Welcome to the New Internet
The Great gTLD Experiment

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“The Internet will be changed forever. We’re standing at the cusp of a new era in online innovation.”
Rod Beckstrom, CEO of ICANN, (2009-12)

“For the wise man looks into space and he knows there is no limited dimension.”
Lau Tzu

This article builds on a vast collection of knowledge acquired from experienced internet governance individuals, including Internet Corporation for Assigned Names and Numbers (ICANN) stakeholders and top level domain in-house counsel, to act as a substantial footnote for historical reference while remaining a forward-looking article to direct the future policy of top level domain expansion. Using the New Haven Approach, various stakeholders and their conflicting views are analyzed, from commercial interests such as Google and Amazon, to ICANN’s educational and policy-oriented Non-Commercial Stakeholders Group, as are the current policies and procedures around the application and assignment process for generic top level domains (gTLDs). The world has never seen an opportunity to use the internet in this expansive way, and this article focuses on today in order to look backwards at the internet’s successes, such as the .gov and .edu domains, as well as its failures, explaining failed gTLDs such as .travel and the problem with the .com monopoly, while at the same time looking forward at what this gTLD expansion means for the future of the internet.

This summer, an ICANN meeting in Africa discussed problems with the Amazon trademark and the impact on the Amazon region if .amazon were to


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become a gTLD. Using the well-defined term ‘critical internet resources,’ this article draws a comparison to limited natural resources and the United States Supreme Court case of Wyoming v. Colorado, a departure from English common law, which stated that the first party to put resources to a beneficial use is the rightful owner of those resources. Here, it would be the Multinational Corporation Amazon, and any issue with the general public identifying Amazon as the commercial entity prior to the geographic region has already been harmed by the use of a second level domain, amazon.com.

In an effort to both look ahead to shape policy and act as an article about the present, the massive gTLD applicant Donuts, Inc. is discussed as part of identifying the problem with allowing one applicant to apply for as many gTLDs as they want—which in the case of Donuts was over three hundred. As a policy solution, this article advocates for limiting ownership of gTLDs to only one per commercial entity, conserving these critical internet resources, while forcing applicants to act carefully when applying for a gTLD.

Keywords: Internet Regulation, Domain Name Governance, Electronic Commerce, International Law of Telecommunication, generic Top Level Domains, Cyber Law

INTRODUCTION

The internet\(^2\) is so vast and complex—with so much still unknown—that it has been compared to the Universe.\(^3\) However, when it comes to the unlimited dimensions of space and the technical constraints on the internet, the analogue ends. The internet as it is now known may seem to be without beginning or end, but constraints from the physical world, including the internet’s reliance on physical hardware\(^4\) and the known and limited concept

\(^2\)Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997) (explaining “the internet” and describing it for the first time in a United States Supreme Court opinion). “The Internet is an international network of interconnected computers.” \textit{Id.}

\(^3\)Roy Balleste, \textit{The Internet Governance Forum & Technology: A Matter of Human Development}, 7 \textit{Loy. L. & Tech. Ann.} 37 (2007). See generally supra note 2 at, 844, 851 (calling the internet a “unique medium” and using the term “cyberspace”). “[The Universe] is a place that offers us experiences similar to those found in the present development of Internet technologies.” \textit{Id.} “‘Cyberspace’ . . . [is] located in no particular geographical location but available to anyone, anywhere in the world, with access to the internet.” \textit{Id.}, at 851.

of language, prove the internet to be much smaller than the infiniteness of the Universe. Some of these physical and technical constraints on the internet keeping it grounded in the world of the physical have been dubbed “critical internet resources.” One such constraint is the limited number of generic Top-Level Domains (“gTLDs”), the last part of a web address after the period.

The internet developed from a project of the United States Department of Defense in the late 1960s, linking computers at research and educational institutions across the United States and several North Atlantic Treaty Organization member-countries. Initially a private network, the internet exploded with activity the early 1990’s when the Scientific and Advanced Technology Act of 1992 opened internet access to the public, allowing commercial activity. On January 12, 2012, the start of another potential internet explosion occurred when the Internet Corporation for Assigned Names and Numbers (“ICANN”) opened up a whole new frontier by

5. Mueller relates critical internet resources to “name and number resources,” that “provide . . . one of the few points of global leverage over the operation of the internet . . . .” Id.

6. Report of the Working Group on Internet Governance, (June 2005), ¶ 13, available at http://www.wgig.org/docs/WGIGREPORT.pdf [hereinafter Report of the Working Group]; Milton Mueller, supra note 4, at. 215 (discussing the origin of “the term critical Internet resources”); Roy Balleste, Persuasions and Exhortations: Acknowledging Internet Governance and Human Dignity for All, 38 Syracuse J. Int’l L. & Com. 227, 227 (2011) [hereinafter Persuasions and Exhortations]. “[C]ritical Internet resources. . . include . . . administration of the domain name system and Internet protocol addresses (IP addresses), administration of the root server system, technical standards, peering and interconnection, telecommunications infrastructure, including innovative and convergent technologies, as well as multilingualization.” Report of the Working Group, supra note 6. The Report stated that the policy behind top-level domain expansion needed to be developed and had a “significant impact on key issues, such as the equitable distribution of resources, access for all and multilingualism.” Id. at ¶ 21. The topic of Internet Governance includes the allocation of these critical internet resources, which includes not only the creation, but management of TLDs. Roy Balleste, supra note 6.

7. Gary Schneider, Electronic Commerce 67 (9th ed. 2011). “The rightmost part of a domain name is called a top-level domain . . . .” Id.


10. Alexandra Paslawsky, supra note 8, at. 1493-94. “This allowed for the privatization of the Internet and resulted in its extensive development.” Id.
accepting applications for gTLDs, giving rights to any applicant to stake a claim to a part of this vast, yet finite, area of the internet.\footnote{ICANN, New gTLDs: What to Expect in 2012, available at http://newgtlds.icann.org/en/announcements-and-media/announcement-23jan12-en (last visited Apr. 9, 2013).}

ICANN has always been faced with the question of when, how, and under what circumstances gTLDs would be added,\footnote{Jonathan Weinberg, ICANN, “Internet Stability,” and the New Top Level Domains, in Communications Policy and Information Technology: Promises, Problems, Prospects 3, 11 (Lorrie Faith Cranor & Shane Greenstein eds., 2002) (arguing that expansion of gTLDs would increase competition and eliminate the existing problems relating to a small number of available gTLDs).} as it is the sole entity responsible for performing this and other technical functions of the internet.\footnote{Milton Mueller, supra note 4, at 62. “These functions include allocating IP address blocks, editing the root zone file, and coordinating the assignment of unique protocol numbers.” Id. (citing ICANN/U.S. Government Contract for Performance of the IANA Function, Section C.2 (contractor requirements), Aug. 14, 2006, available at http://www.icann.org/en/about/agreements/iana/iana-contract-14aug06-en.pdf).} At the beginning of the 2012 expansion, ICANN stated it did not know how many applications it would receive,\footnote{ICANN, Frequently Asked Questions, available at http://newgtlds.icann.org/en/applicants/customer-service/faq/faq-en (last visited Apr. 9, 2013) “There is no way of knowing the exact number of applications ICANN will receive nor how many of these applications will qualify to become gTLD registries.” Id.} but initial expectations were that between 300 and 1000 new gTLDs would be created as a result.\footnote{New Top-Level Domains Approved by ICANN, CIRCLE ID, available at http://newgtlds.icann.org/en/announcements-and-media/announcement-23jan12-en (last visited June 19, 2011, 9:09 PM).} These figures were exceeded when, on June 13, 2012, ICANN revealed the number of gTLD applications—1930—and their applicants.\footnote{See Press Release: New gTLD Reveal Day: Applied-for Strings, ICANN, available at http://www.icann.org/en/news/announcements/announcement-13jun12-en.htm (last visited June 13, 2013).} This figure could be called shocking when compared to the number of gTLDs—22—that were available at the time.\footnote{Christina Warren, 9 Things you Need to Know about ICANN’s New Top Level Domains, MASHABLE, available at http://mashable.com/2011/06/20/new-gtld-faq/ (last visited July 20, 2011). “Historically, only 22 general use-approved TLDs . . . have existed across the web.” Id.}
The large number of applications resulted in another problem, but a problem ICANN was prepared to address. Of these 1930 applications, 751 applicants applied for 230 gTLDs. The four most popular gTLD strings, with ten or more applicants each, were .APP, .HOME, .INC, and .ART. With all things in the application process equal, applicants will either resolve the conflict themselves, or an auction will take place and the TLD will go to the highest bidder.

