

header is akin to an envelope (and as easy to open). With the current controversy surrounding copyright protection for content transmitted over the internet, headers may assume an increasingly important role. Whereas headers now identify the author, the intended recipients and the subject matter of each e-mail message, future headers may well include warnings regarding confidentiality and proprietary rights to ensure that each "envelope" is opened knowingly.

Software (including programs and all other digital data such as e-mail) and the law have been odd bedfellows from the start. We question shrinkwrap

licenses while accepting severely limited warranties on washing machines without signing or blinking, and we impose onerous obscenity rules on digital transmissions, all on the basis of distinctions as to the medium. As this article attempts to make clear, existing law provides an adequate framework to protect the confidentiality of attorney-client communication via unencrypted e-mail. Let's not impose higher confidentiality requirements for the internet than we impose on other confidential communications.

Trademarks on the Internet: Who's in Charge?

*By David W. Maher**

Introduction

The Wall Street Journal, on Oct 2, 1995, reporting on the acquisition of Network Solutions, Inc. by Science Applications International Corp., said that domain names "are potentially of immense value as the Internet becomes a fundamental part of the American-and world-economy."¹ The business world agrees with this assessment. The rush to acquire domain names that incorporate trademarks, product names or market segments is ample evidence that business users are concerned with the market value of domain names. Kraft General Foods, of Northfield, IL has registered over 150 domain names such as "velveeta.com" and "parkay.com." Proctor and Gamble, of Cincinnati, Ohio has registered not only its familiar trademarks but also names such as "underarm.com" and "diarrhea.com". Both companies pay at least lip service to the concept of opening web sites using these domain names, so that the global consumer market can readily find the very latest product information and recommended remedies.

However, many of the "stakeholders" in the Internet, and in particular, many of the government and

academic users, do not necessarily see eye to eye with the business community. Probably the only area of real agreement among all users is that the present system needs to be overhauled.

The current system for registering domain names is widely recognized to be inadequate for the needs of the Internet, even without considering the issues raised by conflicts over trademarks. A number of key figures in the Internet community have proposed new protocols for the assignment of domain names that would address such problems as the impending shortage of Internet addresses, and the need for a financially self-supporting system. Most of these proposals recognize that interests outside the original Internet community (such as trademark owners) have claimed a place in the system. It is now clear that the Internet can no longer be managed as an academic, government and military network system which merely tolerates commercial and private user interests.

Unfortunately, some of the proposals for new domain name registration procedures adopt a "head-in-the-sand" attitude and attempt to insulate the 'Net from the real world of commercial concerns. Some proposals straightforwardly deny that domain names have any trademark significance. Others call for creation of a regulatory authority with absolute powers that permit no right of appeal and no guarantees of elementary due process. Some such proposals are framed in a way that purport to avoid litigation by conditioning access on the user's waiver of all legal rights. Where will the wise dictators be found to run these systems? One theory seems to be that if all the lawyers are excluded, everything will run smoothly. Even taking into account the currently fashionable

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unpopularity of lawyers, this proposition is not likely to be accepted by the business community at large.

This paper will examine the present situation and will appraise some of the principal proposals for change, together with a look at the jurisdictional basis for regulation of the Internet, all from the perspective of trademark owners.

Present Situation

Operating under a contract with the U.S. National Science Foundation (NSF), Network Solutions, Inc. (NSI), a private corporation, now administers the registration of domain names that end in ".com", ".edu", ".org", ".gov" and ".net." (The ".mil" domain is excluded from NSI's jurisdiction.) NSI's contract with the NSF dates from 1993, just before the explosion of requests for the assignment of domain names. When the contract was first signed, NSI did not face any of the trademark issues that have come to plague it since mid-1994.²

As a result of litigation and threats of litigation,³ NSI in July, 1995, announced a new policy which gave trademark owners at least some relief.⁴ The policy, later amended in November, 1995,⁵ allowed the owner of a U.S. or foreign registered trademark to complain to NSI if its mark was registered as a domain name by someone else. If the original domain name owner has prior rights in the name or can also produce a U.S. or foreign trademark registration, NSI's policy allows the original domain name owner to continue to

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use the name if it posts bond and agrees to indemnify NSI against legal liability and expense. If the original domain name owner does not agree to this, or if the original domain name owner does not have prior rights or a registration, NSI suspends the domain name registration pending the outcome of whatever court or arbitration proceedings the two parties may bring against each other.

