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**TRADEMARKS ON THE INTERNET: CONFUSION, COLLUSION OR DILUTION?**

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**I. Introduction**

Many of the guiding principles of our trademark law can be traced to medieval times when English craftsmen in the various guilds placed marks on their products to indicate their guild as the source of those products. Commentators argue that trademark principles, with their roots in an era when the streams of commerce were characterized by ox carts and sailing ships traveling in “real” space, are cumbersome tools for resolving disputes over the use of trademarks in “cyberspace.” Despite this criticism, traditional trademark principles are surprisingly resilient tools for the development of new guideposts for governing trademark use on the Internet.

The explosive growth in the use of the Internet by individuals has been accompanied by a heightened interest in the use of the Internet for commercial \*2 transactions. Obviously, for businesses to communicate effectively on the Internet, it is essential that they have a unique “address” that is easily recognizable by customers. Although commercial activities on the Internet raise a host of legal issues,<sup>2</sup> the most significant controversies relating to trademarks have involved “domain names” that

serve as the addresses for communicating over the Internet. In late 1994, more than 17,000 commercial domain name<sup>3</sup> addresses had been registered<sup>4</sup> with more than 2,000 new registrations being requested each month.<sup>5</sup>

While the foregoing illustrates the proliferation of commercial activities on the Internet, the recent controversies involving the use of trademarks on the Internet cannot be fully understood without first understanding the organization and operation of the Internet. The following discussion will provide a brief summary of fundamental Internet principles that bear on the use of trademarks on the Internet.

## **II. Summary of the Internet**

The Internet is a global network of computers and is often referred to as the “Information Superhighway.” The Internet can be viewed as a large network of interconnected smaller networks which are cooperative associations of government entities, educational institutions, corporations, and various other local computer networks.<sup>6</sup>

The Internet was established in the late 1960s under the sponsorship of the U.S. Department of Defense which wanted to establish a decentralized computer system that would not only be able to survive in case of military attack, but would also allow faster data transfer between the various branches of the military and other government bodies. During the 1970s, academic institutions in the United States and other countries began operating on the Internet.

\*3 The independent networks which comprise the Internet contain several million “host” computers which serve an estimated twenty-five million individuals. Each of the hosts within the Internet possesses two addresses. The first address is a numeric Internet Protocol (IP) address (e.g., 123.456.789.01). The second address is an alphanumeric domain name (e.g., “apple.com”). The domain name address, which has far greater mnemonic potential and, therefore, is easier for users to remember, serves a particularly important function in the Internet. A domain name which incorporates all or part of an important corporate name can be an extremely important asset because it provides an intuitive link between the company and Internet users.

The transfer of information across the Internet is performed by breaking up information into small “packets” which can be transported along various routes of the Internet.<sup>7</sup> Once the various packets reach their destination, they are reassembled by the host machine and made available to the recipient. Internet addresses are established through a hierarchy of domain levels. The first level of domain name is the portion of the domain name furthest to the right in the overall address. It is based on an abbreviation which indicates the type of entity that operates the address. The following is a listing of common first level domain name identifiers:

- .com--commercial organizations
  
- .edu--educational organizations
  
- .net--networks
  
- .gov--non-military government organizations
  
- .mil--military organizations
  
- .org--other organizations

The second level of the domain name is a name chosen by the computer network operator. This level of domain name can be virtually any word chosen by the user. However, no two users can have identical first and second level domain names.

The Internet is a cooperative association with no centralized control. Although the Internet is not owned or regulated by any individual or governmental agency, there are a number of volunteer agencies that perform certain regulatory functions. Internet domain names are registered by the Internet Network Information Center (InterNIC), which is a collaborative organization established by the National Science Foundation. Under a grant from the Foundation, InterNIC delegated the actual responsibility for registering domain names to a private company, Network Solutions, Inc., located in Alexandria, Virginia.