This problem helps explain the solution this paper suggests; in limiting applicants to a very limited number of gTLD strings rather than continuing to operate under polices that allow one applicant to apply for more than 300 gTLDs, there will be fewer conflicts, and organizations applying for TLDs will be more thoughtful in deciding the gTLD for which they apply. This policy allows significant competition even with more limited, slower expansion, with the benefits that come with carefully manicured gardens opposed to sprawling overgrown acres, to bring in a repeated real property analogue to the gTLD discussion. Additional benefits under the proposed solution are that the domains will receive a lot more attention and there will be more gTLD resources available to others now and in the future—conserving critical internet resources. This will preserve the intent behind TLDs and the idea that “administrators are performing a public service on behalf of the Internet community.”

18. Id. The article explains how, if two applicants apply for the same domain and neither has completed the process, the claim is resolved. Id. “The applicants will be given points in four different categories. The applicant that amasses the most points, based on this set of criteria, will win the domain. In the even of a tie in points, an auction will take place and the TLD will go to the highest bidder.”


20. Quick Facts, (listing the seventeen most contested strings, including .BOOK, .CLOUD, .MAIL, .NEWS, and .WEB, all with at least seven different applicants each.).

21. Supra note 17.


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This article examines the impact of these gTLD applications on critical internet resources and how the policy behind the release of new gTLDs has developed over time based on input from the various players within the ICANN community. Part II begins with an overview of the stakeholders who influence and effect policy and an analysis of their positions, including Multinational Corporations (MNCs), Internet Users in developing countries, the Noncommercial Stakeholders Group (NCSG), and ICANN’s newly formed Independent Objector (IO) position. Part III discusses the .AMAZON gTLD and why trademarks are an issue when applied on a global scale, while part IV touches on the past trends in the gTLD namespace and how the other gTLD registries continue to have difficulty moving registrant market share away from the .COM gTLD. Part V analyzes the largest applicant, Donuts Inc., including a brief history of the company and who they are, before the article recommends a moratorium on any further gTLD applications until this great experiment has concluded in part VI, with the investor-applicants as guinea pigs for the future of the internet. This article concludes in part VII by applauding ICANN for moving forward with the TLD expansion, acknowledging no policy is perfect, while hoping to appeal to stakeholders to consider the suggestions within the paper and their positive policy implications for the future of the internet and access for all.

THE STAKEHOLDERS, FOR WHOM ICANN SERVES

According to ICANN, “the new gTLD program will open up the top level of the Internet’s namespace to foster diversity, encourage competition, and


“The Internet is a transformative technology that will . . . facilitate trade and commerce . . . .” AFFIRMATION OF COMMITMENTS, id.

24. See discussion infra, at. 44-7.
25. See discussion infra, at. 47-53.
26. See discussion infra, at. 53-6.
27. See discussion infra, at. 56-8.
29. See discussion infra, at. 62-4.
30. See discussion infra, at. 65-7.
31. See discussion infra, at. 67-9.
32. See discussion infra, at. 69-71.
enhance the utility of the DNS [Domain Name System].” The stakeholders involved in making this decision moved slowly at first, but then the decision to open up applications was made with only an entity’s finances standing in the way of applying for as many gTLDs as they wanted—applications were $185,000 per applied-for gTLD, with some MNCs applying for dozens. This is an important part of the experiment—whether these large MNCs will be able to profit off of this new use of the internet ICANN has helped structure, what MNCs might do with their new property, and what that means for the future of the internet. Ownership of a gTLD comes with the


34. ICANN, About the Program: ICANN New gTLDs, available at http://newgtlds.icann.org/en/about/program (last visited Apr. 14, 2013) (listing stakeholders whose concerns were addressed during the policy development process, including governments, civil society, businesses, intellectual property stakeholders, and technologists).

35. Id. “In 2005, ICANN . . . began a policy development process to consider the introduction of new gTLDs, based on the results of the trial rounds conducted in 2000 and 2003.” Id. It was not until 2008 that ICANN adopted nineteen recommended policies for the implementation of the new gTLD program. Id. The gTLD Applicant Guidebook was approved in June of 2011. Id.

36. ICANN, Benefits and Risks of Operating a New gTLD: ICANN New gTLDs, available at http://newgtlds.icann.org/en/about/benefits-risks (last visited Apr. 14, 2013) (describing the risk involved in applying for a gTLD, including loss of some or all of the $185,000 application fee if the applied-for gTLD does not pass the evaluation process). See also About the Program, supra note 34. “There are roughly two dozen [gTLDs] now, but soon, there could be hundreds.” Id.


40. See Pepitone supra note 1 and accompanying text. “The internet will be changed forever.”
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potential to wield great power, and the application list has shown a number of already powerful players attempting to wield this power.

**Multinational Corporations**

Multinational corporations have increasingly utilized the internet for profit because, as stated by United States Supreme Court Justice John Paul Stevens as early as 1997, the internet “constitutes a vast platform from which to address and hear from a worldwide audience of millions of . . . buyers.”

One of the biggest online players is Google Inc. Google applied for 101 gTLDs, including non-ASCII character TLDs as well as such generic and potentially profitable terms as .APP and .MOVIE.

Google isn’t the only major MNC throwing its weight around the gTLD namespace. Amazon.com, Inc. (“Amazon”) applied for the third most gTLDs of all applicants, with seventy-six. Of these, more than twenty were also applied for by Google, leading to a direct conflict between two major players.

41. **Milton L. Mueller**, *Ruling the Root: Internet Governance and the Taming of Cyberspace* 42 (First MIT Press Paperback ed. 2004) [hereinafter Ruling the Root]. When an organization is assigned a TLD, “that organization gains the exclusive authority to coordinate the assignment of second-level domain names under that top-level domain.”


43. Supra note 2 at, 844, 853.

44. See David A. Vise and Mark Malseed, *The Google Story: Inside the Hottest Business, Media and Technology Success of Our Time* 179 (Updated ed. 2008) (quoting Newsweek as stating Google’s initial public offering was “the century’s most anticipated IPO”); see also Matt McGee, *FairSearch Objects To Google’s “Top-Domain Name Land Grab”*, Marketing Land, available at http://marketingland.com/fairsearch-objects-to-googles-top-domain-name-land-grab-36653 (last visited Mar. 19, 2013, 3:01 PM) (quoting the FairSearch objection which states that Google has an overwhelming share of both the US and European search markets, with seventy-nine percent of the U.S. market, and ninety percent of the European market. “Google’s remarkable financial performance, revealed in its IPO filing, stunned analysts, competitors, and investors.”) Vise, id. “In the first half of 2004, the company recorded sales of $1.4 billion and profits of $143 million . . .”


46. Stephen Shankland, supra note 38.
of the largest online corporations. Under current ICANN rules, this leads to either a bidding war at auction or a negotiated agreement between the parties resulting in one paying the other directly for the uncontested rights to the domain. Ideally, this leads to the highest and best use of the domain, as the entity paying the most for the gTLD will seek a return on its investment and will only pay as much as is reasonable under those circumstances. The highest and best use would be one that pulls registrants away from .COM, and in doing so would give internet users another choice, while profiting the registry making the best use—biggest financial gain—out of the gTLD. This is capitalism in practice. However, some of the concerns with the highest and best use are what MNCs will do with the gTLDs they operate.

ICANN stated that the goal of the new gTLD expansion included “enhancing competition and consumer choice, and enabling the benefit of innovation.”

While Google’s investment nears twenty million dollars in application fees alone, any potential success with the program is speculative. Opponents


49. Ill. Pattern Jury Instr.-Civ. 300.84. A typical instruction, the Illinois Pattern Jury Instruction defines highest and best use as “use which would give the property its highest cash market value.” Id.


51. ICANN, supra note 34.

52. Paul Sloan, supra note 37. (stating Google spent $18.7 million in application fees for gTLDs).

53. See Stephen Shankland, supra note 38. See generally Milton Mueller, supra note 41. “The dirty little secret . . . is that domain names are not nearly as valuable or as important as the new institutional regime would like to pretend they are.”; Internet Governance Forum, IGF 2012: Managing Critical Internet Resources Main Session, available at http://www.intgovforum.org/cms/component/content/article/114-preparatory-process/1250-igf-r2012-management-of-critical-internet-resources-main-session (last visited Nov. 7, 2012) (statement of Parminder Jeet Singh) [hereinafter IGF 2012]. Participant
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to Google’s applications, including the Microsoft Corporation,\textsuperscript{54} criticize the policy behind ICANN allowing “closed” gTLDs—gTLDs that would include second level domains (“SLDs”) used solely by the owner of the gTLD.\textsuperscript{55} An example of a SLD and TLD would be GOOGLE.COM, the GOOGLE name being the SLD within the gTLD .COM. With a closed-type gTLD, both the registrar\textsuperscript{57} and gTLD registry would be operated by the same entity, wielding the power to restrict the ability of anyone outside the gTLD operator to register any SLDs within that domain.\textsuperscript{58}

The words “restrict” and “closed” implicate a concern addressed at the first Internet Governance Forum meeting, “openness.”\textsuperscript{59} The broader

Parminder Jeet Singh disagreed with Mueller, saying there is a competitive advantage to owning a closed gTLD. \textit{Id}. While Mueller was speaking about domain names generally and how they are “overrated,” this would be analogous to an argument that gTLDs are equally overrated for their specific name, and the value comes with the ability to assign SLDs. Mueller, \textit{supra} note 41.