The NSI policy in practice satisfies almost no one. It does not even attempt to deal with the rights of

owners of state trademark registrations or owners of "common law" trademark owners, *i.e.* owners of trademarks that are not registered under the Lanham Act or foreign equivalents, and it does not deal with the issues raised by ownership of marks that are not famous, *e.g.* "ACME", which is the subject of dozens

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of federal trademark registrations for goods and services that can be sold under that name without likelihood of confusion of the consuming public. Furthermore, it takes no account of the fact that some assignments of domain names can lead to traditional trademark infringement issues. For example, someone who is not fond of Microsoft has registered "microsoft.com" which is used for a home page with scurrilous material about Microsoft and Bill Gates. "dole96.org" is being used for material attacking Dole's candidacy.

The tremendous increase in the number of domain name registrations and the ever-increasing number of trademark disputes arising from such registrations prompted NSI to seek an amendment to its contract with NSF. In August, 1995, NSI announced that NSF had amended the contract to allow NSI, for the first time, to impose a fee for the registration of domain names.⁶ The fee applies not only to new applicants, and also to all present users. Special arrangements are made for users of ".gov" and ".edu".

The rationale for this policy was in part that the original payment by NSF to NSI for its services was inadequate, and NSI simply could not continue to operate if it were to incur tremendous losses based on the demand for registrations. Another part of the rationale was that part of the increasing demand was from speculators (both individuals and corporations) who, having heard about domain names being held for ransom, wanted to get in on the action and grab

(Continued on page 10)

names that could be sold to trademark owners who had not already registered their marks as domain names. NSI's theory was that a fee (initially \$100 for two years and \$50 per year thereafter) would cut down on the number of such speculators. It is doubtful that the policy has had this result. After a brief dip in the number of domain registrations, it appears that the number of applications is continuing to increase at a geometric rate.

One of the most intriguing questions that has arisen from the disputes over NSI's role and its policies is the question of how NSI gets its power.

The new fee for registration policy has had another unintended effect. Many of the long-time users of the Internet, and especially those who are not large corporate entities with trademark portfolios, are outraged at having to pay for a domain name registration which has traditionally, and in accordance with the often anarchic principles underlying the Net, been available for free.

A further contentious issue affecting trademark owners is the question of how to find out who is using what domain name, and more importantly, what range of domain names similar to a given name are in use. There is a database utility offered by NSI known as "WHOIS" which allows a query of its records to find out company, contact and operational information on any given name. "WHOIS" by itself does not allow a

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trademark search of the type offered by such trademark search services as Corsearch or Thompson & Thompson. These services have recently gained the ability to search the entire database, but must still use "WHOIS" to see the full name registration record. Efforts to gain fuller access to the database to expand search capabilities have been rebuffed for various reasons. Other than the "WHOIS" search capability,

there is no complete directory of users of the Internet. (Search programs such as "Yahoo" and "Lycos" can also find users, but do not perform trademark search functions.)

One of the most intriguing questions that has arisen from the disputes over NSI's role and its policies is the question of how NSI gets its power. Is there an international treaty, or an act of Congress, or a body of regulations from a government agency? The answer is none of the above. From a legal and jurisdictional standpoint, the Internet "just grew". It began, at least in part, as an effort by the U.S. Department of Defense (DOD) and the universities and other academic institutions that receive research grants from the DOD to interconnect the powerful mainframes and local networks that had become essential for scientific research in the 1970's. The DOD also wanted a secure means of communication that would be relatively impregnable in the event of nuclear war; the

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DOD realized that the national telephone network, with its elaborate central switching architecture, might not be available after a nuclear attack. However, a totally decentralized and flexibly connected internet network could continue to function. The great Internet pioneers, including Vinton Cerf and Jon Postel, devised protocols which developed into the protocol known as TCP/IP to carry out this approach to inter-networking, and the Internet was born, arguably in 1970, although other dates have been suggested.

From the beginning, the genius of the Internet is that no one really runs it. So long as a network subscribes to the TCP/IP protocols, it can connect to and be part of the Internet. Since each network must have a unique address, it was apparent that there had to be some central authority to assign addresses and maintain records to insure that each address is unique. The addresses are in fact numerical, conforming to a protocol that, in general, consists of four separate groups of not more than three integers each separated by a period, e.g. 190.5.23.0.⁷

The domain name is a mnemonic device adopted to make the addresses easier to use than sets of numbers. In the early days of the Internet, when educational institutions and the government were the primary users, the names caused no problem. There is, after all, only one University of Chicago, and there are not likely to be trademark issues arising from its domain name: "uchicago.edu".