It has been the policy of InterNIC to allocate domain names on a first-come, first-served basis without any examination of the right of the user to choose a particular \*4 domain name. This registration policy has resulted in a number of very well-known trademarks being incorporated into domain names registered to individuals or organizations that have no previous connection with those marks. Another problem in domain name registration results when more than one organization or individual has a colorable claim on a domain name and asks for the same domain name. For example, the Austin Intellectual Property Law Association (AIPLA) and the American Intellectual Property Law Association (AIPLA) may both seek to register the acronym "AIPLA" as a domain name for purposes of communicating with their members. A third problem is that the second-level domain name could be assigned to multiple first-level domain names. For example, in theory, both "aipla.com" and "aipla.org" could be registered to different users. The above-mentioned problems have been identified by the International Trademark Association (INTA) and are discussed in a report of the INTA Internet Task Force.<sup>8</sup>

Under the registration framework established by InterNIC, there is no procedure for protesting, opposing, or canceling a domain name registration. In addition, because of the large volume of requests, InterNIC has established a "one domain name per company rule," which forces companies to choose a single mark or other identifier for registration as a domain name. While more than one domain name has been registered to a company under certain circumstances, it is clear that the general requirement that only a single domain name be registered results in a number of famous marks being available for unauthorized users. InterNIC has not stated publicly whether preempting potential domain name "squatters" will be viewed as a valid rationale for registration of multiple domain names.

The following is a statement of InterNIC's rule regarding the one-name-percompany registration process:

Our basic policy at the InterNIC is to register one domain per "organization." We would prefer that divisions, subsidiaries, etc. be handled as 3rd level domains. The Federal Systems Division of IBM (as a hypothetical example) should be FSD.IBM.COM not FSD.COM. We recognize that there are instances where a company may need additional domains subsidiaries may operate independently, a service provider may need to register in both the COM and NET domains. Justification for additional names registered to the same organization should be included in Section 9 of the attached template.

The existence of a registered trademark is not sufficient reason for registering it as a domain name. Companies may have hundreds of registered trademarks [sic]. Trademarks should be treated as third-level domains under the domain name registered with the InterNIC. If "PC" were a registered trademark of IBM, they could create PC.IBM.COM (or any other productline names as necessary) as third-level domains.

The InterNIC does not have the mission nor the resources to check trademarks. Existing procedures and organizations are in place to do this. The responsibility for checking \*5 trademarks is placed on the organization/person submitting the template, as indicated by the statements at the end of the template.<sup>9</sup>

### **III. Domain Names as Trademarks**

Despite the position taken by InterNIC and a number of computer organizations, there are many who believe that domain names do in fact function as trademarks. The Patent and Trademark Office (PTO) has taken the position that domain names can be registered as trademarks when they are used in a trademark sense.<sup>10</sup> This position comes, in part, from analogizing domain names to certain registrable telephone number mnemonics and radio station call letters. The PTO has not, however, intervened in any way in the controversy over registration of domain names by InterNIC.

### **IV. Internet Trademark Disputes**

The current system for registering Internet domain names has led to a number of disputes over commercially important trademarks and trade names. One recent example involves the trademark, "BBB," owned by the Council of Better Business Bureaus, Inc. (CBBB).<sup>11</sup> The dispute arose when the CBBB attempted to obtain a domain registration of its federally registered trademark BBB. The CBBB, much to its dismay, learned that the domain name BBB had already been registered by Mark Sloo of Kansas City who apparently hoped to force the CBBB to buy the Internet address from him. The CBBB has filed a trademark infringement lawsuit in the U.S. District Court in Kansas City, claiming both federal trademark

infringement and unfair competition.<sup>12</sup>

Another recent dispute over domain name registrations involved *Wired* magazine, one of the most widely read magazines reporting on Internet issues.<sup>13</sup> Operators of a computer network named WIRE, which was established to encourage women to become more active on the Internet, registered the domain name “wire.com.” *Wired* magazine responded by sending a letter demanding that WIRE’s registration of wire.com be withdrawn because it was likely to be confused with *Wired* magazine’s online \*6 service domain name “wired.com.” The dispute was settled amicably when the women’s network changed their domain registration name to “wwire.com.”<sup>14</sup>

Other disputes in which domain names have conflicted with established trademarks have not ended so amicably. The following is a brief summary of three of the most widely reported disputes over the Internet.