Microsoft, \textit{supra} note 50. “[Closed gTLDs] threaten . . . the openness and freedom of the internet and could have harmful consequences for internet users worldwide.”

ICANN, “Closed Generic” gTLD Applications, available at http://www.icann.org/en/news/public-comment/closed-generic-05feb13-en.htm (last visited Apr. 19, 2013). A closed gTLD is “a TLD string that is a generic term and is proposed to be operated by a participant exclusively for its own benefit.” \textit{Id}.

Michele Neylon, \textit{5 Reasons Why Closed Generic New gTLDs Should Be Opposed}, CircleID, available at http://www.circleid.com/posts/20130224_5_reasons_why_closed_generic_new_gtlds_should_be_opposed/ (last visited Feb. 24, 2013, 8:44 PM), (listing five reasons why closed generics are a bad idea).

See ICANN, Registrar Accreditation Agreement, available at http://www.icann.org/en/resources/registrars/raa/ra-agreement-21may09-en.htm#1 (last visited Apr. 21 2013) (defining such terms as ‘registrar’). “The word ‘registrar’ . . . refers to a person or entity that contracts with Registered Name Holders and with a Registry Operator and collects registration data about the Registered Name Holders and submits registration information for entry in the Registry Database.” \textit{Id}.

Michelle Quinn, ICANN’s debating what’s in a domain name, POLITICO available at http://www.politico.com/story/2013/02/icanns-debating-whats-in-a-domain-name-87816.html (last visited Feb. 22, 2013 4:41 AM) (explaining that under a closed gTLD, operators of the TLD will not allow others to purchase SLDs).


Some speakers called on governments to enable free access of information on the Internet. They drew a parallel to libraries: governments bought books
concepts at the openness session apply to a MNC operating a closed gTLD, even though the specific openness dialogue was initially narrowly tailored to address the concerns of copyright protected content and the balance between that protection and access to knowledge. However, the private sector was specifically addressed at this early meeting in regard to market forces and their impact on human rights. The policy of allowing hundreds of gTLDs to go to the highest bidder prior to developing countries joining in the application process or having a meaningful say in the development of these policies due to underrepresentation is problematic. Some of these gTLDs could do well serving these developing countries, and this mass application further closes off a vital part of the internet from these users.

**INTERNET USERS IN DEVELOPING COUNTRIES AND PAST SUCCESSFUL gTLDs**

For the internet user in developing countries, access is far more limited than it is for those in fully developed countries. This limited access equates for citizen to allow them to gain access to information and knowledge. Should governments do the same with the Internet and remunerate the creators and owners of content?

_Id_.

60. _Id._

61. _Id._

62. *See Internet Governance Forum, Seventh Meeting of the Internet Governance Forum (IGF) Baku, Azerbaijan, available at* http://www.intgovforum.org/cms/Substantive_1st_IGF/Summary.Final.07.11.2006.doc, at 15. “The inclusion of developing countries in the debate was stressed throughout the session. Oftentimes in this new policy domain laws or regulations established in more developed countries or regions can affect other countries.” _Id._


64. Roy Balleste, _supra_ note 63, at. 23 (discussing the “digital divide” between developed and undeveloped countries).
to less representation on the international scale when it comes to internet governance, which in turn has led to a weaker voice within ICANN and the giants that represent MNCs and other intellectual property holders. Concerns over access in the future surround the criticism of Google and their plans to operate its gTLDs in essentially whatever way they see fit.  

Google has lambasted these gTLD critics—ironically for a corporation owning such a large portion of the online search market share—stating that its goal in operating the applied-for gTLDs is to increase competition. With the resources to make an effort at driving registrants away from .COM, this is a lofty, although achievable goal. In its public comment responding to criticism of closed gTLDs, Google cited to successes it saw in the gTLD arena, showing how, based on these successes, internet users are given increased choices.

The applause Google heaps on the few successful gTLDs outside of .COM is warranted and is the perfect example to use when railing against such gTLD uses that Google, and even many gTLD applicants, propose. The gTLDs .CAT and .EDU were specifically mentioned by Google as providing users with unique and trusted spaces. The user speaking the Catalan language now has a place dedicated to her community online and

65. See generally Microsoft, supra note 50 (analyzing the drawbacks to closed gTLDs, both as to the applications from Google and generally).
67. See Google, Re: Public Comment on Closed Generic Top Level Domains by Google Inc., available at http://forum.icann.org/lists/comments-closed-generic-05feb13/pdfVMmmFgwpbw.pdf; see also J. Postel, New Registries and the Delegation of International Top Level Domains, Internet-Draft, (June 1996) available at http://tools.ietf.org/html/draft-postel-iana-itld-admin-01 (proposing a policy and procedure for assignment of TLDs)/ “It is not, however, undesirable to have diversity in the top-level domain space, and in fact, positive market forces dictate that this diversity, obtained through free competition, is the best means available to insure quality service to end-users and customers.” Id.
69. Google, supra note 67.
70. Id.
can benefit from being a part of that community. Additionally, the .EDU gTLD allows internet patrons visiting a SLD within the .EDU TLD to feel secure, knowing they are accessing an approved educational institution and the information they are receiving is inherently more reliable than other, open gTLDs.

The flaw in mentioning these current successful gTLDs, as well as .MIL and .GOV, to prove the point that innovation is possible based on the successes of other gTLDs, is that Google can only name successful gTLDs that serve to benefit the public good in a non-commercial way. The public or subsets of the public have adopted these gTLDs to drive SLD registrations away from .COM because they speak directly to the communities they represent—and were the only ones doing so at the time, acting as mini-monopolies. All these uses are completely contra to the uses Google will operate the majority of its gTLDs, which, like all businesses, want to see a return on their investment. In its initial applications for such common words as .PLAY, .SEARCH, .TALK, and .HANGOUT, Google stated it would operate the gTLDs for Google use only.

Unlike such generic, profit-centric words operating under a closed gTLD system, the public benefits greatly through the use of Google’s cited gTLDs. This effectively worked against what Google was hoping when citing these successful gTLDs up in its position paper. Google mentioned these gTLDs to show that there were successful gTLDs outside the .COM giant, which gained the attention of the public or community it served, and thrived. However, Google is not on a humanitarian mission to help authors with its

72. See Educase, About Educase, available at http://www.educause.edu/about (last visited Apr. 16, 2013). “Membership is open to U.S. and international institutions of higher education, corporations serving the higher education information technology market, and other related associations and organizations.” Id.  
73. Google, supra note 68.  
74. Brad Moon, Google: Has the ‘Don’t Be Evil’ Company Lost its Mojo?, INVESTORPLACE, available at http://investorplace.com/2013/04/google-has-the-dont-be-evil-company-lost-its-mojo/ (last visited Apr. 19, 2013, 9:51 AM) (stating that, while Google may want to diversify into other areas outside of its online advertising, everything revolves around increasing revenues).  
75. Paul Sloan, supra note 37 (listing some of Google’s open, restricted, and closed gTLD applications in an infographic).
.BOOK gTLD nor will it likely endeavor to increase e-mail security with .MAIL—given the fact that Google shares much of its Gmail e-mail with the United States Government. All this taken together cuts against arguing for Google as the perfect candidate to run a host of new gTLDs.

Of the gTLDs cited, Google first lists the restricted .CAT gTLD, which serves the Catalan linguistic and cultural community. This is a cultural group with their own needs outside of a country code TLD (ccTLD) due to their unique geographic placement. The geographic distribution of those who speak this language made it ill-suited for a country code gTLD, so this brought together members of a common culture, who are far apart geographically, and gave them the ability to interact in cyberspace. This strengthens this community, and even gives commercial interests the ability to serve this group. It is a win for both the community and commercial interests hoping to target this unique demographic.

The next successful gTLD Google mentions is .EDU, which serves educational and related institutions—which are of paramount importance to society. The ability for a parent to know the website they are on is devoted to educational purposes is certainly of value, as is knowing that a website is educational when glancing over a child’s shoulder. This serves the entire world by giving a place for educational institutions to inhabit.

