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Trademark Law 2007: Implications of Branding

Advertising on the Internet
and Resulting Trademark Issues

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Advertising on the Internet and Resulting Trademark Issues

There is no question that the development of the Internet has had a profound effect on marketing, and it has given rise to an enormous number of trademark issues. This paper will focus on two Internet trademark issues currently receiving significant attention: the use of trademarks as keywords in Internet search engines (leading to "sponsored" search results), and the issue of "domain name tasting."

I. Use of Trademarks as Search Engine Keywords

Most if not all of the significant Internet search engines (such as Google, Yahoo!, and MSN) feature advertising programs in which their clients may bid on search terms. These purchased terms are frequently known as keywords. When a search engine user enters a search that includes a keyword, it will trigger a group of "sponsored link" advertisements for each client that has purchased that keyword. Keywords may be generic or descriptive terms that do not raise trademark issues. However, when a keyword is a trademark (or alleged to be confusingly similar to a trademark), it raises issues that trademark owners, advertisers, search engines, and courts have all struggled to deal with.

A. Search Engines' Policies

Google is far and away the leading search engine and therefore the leader in keyword sales. In the United States, Google allows anyone to purchase trademarks as keywords, including competitors of the trademark owner. The current policy provides that Google will take action only upon receipt of a complaint from a trademark owner and only if the advertisement uses the complainant's mark in the actual content or title of the advertisement itself.[1] If the trademarked term appears in the text or title of the ad, Google will require the advertiser to remove it. But Google will not disable keywords (i.e., prevent someone from purchasing them) in response to a trademark owner's complaint.

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[1]Google's policy provides: "When we receive a complaint from a trademark owner, we only investigate the use of the trademark in ad text. If the advertiser is using the trademark in ad text, we will require the advertiser to remove the trademark and prevent them from using it in ad text in the future. **Please note that we will not disable keywords in response to a trademark complaint.** In addition, please note that any such investigation will only affect ads served on or by Google." *See* http://www.google.com/tm_complaint_adwords.html (emphasis in original).

Other search engines have more restrictive policies; for example, the Yahoo! Search Marketing (formerly Overture Services, Inc.) policy states:

> For bids on search terms ... Yahoo! Search Marketing requires advertisers to agree that their search terms, their listing titles and descriptions, and the content of their Web sites do not violate the trademark rights of others.

See http://searchmarketing.yahoo.com/legal/trademarks.php. If an advertiser bids on a trademarked term, Yahoo! Search Marketing will accept the bid only if:

> the advertiser presents content on its Web site that (a) refers to the trademark or its owner or related product in a permissible nominative manner without creating a likelihood of consumer confusion (for example, comparative advertising, sale of a product bearing the trademark, or commentary, criticism or other permissible information about the trademark owner or its product) or (b) uses the term in a generic or merely descriptive manner.

Id. Thus, Yahoo!'s policy attempts to follow traditional trademark law, including a provision for fair use and comparative advertising.

Whether the use of a trademark as a keyword is actionable as trademark infringement or a related claim depends on whether the use of the trademark to trigger advertisements and links (1) constitutes a sufficient use in commerce for liability under the Lanham Act or applicable state statutory or common law, and (2) is likely to cause confusion. Courts examining these issues have split on both points.

B. Search Engine Cases

The first cases objecting to purchasing trademarks as keywords were brought against search engines, most notably Google. This tactic was likely viewed as a more efficient alternative than objecting to individual parties purchasing the keywords.

GEICO v. Google I. The first significant decision on keyword purchasing was *Government Employees Insurance Co. v. Google, Inc.*, 330 F.Supp.2d 700 (E.D. Va. 2004). The court found that Google's AdWords program constituted a "use in commerce" and thus denied Google's motion to dismiss on the ground that it was not using GEICO "in commerce" by allowing advertisers to bid on trademarks and pay for links to be triggered by their use. In so ruling, the Court distinguished cases holding that the use of marks in broad categories to generate "pop-up" advertisements does not constitute sufficient use in commerce to trigger liability under the Lanham Act. *See, e.g., Wells Fargo & Co. v. WhenU.Com*, 69 U.S.P.Q. 2d 1171 (E.D. Mich. 2003), *and U-Haul Int'l, Inc. v. WhenU.Com*, 279 F. Supp. 2d 723 (E.D. Va. 2003) (both holding that using marks to generate pop-up advertisements is not "use" under the Lanham Act). The GEICO holding is also consistent with *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004), which found Netscape's use of

