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E-COMMERCE REGULATION

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A critical analysis of the effectiveness and authority for e-commerce of:

a. DN regulation

b. Trademark law

1. Introduction

The Internet's expansion can be characterised as a spider web that embraces the globe, comprising of interconnected online network which permits users to communicate and conduct commerce[1]. Recently, the development of e-commerce can be seen as a transformation of the Internet world form a research engine to an international marketplace with the ability to provide services to millions of consumers around the earth[2]. Commercial businesses and individuals can easily activate an e-commerce website with an exclusive DN (DN) which may be reachable globally[3]. A DN constitutes an online address by which a business or an individual can be reached by any cyber user[4]. The choice of DNs is free upon the companies and so they attempt to select from the available DNs, names easy and common for the customers to remember[5]. The problem occurs when a business/individual picks a name which has already been used as a trademark from another business, or when the same DN is desired by two or more businesses[6]. This essay starts by providing the basics of trademark and DN, namely the definition of registered trademarks and the elements used to determine trademark infringements. Afterwards, it explains the meaning of DNs, the parts that constitute a DN and how they administrated. It then discusses the interrelation between trademarks and DNs and the infringements that have occurred between registrants of infringing DNs and owners of registered trademarks. Finally, it examines the efficiency of the mechanisms that have implemented so far in order to mitigate the trademark/DN disputes.

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[1] 174 F.3d. 1036, 1044 (9th Cir. 1999)
[2] Gary W. Hamilton, 'Trademarks on the Internet: Confusion, Collusion, or Dilution?' (1995) 4 TEx.Intel.Prop.L.J. 1, 2
[3] Todd W. Krieger, 'Internet DNs and Trademarks: Strategies for Protecting Brand Names In Cyberspace' (1998) 32 SuffolkU.L.Rev. 47
[4] Gayle Weiswasser, 'DNs, the Internet, and Trademarks: Infringement in Cyberspace' (2003) 20 SantaClaraComputer&HighTech.L.J. 215, 217
[5] Ibid
[6] Ibid 218

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2. Basics of Trademark and DN

2.1. Trademark Definition and Law

To start with, trademark means any 'word, name, symbol, or device, or any combination thereof [...] used by a person [...] to identify and distinguish his or her goods [...] from those manufactured or sold by others and to indicate the source of the goods'[7]. The most significant aspect of the definition is that a trademark should determine and differentiate the manufacturer's goods from others' goods[8]. It is commonly acknowledged that the 'trade-marked commodity and its producer or distributor [had] a dominant or monopolistic position'[9]. In US, the trademark law is found in the Lanham Act at the federal level, through state regulations at the state level and through the provisions of common law[10]. The Lanham Act prevails when the state's laws contradict any of the federal provisions of the Lanham Act[11]. An owner who has registered a trademark under the federal Act can protect its trademark over a mark which has registered under a state's law, namely **'**state law cannot narrow the rights of a federal registrant or permit confusion of customers which federal law seeks to prevent'[12]. However, some states provide certain advantages to the holders of state registered trademarks. For instance, some state laws confer wider security than the federal Act, some others specify that a registered trademark under state law evidences prima facie ownership, whereas other states regard registration as a confirmation of validity[13].

2.2. Trademark Infringement: Likelihood of Confusion and Dilution

One of the main functions of trademark law is to protect both registered and unregistered trademarks from others' infringements. Protection from trademark infringements is of great importance in order to be ensured that customers can recognise the authentic website of the goods and are secured from confusion and scam while manufactures and businesses can protect their reputations and ascertain

[7] 15 U.S. Code para 1127 (1988)
[8] 115 S. Ct. 1300, 1303 (1995)
[9] Sigmund Timberg, 'Trade-Marks, Monopoly, and the Restraint of Competition Sigmund' (1949) 14 LawAndContemporaryProblems 323, 326
[10] Ibid 219
[11] I J. Thomas Mccarthy, *Mccarthy On Trademarks And Unfair Competition* (3d edn, 1994) 22
[12] Ibid
[13] Ibid

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their goodwill[14]. Below, it is explained the two main categories of infringements that are related to trademarks: infringement that produces a possibility of confusion, and infringement that dilutes the trademark's value.

