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Internet Domain Names, Trademarks and Free Speech

Jacqueline Lipton

ELGAR INTELLECTUAL PROPERTY AND GLOBAL DEVELOPMENT

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Case Western Reserve University, USA

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ELGAR INTELLECTUAL PROPERTY AND GLOBAL DEVELOPMENT

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Preface

I originally became interested in Internet domain names when I first learned of their existence in the mid-1990s. I had recently embarked on an academic career and was looking for a direction for my scholarly agenda. It seemed to me that domain names made for an extremely interesting subject of study. They were unlike any other form of intangible 'property' (for want of a more appropriate term). Like digital copyright works, domain names were valuable virtual assets. However, unlike copyrights, domain names were rivalrous. Only one person could own a given domain name at any given time. This led to a new set of questions about online property. While nonrivalrous digital copyright works raised issues of how to prevent uncontrolled online copying, domain names potentially raised the opposite problem – scarcity.

Even as the number of available generic Top Level Domains (gTLDs) and country code Top Level Domains (ccTLDs) has increased over the years (and will continue to increase)[1] only one person can hold any given iteration of a domain name at any one time. While Anna holds 'domain.com', Bill cannot own it, even though he might own 'domain.net' or 'domain.co.uk'. Domain names also differ from other digital assets in that they are simultaneously technological addresses and intuitive labels for the online presence of a person or organization. Courts have struggled to find an appropriate classification scheme for domain names. The names have been likened both to an intangible property right[2] and to a mere technological addressing system.[3] Domain names are also creatures of contractual license between a registrar and a registrant.[4]

The most immediate problem with domain names in the 1990s was the fact that domain names are very much like trademarks. They can indicate the source of products or services by incorporating a trademark: for

[1] ICANN, new gTLD Program, available at www.icann.org/en/topics/new-gtld-program.htm, last accessed October 19, 2009 (program to increase available generic Top Level Domains).

[2] *Kremen v Cohen*, 337 F.3d 1024 (9th Cir. 2003) (finding domain name to be property for the purposes of the Californian statutory tort of conversion).

[3] *Lockheed Martin v Network Solutions*, 194 F.3d 980 (9th Cir. 1999).

[4] *Network Solutions v Umbro International*, 529 S.E.2d 80 Va. (2000).

example, 'nike.com'. This opened the possibility for all kinds of trademark abuses, starting in the early days of the system with good, old-fashioned cybersquatting. Cybersquatting refers to the practice of registering domain names corresponding with other people's trademarks in an attempt to extort money from trademark holders for transfer of the names.[5] Because trademark holders were the most powerful lobby group impacted by these domain name practices, much of the discussion of domain name regulation from the 1990s onwards has focused on the protection of trademarks in the domain space.

This book is the first comprehensive discussion of issues that can arise in the domain space outside of traditional cybersquatting. It has now been ten years since the Internet Corporation for Assigned Names and Numbers (ICANN)[6] adopted the Uniform Domain Name Dispute Resolution Policy (UDRP)[7] to address global concerns about cybersquatting. This book raises questions about what we have learned in the ensuing years about domain name regulation. It addresses the limitations of existing regulatory regimes when confronted with competitions between multiple legitimate trademark holders; free speech issues; the desire to protect individual names and identities in the domain space; the need to facilitate democratic discourse; and the need to protect cultural and geographic indicators online.

This book has been a long time coming, and I have a number of people to thank for their help and support in its preparation. Much of the material in the following pages is developed from my earlier work on domain name regulation. I would like to acknowledge and thank the editors of the following publications for all their help, support and editorial expertise in preparing the articles that preceded this book: Lipton, *Bad Faith in Cyberspace: Grounding Domain Name Theory in Trademark, Property, and Restitution*, HARVARD JOURNAL OF LAW AND TECHNOLOGY (forthcoming, 2010); Lipton, *From Domain Names to Video Games: The Rise of the Internet in Presidential Politics*, 86 DENVER UNIVERSITY LAW REVIEW 693 (2009); Lipton, *Celebrity in Cyberspace: A Personality Rights*

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[5] Jonathan Nilsen, *Mixing Oil with Water: Resolving the Differences Between Domain Names and Trademark Law*, 1 J. HIGH TECH. L. 47, 51 (2002) ('Cybersquatting has been defined several ways. The most general definition of a cybersquatter is a person who registers a domain name that matches a well-known company for the purpose of ransoming it to that company.')