The founders of the Internet established working groups to administer the Net, including the address and naming system. An additional alphabet soup came into being:

- The Internet Society (ISOC)
- Internet Architecture Board (IAB)
- Internet Assigned Names Authority (IANA)
- Internet Engineering Task Force (IETF)
- Internet Network Information Center (InterNIC)
- Commercial Internet Exchange Association (CIX)
- Reseaux IP Europeens Network Coordination Center (RIPE-NCC)
- Asia-Pacific Network Information Center (APNIC)

All of the groups listed above are non-governmental. They are all private and voluntary organizations with relatively open membership. To this day, any computer engineer with reasonable credentials can become a member of IETF and join in its deliberations on the present and future structure of the Net. Anyone can pay \$35 per year and become a member of the Internet Society. Microsoft and IBM are also members; they pay more, and it will come as no surprise that they carry more weight in the Society than the private citizens who join at the \$35 rate.

Rather than spill more ink describing the interrelationships of these groups, it is sufficient for the purposes of this paper to inquire what authority any or all of them may have. The question is appropriate because NSI, operating under a contract with NSF, stands astride access (in the United States) to the assignment of domain names on the Internet. If you want to attach your network to the Internet, but you don't like NSI's policies, for whatever reason, you quickly learn that NSI is the only game in town. NSI has been sued more than once, but there is no judicial or other determination, as of March, 1996, that puts in question its authority to grant or deny the domain names that give access to the 'Net.

Everyone knows that the Internet is global. If NSI hands out the domain names primarily used in the United States, who does the job in England or China or Kazakhstan? In most industrial countries outside

the USA, there are voluntary and cooperative groups, mainly supported by the Internet Service Providers (ISP's) who collect fees for providing interconnection services to the networks operating in their respective countries. These cooperative groups assign domain names in their countries and coordinate their activities so that each domain name remains globally unique.

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By agreement going back to the early days of the Internet, each nation, including the United States is assigned a two letter top level domain ("TLD") identifier, e.g. "uk" for England and "jp" for Japan. The smaller nations have also been assigned these identifiers, and if there is no cooperative entity in, say, Mongolia, then the regional group for Asia, located in Japan, can assign the domain name for a Mongolian network.

Every nation other than the United States uses its two letter identifier as the TLD. In England and some other countries, there are also second level domains that roughly parallel the TLD's in use in the United States, e.g. ".co" in England corresponds to ".com" in the USA. Thus, in England, the Jones Company Limited might be assigned the domain name "jones.co.uk" and in Australia, Smith (Pty), Ltd. would get "smith.com.au". Because the Internet was born in the United States, the networks in the USA chauvinistically ignore the ".us" TLD and use ".com", ".edu", etc. as their TLD's. It is also possible for a user not located in the U.S. to obtain a domain name ending in ".com", etc.

It should be kept in mind that one result of this global structure is that it is perfectly possible for a U.S. company to have the domain name "jones.com", while there is also a separate and unrelated U.K. user with "jones.co.uk" and yet another user in Japan with "jones.jp" and so on in every country all around the world. (And, of course, each user is accessible any-

(Continued on page 12)

where in the world.) The trademark implications of this have of course rapidly attracted the attention of owners of globally famous trademarks such as "McDonald's", "Coke", "Kodak" and the like. In many cases, these companies are registering domain names in multiple countries, especially in countries where they operate. As previously noted, however, there is no mechanism available within the domain name registry system to stop unauthorized users from registering a famous trademark in a country where the name is still available.

From a trademark standpoint, there are two separate concerns:

1. A trademark owner may want to establish a web-site using its mark as a domain name. If there is already a domain name registration using that mark, the trademark owner is blocked from using its mark, except for the limited remedies provided by the NSI policy established in July, 1995 and revised in November, 1995.

