LIKE TRADEMARKS and copyrights, domain names have become a part of the intellectual property rights portfolio of many businesses. Commercial and noncommercial uses of domain names may violate statutory or common law, and legal action can wrest control of a domain name from someone who uses it for improper or illegal purposes. At the same time, it may be perfectly legal for an individual or company to acquire rights to a domain name even if the name is a well-recognized trademark that belongs to someone else.

Acquiring a domain name is typically simple and inexpensive. Through services such as GoDaddy, anyone can register a domain name for as little as $2.99 per year. If the desired name is already registered to someone else but is not being used, the owner may be willing to sell it. Pricing for active domain names varies widely, from a few dollars to multiple millions.

While acquisition of a domain name is easy, there are several ways that the use of a domain name can result in liability even if the name is acquired properly. Successful claims for cybersquatting, trademark infringement, false advertising under the Lanham Act, and conversion have been brought against individuals and companies that lawfully acquired domain names. On the other hand, if a domain’s owner makes no effort to monetize it (for example by selling products or services through the domain or trying to sell the domain to the trademark holder) courts have found that domain name owners have no legal liability even when the domain name includes a trademark or a personal name.

The Coca-Cola trademark can be used as an example. The mark is unquestionably one of the most recognized and valuable marks in the world. Nevertheless, if a person or company other than Coca-Cola had registered and used the domain name cocacola.com before the real Coca-Cola Company acquired it, that would not have been inherently improper or illegal.

How a domain name is used determines its propriety and the owner’s potential liability. If the owner of cocacola.com offered to sell the domain name to the Coca-Cola Company, the owner could run afoul of the Anticybersquatting Consumer Protection Act (ACPA). By the same token, if the domain owner offered Pepsi advertising space on the site or tried to sell the domain name to Pepsi for Pepsi’s advertising purposes, that use would likely constitute trademark infringement or a Lanham Act violation.

On the other hand, if the domain owner used the domain name cocacola.com in good faith on
a Web site for noncommercial purposes only—perhaps to describe the history of the creation of Coca-Cola or to provide facts regarding the connection between childhood obesity and sweetened carbonated beverages—it is unlikely that the Coca Cola Company, as the trademark holder, would have a legal basis to challenge that use.

The owner of a domain name has a protectable property right in the name. In Kremen v. Cohen, the plaintiff had the foresight to register sex.com in 1994, before the then-ssole domain registrar Network Solutions started charging for registrations. The defendant, called “con man Cohen” by the Ninth Circuit, convinced Network Solutions, through use of a forged letter, that the plaintiff had assigned the rights to the domain name to him. Without undertaking any investigation, Network Solutions transferred the domain name to Cohen, who in turn launched “a lucrative online porn empire.” The plaintiff obtained an uncollectible judgment against Cohen, so he asserted claims against Network Solutions, including a claim for conversion. The district court rejected the claim, ruling that the tort of conversion did not apply. The Ninth Circuit reversed, observing, “Negligent or not, it was Network Solutions that gave away Kremen’s property.”

Cases that have considered the use or misuse of domain names often focus on whether the site has a private or commercial purpose. If there is no competitive advantage or anti-competitive purpose, courts have sometimes upheld the use of domain names that comprise others’ trademarks or even personal names.

In Palermo v. Underground Solutions, Inc., the plaintiff was a self-proclaimed “internationally recognized expert” in the plastic piping industry who “has become a champion for certain types of [plastic] piping.” His promotion of plastic pipe—rather than competing products made from ductile iron, steel, or concrete—was not unequivocal. Rather, Palermo routinely gave presentations “highlighting the risks associated with using fused PVC,” a product developed and sold exclusively by Underground Solutions, while speaking favorably about pipe made from HDPE, a competing material.

Palermo filed suit in the Southern District of California, alleging that Underground Solutions registered the domain name genepalermo.com and supplied “written content and photographs that purport to show the ‘facts’ about HDPE piping,” including that it is “dangerous to use, highly fragile, and prohibitively expensive to fix.” Palermo’s complaint was based on his claim that the content of this website is completely inimical to the views that Dr. Palermo maintains and has publicly espoused throughout his career.