The final gTLDs this article will mention from the Google position paper


78. See id. “Catalan . . . is spoken in three adminsitratives [sic] divisions of Spain (and partly in a fourth), another in France and just one in Italy, as well as being the sole official language of a country, Andorra.” Id.

79. See Educase, About Educause, available at http://www.educause.edu/about (last visited Apr. 16, 2013). See generally Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, ¶ 62, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue) [hereinafter Special Rapporteur] (“[T]he internet is an important educational tool, as it provides access to a vast and expanding source of knowledge . . . .”)
are .MIL and .GOV. These gTLDs serve the United States Military and United States federal, state, and local governments, respectively. Similar to the sound policy behind the educational gTLD, it is important for the Military to have a designated gTLD to run, if only for security reasons, while the ability for governments to reliably connect and interact with their constituents is valuable, but not to be overshadowed by the additional value of their constituents having oversight and transparency in their government. This interaction between the two parties is made easier by a reputable, accessible, dedicated TLD.

There is no such analogue to these success stories with the flood to the commercial market we now see, even more so with such generics as noted above—.PLAY does not serve any community or address any need or benefit to the public. It could serve children or youth, which could just as easily be served by .FUN or .KIDS. This article suggests there is no community that wishes to be served solely for the profit of a MNC, or alternatively, due to the flood of gTLDs on the market, there is no mini-monopoly power to keep these communities, such as the Catalan language and cultural community, from splintering into gTLD failure.

These examples write themselves, especially with ICANN deciding that plural and singular words are not confusingly similar. In theory, this would allow all the following potentially youth-related gTLDs: .KID, .KIDS, .PLAY, and .PLAYS. This is not the same as tying to move government entities to .GOV when it was the only one competing for registrations, or in the case of .CAT, the only entity vying for members of the Catalan linguistic and cultural community to come to one place on the web.

This fierce competition could result in success for some, but given the large number of past failures it is unlikely. Other gTLDs have started in the past and failed to drive away registrants from .COM, even when they seem to have amazing potential. For example, the state of Florida has a .TRAVEL gTLD—FLORIDA.TRAVEL—but it is used solely to redirect traffic to their site within the .COM TLD. While it would seem that .TRAVEL would be


82. See http://www.florida.travel/
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a financially lucrative holding for a company in an age where the world is so small that visits to faraway places are readily available by plane and research into exotic and desirable locations can be done from the comfort of one’s home, this is not so. Google’s gTLD plans are unclear and changing with great frequency. With Google’s history of investing in critical areas and innovating in the online space, watching its policies appear and evolve over time should be interesting, if not scary.

It is hard to imagine how closed gTLDs will enhance consumer choice, but on another level the goal of the gTLD expansion included the addition of internationalized domain name (“IDN”) gTLDs. These non-ASCII character set gTLDs will be the first to launch, an interesting development to watch as the MNCs fight over potentially financially lucrative ASCII gTLDs. Once an applicant is assigned a gTLD the process begins—and

84. Michele Neylon, Google Does the Right Thing Opening Several Closed Generic TLD Applications, CircleID available at http://www.circleid.com/posts/20130410_google_does_right_thing_opening_several_closed_generic_tld_apps/ (last visited Apr. 10, 2013, 11:03 AM) (stating that Google planned to change the use of some of their applied-for gTLDs to be “more open and inclusive”).
85. See generally Ingrid Lunden, Meet Genesis Angels, A New $100M Fund For AI And Robotics, Co-Founded By Investor Kenges Rakishev And Chaired By Israel’s Ex-PM, TechCRUNCH, available at http://techcrunch.com/2013/04/19/meet-genesis-angels-a-new-100m-fund-for-ai-and-robotics-from-investor-kenges-rakishev-and-led-by-israel-ex-pm/ (last visited Apr. 19, 2013). “Google is not afraid to make big investments, [CEO Larry Page] said, because the fear is that if it doesn’t it may miss out on the next big thing.” Id. (citing Drew Olanoff, Larry Page: Google’s Focus On Constant Iteration Will Shift Toward Big Bets Like Google Fiber And Glass, TechCRUNCH (Apr. 18, 2013), available at http://techcrunch.com/2013/04/18/larry-page-its-important-for-google-to-focus-on-future-big-bets-not-just-incremental-changes/).
86. But see Brad Moon, supra note 74. Moon argues that, while Google is still highly regarded as an innovator, the company’s current trend in innovating is over and it currently buys innovative companies, which “isn’t the same as being innovative.” Id.
87. ICANN, supra note 34.
during the ten year contract period ICANN and the stakeholders should watch the successes and failures very closely, allowing for a meaningful policy for the next round.  

**Noncommercial Stakeholders Group**

Another major player in the formation of gTLD policy, but with no commercial stake in the policy development, is the NCSG.\(^{90}\) The NCSG, comprised of the Noncommercial Users Constituency (NCUC) and Not-For Profit Operational Concerns Constituency (NPOC),\(^{91}\) represent Civil Society organizations within ICANN.\(^{92}\) “Civil Society represents the ability of society in general to help mold the utility of the Internet as a technology.”\(^{93}\) While not the official position of the NCSG, a comment of its members dated March 2013 was made public to address the complaints lodged against gTLDs and whether the operation of closed gTLDs should be allowed.\(^{94}\)

The NCSG seemed to echo the comments of both ICANN and Google, in that closed generics “represent an additional option in the marketplace, a different type of platform, not a restriction of [consumer]...

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89. _IGF 2012, supra_ note 53. Participant Milton Mueller discusses the ICANN gTLD policy development that occurred over a six year period, and the policy concerns such as trademark rights, free expression, who should own or control geographic or country code gTLD names, and what restrictions or requirements to place on those who operate them. *Id.*

90. *Comments of NCSG Members* on ‘Closed generic’ TLD applications, available at https://docs.google.com/document/d/1tPuEELJ2y6-d0hwF_q7Upq60V50EFpkwMwLAdPZf0/mobilebasic?pli=1 [hereinafter *NSCG Comment*] “As NCSG stakeholders, our position is driven neither by paying clients nor an interest in the success of specific applications. It is based on a principled commitment to the ‘permissionless [sic]’ innovation that has made the Internet a source of creativity and growth.” *Id.*


92. Roy Balleste, _supra_ note 3, at 50 “This participatory category is composed of the Media, NGOs, Youth, Gender, Volunteers, Cities and Local Authorities, trade unions; indigenous people; education academia and research, the science and technology community, networks and coalitions; multi-stakeholder partnerships, philanthropic institutions, Think Tanks and people with disabilities.” *Id.*

93. *Id.*

94. *NSCG Comment, supra* note 90. (stating, under the heading “conclusion,” the questions to which the comment was specifically addressed).
choice.” This statement seemed to stand for the position that market forces will solve any problems better than out front restrictions from ICANN. Wary of the .COM monopoly, the NCSG stated that if some monopoly power did arise, action could then be taken to restrict that power.

The NCSG takes a similar “wait and see” approach as is advocated by this article, in that the ICANN process has done what it could in shaping a meaningful policy, and that moving forward is reasonable at this point in time. Analyzing the potential market impact gTLDs will have, the NCSG comment cites “an economic interest” in operating an open gTLD that becomes popular to take advantage of the influx of registrations—registrations that renew every year and provide a healthy influx of annual capital. The NCSG are wise to take the approach that market forces will work out any gTLD problems, advocating for this gTLD expansion based on prior registrations of SLDs and the addition of new gTLDs augmenting virtually nonexistent consumer alternatives to .COM.

To this group of NCSG members, the SLD within the .COM gTLD that best stands for the proposition that allowing closed gTLD names is not a competitive advantage is BOOK.COM. The owner of BOOK.COM, Barnes & Noble, is hemorrhaging market share to other booksellers, including previously mentioned Amazon. The NCSG paper argues that

95. Id.
96. Id.
97. Id. (arguing for the unrestrained freedom of a registry to operate their gTLD however they please, without ICANN intervention, unless problems arise similar to the .COM monopoly power seen in the late 1990s).
98. See generally Joyner v. Duncan, 299 N.C. 565, 581, 264 S.E.2d 76, 88 (1980) (stating that the wait and see doctrine, as it applied to a will or testamentary trust, would view events as they actually happen, rather than as they might have happened from the outset of the testator’s death); NBC, My First Step, 2 Scrubs 7, (Nov. 7, 2002) (ridiculing protagonist J.D. for advocating a “wait-and-see” approach to treating a patient).
99. See generally Mueller, supra note 4, at 83. “Multistakeholder governance raises many institutional issues . . . .” Id. The interest in both formal and informal processes needs to be balanced. Id. This includes the need for openness and diversity but formal mechanisms that enable decision making to be effective. Id.
100. NSCG Comment, supra note 90.
102. Jim Milliot, E-Books Market Share at 22%, Amazon has 27%, Publishers
this example shows that registration of a gTLD such as .BOOK will not result in a monopoly in the book sellers market, similar to the result seen with BOOK.COM.\(^{103}\) In his 1994 Request for Comments 1591, the late Jon Postel made essentially the same analogy between SLDs and TLDs, in that “[m]ost of these same concerns [over TLDs] are relevant when a sub-domain is delegated.”\(^{104}\)

This example seems genius on its face—more so with the historical policy support by Postel—but is deeply flawed when looked under the microscope of capitalism and market forces as they relate to internet commerce. Barnes & Noble is a brick and mortar store trying to move its sales online. Amazon is a giant online presence, able to beat the bookseller at its own game by really beating it at the online game\(^{105}\)—precisely where online MNCs like Amazon and Google are staking out for themselves. While BOOK.COM is failing to do anything major for Barnes & Noble’s e-commerce, the bookseller was beaten at a different game—not selling books, but selling product online: products that were cheaper, at an online space with a wider selection.