Infringement due to potential of confusion is the more usual[15]. In such a scenario, a claimant should demonstrate that the perpetrator's mark is indeed quite similar to his own trademark and so the defendant, by using his so similar mark in e-commerce, is possible to cause consumers' confusion as to the origin of goods[16]. Several factors are taken into consideration by the courts in order to examine a claim of possible confusion[17]. Factors such as the proximity of the marks in meaning, sound and appearance; the strength of the marks; the defendant's intention in choosing an almost identical mark, the proximity of the relevant goods, the similarities in marketing and advertising and the consumers' sophistication for the goods[18]. The list of factors is not exhaustive as any other evidence which illustrates that a mark impacted the whole impression devolved to a potential buyer can be considered relevant in determining the possibility of confusion[19].

Trademark dilution, the second category of infringement that prohibited under federal law, constitutes 'the lessening of the capacity of a famous mark to identify and distinguish goods or services'[20]. Trademark dilution added in federal law after an amendment of Lanham Act in 1996 and its aim is to protect the distinguishing nature of a trademark[21] while it does not require the possibility for a confusion[22]. Dilution can occur in two ways: dilution by blurring a mark's product identification, namely 'the whittling away of an established trademark's selling power through its unauthorized use by others upon dissimilar products'[23] or dilution by tarnishment of the positive associations that a trademark was meant to convey, namely 'when plaintiffs mark is associated with goods of inferior quality or is depicted in an unwholesome or unsavory context'[24]. Again, the courts consider some

[14] Ibid (n 4) 221
[15] Ibid
[16] Ibid
[17] Ibid
[18] 287 F.2d 492, 495 (2d Cir. 1961)
[19] Ibid (n 4) 221
[20] 15 U.S.C § 1127 (West Supp. 1996)
[21] 15 U.S.C.A. § 1125(c) (West Supp. 1996)
[22] Ibid
[23] 875 F.2d 1026, 1031 (2d Cir. 1989)
[24] 346 F. Supp. 1183 (E.D.N.Y. 1972)

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factors in order to examine whether the defendant's mark dilutes the claimants. The relevant factors in dilution may be the grade of intrinsic or possessed distinctiveness of the trademark; the time period of trademark's use in relation with the products/services for which the trademark is used; the geographic area of trading in which the mark is operated; the extent of recognition of the mark in e-commerce industry; and the nature of the use of similar marks[25].

2.3. DN Definition

In order 'for businesses to communicate effectively on the Internet, it is essential that they have a unique "address" that is easily recognizable to customers'[26]. For that purpose, every user has an Internet Protocol Address (IP Address), namely a distinctive combination of numbers such as 123.231.24.04. which represents the particular network of the user and the user's local address which recognises him in the network[27]. Because IP addresses are indeed difficult to remember, the IP Address system created a more user-friendly system 'in which IP Address holders are given an easily remembered mnemonic designation', known as DN[28]. For online businesses operating e-commerce activities, a DN is particularly significant for communicating with customers[29]. As there is no other efficient alternative for reaching the online address of a company, a DN which coincides with a renowned trademark is definitely a precondition for a company which seeks to start an online business[30]. Therefore, DNs are not merely addresses to online traders but could be regarded as 'the electronic signs on the virtual storefronts',[31] the company's 'postal addresses, vanity license plates and billboards, all rolled into one digital enchilada'[32] or the corporate's 'identity in the information age'[33].

2.4. DN space and administration

[25] I5 U.S.C. § 1125 (c)
[26] Ibid (n 2) 3
[27] Dan L. Burk, 'Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks' I.RICHMOND.J.L.&TECH. 1, 4
[28] Ibid
[29] Ibid (n 4) 224
[30] Ibid (n 4) 224
[31] David P. Krivoshik, 'Intellectual Property: Paying Ransom on the Internet' (1995) NJLJ 10
[32] Joshua Quittner, 'Life in Cyberspace: You Deserve a Break Today' (*Newsday*, 7 October 1994) at A5
[33] Stewart Ugelow, 'Address for Success: Internet Name Game; Individuals Snap Up Potentially Valuable Corporate E-Mail IDs' (*Wash. Post*,11 August 1994) at Al

