

ICANN Can or Can It?: Recent Developments in Internet Governance Involving Cybersquatting, Online Infringement, and Registration Practices

By Mark V.B. Partridge and Scott T. Lonardo

Domain names are familiar territory, but who is in charge? Internet commerce has become an indispensable part of modern life for businesses of all types, yet ICANN—the Internet Corporation for Assigned Names and Numbers—remains a mystery to many even though it is the primary global organization in charge of the management of the Internet domain name system.

In the next few months, ICANN plans to launch a major expansion of the domain name system and it is expected to act on other important issues affecting the rights of intellectual property owners online. It is time to learn more about this organization and the issues it manages.

ICANN and the Importance of Names and Numbers

ICANN is a private, nonprofit California corporation formed in 1998 and delegated authority by the United States Department of Commerce to manage the domain name system (DNS).¹ A basic understanding of the DNS, which has been called the “backbone of the Internet”² and “the spark that breathes life and the very existence on the Internet,”³ is necessary to fully appreciate ICANN’s role.

Each computer that communicates on the Internet needs a unique Internet protocol (IP) address, which is a series of numbers like 128.143.28.135.⁴ These numbers can be assigned correlating domain names, which are easier to remember and more user-friendly than multidigit strings of numbers.⁵ Domain names are organized by top levels (generic Top-Level Domains, or gTLDs) such as .com and .org and country-code top-level domains (ccTLDs) like .ca (Canada) and .mp (Northern Mariana Islands).⁶ This top level is referred to as the “root” or the “root zone.”

ICANN has authority over the root. It coordinates the allocation and assignment of IP addresses (the “Numbers” part of its name), determines how the domain names associated with those numbers are distributed (the “Names” part), and makes sure that no two numbers or domain names are identical.⁷ As its bylaws indicate, ICANN also “coordinates policy development reasonably and appropriately related” to the technical functions described above.⁸ For this reason, ICANN is self-described as “dedicated to keeping the Internet secure, stable and interoperable.”⁹

ICANN authority is limited in several ways. For example, it does not have binding agreements with a majority of ccTLD registries.¹⁰ Of the approximately 260 current top-level domains, roughly 240 are for country codes such as .uk for England or .ca for Canada.¹¹ The rest are either gTLDs such as .com or .org; restricted gTLDs such as .biz (for businesses)

or .name (for individuals); or sponsored TLDs such as .edu (for post-secondary education institutions) or .gov (for the U.S. government). Although ICANN lacks binding authority over most ccTLD registry operators, it runs the Internet Assigned Numbers Authority (IANA), the institution that predated ICANN and continues to manage the technical names and numbers duties relating to ccTLDs.¹²

ICANN is not without controversy, particularly over its legitimacy and ties to the U.S. government. Just prior to ICANN’s creation, a group of engineers who “founded” the Internet through U.S. government-funded contracts formed the Internet Society to assert authority over the DNS root.¹³ This effort was unsuccessful, but other attempts followed. In 2005 the European Union put forward a stern proposal to shift control of the DNS from ICANN to a United Nations-affiliated organization, a plan that also failed.¹⁴ Similarly, overtures by the International Telecommunications Union to assume greater control so far have not changed ICANN’s role.¹⁵

Although the Department of Commerce’s agreement with ICANN was set to terminate after two years, the Department of Commerce retains oversight.¹⁶ A major criticism of ICANN’s legitimacy and operations is the continued U.S. government involvement in ICANN’s functioning. A prominent example was the highly publicized decision by ICANN to reject the .xxx top-level domain for adult websites, a decision critics allege was influenced unduly by the United States.¹⁷ Others criticize ICANN as undemocratic and lacking in accountability and transparency.¹⁸

Nevertheless, at least some commentators have credited ICANN with maintaining sufficient stability in the naming and numbering system to keep it operating effectively, decentralizing the distribution of domain names, and creating an effective mechanism for resolving trademark disputes to address the problem of cybersquatting.¹⁹

Cybersquatting and the Uniform Dispute Resolution Policy

Cybersquatting—the bad faith registration of a domain name that is confusingly similar to another party’s trademark—continues to plague trademark owners. It has been estimated that cybersquatting costs brand owners \$1 billion worldwide every year as a result of diverted traffic, loss of goodwill, and enforcement expense.²⁰ Even excluding intangible harm like lost goodwill, the costs may be as much as \$1 million per brand, per year.²¹ Despite policies and laws aimed at addressing this issue, the problem is increasing. A report found 428,617 instances of cybersquatting of mainstream brands in

the second quarter of 2008 alone, a 38 percent increase over the previous year.²²

