WITHDRAWAL SHEET
Clinton Library

Collection: Domestic Policy Council
Magaziner, Ira – Electronic Commerce
OA/Box: OA 13114/Box 16
Archivist: mpw
File Folder: Domain Names [5] **Date:** 5/27/2004

DOCUMENT NO. & TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1) Memo	To: Magaziner, From: Kelly, RE: Competition in Internet Domain Name Registration Services, 6p	12/18/97	P5 6292
2) Notes	Hard to read Handwritten notes. Will be reviewed upon Researcher's Request, 4p	nd	
3) Letter	To: Magaziner, From: Bordogna,, RE: Internet Domain Name Transfer, 2p	10/31/97	P5
4) Memo	To: Burr, Kahil, From: Rudolph, RE: Legal Concerns of the National Science Foundation, 3p	10/31/97	P5
5) Memo	From: Sonya Patterson, RE: Domain Names Breakfast Meeting participants, 1p (partial)	6/17/97	P6/B6
6) Memo	To: USSS, Workers and Visitor Services System, RE: Domain Names Breakfast Meeting participants, 1p (partial)	6/17/97	P6/B6

RESTRICTIONS

P1 National security classified information [(a)(1) of the PRA].
P2 Relating to appointment to Federal office [(a)(2) of the PRA].
P3 Release would violate a Federal statute [(a)(3) of the PRA].
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].
PRM Personal records misfile defined in accordance with 44 USC 2201 (3).

B1 National security classified information [(b) (1) of the FOIA].
B2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
B3 Release would violate a Federal statute [(b)(3) of the FOIA].
B4 Release would disclose trade secrets or confidential commercial financial information [(b)(4) of the FOIA].
B6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
B7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
B8 Release would disclose information concerning the regulation of financial institutions [(b)(9) of the FOIA].
B9 would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

6292

United States Department of Justice

Antitrust Division

Rm. 3312 Main Building
Washington, DC 20530-0001
Fax Number: (202) 616-2645
Voice Number: (202) 514-8348

FAX COVER SHEET

DATE: December 18, 1997

TO: Ira Magaziner

of: EOP

Fax Number: (202)456-5557

FROM: Christopher J. Kelly

Pages Sent (including this sheet): 6

Remarks: Brian Kahin asked me to fax you the attached memo, which contains the Antitrust Division's advice to the DNS working group on the desirability of a transition to competition in domain name registration services. I'm looking forward to seeing you and Becky Burr tomorrow morning at 9:00.

Chris Kelly

Privileged and ~~Confidential~~
Deliberative Attorney-Client Communication

MEMORANDUM

TO: Domain Name System Interagency Working Group

FROM: Antitrust Division, U.S. Department of Justice

RE: Competition in Internet Domain Name Registration Services

Summary

Unlike several other functions related to the governance and operation of the Internet Domain Name System (DNS), the registration of second-level domain (SLD) names can be performed efficiently on a competitive basis.[1] This cannot happen, however, if the Cooperative Agreement between the National Science Foundation (NSF) and Network Solutions, Inc. (NSI) is simply allowed to expire. In that case, NSI will be left in exclusive control of the generic top level domains (gTLDs) it has administered pursuant to the Cooperative Agreement, with no incentive to loosen its grip. Even if it were to allow other firms to register SLD names in those gTLDs, its unfettered control over the gTLD registries, to which the new registrars will need equal access, would render this new competition meaningless. Therefore, the Government should act to effect a transition from the current administration of the gTLDs to an environment in which the gTLDs' registries are operated on a nondiscriminatory, equal-access basis, so that competition among registrars can thrive on a level playing field, to the benefit of Internet users. To ensure the transition's effectiveness, NSF must request that NSI include in its final report pursuant to the Cooperative Agreement copies of all software and data generated pursuant to the Cooperative Agreement so that this material will be equally available to all competing registrars through the new managers of the gTLD registries.