trademarks to trigger banner advertisements on the search results page sufficient to subject it to liability under the Lanham Act.[2] *Cf. 1-800 CONTACTS, Inc. vs. WhenU.Com, Inc. and VisionDirect, Inc.*, 414 F.3d 400 (2d Cir. 2005) (distinguishing selling keywords from WhenU's activities, noting the GEICO case's holding that Google's sale of trademarks as keywords is a use in commerce).

GEICO v. Google II. In a later ruling in the same case, the court held that sponsored links that did not mention the mark used as the keyword (GEICO) either in the title or the text of the sponsored ad were not likely to cause confusion. *Government Employees Insurance Co. v. Google, Inc.*, 414 F.3d 400 (2d Cir. 2005). Note, however, that the court did allow GEICO to proceed with its claim that Google's sale of the trademark GEICO to trigger keyword ads that featured GEICO in the title or text of the sponsored ad was likely to cause confusion. This case appears to be the basis for Google's current U.S. policy allowing the use of trademarks as keywords but prohibiting the trademark from appearing in the triggered advertisement.

800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F.Supp.2d 273 (D.N.J. July 17, 2006). The court denied the plaintiff's motion for summary judgment, finding that GoTo.com's conduct was a "use in commerce," but that the issue of likelihood of confusion was fact intensive and not suitable for a summary judgment ruling. On the issue of "use in commerce," the court relied heavily on *GEICO*, explaining that:

> GoTo makes trademark use of the JR marks in three ways. First, by accepting bids from those competitors of JR desiring to pay for prominence in search results, GoTo trades on the value of the marks. Second, by ranking its paid advertisers before any "natural" listings in a search results list, GoTo has injected itself into the marketplace, acting as a conduit to steer potential customers away from JR to JR's competitors. Finally, through the Search Term Suggestion Tool, GoTo identifies those of JR's marks which are effective search terms and markets them to JR's competitors.

473 F.Supp.2d at 285.

As to the likelihood of confusion element, the court found material issues in dispute and denied summary judgment for either party. The court also briefly discussed the defendant's fair use argument, noting that the defendant's use of the plaintiff's marks:

> ...is probably fair in terms of its search engine business; that is, where GoTo permits bids on JR marks for purposes of comparative advertising, resale of JR's products, or the provision of information about JR or its products. However, fairness would dissipate, and protection under a fair use defense would be lost, if GoTo

[2] The nature of use required for liability under state unfair competition statutory or common law may differ from that required under the Lanham Act.

> wrongfully participated in someone else's infringing use. Thus, the factual issue of whether GoTo's conduct supports a fair use defense is for the trier of fact.

Id.

Rescuecom Corp. v. Google, Inc., 456 F. Supp.2d 393 (N.D.N.Y. Sept. 28, 2006). The court granted Google's motion to dismiss for failure to state a claim, finding that Google's sale of trademark keywords was not a use in commerce. The court rejected each of plaintiff's arguments for finding a use in commerce, namely that: (1) Google was capitalizing on the goodwill of plaintiff's trademark by marketing it to plaintiff's competitors to generate advertising revenues; (2) plaintiff's competitors believed Google is authorized to sell its trademark; (3) Internet users viewing the competitors' sponsored links are confused as to whether the sponsored links belong to or emanate from plaintiff; and (4) Google's sale of the mark alters the search results and prevents Internet users from reaching the plaintiff's website. The court drew a distinction between "use in commerce" and "trademark use": "Although these facts may suffice to satisfy the 'in commerce' and likelihood of confusion requirements at the pleading stage, without an allegation of trademark use in the first instance, they cannot sustain a cause of action for trademark infringement." 456 F. Supp.2d at 401.

Rescuecom has appealed the case to the Second Circuit, arguing, *inter alia*, that a visual branding of goods or services is not required to find a trademark use, and that sale of a trademark as a keyword is a use in commerce, as found by the courts in the subsequently decided *Edina Realty*, *Buying for the Home*, and *JG Wentworth* cases, each of which is discussed below.

