

DE JURE NEXUS LAW JOURNAL

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2nd Year, BA LL.B. (Hons.)**TRADEMARK TRAFFICKING IN CYBERSPACE: AN ANALYTICAL STUDY****Abstract**

Trademark issue or trademark Trafficking is a very concerning issue in cyberspace. This happens as there is unfathomable data over the internet. DNS introduction came up in order to substitute numerical IP addresses. As novel methods came for unique identification of products, civilization advanced and trademark became a milestone. Ill and illegal practices like cybersquatting and meta- tagging came up due to online trade and e- commerce. Different dispute resolutions appeared as ICANN was the most instrumental one. The main reason behind this illegal practice is that the Internet is a global world and has no boundaries. So the problem lies in the jurisdictional issue over cyberspace.

Introduction

The Internet is instrumental and is a sole medium between the masses. It is a very important point for business transactions, and Social interaction. The counterfeit objects have been escalated in the market due to a rampant increase in global trade. The laws related to trademark have only applied to physical markets traditionally and were given to the traders so that they can carry their business under a particular trademark but with the sudden boom of the online or virtual world, different issues have arisen relating to trademark protection. A trademark is understood as a symbol, mark, logo, emblem which associates a product. Moreover, no business can enter the virtual world without any identity of its own. IP (Internet Protocol) addresses are very difficult to remember, so the concept of DNS, that is Domain Name Systems, was invented and came into form. The primary objective of this DNS is to replace numeric values and IP addresses. It converts the difficult IP address of a website to simple names for easy access by any individual. For example, some common ones are .com for commercial and .int for international organisations. Online ventures have been boosted, also at the same time vulnerable to many risks. A TRIPS Agreement was created by the World Health Organization for Intellectual property protection. India is said to be

signatory to TRIPS. Cyberspace is totally filled with flaws. The crimes are becoming so complex these days and of such a nature where the jurisdiction is determined and the offender is punished.

Domain Name and Trademark

The domain name carries the address and location of a website. Conventional trademarks have been used in the trading world. Now the question arises why does dispute over domain names occur? It is akin to a trademark. Any offline business having a trademark is a valuable addition by wishing to do the same thing online. Trademark is a territorial law and the Internet has no borders¹. There are techniques where the products are passed by the method of deception to innocent people. This is seen in the case ruling **Rediff Communication Ltd. V. Cybertooth and Another**, where the respondent has registered the same domain name as the plaintiff who was carrying the business of similar nature. The court stated the defendant had a bad intention to carry the trade and business under the trademark of the plaintiff, which will result in the Infringement of the plaintiff's right.

As in the physical world, two trademarks can exist at the same time but over cyberspace, more than one domain name cannot be registered. The registrars do not have a framework to survey for the bonafides of any candidate but instead a first come first serve basis would award a registration leading to numerous opportunities. This is called oppressive registrations. Suppose, a registration is done by an individual of a domain name where that individual has no authentic right.

There is another situation which arises known as cyber twin. This situation occurs when both the parties or the persons hold an authentic claim towards a particular domain name. Hyperlink text is an area where the problem of trademark infringement can arise. This generally happens from one website location to another. Let us take an example of the web link "Gucci". Sometimes what happens when we see the hyperlink of Gucci, we are taken to some other web page rather than the official site of Gucci. This web page may be a similar one but not of exactly the brand name Gucci. Such things result in trademark infringement.

Cybersquatting

In general terms, cybersquatting is a process where one party attracts the customers and gains profits out of it. This is done by misusing some other party's trademark. Cybersquatting is an obstacle in online business organisations. The abuse can occur when a domain is listed which has a likeness or any brand of notable organization. Cyber squatters do not limit any company to use a domain name of their own wish. The cyber squatters constraints different web based organisations which pays immense amounts of cash and thus ensures the goodwill of the organisation. There was a person from Canada who enrolled in the Appleimac to sell this to Apple². This domain name was purchased by some web columnists at \$700. This was said to be a domain destination by cyber squatters. This idea of cybersquatting can be better understood from the case **Intermatic Incorporated v. Dennis Toeppen**³, where the organisation was the proprietor of

¹ Singh, Bhavna, "Cybersquatting and Domain Name Disputes; Under the Trademark Law", p. 7

² Tracy Kraft- Tharp, Domain Names and Trademark Law, 18 Preventive L Rep. 10 (1999)

³ 96 C, 1982 (7th Cir.:1996)

"Intermatic brand" and thus enrolls it with the US Patent and Trademark Office. The organisation has brought a claim against "Dennis Toepen" where Intermatic.com domain name was utilised by the respondent. This came under 32(1) of Federal Trademark Infringement Act and Section 43(1) of Federal Trademark weakening Act, 1995. The claim made by the respondent was they were the initial ones who enrolled with that same domain and thus they need their rights over the "early bird gets the worm" rule. As the respondent organization did not have any adequate proof or evidence of their dispute and the the complainant organization was working at a worldwide level for 50 years with the same domain and brand name, so the case was ruled in favor of the petitioner.

