

A STUDY OF DOMAIN NAME & RISK MANAGEMENT OF ONLINE BUSINESS IN CONTEXT OF TRADEMARK ISSUES IN CYBERSPACE

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INTRODUCTION

The aspect of modern business and culture has evolved very rapidly due to the increasing importance and use of the internet in the commercial world (R. Ryder 2007). As the Internet grew, every business is marking its online presence. Notwithstanding the digital divide, India is one of the largest internet-user markets in the world and India e-commerce will reach US\$ 99 billion by 2024, growing at a 27% CAGR over 2019-24 (IBEF, 2021). India is now the fourth largest start-up hub in the world, with more than 3000 new companies (NASSCOM, 2015). Since the announcement of the Digital India campaign by the government of India, several start-ups have emerged recently to signal the potential in the South Asian country. The Covid-19 has also accelerated the adoption of online technologies in India. At present, the development of internet business is expanding around the world. Here an issue of danger emerges to ride the development. The risk is of digital wrongdoing. The emergence of e-commerce has exposed persons and businesses on networks and communication devices to greater risks of economic offences in cyberspace (D. Slater, U. Gasser, M Smith, D. Bambauer & J. Palfrey, 2005). IPR related issues in online business include, Privacy, piracy, Cybercrime, Online Banking frauds, Domain Name Disputes, Copyright infringements, Spamming and so on. Businesses rely on their trademarks and goodwill built through their good service to the consumers to continue to make economic gains.

In short in recent business, it serves the functions like identifying the goods of one seller from others and tell between the goods, identifies the goodwill, signifies the quality, advertises the goods and services, announces the obscurity and finally, it

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creates an image about the business in which it is used (W. Reid Paul & J Gallo Winery, 2001). Any dispute relating to a trademark may tarnish the whole image and goodwill of the business and thus, such risk should be systematically identified and mitigated (Bond, N. M. 1998).

ONLINE BUSINESS, DOMAIN NAME & TRADEMARK

The growth of the internet in business transactions throughout has raised challenges to the business as well. With the rapid use of the internet in business the intellectual property protection has become a challenge (Vakul Sharma, 2007). The owners of intellectual property over the internet are thus provided with an unlimited market for their works thanks to the global reach of the internet. Trademarks presence online helps to build great brands. The Management Strategy of business expansion online needs careful use of trademark, its registration and business policy for its protection. If there is high brand loyalty, the companies can retain customers for a long and reduce investment in marketing (R. Spinello, 2006).

The trademark for a business serves three main purposes (S. Reed, 2011);

- Protection of customers from confusion;
- Goodwill protection of property, &;
- Promotion of fair competition

Trademarks act as an identity for a particular business' products or services. Trademarks being visual make it easy for the consumers to quickly identify the products of a particular business. They are usually distinct, either in their name or representation and grab the attention of the consumers easily (S Agarwal, 2007).

A trademark may be infringed if another tries to pass off his good or services as that of an established business that has a well-known trademark. A domain name is a method devised for internet communication. They provide a system of easy to remember Internet addresses. Addresses for webpages on the internet at assigned numerical identities called Internet Protocol (IP) (A K.Mehrotra, and M Halpern, 2000). As the number of web pages increased on the internet there was more Internet protocol and users couldn't remember all internet protocols.

An alternative method was devised to assign names to each of the internet protocols. These names came to be known as Domain names. Invariably the domain name and trademark are irrevocably interconnected in online business (Rees, J. 2016). Websites are a gateway for businesses, and domain names play a part in how customers reach these websites (J. Jennings, 2015).

Assigning domain names to internet protocols is known as Domain Name System (DNS). Domain names represent the Internet protocol, which is the distinct address for the webpage on the internet. Some domain names have a country code along with the generic domain name to indicate the country of origin of the web page.