Trademark holders can take action against suspected cybersquatters through ICANN's Uniform Dispute Resolution Policy (UDRP) or through U.S. court litigation under the federal Anti-Cybersquatting Consumer Protection Act (ACPA).²³ Generally, a trademark holder must show that another has registered and used a domain name in bad faith and that the domain name is identical to or confusingly similar to the trademark holder's mark.²⁴ Factors determining bad faith include whether the registrant's use of the domain name is commercial or noncommercial, whether the registrant uses the domain name to divert customers from the trademark holder, and whether the registrant has offered to sell or transfer the domain name to the trademark holder.²⁵

Cybersquatting has been found, for example, where an individual registered the domain name <fordworld.com> and then offered to sell the domain name to Ford Motor Company knowing that Ford World was the name of Ford Motor Company's employee newspaper.²⁶ Another instance of cybersquatting occurred where an individual registered the domain name <peta.org>, for the fictitious organization "People Eating Tasty Animals," in an attempted parody of the organization, People for the Ethical Treatment of Animals (PETA).²⁷

Cybersquatters also target celebrities. Julia Roberts, Nicole Kidman, and single-name celebrities like Madonna and Charo have all brought successful cases against cybersquatters.²⁸ The musician Sting, however, lost a domain name dispute over <sting.com> because he failed to prove that the site was used and registered in bad faith.²⁹

A variation on cybersquatting is typosquatting, the deliberate use of slight deviations from famous marks for commercial gain. The typical case occurs where, for example, an individual registers <marriott.com> to divert Internet users looking for the hotel's website but who mistakenly add an extra "t" to the domain name.³⁰ Typosquatting has become increasingly popular. A domain typo report reveals that there were over sixty domain-name variations of "Sarah Palin" within weeks of her selection as John McCain's running mate. These variations included <sarapalin.org>, <sarhapalin.com>, and <sarahplain.org>.³¹ One study found that 7.2 percent of possible typographical errors in domain name registrations were actively squatting, meaning that an Internet user who misspells a popular domain name has a one in fourteen chance of landing on a typo-squatted site.³²

Cybersquatting causes obvious harm to trademark owners and consumers alike. It diverts consumers seeking to reach the trademark owner's website, possibly subjecting consumers to unwanted advertisements or offensive material and diverting business away from trademark owners. Moreover, it prevents IP rights holders from using the domain names for legitimate purposes. Cybersquatting can also dilute or tarnish the owner's mark depending on the content of the site. Finally, it allows a cybersquatter to benefit financially from another's goodwill, particularly where the cybersquatter sets up pay-per-click advertisements on the infringing website or utilizes unlawful scams to obtain private information.

Among ICANN's more significant accomplishments is

the establishment of the UDRP to resolve trademark disputes involving domain names. The UDRP is a contractually created arbitration system in which trademark holders can initiate dispute proceedings arising from alleged abusive registrations of domain names such as cybersquatting. All ICANN-accredited registrars for gTLDs have incorporated the UDRP into their registration agreements.³³ All gTLD registrants agree to abide by the UDRP arbitration process when they register a domain name within a gTLD. Where ccTLDs are concerned, because ccTLD registries are not under ICANN's binding authority, they are not required to use the UDRP. In practice, however, many ccTLD registries use the UDRP or some variation of it. One ICANN-accredited dispute resolution provider, the World Intellectual Property Organization (WIPO), reports that 51 ccTLD registries now have designated WIPO to provide domain name dispute resolution services.³⁴

The UDRP and the accompanying UDRP Rules permit a trademark holder to seek cancellation or transfer of a domain name if (1) the domain name is identical or confusingly similar to the complainant's mark, (2) the registrant has no rights or legitimate interests in the domain name, and (3) the domain name was registered and is being used in bad faith.³⁵ The process is relatively fast and inexpensive compared to federal court litigation. To initiate a proceeding, a complainant can file a complaint with an ICANN-approved dispute resolution provider, and the decisions generally are rendered based only on the complaint and the response from the registrant, if any. The remedies in a UDRP proceeding, however, are limited either to cancellation of the domain name or transfer of the domain to the complainant. In comparison, monetary relief is available against cybersquatters under the ACPA.³⁶

Complainants increasingly are resorting to the UDRP for relief against cybersquatters. WIPO reported that 2,156 complaints alleging cybersquatting were filed in 2007, a record number and an 18 percent increase over 2006.³⁷ The vast majority of disputes occurred in the .com gTLD (73.6 percent), followed by the .net (8.7 percent) and .info gTLDs (7.4 percent).³⁸ UDRP complaints involving ccTLDs are also on the rise, with the number of disputed ccTLD domain names increasing from 1 percent in 2000 to 7 percent in 2007, indicating that cybersquatters have expanded the scope of their activities.³⁹ It is perhaps noteworthy that the leading industries targeted by cybersquatters in WIPO proceedings were biotechnology and pharmaceuticals, banking and finance, Internet and Internet technology, and retail.⁴⁰