#### **A. *MTV Networks v. Curry***

In *MTV Networks v. Curry*,<sup>15</sup> MTV Networks (MTV) sued one of its former “VJs,”<sup>16</sup> Adam Curry, for trademark infringement based on his use of the Internet domain name “mtv.com.”<sup>17</sup> Curry had originally developed the Internet site using the mtv.com domain name in order to publish a daily “cybersleaze report” which provided gossip regarding developments in the rock music and entertainment industries.<sup>18</sup> He registered mtv.com under his own name and refused to assign the domain name to MTV after his employment was terminated.<sup>19</sup> Curry began using the domain name “metaverse.com” pending trial and, in March 1995, relinquished mtv.com in a settlement with MTV.<sup>20</sup>

#### **B. *Kaplan v. Princeton Review***

One of the most bitter trademark disputes over domain names on the Internet involved the test preparation company Stanley Kaplan Educational Centers (Kaplan) and its arch-rival Princeton Review (Princeton). Princeton registered and began using the domain name “kaplan.com.”<sup>21</sup> Although Princeton claimed that the registration of a domain name incorporating its rival’s trademark was a “joke,”<sup>22</sup> the address was activated with advertisements for Princeton’s services,<sup>23</sup> presumably directed at Internet \*7 users trying to reach Kaplan. Princeton also used the domain name to distribute disparaging information regarding Kaplan.<sup>24</sup>

At one point during the dispute, Princeton’s president offered to transfer the domain name in exchange for a case of beer--“domestic or imported.”<sup>25</sup> When Kaplan refused to accept this settlement offer, Princeton’s president stated that Kaplan had “no sense of humor, no vision, and no beer.”<sup>26</sup> Although this dispute resulted in the filing of a lawsuit, it was eventually referred to binding arbitration. The arbitration panel held in Kaplan’s favor and ordered Princeton to transfer the domain name to Kaplan.<sup>27</sup> At one point during the dispute, the president of Princeton Review threatened to register “kraplan.com” as a domain name in order to continue providing disparaging information regarding Kaplan.<sup>28</sup>

#### **C. *McDonald’s v. Quittner***

Another recent trademark dispute arose when a reporter for *Newsday* decided to write an article on the failure of businesses to register well-known trademarks as Internet domain names. The author, Joshua Quittner, singled out McDonald’s as an example of a company which had not yet registered some of its most famous trademarks. He then proceeded to register the address “ronald@mcdonalds.com,” listing himself as the user of that domain name.<sup>29</sup> Using his magazine as a forum, he solicited e-mail from readers, whom he asked to send him suggestions on how he should use his newly registered domain name. Apparently, half of the e-mail messages he received suggested that he sell the name back to McDonald’s for a large sum of money; the other half suggested that he use the name as an address to distribute information promoting vegetarianism over hamburger consumption.<sup>30</sup> Quittner has offered to surrender the domain registration to McDonald’s if they will provide an updated computer system for a New York elementary school.<sup>31</sup>

### **V. Trademark Law**

Under section 45 of the Lanham Trademark Act, a trademark is “any word, name, symbol, or device, or any combination thereof” that serves to identify and distinguish \*8 the goods provided by one party from those provided by others.<sup>32</sup>

Generally, trademarks can exist only with respect to some sort of commercial activity, although certain statutorily created categories of marks, such as certification marks and collective marks, can also exist as valid trademarks.<sup>33</sup> Service marks are entitled to the same protection as trademarks, although they are used to identify and distinguish the source of services rather than goods.<sup>34</sup>

Trademarks serve the dual purpose of protecting the public by preventing confusion as to the source or origin of goods while also allowing businesses who have adopted a trademark to build goodwill in that trademark. Traditionally, trademark law has been considered a part of the broader category of unfair competition law.<sup>35</sup> One of the basic tenets of unfair competition law is that it is unfair for one party to “palm off” his goods and services as being those of a competitor. Since fairness and competition are the principle objectives of unfair competition law, the good faith of a trademark user is one of the central issues in determining infringement. Clearly, the intent of a party in adopting a particular mark is one of the central issues which must be established in a claim for trademark infringement.