Discussion

Currently, all Internet Domain Name System (DNS) functions, from Internet rulemaking to the registration of individual second-level domain (SLD) names, are performed on a monopoly basis. In advising the Working Group, the Antitrust Division has focused on the question of which of these DNS functions are true natural monopolies and which would be more efficiently provided in a market setting that allowed competition among multiple entities. The need for interoperability requires that some functions, such as rulemaking, the operation of the

[1]The legal advice contained in this memorandum is provided in connection with the deliberations of the interagency DNS working group. Consequently, it is expected that this memorandum is subject to both the attorney-client privilege and the deliberative process privilege and, as such, is exempt from disclosure pursuant to the Freedom of Information Act. See 5 U.S.C. § 552(b)(5).

root server, and the operation of the registry for each top level domain (TLD),[2] be performed on a centralized basis. It is clear, however, that registration services could be provided efficiently through market-based competition. A competitive environment, in which registrars could compete for the business of registrants on the basis not only of price, but also related value-added services, is necessary to prevent the arbitrary and exploitative conduct, as well as inefficiency and unresponsiveness, associated with monopoly power. *

Moreover, given the realities of the DNS today, only registrar-level competition is likely to be effective, at least in the near term. Eventually, new TLDs may establish a foothold as alternatives to the .com generic TLD for businesses that desire a presence on the Internet. The information gathered by the Working Group, however, suggests that this is extremely unlikely in the near term. The power of .com is such right now that it is implausible that businesses would risk becoming less visible or accessible on the Internet by switching to an upstart TLD, even in response to a significant increase in .com registration fees. Consequently, while the creation of new TLDs may hold out significant promise in the long term, as .com slowly succumbs to the lethargy that ultimately overtakes monopolists, in the near term, those new TLDs will not offer a competitive solution.

It is no criticism of the agencies that entered into the contracts that established the current DNS to say that those contracts created monopolists. Any Government contract or award that funds someone to do something new carries with it the possibility that the activity may overtake an existing market, or create an entirely new market of its own, in which the contractor or awardee has market power over customers. Given the experimental nature of such activities, this outcome will be rare. When it happens, however, as in the present instance, the Government must be alert to ensure that consumers and the economy are not harmed needlessly as the contractor or awardee moves out of the oversight of the Government. In particular, the Government needs to consider whether it has entrenched a monopolist, secure from competitive challenge, to the long-term detriment of consumers, or whether the market will bring about swift and effective competition.

Here, it seems clear that the market will not be able to provide competition for NSI in registration services without action by the Government. Once the Cooperative Agreement expires, NSI will be in sole control of the domains it had maintained as a contractor, with none of the explicit and implicit constraints imposed by Government oversight. It will be free to exercise its monopoly power at the expense of consumers, subject only to the possibility of

---

[2] A registry, as referred to here, maintains a TLD's zone files, which contain the name of each SLD in that TLD; each SLD name's corresponding IP number; and a pointer to each SLD's registrar. A registrar acts as an interface between domain-name holders and the registry, providing registration and value-added services. It submits to the registry zone file information and other data (including contact information) for each of its SLDs.

antitrust enforcement.[3] Even if NSI deigned to allow other firms to serve as registrars for the gTLDs, its control over the gTLD registries would allow it to act as a monopolist towards them, imposing costs that would ultimately be borne by Internet users.

Accordingly, before the Cooperative Agreement expires and the gTLDs managed by NSI irretrievably leave the Government's control, the Government should act to effect a transition from the current monopoly registration of SLD names in those gTLDs to a competitive, market-oriented system that, to the extent practicable, would not unfairly favor or handicap any particular registrar. The transition could be carried out pursuant to contracts, awarded in response to competitive bids, covering, among other things: (1) management, on a nondiscriminatory, equal-access basis, of shared TLD registries; (2) testing and implementation of shared registration systems, including the development and debugging of software ensuring orderly registration by multiple registrars in a single TLD;[4] (3) establishment of minimum technical and financial standards for registrars; and (4) evaluation of registrar applicants in accordance with those standards. The term of this transition should be no longer than necessary to guarantee that a technically viable system is in place to support competition in registration services.

NIST/NTIA future.