Recent Developments in ICANN Policy

Domain Name Tasting

"Domain name tasting" refers to a situation where an entity registers a domain name and then tests to see if the name has sufficient traffic to provide more income than the annual registration fee (usually through pay-per-click advertising). If the name is profitable, it is kept. If not, the applicant will use the "add grace period" (AGP) offered by gTLD operators, usually a five-day period, to return the domain name at no cost to the registrant.

The AGP was originally developed to protect consumers who accidentally purchased a domain name they did

not want. Over the past few years, however, it increasingly has been abused by cybersquatters trying to find the most profitable domain names to register. For example, a 2006 *Washington Post* article reported that, of the 30 million dot-com names that were registered in one month, over 90 percent were dropped.⁴¹ WIPO and others attribute the rise in cybersquatting and typosquatting directly to the increased prevalence of domain tasting.⁴² Domain name tasting is also problematic because the five-day AGP window of tasting is too small for rights holders to effectively assemble reliable information to file a UDRP complaint. Thus, cybersquatters who engage in the practice of domain name tasting can do so largely without fear of a UDRP action.

In response to this problem, in June 2008, the ICANN Board decided to implement a policy to discourage gTLD operators from using the AGP.⁴³ The policy is designed to “prohibit any gTLD operator that has implemented an ‘add grace period’ from offering a refund for any domain name deleted during the add grace period that exceeds 10 percent of its net new registrations during that month, or fifty domain names, whichever is greater.”⁴⁴ The FY 2009 ICANN budget proposal included a transaction fee consistent with these limitations.⁴⁵

This new measure already has produced a dramatic reduction in domain tasting. In the first month after the policy went into effect, there was an 84 percent decrease in the number of domain names deleted during the add grace period.⁴⁶

WHOIS Protocol

WHOIS (not an acronym and pronounced “who is”) is a query/response protocol providing public access to data on registered domain names.⁴⁷ Currently, ICANN requires accredited registrars to collect and provide free public access to the contact information for the registered name holder, among other things.⁴⁸ This system presents an inherent conflict. A public WHOIS creates privacy problems, such as the risk of use of WHOIS data in spam generation, abuse of personal data, identity theft, security costs, and loss of data.⁴⁹ These concerns, however, are in tension with the interests of trademark owners and others to identify and locate registrants who are suspected of cybersquatting, posting illegal content, or engaging in other abusive scams.⁵⁰

On August 26, 2008, a study group convened by the Generic Names Supporting Organization (GNSO) Council, which is one of three supporting organizations within the ICANN governance structure, created a list of WHOIS issues for further research.⁵¹ Although there is no ICANN Board action currently scheduled, IP rights owners should monitor these developments.

A related topic is the growing use of privacy or proxy

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registration services shielding a registrant’s identity.⁵² As WIPO panelists have recently noted in UDRP decisions, these proxy services cause complications for UDRP complainants and panelists in ferreting out the true registrant, and they may harm registrants who are not aware of action being taken against their registered domain name.⁵³

Inaccurate WHOIS data maintained by registrars also present enforcement problems for trademark owners. A 2005 U.S. Government Accounting Office study found that at least 8.65 percent of all domain names are registered with false or incomplete WHOIS information.⁵⁴ Registrars are contractually bound by the terms of their Registrar Accreditation Agreement with ICANN to take “reasonable steps to investigate” potential inaccuracies in registrant data.⁵⁵ On September 30, 2008, ICANN sent breach notices to two ICANN-accredited registrars (DNS.com.cn and Joker.com), following up on notices of concern about WHOIS data inaccuracies sent last year.⁵⁶ If the registrars do not cure their breaches, ICANN can terminate their accreditation agreements.⁵⁷ If ICANN continues to police the accuracy of WHOIS data through audits and hold registrars accountable for lapses, this could be a major boost for IP rights owners seeking to curb cybersquatting and online infringement.