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When internet users taping an alphanumeric DN, computers programs are set automatically to reach the corresponding numeric Address[34]. The space of a DN (i.e. queenmary.com) involves two important parts/labels. The first part is called the second-level domain (i.e. queenmary) and is a choice made by the registrant of the DN while the next element (i.e. .com) is named the top-level DN and defines the organisation's purpose. Currently, there are many top-level domain identifiers such as 'edu' for educational organisations, 'gov' for government network, 'org' for non-profit organisations, 'us' for addresses located in the US, 'uk' for UK addresses etc.[35]. This DN System is developed and controlled by the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN was established in 1998 by the World Intellectual Property Organization (WIPO)[36]. It is a non-profit international organisation and is formed of Internet stakeholders from private sector[37]. ICANN exists to organise and protect the international policies and operations of databases which are linked to Internet namespaces[38]. It is also the organisation that approves DN registrants which in turn register and reassign DNs[39]. It is noteworthy here that before the formation of ICANN and its relevant administrative control, Network Solution, Inc. (NSI) was the first and main company (founded in 1979) which operated DN registrations based on 'first-come, first-served' policy[40].

3. Interrelation of trademarks and DNs

After explaining the terms 'trademark' and 'DN' and their separate functions, it is important to discuss the interrelation and interaction between them as interestingly, it has been noticed that 'alphanumeric DNs that incorporate trademarks have become a source of friction between trademark owners and DN registrants'[41]. This section analyses the DN and trademark infringements and the ineffective attempts that have been implemented in order to mitigate the problem. At the end, the essay suggests possible alternatives which may reduce the infringements.

[34] Ibid (n 27)
[35] Ibid (n 4) 224
[36] Matthew Edward Searing, 'What's in a DN - A Critical Analysis of the National and International Impact on DN Cybersquatting' (2000) 40 WashburnL.J. 110, 131
[37] Ibid
[38] Michael S. Denniston & Margaret Smith Kubiszyn, 'WWW.YOURCLIENT.COM: Choosing DNs and Protecting Trademarks on the Internet' (2000) 61 Ala.Lawyer 40, 42
[39] Ibid
[40] Stacy B. Sterling, 'New Age Bandits in Cyberspace: DNs Held Hostage on the Internet' (1997) 17 Loy.L.A.ENT.L.J. 733, 737
[41] Ibid (n 3) 49

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3.1. DN and Trademark Infringements

To start with, it should be clarified that DNs are distinct globally whereas trademarks in US may appear simultaneously in different markets and in different product ranges[42]. For example, Domino's Pizza and Domino's Sugar can co-occur legally and peacefully as it is extremely improbable for a consumer to confuse the websites of the two products[43]. In Internet world, though, the same DN cannot be allocated to two individuals or businesses, no matter how different their markets and products are. This is because in cyberspace the geographic markets are merged and so DNs are not just territorial[44]. This is the main cause of skirmishes between trademark law and DN as businesses with the same name, usually try to register the alike DN too.

Additional problems evolved from the 'first come, first served' policy of NSI as it makes it possible for cybersquatters to register a company's DN before the company does so, making the name unavailable to the business[45]. Namely, NSI policy endorsed several trademark violations and dilution conflicts[46]. Case law clearly illustrates the aforementioned negative implication. One of the very first cases of cybersquatting is Panavision International LP v. Toeppen and Network Solutions, Inc[47]. In that case, Dennis Toeppen, the defendant, registered the DNs 'panavision.com.' and 'panaflex.com' and then tried to gain money from Panavision for the ownership of DNs. The court held that the defendant diluted the trademark of Panavision[48]. Another interesting case involves the famous fast-food chain McDonald's. Here, Joshua Quittner, a writer for Wired and Newsday, desired to test the reaction of McDonald's to his registration of the DN 'mcdonalds.com'[49]. He wanted to prove that it is indeed extremely easy to register a famous DN under NSI. When McDonald's finally realised the registration, it demanded the renunciation of the DN. Quitter accepted the request under one condition, only if McDonald's made a donation of $3,500 to a junior high school and so McDonald's did[50].