Based on the content on the www.genepalermo.com site, Palermo asserted Lanham Act claims for false designation of origin and false association, misappropriation of likeness, and unfair competition under Business and Professions Code Section 17200. The court examined the Web site, which does not mention Palermo’s name or the products or services of Underground Solutions. Rather, the site contains links to 14 instances of HDPE pipe failures, including descriptions of the failure mode and the costs that municipal purchasers paid to repair or replace HDPE pipe.

The court rejected Palermo’s motion for preliminary and permanent injunctions, primarily due to the absence of a commercial use for the Web site, an element of Palermo’s claims. The court noted that while Underground Solutions sells Fusible PVC pipe, a product that competes with HDPE pipe, Palermo himself does not sell HDPE pipe or any product. Nor did Palermo submit any evidence that Underground Solutions earned revenue from the Web site, which does not mention the company or any of its products. The site listed no products for sale, had no links to any other site, did not collect information from visitors, and did not contain advertising. Based on that evidence, the court concluded that for the Lanham Act claim, “the facts in the record are not sufficient to show that a visitor to the website would believe that Gene Palermo originated, sponsored, or approved Defendant’s product, fusible PVC.”

The court reached the same conclusion in connection with the state law misappropriation of likeness claim, under Civil Code Section 3344, which requires a showing that commercial use of one’s identity resulted in injury. Further, the court rejected Palermo’s Section 17200 claim for lack of standing, as he submitted no evidence that he had suffered any injury from the existence of the site. As such, there was a lack of probable success on the merits, so the court denied the motion for injunctive relief.

Only nine days after the Southern District’s decision in Palermo, a decision from the Central District of California that involved personal names being used as domain names was decided the other way. In Branca v. Mann, the plaintiffs, executors of Michael Jackson’s estate, sued multiple defendants who created domain names—including michaeljacksonsecretvault.com and MJ-gives.com—that displayed the singer’s copyright-protected songs and videos. As in Palermo, the plaintiffs’ claims included false designation of origin under the Lanham Act and misappropriation of likeness under Civil Code Section 3344.1, although only a cybersquatting claim related to the domain names. The court granted the plaintiffs’ motion for summary judgment on the cybersquatting claim based on “undisputed evidence that Defendants intended in bad faith to profit from use of Jackson’s name, by registering multiple domain names containing his name or the initials ‘MJ’ to sell Jackson-related products.”

The Palermo and Branca decisions were consistent with the Ninth Circuit’s holding in Bosley Medical Institute, Inc. v. Kremer, Bosley Medical is a registered trademark of the plaintiff, which provides hair restoration services. Michael Kremer was dissatisfied with the services provided by Bosley, so he created bosleymedical.com. On the site, Kremer published information that was highly critical of Bosley, including a summary about a district attorney investigation into the com-

In Nissan Motor Company v. Nissan Computer Corporation, the defendant computer store derived its name from its owner, Uzi Nissan, who used his name for several businesses and registered the domain name nissan.com in 1994. Five years later, in addition to advertising his store’s products, the defendant started advertising for automobile-related products and services on the nissan.com site. The plaintiff automobile manufacturer then sued for dilution under the Federal Trademark Dilution Act.

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MCLE Test No. 228

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. The owner of a domain name does not have a protectible property right in the name if it includes a trademark that the domain owner does not own.
   - True.
   - False.

2. Owners of a domain name that includes a trademark they do not own may be liable for cybersquatting if they seek bad faith commercial gain from use of the name.
   - True.
   - False.

3. Owners of a domain name that includes a trademark they do not own can be liable for trademark infringement if they seek commercial gain from use of the name.
   - True.
   - False.

4. The owner of a domain name that uses the name of a celebrity without permission will likely violate the Anticybersquatting Consumer Protection Act (ACPA).
   - True.
   - False.

5. If the owner of cocacola.com does not own the Coca-Cola trademark but offers to sell the domain name to the Coca-Cola Company, the owner will likely be held in violation of the ACPA.
   - True.
   - False.

6. In Kremen v. Cohen, the Ninth Circuit held that the plaintiff did not have a viable claim for conversion against a domain registrar that assigned ownership of a domain that he owned to a con man.
   - True.
   - False.

7. Owners of a domain name that includes a trademark they do not own may commit trademark infringement by offering a competitor of the trademark holder advertising space on the site.
   - True.
   - False.

   - True.
   - False.