The NCSG member comment states “buyers base their online commerce decisions on quality of product, reputation or experience with the vendor, and the content and features of the site, not just the TLD.”\(^{106}\) The likes of Google and Amazon have already won the battle over reputation and will continue to dominate in the content and features of a site, based on each company’s online experience and the large number of quality staff able to turn out amazing online features.\(^{107}\)

The problem with allowing large MNCs to have a generic product...
specific gTLD such as .BOOK is that any small advantage given to a popular gTLD operator is compounded when coupled with the resources of a huge MNC already able to outperform all others attempting to sell a product. Whether 150 new gTLDs being operated by two different companies will lead to more consumer choice is a question the NCSG need to discuss. If this is a question of whether three is better than one, VeriSign,\textsuperscript{108} then yes—at the most basic level consumers will perceive to have more choices.\textsuperscript{109}

\textbf{ICANN’s Independent Objector as the Global Internet User}\textsuperscript{110}

As an additional entity to advocate for the public interest, ICANN established the Independent Objector (“IO”).\textsuperscript{111} The IO is completely autonomous, not answering or taking direction from ICANN’s Board of Directors or staff.\textsuperscript{112} The first and current IO is Professor Alain Pellet,\textsuperscript{113} a man with a lot of power—and as with any position of power, there is potential for abuse.\textsuperscript{114}

\begin{itemize}
  \item \textsuperscript{108.} Mueller, \textit{supra} note 4, at 63. VeriSign is the U.S. corporation that operates the master root server and owns the .com and .net top-level domains . . . making it both a dominant supplier in the domain name industry and a critical part of the domain name system’s infrastructure.” \textit{Id.}
  \item \textsuperscript{109.} See \textit{generally} George Orwell, \textit{1984} 34 (60th Ann. Ed. 1950) (listing the three powers Oceana, Eurasia, and Eastasia that revolved between alliances and wars with each other).
  \item \textsuperscript{110.} See Official Website of the Independent Objector, \textit{available at} http://www.independent-objector-newgtlds.org/english-version/home/ (last visited Apr. 9, 2013). “[The IO] acts solely in the best interests of the public who use the global Internet when determining whether to file an objection to a given application.” \textit{Id.}
  \item \textsuperscript{111.} \textit{Id.}
  \item \textsuperscript{112.} \textit{Id.}
  \item \textsuperscript{113.} Official Website of the Independent Objector, \textit{The person who will serve as the Independent Objector, \textit{available at} http://www.independent-objector-newgtlds.org/english-version/introducing-the-independent-objector/ (last visited Apr. 26, 2013) (“Introducing the Independent Objector”). Professor Pellet has a resume that includes professor of Public International Law, lawyer, and former member and chairperson of the United Nations International Law Commission. \textit{Id.}
  \item \textsuperscript{114.} Milton Mueller, \textit{On Second Thought, Let’s NOT Kill All the Lawyers, Internet Governance Project}, (Feb. 12, 2013), \textit{available at} http://www.internetgovernance.org/2013/02/12/on-second-thought-lets-not-kill-all-the-lawyers/. Mueller credits the current IO for his “scrupulously legalistic and liberal approach” to making objections. \textit{Id.} In supporting this claim, Mueller cites the IO’s .WTF gTLD opinion, in which the IO does not object. \textit{Id.} However, Mueller fears that, in different hands, the IO could be “more
The IO has the power to lodge objections to gTLD applications on two specific grounds, and those grounds only—limited public interest, and community. The limited public interest objection can be raised when a gTLD “contradicts generally accepted legal norms of morality and public order recognized under principles of international law,” while the community objection is further explained with a four factor test, basically asking whether the gTLD name or applicant appears to target a “clearly delineated community” whose rights or interests will be detrimentally affected if the gTLD is issued.

In applying these two grounds for objection to the debate over whether ICANN should issue certain gTLDs, the IO has stated he will not make any objections based solely on an applicant attempting to operate a closed gTLD. The IO cites his “limited powers” as justification in constraining himself to an analysis of the issue solely on these two grounds. Under the Limited Public Interest objection ground, the IO states that the freedom of expression or access to information are not an accurate statement of the concerns over gTLDs, which he says are more likely commercial in nature.

Any objection on the community grounds would be vague, but the

susceptible to defining his own preferences as ‘the global public interest.’”


116. Id.


119. Id. “On this (gTLD) issue, it is important to insist on the core essence of the IO’s functions and his ‘limited powers’ as described in the Applicant Guidebook, which constitutes the basis for his mandate under the new gTLDs Dispute Resolution Process.”

120. Id. The IO states that questions relating to the openness of the internet, while relevant in the sense of a Public Interest Objection, are not so relevant when specifically addressing the gTLD issue. Id. The IO finds no problem with gTLDs and access to the internet, citing to a United Nations Human Rights Council report by Special Rapporteur Frank La Rue that was void of any slight reference to the role closed gTLDs would play in this regard.
IO does not rule it out altogether. He merely states that, generally, any objection would not be made due to the failure to satisfy the four factor test. To come to this conclusion the IO identified, as the required “clearly delineated community,” the public who uses the Internet as a whole—“which cannot be considered as a clearly delineated community.”

While the IO is a great idea in theory, it may not tend to be so in practice, as Mueller fears. As long as the IO remains independent, unbiased, and adheres to the principles that established the IO position, the IO is valuable. Unfortunately, without such a principled IO as Professor Pellet, a man of character that does not come along frequently enough, the position is a liability.

AMAZON AND THE TROUBLE WITH TRADEMARKS

Trademarks are everywhere. They include nonsense words like Xerox and Zipper, and geographic names like Amazon and Patagonia—names which have no relation to their corresponding location on the map. Amazon is a well-known online retailer, while Patagonia is a manufacturer of outdoor gear and related clothing. The trouble arises when these intellectual property rights are asserted online—with the need to determine the rightful owner of a certain domain that is both a trademark and a geographical location.

In July 2013, ICANN meet in Durban, South Africa, in a meeting that included a review of the gTLD application for .AMAZON—an application that was made by the MNC Amazon. The clothing company Patagonia had previously withdrawn its application for .PATAGONIA due to objections 121. Id. “This does not exclude that I could deem it nevertheless appropriate to file a community objection in exceptional circumstances . . . .” Id.

122. Id. “In view of the broad elements of definition mentioned above, and more pertinently in view of the very nature of a ‘generic term’, it is unlikely that these applications will pass this community test. Of course for a community objection, each application has to be reviewed separately.” Id.

123. Id.


from South American countries in the Patagonia region, so ICANN and its stakeholders were left with one set of facts—an objection from a bloc of South American Countries against the largest online commercial entity of the past decade.\(^{128}\)

Though the contest was between nation-states and a Multinational Corporation, this decision will have huge impacts on intellectual property rights. The concern thus far with the ICANN policy is the failure of everyone involved—including the six South American countries who objected,\(^{129}\) to see how the resources of such a large MNC as Amazon can be benefited by expansion into their own gTLD—although the particular ground advocated by this article is related to natural resources policy developed by the United States Supreme Court less than one hundred years ago, in contrast to English law previously developed. However, with the analogue between natural resources and critical internet resources, the reasoning of the U.S. Supreme Court is easily applied and makes for good policy for ICANN in dealing with issues of critical internet resources.

First, to explain what Amazon was up against, even the IO objected to Amazon’s trademark name gTLD.\(^{130}\) This was based on the community objection ground, joining the South American bloc of Brazil, Peru, Bolivia, Ecuador, Guyana, and Argentina.\(^{131}\) While these countries joined to object to the gTLD, they did not indicate it was a gTLD they would use, but somehow saw an interest in the gTLD string name .AMAZON enough to prevent its use while at the same time being extremely poor stewards of the riches the Amazon Forest provides.\(^{132}\) Additionally, the United States Government had said it would “abstain and remain neutral” on the issue,

128. \textit{Id.} (stating Patagonia withdrew its gTLD application prior to the 2013 Durban meeting, leaving only .AMAZON as the key gTLD objection to be considered).