The system of Domain names was started by National Science Foundation (NSF) USA around 1990. In 1992, the NSF with a cooperative agreement with Network Solutions, Inc. (NSI) started managing the registration, coordination, and maintenance functions of the Internet domain name system for some of these services, including the domain name registration services till 1998. Due to rising questions on the fairness of NSI functioning, a not-for-profit Internet Corporation for Assigned Names and Numbers (ICANN) was formed in the USA under the auspices of the Department of Commerce (Osborn, 2001). In late 1998, the Department of Commerce reached an agreement with ICANN to assume from NSI the role of overseeing domain names registration. The agreement empowers ICANN to accredit and authorize other companies to register domain names (A J Mcshane, OS Shifrin, 2000).

The Internet gives a great opportunity to corporations to efficiently build their brands virtually and enhance their global presence. However, with this opportunity, there are threats as well as anti-branding activities that are easier in cyberspace.

LEGAL & ETHICAL ISSUES IN OF TRADEMARK CYBERSPACE

The application of the Internet and virtual positioning in cyberspace of the corporation have a relative effect on the marketing mix of the firm. Trademark protection can be expected to facilitate consumer recognition, embody business goodwill, and prompt product quality online as well as off (Burk, 1997). The web is such an attractive medium that creates an environment that presents a dilemma in the mind of managers as well as policymakers as to how to protect the trademark. The owner of the trademark applies the law to manage and protect from any type of violation like counterfeiting or misappropriation, delusion, infringement etc. (S. Kopp & T. Suter 2000).

Critical trademark violation issues may include illegal activities like cybersquatting, trademark keying, Meta-tagging, framing, linking etc.

Cyber-Squatting

If somebody is using a domain name with badfaith or registering it to make an illegal profit from the goodwill of others trademarks, then it can be referred to as Cybersquatting (S Ahmed, 2010). This may cause loss to the owner of the registered

trademark because he is unable to register it as a domain name and carry out his business activities on such a web page (Jonh D Mercer, 2000). A cyber-squatter is anyone who registers infringing domain names in bad faith. Cybersquatters may create ongoing battles for businesses. The speculators buy the domains intentionally to get arbitrage for trade with the owner of the business. In response to this problem, the US government passed the Anti-cyber-squatting Act, 1999 which defined cyber-squatting to target only the true cyber-squatters (A Wang, 2017).

“The courts there while giving shape to the interpretation to the definition of cyber-squatting stated that it may comprise the following acts (J. Gilfoil, 2005):

- 1. There should be the intent to divert customers from the trademark owner’s online location to another site under the infringing domain name, either for commercial gain or with the intent to tarnish or disparage the mark.*
- 2. It shall be seen whether the person has offered to sell the domain name for financial gain without having first used that domain name in the bona fide offering of goods or services*
- 3. It shall be seen whether the person has registered or acquired multiple domain names that the person knows are identical or confusingly similar to the marks of others and*
- 4. The extent to which the mark incorporated in the person's domain name registration is distinctive and famous”*

Passing off

The basic notion of passing off emanates from the unfair use of the goodwill, earned by one manufacturer, by another person for the promotion of his goods. Therefore, when a person creates a domain name and uses an established brand name of some other company and sells products of its own, then it is passing off its goods as that of other more established brands and hence the concept of passing off comes into the picture.

Typo Squatting

In this case, there is no pre-registration of a similar domain name or selling that in profit or dealing/negotiation with the owner for higher gains. In typo squatting the wrongdoer, registers as domain names the typographical errors that users are likeliest to make when entering the address of popular Web sites (A J Mcshane, OS Shifrin, 2000). For example, a typo-pirate might register "goooogle.com" or "radiif.com" hoping to attract persons searching for rediff.com or the Google Web sites.

Meta tagging & linking

In the case of mitigating or linking hyperlinks or Meta tags of a registered trademark is used on a particular website to serve as a link or it is used in the search engine optimisation function as a keyword to get more traffic. And there is no connection between the said website and the original trademark. Nevertheless, these issues are not very important as they may get protection under the fair use category of defence under copyright law. However, the seriousness depends on the nature of the injury, effect on reputation and goodwill to the owner. The act of linking is mostly protected as fair use under copyright law. Trademark law, however, may place limits on linking, it creates confusion in the mind of the customer and affect business revenue or results in goodwill misuse.

