

# DOMAIN NAME SPECULATION: ARE WE PLAYING WHAC-A-MOLE?

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Since the inception of the Internet, speculators have sought to monetize web pages, often by selling space to advertisers. Monetized domain parking has emerged as a multi-million-dollar business over the last several years,<sup>1</sup> evolving from simple cybersquatting to a sophisticated and mostly automated method of delivering pay-per-click advertising on thousands of domains. Similar to the game of Whac-A-Mole,<sup>2</sup> whenever the state introduces new legal tools to curb domain speculation abuse, domain name speculators alter their business models to survive. Although federal trademark law has a part to play in the battle against domain name speculation, some academics are concerned about expanding the law for this purpose.<sup>3</sup> Additionally, the legal tools currently used most frequently to battle domain name speculation, the Uniform Domain-Name Dispute-Resolution Policy (UDRP)<sup>4</sup> and the Anticybersquatting Consumer Protection Act (ACPA),<sup>5</sup> have been in use for ten years, yet the problem persists.<sup>6</sup>

This Note examines the evolution of the domain name speculation business model and the tools used to fight it, outlines the scope of the problem and the barriers to solutions, and concludes that due to the difficulties of policing domain name speculation using trademark law, a combination of policy changes, technological solutions, and social engineering will more likely achieve lasting success against domain name speculation.

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1. David Kesmodel, *Thanks to Web Ads, Some Find New Money in Domain Names*, WALL ST. J. ONLINE, November 17, 2005, [http://online.wsj.com/public/article/SB113200310765396752-FYV6dsilRS0N1fsiVu\\_bLf\\_5nI8\\_20061116.html?mod=rss\\_free](http://online.wsj.com/public/article/SB113200310765396752-FYV6dsilRS0N1fsiVu_bLf_5nI8_20061116.html?mod=rss_free).

2. *See, e.g.*, Wikipedia, <http://en.wikipedia.org/wiki/Whac-A-Mole> (last visited, Dec. 22, 2009).

3. *See* Stacey L. Dogan and Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 779 (2004).

4. Internet Corp. for Assigned Names and Nos., Uniform Domain Name Dispute Resolution Policy, <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm> (last visited Feb. 22, 2010).

5. Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (2006).

6. *See* Robert L. Mitchell, *Domain-Name Wars: Rise of the Cybersquatters*, COMPUTE|RWORLD, June 25, 2009, [http://www.computerworld.com/s/article/9134605/Domain\\_name\\_wars\\_Rise\\_of\\_the\\_cybersquatters](http://www.computerworld.com/s/article/9134605/Domain_name_wars_Rise_of_the_cybersquatters).

Part I of this Note defines the technology and ideas behind the domain speculation business model and identifies the players. Part II charts the evolution of domain name speculation and the legal remedies dedicated to preventing its harms. Part III describes monetized domain parking, the current iteration of the domain name speculation business model. Part IV outlines the challenges inherent in using trademark law against domain name speculation and addresses why those who might be able to curb domain name speculation choose not to do so. Part V suggests other, non-legal tools that may be effective against domain name speculators and why those methods may prove to be more effective in the long term than further legal remedies.

## I. STRUCTURE AND DEFINITIONS REQUIRED FOR AN UNDERSTANDING OF THE DOMAIN NAME SPECULATION BUSINESS MODEL

This Part will outline the basic architecture of the Internet and define the terms necessary to understand the business model of domain name speculators. Further, it will explain how advertising works to monetize the Internet so it is clear how the domain name speculators have taken advantage of each stage of the development of the hodge-podge of laws governing the Internet.

### A. THE ARCHITECTURE AND LANGUAGE OF THE INTERNET

The Internet is a distributed and interconnected system of computers originally developed by the U.S. government that now forms the backbone of an international communications network.<sup>7</sup> The World Wide Web is the information existing within the structure of the Internet.<sup>8</sup> Traffic across the Internet is sent and received using internet protocol (IP) addresses. IP addresses are a string of numbers separated by a period, e.g., 192.168.0.2. These numbers are like street addresses or telephone numbers in that they signal to the computer where to look for the information being requested.<sup>9</sup> Because internet users found it difficult to remember these numerical

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7. Heather N. Mewes, Comment, *Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System*, 13 BERKELEY TECH. L.J. 235, 238 (1998).

8. See Nat'l Sci. Found., *NSF and the Birth of the Internet*, [http://www.nsf.gov/news/special\\_reports/nsf-net/textonly/90s.jsp](http://www.nsf.gov/news/special_reports/nsf-net/textonly/90s.jsp) (last visited Feb. 22, 2010).

9. Colby B. Springer, *Master of the Domain (Name): A History of Domain Name Litigation and the Emergence of the Anticybersquatting Consumer Protection Act and Uniform Dispute Resolution Policy*, 17 SANTA CLARA COMPUTER & HIGH TECH L.J. 315, 318–19 (2001).

sequences, domain names developed.<sup>10</sup> Domain names are words or phrases that substitute for and corresponded to IP addresses.<sup>11</sup>

A typical website address, or uniform resource locator (URL), has consistent components. The domain name is the part that follows the “http://www.” or “http://” part of the URL. For example, in the URL that will land a user on CNN’s website, <http://www.cnn.com>, “com” is the top-level domain (TLD) and stands for “commercial.” Generic TLDs are the part of the URL that ends in .com, .net, .gov, .org, etc. There are also country-specific TLDs, such as .uk (United Kingdom) and .au (Australia). Originally, TLDs were intended to reflect the kind of information that was offered, e.g., .com was supposed to be for commercial purposes, .org for non-profit groups. However, in September 1995, the domain registrars stopped enforcing these restrictions,<sup>12</sup> and more recently, Internet Corporation for Assigned Names and Numbers (ICANN) has proposed the implementation of even more TLDs.<sup>13</sup> Second-level domains (SLDs) are the part of the URL that precedes the TLD,<sup>14</sup> “cnn” in our example. Many companies include their trademark in the SLD.<sup>15</sup> TLDs are the battlefield upon which the domain name speculation wars have been fought and SLDs are the spoils of that war. All of these domain names must be translated back into IP addresses before an internet user is correctly directed to the web page he seeks.

Domain Name System (DNS) servers do the work of “resolving” a domain name—either entered by a user into the browser bar or by clicking a link—into an IP address understandable by the internet infrastructure. Used in this context, “resolving” simply means the process by which the domain names are matched to an IP address within DNS servers.<sup>16</sup> DNS servers maintain the lists that match domain names to IP numbers.<sup>17</sup> The fact that registering a domain name is on a first-come, first-served basis and is a fairly straightforward two-step process may have set in motion the first domain

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10. *Id.* at 319.

11. *Id.*

12. Jonathan M. Ward, *The Rise and Fall of Internet Fences: The Overbroad Protection of the Anticybersquatting Consumer Protection Act*, 5 MARQ. INTELL. PROP. L. REV. 211, 213 (2001).

13. Press Release, Internet Corp. for Assigned Names and Nos., Trademark Issue to be Addressed Ahead of Internet Address Expansion, Mar. 7, 2009, <http://www.icann.org/en/news/releases/release-07mar09-en.pdf>.

14. Springer, *supra* note 9, at 321.

15. *Id.*

16. InterNIC, FAQ, <http://www.internic.net/faqs/authoritative-dns.html> (last visited Feb. 22, 2010).

17. *See* Springer, *supra* note 9, at 319.

name speculators.<sup>18</sup> First, an interested purchaser visits one of the domain name registrars certified by ICANN to handle the transaction (such as GoDaddy.com).<sup>19</sup> Second, the purchaser inputs his contact information, pays a small fee (usually between \$10 and \$35), and then has the right to use the domain name for the duration of the term purchased (usually one year with the option to renew).<sup>20</sup>

Users arrive at an internet destination by clicking links on a web site, by using a search engine and clicking a link in the results, or by type-in traffic. Type-in traffic, also known as direct navigation,<sup>21</sup> occurs when internet users type in the URL directly into a browser's URL bar. For example, instead of using a search engine to search for websites related to the term "wealth," a user may type "wealth" into the URL bar. When this happens, DNS servers, rather than returning an error page or a search engine results page, attempt to resolve it to a web address incorporating the user's term, with varying amounts of success.<sup>22</sup> Type-in traffic is important because it is why many internet users land on pages created by domain name speculators for the purposes of receiving advertising revenue instead of reaching a page that more closely matches their desired destination.<sup>23</sup> Without an understanding of the process that leads internet users to the web pages they are seeking, one cannot understand the ways in which others try to take advantage of this system.

