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## **TYPOSQUATTING – AN INNOVATIVE BUSINESS PRACTICE: THE LAW DOES NOT AGREE**

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### **ABSTRACT**

*The primary objective of this article is to address harmonizing business practices with traditional legal practices and current government regulatory initiatives as applied to Internet Law in resolving business disputes relating to “typosquatting.” The law has determined that typosquatting is illegal. But is the practice of typosquatting just being overly competitive? Is the law being reactive and restrictive and flying in the face of the free-market system? This basic principle will be reviewed. This article will briefly cover cybersquatting. Typosquatting will be more closely defined. A scenario will be presented and current law applied. In arguendo, the alternative argument to current law will be presented.*

### **INTRODUCTION**

The Internet, used as a tool and technology within the commercial world, has dramatically altered traditional approaches in conducting business transactions, both locally and globally. The dynamics of these evolutionary trends are significantly redefining and refocusing on new sets of skills and core competencies. The Internet creates an environment where networking and interdependent actions are encouraged; where an interlocking series of relationships among customers, employees, distributors, suppliers, business partners, etc., are cultivated; where business entities form linkages with associated and interrelated enterprises that address issues pertaining to commonalities, complementarities, externalities, and infrastructure; where such linkages join forces that create new opportunities by enhancing productivity through establishing increased capacity, added value, and productivity.

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The fact is that the Internet is not going away. It is here to stay, and then some. It is a factor we must live with and accept in the business community. Pertinent insights to this line of reasoning has been expressed by Michael Dertouzos, Director of the MIT Laboratory for Computer Science (home of the World Wide Web and birthplace of many of the high-tech products and processes that surround us today), for over two decades in predicting today's world of information with stunning accuracy (Dertouzos, 1997). Additional insights into core competencies and their corresponding skills in times of change are addressed by Hellriegel, Slocum, and Woodman in the eighth edition of their text on organizational behavior (Hellriegel, Slocum & Woodman, 1998).

The Internet poses an exciting challenge to business and commercial law. Answers to this challenge must transition with the demands of an evolving Internet as a medium for doing business, social norms, and legal evolution. Historically, business generally does well where levels of "uncertainty" are reasonable, when there is stability, predictability, and continuity in the law and how disputes are resolved; all in the interests of containing business risk. With traditional methods of doing business the usual and customary common law and the principles of free enterprise system have worked in harmony.

Regarding Internet law, it is not surprising to find legal issues have become controversial as to the rights, obligations and limits of the free enterprise system in business. This is so because the Internet as a medium for doing business provides a truly global market that includes numerous cultures and, many times, extreme diversity. In the not too distant future a high percentage of the world's population will be potential customers. Moreover, its reach is not subject to traditional legal jurisdictional lines of demarcation. No one nation of legal authority can ultimately control it, though aspects of the subject to some legal restraints.

A current study predicts that "Online retail sales in the US are expected to more than double in the next six years, reaching an estimated \$316 billion by 2010. E-commerce growth will account for 12 percent of total retail sales in 2010, which would be an increase from 7 percent in 2004," according to a report from Forrester Research, Inc. (Park, 2004)

Against this backdrop business is concerned about false and deceptive acts in commerce (particularly advertising). Congress and several state legislatures, in reaction to a litany of abusive and unfair business practices, have enacted laws that are designed to stop or the very least restrict unfair business practices on the Internet. In addition, the U.S. Federal Trade Commission faces a major challenge adapting 19<sup>th</sup>

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and early 20<sup>th</sup> century anti-trust/commercial law into the development of administrative rule making and enforcement of questionable electronic trade practices.

Issues of the Internet business/legal relationship will be a recurring theme throughout this article. Typosquatting is one such issue. This article will look at this subject as it relates to Internet business. The main issue in this article is to challenge the notion that typosquatting is an unfair business practice. The law has determined that typosquatting is illegal. But is the practice of typosquatting just being overly competitive? Is the law being reactive and restrictive and flying in the face of the free-market system? This basic principle will be reviewed. This article will briefly cover cybersquatting. Typosquatting will be more closely defined. A scenario will be presented and current law applied. In arguendo, the alternative argument to current law will be presented.