Framing

In the case of Framing, the wrongdoer uses certain commands in its HTML code to make a link to another site and display it in his website as a window or frame (M A. Rourke. 1998). In this, the website is created by taking data from another website. This results in copyright violation. It can also be considered as the hijacking of your website by others. This practice affects the rights of Web site owners for its exclusive use as it is his Intellectual Property and unfairly drive traffic to framed site due to illegal use of owner's data.

Trademark Keying

Trademark keying involves the sale of search results and advertising linked to searches based on product names and trademarks. Trademark owners claim that their significant investments to build goodwill and brand awareness among consumers are at risk when competitors are allowed to use their trademarks to trigger competitive advertising online. A business that purchases a competitor's trademark from a pay-for-priority search engine is blatantly attempting to capitalize on the established goodwill in

that mark and divert would-be customers to his site. Misappropriation of another's goodwill for commercial advantage is precisely what courts have sought for years to prevent under trademark laws.

Deep Linking

Linking is a practice where the link of another website is used on its website without permission. Sometimes the link provides access to the offsite page and not the home page of the owner's site, then it is typically called a deep link. Owners of the website have no problem generally if someone gives a link to his website, as it helps them reaching to large customer base and get free advertising. However, when a deep link bypasses the home page, advertisements placed on that home page get less exposure. This has led people to argue that while most linking should be lawful, deep linking should not. In many cases, deep linking results in loss of traffic as the visitor gets access to the subpage which he wants and do not visit the main page. When trademarks are used in linking to a particular website, this could lead a consumer to believe that the offending website is related to the owner of the trademark in some way. For example, when an adult website used the registered Playboy Bunny mark to link to the Playboy website, Playboy sued and won a verdict in its favour.

LEGAL RISK MANAGEMENT IN ONLINE BUSINESS: TRADEMARK CONTEXT

The Internet provides new trademark and branding opportunities for conducting business globally and making it accessible to consumers worldwide at affordable prices. However, the threats they pose are enormous and the general threats concerning websites are:

1. Cross-Site Scripting (XSS)
2. Injection Flaws
3. Malicious File Execution
4. Insecure Direct Object Reference
5. Cross-Site Request Forgery (CSRF)
6. Information Leakage and Improper Error Handling
7. Broken Authentication and Session Management
8. Insecure Cryptographic Storage
9. Insecure Communications
10. Failure to Restrict URL Access

At the policy level, the legal tool currently used to battle domain name disputes at the

global level are Uniform Domain name Dispute Resolution Policy (UDRP) and state legislation on Trade Marks. For a successful business, policy and legal solutions are not enough. Firms always strategize to avoid litigations and disputes with help of technology, management strategies and best practices of good governance (S. Sunderland, 2010).

To counter these threats to websites some precautions could be taken. It would be advisable if a website containing valuable content and information begins with an opening agreement. It should inform the visitors about the nature of contents on the websites and should legally cut off the hands of the visitors. It would be prudent to place an undertaking on the homepage of the website. This undertaking from the online customer would be to effect that he is entering the website out of his own choice and that he agrees not to hold the website, its owners and administrators liable in any manner whatsoever, in any event, or for any cause whatsoever. This is a legal precaution and unless the online customer clicks on the button "I Accept", he should not be allowed to come into the site. Utilizing this, the online customer is stopped from pulling the website.

Through this, the online customer is stopped from pulling the website, its owners and administrators into unwanted litigation. Websites must also contain terms and conditions of use, which should detail legal and liability issues. The terms and conditions should clarify the fact that the use of the website is at the risk and liability of the visitor and that in case of any computer contaminant being released, the website or owners thereof will not be responsible.

In case the website has a search facility or search engine, a specific declaration needs to be given on the homepage. Express disclaiming statements need to be given on the homepage. Express disclaiming statements need to be given stating that the search engine is only spidering the web means of available technology and is not responsible either for search results or the contents of the websites mentioned in search results. This is essential to escape potential liability in case of unwanted litigation. In an e-commerce site, specific jurisdiction has to be explicitly spelt out to avoid being dragged into unwanted litigation.