[42] Ibid
[43] 615 F.2d 252 (5th Cir.1980)
[44] 260 U.S. 689 (1923)
[45] Ibid (n 36) 117
[46] Ibid (n 38) 43
[47] Inc 945 F. Supp. 1296 (C.D. Cal. 1996)
[48] Ibid
[49] Ibid (n 27) 21
[50] Ibid

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Significantly noteworthy is also the fact that the interaction of trademark and DN raises legal issues. It is now questionable whether a registered DN corresponds to a mark adequate enough to provide to the registrant trademark protection for that name and moreover, whether a second user should be averted from registering a trademark with a name that someone else has first requested it for a DN[51]. So far, none of these legal issues has been clarified but it is awaited that as e-commerce develops, ambiguities like these will be addressed[52]. Besides, the utility of a DN in the cyberspace erects 'thorny jurisdictional issues'[53]. For example, a holder of an Internet DN whose online use allows access to both national and global markets may breach the trademark rights of a trademark holder who is from a different jurisdiction[54]. In such a case, it is doubtful whether the DN holder should be considered liable under the national law of the trademark holder. This issue was addressed in Bensusan Restaurant Corp. v. King where a court examined whether the Blue Note jazz club in Missouri, which registered and run an Internet website using its name, had breached the trademark rights of the more famous New York jazz named Blue Note too[55]. The court focused on 'whether the creation of a website, which exists either in Missouri or […] anywhere the Internet exists […] is an offer to sell the product in New York'. Even more complicated here was the fact that the New York club could evidence that the Missouri club's website confused the customers as some bought online tickets for the Missouri club assuming that they were tickets for the New York club[56]. However, the court issued that the website was not subject to New York jurisdiction because it did not constitute a sufficient 'use in commerce' and also gaining 'information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling, or otherwise making an effort to target its product in New York'[57]. The extraterritorial application of domestic laws is a huge problem itself and it becomes even more tremendous when it is combined with the controversy of DNs and trademarks infringements.

3.2. Attempts to mitigate infringements

The negative implications from the interaction between trademarks and DNs occur 'within a legal and moral grey area' and therefore, any interventions to mitigate the problems have been eventually

[51] Ibid (n 4) 249
[52] Ibid
[53] Ibid
[54] Ibid
[55] 1996 U.S. Dist. LEXIS 13035 (S.D.N.Y. 1996)
[56] Ibid
[57] Ibid

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proven inefficient[58]. The main attempts for mitigating the problems came from policy options[59]. Specifically, the two most significant instruments that have existed for policy interference are the US Anticybersquatting Consumer Protection Act 1999 (ACPA) and the Uniform Domain Name Dispute Resolution Policy (UDRP)[60]. Afterwards, due to the above policies' weaknesses, many other tools have been implemented aiming to fill the gaps of the previous interventions and provide a more adequate administration.

The ACPA (15 USC §1125(d)) was intended to 'thwart cybersquatters who register Internet DNs containing trademarks with no intention of creating a legitimate web site, but instead plan to sell the DN to the trademark owner or a third party'[61]. The Act imposes liability to a person who registers a DN having a bad faith intention to gain money or when the DN registered is 'identical, or confusingly similar' to a well-known trademark[62]. Firstly, the ACPA was considered a positive intervention because since its establishment, a trademark holder is now allowed to attain jurisdiction by suing the DN holder in his territory; it enables a court 'to transfer, forfeit or cancel the DNr of the registrant'; and most importantly, it 'has carved the way for trademark holders to receive injunctive relief and statutory damages for every DN held in bad faith'[63]. Notwithstanding, it has been soon realised that it is not the ideal way to prevent typosquatting and infringements. Like any other legal action, the application of the ACPA is expensive and hence only some of the big trademark holders have effected their rights such as Facebook against typosquatters on 105 domains[64]. Furthermore, the requirement of bad faith is difficulty proven and so the legal action may usually be inefficient[65]. Unfortunately, it has been eventually observed that 'even vigilant companies seem overwhelmed by the number of typosquatting domains targeting their brands, motivating them to litigate; even so, many of their

[58] Janos Szurdi Balazs Kocso,Gabor Cseh,Jonathan Spring, Mark Felegyhazi,Chris Kanich, 'The Long "Taile" of Typosquatting DNs Janos Szurdi' (San Diego, 20-22 August 2014) <https://www.usenix.org/conference/usenixsecurity14/technical-sessions/presentation/szurdi> accessed 19 March 2018
[59] Ibid 202
[60] Ibid
[61] Ibid (n 58) 202
[62] 15 U.S.C. § 1125(d)(1)(A)(ii)(I) (1999)
[63] Ibid (n 36) 124
[64] Ingrid Lunden, 'U.S. Court Rules for Facebook In Its Case Against Typosquatters On 105 Domains; $2.8M In Damages' (1 May 2013) <https://techcrunch.com/2013/05/01/u-s-court-rules-for-facebook-in-its-case-against-typosquatters-on-105-domains-2-8m-in-damages/> accessed 20 March 2018
[65] S. D. Sunderland, 'DN speculation: Are we playing whac-a-mole' (2010) 25 BerkeleyTech.LJ 465

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domains are still controlled by typosquatters'[66]. Therefore, it is clear that the ACPA did not manage to address the targeted problems and so, it could be considered as another unsuccessful Act with little relevance and importance.