131. \textit{Early Warning Amazon, supra} note 129.

132. Scott Wallace, \textit{Farming the Amazon, NATIONAL GEOGRAPHIC, available at} \url{http://environment.nationalgeographic.com/environment/habitats/last-of-amazon/} (last visited Apr. 19, 2013). “During the past 40 years, close to 20 percent of the Amazon rain forest has been cut down—more than in all the previous 450 years since European colonization began.” \textit{Id.}
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leaving Amazon to fight its own battle.\footnote{133}{National Telecommunications & Information Administration, \textit{U. S. Statement on Geographic Names in Advance of Durban Meeting}, available at http://www.ntia.doc.gov/files/ntia/publications/ug_nextsteps_07052013_0.pdf.}

The Durban meeting saw the Governmental Advisory Committee recommend to ICANN that Amazon’s application for .AMAZON be denied. This non-final recommendation was a critical blow to Amazon in its hopes to streamline the use of its trademark throughout various categories of its vast online commercial empire. Whereas Amazon might be able to use MOVIES.AMAZON as a simple way to connect to its users, it currently has a string of nonsense with a few key words, navigating through the homepage, to access the vast collection of movies and television on the web site.\footnote{134}{See http://www.amazon.com/movies-tv-dvd-bluray/b/ref=sa_menu_mov?ie=UTF8&node=2625373011.}

This paper draws on policy developed by the 1922 United States Supreme Court case of \textit{Wyoming v. Colorado}\footnote{135}{\textit{Wyoming v. Colorado}, 259 U.S. 419 (1922) decree vacated sub nom. Wyoming v. Colorado, 353 U.S. 953 (1957) and decision modified on denial of reh’g sub nom. Wyoming v. Colorado, 260 U.S. 1 (1922).} in justifying Amazon’s use of the gTLD over these objections. While this is not international law, it explains the reasoning behind the position this article advocates for, drawing on the analogue of real property and internet/natural resources. In Wyoming, the Court held that the prior appropriation of water by the state of Wyoming from an interstate stream that originated in the state of Colorado gave Wyoming the right to prevent Colorado from claiming a superior right to the water solely because it originated in Colorado.\footnote{136}{\textit{Id.} at 470. “The cardinal rule of the doctrine is that priority of appropriation gives superiority of right.” \textit{Id.} This is contra to riparian water rights, originating earlier in time within the English Common Law, which stand for the position that the owner of land at the water’s source is the owner of all the water that flows from it. \textit{Id.} at 458–59.}

Here, the resources being used are critical internet resources, gTLDs and other internet namespace. Amazon has a very large online footprint, will put the gTLD to a beneficial use, and was first to apply for the gTLD.\footnote{137}{ICANN, \textit{New gTLD Application Submitted to ICANN by: Amazon EU S. à r.l.}, available at https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/984?t:ac=984 (last visited Apr. 26, 2013). “Amazon and its affiliates operate websites, including www.amazon.com, www.amazon.co.uk, www.amazon.de, www.amazon.co.jp, www.amazon.fr, www.amazon.ca, www.amazon.cn, www.amazon.it, and www.amazon.es.” \textit{Id.}} Based on these facts and the realization that critical internet resources are at issue,
the application of Wyoming clearly results in Amazon as the rightful owner. Amazon was online, using these internet resources, prior to the Amazon Region’s request for any gTLD. In the Amazon Countries’ complaint, they did not mention any need for a gTLD or that the coalition of Amazon Region countries were working together online at all. Similar to the facts in Wyoming, where the stream originated in the state of Wyoming, the Amazon Region is claiming international ownership of the word “Amazon” solely because it originated with the geographic location of the Amazon Rainforest. To these countries, they have the right to use the word Amazon and to prevent its use on a global scale. However, under the policy developed in Wyoming, this is insufficient to prevent someone else’s use when the complained of user is attempting to put the resource to beneficial use, and is doing so prior to the user in which the name originated. Even the SLD AMAZON within the .TRAVEL gTLD is not operated by more than the single country Brazil, who uses it to redirect to its own BRASIL.TRAVEL domain.

The internet community may have, and hopefully do have, significant interest in the Amazon Rainforest and its conservation. This natural resource has been called one of the “Seven Wonders of Nature”—but this region, the conservation of the rainforest, and any other Amazon Region-specific issues, even taken all together, do not need their own gTLD. Blocking Amazon from its own gTLD serves no purpose, especially when there was no issue with the registration of the trademark or the registration of a now internationally recognizable trademark SLD. If the Amazon region countries fear the term “amazon” will soon have an unknown origin, it is too late for that—the MNC Amazon has established secondary meaning on an international scale. Further, it is curious why such countries, without any plans to correct the evils that have befallen their rainforest, would organize for an early warning objection when they should be organizing their efforts to save one of the most precious resources on earth—the rainforest—truly a critical natural resource.

138. See Early Warning Amazon, supra note 129.
139. See http://www.amazon.travel/.
140. Early Warning Amazon, supra note 129.
141. Wallace, supra note 132 (discussing development within the Amazon Region). “... Brazil’s measures to protect the Amazon must be weighed against its other ambitions. These include plans to build seven dams on the environmentally sensitive Xingu and Madeira Rivers, as well as roads, power lines, oil and gas pipelines, and large-scale mining and industrial projects.”Id.
There are many options, indeed many options even with the new gTLD offering, that would do well to serve an “amazon” SLD—including .ECO.\(^{143}\) This would make available not just AMAZON.ECO, but each unique country that wanted to operate from within the AMAZON.ECO address could operate a subdomain, for example, Brazil could operate BRASIL.AMAZON.ECO and have their entire conservation—and consequential commercial eco-tourism\(^{144}\)—interests run within that domain. So while Amazon the MNC would use a massive amount of the gTLD .AMAZON, there is no realistic reason to believe the Amazon Region countries would be able to, or even want to, use this critical internet resource. This speculation is not only due to a lack of online presence by the South American Countries relating to the Amazon Region, but draws from their lack of stating any need for a gTLD or internet namespace within their objections.\(^{145}\)

**Past Trends and the Sticky .COM gTLD**

As shown in some small part in the United States government’s acquiescence in the .AMAZON and other geographic names policy development in Durban,\(^{146}\) the issue of expanding the DNS to include dozens or hundreds of gTLDs remains a difficult issue to fully support for the United States Government.\(^{147}\) In contracting with ICANN, the United States Department of Commerce noted that “industrial materials and capacities . . . supplied by nature”.

143. Press Release: Environment-Related TLD Applications, doteco.org, (June 15, 2013) available at http://doteco.org/blog/environment-related-tld-applications/ (listing six environment-related gTLDs, including .ECO, which received applications from two small-scale and two large-scale applicants—including Donuts).

144. The International Ecotourism Society, What is Ecotourism?, available at http://www.ecotourism.org/what-is-ecotourism (last visited Apr. 26, 2013). “Ecotourism is defined as ‘responsible travel to natural areas that conserves the environment and improves the well-being of local people,’” and thus might still fall into whatever restrictions a .ECO Registry might apply. Id.

145. See Early Warning Amazon, supra note 129.

146. National Telecommunications & Information Administration, U.S. Statement on Geographic Names in Advance of Durban Meeting, available at http://www.ntia.doc.gov/files/ntia/publications/usg_nextsteps_07052013_0.pdf. “. . . the United State is willing in Durban to abstain . . . on .amazon . . . thereby allowing the GAC to present consensus objections on these strings to the Board, if no other government objects.” Id.

147. Affirmation of Commitments by US DOC and ICANN, supra note 23. “Nothing in this document is an expression of support by DOC of any specific plan or proposal for the implementation of new generic top level domain names
of Commerce affirms its commitment to such concepts as the security and stability of the DNS, competition and consumer choice, and the desire to include international stakeholders.\textsuperscript{148} While these are ideal and proper goals for the future of the internet and tie into the concerns over gTLD expansion, the problem with one of these commitments—competition and consumer choice—originated with the United States Government. It all started when ICANN assigned the predecessor to VeriSign, Network Solutions International,\textsuperscript{149} the exclusive right to registrar operations within the .COM and .NET gTLDs.\textsuperscript{150} Due to the unparalleled success of the .COM gTLD there have been allegations of VeriSign operating like a monopoly,\textsuperscript{151} and indeed, an overwhelming percentage of websites, including the most popular ones,\textsuperscript{152} currently reside within the .COM gTLD.\textsuperscript{153}

The sticky situation with the .COM domain is best illustrated by Google’s gTLD position comment describing the problem ICM Registry\textsuperscript{154} had with driving adult-content providers to their .XXX TLD.\textsuperscript{155} ICM Registry ran an advertising campaign, directing potential registrants to WWW.BUY.(gTLDs) or is an expression by DOC of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.” \textit{Id.} The Department of Commerce lists a number of concerns with the gTLD expansion, “including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.” \textit{Id.} at ¶ 9.3.