## B. CYBERPIRACY

Cyberpiracy encompasses many forms of deceptive internet practices with the intent to profit from online users. Cybersquatting and typosquatting are both encompassed in cyberpiracy. Cybersquatting entails purchasing domain names that include a trademark in the hope that the trademark owner will purchase the domain from the squatter for a value over the amount that

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18. *Id.* at 320–21.

19. *See, e.g.*, Christopher Heng, How to Register Your Own Domain Name, thesitewizard.com, <http://www.thesitewizard.com/archive/registerdomain.shtml> (last visited Dec. 22, 2009).

20. *Id.*

21. DomainNameWire, Defining Direct Navigation, <http://domainnamewire.com/2006/11/09/defining-direct-navigation-marchex> (last visited Feb. 22, 2010).

22. *See, e.g.*, Berkman Ctr. for Internet & Soc'y, DNS as a Search Engine: A Quantitative Evaluation, [http://cyber.law.harvard.edu/archived\\_content/people/edelman/DNS-as-search](http://cyber.law.harvard.edu/archived_content/people/edelman/DNS-as-search) (last updated July 1, 2002).

23. *See, e.g.*, Domain Superstar, <http://www.domainsuperstar.com/domain-finder-tools/type-in-traffic-finder> (last visited Feb. 22, 2010).

the squatter paid.<sup>24</sup> Indeed, “many Fortune 500 companies . . . paid as much as \$15,000 to purchase their brand domain names.”<sup>25</sup> Anytime a new TLD launches, a “land grab” occurs where domain name speculators register thousands of names hoping to receive a substantially larger sum of money from the trademark owner than what they paid.<sup>26</sup> Cybersquatting was the first form of domain name speculation and began in the 1990s when the Internet first became commercialized.<sup>27</sup>

Typosquatting is even more speculative and was developed shortly after cybersquatting. Typosquatters register domain names that are “intentional misspellings of distinctive or famous names”<sup>28</sup> with the hope that the domains will generate traffic when an internet user makes a typographical error when typing a URL directly into the browser’s URL bar. Typosquatting can be accomplished several ways. A typosquatter might register a common misspelling of a trademarked word, a foreign spelling, a common typographical error (“berizon.com” instead of “verizon.com”), different formations of a word (the trademarked word with the addition of an –s or –ed), or a different TLD version of the trademarked word (“.org” instead of “.com”).<sup>29</sup> Some typosquatters have even purchased domain names with the period after “www” removed, e.g. “wwwcn.com.”<sup>30</sup> Particularly insidious are typosquatting websites that “mousetrap” the user in an endless loop of pop-up browser windows<sup>31</sup> and those that direct traffic—especially mistyped children’s website URLs—to pornographic websites.<sup>32</sup>

Another popular method to profit from typosquatted domain names is “phishing.” Phishing is when an internet user mistakenly arrives at a webpage that mimics his desired destination, yet is a cybersquatted or typosquatted domain. For example, one may reach what appears to be a bank’s website.

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24. See Christopher G. Clark, *The Truth in Domain Names Act of 2003 and a Preventative Measure to Combat Typosquatting*, 89 CORNELL L. REV. 1476, 1487 (2009).

25. Gregory Steffens, *Cybersquatting*, gaebler.com, <http://www.gaebler.com/Cybersquatting.htm> (last visited Dec. 22, 2009).

26. Steve DelBianco & Braden Cox, *ICANN Internet Governance: Is It Working?*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 27, 35 (2008).

27. *Id.*

28. *Shields v. Zuccarini*, 254 F.3d 476, 483 (3d Cir. 2001).

29. See Reshika Dhir, *Typosquatting: a civil conspiracy?*, IP Osgoode, Nov. 9, 2008, <http://www.iposgoode.ca/2008/11/typosquatting-a-civil-conspiracy>.

30. See Dara B. Gilwit, Note, *Latest Cybersquatting Trend: Typosquatters, Their Changing Tactics, and How to Prevent Public Deception and Trademark Infringement*, 11 WASH. U. J.L. & POLY 267, 269 (2003).

31. *Id.* at 275.

32. See, e.g., John Brogan, *Much Ado About Squatting: The Constitutionally Precarious Application of the Anticybersquatting Consumer Protection Act*, 88 IOWA L. REV. 163, 178–79 (2002).

When the user attempts to login, his username and password are stored by the website and either directly used in a fraudulent manner by the owners of the website, or the list of usernames and passwords generated through this activity may be sold to someone else.<sup>33</sup>

Domain parking is a broad term that encompasses several specific practices. The simplest form of domain parking occurs when someone purchases a domain and does very little with it. For instance, if the domain contained no content, the DNS would resolve to a “404” error page.<sup>34</sup> Rather than have this error page display, the domain owner uploads a simple page stating that the page is “under construction” or “coming soon.”<sup>35</sup> A second type of domain parking is when the registrar or the domain owner instead uploads a page that contains many pay-per-click advertising links in the hope that the user will “click-through” and provide income to the registrar or domain owner through an advertising agreement.<sup>36</sup> This is the type of domain parking that the rest of this Note will refer to as “domain parking.” It is the second generation of the domain name speculation business model. Parked domain pages often look similar to a search engine site to confuse internet users. The owner of the domain name often uses a middleman service specializing in placing advertising on web pages. These services often take a large percentage of the advertising revenue generated. Those who practice this business model have attempted to re-brand themselves as “domainers.”<sup>37</sup>

Domain tasting and domain kiting have encouraged the practice of domain parking. Domain tasting resulted from ICANN’s policy allowing registrars a five-day grace period to return domains at no charge.<sup>38</sup> This policy was intended to help registrars who mistakenly registered a domain or domains. During the grace period, domain parkers analyzed the website for traffic to see if purchasing the domain for use as a monetized parked domain

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33. See Jennifer Lynch, Note, *Identity Theft in Cyberspace: Crime Control Methods and Their Effectiveness in Combating Phishing Attacks*, 20 BERKELEY TECH. L.J. 259, 567–70 (2005).

34. Pcmag.com, Encyclopedia, [http://www.pcmag.com/encyclopedia\\_term/0,2542,t=404+error&i=37106,00.asp](http://www.pcmag.com/encyclopedia_term/0,2542,t=404+error&i=37106,00.asp) (last visited Feb. 22, 2010).

35. Wisegeek.com, What is Domain Parking?, <http://www.wisegeek.com/what-is-domain-parking.htm> (last visited Jan. 24, 2010).

36. See, e.g., ICANNWiki, Domain Parking, [http://icannwiki.org/index.php/Parked\\_Domain\\_Monetization](http://icannwiki.org/index.php/Parked_Domain_Monetization) (last visited Jan. 24, 2010).

37. Jay Westerdal, *Domainers are not Cybersquatters*, DOMAINTOOLS BLOG, April 11, 2007, <http://blog.domaintools.com/2007/04/domainers-are-not-cybersquatters>.

38. See Internet Corp. for Assigned Names and Nos., *The End of Domain Tasting*, August 12, 2009, <http://www.icann.org/en/announcements/announcement-12aug09-en.htm>.

would be profitable.<sup>39</sup> “In April 2006, out of thirty-five million registrations, only a little more than two million were permanent or actually purchased.”<sup>40</sup> Domain kiting is the process of repeatedly registering and canceling within the five-day grace period. The domain kiter captures short-term advertising revenue from the domain name without actually ever paying or intending to pay for the right to use it.<sup>41</sup> ICANN changed their policy in June 2008, no longer allowing unlimited free returns during the grace period. They recently announced that this change resulted in a dramatic drop in domain trading.<sup>42</sup> This change also, by definition, eliminates domain kiting altogether since there are now financial consequences for registering and dropping domain names.<sup>43</sup>

C. THE DEVELOPMENT OF INTERNET ADVERTISING AND HOW  
INTERNET ADVERTISING FUNCTIONS TO PROVIDE MONETARY  
COMPENSATION FOR DOMAIN NAME OWNERS

The way advertising works on the Internet enables parked domains to earn money. Early advertising on the Internet consisted of banner advertising—banners displaying graphics and text on the top or bottom of a page that users could click to be redirected to the advertised site.<sup>44</sup> Similar to hard copy advertising, advertisers paid a fee for their banner ad to be displayed. By keeping track of how many times that particular ad was displayed through website counters, an advertiser could estimate how many “impressions” his ad had. Then, advertisers started paying a rate based on how many “click-throughs” they received from the advertising on a particular webpage. A click-through is when a user actually clicks upon the link embedded within the advertisement, resulting in a visit to the advertiser’s site.<sup>45</sup>

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39. *Id.*

40. DelBianco & Cox, *supra* note 26.

41. Archive, BobParsons.me, June 21, 2006, <http://www.bobparsons.me/118/35-million-names-registered-only-registrations-paid-32-part-scam-called-domain-kiting.html> (last visited February 8, 2010).