[6] ICANN Is the body that administers the technical (and some of the policy) aspects of the domain name system. See www.icann.org for more information.

[7] See www.icann.org/en/udrp/udrp-policy-24oct99.htm, last accessed October 19, 2009 (full text of the UDRP).

Paradigm for a New Personal Domain Name Dispute Resolution Policy, 65 WASHINGTON AND LEE LAW REVIEW 1445 (2008); Lipton, *A Winning Solution for YouTube and Utube? Corresponding Trademarks and Domain Name Sharing*, 21 HARVARD JOURNAL OF LAW AND TECHNOLOGY 509 (2008); Lipton, *Who Owns 'hillary.com'? Political Speech and the First Amendment in Cyberspace*, 49 BOSTON COLLEGE LAW REVIEW 55 (2008); Lipton, *Commerce versus Commentary: Gripe Sites, Parody and the First Amendment in Cyberspace*, 84 WASHINGTON UNIVERSITY LAW REVIEW 1327 (2006); and, Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 WAKE FOREST LAW REVIEW 1361 (2005).

A number of colleagues have contributed to my thinking about domain names over the years, and it is probably dangerous to attempt a list as someone is sure to be accidentally omitted. Nevertheless, for what it's worth, I would very much like to thank: Olufunmilayo Arewa, Graeme Austin, Amitai Aviram, Taunya Lovell Banks, Margreth Barrett, Ann Bartow, Joseph Bauer, Patricia Bellia, Erik Bluemel, Bruce Boyden, M. Brent Byars, Anupam Chander, Kevin Collins, Frank Rudy Cooper, Robert Denicola, Joshua Fairfield, Brett Frischmann, Eric Goldman, Paul Heald, Deborah Hellman, B. Jessie Hill, Cynthia Ho, Mark Janis, Raymond Ku, Ilhyung Lee, Mark Lemley, Michael Madison, Andrea Matwyshyn, Mark McKenna, Andrew Morriss, Craig Nard, Elizabeth Rowe, Catherine Smith, Lawrence Solum, Robert Suggs, Michael Van Alstine and Diane Zimmerman. I would also like to acknowledge the law deans at Case Western Reserve University School of Law who supported this project in its various iterations over the years: Dean Gerald Korngold, Dean Gary Simson and Interim Dean Robert Rawson.

Particular thanks go to my friend, Peter Yu, for convincing me to develop my thoughts on domain name regulation into a book for this series, and to the staff at Edward Elgar, including Tara Gorvine who believed these thoughts were worth translating into a book. And most importantly, I must thank my family who coped stoically with the stress and anxiety of my attempts to balance the writing process with everything else going on in our lives. I could not have done this without the support and understanding of my husband, Patrick, and our two children, Sean and Brianne. Naturally, I take responsibility for any errors or omissions in the text, but the text would not be here without the unwavering support and advice from these people.