Adding a disclaimer to your website is essential. It won't cover you for every eventuality but helps to protect the corporate and restrict liability. Disclaimer is nothing but a way of stating the terms under which people would access and use the information, explaining the obligations of the person who makes it and that of others. Disclaimers are sometimes called 'Terms of Use' and may incorporate a privacy policy. A disclaimer thus protects against litigation. It is the sign of providing proof

that you have purchased some products under international standards. The main purpose of a disclaimer is to show that you have limited liability rights and are responsible for the reader actions. It also includes some specifications related to the purchased product.

Organizations are threatened with sophisticated cyber-attacks which are ever on the increase unless suitably protected and managed to keep them under control, organizations will be exposed to risks like data loss, failure to keep confidentiality of vital information and will not be able to achieve business targets. In today's environment organizations are also required to comply with various regulations concerning information security. Unless compliance and regulatory requirements are embedded in their process, they may have to undergo litigations.

Further liability for the content and action arises in the case of copying of content. This is where the issue of infringement of copyright comes in. Any and every web containing original contents and design has inherent copyright and the same copyright exists on the internet. Infringement of copyright gives rise to an actionable civil wrong. There is no need to register a copyright. If your website gives links to other websites and they open within the frame of your website, appropriate copyright disclaimers should be given stating that the web pages the visitor intends to view are not your property and the copyright for the same vests in the respective owners.

If one's website is using famous trademarks/brands, it would be prudent to give specific copyright acknowledgement that the copyright in respective trademark/brands belongs to the respective owners. In case of infringement of copyright, one can exercise the option for suits of permanent injunction restraining infringement and criminal complaints. It is pertinent to note that the copyright act, 1957, is not fully equipped to deal with newly emerging and complicated issues relating to Digital copyright. The trademark should be registered with the relevant Registrar of trademarks.

In case the domain name is the trademark, registration of the domain name as a trademark should be done with the concerned registrar for trademarks. In case of infringement of trademarks, one can exercise the option for filing suit for permanent injunction restraining the passing of goods and services and dilution of a trademark under the Trade Marks Act, 1999. The remedy of filing a criminal complaint is also available.

Immense concerns are already prevailing concerning the protection of personal data and information, in essence, the right to one's privacy. The right to privacy refers to the specific right of an individual to control the collection, use and disclosure of personal

information. It, therefore, becomes very important to be careful about privacy on the net. As an employer, it is generally felt that one should snoop over the mails sent by the employees even of official accounts however the reporting of misuse of the official account is a good enough ground to monitor emails of the relevant employees.

Websites should have a specific linking policy in case it provides links. The policy should specifically state the crux of understanding or agreement with linking websites. It should specifically state that links are purely given as a goodwill reciprocal gesture and at no point is the website responsible for the contents of the links. It should further be stated that the website does not seek to misappropriate the intellectual property rights of linked websites. The linking policy should disclaim any liability for damage caused to the online customer by the links.

Deep linking refers to the practice of linking to a web page(s) deep into another site and passing off the content of the said web page(s) as one's own. As far as possible, deep linking should be avoided as various Courts of various countries have declared the same illegal. Companies must endeavour to have a cyber law audit to find out their compliance status of various cyber legal provisions.

CONCLUSION

With the development of science and technology, cyberspace is not only limited to gather information and communication. Internet today has become a hub for commercial activities. And to identify someone over this cyberspace there is a need for a unique domain name. No two domain names can be identical because it is the address for cyberspace. Thus, a domain name possesses high value to carry out commercial activities. And this usage of domain name makes it vulnerable, with a little twist any third party which does not have any legitimate interest can reap the benefits arising out of someone's hard work. Corporate organizations are, no doubt, facing various challenges but a well-equipped organization with the awareness of cyberlaw issues and the way to handle them would go a long way in fighting against any kind of odds. Thus legal risk management of trademark disputes should be strategized by the start-ups and online business organisations to avoid losses and litigations in future. Without legal and policy changes with the emergence of critical IP issues in cyberspace, the management practice will not get results. Thus, It is also required that the Trade Mark Act, 1999 can, and should, be extended to provide a remedy in this arena for owners who have invested countless hours and resources into the development of their marks.

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