9. In Palermo, the court rejected Palermo’s motion for injunctions based on the absence of commercial use of the Web site in question.
   - True.
   - False.

10. In Branca v. Mann, the court found sufficient evidence to support Lanham Act claims.
    - True.
    - False.

11. Palermo and Branca are inconsistent with the Ninth Circuit’s decision in Bosley Medical Institute, Inc. v. Kremer.
    - True.
    - False.

12. In the Bosley Medical case, the Ninth Circuit found a Lanham Act violation.
    - True.
    - False.

13. In Nucal Foods, Inc. v. Kaye, the court found a bad-faith intent to profit from registration of a domain name that included a trademark that the domain holder did not own.
    - True.
    - False.

    - True.
    - False.

15. In the Nissan Motor case, the Ninth Circuit ruled that under the Federal Trademark Dilution Act, injunctive relief is available for noncommercial use of a trademark.
    - True.
    - False.

16. In the Nissan Motor case, the Ninth Circuit also found that a permanent injunction implicated the First Amendment.
    - True.
    - False.

17. In West Coast Corvettes, Inc. v. MV Marketing, Inc., evidence of customer confusion contributed to a grant of injunctive relief.
    - True.
    - False.

18. In the West Coast Corvettes case, the court did not find bad faith in the defendant’s use of the name in question to divert Web traffic away from the plaintiff’s site.
    - True.
    - False.

19. Academy of Motion Pictures Arts and Sciences, Inc. v. GoDaddy.com, Inc. concerns advertising revenue from Web sites that include a trademark.
    - True.
    - False.

20. In the GoDaddy.com case, the court accepted the defendant’s defense that as a domain name registrar, it was immune from suit under the ACPA.
    - True.
    - False.
pany’s practices and a link to the full investigative report. Significant to the court’s consideration were the facts that “Kremer earns no revenue from the website and no goods or services are sold on the website. There are no links to any of Bosley’s competitors’ websites.”

Bosley sued for Lanham Act violations, including trademark infringement and cybersquatting. The Ninth Circuit agreed that the infringement claims were properly dismissed by the trial court. Noting that infringement claims “are subject to a commercial use requirement,” the appellate court pointed to Supreme Court authority that “made it clear that trademark infringement law prevents only unauthorized uses of a trademark in connection with a commercial transaction in which the trademark is being used to confuse potential consumers.” As there was no commercial use made of the Bosley Medical trademark, there was no Lanham Act violation. Finding that the only harm suffered by Bosley arose “from Kremer’s criticism of their services,” the court concluded that “Bosley cannot use the Lanham Act either as a shield from Kremer’s criticism, or as a sword to shut Kremer up.”

Commercial use is not an element of a cybersquatting claim, so the lack of a commercial use does not bar such a claim. There does, though, have to be a showing of a bad-faith intent to profit from the use of the domain name that includes another’s trademark. Bad faith is typically shown through evidence that the site is not being used or that the owner has offered to sell the domain name to the trademark holder. For example, in *Nucal Foods, Inc. v. Kaye,* the plaintiff, owner of the Cal Eggs common law trademark, attempted to register the domain name caleggs.com. When doing so, plaintiff discovered the domain name was already owned by the defendant. The plaintiff sent a cease-and-desist letter to the defendant. The defendant refused but offered to sell the domain name to the plaintiff for $500,000. The plaintiff brought suit under the ACPA, alleging that the defendant registered the caleggs.com domain name in bad faith. The defendant failed to answer, and, after entry of default, the plaintiff moved for default judgment. The court found that the defendant registered the domain name for no purpose other than to offer it for sale to plaintiff. This was sufficient to show a bad-faith intent to profit and warranted imposition of a permanent injunction, an order directing the transfer of the caleggs.com domain name to the plaintiff, and an award of statutory damages and attorney’s fees.