### DEFINING THE PROBLEM

Forgetting for a moment that one can cut and paste a uniform resource locator (URL) into your Web Browser or click on a hyperlink to get to where one wants to go on the World Wide Web there is another way and that is simply typing-in the URL. It may seem old fashioned, but it has created a problem for the Internet. The concern lies in a user's inability to type correctly. For example, the user hits the key next to the one originally intended or transposes two letters instead. One may say that it is "no-big-deal" really; just type the URL over again, that is if you catch the error before clicking the GO key. If you do not catch it then you go to a web site, but not the one you intended. So what?

Disingenuous websites have been created to prey on the frailties of human error to drive visitors to their own site. Usually these websites are variations of popular websites. This practice of preying on a user's inability to type correctly has been given a name: "typosquatting." No area of the Internet has been safe from this type of practice. A simple explanation of the term is that it involves purchasing a domain name that is a variation of an original/existing popular domain name with the expectation that the new site will receive traffic off the original/existing site because of a user's misspelling of the original domain name. As an example, a typosquatter might register the domain name "www.yahooo.com" in the hopes that someone making a typo will unexpectedly log onto the typosquatter's site.

## CYBERSQUATTING

### Cybersquatting

As previously discussed, “cybersquatting” is loosely defined as using a name belonging to another as the URL domain address without legitimate approval or licensing from the apparent owner. The definition of cybersquatting in this instance follows the reasoning of the court in *Toys “R” Us, Inc. v. Eli Abir, 1997*, that describes and defines a typical cybersquatting situation. Controversies relating to domain address use were unknown a few years ago. Now, it is an integral part of our personal and business life as we conduct commercial transactions over the Internet. In short, a definition for cybersquatting is as follows: “Cybersquatting is the act of registering a popular Internet address—usually a company name—with the intent of selling it to its rightful owner.” (*Webopedia/cybersquatting, 2005*)

## TYPOSQUATTING

Typosquatting is a specific form of cybersquatting. The current definition for typosquatting is: “Purchasing a domain name that is a variation on a popular domain name with the expectation that the site will get traffic off of the original sight because of a user’s misspelling of the name. (*Webopedia/typosquatting, 2005*). For example, registering the domain names *webapedia.com* or *yahooo.com* in the hopes that someone making a typo will get to that site unexpectedly.”

Initially the typosquatters finds websites that have heavy volume of hits. The typosquatter then registers domain names that are similar to the legitimate website but have typographical errors. The typosquatter has to be creative and insightful to generate a typographical variation of the legitimate domain name that has a high probability of being typed. These tend to fall into three categories:

1. Common misspelling of the intended site; for example, *webadress.com*.
2. A misspelling based on typing errors; for example, *webaddress.com* or *wwbaddress.com*.

3. A differently phrased domain name; for example, web-address.com. (Grohals, 2005)

The typosquatter plays the numbers game that a user will mistype a popular high volume URL. When the user arrives at the unintended site several scenarios develop. The unintended site may have a competing product, it might be a pornographic site or the most irksome for a user is being mousetrapped. Mousetrapping is when someone misspells a domain name and they are then led to a series of pop up advertisements that prevent them from getting out of the Web site they originally accessed. (Webopedia/mousetrapping, 2005). To prevent mousetrapping a user needs a pop-up blocker to accomplish the task or in the worst case the user needs to shut down their computer and reboot.

The typosquatter makes money by selling advertising or by offering a related product. It is easy to see that typosquatting the high volume legitimate sites will have the best return on investment. Studies have estimated that 10 percent to 20 percent of all hand-entered URLs are mistyped adding up to at least 20 million wrong numbers per day. (Gibbs, 2003). It is easy to do the math to see that one could earn a good income in this manner. John Zuccarini one of the best-known typosquatters has registered over 3,000 typos of popular websites and generates over a million bucks a year. (Boutin, 2005).

### **WHAT HAS THE LAW DONE ABOUT TYPOSQUATTING?**

Is this activity illegal? The law says yes. There are two ways to challenge the activity of typosquatting; 1) The Uniform Domain Name Resolution Policy (UDRP) and 2) use of the courts, in particular, the Anti-Cybersquatting Consumer Protection Act. (ACPA)

### **THE UNIFORM DOMAIN NAME RESOLUTION POLICY (UDRP)**

The UDRP is an administrative body designed to allow victims of cybersquatter to have their case heard quickly and with little cost. If the alleged victim is successful then the UDRP recommends having the offending domain name cancelled or transferred.