Jacqueline Lipton

Abbreviations

ACPA	Anti-Cybersquatting Consumer Protection Act (US)
ccTLD	country code Top Level Domain
CDA	Communications Decency Act (US)
ECJ	European Court of Justice
gTLD	generic Top Level Domain
ICANN	Internet Corporation for Assigned Names and Numbers
PCAA	Political Cyberfraud Abatement Act (California)
TDRA	Trademark Dilution Revision Act (US)
UDRP	Uniform Domain Name Dispute Resolution Policy
URL	uniform resource locator
WIPO	World Intellectual Property Organization

Contents

Introduction

From day one, the Internet domain name system has created puzzles for law and policy-makers. These challenges have included questions about whose responsibility it is to develop and enforce domain name policy, and on what basis policy decisions are to be made. The Internet Corporation for Assigned Names and Numbers (ICANN)[1] is formally tasked with the administration of the domain name system.[2] However, there has been some confusion over the years about the appropriate balance between ICANN's technical and policy functions.[3] It was originally assumed that ICANN was a purely technical body, and not a policy-making organization.[4] However, ICANN was fairly quickly forced to make policy in some areas related to its core technical functions.[5] An obvious example of ICANN's policy-making role is its implementation of an online dispute resolution procedure for Internet domain names, the Uniform Domain

[1] See www.icann.org, last accessed December 11, 2008. Details of ICANN's development and structure can be found in DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP, ch. 2 (2007); MILTON MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE, ch. 8 (2002).

[2] LINDSAY, *supra* note 1, at 66 (describing ICANN's mission as set out in article 1.1 of its Bylaws); see also Bylaws for Internet Corporation for Assigned Names and Numbers, available in full text at www.icann.org/en/general/bylaws.htm#I, last accessed December 11, 2008.

[3] *Id.* at 65 ('The scope of ICANN's responsibilities and functions has been one of the most controversial areas of DNS governance. In particular, the first years of ICANN's operations were characterised by debates over whether ICANN was a purely technical coordination body or whether it was primarily a policy-making body'.)

[4] *Id.* at 65 ('The scope of ICANN's mission received considerable attention during ICANN's structural reform process, with many claiming that ICANN had acted beyond its core technical functions.')

[5] *Id.* at 65 (noting that a 2002 report on reforming ICANN concluded that ICANN was necessarily involved in some policy-making activities, but that this role should be limited to activities reasonably related to its technical mission). See also Bylaws for Internet Corporation for Assigned Names and Numbers, art. I.1.3, available in full text at www.icann.org/en/general/bylaws.htm#I, last accessed December 11, 2008 ('[ICANN] coordinates policy development reasonably and appropriately related to [its] technical functions.').

Name Dispute Resolution Policy (UDRP).[6] Some policy-making has also been incorporated into ICANN's proposal for new generic Top Level Domains (gTLDs).[7]

Domestic legislatures and courts have also been involved in making domain name policy.[8] Some domestic legislatures have been more active than others in this area: for example, at both the federal and state levels, American legislatures have enacted laws that regulate certain conduct involving domain names.[9] The variations in approach between different legislatures naturally raise potential disharmonization concerns. Nevertheless, the different approaches create a variety of testing grounds that ultimately might assist in formulating the best approach to resolving domain name conflicts. When set against the backdrop of the more international UDRP, local experiments may prove useful in developing new approaches to specific disputes. At the same time, the UDRP might retain a baseline mechanism for expeditiously resolving some of the more pressing conflicts.

Some have argued that domain name regulation is no longer important because Internet users rely on search engines, rather than domain names, for navigating content on the World Wide Web.[10] So why write a book on domain name regulation?[11] In fact, there is little evidence that disputes over Internet domain names are becoming less prevalent in practice.

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[6] Full text available at www.icann.org/en/udrp/udrp-policy-24oct99.htm, last accessed December 11, 2008.

[7] ICANN, New gTLD Program: Draft Applicant Guidebook (Draft RFP) (October 24, 2008), Module 3, full text available at www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf, last accessed December 11, 2008.

[8] Particularly with respect to application of trademark law to the domain space. See, for example, discussion in GRAEME DINWOODIE and MARK JANIS, TRADEMARKS AND UNFAIR COMPETITION: LAW AND POLICY 611–38 (2d edn 2007).