Google v. American Blind & Wallpaper Factory, Inc., Case No. C03-5340 JF EAI (N.D. Cal.). Google sought a declaration that its sale of trademark keywords did not violate American Blind's rights. American Blind counterclaimed that Google's sale was infringing. Google moved for summary judgment on December 26, 2006 on the familiar grounds that its sale of marks as keywords was not a trademark use. The motion is still pending.

One additional case has involved a search engine operator as defendant. In June 2006, JP Enterprises sued Yahoo! in connection with purchase of JP's trademarks on the Google search engine. *JP Enters., Inc. v. HDVE, LLC*, 1:06-cv-01046-REB-PAC (D. Colo.). Yahoo! was dismissed as a party in December, and the pleadings reveal very little about Yahoo!'s alleged role in the sale or purchasing of keywords on Google.

Notwithstanding the rulings that have refused to find trademark infringement based on a search engine's sale of trademarks as keywords, there remains some chance that another court will find that sale of trademarks as keywords is infringing activity, including under the theory of initial interest confusion.[3] The Ninth Circuit's ruling in

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[3] Initial interest confusion was rejected in *J.G. Wentworth SSC Ltd. v. Settlement Funding LLC*, 2007 U.S. Dist. LEXIS 288 (E.D. Pa. Jan. 4, 2007), *infra*.

Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 F.3d 1020 (9th Cir. 2004), that banner advertisements triggered off searches of PLAYBOY or PLAYMATE infringe Playboy's trademark rights indicates that there is not yet a settled perspective on when the use of trademarks as search terms creates a likelihood of confusion.

C. Competitor Cases

Following the initial decisions in the *Google* cases, several decisions have addressed a company's liability for purchasing a competitor's trademark as a keyword. As in the search engine cases, courts have split on whether purchase of a trademark keyword is a use in commerce. The three courts that have found purchase of a trademark keyword to be a use in commerce have reached varying results on the issue of likelihood of confusion. Thus, there it not yet a settled consensus on overall liability.

Edina Realty, Inc. v. The MLSOnline.com, 80 U.S.P.Q. 2d 1039 (D. Minn. March 20, 2006). On cross motions for summary judgment, the court found that, although not a conventional trademark use, defendant used plaintiff's mark commercially by purchasing the mark from various search engines. The court did not provide much analysis, but found that this was a use in commerce "[b]ased on the plain meaning of the Lanham Act." Having found a use in commerce, the court found that fact issues existed regarding the likelihood of confusion and denied the summary judgment motions.

Merck & Co., Inc. v. Mediplan Health Consulting, Inc., 425 F.Supp.2d 402, 415 (S.D.N.Y. May 24, 2006). The *Merck* court found that, in purchasing trademark keywords, defendant did not "'place' the [Plaintiff's] marks on goods, containers, displays, or associated documents," and that the marks were not used to indicate source or sponsorship. Thus, defendant's purchase of the trademark was an "internal use" and not a "trademark use."

Buying for the Home v. Humble Abode LLC, 459 F.Supp.2d 310 (D.N.J. Oct. 19, 2006). In *Buying for the Home*, the defendant moved for summary judgment only on the issue of "use in commerce." The court found the keyword use was, in fact, "in commerce" because (1) the keyword purchase was a commercial transaction that occurred "in commerce," and that it "trad[ed] on the value of plaintiff's mark"; and (2) the keyword triggered advertisements related to defendant's business, and provided potential consumers with direct access to defendant's website. The court stressed, however, that its finding regarding use in commerce had no bearing on whether that use of the mark was unlawful. Since the issue of likelihood of confusion was not before the court, it offered no guidance.

Nautilus Group, Inc. v. Icon Health and Fitness, 2006 U.S. Dist. LEXIS 92550 (W.D. Wash. Dec. 21, 2006). In a trademark infringement and dilution action, plaintiff objected, *inter alia*, to defendant's purchase of its mark as a keyword on a dilution theory. The court ruled that the use of the mark to trigger advertisements was

not a use in commerce because the keyword was only used in the context of comparative advertising.