42. Internet Corp. for Assigned Names and Nos., *supra* note 38.

43. *Id.*

44. *See* Mktg. Assoc. of New Zealand Dictionary, [http://www.marketing.org.nz/emarket\\_dictionary.php](http://www.marketing.org.nz/emarket_dictionary.php) (last visited Dec. 22, 2009).

45. *See* Corporate Website Mktg., <http://www.corporatewebsitemarketing.com/search-engine-marketing-glossary.html> (last visited Dec. 22, 2009).

Google revolutionized online advertising by offering unobtrusive text advertising links instead of banner ads.<sup>46</sup> In October 2000, Google introduced its “self-serve” AdWords program,<sup>47</sup> but it was not very successful.<sup>48</sup> In 2002, Google introduced a new version that adopted a pay-per-click auction model, auctioning off search terms to bidders, and also incorporated an ad’s relevance by measuring its click-through rate.<sup>49</sup> For example, Rolex might buy the key word “watch.” When an internet user searches for “watch” using these search engines, the search engine returns results that its internal algorithms determine to be most relevant.<sup>50</sup> Along with these “organic” search results, search engines display advertising links along the side of the page, at the top of the page, or both.<sup>51</sup> The search engines label these links with an indication that these search engine results are “sponsored” by an advertiser as was suggested by the Federal Trade Commission.<sup>52</sup>

Google does not disclose how much they share per click with the website displaying the advertising. Domainers claim that the rate could vary between \$0.02 and \$15.00 per click depending on the advertiser, product being advertised, conversion rate—the number of people who click the ad compared to the number of times the ad is displayed—and various other factors.<sup>53</sup> The advertiser pays Google when the ad is clicked.<sup>54</sup> Google then splits the proceeds with the owner of the page that generated the click-through.<sup>55</sup> Again, Google has not released specific numbers, but discussions on forums dedicated to discussing domainer issues claim that Google may

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46. Scott Karp, *Google AdWords: A Brief History of Online Advertising Innovation*, PUBLISHING 2.0, May 27, 2008, <http://publishing2.com/2008/05/27/google-adwords-a-brief-history-of-online-advertising-innovation>.

47. *Id.*

48. Search Engine History, *History of Search Engines: From 1945 to Google 2007*, Google AdWords section, <http://www.searchenginehistory.com> (last visited Feb. 22, 2010).

49. Karp, *supra* note 46.

50. How Stuff Works, *Why is the Google Algorithm So Important*, <http://computer.howstuffworks.com/google-algorithm.htm> (last visited Feb. 22, 2010).

51. Open a web browser that does not have ad blocking enabled. Navigate to Google.com. In the search bar, enter “figure skating.” Note that the results that appear to the right of the main body of search results are “sponsored links.”

52. Fed’l Trade Comm’n, <http://www.ftc.gov/os/closings/staff/commercialalertattach.shtm> (last visited Dec. 22, 2009).

53. Danny Wirken, *Internet, How Much Does Your Google AdSense Really Pay*, <http://www.exchangenet.com/lifestyles/internet/internet-30983.html> (last visited Dec. 22, 2009).

54. Google.com, *How AdSense Works*, [http://www.google.com/services/adsense\\_tour/howitworks.html](http://www.google.com/services/adsense_tour/howitworks.html) (last visited Feb. 22, 2010).

55. Wirken, *supra* note 53.

pay out between thirty and fifty percent of the revenue produced by the click-through.<sup>56</sup> Most academics and consultants who study online advertising, however, estimate that ten to fifteen percent of ad clicks are a result of fraud, representing roughly one billion dollars in annual billings.<sup>57</sup> “Google has defined click fraud as the intentional clicking of an online advertisement for a reason ‘other than to view the underlying content.’”<sup>58</sup>

## II. THE EVOLUTION OF THE DOMAIN NAME SPECULATION BUSINESS MODEL

This Part will chronologically describe the back-and-forth between the domain name speculators and those that battled to reign in the abuse. First, this Part describes how Federal Courts applied existing trademark law to internet domain name disputes. Second, this Part outlines how policy changes by national and international governing bodies altered the internet domain name playing field, requiring internet domain name speculators to modify their businesses.

### A. ROUND ONE: CYBERSQUATTERS VERSUS THE FEDERAL COURTS

The business of domain name speculation began by profiting on domain names comprised of trademarks.<sup>59</sup> The arrival of the World Wide Web spawned “gold-rush” style acquisitions of domain names.<sup>60</sup> In many cases, traditional brick-and-mortar trademark owners were slow to realize the value of their trademarks on the Internet.<sup>61</sup> Instead, domain speculators recognized that value, swooped in and, in some cases, bought hundreds or thousands of domains, including those domain names that invoked an existing trademark.<sup>62</sup> Early cybersquatters were often unsophisticated, blatantly extorting trademark owners for use of the trademarked domain name.<sup>63</sup> With the

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56. Webmasterworld.com, <http://www.webmasterworld.com/forum89/7397.htm> (last visited Dec. 22, 2009).

57. Brian Grow & Ben Elgin, *Click Fraud The Dark Side of Online Advertising*, BUSINESS WEEK, Oct. 2, 2006, [http://www.businessweek.com/magazine/content/06\\_40/b4003001.htm?chan=rss\\_topStories\\_ssi\\_5](http://www.businessweek.com/magazine/content/06_40/b4003001.htm?chan=rss_topStories_ssi_5).

58. Sajjad Matin, *Clicks Aboj! Navigating Online Advertising in a Sea of Fraudulent Clicks*, 22 BERKELEY TECH. L.J. 533, 538–39 (2007).

59. Gilwit, *supra* note 30, at 268.

60. Hannibal Travis, *The Battle for Mindshare: The Emerging Consensus that the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 VA. J.L. & TECH 3, 34 (2005).

61. *See, e.g.*, *Panavision Int’l v. Toeppen*, 141 F.3d 1316, 1325 (9th Cir. 1998) (demonstrating early cybersquatting against big companies not quick enough to register the domain names they used as trademarks).

62. Mitchell, *supra* note 6.

63. *See id.*

“wild-west” feel of the Internet, and little established law concerning domain names and trademarks, trademark owners often purchased these domain names at inflated prices.<sup>64</sup>

As with any emerging technology, the legal framework lagged behind,<sup>65</sup> requiring the courts to interpret statutes written before the advent of the Internet. Using then current trademark and anti-dilution laws, the federal courts in the 1990s tried to fashion some fences to restrain domain name abuse. In *Panavision v. Toeppen*,<sup>66</sup> the Ninth Circuit held that the defendant Dennis Toeppen’s registration of the Panavision.com domain name was a “commercial use”<sup>67</sup> and his offer to sell it to Panavision violated the Federal Trademark Dilution Act.<sup>68</sup> The court rejected Toeppen’s argument that a domain name was simply an address.<sup>69</sup> The court stated that a “significant purpose of a domain name is to identify the entity that owns the web site.”<sup>70</sup> The court further noted that a domain name is one of the primary ways customers can find a company on the Internet, and it is a valuable corporate asset because it can facilitate customer communication.<sup>71</sup> In addition, the company’s customers may become frustrated or angry when trying to search for the company’s website.<sup>72</sup> When they are unable to find it, the customer may be less likely to seek out that company in the future.<sup>73</sup> This opinion was a firm response to the business of speculative buying of domain names containing trademarks and offering them for sale to the trademark owner. The federal courts fashioned a mallet out of existing law, the Federal Trademark Dilution Act, to whack the first mole that popped up in the domain speculation business.

#### B. ROUND TWO: CYBERSQUATTERS AND TYPOSQUATTERS VERSUS POLICY AND LEGISLATIVE CHANGES

As the full scope of the problems of combating domain name speculation using existing trademark law became clear, two new tools for

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64. Ian Douglas, *Conquering the Wild West of Internet Domains*, TELEGRAPH.CO.UK, June 27, 2008, <http://www.telegraph.co.uk/comment/personal-view/3559919/Conquering-the-wild-west-of-internet-domains.html>.