\textsuperscript{148} \textit{Id.} \\
\textsuperscript{149.} \textbf{AMERICAN ECONOMIC POLICY IN THE 1990s} 382 (Jeffery Frankel & Peter Orszag eds. 2002) “[I]n March 2000 VeriSign paid more than $21 billion to acquire NSI.” \textit{Id.} \\
\textsuperscript{151.} \textbf{AMERICAN ECONOMIC POLICY, supra} note 149 (describing the Network Solutions contract with the U.S Government as a “monopoly contract”). \\
\textsuperscript{152.} \textit{See, e.g.} IMDB.COM; PAYPAL.COM; AMAZON.COM. \\
\textsuperscript{153.} VeriSign, Internet Grows to More than 246 Million Domain Names in the Third Quarter of 2012, (Dec. 20, 2012) \textit{available at} http://www.verisigninc.com/en_US/news-events/press-room/articles/index.xhtml?artLink=aHR0cDovL2ZIZWRzLm13bmV3c3Jvb20uY29tL2FydGljbGUvcNzP2lkPTE2NzEwN Tg%3D (stating that 105 million of the more than 246 million registered SLDs across all TLDs were registered within the .COM TLD). \\
\textsuperscript{154.} Google, \textit{supra} note 67. \\
\textsuperscript{155.} Mueller, \textit{supra} note 4, at 71. “. . . ICM Registry . . . proposed .xxx, a top-level domain that would be restricted to adult content.” \textit{Id.} The idea was that this adult content-specific TLD would assist both access and blocking of this controversial content. \textit{Id.}
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XXX for SLD domain registration within the new .XXX TLD.156 “[M]any users did not realize that .XXX was a valid TLD and instinctively appended .COM to the domain, resulting in significant amounts of traffic to other domains such as BUYXXX.COM.”157 Data supporting the public’s lack of knowledge of the new TLD, or even the potential for new TLD options, showed up in an analysis of traffic to sites within the .COM TLD WWW.BUYXXX.COM and WWW.XXX.COM while ICM Registry was running the ad campaign.158

The problem of only one choice openly recognized by consumers—.COM—is that some SLDs are very attractive, much like complaints around gTLDs. Popular applications for the gTLDs, .BOOK, .CLOUD, .MAIL, .NEWS, and .WEB,159 are all up and running sites as SLDs within the .COM gTLD, shutting out others interested in operating these sites within the .COM TLD.160 Whether or not these sites have resulted in monopoly power is doubtful, as shown with Barnes & Noble’s ownership of BOOK.COM,161 but that does not deny their desirability, shown by multiple gTLD applications for these names.162

The desirability of these specific names by large MNCs and other for-profit ventures should be a simple illustration that there are names that are more commercially desirable than others and could translate to large financial gains for those able to capitalize on the desirable characteristics of a particular gTLD. Much like SLDs, there can only be one owner of each of these popular gTLDs, which further stands for the finiteness of the internet—there are only so many domains—SLDs or TLDs—to go around.

DONUTS—EYES BIGGER THAN ITS STOMACH?

While billion-dollar MNCs attempt to swallow up what are believed to be the most valuable gTLDs, another entity, DONUTS Inc. (“Donuts”)

156. See Google, supra note 67.
157. See Id.
159. Quick Facts, supra note 20.
161. See discussion supra at 53-6.
162. Quick Facts, supra note 20.
163 has emerged solely for doing just that—grabbing valuable gTLDs as an investment.164 The impact of this applicant is yet to be seen, but will be huge for the future of the internet, whether it succeeds or fails. After all, it did apply for 307 gTLDs,165 raising money not only for the application fees, but the money to lay down the infrastructure ICANN requires for all applicants. It is also the largest applicant during this gTLD expansion.166

When Donuts launched in 2011 it was a company clothed in secret, but with executives who were well known within internet domain circles.167 Members of the Donuts executive team listed on the SEC filing included Chief Executive Officer Paul Strahura, who founded the domain name registrar eNom in 1997—a successful registry which generated revenue of $100 million in 2010 while managing more than eleven million domains168—and Jonathon Nevett, former Vice President of Policy at Network Solutions.169 This led to speculation about the company and its purpose, but many believed Donuts was formed to apply for gTLDs.170

163. See DONUTS, Donuts Inc.: About, available at http://donuts.co/index.php?option=com_content&view=article&id=9&Itemid=104 (last visited July 21, 2013) (“Donuts is a domain name registry bringing variety and choice to Internet naming.”)

164. See DONUTS, Donuts Inc.: Investors, available at http://donuts.co/index.php?option=com_content&view=article&id=5&Itemid=107 (last visited July 21, 2013). Donuts’ financial resources are extensive. The company has raised more than US$100 million from capital sources including several multi-billion dollar venture capital and private equity funds, a top-tier bank, and other well-capitalized investors. Should circumstances warrant, our investor base is prepared and able to consider additional funding. Id.


168. Id.

169. Id.

170. Id. (“. . . it will be fascinating to see what Stahura and crew are frying up with
In an April 2011 interview Strahura said “[w]e are in stealth mode” when asked about Donuts intentions during the gTLD application period.\footnote{171}{Id.} Strahura maintained secrecy and even continued to misrepresent Donuts’ intentions to the press, stating it would apply for only ten gTLDs mere months before the applications were disclosed to the public.\footnote{172}{See Eric Engleman, Go Daddy Bets on Windfall From Web-Address Expansion Beyond .Com, BLOOMBERG, available at http://www.bloomberg.com/news/2012-01-10/go-daddy-verisign-bet-on-windfall-from-web-address-expansion-ge-opposes.html (Jan. 10, 2012); Press Release: Donuts Launches Domain Namespace Expansion with 307 gTLD Applications, More Than $100 Million in Funding, DONUTS.CO., June 5, 2012, available at http://doteco.org/blog/environment-related-tld-applications/. This statement was reported on January 10, 2012. Engleman, supra note 172. Donuts reported it had placed bids on 307 gTLDs on June 5, 2012. \textit{Donuts Launches Domain}, supra note 172.} The company garnered much attention when it sent out a press release on June 5, 2012, finally disclosing that it was the applicant for 307 different gTLDs.\footnote{173}{Id. The press release was fairly straightforward, announcing various basics to the world about the company—that it was funded by more than $100 million in capital and a listing of the key executives. \textit{Id.} This included former Chief Financial Officer Kevin Wilson, the former CFR of ICANN; Mason Cole as the Vice President of Communications and Industry relations, who was said to be a twelve year veteran of “the domain name industry”; and Alvaro Alvarez was named the Vice President and General Counsel, the former Outside Counsel to Donuts and with legal experience in domain industry matters since 2007. \textit{Id.} The release also applauded the gTLD expansion as being big news, and stated the company’s intent to “bring significant new industry competition and fresh choices for Internet end-users who need better, more specific domain names for their products and services.” \textit{Id.}} This was well after the gTLD application period closed but only one week before ICANN was scheduled to reveal the identities of all applicants, and the gTLDs they were applying, to the public for the first time.\footnote{174}{Id.}

The question remains as to what the company will do with these domains. Donuts contends, as if it could be trusted again, that it will personally operate the gTLDs, not lease out or otherwise ‘sell’ the TLDs for others to use.\footnote{175}{See DONUTS, Donuts Inc.: TLDs, available at http://www.donuts.co/index.php?option=com_content&view=article&id=7&Itemid=106 (last visited July 21, 2013) [hereinafter Donuts TLDs] (“The company has filed more than 300 applications for new TLDs, and its intention is to secure and operate every applied-for TLD.”).} However, the question remains—if Donuts wanted to sell a certain TLD,
after thousands or millions have registered with it, what can ICANN do to stop it, and what would the limitations on such a transfer be? With members of the Donuts executive team who have proven track records, funding from a variety of sources, and the potential to be able to convert the largest number of applications into being the biggest gTLD operator for the next decade, all eyes should be on Donuts.

**STAND FIRM, ICANN, AND SEE THE RESULTS OF THE GREAT EXPERIMENT**

The point is to spread out TLDs—these critical internet resources—to those who need and will use them. With this principle in mind, a MNC should only be allowed to register for one TLD. The policy behind this is simple: the .COM domain is home to countless MNCs who operate most of their different subsidiaries fully within their own SLDs, therefore their needs can be wholly satisfied by one gTLD. It is doubtful that even huge companies like Amazon, Apple, or Google could, at this present time, expand even one TLD to capacity, let alone the dozens for which they are applying.

