach into the millions of dollars, successful applicants are likely to market and advertise their new domain names with an eye to steering all consumers away from ".com" domains to their new domains. If the industry organization members are successful in their marketing and advertising efforts, market power and potential antitrust risks are in essence inevitable. For instance, if the ".bank" top-level domain becomes so trusted by consumers that consumers begin to refuse to conduct online banking on any other top-level domain, the industry association in control of ".bank" would have enormous market power in the industry. Having obtained that market power, the industry association can expect to receive tremendous scrutiny of their rules for the top-level domain from regulators and from competitors armed with antitrust attorneys.

Avoiding Antitrust Risk

Every organization that applies for a top-level domain for the benefit of an industry "community" will be required to submit to ICANN proposed registration and use policies for all sub-domains in its top level domain. Every organization that submits these policies should carefully review them for antitrust concerns. If the organization foresees that its top-level domain will rise to as significant a level of importance in its industry as the ".com" top level domain is in the current landscape, the organization should be especially diligent in preempting antitrust issues.

At the most basic level, any community registration and use policy should avoid creating rules that exclude businesses from participating in the top-level domain for no other reason than to reduce the quantity or quality of market output.[8] Such rules would be per se illegal. For example, rules that exclude competitors from a top-level domain solely on the basis of failing to offer products or services at a minimum price are highly likely to draw antitrust enforcement. But if the community's rules are "closely related to the functioning of a joint venture with significant potential for coordinating production or distribution . . . [as a device for] reducing members' costs or improving their own market effectiveness," the rules will be upheld.[9]

Organizations should document the pro-competitive justifications for their community applications and should be able to readily explain to regulators and other interested stakeholders how their proposed community policies are consistent with those goals. For example, an industry organization applying for ".bank" could justify allowing only legitimate banks to participate in the domain to prevent phishing attacks by educating consumers that .bank is an easy-to-remember and secure domain on which to conduct online banking. All restrictions on membership in the policy should be closely tailored to this goal.

As the market power of the top-level domain increases, regulators will demand increasingly broad access for competitors in the industry to participate in the top-level domain. On the other hand, top-level domains with little market power will likely have considerably more leeway in restricting access. To achieve a proper balance, attorneys drafting such policies should develop a strong understanding of the conditions in their client's industry and their client's goals.

Preventing Anticompetitive Threats

Businesses that are not considering applying for a top-level domain should still be vigilant of threats from organizations that may use a top-level domain for anticompetitive purposes. The first step for a business is to know which competitors are contemplating registering top-level domains relevant to their

market. For early intelligence, many websites, such as "newTLDs.tv," are dedicated to tracking publicly-announced plans to acquire top-level domains.

In April 2012, all applications for top-level domains will be officially published by ICANN. All concerned parties can register their concerns in a public commenting process. ICANN has also created formal objection procedures where those with trademark rights or those who represent a clearly recognized community can have certain objections to a top-level domain name application resolved in arbitration proceedings. The deadline for objections is currently November 12, 2012. In addition to arbitrations under ICANN rules, parties may file civil litigation.

Businesses should monitor the progress of all top-level domain applications that might have a competitive impact. Working with counsel, businesses should ensure that anticompetitive applications are prevented in the public comment, objection, or litigation process, as necessary.

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[1] *See, e.g., FTC v. Willms*, 2011 BL 234401, at *5 (W.D. Wash. Sept. 13, 2011) (granting preliminary injunction against individual alleged to have used "eighty-eight websites offering services ranging from phone number lookup services to criminal background checks and to judicial records search services" to unlawfully earn hundreds-of-millions in revenue).

[2] 112 F. Supp. 2d 667, 669 (N.D. Ohio 2000).

[3] *Id.* at 673.

[4] *Id.*

[5] *Id.*

[6] Letter from Deborah Garza (DOJ Antitrust) to Meredith (NTIA), at 2 dated Dec. 3, 2008, *available at* http://www.ntia.doc.gov/files/ntia/publications/icann_081218.pdf.

[7] *Id.*

[8] *See* Hovenkamp, Antitrust Law, Vol. XIII ¶ 2201a.

[9] Hovenkamp, Antitrust Law, Vol. XIII ¶ 2201a.