[9] See, for example, 15 U.S.C. § 1125(d) (federal prohibition on cybersquatting involving a trademark); § 8131 (federal prohibition on cybersquatting involving a personal name); Cal. Elections Code, § 18320 (prohibiting activities described as 'political cyberfraud', some of which implicate Internet domain names); California's Business and Professions Code, § 17525–6 (regulating unauthorized registration and use of Internet domain names at the state level in California).

[10] Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 548 (2005) ('For some searchers, search engines have supplanted the DNS's core search function of delivering known websites. In turn, top search engine placements have eclipsed domain names as the premier Internet locations'.).

[11] Interestingly, despite comments that domain names are decreasing in legal relevance, the literature on Internet domain names appears to be increasing. See, for example, LINDSAY, *supra* note 1; DAVID KESMODEL, THE DOMAIN GAME (2008); VADIM GOLIK and ALEXEY TOLKACHIOV, VIRTUAL REAL ESTATE (2006); TORSTEN

Recent statistics indicate that domain name disputes are actually on the rise.[12] The implementation of new gTLDs will also raise the specter of new classes of domain space disputes. The new system allows for people and organizations to apply for new gTLDs, such as '.hotel', '.camera', or '.fun'.[13] ICANN is anticipating disputes over such registrations on legal,[14] moral,[15] community[16] and string confusion[17] grounds.

In the early days of the domain name system, the policy focus was very much on the protection of trademarks in the domain space,[18] often to the detriment of other interests, such as free speech,[19] personal reputation or privacy.[20] The introduction of new gTLDs creates an opportunity to review, evaluate and make suggestions for future directions in domain name policy. This book contributes to the debate by identifying gaps in the current regulations and directions in which future policies might be developed.

BETTINGER, DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK (2005).

[12] In fact, a survey of the biggest arbitrator of Internet domain name disputes under the 'UDRP' evidences that between 1999 and 2008, the number of disputes heard by the WIPO Domain Name Dispute Resolution Service rose from 199 complaints to 1,999: see www.wipo.int/amc/en/domains/decisionsx/index.html, last accessed January 14, 2009.

[13] ICANN, New gTLD Program: Draft Applicant Guidebook (Draft RFP) (October 24, 2008), para. 3.1.2.2, available at www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf, last accessed December 11, 2008.

[14] *Id.* para. 3.1.2.2.

[15] *Id.* para. 3.1.2.3.

[16] *Id.* para. 3.1.2.4.

[17] *Id.* para. 3.1.2.1.

[18] See discussion in Jacqueline Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 WAKE FOREST L. REV. 1361, 1363 (2005) ('[C]urrent dispute resolution mechanisms are focused on the protection of commercial trademark interests, often to the detriment of other socially important interests that may inhere in a given domain name. If the global information society continues down the current road of protecting these interests at all costs, other important social norms relating to Internet use will not have a chance to develop, and the Internet will become permanently skewed in favor of commercial trademark interests. Thus, society will miss out on the potential to develop the Internet in general, and the domain name system in particular, in new and useful ways.')

[19] See Margreth Barrett, *Domain Names, Trademarks and the First Amendment: Searching for Meaningful Boundaries*, 39 CONN. L. REV. 973 (2007); Jacqueline Lipton, *Commerce versus Commentary: Gripe Sites, Parody and the First Amendment in Cyberspace*, 84 WASHINGTON UNIVERSITY L. REV. 1327 (2006).

[20] Jacqueline Lipton, *Celebrity in Cyberspace: A Personality Rights Paradigm for a New Personal Domain Name Dispute Resolution Policy*, 65 WASHINGTON AND LEE L. REV. 1445 (2008).