In order that the UDRP administrative body finds in favor of the complainant they have to prove the following that:

- (i) The domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;
- (ii) That the registered party (respondent) has no rights or legitimate interests in respect of the domain name; and
- (iii) The domain name has been registered and is being used in bad faith. (Uniform Domain Name Dispute Resolution Policy, 1999).

It must be recognized immediately that the decision of this committee is not binding on the courts. The remedies available to UDRP are limited to transferring or canceling the offending domain name.

### **THE UDRP IN ACTION**

The World Intellectual Property Organization (WIPO) administered a UDRP hearing involving JK Rowling (complainant), author of the popular Harry Potter book series, and Alvaro Collazo of Colonia, Uruguay (respondent.) The domain names in question were www.jkrowling.com belonging to Ms. Rowling and www.kjkrowling.com and www-jkrowling.com legitimately belonging to Mr. Collazo. By mistakenly going to these sites the user was bombarded with pop-up ads. (Scotland on Sunday, 2004).

At the hearing Mr. Collazo offered no evidence or defense. The committee confirmed that Mr. Collazo had tried to profit from Ms. Rowling's world wide fame. In reaching their decision the committee took into account the fame of Ms. Rowling, the use of the disputed website names, the similarity of the web addresses created a confusing similarity with the trademark and Mr. Collazo's pattern of conduct. The panel found that on the balance of probabilities, the disputed website names were registered and used in bad faith. The committee ordered both domain names transferred to Ms. Rowling. (WIPO Arbitration and Mediation Center, 2004)

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### ANTI-CYBERSQUATTING CONSUMER PROTECTION ACT (ACAP)

The court system offers an alternative to the UDRP arbitration process. However, it generally takes a long time and is generally very expensive. The key, if an alleged victim takes this avenue, is to obtain a temporary restraining order as soon as possible. In the long run, if successful, the plaintiff can obtain an injunction, damages, and/or attorneys' fees

Companies and organizations holding trademarks can allege traditional trademark claims and trademark dilution claims under the Federal Trademark Dilution Act. Once again these avenues are costly and expensive. (Karyn, 2003)

In terms of typosquatting the courts have held typosquatters liable under the Anticybersquatting Consumer Protection Act. (Shields v. Zuccarini, 2001 and Electronics Boutique v. Zuccarini, 2002)

This act is an amendment to Section 43 of the Trademark Act of 1946. This act makes a person acting in bad faith who takes the name of a person or entity that has a trademark (name) liable civilly for damages incurred as a result of the taking. The act includes nine factors in determining bad faith. In *Virtual Works, Inc. v. Volkswagen of America, Inc.*, the court enjoined the plaintiff Internet service provider from using the domain name of VW.NET, which it had registered with Network Solutions, Inc. in 1996. The owners of the site used it for their business and had intended to sell the site to Volkswagen, the owner of the VW trademark, for a substantial amount of money. With this there was a finding of bad faith. (*Virtual Works, Inc. v. Volkswagen of America*, 2000)

The ACPA conducts a 3 prong analysis on the evidence presented by the parties:

- Prong 1: Under § 1125(d)(1)(A)(ii)(I) and (II), the district court first has to determine if plaintiff's domain name is a "distinctive" or "famous" mark and, therefore, is entitled to protection under the Act. The following factors may be considered when making this inquiry:
- (A) the degree of inherent or acquired distinctiveness of the mark;
  - (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;

- (C) the duration and extent of advertising and publicity of the mark;
- (D) the geographical extent of the trading area in which the mark is used;
- (E) the channels of trade for the goods or services with which the mark is used;
- (F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought;
- (G) the nature and extent of use of the same or similar marks by third parties.

Prong 2: Under the Act, the next inquiry is whether Respondent's domain names are "identical or confusingly similar" to Plaintiff's mark.

Prong 3: The final inquiry under the ACPA is whether Defendant acted with bad faith intent to profit from Plaintiff's distinctive and famous mark or whether his conduct falls under the safe harbor provision of the Act. Section 1125(d) (1)(B)(i) provide a non-exhaustive list of nine factors for us to consider when making this determination:

- (I) the trademark or other intellectual property rights of the person, if any, in the domain name;
- (II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;
- (III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;
- (IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;
- (V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the



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- goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;
- (VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;
- (VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;
- (VIII) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and
- (IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of subsection (c) (1) of this section. on with the goods or services with which the mark is used; (C) the duration and extent of advertising and publicity of the mark; (D) the geographical extent of the trading area in which the mark is used; (E) the channels of trade for the goods or services with which the mark is used; (F) the degree of recognition of the mark in the trading areas and channels of trade used by the

marks' owner and the person against whom the injunction is sought; (G) the nature and extent of use of the same or similar marks by third parties.