65. Manav Tanneeru, *Can the law keep up with technology?*, CNN.com, November 17, 2009, <http://edition.cnn.com/2009/TECH/11/17/law.technology>.

66. *Panavision*, 141 F.3d at 1325.

67. *Id.*

68. Federal Trademark Dilution Act, 15 U.S.C. 1125(c) (2006).

69. *Id.* at 1324–25.

70. *Id.* at 1327.

71. *Id.*

72. *Id.*

73. *Id.*

trademark owners arrived on the scene. In 1998, the World Intellectual Property Organization (WIPO) attempted to bring some order to the chaos and developed the Uniform Domain-Name Dispute-Resolution Policy (UDRP) to adjudicate trademark disputes between all member nations. Shortly after, in 1999, the U.S. Congress also dipped its toes into the internet waters, and passed the Anticybersquatting Consumer Protection Act that allows for civil relief to trademark owners when their mark has been infringed through the use of domain names.<sup>74</sup>

1. *WIPO Fashions Another Mallet*

The international community developed dispute resolution procedures that would provide trademark owners limited forms of relief against domain name speculators. At the request of the United States, WIPO<sup>75</sup> conducted a consultative study on the domain-name trademark issue.<sup>76</sup> WIPO delivered its report to ICANN in April 1999, recommending a uniform dispute resolution policy by all registrars.<sup>77</sup> The UDRP was then adopted by ICANN who had the power to compel domain name registrants to agree to the resolution's terms.

ICANN manages the assignment of domain names and other activities related to the basic functioning of the Internet.<sup>78</sup> In 1997, the Clinton Administration called for the privatization of the Internet Domain Name System.<sup>79</sup> In response, ICANN formed as a non-profit corporation a year later,<sup>80</sup> and the U.S. government then "ceded" control of the domain name

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74. Anticybersquatting Consumer Protection Act, Pub. L. 106-113, 113 Stat. 1501, app. I 1501A-521 (Nov. 29, 1999) (codified at 15 U.S.C. § 1125(d) (2006)).

75. WIPO was established in 1970, and became a specialized agency of the United Nations in 1974. World Intellectual Prop. Org., What is WIPO?, [http://www.wipo.int/about-wipo/en/what\\_is\\_wipo.html](http://www.wipo.int/about-wipo/en/what_is_wipo.html) (last visited Dec. 22, 2009). Its mission is to develop "a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest." *Id.* Over ninety percent of the world's countries are members of WIPO, which is headquartered in Geneva, Switzerland. World Intellectual Prop. Org., Frequently Asked Questions about WIPO, <http://www.wipo.int/about-wipo/en/faq.html> (last visited Dec. 22, 2009).

76. Internet Corp. for Assigned Names and Nos., Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy, <http://www.icann.org/en/udrp/udrp-schedule.htm> (last visited Feb. 22, 2010).

77. *Id.*

78. Internet Corp. for Assigned Names and Nos., <http://www.icann.org/en/about> (last visited Dec. 22, 2009).

79. Ctr. for Democracy and Tech., Appendix III: Background on ICANN, <http://www.netdemocracyguide.net/dns/icann/study/appendix3.shtml> (last visited Feb. 22, 2010).

80. ICANN, *supra* note 76.

process that up until then had been controlled by the National Science Foundation through the Internet Assigned Numbers Authority.<sup>81</sup> “[T]he Internet community actually relies on ICANN to manage the DNS to achieve two key qualities—availability and integrity.”<sup>82</sup> ICANN certifies domain name registrars who then sell the domain names to the public,<sup>83</sup> and requires that all of its certified registrars include in their agreements that the registrant agrees to submit to the UDRP.<sup>84</sup> Thus, after WIPO recommended the adoption of a uniform policy for dispute resolutions concerning domain names, ICANN adopted one and registrars are bound by contract to enforce it.<sup>85</sup>

The UDRP outlines a procedure by which trademark owners can dispute the ownership of a domain they believe infringes their trademark.<sup>86</sup> There are five stages to a WIPO domain dispute: (1) a complaint, (2) a response, (3)

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81. Nat’l Sci. Found., A Brief History of NSF and the Internet, [http://www.nsf.gov/news/news\\_summ.jsp?cntn\\_id=103050](http://www.nsf.gov/news/news_summ.jsp?cntn_id=103050) (last visited Feb. 22, 2010). However, the U.S. government has maintained ties and control over ICANN even now, 12 years later. Sean Michael Kerner, *U.S. Cedes ICANN Control to the World*, INTERNETNEWS.COM, Sep. 30, 2009, <http://www.internetnews.com/infra/article.php/3841671/US+Cedes+ICANN+Control+to+the+World.htm>; David Meyer, *ICANN Wants Independence From US Govt*, ZDNET UK, Jan. 25, 2008, <http://community.zdnet.co.uk/blog/0,1000000567,100071490-2000331761b,00.htm>. But it was recently announced that ICANN will be set free of U.S. governmental control. David Meyer, *ICANN Gains Independence from the U.S.*, CNET NEWS, September 30, 2009, [http://news.cnet.com/8301-1023\\_3-10364278-93.html](http://news.cnet.com/8301-1023_3-10364278-93.html).

Some law professors have voiced concerns about whether ICANN has monopoly power over registrars and domain names. Michael Froomkin and Mark Lemley have criticized the control ICANN holds over the Internet, asserting that ICANN is either a government entity, or it is a private entity, perhaps subject to antitrust issues. *See* A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. ILL. L. REV. 1 (2003).

82. DelBianco & Cox, *supra* note 26, at 28.

83. *Id.* at 32.

84. Froomkin & Lemley, *supra* note 81, at 4.

85. Internet Corp. for Assigned Names and Nos., Registrar Accreditation Agreement, <http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm#3> (last visited Feb. 22, 2010).

86. WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP), Scope of the Uniform Domain Name Dispute Resolution Policy, <http://www.wipo.int/amc/en/domains/guide/index.html> (last visited Dec. 22, 2009). The WIPO guide explains:

The Uniform Domain Name Dispute Resolution Policy (the UDRP Policy) sets out the legal framework for the resolution of disputes between a domain name registrant and a third party (i.e., a party other than the registrar) over the abusive registration and use of an Internet domain name in the generic top level domains or gTLDs (e.g., .biz, .com, .info, .mobi, .name, .net, .org), and those country code top level domains or ccTLDs that have adopted the UDRP Policy on a voluntary basis.

*Id.*

appointment of an administrative panel that will decide the dispute, (4) the issuance and notification of the decision, and (5) implementation of the decision through the domain name registrars, e.g. the cancellation or transfer of the domain name.<sup>87</sup> Normally, the process takes sixty days from receipt of the complaint.<sup>88</sup> This process is a simple and relatively cheap alternative to bringing a lawsuit against alleged infringers. Currently, the fees for this process range from \$1500 to \$5000 depending on the number of domain names in dispute and the number of panelists requested to decide the dispute.<sup>89</sup> The decision of the panelists can be appealed by filing a lawsuit in certain courts.<sup>90</sup> Trademark owners using the WIPO process, however, are not entitled to any relief other than the cancellation or transfer of the domain.<sup>91</sup> For other remedies, trademark owners must turn to another forum.<sup>92</sup>

## 2. *The United States Congress Gives Trademark Owners Another Mallet*

In 1999, the U.S. Congress amended the Lanham Act,<sup>93</sup> the federal trademark law statute originally passed in 1946, by enacting the Anticybersquatting Consumer Protection Act (ACPA).<sup>94</sup> ACPA provides civil remedies against domain owners found to be guilty of cybersquatting.<sup>95</sup> According to the Senate Report accompanying the Act, “[t]rademark owners are facing a new form of piracy on the Internet caused by acts of ‘cybersquatting,’” which the Senate Report defined as “the deliberate, bad-faith, and abusive registration of Internet domain names in violation of the rights of trademark owners.”<sup>96</sup> One key provision within the ACPA allows lawsuits to be brought in rem against domain names as if they were real property, instead of requiring the suit to be brought against the registrant.<sup>97</sup>

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87. WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP), Overview of the UDRP Administrative Procedure, <http://www.wipo.int/amc/en/domains/guide/index.html> (last visited Dec. 22, 2009).

88. *Id.*

89. WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP), Fees, <http://www.wipo.int/amc/en/domains/guide/index.html> (last visited Dec. 22, 2009).

90. WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP), The Administrative Panel Decision, <http://www.wipo.int/amc/en/domains/guide/index.html#f5> (last visited Feb. 22, 2010).