This article realizes the concerns over ease of use and using “suitable domain names” that make locating something easier—the examples given on the Donuts site are “theater.tickets, or broadwaytixnyc.net” but no matter what, this prime real estate is finite, and further the name broadwaytixnyc.net gives the internet user a clearer idea of what the site is designed for, with internal breakdown of the site with a .TICKETS gTLD inevitable. This would lead to theater.tickets becoming nyc.broadway.theater.tickets—which is hardly easier than the first complained-of domain name. While the expansion of the TLD namespace is about opening up choices and more prime real estate, like the fact that there are only so many oceanfront properties, there are only so many desirable gTLDs. The limited expansion advocated by this article would still allow variety and choice while conserving

176. Special Rapporteur, *supra* note 79. Contra Independent Objector, *The Issue of “Closed Generic” gTLDs: Official Website of the Independent Objector, available at* http://www.independent-objector-newgtds.org/english-version/the-issue-of-closedgeneric-gtlds/ (last visited Apr. 19, 2013) [hereinafter *IO Issue of gTLDs*]. La Rue voices his concern over access to the internet, “which facilitates economic development and the enjoyment of a range of human rights . . . .” *La Rue, supra* note 78. “However, [La Rue’s] reports do not, either directly or indirectly, address the issue of “closed gTLDs . . . .” *IO Issue of gTLDs, id.*

177. See *Donuts TLDs, supra* note 175.

178. *Id.*
the critical internet resources that are the DNS.

Furthering commercial interests of the user and consumer, gTLDs could serve as a source identifying function. This would allow consumers to be aware of the brand they are patronizing while providing the TLD owner with a clear ownership of the product or service.\(^\text{179}\) This promotes intellectual property use in a way that benefits consumers while holding brand owners accountable for their subsidiaries.

The way ICANN is operating these gTLD assignments, reviewing hundreds of TLD applications, companies are grabbing up as much online real estate as possible.\(^\text{180}\) This is with the knowledge gained from history, knowing that in the long run, like the .COM TLD, the desirable TLDs may one day be exhausted. That, as opposed to anti-competition concerns, should be the reasoning behind ICANN not allowing, for example, Amazon to own all gTLDs .BOOK, .AUTHOR, and .READ.

This article advocates for a slow move into the realm of gTLDs, combating the monopoly and access concerns by allowing a corporation only one gTLD. This is not more of the same, because MNCs and others are ready to gamble on such opportunities, but would instead increase competition by forcing each entity to pick their gTLD wisely—corporations would need to think very carefully about which gTLDs they want, and would actually use them instead of abandoning or selling certain ones when the money is right.

This also leaves more community organization-related gTLDs to be reserved for small organizations or cooperatives whose sole aim is in furthering those particular interests, that may not be identified yet. This delay in full development will allow developing countries to be able to catch up in internet infrastructure and access, while ensuring that when they do, there will still be gTLDs that can serve them. Further, this policy would in no way prevent MNCs or other groups from filing objections to others applying for TLDs the MNCs are interested in, allowing a fuller discourse on the policy concerns behind the assignment of TLDs.\(^\text{181}\)

179. See generally 1 McCarthy on Trademarks and Unfair Competition § 2:4 (4th ed.) (discussing the benefits to consumers and businesses relating to how trademarks function). “Without marks, a seller’s mistakes or low quality products would be untraceable to their source. Therefore, trademarks create an incentive to keep up a good reputation for a predictable quality of goods.” Id.


181. See generally IGF 2012, supra note 53 (discussing various policy concerns
CONCLUSION

Even a crystal ball is murky as the future of the internet takes quick turns with alarming frequency as innovation continues, from online shopping with overnight shipping to connect any remote area of the United States to a faraway store, to the power of social media to connect people the world over. The ability to connect the world, however, relies on the continued openness and access to the internet for people around the world. An

behind the approaching expansion of gTLDs).

182. See generally Stephen Shankland, supra note 38 (quoting Vint Cerf as jokingly stating “[p]redicting is hard, especially about the future.”).
183. See, e.g., Target, Target: Expect More Pay Less—All about Shipping & Tracking, available at http://www.target.com/HelpContent?help=/sites/html/TargetOnline/help/orders_and_shipping/shipping_charges_and_timing_estimates/shipping_charges_and_timing_estimates.html#?lnk=snav_rd_shipping (last visited Apr. 14, 2013). Target offers online shopping that, during checkout, gives an estimated delivery date depending on the shipping options selected—methods that take between one and five business days. Id.
184. See generally Jennifer Preston, Movement Began With Outrage and a Facebook Page That Gave It an Outlet, N. Y. TIMES, (Feb. 5, 2011), available at http://www.nytimes.com/2011/02/06/world/middleeast/06face.html?ref=socialnetworking (discussing the creation of a Facebook page and YouTube videos to chronicle the death of Khaled Said, who was beaten to death by police officers in Egypt); Christina Prell, Social Network Analysis: History, Theory, and Methodology 1 (2012) (characterizing the twenty-first century as one in which technologies connect persons all over the world). At the time of publication, the page accounting the death of Said engaged 473,000 users, and “helped spread the word about the demonstrations in Egypt.” Preston, supra note 184.
185. Secretariat’s summing-up, supra note 59, at 2 (summarizing the 2006 IGF meeting openness section that looked at the commercial market and its relation to Human Rights and any private sector responsibilities).

The question was asked whether major corporations should use their bargaining power to promote freedom of expression. It was pointed out that for some companies doing business in a country signified an engagement or bringing persuasion in the form of economic development rather than trying to use some form of market power in order to negotiate and bring about change. Id.

186. See generally Special Rapporteur, supra note 79. “The internet has become an indispensable tool for realizing a range of human rights . . . ensuring universal access to the Internet should be a priority for all States.” Id.
eye toward access for all\footnote{Roy Balleste, \textit{supra} note 3 “[T]he Internet is the key to free humanity from the bonds of ignorance and fanaticism.” \textit{Id.}} should drive the conversation around gTLDs, as for-profit corporations continue to vie for increasingly large chunks of limited resources\footnote{See generally Press Release: New gTLD Reveal Day—Applied-for Strings, ICANN available at http://www.icann.org/en/news/announcements/announcement-13jun12-en.htm (June 13, 2013) (stating 1930 gTLDs applications were filed); Chris Sherman, \textit{supra} note 42 (listing large MNCs such as Google, Microsoft, and Amazon as gTLD applicants).}.

The result of this gTLD experiment over the next ten year cycle will drive policy for the future of TLDs for some time\footnote{See generally Affirmation of Commitments by US DOC and ICANN, \textit{supra} note 23 (outlining the review process of the gTLD program). After new gTLDs have been operated for a year, ICANN will review them, focusing on the impact on competition, consumer trust and consumer choice, and effectiveness of the process and safeguards that were established. \textit{Id.} Two years after the first review, another review will occur, then no less than every four years after that. \textit{Id.}}. However, the control that VeriSign has over .COM and hence the majority of the internet will not likely change this early in the history of the internet as it relates to ASCII character gTLDs\footnote{NSCG Comment, \textit{supra} note 90 (calling the monopoly the .COM gTLD has over domain registrations “well-documented”).}. ICANN should be focused on studying the success of non-ASCII gTLDs due to the potential that, without a heavyweight like .COM in the way of pulling in significant new SLD registrations, there will be successes in that arena\footnote{Paul Mozur, \textit{Coming Soon: A Truly Chinese Internet}, \textit{Wall St. J.} available at http://blogs.wsj.com/chinarealtime/2013/04/10/coming-soon-a-truly-chinese-internet/ (last visited Apr. 10, 2013 9:02 PM). Many Chinese companies have been awaiting the arrival of Chinese character gTLDs. \textit{Id.}}.

In closing, this article suggests watching the non-ASCII character gTLDs as they create new and innovative spaces for these non-ASCII character language communities\footnote{See generally ICANN, \textit{supra} note 77 (discussing the benefits of a TLD targeting a specific language) “If there is a real sense of belonging to a given community within the Internet this is precisely because those belonging to the community are communicating in their own language, no matter which one it is.” \textit{Id.}}. This is not to say that Amazon or Google will fail, but with the problems other TLDs have seen in driving consumers away from .COM it is not likely that there will be any significant change. The flood of choices this gTLD round, and no clear idea of which gTLD will be the next...
to be recognized by its respective community, dilute the potential for success outside of .COM. To Google, Amazon, Donuts, and others: the world is watching. What will you do with your multi-million dollar investments?\textsuperscript{194}

194. \textit{See} Chris Sherman, \textit{supra} note 42.