The UDRP was established as another attempt to mediate the conflicts over the registration of DNs and to offer a cheaper and quicker way to litigate[67]. The UDRP mandates that a registrant should ensure that there is no infringement against a third party and that if any violation exist, the registrant will be found liable[68]. Compared to the ACPA, the UDRP is considered more beneficial because it is mandatorily bound to all DN registrants and so it somehow diminishes the problem of international jurisdiction and also, it shortens the time for investigations and movements[69]. Nonetheless, the UDRP does not indicate which trademark laws should be accepted and so it remains unclear which laws violate other countries' trademark laws[70]. Besides, like the ACPA, so exactly the UDRP mostly encourages big trademark holders to pursue legal action against smaller businesses as there is always the fear of costly procedures by the last ones[71]. After UDPP, ICANN introduced a procedure of creating new generic top-level domains (gTLDs) as another mechanism to counter the problems of DN disputes. The effectiveness of this process has obtained several criticisms[72]. The creation of some new gTLDs gives more options for new DNs and this alleviates some of the DN problems[73]. Concurrently, new gTLDs cause consumer confusion and businesses with registered DNs have to protect their trademark names from the new options created by the new gTLDs[74]. It has been also evidenced from previous extensions of the namespace that .com continues its dominance in size and popularity for cybersquatting disputes[75]. Thus, the process of creating new gTLDs seems inappropriate and incapable to deal with the problems.

[66] Ibid (n 58) 202
[67] Ibid (n 36) 132
[68] Ibid
[69] Ibis 134
[70] Ibid 136
[71] Ibid 135
[72] Ibid 140
[73] Ibid
[74] Ibid
[75] Ibid

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Lastly, the most recent options to reduce typosquatting problems is through the enforcement of technical tools[76]. Examples of such tools are notified below:

> Strider Typopatrol, a tool to automatically discover typo domains of popular domains. OpenDNS provides typosquatting correction in their DNS services, but only for major TLDs. […] URLFixer was introduced in the Adblock Plus advertisement blocking tool, […] includes misspellings of top Alexa domains, but fails to correct less popular DNs and includes some short DNs leading to false corrections. [A] browser plugin to check typo domains based on a user-customized local repository. […] SUT, a method to identify typosquatting domains mostly based on HTML properties. Finally, the autocomplete feature of most major browsers can also decrease the instance of typos, albeit only for previously visited sites.[77]

All the above have some common shortcomings: they are limited in scope as they only cover a small range of domains and usually the most popular and frequent ones; limited in features as they only correct TLD or HTML features; or limited in the info utilised regarding search typing or national browser history[78]. Therefore, these instruments are omitting a significant amount of typosquatting typos.

4. Conclusion

By taking everything into consideration, it can be argued that 'the Internet poses unique problems for those trying to protect the goodwill and intangible value encapsulated in a trademark'[79]. The inevitable and complex interrelation between trademarks and DNs creates controversial disputes in the e-commerce world which the laws (national and international) have not managed to resolve so far. Many policy interventions and technical tools have introduced in order to mitigate the infringements but they have all proved inefficient and inappropriate as they create more problems instead of eliminating the existing ones. It is therefore suggested that rather 'waiting for an international treaty or engaging in expensive litigation, trademark holders must develop a cost effective strategy for maintaining the strength of their trademarks without being overwhelmed by infringers'[80]. On the one hand, it is clear that trademarks and DNs aim to provide adequate protection

[76] Ibid (n 58) 203
[77] Ibid (n 58) 203
[78] Ibid
[79] Ibid (n 4) 216
[80] Ibid (n 3)

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for the digital business owners, on the other hand, both the case law and the statutory provisions aim to create a user-friendly framework, by avoiding confusion towards the wider digital public. Internet and e-commerce have undoubtedly a significant impact to our everyday life, the point is to make it as much useful and friendly to the users/consumers as possible.

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