Domain names comprise a unique form of online asset. They are the closest Internet analogy to real property.[21] This is because, unlike other forms of digital property, they are rivalrous. This means that one domain name can only be held by one person or entity at a time. However, unlike real property, domain names exist across domestic boundaries so domestic property law has limited application. Even nationally focused intellectual property laws are limited in the face of global online assets. The closest analogy to domain names in intellectual property law is probably found in trademark law. However, even trademark law effectively deals with non-rivalrous assets within fixed geographical boundaries. If two people develop the same trademark for different geographic or product markets, they can simultaneously hold trademark rights.[22] Unlike trademarks, any given domain name can only be held by one person. Of course, similar domain names can be simultaneously registered by different people: for example, one person could register 'alice.com' while another registers 'alicia.com', 'alice.net', or 'alice.co.uk'. However, only one person can hold any one of those names at any given time.[23]

Unlike real property, the most popular domain names – in the gTLDs like '.com' and '.net' – are effectively global in scope. They are not tied to any particular geographic region. Other online assets, including copyrights and trademarks, are not global in the same sense as domain names. Copyrights and trademarks derive from domestic legal systems as government-granted rights. These rights may be supported by international treaties.[24] However, they are domestic grants of rights rather than

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[21] In fact, Paul Twomey, the Chief Executive of ICANN, has described recent moves to expand the number of gTLD extensions as: 'a massive increase in the geography of the real estate of the Internet'. See Danielle Nordine, *ICANN Proposes Major Domain Name Changes*, ITPRO, (June 23, 2008) available at www.itpro.co.uk/603930/icann-proposes-major-domain-name-changes, last accessed July 11, 2008.

[22] In the United States, this is often referred to as the 'concurrent use' doctrine: David Barrett, *The Future of the Concurrent Use of Trademarks Doctrine in the Information Age*, 23 HASTINGS COMM. AND ENT. L.J. 687, 689–92 (2001) (examining American legislative history of the 'concurrent use' doctrine in trademark law which allows different trademark-holders to use similar marks in different geographic areas).

[23] Of course, the same person can register multiple similar names so one person could, in fact, hold all four of these names simultaneously.

[24] See, for example, discussion of a variety of international intellectual property law treaties in MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 551–68 (4th edn 2005). For a list of international intellectual property treaties administered by the World Intellectual Property Organization, see www.wipo.int/treaties/en/, last accessed January 19, 2009.

truly global assets. Of course, domestic laws might impact on individual rights in particular domain names.[25] Nevertheless, domain names exist outside domestic legal systems, while copyrights and trademarks are creatures of domestic law. Thus, domain names are arguably the first truly global Internet analog to real property.[26] They are an example of something that is like real property, but that exists in the borderless realm of cyberspace.

This raises interesting questions about domain names. In particular, issues arise about the need to balance competing interests in domain names, such as property and speech interests. While domain names are often traded as marketable commodities, they also have speech characteristics in that they are made of up strings of alphanumeric characters intended to mean something to Internet users. Domain name regulations need to accommodate, to the maximum extent possible, legal and cultural differences in different jurisdictions on questions relating to property and speech, as well as some other competing interests such as privacy. Regulations must also be enforced, which is problematic in the case of a truly global asset. Avenues for complaint about domain name registrations and uses need to be readily accessible to complainants, yet another tall order.

To date, the process of developing and enforcing balanced domain name policies seems to have stalled, except for some recent developments by ICANN in the area of the proposed new gTLDs. These developments largely reflect policy positions previously taken by ICANN with respect to existing gTLDs. These initial policy determinations were aimed largely at protecting trademark holders from the activities of cybersquatters. Cybersquatters registered domain names corresponding with trademarks and sought to profit from selling them to the corresponding trademark holder, or one of its competitors.[27] ICANN adopted the UDRP in 1999[28] to deal with this issue.[29] Much of the early drafting of the UDRP was

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[25] For example, trademark holders have often been successful in asserting trademark infringement and dilution claims against domain name registrants. See, for example, *Panavision v Toeppen*, 141 F.3d 1316 (9th Cir. 1998) (successful trademark dilution claim against a cybersquatter); *Planned Parenthood Federation of America Inc. v Bucci*, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997) (successful trademark infringement and dilution claims against a domain name registrant).

