Name.Space, Inc. v. Internet Corporation For Assigned Names & Numbers 795 F.3d 1124 (9th Cir. 2015)

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BACKGROUND

Plaintiff-Appellant, name.space, applied for top level internet domain name from defendant-appellee, Internet Corporation for Assigned Names and Numbers (ICANN). As a result of being denied approval, name.space brought suit against ICANN asserting anti-competitive behavior under the Sherman Act, Lanham Act, and California statue.

Internet websites are each given unique Internet Protocol ("IP") numerical addresses as well as alphanumeric domain names that are far easier for users to remember such as "google.com." What appears before the dot ("google") is known as the second level domain. What appears after the dot (e.g. com) is referred to as the top level domain ("TLD"). There are three types of TLDs: country codes like .uk, sponsored ones like .edu and generic TLDs i.e. .com and .net. The case concerned generic TLDs specifically. These TLDs are controlled by registries which sell access to register a domain name to a specific TLD and operate a zone file a registry of all the domain names correlated with that TLD. Registrars like go daddy.com are then approved to sell domain names with those TLDs to the public.

The Domain Name System ("DNS") connects unique domain names with their corresponding IP addresses. When a web user searches for a particular domain name the DNS translates the domain name to an IP address by sifting through a list of TLDs, referred to as the "root zone file" ("Root"). Without special web setting which allow users to find these TLDs via alternate sources, most web users by default access ICANN controlled Root.

Both the DNS and the Root were initially operated by National Science foundation who later transferred management to the Department of Commerce ("DOC"). The DOC later decided that management should be transferred to a private, not-for-profit corporation stating that the corporation's board should represent registries, registrars, the technical community and internet users equitably. In 1998, ICANN was granted permission and authority by the DOC to operate the DNS and the Root, add new TLDs, and decide which registries would use existing TLDs. ICANN is led by a board of directors, some of whom are insiders, and adhere to the qualifications listed above.

[N]ame.space is a registry which provides "expressive" TLDs "such

as .art, .food, .magic, .music, .now, and .sucks,"[1] none of which occupy the Root.

ICANN began accepting applications for new TLDs in 2000. At the time, instructions for the application were seven pages, cost $50,000, and allowed registries to apply for multiple TLDs using one application. ICANN only accepted seven new TLDS and rejected all 118 TLDs submitted by name.space. ICANN again began accepting applications for new TLDs in 2012 however this time the instructions for registration were 349 pages, the cost to register was $185,000, and each application only allowed for one TLD. Parties who originally applied in 2000 but were denied, were given a application credit of $86,000 if they waived claims from the 2000 application process. name.space did not apply in 2012 because the costs were too high. Of the TLDs submitted in 2012 by others, 189 of them were in use by name.space, though ICANN has not announced which of the 189 will be on the Root.

[N]ame.space filed their original complaint in 2012, stating that ICANN had violated sections 1 and 2 of the Sherman Act, the Lanham Act, the California Cartwright Act, and the California Business and Professions Code, following the 2012 application. This complaint also stated that ICANN participated in common law trademark violations, unfair competition, and tortious interference.

In 2013, the district court held that the trademark and unfair competition claims failed to state a case or controversy and the other claims failed to state a claim upon which relief could be granted, and therefore granted ICANN's motion to dismiss the complaint. The district court also dismissed the Sherman Act § 2 claim with prejudice. name.space was given opportunity to amend other claims but after choosing not to, final judgment was found in favor of ICANN and name.space appealed thereafter.

ISSUE

The United States Court of Appeals for the Ninth Circuit first addressed whether the district court erred in dismissing name.space's Sherman Act § 1 claim, which stated that ICANN's procedures for application for new TLDs were the product of a conspiracy with industry insiders. Second, the court deliberated the Sherman Act § 2 claim, debating whether ICANN had a monopoly on the market as a competitor and if so, had valid authority to act from the DOC contract. Lastly, the court discussed whether the trademark and unfair competition claims were ripe considering the TLDs applied by others in the 2012 Application Round which where in use by name.space.