One of the most challenging issues in domain-name disputes arises when two persons or companies have comparable rights to
the same domain name, and neither desires to
use the name for anticompetitive purposes.
This situation arose in Nissan Motor Com-
pany v. Nissan Computer Corporation. In
that case, the defendant computer store
derived its name from its owner, Uzi Nissan,
who used his name for several businesses
and registered the domain name nissan.com
in 1994. Five years later, in addition to
advertising his store’s products, the defen-
dant started advertising for automobile-
related products and services on the nissan
.com site. The plaintiff automobile manu-
facturer then sued for dilution under the
Federal Trademark Dilution Act (FTDA),
domain name piracy, unfair competition, and
trademark infringement and false designa-
tion of origin under the Lanham Act. After
the lawsuit was filed and the plaintiff had
obtained a preliminary injunction, the defen-
dant posted a link on www.nissan.com and
www.nissan.net to another site, which con-
tained information about the lawsuit, infor-
mation critical about the auto manufacturer,
and links to auto-related advertising.
The district court granted the auto manu-
ufacturer’s motion for summary judgment
and permanently enjoined the defendant from
“posting commercial content, advertising,
and disparaging remarks or negative com-
mentary regarding Nissan Motor on www
.nissan.com or www.nissan.net; and placing
links to other websites containing commercial
content or disparaging remarks and nega-
tive commentary about Nissan Motor.” The
district court concluded that the two
sites were commercial because they contained
disparaging remarks about Nissan Motor
while drawing visitors interested in Nissan
Motor based on the domain name.
There was a mixed result on appeal. The
Ninth Circuit noted that under the FTDA,
injunctive relief is available if the defendant
makes commercial use of plaintiff’s mark in
commerce, while noncommercial use is ex-
cepted. Dilution, noted the court of appeals,
is different from and broader than trademark
infringement, for “neither confusion nor com-
petition is required” for a dilution claim. Dilu-
tion protection, however, requires evi-
dence that the mark is famous, meaning that
the use of the mark by the diluter diminishes
the value of the mark in identifying the prod-
cut with which it is commonly associated. A
mark that is not “famous”—that is, does not
have “such powerful consumer associations
that even non-competing uses can impinge
on their value”—does not receive protection
from dilution. Because the record was
“clouded” with dozens of uses of “Nissan”—
as a common last name, the name of a month
in the Bible, part of the trademark or trade
name for more than 190 unaffiliated busi-
nesses in the United States, plus thousands
domain names that include the word
“Nissan”—the court found that the record
“at a minimum raises a question whether
the mark can be considered a famous mark
eligible for dilution protection.” Based on
this conclusion, the Ninth Circuit determined
that the injunction based on dilution was
improper, and sent the case back to the dis-
trict court for further consideration of the
issue.

The Ninth Circuit also found that the
permanent injunction violated the First
Amendment, because it was a content-based
restriction on the defendant’s speech rights.
The court rejected Nissan Motor’s contention
that the domain name is a mere “source iden-
tifier” rather than communicative message
and thus did not implicate the First Amend-
ment. The court adopted the position taken
by the Fourth Circuit that “trademarks
[should] not be ‘transformed from rights
against unfair competition to rights to con-
trol language.’”
The Ninth Circuit found for the automo-
bile manufacturer, however, on its trademark
infringement claim, but only to the extent that
the www.nissan.com site included links to
automobile-related Web sites. The court
upheld summary judgment for the auto man-

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the registration services safe harbor.\textsuperscript{38} Given the facts that other domain name registrars engage in similar commercial practices and the ACPA provides a safe harbor for registrars, and given the highly lucrative nature of the practice, it is likely that GoDaddy will ask the Ninth Circuit to review the trial court’s decision.

As the use of domain names becomes more clever and varied, courts will have to become more creative in balancing and interpreting the various constitutional and statutory considerations involved.

\textsuperscript{1} The most expensive domain name is insure.com, which reportedly was purchased in 2009 for $16 million. See http://most-expensive.com/domain-name (accessed June 26, 2013).

\textsuperscript{2} Coca-Cola ranked third on a list of the world’s most valuable brands compiled by Forbes. See Apple Top List of the World’s Most Powerful Brands, \textit{FORBES} (Oct. 22, 2012).

\textsuperscript{3} “The mere registration of a domain name does not constitute a commercial use,” so no Lanham Act liability attached. Academy of Motion Picture Arts and Sciences v. Network Solutions, Inc., 989 F. Supp. 1276, 1279 (C.D. Cal. 1997); see also Panavision Int’l, L.P. v. Toeppen, 141 F. 3d 1316, 1324 (9th Cir. 1998).

\textsuperscript{4} 15 U.S.C. §1122(d). See also Bosley Medical Inst., Inc. v. Kremer, 403 F. 3d 672 (9th Cir. 2003).