91. *See id.*

92. *Id.*

93. Lanham Act, 15 U.S.C. §§ 1051–1141 (2006).

94. Anticybersquatting Consumer Protection Act, *supra* note 74.

95. *Id.*

96. *Virtual Works, Inc. v. Volkswagen of America, Inc.*, 238 F.3d 264, 267 (4th Cir. 2001) (quoting S. Rep. No. 106-140, at 4 (1999)).

97. *Brogan*, *supra* note 32, at 174.

ACPA provides for civil liability for registering, trafficking in, or using a domain name in bad faith if the domain name is a registered trademark, is identical or confusingly similar to a distinctive mark, or is identical, confusingly similar, or dilutive of a famous mark.<sup>98</sup> To determine bad faith intent, the statute outlines several non-exhaustive factors to examine.<sup>99</sup> Bad faith will not be found if a court determines that a person had a reasonable belief that the use of the mark was fair use or otherwise lawful.<sup>100</sup>

In a case of first impression interpreting the newly passed ACPA, the Third Circuit in *Shields v. Zuccarini* held that Zuccarini violated the ACPA and awarded Shields statutory damages and attorney's fees.<sup>101</sup> Zuccarini argued that the ACPA did not apply to his practice of typosquatting but only to cybersquatting.<sup>102</sup> The court disagreed, reasoning that "[t]his argument ignores the plain language of the statute and its stated purpose as discussed in the legislative history."<sup>103</sup>

3. *The Federal Trade Commission Wields a Mallet Against Fraudulent Domain Name Practices*

Being sued in federal court after passage of the ACPA was not enough to shut Zuccarini down. He continued to purchase domain names that were confusingly similar to trademarked names and eventually was sued by the Federal Trade Commission.<sup>104</sup> The Truth in Domains Act of 2003 criminalized some of Zuccarini's activities, such as "mousetrapping" users and directing domain names confusingly similar to trademarked children's

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98. 15 U.S.C. § 1125(d).

99. Bad faith factors to consider: 1) the trademark or other IP rights in the domain name; 2) whether the domain name is the person's name or nickname; 3) the person's prior use of the domain name in offering goods or services for sale; 4) noncommercial or fair use of the domain name; 5) intent to divert customers away from the mark owner's online location that could harm the goodwill associated with the mark, either for commercial gain or with the intent to tarnish the mark, by creating confusion about the actual source or sponsorship of the site; 6) the person's offer to sell or transfer the domain name to the mark owner without having used the domain name itself to offer goods or services or the person's prior pattern of conduct of doing so; 7) providing false contact information when registering the domain name or a past pattern of doing so; 8) the person's acquisition of multiple forms of the domain name that are confusingly similar to marks of others or a pattern of doing so; and 9) the extent to which the mark is or is not distinctive or famous. 15 U.S.C. § 1125(d)(1)(B)(i).

100. 15 U.S.C. § 1125(d)(1)(B)(ii).

101. *Shields v. Zuccarini*, 254 F.3d 476, 486 (3d Cir. 2001).

102. *Id.* at 483.

103. *Id.*

104. Ben Polen, *FTC Seeks to Trap a Mousetrapper*, WIRED, Oct. 2, 2001, <http://www.wired.com/politics/law/news/2001/10/47217>.

websites to websites containing pornography.<sup>105</sup> Zuccarini was arrested in 2003 for violating the Act and in 2004 was sentenced to two and a half years in prison.<sup>106</sup>

### III. MONETIZED DOMAIN NAME PARKING: THE LATEST ITERATION OF THE DOMAIN NAME SPECULATION BUSINESS MODEL

Domain name speculators have persevered through these legal attempts to shut down domain name speculation. Their business model has evolved from simple trafficking in domain names to a pay-per-click advertising-based business model called monetized domain parking. “[T]oday advertising-based ‘domain-parking’ sites are the fastest growing cybersquatting problem.”<sup>107</sup> Legal domain parking occurs when a non-trademarked or generic term is purchased with the hope that internet users will simply type the term into their browser’s URL bar instead of searching for the term in a search engine.<sup>108</sup> Examples of these are terms so generic they cannot be trademarked, such as business, pets, or wealth. Generic domain names can generate millions of dollars when sold. For example, business.com was sold for \$7.5 million, sex.com was sold for \$14 million,<sup>109</sup> and Toys.com was sold to Toys R Us for \$5.1 million in March 2009.<sup>110</sup> Illegal domain parking is a form of cybersquatting or typosquatting that occurs when a trademark or typographical error of a trademark name is registered and generates revenue through the use of pay-per-click advertising.<sup>111</sup> Thus the domain owner profits from the trademark without the consent of the trademark owner.

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105. Truth in Domains Act, 18 U.S.C. § 2252B (2006).

106. Man Sentenced for Registering Misleading Web Site Names, USATODAY.COM, Feb. 27, 2004, [http://www.usatoday.com/tech/news/2004-02-27-zuccarini-gets-jailtime\\_x.htm](http://www.usatoday.com/tech/news/2004-02-27-zuccarini-gets-jailtime_x.htm).

107. Mitchell, *supra* note 6.

108. ACPA only prohibits the use of trademarked terms, or those so similar that they are likely to cause consumer confusion.

109. Most Expensive Domain Name, The Most Expensive Journal, <http://most-expensive.net/domain-name> (last visited Dec. 22, 2009).

110. Harry Wallop, *Domain Names Jump in Value*, TELEGRAPH.CO.UK, July 7, 2009, <http://www.telegraph.co.uk/technology/news/5767130/Domain-names-jump-in-value.html>.

111. These are the domain names discussed *infra* Section II.B.2.

A. DOMAIN PARKING GENERATES MILLIONS OF DOLLARS FOR DOMAIN NAME SPECULATORS

Domainers purchase many domains and “park” advertising-laden pages at the domain site.<sup>112</sup> They hope to get a few visitors per day from type-in traffic rather than search engine traffic. For example, if an internet user types a generic term into most popular browsers’ URL address bar window (not the search bar window), the browser will be unable to resolve the term into a usable domain name that can be looked up in the DNS servers. Instead, the browser will resolve to a page of search results generated by the default search engine specified for that particular browser. However, if the user types in “[genericterm].com,” the browser will look up the domain name on the DNS server and resolve the address to what is often a web site featuring advertising links to other retail sites.<sup>113</sup> These sites generate income through advertising click-throughs.<sup>114</sup> In addition, formerly registered domain names that are allowed to expire and have pre-existing traffic are often scooped up the moment they expire.<sup>115</sup> “A Google AdSense ad tends to generate between \$2 and \$3 [per thousand visitors] on average.”<sup>116</sup> When a domainer owns thousands or even hundreds of thousands of domains, however, this small amount of money can add up to very large sums of money.<sup>117</sup> Domain parkers do not have to create their own parked pages but instead contract with a service with which they split the advertising proceeds. For example, companies like Sedo allow domain purchasers to register with them and then Sedo generates pages with advertising in exchange for a partial share of the advertising revenue.<sup>118</sup>

Overall, monetized domain parking generates hundreds of millions of dollars per year for domainers.<sup>119</sup> There is even a resale market for domainers

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112. Westerdal, *supra* note 37.

113. *See* wheat.com, <http://wheat.com>, for an example (last visited Feb. 22, 2010).

114. NameDrive, FAQ, <http://www.namedrive.com/faq/Browse?lang=en&catid=1#q2> (last visited Feb. 22, 2010).

115. *See, e.g.*, Ben Edelman, Berkman Ctr, for Internet & Soc’y, Domains Reregistered for Distribution of Unrelated Content: A Case Study of “Tina’s Free Live Webcam”, [http://cyber.law.harvard.edu/archived\\_content/people/edelman/renewals](http://cyber.law.harvard.edu/archived_content/people/edelman/renewals) (last updated Feb. 18, 2003).

116. WebKEW, Lesson #3—How much money can you make with a web site?, Apr. 23, 2005, <http://webkew.blogspot.com/2005/04/lesson-3-how-much-money-can-you-make.html>.

117. *See*, Leslie Walker & Brian Krebs, *The Web’s Million-Dollar Typos*, WASH. POST, Apr. 30, 2006, at F01.

118. *See* Sedo, Domain Parking, <http://www.sedo.com/us/parkdomains/park-domains-overview/?tracked=&partnerid=&language=us> (last visited Dec. 23, 2009).

