



Trademark trafficking in cyberspace

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Abstract

Unimaginable growth of the Cyberspace raise the various thought in trademark related issues arises in it. Many of the issues are solved by the traditional notion of trademark law, where as the other present thornier questions requiring greater sensitivity for the effecting marketing in internet. The cyberspace trademark issue that continues to get the most press is the domain name controversy. Is a domain a trademark? When does use of a domain infringe trademark rights? If someone else registers a company's name or trademark as their domain, what can the company do? Beyond domains lie the vast array of trademark issues that ultimately are likely to be more important than domain disputes. Questions of what constitutes use, and abuse, of trademarks in cyberspace are exploding along with the web. In addition to garden variety trademark enhancement and policing concerns that take new shapes on the Internet, companies must be vigilant in avoiding trademark dilution and think twice before linking to other sites or permitting others to link to the company's site using company logos. Attempting to police trademark rights in cyberspace can be a daunting, but infinitely interesting, task.

Keywords: cyberspace, trademark

Introduction

Cyberspace

Cyberspace is the virtual computer world and it is an electronic medium which is used to form a global computer network. Cyberspace is a worldwide computer network that work on TCP/IP protocol to facilitate the online communication and data exchange. The term cyberspace was initially introduced by William Gibson in his 1984 books, "Neuromancer". Later on it was Gibson who criticizes the term in late year, calling it evocative and essentially meaningless. Cyberspace allows users to share information, conduct business and many other activities. It mostly gained its interest not by its technical execution and implementation but by the social interaction. Cyberspace does not have any physical foundation that we used in the real world. But that virtual effect in cyberspace takes place in the real world have a real effect.

Author Bruce Sterling describes cyberspace as "the place where a telephone conversation appears to occur. Not inside your actual phone, the plastic device on your desk. Not inside the other person's, in some other city – the place between the phones. The indefinite place out there, where the two of you, human beings, actually meet and communicate [1]."

The growth in the internet brought the problem in the cyberspace because of its ease flow of information and communication led the misuse of the information in the internet. In fact, the investigator has revealed that the incident of 9/11 in the U.S.A and the 26/11 in Mumbai are result of the internet where the carnage communicates to each other through the internet.

Trademark law

Trademark is the word, symbols, or phrase of the particular manufacturer or seller's product distinguish itself from other product. For example the TM of Nike is different from other brand of the shoes such that in internet is done by Nike.com and under some circumstances the packaging and procedure also include in the trademark. Trademark is very much essential in industry and commercial business to of identify their product. This trademark secures the right of the owner of the manufacturer and avoids the infringement of the product so that no person can allow using that mark with approval of the owner. The trademark is the way by which right of both the consumer and manufacturer owner. The essential function of the trademark is to identify the origin of the consumer source and the product source. It is properly called as indicate source or serves for example, "Pepsi", "coke cola", "McDonalds" etc.

Trademark is an essay way to the consumer to identify the product source. Trademark just directly looks in the symbols of the product from which a consumer can easily know the quality of the product. For example if the person has to buy cold drink he simply sees the symbols of Pepsi and borrows it. Such that in internet the consumer directly look into the domain name example when a person have to buy cell phone he will look into the application of flip kart which assured the safe delivery of the product.

Source of Trademark

The trademarks are mostly governed by the state and federal law. The state common law is the most active part in order to make law in the trade mark. The federal was first active in the 1800 by the congress today the federal is the vast and

¹ Bruce sterling, the Hackers Crackdown,(1994)

expanded in order to protect the trademark.

Right in Trademark

Right of TM owner – the trademark owner has three essential rights:

1. Exclusively right to use that product.
2. To obtain relief from the infringement of the product.
3. Right to assign the TM in consideration to use.

The right in the trademark are confer by two ways that is by registering the trademark in registration office i.e. patent and registration office or by being the first one to use that trademark in commerce.

The use of marks means the actual sale of the product to public in that area where it gain the reputation for example if owner sale pizza in his local area than he gain the reputation over there and can protect that marks from the late comers who use that marks. But if the mark is used in other geographical area then the mark could not called as infringes. The other way to use mark is by registering that mark in the registration office. It is the bonafide intention to use that mark. After the marks have been registered the right will be confers to sue the party in infringement or could claim the remedy from that person. This right is limited if the mark is been used in geographical area then the registration owner of the trademark can use that mark everywhere except in that area where it has been used earlier.

Registration of Trademark

Although it is not important to register the trademarks but registering the trademarks confer you some benefits related to trademark. Registration of trademark can give you right to use that trademark nationwide. It is constructive notice to the public that such trademark is owned by party. It gives to sue the other party in court. Also give a remedy to that party for the damage, attorney fees and other remedy.

Trademark in Cyberspace

The internet was initially created as a tool for communication only for government and industrial purpose but now it becomes the global economic purpose. The easy flow of information and ease of communication increase the ability to access the information which creates the opportunity to misuse and criminal activity. It had tremendous impact in intellectual property. Domain name dispute is the most active part that involves the accusation of trademark infringement usually by the cyber squatter. Recently there was no law regarding the protection of the domain name but after the legislation made by the United State which is the first country to make cybersquatting infringement act 1999.

In an increasingly global market the brand become important for competitive advantage in the internet. "Brands rely on their symbolic power to draw attention to themselves and build an acknowledged capacity for value creation"^[2]. Brand can secure its rights by registering the trademark as a domain name.