\textsuperscript{5} Id. at 675.

\textsuperscript{6} Id. at 676, 680.

\textsuperscript{7} Id. at 680-81.

\textsuperscript{8} 15 U.S.C. §1125(d).


\textsuperscript{10} Id., findings and recommendations adopted in full, with additional analysis, at Case 2:12-cv-02754-KJM-AC, ECF No. 491 (June 21, 2013), Summary Judgment, ECF No. 491 (June 21, 2013), findings and recommendations adopted in full, with additional analysis, at Case 2:12-cv-02754-KJM-AC, ECF No. 491 (June 21, 2013), Order Re: (1) Plaintiff’s Motion for Partial Summary Judgment; and (2) Defendants’ Motion for Summary Judgment, ECF No. 491 (June 21, 2013), at 4.

\textsuperscript{11} Id., at 1006.

\textsuperscript{12} 15 U.S.C. §1125(c).

\textsuperscript{13} 15 U.S.C. §1114.

\textsuperscript{14} Nissan Motor Co., 378 F. 3d at 1008.

\textsuperscript{15} Id. at 1109.

\textsuperscript{16} An HDPE pipe manufacturer paid Palermo to give the presentations, but Palermo did not disclose that financial arrangement. Underground Solutions did, which resulted in a separate defamation claim that the trial court rejected. See id. at *7-8.

\textsuperscript{17} Id. at *1.

\textsuperscript{18} Id. at *4.

\textsuperscript{19} Id. at *4-6.


\textsuperscript{21} Id. at *6.

\textsuperscript{22} Bosley Medical Inst., Inc. v. Kremer, 403 F. 3d 672 (9th Cir. 2003).


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\textsuperscript{25} Nissan Motor Co., 378 F. 3d at 1008.

\textsuperscript{26} Id., at 1009 (citing Avery Dennison Corp. v. Sumpton, 189 F. 3d 868, 873 (9th Cir. 1999)).

\textsuperscript{27} Id., at 1010 (citing 15 U.S.C. §§1125(c)(4)(B)).

\textsuperscript{28} Id. at 1011 (citing Avery Dennison Corp. v. Sumpton, 189 F. 3d 868, 873 (9th Cir. 1999)).

\textsuperscript{29} Id. at 1014.

\textsuperscript{30} Id. at 1016.

\textsuperscript{31} Id. at 1017 (citing CPC Int’l, Inc. v. Skippy Inc., 214 F. 3d 456, 462 (4th Cir. 2000)).

\textsuperscript{32} Id. at 1019.


\textsuperscript{34} Id. at *7-9; see also eAdGear, Inc. v. Liu, 2012 WL 2367805 (N.D. Cal. June 21, 2012) (granting application for default judgment on claims for false designation of origin, trademark dilution, and cyberpiracy, upon showing of likely confusion between plaintiff’s trademark and domain, eadgear.com, and defendant’s domain, eadgear.ca; International Oddities, Inc. v. Domestic Oddities Wholesale Distrub. LLC, 2012 WL 3656529 (C.D. Cal. Aug. 23, 2012) (stipulated permanent injunction against defendants’ further use of domesticoddities.com and similar domains, which were confusingly similar to plaintiff’s domain internationaloddities.com); Facebook, Inc. v. Banana Ads LLC, 2013 WL 1873289 (N.D. Cal. Apr. 30, 2013) (Defendants maliciously registered dozens of domain names similar to plaintiff’s trademark through “typosquatting,” with domains such as facebook.com, facebkkk.com, and facebooo.com).}

\textsuperscript{35} Academy of Motion Pictures Arts and Sciences, Inc. v. GoDaddy.com, Inc., CV 10-3738 ABC (CWx) (C.D. Cal. 2010).

\textsuperscript{36} Academy of Motion Picture Arts and Sciences, Inc. v. GoDaddy.com, Inc., CV 10-3738 ABC (CWx) (C.D. Cal. 2010).

\textsuperscript{37} Id., Order Re: (1) Plaintiff’s Motion for Partial Summary Judgment; and (2) Defendants’ Motion for Summary Judgment, ECF No. 491 (June 21, 2013), at 4.

\textsuperscript{38} Id. at 15.