2. A trademark owner may find that its mark is being used as a domain name by an unauthorized party. Even if the trademark owner has no interest in using its mark as a domain name, the trademark owner may be concerned about trademark infringement or dilution or both. At this time, there are no reported decisions establishing what might constitute actionable trademark infringement or dilution arising from use of a domain name, although conceptually there should be no reason why traditional trademark legal principles are not available to stop infringement by unauthorized users of a mark.⁸

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The trademark issue peculiar to the Internet is that described in item 1 above—namely, the ability of a trademark owner to use its mark as the basis of a domain name. This is especially important because the normal way to find a commercial entity on the

Internet (or World Wide Web) is to use its mark followed by ".com". However, if the Acme Company wants to establish a presence on the Internet and finds that someone has already registered "acme.com", its only remedies are those provided by the NSI policy. It is out of luck if the original registrant turns out to be another Acme that has a registered trademark for that name.

This trademark problem, with the litigation that has already entangled NSI in trademark issues it is not equipped to handle, and the uproar over NSI's imposition of fees for the registration of domain names, has led to a number of proposals for changes in the entire domain name system. These proposals have in turn prompted a closer examination of the whole question of who has the authority to make changes.

The Proposals

The following does not purport to be a complete survey of all the proposals for changes in the domain name registry system, but it will examine some of the key proposals.

In November, 1995 a group of leaders of the Internet Society (J. Postel, et al.) proposed giving ISOC "a formal role in the oversight and licensing of competitive registries for the international Internet name space ..."⁹ This proposal envisioned the creation of competing Internet Name Providers ("INP"), and in order to accommodate the business community, the creation of additional domains such as ".corp", ".bus" or ".ltd". ISOC, through the IAB and IANA, would license the INP's and set standards for their performance. The proposal also called for creation of an arbitration panel to resolve disputes, presumably including disputes between trademark owners. Domain name owners would be required to accept binding arbitration of any disputes.

Trademark owners would not be better served by this proposal than by the present system, and, in fact, might be in a worse situation. The modest increase in top level domains would not do much to insure access for trademark owners who want to use their marks as part of their domain names. The proposal includes no standards for arbitration of disputes based on trademark ownership. The proposal is replete with protective provisions for ISOC, IAB and IANA, including what amounts to a waiver of due process if questions arise regarding the fairness of proceedings under the arbitration provisions.

Another view of the current situation has been published by A. M. Rutkowski in connection with the

Internet Numbering Issues program sponsored by the Kennedy School of Public Administration of Harvard University at Washington, D.C. on November 20, 1995 (the Kennedy Conference"). Rutkowski's paper, "Internet Names, Numbers and Beyond: Issues in the Coordination, Privatization and Internationalization

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of the Internet" ¹⁰ does not offer any specific proposals for a new system of registering domain names but rather addresses the administrative issues. Rutkowski suggests that any long term program must take account of a variety of factors, including public international law, domestic law and intellectual property rights. He further points out that existing international bodies such as the ITU, WTO and WIPO/UNESCO have interests at stake, i.e., "general telecom regulatory, open competitive provisioning, and trademark issues, respectively." Rutkowski envisions new international bodies to administer Internet numbering and addressing which must have adequate legal authority "either by pre-existing treaty or statutory instrument, or by delegation from such entities".

Rutkowski's views are colored, as are those of Postel, et al., ¹¹ by a fear of litigation and "adjudication of disputes that will inevitably arise that are both procedural and substantive in nature. There is considerable evidence that these disputes may involve very complex trademark and anticompetitive issues."

To which the trademark owner may well say "Amen". Instead of facing up to this fear and proposing a rule of law, Rutkowski goes on to say that the problem of exposure to litigation has

"usually been dealt with by entrusting the responsibility to either a public international organization which enjoys significant immunities from such litigation, or by establishing the organization in a country where immunity is provided by either special legislative enactment or by the nature of the legal system. It is no coincidence, for example, that Switzerland is host to more international organizations than any other nation."

Another proposal for reform of the domain naming system was advanced by Paul Vixie, of the Internet Software Consortium. In a paper also prepared for the Kennedy Conference, "External Issues in DNS Scalability", November 11, 1995¹², Vixie proposed to abolish the present system and provide top level domain names that are "meaningless yet unique", that have no significance whatever except as addresses. He suggested a domain name comprised of three to five digits and letters in which the rule would be that no address could have meaning in any language. It would be a system analogous to license plate number allocation (without the vanity plates) or telephone number allocation (without the 800 numbers such as 1-800-CALLATT). Trademark owners would be able to use their marks freely because there would be no practical limit on the number of TLD's available. There could be 100 or more "acme.xxxxx.zz" domains. Questions of infringement might be determined under applicable principles of trademark law in the relevant trademark jurisdiction, which would not necessarily involve the domain number system, or a new dispute resolution system might be created to resolve disputes.