119. Kesmodel, *supra* note 1.

to sell domains to other parked domain speculators.<sup>120</sup> However, click-through fraud has been alleged where the “type in” traffic is not legitimate but instead utilizes “bots”<sup>121</sup> to comb through a domainer’s websites. These bots, using unique IP addresses so as to not raise red flags by their activities, generate small amounts of click-through revenue every day on each owned domain.<sup>122</sup>

B. DOMAIN NAME SPECULATION EVOLVES AGAIN TO BATTLE POLICY AND TECHNOLOGICAL INNOVATIONS

Simple monetized domain parking became less profitable because of the change in ICANN policy removing the ability to “taste” domains<sup>123</sup> and various technological changes.<sup>124</sup> With the success of these tools against this form of domain name speculation, the speculators have changed their business model once again. The latest incarnation of the domain name speculation business attempts to provide actual content, albeit just enough to achieve a legitimate business ranking.<sup>125</sup> This new domain parking system utilizes pages resembling “wikipedia lite.”<sup>126</sup> Although there is some actual information on these pages, the intent is still to get a visitor to click through on one of their advertising links.<sup>127</sup> Since these pages appear to be actual web pages, consumers may be more likely to be confused into thinking they have arrived at a website with actual content, and so they may be more likely to click on a link that will generate click-through revenue.

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120. James Charles, *How to Profit from Domain Names*, TIMESONLINE.COM, Sep.18, 2008, <http://www.timesonline.co.uk/tol/money/article4781681.ece>.

121. TechEncyclopedia, techweb.com, <http://www.techweb.com/encyclopedia/defineterm.jhtml?term=bot> (last visited Dec. 23, 2009).

Bot - (1) (roBOT) A program used on the Internet that performs a repetitive function such as posting a message to multiple newsgroups or searching for information or news. Bots are used to provide comparison shopping. Bots also keep a channel open on the Internet Relay Chat (IRC). The term is used for all variety of macros and intelligent agents that are Internet or Web related.

*Id.*

122. See Jason Wilk, *The Big Business of Domain Buying/Monetization Fraud Exposed*, TINYCOMB, Aug. 14, 2009, <http://tinycomb.com/2009/08/14/the-big-business-of-domain-buyingmonetization-fraud-exposed/>.

123. Internet Corp. for Assigned Names and Nos., *supra* note 38.

124. See *infra* Section V.A.3.

125. Dot Parked, Domain Parking 2.0, <http://www.dotparked.com> (last visited Feb. 22, 2010).

126. See <http://stopdomainparking.com/> for an ironic example (last visited Feb. 22, 2010).

127. See, e.g., Whypark.com, Welcome to the New Generation of Domain Development, <http://www.whypark.com/domain-parking.htm> (last visited Dec. 23, 2009).

#### IV. CHALLENGES IN USING LEGAL REMEDIES TO FIGHT DOMAIN NAME SPECULATORS

As noted above, domain name speculation has evolved to side-step the legal and technological remedies deployed against it.<sup>128</sup> This Part will discuss how trademark law differs from other intellectual property and how that creates challenges for the legal system, those injured by domain name speculation, and why those who might be able to provide lasting solutions fail to do so.

##### A. TRADEMARKS ARE NOT LIKE OTHER INTELLECTUAL PROPERTY

Trademark owners have now had ten years to use the WIPO dispute resolution process or to sue in court using the ACPA. These tools have not stopped typosquatters and the issue is still alive and changing today. In fact, the New York Times reported that in 2008, the sales of domain names containing a trademark rose eighteen percent.<sup>129</sup> Using trademark law to fight domain name speculation has been problematic from the start. Trademark law is different than other forms of intellectual property like copyright and patents.<sup>130</sup> Instead of being a right derived from the Constitution, trademark doctrine developed out of unfair competition common law.<sup>131</sup> Trademark doctrine has dual goals.<sup>132</sup> First, trademark doctrine seeks to protect the consumer from deception and confusion over trade symbols.<sup>133</sup> Second, trademark doctrine seeks to protect the trademark owner.<sup>134</sup> “[T]he Lanham Act . . . gives a producer a cause of action for the use . . . of ‘any word, term, name, symbol, or device, or any combination thereof . . . which . . . is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods . . . .’”<sup>135</sup> Historically, trademarks have not been viewed by the courts as property.<sup>136</sup> However, the application of trademark law to the Internet and domain names appears to be stretching existing law to give trademark law quasi-property status. And domain names themselves are arguably recognized

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128. See *infra* Part III.

129. Alex Mindlin, *The Rush to Stake a Claim Online*, N.Y. TIMES, Mar. 16, 2009, at B3.

130. Dogan & Lemley, *supra* note 3, at 801.

131. See ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 635 (4th Ed. 2007).

132. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:2 (4th ed. 2003).

133. *Id.*

134. *Id.*

135. Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 209 (2000).

136. Dogan & Lemley, *supra* note 3, at 788.

as property. For instance, the ACPA grants the ability to conduct in rem suits against domain names, a right traditionally granted against property.<sup>137</sup>

When evaluating the success of the remedies currently used against domain speculators, one might question just how successful we want them to be. Although ICANN made assurances that the UDRP would be used only in egregious cases evidencing “bad faith” the use of the UDRP has been expanded to rule against even un-trademarked famous names.<sup>138</sup> A common complaint against the UDRP is that it is biased towards trademark owners, finding in their favor over 80 percent of the time.<sup>139</sup> Domainers’ due process rights may be violated through the use of privatized arbitration procedures established by WIPO and adopted by ICANN.<sup>140</sup> Furthermore, if the purpose of trademark law is to promote economic efficiency by providing consumers with information,<sup>141</sup> then the use of trademark law through ACPA against some domain names that contain a trademark term defeats this purpose. Finally, critics contend that, “too many [courts] have rushed to find a trademark use without proper consideration of the long-established limitations on trademark owners’ rights under the Lanham Act . . . .”<sup>142</sup>

#### B. WHO ARE THE VICTIMS OF DOMAIN NAME SPECULATION?

Domain parking, whether trademark infringing or not, injures consumers, intermediaries like ISPs, and trademark holders. Trademark owners are injured by the loss of value in their trademark and in some cases are financially harmed directly. For example, Land’s End was directly harmed when it paid out affiliate-referral dollars to a domain owner who owned several typographical misspellings of Land’s End.<sup>143</sup> The typosquatting websites resolved domain names with landsend.com misspellings through an unseen process that directed internet users invisibly through the typosquatter’s own website to Land’s End to gain affiliate revenue.<sup>144</sup> Thus, the trademark owner had to pay for a referral from a typosquatted domain when users who arrived there via a typographical error were automatically routed through to the trademark owner’s site. The automatic and invisible

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137. Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(2)(A) (2006).

138. Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 164–65 (2000).

139. Patrick D. Kelley, *Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute Resolution Policy*, 17 BERKELEY TECH. L.J. 181, 182–83 (2002).

140. *See generally id.*

141. McCarthy, *supra* note 132, at § 2:3.

142. Margreth Barrett, *Internet Trademark Suits and the Demise of “Trademark Use”*, 39 U.C. DAVIS L. REV. 371, 421 (2006).

143. *Land's End, Inc. v. Remy*, 447 F.Supp. 2d 941, 945 (W.D. Wis. 2006).

144. *Id.* at 946.

“click-through” resulted in a fee paid to the affiliate from the aggrieved trademark owner.

Additionally, trademark owners are injured when a domainer, by acquiring thousands of domains, intentionally or unintentionally infringe upon trademarks to generate ad-click revenues. Trademark owners have no choice but to attempt to enforce their mark or they risk the cancellation of their mark.<sup>145</sup> Moreover, consumers may be confused or annoyed by the typosquatter’s domain and blame the inconvenience on the trademark owner.<sup>146</sup> Trademark owners’ costs increase whenever ICANN decides to implement new TLDs because they must then purchase additional domain names to guard against cybersquatters.<sup>147</sup> ICANN recently announced that the next time it introduces new TLDs, it will implement new rules to protect trademark owners.<sup>148</sup> The sheer amount of typosquatted domains can overwhelm even large companies. Some companies have to prioritize which domains to pursue (usually those serving pornography ads) and simply leave the others alone to profit.<sup>149</sup>

Consumers are injured, both by trademark infringing domain parking and non-trademark infringing domain parking. An internet user typing a word or internet address into the browser’s URL bar loses time when arriving at a parked domain. In addition, some parked domains have caused harm to consumers through phishing.<sup>150</sup> Consumers may also be injured if they desire to become domain name owners. For instance, the “land grab” that has already occurred by cybersquatters and domainers<sup>151</sup> results in few attractive options for ordinary consumers. Prospective registrants are often unable to find any domain names in the most common TLDs that are not nonsense arrangements of letters and numbers.<sup>152</sup> Trademark holders must police their trademarks,<sup>153</sup> and can spend thousands of dollars a year in fees to WIPO for

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145. 15 U.S.C. § 1064(5) (2006).