J.G. Wentworth SSC Ltd. v. Settlement Funding LLC, 2007 U.S. Dist. LEXIS 288 (E.D. Pa. Jan. 4, 2007). In the most recent keyword decision, the *J.G. Wentworth* court found that the defendant's purchase of search terms using the plaintiff's mark was a trademark use in commerce: "[b]y establishing an opportunity to reach consumers via alleged purchase and/or use of a protected trademark, defendant has crossed the line from internal use to use in commerce under the Lanham Act." 2007 U.S. Dist. LEXIS 288 at *17. The court went on to say, however, that use of the mark to trigger a sponsored link was not likely to cause consumer confusion *as a matter of law*, and granted defendant's motion to dismiss. The court based its finding on the fact that the link to the defendant's website (i.e., the sponsored link) is only one of many choices "for a consumer to investigate" on a search-results page. The court found it significant that consumers are not actually taken to defendant's website as a result of the keyword.

A final issue to consider in a case involving competitors is an "unclean hands" defense based on the plaintiff's own use of trademarks as keywords. For example, in *1-800 CONTACTS, Inc. vs. WhenU.Com, Inc. and VisionDirect, Inc.*, 414 F.3d 400, 409 fn. 12 (2d Cir. 2005), the Second Circuit reversed the district court's grant of a preliminary injunction for 1-800 CONTACTS, noting that 1-800 CONTACTS itself purchased competitors' – even defendants' – trademarks as keywords through Gator and Yahoo!, competing pop-up and banner advertisement services to WhenU.

II. Domain Name Tasting

The past year or so has seen a new development in domain name issues. Millions of domain name registrations appear, only to disappear a few days later (and sometimes reappear with different registrants). The phenomenon is called domain name tasting, and this now-you-see-them-now-you-don't trend has generated a great deal of discussion among trademark owners trying to protect their marks online.

A. What Is Domain Name Tasting And How Does It Work?

The basic principle of domain name tasting involves registering and using a domain name for a limited time without actually having to pay for it. The practice is of course driven by profit, and domain name tasters take full advantage of the system to maximize their income. To do so, tasting combines (1) provisions that allow a refund of registration fees, with (2) established ways of profiting from domain names, to make (3) increased profits with far less investment and risk than would traditionally be required.

ICANN, the Internet Corporation for Assigned Names and Numbers, oversees and manages the Internet's domain name system. ICANN operates through a series of agreements with domain name registries, each responsible for one or more top-level

domain. The most notable registry for purposes of this paper is Verisign, the registry for the .com and .net generic top-level domains (gTLDs).

For new domain name registrations, ICANN's policies provide for a five-day period, known as the Add Grace period, during which the domain name may be deleted and the registration fee refunded to the registrar.[4] This provision was originally intended to allow for correction of mistakes, such as typographical errors in entering the domain name upon registration. Certain registrars, however, have increasingly leveraged this provision to allow registration, evaluation, and deletion of domain names on an enormous scale during the grace period. Interestingly, the ICANN-VeriSign agreement provides VeriSign with the "right to charge registrars a fee . . . for disproportionate deletes during the Add Grace Period,"[5] but VeriSign has never chosen to do so.

B. Profiting from Tasting (Including Domain Name Parking)

Most Internet users are likely familiar with "parking," or search pages that are often used in connection with otherwise dormant domain names. These pages typically feature numerous links relating to the subject of the domain name, often generated automatically. The registrant of the domain name signs up with an Internet advertising program and receives a referral fee for each link that users click on the parked site. Traditionally, such pages would have to draw a fair amount of traffic (and clicks) just to earn back the annual domain name registration fee, so the fee served to limit the amount of domain names involved.

By utilizing the grace period, however, tasters realized they could register a virtually unlimited number of domain names, post parking pages at all of them for a few days, and evaluate the profitability before deciding whether the domain name was worth keeping. This process has allowed tasters to evaluate millions of potential domain names without risk and keep only the names that have a demonstrated ability to turn a profit. Additionally, many tasters continually drop and then re-register even marginally producing names for repeated five-day periods without ever having to actually pay for them. Having just a few domain names involved in such a process would not generate enough profit to make the ordeal worthwhile; having several hundred thousand certainly does.

It should be noted that a large number of domain names that are tasted are variants of generic or descriptive words or phrases, and do not necessarily implicate trademark concerns. Nevertheless, tasters that deal with millions of domain names every month invariably pick up, intentionally or not, some domain names that create trademark problems.