Vixie proposed to abolish the present system and provide top level domain names that are "meaningless yet unique", that have no significance whatever except as addresses.

In order to administer the new system, Vixie proposed that IANA award contracts to multiple, competing TLD registries, each of which would be allocated some address space and would have to meet technical standards. However, Vixie proposed giving IANA dictatorial powers with no right of appeal. This echoes Rutkowski's concern for avoiding litigation by finding an entity that is immune from litigation.

On January 31, 1996, Vixie withdrew his own proposal and gave his support to another proposal made by R. Bush, B. Carpenter and J. Postel which allows open competition in domain name registration, multiple registries and a permanent role for IANA.¹³ This proposal has been further refined in a "Random Draft" prepared by Jon Postel, and posted

(Continued on page 14)

to the listserv, "newdom@iia.org", on March 30, 1996. Even in its first draft form, it has been criticized for proposing only a limited number of new top-level domain registries.

Owners of trademarks cannot but wonder at the mistrust of legal systems, domestic and international, evidenced by both Rutkowski and Vixie. In the United States, for example, no one questions the soundness of giving deference to the rulings of the US Patent and Trademark Office as an expert administrative agency, but still making its rulings subject to review by judges of the Court of Appeals for the Federal Circuit. In order to maintain public confidence in any system of domain name registration, an adequate legal structure encompassing judicial review (whether by national or international judicial bodies) must be made available.

The flaw in the current proposals, the absence of due process, can readily be solved by a creative adaptation of existing principles of international law for dispute resolution.

The above criticism of the current proposals is not intended to oppose the adoption of whatever proposal best provides for a solution to the major trademark issue—namely the ability of a trademark owner to use its mark on the Internet, even if there are other identical or similar marks in use. The flaw in the current proposals, the absence of due process, can readily be solved by a creative adaptation of existing principles of international law for dispute resolution. Treaties or international agreements to interpret existing treaties may be needed to put such legal principles in force, but it seems clear that the entire question of jurisdiction and control over the Internet can only be solved, in any event, through international cooperation.

Jurisdiction

At the beginning of this paper, the question of jurisdiction over the Internet was raised. As is apparent from the foregoing discussion, there is no current basis for jurisdiction under any settled doctrine of law. This does not mean, however, that there are no claimants. At the Kennedy Conference, a representa-

tive of a body known as the Federal Networking Council ("FNC") made the extraordinary claim that the FNC owns the domain name number space, "but chooses to limit its control over the space to issues (e.g. paying for numbers) that it considers critical."¹⁴ The FNC is composed of representatives of 18 United States federal administrative agencies.

The arrogance of the FNC's position is emphasized by further explanation that the U.S. Department of Defense ultimately controls all Internet addresses, with the implication that all users, including those in countries outside the United States, have access to the Internet by sufferance of the Department of Defense. It is simply inconceivable that any court, and especially a court in the United States, would support this proposition.

The claim of FNC at the Kennedy Conference was met, not surprisingly, with a complaint of United States imperialism by the administrator of RIPE-NIC.

The FNC position is also obliquely referred to in Rutkowski's paper, where he refers to "some vestigial and unnecessary government involvement in place", and in Vixie's paper, where he states: "it is inappropriate for any regional government to take any kind of leadership role in designing, maintaining or funding the universal DNS namespace."

The possibility that existing international agencies, or domestic agencies in their respective countries, will assert jurisdiction over the Internet is not a cheerful prospect.

Rutkowski makes some very interesting points about possible grounds for assertion of jurisdiction at international, national and even local levels. In addition to the interests of ITU, WTO, WIPO and UNESCO mentioned above, Rutkowski points out that the U.S. Federal Communications Commission (FCC) has a plausible statutory basis for asserting jurisdiction over the Internet in the United States (The Communications Act can in fact be read very broadly—see 47 U.S.C 151 and 152), but the FCC has wisely restricted its reach. Within the United States, even state Public Utility Commissions could also make some claim of jurisdiction over Internet facilities and communications within their boundaries.