### STATEMENT OF FACTS

The University of Nowhere (UN) has registered trademarks for the "University of Nowhere" and for the University of Nowhere "Winners," the university's sports teams. The university registered its domain name, [www.un.edu](http://www.un.edu), through the Internet Corporation for Assigned Names and Numbers, and its uniform resource locator (URL) address has been in operation for over ten years. The University uses its Internet site to inform the public about its highly accredited academic programs as well as its accomplishments on the sports fields. The University has been recognized as one of the top universities in the United States for many years. The University has also competed successfully for numerous NCAA titles over the years.

The University discovers that Mr. Bill M. Phast, owner and Chairman of the Board of the University of Minimum Standards of America, Inc. (UMS), is registered and using the Internet domain names of "[www.ums](http://www.ums)" and "[www.um.edu](http://www.um.edu)." Mr. Phast justifies the use of the "um" designation as being part of the acronym associated with his university. This website offers university degrees through non-traditional means. The education community generally regards UMS as a diploma mill. It should be noted that UMS is located in an industrial park in the City of Nowhere and employs three clerks.

The President of the University of Nowhere, Dr. Ima Goode, contacted Mr. Phast, who informs the University president that he has no intention of relinquishing the "[www.um.edu](http://www.um.edu)" domain name unless the University of Nowhere pays him \$10,000 and gives him two lifetime passes to all "Winner" games. Dr. Ima Goode of the University of Nowhere declines the offer and writes a letter to Mr. Phast informing him that he must stop using the "[www.um.edu](http://www.um.edu)" domain name immediately. Mr. Phast responds by sending the University of Nowhere an invoice for \$10,000 and two lifetime passes to "Winner" events. The cover letter to the invoice states that he will not stop using the domain name until the invoice is paid by the University of Nowhere.

At a news conference three days later, Dr. Ima Goode of the University of Nowhere stated that in her opinion the "[www.um.edu](http://www.um.edu)" domain name used by UMS

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was possibly responsible for a large number of its students transferring to UMS. When questioned later by the news media, Mr. Phast stated that such allegations by the University of Nowhere were defamatory to UMS and that the University of Nowhere has no legitimate right to the “www.um.edu” domain name since its official acronym is “UN” and not “UM.” What are the issues of this case and the rights of the parties?

The arbitration panel would probably determine that University had a common law and trademark rights in University of Nowhere Winners, and that the domain names issued to Mr. Phast, the respondent, were confusingly similar to the University’s trademark. Additionally, the panel would rule that Mr. Phast had no rights or legitimate interests in the domain name, and that they were registered and used in bad faith. Additionally, the respondent would have no legitimate interests in respect of the domain name where he had not used or developed the domain name for legitimate noncommercial or fair purposes and was not using the domain name in connection with a *bona fide* offering of goods or services. Lastly, the respondent, Mr. Phast, directly implied that he wanted a sum far greater than registration costs in exchange for the transfer of the four domain names. This action is a *per se* finding of bad faith. Final outcome: the University wins. What the University wins will depend on the documentation that the University originally filed. There could be deletion or transfer of the domain name.

The case would reach a similar conclusion under ACPA given their rulings to date. However, are the courts being too protective in their analysis? Consider the following applying the three pronged analysis of the ACPA.

#### **PRONG 1 – DISTINCTIVE OR FAMOUS MARK**

It is conceded that the University of Nowhere is a well-known institution recognized across the country and therefore the trademark and domain name are protected.

The first prong is met.

#### **PRONG 2 – CONFUSINGLY SIMILAR**

“A reasonable interpretation of the conduct covered by the phrase “confusingly similar” is the intentional registration of domain names that are

misspellings of distinctive or famous names, causing an Internet user who makes a slight or typing error to reach an unintended site.” (Shields v. Zuccarini, 2001)

So what? Why stifle competitive business practices. Where the courts get it wrong in their analysis is that they interpret everything from the alleged wrong party and proscribe what the Internet user wants to see.