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[4] The relevant Appendix to ICANN's registry agreement with Verisign is available at http://www.icann.org/tlds/agreements/verisign/registry-agmt-app7-22sep05.pdf (see paragraph 3.1, Grace Periods).

[5] *Id.* at paragraph 3.1.1.

C. History of Domain Tasting and Current Statistics

While some commentators note that the practice of domain name tasting has its origins dating back to 2001 or 2002,[6] the issue did not receive widespread attention until 2006, as the number of domain names involved in tasting programs exploded.

VeriSign issues a Registry Operator's Monthly Report with domain name statistics, in accordance with the ICANN/VeriSign Registry Agreements. As of March 2005, there were a total of 42.7 million .com and .net domain names registered, and 2.5 million names were deleted that month.[7] By March 2006, the total number of registrations had increased to 56.4 million, but the number of deletions during March 2006 had shot up to 33 million.[8]

The monthly reports show the distribution of deleted domain names among the various registrars. According to the report for September 2006,[9] there were 753 operational registrars in the .com and .net gTLDs. Eight of those registrars had more than one million "gross deletes," and these eight registrars alone accounted for over 30 million of the 36 million total deletions. NameKing.com, Inc. had 6.6 million deletions, while maintaining 1.6 million registrations. Belgiumdomains, LLC, Capitoldomains, LLC, and Domaindoorman, LLC each had nearly 6 million deletions in September 2006, while maintaining fewer than 500,000 registrations each.

Most of the significant "tasters" quietly register and delete millions of domain names without trying to draw attention to the practice. But at least one domain name retailer is attempting to market the practice of domain name tasting. Pool.com recently launched a service it calls "Catch & Release," offering users an opportunity to "try a domain on for $ize." Under this program, users may "evaluate" domains for "approximately 4 1/2 days" for a fee ranging from 10 to 20 cents per domain, depending on the volume evaluated.[10]

D. Effects of Domain Name Tasting on Trademark Owners

The most obvious impact of this practice on trademark owners is that it makes cybersquatting easier, less expensive, and more profitable. Without the availability of

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[6] *E.g., Frank Shilling, The Closing Window: A Historical Analysis of Domain Tasting*, available at http://www.circleid.com/posts/historical_analysis_domain_tasting.

[7] http://www.icann.org/tlds/monthly-reports/com-net/verisign-200503.pdf.

[8] http://www.icann.org/tlds/monthly-reports/com-net/verisign-200603.pdf

[9] The September 2006 report, available at http://www.icann.org/tlds/monthly-reports/com-net/verisign-200609.pdf, is the most recent report currently available. As noted in the report, the information must be "kept confidential by ICANN until three months after the end of the month to which the report relates."

[10] *See* www.pool.com/CNRLanding.aspx.

tasting, the registration fees, while modest (as low as $7/year at the "discount" registrars), help to limit the number of variations of marks that will be profitable. Only those domain names that will generate $7.01 or more per year in revenue are worth registering and maintaining, and determining which names are likely to do so requires analysis, guesswork, and usually a human element. By utilizing a domain name tasting program, however, registrants can register as many domain names as their computers can find available, test them for several days using software programs to track which domain names generate the most traffic and clicks, and keep only the names proven profitable.

A second significant impact is the added complexity and confusion that tasting adds to the policing process. Trademark owners often subscribe to watch reports that notify them when new domain names of concern are registered. Many a trademark lawyer has identified a list of "problem" domain names and begun to take action, only to find a week later that some of the domain names were then "available" or registered to a new registrant. This trend has led to the practice of deferring action on newly identified registrations long enough to get through the tasting period, then checking on them again, in effect doubling (or more) the work and cost involved in keeping up with registrations of concern.

A third, less direct effect that impacts both trademark owners and all persons attempting to secure a domain name is that the practice of tasting removes millions of domain names from the system that would otherwise be available. It is almost impossible to review a trademark search these days without finding multiple variants of the proposed mark registered in multiple gTLDs, often pointing to parking pages. This not only complicates the screening process, but may also interfere with marketing objectives.