The possibility that existing international agencies, or domestic agencies in their respective countries, will assert jurisdiction over the Internet is not a cheerful prospect. The Internet has achieved success beyond the wildest dreams of its creators; bureaucratic procedures have been conspicuously absent. There is undoubtedly a causal relationship linking these facts. However, the current procedures for registration of domain names need reform, and whatever proposal is adopted, it will require at least some international and domestic governmental support. As pointed out above, some form of treaty or other international agreement will probably be necessary to fill the current jurisdictional vacuum.

Conclusion

Trademark owners have an enormous stake in the Internet. Their interests have now been recognized, albeit recognized by some only as an irritant in an otherwise well-engineered system that ran smoothly so long as it was non-commercial. Everyone recognizes that that day has passed.

Trademark owners have interests that can readily be accommodated by the structure of the Internet, especially if the best of the current proposals for changes in the Domain Name System are adopted. These interests may be briefly summarized:

1. The ability of any trademark owner, whether the owner of a common law mark or a mark registered under any national or international system, to use its mark as part of a domain name with no special advantage based on first come-first served administration.

2. Access to the data base of domain names to determine both availability and possible infringing uses,

3. A rule of law incorporating due process insuring that erroneous, illegal, arbitrary, biased or corrupt actions of the responsible administrative agency or agencies can be reviewed by a competent judicial tribunal at the national or international level, and

4. A system for protection of trademarks against infringement.

Only the last of these might arguably be omitted from any restructuring of the domain name system. On the other hand, there are good reasons for creation of a new international jurisdiction, based on treaty, to resolve trademark disputes. Such a jurisdiction, taking its legal principles from domestic law of most nations, and the growing body of international law

derived from existing trademark treaties, could be most welcome. It might be the best vehicle for the further development of the concepts of dilution and unfair competition to handle new forms of infringement on the Internet.

Whatever the direction of developments in the administration of the Internet, and the assignment and registration of domain names, it is clear that trademark owners are now stakeholders in the Internet. As such they should rightfully claim their place at any and all assemblies where decisions are made affecting the domain name system.

¹ WALL STREET JOURNAL, Monday, October 2, 1995, p. B1.

² See, for example, WIRED, October, 1994, p. 50.

³ *KnowledgeNet, Inc. v. D.L. Boone & Company, et al.* 94 C 7195 (N.D. IL 1995) (Consent decree entered May 9, 1995). There are four other cases involving trademark rights on the Internet which are of some interest even though they only peripherally involve the domain name issue. These are:

A. *MTV Networks v. Curry*, 867 F. Supp. 202 (S.D. N.Y. 1994);

B. *Playboy v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993);

C. *Sega v. Maphia*, 30 USPQ2d 1921 (N.D. Cal. 1994);

D. *Princeton Review Management Corp. v. Stanley H. Kaplan Education Center, Ltd.*, 94 CV 1604 (S.D. N.Y. 1994).

Of these four cases, two, *Playboy* and *Sega*, involve the unauthorized use of trademarks by bulletin board operators. These two decisions are primarily of interest for their treatment of copyright issues, but it is worth noting that each defendant was also found to have infringed the plaintiff's trademark rights. The *MTV* decision involves collateral issues of employer-employee rights and does not squarely address trademark issues; however, *MTV* ultimately prevailed in its attempt to recover its right to use "mtv.com". *Princeton-Kaplan* wound up as an arbitration between two competitors, one of whom, arguably as a practical joke, registered the name of its competitor as a domain name; it was required to give it up.

Two more recent cases, still unreported in official legal reporting systems, involved "avon.com" and "candyland.com". Using the new Federal Trademark Dilution Act of 1995 Statute, the owners of the trademarks "Avon" and "Candyland" respectively were able to force the holders of the domain registrations to stop using them. In a third recent and unreported case, the owner of the trademark "Juris" was able to obtain a temporary restraining order against the use of the domain name "juris.com" on the grounds of likelihood of confusion.

⁴ *NSI DOMAIN DISPUTE RESOLUTION POLICY STATEMENT*, URL ftp://rs.internic.net/policy/internic/internic-domain-1.txt (07/95).

⁵ *NSI DOMAIN NAME DISPUTE POLICY STATEMENT*, URL ftp://rs.internic.net/policy/internic/internic-domain-4.txt (11/95).

(Continued on page 16)

⁶EE FOR REGISTRATION OF DOMAIN NAMES, URL <ftp://rs.internic.net/policy/internic/internic-domain-3.txt> (9/95).