The current internet technology does not limit problem of cyber squatting and other confusion regarding the TM as a

domain name. The Internet Corporation for Assigned Names and Numbers (ICANN) made a new law with Domain Name Dispute Resolution Policy (UDRP) adopted in the august 26, 1999. The (ICANN) is responsible for managing and coordinating the domain name system so that every address is unique as a unique IP address and domain names.

The World Intellectual Property Organization (WIPO) is an organization that ensures the right of creators and owners of intellectual property are protected worldwide through its Digital Agenda confluence of the internet, digital, technologies and the intellectual property system.

Cyberspace is functioning well in order to effective commercial marketing and business but with this the right of consumer and owner of product must be protected. The development of law in the technical field is limited but with little courage the law and technology together will protect the trademark community in cyberspace.

The most common aspect of domain name issue issues is that of cyber squatting. Under the U.S Anti-Cyber squatting Consumer Protection Act 1999, cyber squatting is the use of trademark in order to take advantage by that trademark and by registering domain name of the famous company to take undue benefit from it. One of the corollary of the cyber squatting is typo squatting where the users are made to make a typographical errors when entering in the domain name. For example:

1. BSNL.co.in into BSNL.com
2. Sony.com into soni.com
3. Facebook.com into facebok.com

Yahoo Inc. vs. Akash Arora 19 february1999^[3].

Wherein the plaintiff is the registered owner of the domain name "yahoo.com" succeeded in obtaining an interim order restraining the defendants and agents from dealing in service or goods on the Internet or otherwise under the domain name "yahooindia.com" or any other trademark/domain name which is deceptively similar to the plaintiff's trademark.

Sbicards.com vs. Domain Active Property Ltd

Sbicards.com was ordered by the WIPO to be transferred to the Indian Company from an Australian entity, which hijacked the domain name hoping to later sell it for a hefty sum to the State Bank of India subsidiary. The panel accepted SBI Card counsel's argument that the Australian company was in the business of buying and selling domain name through its website.

Linking and Framing

Hyperlink is the transportation of the users to another location. Linking create problem with feature like "deep linking" and in the framing helps the site manager to create frames on the page itself and open web page on a single page. It makes vulnerable to intellectual property right violations.

Meta tagging is another major problem for the trademark holders. Meta tagging containing the words, keywords and content of the pages due to its meshing of the technology makes its legal issue. It signify the HTML which forms the basis of the WWW.

² M Castells, the internet galaxy

³ 1999 IAD Delhi 229, 78 (1999) DLT 285.

Remedies

International level

- Provision of the Anti cyber squatting consumer protection act (1999).
- International arbitration system created by ICANN.
- National level
- National internet exchange of India
- WIPOs and arbitration system
- Suit in ICANN

Jurisdiction and enforcement

Anti cyber squatting Consumer Protection Act (ACPA) feature is that it enables in rem jurisdiction in domain name dispute which means that the domain name owner does not have to sue personally but can taken a action against domain name itself. But it is not easy to sue the cyber squatter as the location of the infringer could not be located then the person cannot be sue as in context of the U.S. law. To take advantages of the rem provision the trademark owner must have to satisfy that the location of the infringer could not be found. The plaintiff in rem provision cannot claim damages but the remedies to cancellation or transfer of the domain name in related matter the TM owner prefer the (ICANNs) Uniform Dispute Resolution policy. Thus the above policy cannot provide the damages claim. For such that the plaintiff has to sue the cyber squatter personally for damages. But such policy is silence in the dispute which is outside of their jurisdiction and the internet community has to take more skill technique and effective implementation of law in the cyberspace in order to protect the TM in internet.

Conclusion

Therefore, it can be concluded that the protection of trademark in the cyberspace is very complex subject and it is very difficult to stop the infringement of trademark as the internet is so much vast in nature, involving many grey area which have to be focused in order to protect the right of TM owner. Our existing law doesn't have the effective remedies to plaintiff as the infringer location could not be found and the out of jurisdiction could not be sued. Such failure could amount to destruction in the global market. Legal right of an individual poses the challenge for the court to secure the physical presence of the party who is located outside the jurisdiction of the respective court and enforce it.

All the concerned authorities working towards betterment of healthcare facilities should work together and take steps to provide:

- Remedies to the plaintiff
- Implementation of law where it is not possible
- Protection of trademark community in cyberspace

References

1. Jack Goldsmith. Cybercrime and Jurisdictions, 2000.
2. David Post. Governing Cyberspace This article was to appear in Fall 1997 in Wayne Law Review.
3. F. Gregory Lastowka, Search Engines, HTML, and Trademarks: What's the Meta For? 86 Virginia Law Review, 2000, 835.
4. See David Streitfeld. Making Bad Names for Themselves; Firms Preempt Critics With Nasty Domains The

Washington Post, Friday September 8, 2000, Westlaw 25414864

5. Jonathan Eisenberg, A Guide to the Anti cyber squatting Consumer Protection Act, 2000. www.gcwf.com/articles/journal/jil-march00-1.html
6. Jonathan Eisenberg, A Guide to the Anti cyber squatting Consumer Protection Act 2000. www.gcwf.com/articles/journal/jil-march00-1.html
7. Christopher R Perry. Trademarks as Commodities: The 'Famous' Roadblock to Applying Trademark Dilution Law in Cyberspace Connecticut Law Review, 2000; 32:1127.