146. *See* Panavision Int’l v. Toeppen, 141 F.3d 1316, 1327 (9th Cir. 1998).

147. *See infra* Section V.A.2.

148. Posting of Thomas O’Toole to E-Commerce and Tech Law Blog, New Domain Name Registries Feeling Heat from Trademark Owners, Mar. 17, 2009, <http://pblog.bna.com/techlaw/2009/03/new-domain-name-registries-feeling-heat-from-trademark-owners.html> (last visited Dec. 23, 2009).

149. Mitchell, *supra* note 6.

150. *See* Lynch, *supra* note 33, at 267.

151. *See supra* Section I.B.

152. All three and four letter combinations in the “.com” domain are gone. Preeti Pradhan, *Get Creative With Your Domain Name*, SMASHING MAGAZINE, July 26th, 2009, <http://www.smashingmagazine.com/2009/07/26/get-creative-with-your-domain-names>.

153. Tiffany (NJ) Inc. v. eBay, Inc., 576 F.Supp. 2d 463, 518 (S.D.N.Y. 2008).

UDRP proceedings<sup>154</sup>—possibly more if the trademark owner sues in federal court to enforce their trademark rights.<sup>155</sup> Consumers must also bear increased costs that result in the excess and unwanted bandwidth generated by accidental visits to parked domain pages. All these costs are passed on to the consumer through the products and services they purchase. Accordingly, domain parking profits off unrealized externalities. If domain parkers had to pay for the unwanted internet traffic they generate, domain parking might cease to be profitable.

C. LEGAL SYSTEM LARGELY INEFFECTIVE AGAINST PARKED DOMAINS,  
WHO CAN HELP?

Since legal solutions have so far proven ineffective in ending domain name speculation, especially the most recent iteration of monetized domain parking, consumers may find relief elsewhere. Google could effectively solve the problem if they stopped serving their ads to parked domain pages. Not only does Google serve ads to middleman services that host parked domain pages, but also expanded their AdSense program specifically for domains.<sup>156</sup> When Google acquired Doubleclick in 2008, it doubled its market share over search engine advertising and now controls almost seventy percent of the market.<sup>157</sup>

Google has little incentive to end parking as it is generating millions of dollars in revenue.<sup>158</sup> Google's use of AdSense advertising on parked domain pages could be seen as hedging position. Google now offers its own parking service, in effect cutting out the middleman domain parking services like Sedo.<sup>159</sup> Historically, Google made money if its search engine was used to find a website when the user clicked a sponsored link.<sup>160</sup> Google now also makes money when users type directly into a browser and are redirected to Google's monetized parked domain.<sup>161</sup>

ICANN significantly diminished parking by altering its policy of a five-day grace period for domain name registration.<sup>162</sup> ICANN could further curb

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154. *See supra* Section II.B.1.

155. *See supra* Section II.B.2.

156. *See* Google AdSense for Domains, <http://www.google.com/domainpark> (last visited Dec. 23, 2009).

157. Loren Baker, *Google Now Controls 69% of Online Advertising Market*, SEARCH ENGINE JOURNAL, Mar. 31, 2008, <http://www.searchenginejournal.com/google-now-controls-69-of-online-advertising-market/6632>.

158. Leslie Walker & Brian Krebs, *supra* note 117.

159. *See supra* Section III.A.

160. *See* discussion of advertising practices, *supra* Section I.C.

161. *See id.*

162. *See supra* Section III.B.

domain speculation if it decertified its domain registrars for failing to abide by its policies.<sup>163</sup> Further, ICANN or the registrars could institute a trademark check during the registration process.<sup>164</sup> Some registrars already offer, for an additional fee, a service to monitor the registration of domain names including a trademark.<sup>165</sup> Some registrars contribute to the problem by themselves being major domainers.<sup>166</sup> Sarah Deutsche, vice president and associate general counsel at Verizon Communications Inc., says that “all of the companies Verizon has sued for cybersquatting are domain-name registrars that have been accredited by the ICANN . . . .”<sup>167</sup> Registrars often park ad-laden domain pages as soon as a domain name is registered without the registrant’s knowledge.<sup>168</sup> When the domain owner uploads his own content, this ad page is removed.<sup>169</sup>

Additionally, many registrars are in the business of “expiration extortion,” a common practice of forcing a domain owner to pay an exorbitant fee to reinstate a name that has been allowed to expire.<sup>170</sup> A leading registrar, for example, charges \$80 to reinstate a domain name that costs only \$8 to initially register.<sup>171</sup> Expiration extortion also describes the speculative game of snatching expiring domain names for resale to their former owner—or to the highest bidder.<sup>172</sup> Registrars are also accused of running up the prices of expired domain names during auctions.<sup>173</sup> “The gatekeepers ultimately must be those that are responsible for domain names, legitimate or otherwise, reaching the internet—domain name registrars.”<sup>174</sup>

Consumers, arguably the real victim of domain name speculation, cannot themselves find relief. Public choice theory, which applies economic principles to explain political actions, suggests why not. Consumer interest

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163. See, Robert L. Mitchell, *Registrars under Fire in Domain Disputes*, COMPUTERWORLD, June 25, 2009, [http://www.computerworld.com/s/article/9134610/Registrars\\_under\\_fire\\_in\\_domain\\_disputes](http://www.computerworld.com/s/article/9134610/Registrars_under_fire_in_domain_disputes).

164. See, e.g., Mairead Moore, *Cybersquatting: Prevention Better than Cure?*, 16 INT’L J.L. & INFO.TECH. 1, 9 (2008).

165. EnCirca, *Domain Watch*, [http://www.encirca.com/mm5/merchant.mvc?Screen=PROD&Store\\_Code=E&Product\\_Code=Dom-Watch](http://www.encirca.com/mm5/merchant.mvc?Screen=PROD&Store_Code=E&Product_Code=Dom-Watch) (last visited Feb. 22, 2010).

166. Mitchell, *supra* note 6.

167. *Id.*

168. *Id.*

169. Mitchell, *supra* note 163.

170. See, DelBianco & Cox, *supra* note 26, at 36–37.

171. *Id.*

172. *Id.*

173. Michael Arrington, *SnapNames Gets Hit With Class Action Suit Over Shill Bidding*, TECHCRUNCH, Nov. 9, 2009, <http://www.techcrunch.com/2009/11/09/snapnames-gets-hit-with-class-action-suit-over-shill-bidding>.

174. Springer, *supra* note 9, at 360.

groups form only when their constituents believe that the costs of doing so will result in a beneficial action or legislation.<sup>175</sup> Legislation is a public good, however, and will benefit all citizens, even those who did not input any resources in trying to get the legislation passed.<sup>176</sup> If citizens are rational, none will try to influence the political process to pass legislation because any benefit to them will be very small; instead the benefit accrues more to the public at large.<sup>177</sup>

## V. SOLUTIONS

Legal barriers to trademark-infringing parked domains have not successfully stopped domain name speculation. Instead, the business of domain name speculation has evolved to find new models each time the legal system blocks the existing one. If coming up with new legal tools to solve the current *en vogue* model, monetized domain parking, is likely to result in yet a new “mole to whack,” and the players that might solve the problem through policy changes are unlikely to because of economic incentives, what other tools might be available to solve the problem once and for all? The changing marketplace may discover new tools to fight domain name speculation or domain names may become obsolete altogether.

### A. CURRENT SOLUTIONS

This Section will examine several methods to combat domain name speculation, many of which are already in practice to some extent. Each has some usefulness in combating the problem, but each also has limits.

#### 1. *Private Entity Policy Changes*

The most effective policy change to date has resulted in a drastic drop in the amount of domains registered. An August 2009 announcement by ICANN sheds light on whether further efforts are necessary or if domain parking is a dwindling threat to internet consumers and trademark owners alike.<sup>178</sup> In June 2008, ICANN changed the policy that allowed domain tasting and instead began charging registrars for returning large amounts of domains within the five-day grace period. The policy change resulted in a 99.7% drop in domains purchased and dropped within the grace period.<sup>179</sup>

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175. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 88 (2d ed. 2006).

176. *Id.* at 89.