⁷This paper will not attempt to deal with the address space problem. It should be noted that it is at least as serious and thorny as the domain name problem. The present number of available addresses is recognized to be inadequate for the projected growth of the Internet. Various technical solutions have been proposed, including those known as CIDR, RFC 1597, and a new version of the TCP/IP protocol, IPv.6. In the meantime, it has been suggested that the available supply of addresses be auctioned off to the highest bidder or bidders with the proceeds to go to ISOC. Some non-U.S. address holders believe this is a thinly veiled attempt to allow U.S. service providers to buy up more address space. Since these non-U.S. parties already believe that U.S. entities have an inordinate share of addresses, the auction proposal has added fuel to the sentiment that U.S. imperialism is at work.

⁸This may be easier said than done; there are significant opportunities for new law to be created by legislation or judicial decision to establish what constitutes infringement or dilution in "cyberspace". The task may be somewhat easier with the passage of the "Federal Trademark Dilution Act of 1995". In the colloquy on the Senate floor just prior to its passage, Senator Leahy said:

"Although no one else has yet considered this application, it is my hope that this antidilution statute can

help stem the use of deceptive Internet addresses taken by those who are choosing marks that are associated with the products and reputations of others." Cong. Record—Senate, Friday Dec. 29, 1995.

The new Act was in fact used in two of the unreported cases mentioned above in footnote 2.

⁹J. Postel, et al., *Internet Draft Proposal for ISOC Role in DNS Management*, Internet-Draft. URL:<ftp://ds.internic.net/internet-drafts/draft-isoc-dns-role-00.txt>.

¹⁰A. Rutkowski, "Internet Names, Numbers, and Beyond: Issues in the Coordination, Privatization, and Internationalization of the Internet: Generic Requirements of a Transition", *Internet Numbering Issues*, Kennedy School at Annenberg Program Offices, Washington D.C., USA, 20 Nov. 1995.

¹¹J. Postel, et al., *Internet Draft Proposal for ISOC Role in DNS Management*, Internet-Draft. URL:<ftp://ds.internic.net/internet-drafts/draft-isoc-dns-role-00.txt>.

¹²P. Vixie, "External Issues in DNS Scalability", *Internet Numbering Issues*, Kennedy School at Annenberg Program Offices, Washington, D.C., USA, 20 Nov. 1995.

¹³R. Bush, et al., *Delegation of International Top Level Domains (iTLDs)*, Internet-Draft. URL:<ftp://ds.internic.net/internet-drafts/draft-ymbk-itld-admin-00.txt>.

¹⁴M. St. Johns, "FNC's Role in the DNS Issue", *Internet Numbering Issues*, Kennedy School at Annenberg Program Offices, Washington, D.C., USA, 20 Nov. 1995.

Current Developments

Automatic Dialing Device Prohibition Upheld

As new means of technology develop, businesses are constantly trying to utilize these means to their utmost. This was the case with automatic dialing and announcing devices ["ADADs"], which allow businesses who are making home solicitation calls to streamline their procedures by having each potential customer contacted automatically and additionally having the solicitation itself delivered automatically. The result from the businesses standpoint is the elimination of personnel costs in home solicitations. The result from the customer standpoint can be disastrous, however, when ADADs are combined with automatic answering machines: the customer whether consumer or business may find its answering device flooded by unwanted and extensive prerecorded telephone calls.

California responded to this conflict by passing a statute prohibiting the use of automatic dialing and announcing devices unless a live operator first iden-

tified the calling party and obtained the consent of the called party to the prerecorded message. Not long thereafter, a challenge was filed to the statute, alleging that it violated the First Amendment.

The Ninth Circuit Court of Appeals disagreed. *Bland v. Fessler*, No. 95-55522 (9th Cir., April 1, 1996). In so doing, it followed two other appellate decisions upholding similar ADAD statutes as permissible restrictions on speech in terms of time, place and manner. *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995); *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995). Noting that the California has a significant interest in protecting telephone users at home and at work from the annoyance and disruption of ADAD calls, the court observed that the statute was narrowly tailored to achieve its goals. The court further noted that businesses wishing to disseminate information about their services and products still had ample opportunity to do so through other means at their disposal.

The result is that users of new technology should be aware that some uses may be perceived as so abusive as to invoke the regulatory powers of the government. Moderation and discretion may be the key.