In establishing the strength of a particular trademark, the courts have recognized four basic categories:<sup>36</sup>

1. *Generic*: A common name for a product which can never serve as a trademark.
2. *Descriptive*: A term which describes the product and can only become a trademark after a period of exclusive use.
3. *Suggestive*: A term that subtly suggests something about the product and can become a trademark immediately upon use.
4. *Arbitrary/Fanciful*: A term which bears little or no relationship to the product and can become a very strong trademark upon use.

The Lanham Act prohibits the use of a mark that is likely to cause confusion, mistake, or deception.<sup>37</sup> In addition, federal registration is generally unavailable for marks that are either geographically descriptive or geographically misdescriptive.<sup>38</sup> This prohibition, however, is subject to an exception in cases where a mark has attained a \*9 secondary meaning.<sup>39</sup> Furthermore, the prohibition only pertains to marks that are “primarily” geographically descriptive or misdescriptive; thus, it is not necessary for the secondary meaning to totally destroy the geographic sense of the mark.<sup>40</sup> Rather, it is only necessary for the secondary meaning to minimize the geographic aspect of the mark in the minds of consumers.

In general, the prohibition against the registration of geographically descriptive marks assumes that the mark was taken from a geographic location. There are, in fact, a number of cases where a geographic address has been established based on a well-known trademark; for example, the McDonald’s Corporation is located at One McDonald’s Plaza, Oakbrook, Illinois.<sup>41</sup> In such cases, it seems reasonable to allow businesses to establish addresses in the form of domain names on the Internet. Furthermore, it would seem clear that an unfair competition claim could be based on the adoption of a confusingly similar address by a competitor.<sup>42</sup>

### **A. Comparison to Telephone Mnemonics**

The protection of trademarks based on telephone mnemonics is an area in which traditional trademark principles may have a bearing on the protectability of domain names over the Internet. In most cases addressing the use of telephone mnemonics as a trademark, the courts have held such marks to be protectable and have also used the likelihood of confusion standard to assess infringement of such marks.<sup>43</sup>

In the case of *Dranoff-Perlstein Associates v. Sklar*, Dranoff-Perlstein Associates, which had been using and advertising the telephone number “INJURY-1” since 1984, filed an action alleging unfair competition and trademark infringement against Sklar, who began using and advertising the telephone number “INJURY-9” in 1990.<sup>44</sup> In its opinion, the Third Circuit emphasized that the marks in question must be assessed “as a whole.”<sup>45</sup> Although the two marks in question were found to share a generic portion, the Third Circuit remanded the case to the district court to “consider the likelihood of \*10 confusion between the two marks in their entireties, with the emphasis of the inquiry on the non-generic portions of the disputed marks.”<sup>46</sup>

There have also been cases which hold that intentional adoption of similar telephone mnemonics can amount to “parasitic”

practices. In *Holiday Inns, Inc. v. 800 Reservation, Inc.*,<sup>47</sup> the court considered the likelihood of confusion between the telephone mnemonics “1-800-HQLIDAY-INN” and “1-800-HOLIDAY INN.” Because it was well known that consumers would often mistakenly dial a zero instead of the letter “O,” the defendant’s intent in adopting the mark was clearly a major factor in the court’s finding of unfair competition and trademark infringement.

## B. Broadcast Identifiers

Courts have considered trademark issues similar to those involved in Internet domain names in cases involving radio and television services’ broadcast identifiers. Under rules established by the Federal Communications Commission (FCC), radio stations east of the Mississippi River are identified by four call letters beginning with the letter “W,” and stations west of the Mississippi are identified by four call letters beginning with the letter “K.” Although there have been some exceptions, virtually all radio stations in the U.S. follow this convention.

Radio stations commonly seek a combination of call letters which will form an acronym that is easy for consumers to remember, and which suggests the nature of the music the station plays. Although the FCC assigns call signs, courts have often been called upon to decide trademark infringement issues in cases where stations have adopted a call sign acronym that was claimed to be confusingly similar to another station’s.