177. *Id.*

178. Internet Corp. for Assigned Names and Nos., *supra* note 38.

179. *Id.*

Whether due to this policy change, or the economy in general, domain parking business has dropped, and recently one of the largest parking businesses acquired two smaller businesses.<sup>180</sup>

## 2. *Self-help*

One of the first methods of curbing domain name speculation as far back as the 1990s was defensive domain name purchasing.<sup>181</sup> Trademark owners purchase hundreds of domain incorporating their trademark or its common misspellings.<sup>182</sup> Though an individual domain name is inexpensive at about ten dollars, in aggregate the amount of domain names purchased by each mark owner combined with the sheer number of trademark owners seeking defensive domains represent a large number of defensive purchases.<sup>183</sup> Second, some trademark owners purchase services that monitor domain name registration and alert them when a domain name identical to or confusingly similar to a trademark in their portfolio is registered.<sup>184</sup> Some of these services are even provided by the registrars themselves.<sup>185</sup> Mark Monitor is a popular but expensive service used by large companies.<sup>186</sup>

## 3. *Technological Solutions*

It may be useful to analogize domaining to spam emailing. Both are a problem because of the shared resources they consume.<sup>187</sup> Some varieties of spam emailing, like non-trademark infringing domaining, are legal. ISPs, Information Technology (IT) departments, and consumers all share the cost of spam email: ISPs in the form of increased traffic across their network resulting in increasing bandwidths needs, while IT departments in businesses spend a significant amount of both time (setting up programs) and money (buying filtering software) finding ways to ensure that spam emails do not reach their employees.<sup>188</sup> Some of these technological solutions are already

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180. Name Monetizer, Sedo Buys Parking Panel, Sep. 24, 2009, <http://namemonetizer.com/name-monetizer/2009/9/24/sedo-buys-parkingpanel.html> (last visited Feb. 8, 2010).

181. Mitchell, *supra* note 6.

182. *Id.*

183. *See id.*

184. *Id.*

185. *See* EnCirca, *supra* note 165.

186. Mitchell, *supra* note 6.

187. Vicomsoft: Knowledge Share White Papers, Spam, <http://www.vicomsoft.com/knowledge/reference/spam.html#9> (last visited Dec. 23, 2009).

188. John Timmer, *Study: Energy Cost of Spam Comes from User Intervention*, ARS TECHNICA, Apr. 15, 2009, <http://arstechnica.com/business/news/2009/04/study-says-energy-cost-of-spam-comes-from-user-intervention.ars>.

available and in use, for instance, those utilizing blacklisting and whitelisting.<sup>189</sup>

Blacklisting is a list of persons or organizations that are considered to be untrustworthy.<sup>190</sup> Whitelisting is the opposite of blacklisting—a list of contacts that the user deems acceptable.<sup>191</sup> Email spam filters use blacklists and whitelists to provide spam filtering services to ISPs and businesses. A plug-in application<sup>192</sup> is available through the Firefox add-ons page that uses a list generated by the Parked Domain Project to block browsers from resolving to a page known to be a parked domain.<sup>193</sup> User comments, however, complain that the plug-in is very slow.<sup>194</sup>

#### 4. DNS Redirection Tools

Microsoft has developed a similar tool. Microsoft's Strider URL Tracer program includes a Typo-Patrol feature that "generates and scans sites that capitalize on inadvertent URL misspellings, a process known as typo-squatting. The tool also enables parents to block typo-squatting domains that serve adult ads on typos of children's Web sites."<sup>195</sup> In addition, OpenDNS is a provider of services intended to combat a myriad of cyberpiracy attacks, including typographical misspellings that land a user on a parked domain page.<sup>196</sup> It provides free ad-based service for individuals and subscription services for enterprise users.<sup>197</sup> Google's browser, Chrome, eliminates the URL address bar and has one box for entering search terms or website addresses.<sup>198</sup> This should eliminate the problem of DNS servers resolving mistyped domain name addresses to a parked domain page because the user

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189. Brett Watson, *What is Anti-Spam?*, CIRCLEID, Feb. 28, 2006, [http://www.circleid.com/posts/what\\_is\\_anti\\_spam](http://www.circleid.com/posts/what_is_anti_spam).

190. TheFreeDictionary.com, <http://www.thefreedictionary.com/blacklist> (last visited Dec. 23, 2009).

191. TheFreeDictionary.com, <http://encyclopedia.thefreedictionary.com/whitelist> (last visited Dec. 23, 2009).

192. Add-Ons For Firefox, Duck Duck Go Toolbar 1.2.0, <https://addons.mozilla.org/en-US/firefox/addon/10536> (last visited Dec. 23, 2009).

193. The Parked Domains Project, <http://www.ivegotafang.com> (last visited Dec. 23, 2009).

194. Add-Ons for Firefox, *supra* note 192.

195. Microsoft Research, Strider, <http://research.microsoft.com/en-us/um/redmond/projects/strider/urltracer> (last visited Dec. 23, 2009).

196. About OpenDNS, <http://www.opendns.com/solutions/household/guide> (last visited Jan. 24, 2010).

197. *Id.*

198. Google Chrome, <http://www.google.com/chrome/intl/en/features.html> (last visited Dec. 23, 2009).

will instead receive a search engine result page and will be able to choose the desired link.

A common problem with these technological solutions, however, is that they require internet users to choose to implement them. Additionally, the users must be technologically savvy enough to know there is a solution to their annoyance and to install and use each of these third-party solutions. None of these third-party applications are well-known or advertised.

## B. OTHER SOLUTIONS

### 1. *User Retraining*

The simplest way to prevent arriving at an unwanted parked domain is to train users to always use a search engine. For example, typing `whitehouse.com` into the URL bar of either Internet Explorer or Firefox results in being directed to a monetized parked domain. If the user instead types in `whitehouse.com` into either Bing (the default search engine in Internet Explorer) or Google (the default search engine for Firefox), they get directed to a page containing search results where the user can select the official `whitehouse.gov` link in the first few results. If users never see a parked domain page, they will not click on it and the parked domain will fail to generate ad-click revenue.

### 2. *Death of the Trademarked Domain Name*

Perhaps the most striking solution to preventing trademark-infringing domain parking is the choice not to use trademarked terms as domain names. This is being done in many countries, though not to fight parked domain advertising. In countries without Latin alphabets, trademarks are often not translatable to the Latin alphabet-style keyboard and therefore domain names often are not recognizable to their local consumers. In Japan, advertising does not include a standard website URL. Instead, a search engine box is pictured with a suggested search term or terms already entered into the box.<sup>199</sup> Mobile phone browsing is bringing this trend into the United States. “Text-weary thumbs” are making it possible for “QR” codes, considered by some to be URL killers, to gain acceptance in the U.S.<sup>200</sup> QR codes are 2D bar codes containing small bits of data that can be read by applications on

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199. Posting of Cabel Sasser to Cabel’s Blog LOL, Japan: URLs are Totally Out, March 24, 2008, <http://www.cabel.name/2008/03/japan-urls-are-totally-out.html> (last visited Dec. 23, 2009).

200. See, Garrick Schmitt, *Can a ‘URL Killer’ Save our Text-Wearry Thumbs?*, ADVERTISING AGE, July 28, 2009, [http://adage.com/digitalnext/article?article\\_id=138154](http://adage.com/digitalnext/article?article_id=138154).

mobile devices when a user takes a picture of the code.<sup>201</sup> The device then launches the appropriate application, including a browser with the correct address pre-loaded.<sup>202</sup> Only recently, with increased smart phone use, has the use of QR codes begun to catch on in Europe and the United States.<sup>203</sup> The Trademark Blog remarked that the current domain name system is damaged and training users to use search engine terms rather than URLs is a step in finding a way around that damaged system.<sup>204</sup>

## VI. CONCLUSION

After examining how the domain name speculation business model has, for ten years, found ways around the legal tools created to fight it, it is time to consider other methods. It is certain ICANN will introduce more TLDs to meet the growing demand for virtual addresses on the Internet. Due to the difficulties of policing domain name speculation using trademark law, a combination of policy changes, technological solutions, and social engineering will more likely achieve lasting success against domain name speculation. By making domain speculation more difficult, less profitable, or even obsolete, the legal system and trademark owners can cease playing Whac-A-Mole with speculators, leaving more resources for them to conduct their intended activities.

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201. *Id.*

202. *Id.*

203. *Id.*

204. The Trademark Blog, Mar. 26, 2008, [http://www.schwimmerlegal.com/2008/03/the\\_url\\_is\\_so\\_d.html](http://www.schwimmerlegal.com/2008/03/the_url_is_so_d.html) (last visited Dec. 23, 2009).