The moral of the story in this case is that both businesses cannot have a similar domain name. As per the fact, cybersquatters are not limiting the companies to enlist any domain name, so it can be contended that cyber squatters are not forestalling the privileges of organizations in their respective domain names. In cases where domain names are enrolled, alternative approaches are discovered by the cyber squatters to bring in purchasers to internet pages. A search motor is being utilised rather than any undeniable domain name to create extra turmoil or avoid getting to the actual site⁴. Those customers who look for a page of a brand name business, they visit the search engine in light. The fact which arises is that there is an underlying motive of manipulating a domain name which never yields the ideal outcome. This results in cyber vagrants who effectively enrolled in that particular domain.

Meta Tagging and Keywords

All the websites have keyword fields. Meta Tagging means manipulation of a particular keyword field of a particular website. The hackers are so efficient in all these that if they manipulate the keyword field, and a user uses the search engine, he will come back to the same page whether the website is relevant or not according to the search made. A different name was given to meta tags which were in hidden texts and stayed invisible, which resulted in manipulating the search engine. This concept presented a landmark case ruling **ReOppedahl & Larson v. Advanced Concepts**⁵. Here, Oppedahl and Larson were renowned law firms and used the same domain name "patents.com". All three companies were sued as it was alleged that they used meta tagging of the words "Oppedahl" and "Larson" to drive traffic to their websites and manipulate the search engines. The court stated that the defendant was liable for trademark Infringement.

Fair Use in Meta Tags

There is an exception to the use of meta tagging and keywords. This is when the trademark has been used as a descriptive of a particular product which is provided by the website. Here, the fair use of meta tagging is amounted. This can be seen in a case ruling **Playboy Enterprises, Inc. v. Welles**⁶, here the respondent was a playmate and he used some words like "playboy", "playmate

⁴ Ibid.

⁵ 373 F. 3d ,117.

⁶ 7 F.Supp.2d 1098 (S.D. Cal. 1998)

of the year" and "playmate of the month. The honorable court held that this case does not amount to any kind of Infringement the use of these words are permitted on a particular ground. As because, such words describe the nature of the website and also the kind of services which have been provided.

Uniform Dispute Resolution Policy

There have been disputes for a long time regarding the domain names and came into form in relation to the jurisdictional issues in cyberspace. Cybersquatting has hit a record in 2016. Out of all the countries around the globe, America was the first country which has promulgated a law that dealt with trademark infringement over cyberspace. The complete legislation was called the Anti cybersquatting Infringement Act, 1999⁷. Going back to the year 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) introduced a novel policy which was known as Uniform Domain Name Dispute Resolution Policy (UDNDRP). The whole functioning was handled by the Department of Commerce of the USA where the policy is instrumental. This has forbidden the registration of the domain names based on the complete circumstances.

The domain name has resembled the other name to much extent where the thing is confusingly identical. The domain name which is registered by an entry has no inherent right to do something else. Also the usage and the registration of the domain name was done in bad faith with a bad mentality. All these disputes which fall under ICANN go to one- or three-member regulatory boards which choose a question alongside publishing a decision. It is an authoritative choice which is very much restricting the subject of the registrar to the ICANN control. Thus, it is superseded by the court activities. It follows a very quick and economical procedure which follows an email leading to close to home appearances. This requires negligible creation of records. The judges now decide whether the grievance was in bad faith or good faith based on the policy. This reverses the hijack domain name as well as troubles the domain name holder.

In India, all the disputes are controlled and overseen by the Indian Domain Name Dispute Resolution Policy. These disputes are related to domain names and normally fall under the INDRP registry. The resolution policy has their own arrangement of rules, policy and approaches where the grievance gets recorded against the domain name encroachment. The INDRP has a broad individual rundown which decides upon the complaints. This strategy is very straightforward and economical under the INDRP rules and policies which deals with the standards set out by WIPRO.

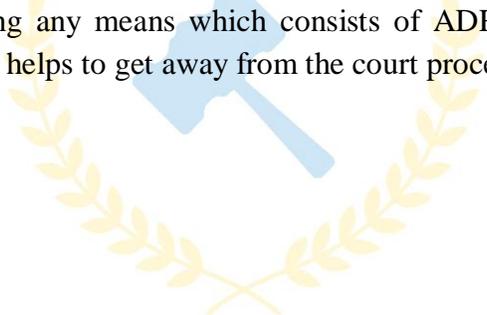
Conclusion

Different problems arise now and then with the expansion of the internet and cyber world. The problems of jurisdictional issues are also discussed. The domain names are a very important component when we talk about e-commerce and online business transactions. The domain names are decided and approved on the basis of first come and first serve basis. The registrars have a

⁷ Lisa M. Sharrock, "The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions from within the Journal, Vol. 51, No. 2 (Nov., 2001), p. 817-849UDRP Framework", Duke Law.

team with National Science Foundation like NSI where they have veto powers which assigns a domain name. In any case, if the domain name for registration is similar like the other one and organisations practice a similar thing, then this registration will encroach the rights of the other. Initially, there are different inquiries which have stumbled upon the courts regarding the domain names and have been equated with a trademark. The question arises whether it should be equated with a trademark? The other question which has arisen is that how can the jurisdictional issues be settled with identification of a brand name encroachment over the internet leading to domain name disputes? The case Playboy Enterprises and Welles, in short, the playboy case shows that the courts pronounce a judgment further giving an order saying whether the defendant has enrolled the trademark with the same domain name in some other country.

Lastly, the intriguing aspect regarding the domain name dispute and their settlement is that the dispute might be settled using any means which consists of ADR and its arrangements. This supports the organization and helps to get away from the court proceedings.



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