TECHNOLOGY POLICY INSTITUTE

Studying the Global Information Economy

Comments to ICANN on Government Advisory Committee Beijing Communiqué
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This is in response to ICANN's request for comments on the Government Advisory Committee (GAC) Beijing Communiqué of 11 April 2013. The GAC Communiqué recommends that ICANN implement a range of regulations (which the GAC calls "safeguards") for all new generic top-level domains (gTLDs) covering areas ranging from malware to piracy to trademark and copyright infringement. The GAC proposes specific safeguards for regulated and professional sectors covering areas as diverse as privacy and security, consumer protection, fair lending and organic farming. Finally, the GAC proposes a "public interest" requirement for approval of new "exclusive registry access" gTLDs.

The GAC's recommendations raise complex issues of ICANN's mission and governance and how they relate to the laws of the jurisdictions in which the registries operate. Without getting into the details of the specific recommendations, the expansion of ICANN's role implicit in the GAC's recommendations is inconsistent with ICANN's policy of opening entry into the domain space. Opening entry into the domain name space is intended to bring the benefits of competition and greater innovation to the market for TLDs. A major benefit of a competitive market is that there is generally no need for regulation of product attributes, as the GAC is proposing. Indeed, regulation of such a market will be counterproductive to the interests of consumers.

In a competitive gTLD market, registries can be expected to provide the services their customers demand. Registries that provide those services will flourish, and those who do not will not survive. Importantly, a competitive gTLD market allows for a range of services corresponding to different preferences and needs. The type of regulation the GAC is recommending will raise costs to registries and impede the development of innovative new TLD services, ultimately harming consumers. The value of gTLDs as economic assets and the benefits of the new gTLD program will be diminished.

Included in the GAC Communiqué is the recommendation that exclusive access or closed registries for generic terms should be in the "public interest." A public interest standard is vague and difficult to define and therefore is susceptible to being applied in an arbitrary manner. As I indicated in March 6, 2013, comments to ICANN on the subject, a major benefit of the new gTLD program, in addition to providing competition to incumbents, is the ability of the entrants to develop new business models, products, and services. Valuable innovations are likely to be blocked if ICANN attaches a public interest requirement to exclusive access registries.

There may be instances where regulation is warranted. For example, the protection of intellectual property in domain names has become a major issue, particularly in connection with the introduction of new gTLDs.[1] ICANN's trademark clearing house is an attempt to address

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[1] See Thomas M. Lenard and Lawrence J. White, "Improving ICANN's governance and accountability: A policy proposal," Information Economics and Policy (2011).

that issue. There may be other areas where regulation is warranted, but it is unclear whether ICANN is the appropriate venue.

If ICANN wants to be more of a regulatory agency, it should adopt good regulatory policy practices. Specifically, ICANN should demonstrate that there is a significant market failure that is addressed by the proposed regulation (or safeguard), that the benefits of the regulation are likely to be greater than the costs, and that the proposal is the most cost-effective one available.

It is preferable, however, for ICANN to minimize its regulatory role. ICANN should hew closely to the technical functions involved in administering the Domain Name System—i.e., coordinating the allocation of IP addresses, managing the DNS root, and ensuring the stability of the DNS. This has historically been ICANN's essential mission and should continue to be so.