In *Infinity Broadcasting Corp. v. Greater Boston Radio II, Inc.*,<sup>48</sup> the District Court in Massachusetts considered whether the call sign “WBCN” was confusingly similar to “WBCS” and, therefore, subject to a possible claim of trademark infringement or unfair competition. The court used several factors to evaluate the likelihood of confusion between the two call signs: the phonetic similarity of the call signs, the similarity of the music formats followed by the two stations, the geographic area of use, the sophistication of the stations’ consumers, and the degree of care exercised by those consumers.<sup>49</sup> The court found that the likelihood of confusion was “minimal,” and, more significantly, determined that the difference in the single letter at the end of each call sign was a sufficient disparity to prevent confusion on the part of \*11 consumers.<sup>50</sup> It is likely, therefore, that similar distinctions between domain names on the Internet could be used to avoid claims of infringement based on likelihood of confusion.

## VI. Conclusion

Although there is disagreement within the legal community over the question of whether Internet domain names are trademarks, there is little doubt that significant commercial interests are at stake. As the commercial use of the Internet expands, there will be increasing pressure to resolve the question of whether domain names truly qualify as trademarks and to establish clear guidelines to prevent unfair competition from domain name squatters who hope to benefit from the goodwill established by others. Though current trademark laws are founded upon principles established long ago in “real space,” we should rest assured that they can be adapted to today’s commerce in “cyberspace” or, for that matter, to future commerce in a “galaxy far, far away.”

### Footnotes

<sup>a1</sup> Akin, Gump, Strauss, Hauer & Feld, Austin, Texas.

<sup>1</sup> “Cyberspace” is a term coined by author William Gibson in his novel *NEUROMANCER* to describe the collective world of networked computers. The term is now commonly used to refer to the “space” defined by a world of networked computer systems.

<sup>2</sup> See generally Dan L. Burk, *Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICHMOND J.L. & TECH. 1 (1995); see also WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INFORMATION INFRASTRUCTURE TASK FORCE, U.S. DEP’T OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1994); INT’L TRADEMARK ASS’N, SPECIAL BULLETIN: MUCH ADO ABOUT THE INTERNET (A PRIMER) (1995).

3 The nature of domain names and their relation to addresses on the Internet will be discussed in the following section.

4 Stewart Ugelow, *Address for Success: Internet Name Game; Individuals Snap Up Potentially Valuable Corporate E-Mail IDs*, WASH. POST, Aug. 11, 1994, at A1.

5 *Company Must Alter Name on Internet; CYBERSPACE: A Competitor Had Chosen 'kaplan.com' to Irritate Kaplan Educational Centers*, ORANGE COUNTY REG., Oct. 7, 1994, at C1.

6 For a discussion of the structure of the Internet, see HARLEY HAHN & RICK STOUT, *THE INTERNET COMPLETE REFERENCE* 1-19 (1994); *see also* NICHOLAS BARAN, *INSIDE THE INFORMATION SUPERHIGHWAY REVOLUTION* 36-40 (1995).

7 *See* HAHN & STOUT, *supra* note 6; *see also* BARAN, *supra* note 6.

8 INT'L TRADEMARK ASS'N, *REPORT OF THE INTERNET TASK FORCE* (1995). The Author wishes to express his gratitude to David W. Maher, member of the Task Force, for providing background information and copies of the Task Force Report.

9 *Id.*

10 For a domain name to be registrable in the PTO, it must be used as a trademark or service mark in a conspicuous manner that identifies the source, origin, sponsorship, or affiliation of a particular set of goods or services. *See* INT'L TRADEMARK ASS'N, *SPECIAL BULLETIN: REGISTRATION OF INTERNET DOMAIN NAMES IN THE USPTO* (1995).

11 *Council of Better Business Bureaus Sues Over Internet Plans: A Wall Street Journal News Roundup*, WALL ST. J., May 15, 1995, at B2.