[26] See *supra* note 21.

[27] See Nilsen, *supra* note 5.

[28] LINDSAY, *supra* note 1, at 105–6 (describing the final adoption of the UDRP by ICANN).

[29] *Id.* at 99–106 (describing the priority given to the protection of trademarks online in the drafting of the UDRP).

conducted by the World Intellectual Property Organization (WIPO).[30] Perhaps understandably, WIPO tended to focus on protecting the interests of one of its main constituencies: trademark holders.[31]

Since the adoption of the trademark-focused UDRP, very little has been done in the way of global policy development to protect other interests in domain names. Such interests might include free speech,[32] privacy,[33] personality rights,[34] and rights in geographic and cultural indicators.[35] WIPO has maintained that some of these interests require further examination in the domain space,[36] but no specific action has been taken outside the new gTLD application process. Even competing commercial interests are not currently addressed particularly effectively under the UDRP. There are no specific rules for determining who has the best right to a given domain

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[30] See www.wipo.int/portal/index.html.en, last accessed December 11, 2008. See also discussion in LINDSAY, *supra* note 1, at 99–120 (describing the drafting process between WIPO and ICANN).

[31] WIPO, *The Management of Internet Names and Addresses: Intellectual Property Issues*, Report of WIPO Internet Domain Name Process (April 30, 1999), para. 168, available at www.wipo.int/amc/en/processes/process1/report/finalreport.html, last accessed December 11, 2008 ('We are persuaded by the wisdom of proceeding firmly but cautiously and of tackling, at the first stage, problems which all agree require a solution. It was a striking fact that in all the 17 consultation meetings held throughout the world in the course of the WIPO Process, all participants agreed that 'cybersquatting' was wrong. It is in the interests of all, including the efficiency of economic relations, the avoidance of consumer confusion, the protection of consumers against fraud, the credibility of the domain name system and the protection of intellectual property rights, that the practice of deliberate abusive registrations of domain names be suppressed. There is evidence that this practice extends to the abuse of intellectual property rights other than trademarks and service marks, but we consider that it is premature to extend the notion of abusive registration beyond the violation of trademarks and service marks at this stage. After experience has been gained with the operation of the administrative procedure and time has allowed for an assessment of its efficacy and of the problems, if any, which remain outstanding, the question of extending the notion of abusive registration to other intellectual property rights can always be re-visited'.)

[32] See *supra* note 19.

[33] Lipton, *Beyond Cybersquatting, supra* note 18, at 1419 (suggesting the development of privacy rights in relation to domain name disputes involving personal names).

[34] See Lipton, *Celebrity in Cyberspace, supra* note 20.

[35] Thekla Hansen-Young, *Whose Name is it Anyway? Protecting Tribal Names from Cybersquatters*, 10 VIRGINIA J. LAW AND TECHNOLOGY 1 (2005).

[36] *Report of the Second WIPO Internet Domain Name Process* (September 3, 2001), available at www.wipo.int/amc/en/processes/process2/report/html/report.html, last accessed January 19, 2009. See, in particular, Chapters 4 and 5 on personal names and geographical indicators respectively.

name between, say, two competing legitimate trademark holders.[37] A presumption of 'first come, first served' currently prevails.[38]

This book identifies and categorizes different interests that may exist in domain names, as well as considering potential approaches to resolving disputes between competing interest holders. Some of these approaches could be implemented by ICANN, while others would require action by other bodies, such as domestic courts and legislatures. Emerging social norms and technological capabilities of the respective domain name registration systems might also play a role.[39] ICANN may need to formally adopt a broader policy-making role in the future. It may need to expressly protect a greater array of interests in domain names outside of the trademark arena. Perhaps the recent moves to protect trademarks alongside interests of public morality[40] and established communities[41] in the new gTLD registration procedure is a step in the right direction. However, a brief survey of ICANN's proposed dispute resolution procedures in the new gTLD system evidences that greater thought has been given to the protection of trademarks than other interests to date.[42] This step forward is also not reflected back with respect to disputes arising under existing gTLDs.