“A reasonable interpretation of the conduct covered by the phrase “confusingly similar” is the intentional registration of domain names that are misspellings of distinctive or famous names, causing an Internet user who makes a slight or typing error to reach an unintended site.”

So what? Why stifle legitimate competitive business practices. The courts, in this instance, are interpreting from the perspective of the plaintiff using the analysis that everything from the alleged bad party is “guilty” until proven “not guilty” (using criminal law terms for point of clarification) and then proscribe what the Internet user wants to see.

1. The domain in question is just a geographical area on the Internet, serving to identify locations wherein the universities information can be located. The URL in and of itself is just a location and as such has no value.
2. It is the user who makes the error. The user finds um.edu not the other way around.
3. The user can decide whether they want to investigate the website further or not.
4. The degree offered at um.edu will be cheaper than the one offered at un.edu. Is it the courts’ job to restrict the free-market system.
5. Insurance companies are very prosperous businesses who make money on the fact that people might make mistakes. The law does not work in this area to protect the big insurance companies from their competitors.

Giving great weight to the above, Plaintiff’s fails on prong 2.

### **PRONG 3 – BAD FAITH**

The final inquiry under the ACPA is whether Mr. First acted with bad faith intent to profit from University of Nowhere’s distinctive and famous mark

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So what, again? When one discusses the issue of bad faith it is implicitly understood that there exists a contract or some type of privity between the two parties, in this case the plaintiff and respondent. This concept is derived from the Uniform Commercial Code. There is no contract and no privity here so how does one determine bad faith. Why is it so hard for the courts not to appreciate the ingenious and smart moves of the businesses who registered domain names on a first come first served basis only to have their business savvy interpreted by courts declaring immediately that such actions are considered as “bad faith.” Where is the chance for the respondent to respond beyond the pronouncement of being a party of bad faith and proving a legitimate commercial transaction in place of the specific action that designates bad faith intent? There is a chance somewhere that sending an invoice for a domain name is not always a bad faith action.

The factors listed to establish bad faith smell of reverse engineering. It appears the court is saying, “we want to stop this practice so lets generate a list of criteria to stop the practice.” Remember Dick Fosberry? Dick Fosberry looked at the high jump in a way nobody else did. He developed a technique to do the high jump better than anyone else. He was smart, innovative, competitive and successful. The first question asked when the athletic world saw his technique was - is it legal? Lucky for the athletic world they deemed it so. Businesses should be so lucky to have the same characteristics as Dick Fosberry. Typosquatters are business people, they looked at a situation differently and profited. Why should the courts intervene? The American way is competition and the free market system.

Giving great weight to the above, Plaintiff’s fails on prong 3.

### CONCLUSION

There exists today a tension on the Internet between the desire to make it a safe environment to transact business. Opportunity for profit is a function of business, why should all the Internet be any different. The ACPA gives the federal government the power to clamp-down on typosquatters. One hope this article makes the reader reconsider how the court is analyzing this business activity.

The perceived problems with typosquatting would go away if a business purchased all the domain names they might need before using a mark in commerce. As it currently stands there is no need to rush because the courts will protect your lack of forward thinking, insight and business competitiveness.

The explosive growth and popularity of the Internet and other developing allied technologies has proven challenging to the traditional business model. Complexities, complications, and new issues will continue to expand as the Internet and the World Wide Web evolves. Questions and concerns will continue to challenge traditional business practices in a changing global economy.

Today, there exists a myriad of issues to be resolved as to creating an Internet with a safe environment for transacting business. Opportunity for profit is a function of business, so why should the Internet be any different. The ACPA gives the federal government the power to clamp-down on typosquatters. It is time to reconsider how the court is analyzing this specific business activity. There is always a need to protect society from itself, but there is also a demanding need to conduct commercial activities.

Presently, the balance, in some instances, such as the one described in this case study, does not favor businesses. It is time for the legislatures and courts to review, adjust, and properly balance the system so as to give businesses the incentive to participate in commercializing new technology without fear of unknown restraints and undefendable per se violations. This theme was active and available for transitioning from the 18<sup>th</sup> to the 19<sup>th</sup> Century and should be available for transitioning from the 19<sup>th</sup> to the 20<sup>th</sup> Century. The essence of this article is to communicate that it is not fair to constructively judge a business person as acting in "bad faith" when there is no process of introducing what the intent of the action was from the perspective of the respondent.

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