New gTLDs

In June 2008, the ICANN Board approved a recommendation to introduce a new range of gTLDs to the Internet’s addressing system.⁵⁸ As many as 5,000 new address extensions may be available as early as 2009.⁵⁹ Proposed new gTLDs include industry-centric TLDs (such as, for instance, .travel for the travel industry) and city-centric TLDs (such as .nyc, .paris and .chicago).⁶⁰ Additionally, the new gTLDs will support extensions in languages that use characters outside of the Roman alphabet.⁶¹

In late October 2008, ICANN released a *Draft Applicant Guidebook* for public comment that outlines proposed procedures for application and delegation of these new gTLDs.⁶² According to the *Guidebook*, application costs for a new gTLD will be \$185,000, with more costs possible for applications requiring extended review or applications subject to a formal objection on grounds of string confusion, legal rights, morality and public order, and community-based objections (the last pertaining to gTLDs associated with a certain community). The *Guidebook* also proposed a two-tiered process to protect intellectual property rights: a “top-level” process for rights holders to object to proposed gTLD strings and a “second level” process whereby new gTLD registries are required, at a minimum, to adopt the UDRP for domain name disputes.

The introduction of new gTLDs will present significant opportunities and challenges for trademark holders. New gTLDs may exacerbate the need for many trademark holders, particular owners of famous marks, to engage in costly defensive registrations to preempt cybersquatters. The new address extensions themselves potentially may be confusingly similar to a trademark or similar to existing address extensions, requiring a careful distribution process to avoid potential problems. On the other hand, this development also presents opportunities for brand owners to secure gTLDs that

match their brand name or product category. For a variety of reasons, it will be important for trademark holders to monitor this new development in the DNS.

Conclusion

The Internet will continue to provide fertile ground for legitimate global commerce by trademark and brand owners—and for infringement. Intellectual property owners will need to adapt to the changing nature of Internet-related infringement problems to protect their rights. Understanding ICANN's role and keeping up-to-date with ICANN policy developments can help with that effort. ■

Endnotes

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6. *Id.*

7. Bylaws for Internet Corporation for Assigned Names and Numbers, as amended effective May 29, 2008, art. 1, § 1.

8. *Id.*

9. ICANN website, <http://www.icann.org/en/about/> (last visited Sept. 30, 2008).

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12. Feld, *supra* note 3 at 351–52.

13. GOLDSMITH & WU, *supra* note 1, at 36–46.

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15. Sivasubramanian Muthusamy, *Overture to Take over Internet Governance: ITU at ICANN Meeting in Ciaro*, CIRCLEID (Nov. 18, 2008), available at http://www.circleid.com/posts/20081115_take_over_internet_governance_itu_icann/ (last visited Mar. 14, 2009); Monika Ermert, *ITU and ICANN—A Loveless Forced Marriage*, Heise-Online (Nov. 7, 2008), available at <http://www.h-online.com/news/ITU-and-ICANN-a-loveless-forced-marriage--111914> (last visited Mar. 14, 2009); *ITU Chiefs Target ICANN Turf*, COMPUTER BUS. REV. ONLINE (Dec. 20, 2004), available at http://www.cbonline.com/news/itu_chiefs_target_icann_turf (last visited Mar. 14, 2009).

16. Sonbuchner, *supra* note 10, at 195 (“Under ICANN’s initial understanding with the government, the U.S.’s oversight would terminate after two years . . .”); see also Memorandum Between U.S. Dept. of Commerce and ICANN, *supra* note 1 (providing that “[t]he Agreement will terminate on September 30, 2000, but may be amended at any time by mutual agreement of the parties”); Joint Project Agreement Between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers (Sept. 29, 2006) (extending oversight to September 30, 2009), available at <http://www.icann.org/en/general/JPA-29sep06.pdf> (last visited Sept. 30, 2008).

17. Sonbuchner, *supra* note 10, at 199–201.

18. See, e.g., GOLDSMITH & WU, *supra* note 1, at 170.

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25. See 17 U.S.C. § 1125(d)(1)(B)(i); UDRP ¶ 4(b).

26. Ford Motor Co. v. Catalanotte, 342 F.3d 543 (6th Cir. 2003).

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28. See Julia Fiona Roberts v. Russell Boyd, Case No. WIPO D2000-0210, 2000 WL 33674395 (May 29, 2000) (juliaroberts.com); Nicole Kidman v. John Zuccarini, WIPO Case No. D2000-1414, 2000 WL 1705172 (Jan. 23, 2001) (nicholekidman.com and nicholekidmannude.com); Madonna Ciccone v. Dan Parisi, WIPO Case No. D2000-0847, 2000 WL 33727232 (Oct. 12, 2000) (madonna.com); Charo Rasten v. URLPro, NAF FA0412000384835 (Feb. 2, 2005) (charo.com). For a searchable database of WIPO panel decisions, see <http://www.wipo.int/amc/en/domains/search/index.html>.

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36. See 15 U.S.C. § 1117(a), (d) (allowing for recovery of profits and damages or, alternatively, statutory damages “in the amount of not less than \$1000 and not more than \$100,000 per domain name”).

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