Importantly, we need to recognize that not all disputes involving

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[37] See, for example, discussion in Jacqueline Lipton, *A Winning Solution for YouTube and Utube? Corresponding Trademarks and Domain Name Sharing*, 21 HARVARD J. LAW AND TECHNOLOGY 509, 510 (2008); KESMODEL, *supra* note 11, at 23 ('Domain names raised a host of new and perplexing questions in the field of intellectual-property law, especially when it came to trademarks. One problem was that only one company could register a domain, whereas under trademark law, multiple companies were entitled to use the same name, as long as they operated in different industries. That's why United Airlines, United Van Lines, and other companies using 'United' could peacefully coexist. But only one entity could register united.com. Trademark law also allowed for companies in different regions to share a name, but that was not practical on the borderless Internet'.)

[38] Lipton, *A Winning Solution for YouTube and Utube?*, *supra* note 37, at 510.

[39] Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARVARD L. REV. 501 (1999) (famously identifying four regulatory modalities that will apply in cyberspace: legal rules, social norms, system architecture or 'code', and market forces).

[40] ICANN, New gTLD Program: Draft Applicant Guidebook (Draft RFP), (October 24, 2008), Module 2, available at www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf, last accessed December 11, 2008.

[41] *Id.* at Module 3.

[42] *Id.* at paras 3.5.2 (describing procedure for protection of trademarks in clear detail, as opposed to, say, paras 3.5.3 and 3.5.4, dealing in somewhat more vague terms with morality and public order confusion, and community objection, respectively).

domain names implicate trademarks. Increasingly, domain name speculators are turning to the registration of names of private individuals, acronyms and generic terms.[43] While some of these strings may coincide with trademarks, many will not. However, they may coincide with legitimate interests in personal identities, privacy, cultural interests, and the like.[44] This book commences with a description of the current regulatory framework for domain names in Chapter 1. It compares the structure and policy approach of the UDRP with domestic legislation at both the state and federal levels in the United States. Some of the domestic legislation focuses on protecting trademarks,[45] while other laws protect different interests, such as personality rights,[46] and interests in the integrity of the political process online.[47] This chapter illuminates the range of approaches available to regulating different aspects of domain name registration and use. It also identifies the various institutions that are involved in making and enforcing domain name policy at the present time.

Chapters 2 to 5 each focus on a specific set of interests that might arise in a given domain name. These chapters contemplate ways in which those often competing interests might be balanced against each other in practice. Chapter 2 focuses on competing commercial interests in a given domain name, such as the interests of multiple legitimate trademark holders with similar interests in the same domain name. Chapter 3 turns to the thorny question of the protection of free speech in the domain space. It considers ways in which decisions of UDRP arbitrators have started to shape the balance between free speech and trademark interests in domain names. Additionally, it considers whether any broader free speech protections are necessary. It focuses on the use of domain names for gripe sites, parody sites, fan sites, and general commentary or criticism. It examines alternatives for protecting and promoting free speech in the domain space outside of current policies and practices. Alternative approaches could include an attempt to zone online speech into different

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[43] See, for example, KESMODEL, *supra* note 11, at 181 (advising domain name speculators to focus on 'generic, commercially relevant words' for domain name registration purposes).

[44] *Kremen v Cohen*, 337 F.3d 1024 (9th Cir. 2003) (involving conversion action with respect to the generic domain name 'sex.com'); see also discussion in KESMODEL, *supra* note 11, at 135–6.

[45] See, for example, 15 U.S.C. § 1125(d).

[46] See, for example, 15 U.S.C. § 8131(1) (protecting rights in personal names in the domain space against cybersquatting); California's Business and Professions Code, §§ 17525–17526.

[47] See, for example, Cal. Elections Code, § 18320.