12 *Council of Better Business Bureaus, Inc. v. Sloo*, No. 95-0473-CV-W-2 (D. Kan. filed May 8, 1995). The author wishes to express his gratitude to Steven J. Cole, Esq., General Counsel to the Council of Better Business Bureaus, Inc., for providing background information and copies of the pleadings in this case.

13 Elizabeth Weise, *Feud Highlights Growing Importance of Internet*, BOSTON GLOBE, Feb. 22, 1994, at 42.

14 *Id.*

15 *MTV Networks, A Division of Viacom Int'l, Inc. v. Curry*, 867 F. Supp. 202 (S.D.N.Y. 1994).

16 "VJ" is an acronym for video disc jockey. *Id.* at 203.

17 *Id.* at 203-04.

18 Joshua Quittner, *Highway Sighing: Computer Writer Fights MTV*, NEWSDAY, May 13, 1994, at A21.

19 *Curry*, 867 F. Supp. at 203-04.

20 *MTV, Curry Settle*, INFORMATION LAW ALERT: A VOORHEES REPORT, Mar. 24, 1995.

21 Joshua Quittner, *Life in Cyberspace: You Deserve a Break Today*, NEWSDAY, Oct. 7, 1994, at A5; *see also* Quittner, *supra* note 18.

22 Jared Sandberg, *Washington Post Co. Wins Unit's 'Name' in Trademark Suit*, WALL ST. J., Oct. 6, 1994, at B8.

23 Ugelow, *supra* note 4.

24 Patricia Alex, *E-Mail Robbery on Information Superhighway*, THE RECORD, N. N.J., Oct. 10, 1994, at A3.

25 Quittner, *Life in Cyberspace*, *supra* note 21.

26 Quittner, *Life in Cyberspace*, *supra* note 21.

27 Sandberg, *supra* note 22; *see also* Alex, *supra* note 24.

28 Ugelow, *supra* note 4.

29 Quittner, *Life in Cyberspace*, *supra* note 21.

30 Quittner, *Life in Cyberspace*, *supra* note 21.

31 Quittner, *Life in Cyberspace*, *supra* note 21.

32 15 U.S.C. § 1127 (1995).

33 *Id.*

34 *Id.*

35 *See generally* J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION §§ 1.01-.14 (3d ed. 1992 & Supp. 1995).

36 *See* SIEGRUN KANE, TRADEMARK LAW: A PRACTITIONER'S GUIDE 5 (2d ed. 1991); *see also* *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9, 189 U.S.P.Q. (BNA) 759, 764 (2d Cir. 1976).

37 15 U.S.C. § 1127 (1995).

38 MCCARTHY, *supra* note 35, §§ 14.10-.13; 15 U.S.C. § 1052(e) (1994).

39 MCCARTHY, *supra* note 35, § 7.26(2); 15 U.S.C. § 1052(f). *Cf.* 15 U.S.C. § 1052(e)(3) (1994) (As of December 8, 1993, primarily geographically deceptively misdescriptive marks are no longer registrable, even upon acquisition of secondary meaning).

40 MCCARTHY, *supra* note 35, §§ 14.01-.13.

41 *See* Burk, *supra* note 2, at 14 (citing numerous examples taken from *Standard & Poor's* Registry).

42 *See* Burk, *supra* note 2, at 14-15.

43 *See, e.g.,* Murrin v. Midco Communications, Inc., 726 F. Supp. 1195, 13 U.S.P.Q.2d (BNA) 1815 (D. Minn. 1989) (mnemonic “Dial L-A-W-Y-E-R-S”); *see also* Burk, *supra* note 2, at 22-24.

44 967 F.2d 852, 853-54, 23 U.S.P.Q.2d (BNA) 1174, 1175-76 (3d Cir. 1992).

45 *Id.* at 861, 23 U.S.P.Q.2d at 1181.

46 *Id.* at 862, 23 U.S.P.Q.2d at 1183.

47 838 F. Supp 1247 (E.D. Tenn. 1993).

48 32 U.S.P.Q.2d (BNA) 1925 (D. Mass. 1993); *see also* Burk, *supra* note 2, at 20-21.

49 32 U.S.P.Q.2d at 1932-35.

50 *Id.* at 1934-35.