E. Combatting Domain Name Tasting

Numerous commentators have noted the problems caused by domain name tasting and called on ICANN to end the practice. Domain name tasting was on the agenda and discussed at the ICANN meeting in Marrakech, Morocco in June 2006,[11] but no reforms have yet been implemented, at least with regard to the .com and .net gTLDs.

Bob Parsons, founder and CEO of domain name registrar Godaddy.com, has been one of the most vocal and perfervid critics, coining the term "domain kiting" based on his comparison of the practice to check-kiting schemes, and "appealing to ICANN to step up and take action to put an end to domain kiting."[12] Somewhat ironically, GoDaddy, with its low domain name registration fees and emphasis on volume, has long been a favorite of high-volume domain name registrants. Parsons

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[11] http://www.icann.org/meetings/marrakech/dn-workshop-27jun06.htm.

[12] http://www.bobparsons.com/MayKiting.html.

insists, however, that GoDaddy and its affiliates do not engage in domain kiting, and the statistics appear to support this claim.[13]

1. ICANN Policy Reforms

Nominet UK, the registry for the .uk country code TLD (ccTLD), was the first registry to take action to limit domain tasting. In a press release dated August 7, 2006, Nominet stated that "it is clear that some registrars are now abusing [the unlimited deletion policy] by domain tasting." It thus announced that as of the next day, it would put an unspecified limit on the number of registrations that can be deleted by registrars, noting that the "limit on deletions for practices such as domain tasting is zero."[14]

Public Interest Registry (PIR), the registry for the .org gTLD, proposed an amendment to ICANN allowing it to charge an "excess deletions fee" on certain .org domain names deleted in the five-day add-grace period. Under this proposal, registrars whose number of deleted registrations within the five-day period exceeds 90% of their total initial registrations would be charged a fee not to exceed five cents per name registration.[15] The International Trademark Association (INTA) submitted a comment denouncing domain name tasting, arguing that the five-cent fee "will have little or no deterrent impact," and urging ICANN to eliminate the registration grace period altogether.[16] Notwithstanding this objection, in the ICANN Board Meeting of November 22, 2006, the Board approved PIR's proposal.[17]

2. Litigation

Given the relatively recent popularity of domain name tasting, it is not surprising that there are no reported decisions yet addressing the issue.[18] There are some cases in the pipeline, though. One notable case that many had hoped would resolve some domain name tasting issues was a suit Neiman Marcus recently brought against domain name registrar Dotster, accusing Dotster of "tasting" hundreds of domain names

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[13] *See* VeriSign's September 2006 Registry Operator's Monthly Report, available at http://www.icann.org/tlds/monthly-reports/com-net/verisign-200609.pdf (showing GoDaddy with 11.7 million total registrations in .com and .net as of September 30, 2006, with 151,000 gross deletions in September).

[14] http://www.nominet.org.uk/digitalAssets/8783_DomainTasting.pdf.

[15] *See* http://www.icann.org/registries/rsep/icann-to-pir-06oct06.pdf.

[16] http://www.icann.org/correspondence/reidl-to-icann-16nov06.pdf. The fact that the five-cent fee is significantly lower than the fee that Pool.com is attempting to collect for commercializing the tasting practice (see Section III above) seems to support INTA's position that the fee is not sufficient.

[17] http://www.icann.org/minutes/resolutions-22nov06.htm.

[18] A January 2006 Westlaw search for "domain" within five words of "tasting" in the database of all federal cases returned no documents.

containing trademarks of others, including at least 26 similar to plaintiff's marks.[19] However, the case settled very recently,[20] so it appears that the wait for guidance from the courts on this issue will continue.

III. CONCLUSION

Both the sale of keywords and domain name tasting are large and profitable business, and both create significant issues for trademark owners and all Internet users. Both issues have received plenty of attention from trademark owners and significant companies in the Internet marketing field, which will likely continue to result in additional guidance from the courts in the coming months.

I would like to thank Allison McDade, trademark counsel at Dell Inc., for her valuable assistance with this paper.

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[19] *See Ryan M. Kaatz & Julie Erin Land, Lawsuit Naming High-Volume, Domain "Tasting" Registrar Blazes New Trail in Combating Online Trademark Infringement*, available at http://www.digitalbrands.info/Dotster_article6.pdf

[20] *See http://domainnamewire.com/2007/02/19/dotster-settles-with-neiman-marcus-over-typosquatting.*