As noted above, the presence of even several registrars for a single gTLD will be competitively meaningless if the operator of the registry for that gTLD is itself an unconstrained monopolist that can dictate the terms on which registrars get access to the registry. Thus, as long as the Internet is not characterized by competition among TLDs, entities that operate the gTLD registries must conduct themselves in the manner of open, responsive and nondiscriminatory standard-setting bodies rather than as proprietary profit-maximizers. The transition should ensure that, upon its conclusion, whatever entities run the gTLD registries exhibit procedural safeguards that ensure that they will not be manipulated to serve the proprietary interests of a few at the expense of many. In addition, all transition contracts should provide unambiguously for access by all registrars to whatever software, databases, and interfaces the contractors create pursuant to the contract, where access to such material is essential in order to provide

---

[3]Even then, NSI can claim that it is only exercising monopoly power that was bestowed on it by the Government. While this argument would not be an iron-clad defense, especially against further acts to cement its power, it may well make NSI somewhat more impervious to antitrust challenge than the average monopolist.

[4]Most of the information gathered by the Working Group indicates that there are no insuperable technical obstacles to competitive registration, but it appears that the optimal software for such a system may not yet exist. A transition solicitation seems like the most effective means of ensuring that the software is developed. Absent a clear commitment to the establishment of a competitive shared-registry system, it is unlikely that anyone would invest substantial resources in developing such software.

registration services.[5]

Even with equal access to this information, opening up the .com gTLD to competition will not be a cure-all. As long as NSI is eligible to be a registrar for .com, and especially if it remains the registrar for its existing customers, it will have significant advantages over new rivals, in terms of both operating costs and in reputation.[6] Moreover, if NSI were to continue to manage any of the gTLD registries during or after the transition, its incentive to exploit these advantages would be even more problematic. If NSI contends that the interfaces with the gTLD registries it has maintained are proprietary, and refuses to give registrants access to those interfaces, or unfairly exploits its superior familiarity with them, competition will be stillborn. Whoever controls the registry, new registrants will need access to enough of the registry databases NSI has maintained to enable them to contact registrants to offer their services. Over time, rivals may innovate, developing faster, more reliable registration or billing software, providing better service, or creating new products or services to offer registrants along with mere Internet registration. This can happen only by leveling the playing field -- by ensuring that new registrants have registry access that is equal to what NSI enjoys.

The Government can ensure that this happens. Pursuant to the Cooperative Agreement between NSF and NSI, NSF has the right to require NSI to include in its final report "a copy and documentation of any and all software and data generated" pursuant to the Cooperative Agreement "in such form and sufficient detail as to permit replication of the work by a reasonably knowledgeable party or organization." In other words, the Cooperative Agreement contemplates its own termination, the assumption of NSI's work under the Agreement by someone else, and that NSI will give NSF the information, including software and data, necessary to continue the work elsewhere. It is inconceivable that a new registry operator and new registrars could function without access to this information. Thus, until the Government is able to convey this information to others, there will not be competition in gTLD registration.

NSI, however, is not required to submit the software and data unless requested to do so

[5]It would be most efficient for the contracts to provide registrars with royalty-free access to such materials. However, royalties would not necessarily be objectionable if they were nondiscriminatory, sufficiently low so as not to present an entry barrier to otherwise financially qualified registrars, and not saddled with other potentially anticompetitive requirements akin to tying agreements. Still, the difficulty of evaluating such licensing terms may make it preferable simply to negotiate dedication of any intellectual property developed pursuant to these contracts to the public domain.

[6]This advantage could be even greater if NSI were to win the transition contract to manage the TLD registries. This points up the importance of ensuring that the TLD manager acts on a nondiscriminatory basis that ensures equal access to all qualified registars.

Privileged and ~~Confidential~~
Deliberative Attorney-Client Communication

by NSF, and we understand that it has sent somewhat mixed signals about its willingness to do so absent such a request. Further, NSF itself has indicated some reluctance to make the request -- or at least to assure the Working Group that it would make that request. A failure to make the request at the conclusion of the Cooperative Agreement will leave NSI in sole control of the information that is critical to bringing about competition in gTLD registration, and will render futile the Government's efforts to launch the DNS into the private sector in a state that will reflect robustness, efficiency and dynamism. NSF must make this request, with a view towards providing the requested material to whatever entities manage the gTLD registries pursuant to the transition, so that they may, in turn, offer equal access to the competing registrars.