DECISION

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1 Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1127 (2015).

On the Sherman Act § 1 claim, the circuit court found the lower court was correct in finding no violation because ICANN's decision-making was compliant with the guidelines in the DOC white paper contract. The circuit court found that despite control of the market, ICANN was not a competitor, and even if competition occurred, no liability could arise because ICANN lawfully obtained its monopoly. The circuit court affirmed judgment that the trademark and unfair competition claims were not ripe because though ICANN accepted TLDs from others that were in use by name.space no allegations existed that ICANN delegated or intended to use them.

REASONING

To determine whether the lower court erred in dismissing the Sherman Act § 1 claim which stated that ICANN participated in conspiracies "in restraint of trade or commerce"[2] the court applied § 1, stating that a claim requires: (1) a "contract, combination or conspiracy among two or more persons or distinct business entities; (2) which is intended to restrain or harm trade; (3) which actually injures competition; and (4) harm to the plaintiff from the anticompetitive conduct.[3] "Because § 1 does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express."[4] Following reasoning from *Bell Atl. Corp. v. Twombly*, the court stated that the challenged anticompetitive behavior must originate from an independent discussion or agreement to be prohibited by § 1.[5] The court further explained that the standard only called for "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[6]

The court reasoned that name.space failed to include a direct allegation of an agreement with specific co-conspirators. The court explained that the complaint, stating that the board members of ICANN many of whom were insiders and large technology companies, may have known the interests of particular TLD registries was not enough to conclude anticompetitive behavior when an equal argument could have been made for rational and legal business actions. In addition, the argument that the 2012 application, which was created by and in control of ICANN, was so costly and burdensome for name.space and others with similar business models that it was anticompetitive, did not sway the court. The court held that because the DOC gave specific authority to ICANN to regulate and control new TLDs onto the Root, ICANN acted reasonably

2 15 U.S.C. § 1 (2015).

3 Brantley v. NBC Universal Inc., 675 F.3d 1192, 1197 (9th Cir, 2012).

4 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, (2007) (alterations, citations, and internal quotation marks omitted).

5 *Id.*

6 *Id.* at 556.

within its power because the procedures for application were facially neutral and intended to safeguard against those who were not financially stable enough to obtain new TLDs. Despite name.space's contention that an "open Internet" with more TLDs would uphold better public policy, the court asserted that the decision was given to ICANN by the DOC.

The court than moved to an analysis of the Sherman Act § 2 claim, in which name.space complained ICANN had a prohibited monopolization of the market. The court used standards of § 2 listed in *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP,*[7] which states "there are three essential elements to a successful claim of Section 2 monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." name.space's complaint stated "three relevant markets: (a) the market to serve as a TLD registry; (b) the international market for domain names; and (c) the market for blocking defensive registration services,"[8] however the court reasoned the ICANN is not a competitor in any of the above listed but rather a manager and cannot fall within the requirements for a § 2 monopoly claim. The court furthered reasoned that if ICANN had been found as a competitor in any of the relevant markets, liability would only arise if "ICANN unlawfully acquired or maintained its monopoly."[9] Since ICANN was given formal authority by the DOC, the court did not find ICANN liable. The court concluded the § 2 analysis by exhausting other potential violations including predatory behavior by ICANN against potential behavior, but because name.space was able to establish TLDs on other root files, no such violation occurred.

[N]ame.space's complaint also asserted Lanham Act, common law trademark, and common law unfair competition claims using ICANN's acceptances of TLDs in use by name.space by others during the 2012 Application Round. The court found this claim was not yet ripe because the complaint rested on the potential for accepted application with name.space's TLDs to be used in the future through ICANN.

The court affirmed district court's holding finding for ICANN with regard to the California common law tortious interference and unfair business practice claims because name.space failed to either establish relative facts or state violations.

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7 Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 1979).

8 Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers 795 F.3d 1124, 1131 (9th Cir. 2015).

9 *Id.* at 1132.