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The Wild World of Domain Names

Kelly D. Talcott
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The nomenclature of domain name law is just plain fun. Concepts such as phishing, typosquatting, tasting and kiting all have legal relevance to domain names and, more importantly, how our clients encounter domain names in their businesses.

Most of the attention to date has been focused on phishing and typosquatting, but tasting and kiting can have an impact that is not as apparent but no less real. Both tasting and kiting have been heavily criticized, and both are under attack by [Internet Corporation for Assigned Names and Numbers](#), with some help on kiting from Google.

The common situation arises when a client fails to renew a domain name registration when that registration expires. There are systems in place, of course, to prevent that from happening, ranging from calendared reminders at the client level to an auto-renewal feature with domain name registrars. All are imperfect, however: an expired credit card tied to an auto-renewing domain name and an old e-mail account can add up to a failed registration renewal.

Whatever the reason, if the domain name registration fails to renew, and the domain name enters the open market, then the client will almost certainly have a problem with retrieving control of that domain name. The strong likelihood is that any domain name that is associated with an active Web site that comes up for renewal will be purchased as soon as it becomes available, whether or not the purchaser has any articulable need for the specific domain name. The purpose of this: to 'taste' the domain name to see whether it attracts traffic and, as a result, is a potential source of revenue for the new owner.

Tasting takes advantage of a five-day "add grace period" that is a current feature of domain name registration. This grace period allows the purchaser of a domain name registration to return the name to the pool of available names within five days of registration, with a full refund of both the registration fee charged by the registrar and the ICANN fee (20 cents) that it receives for each registration. (Some tasters reduce their exposure further and operate as domain name registrars.)

A domain taster will monitor the traffic that its newly purchased domain names attract during the add grace period, and will keep the domains that are likely to generate revenue while releasing the ones that are not. There is very little risk to the domain taster, since it will receive a refund of all of its registration and ICANN fees paid for any unprofitable domain that it chooses to release.

Lest you think domain tasting is small potatoes, consider the sheer numbers of domains affected by this practice: ICANN reported that in January 2007, the top 10 domain tasters accounted for more than 45 million deleted .com and .net domain names, about 95 percent of all deleted domain names in those two domains.

Bob Parsons, the CEO of GoDaddy.com, a domain name registrar, noted that of 764,672 domain names registered in one day on March 31, 2006, about 92 percent of them, or 703,503, were dropped just before the grace period expired.

The high level of activity explains why a client that fails to renew its domain name registration within whatever renewal grace period is offered by its registrar is likely to lose control of the name. If the client domain attracts even a small amount of traffic, and that traffic brings revenue to the site that the taster builds for that domain name (through the use of "click-through" ads, for example), the domain name will be retained by the taster and added to its stable of money-making domains.

KITING: SERIAL TASTING

Domain name kiting is a variant of tasting. It is simply the process of sequentially registering a domain name, dropping it within the grace period and re-registering it as soon as it is dropped -- over and over again.

A kiter can control a domain name for a significant period of time without ever having to pay for the privilege.

Up to now there has been virtually no downside risk to domain name kiting; there is, for example, no requirement that the registrant have a bona fide intention of using the domain name in any particular manner, as there is for trademarks.

ICANN announced in late January that its board had approved dropping the ICANN fee refund for domain names that are released during the add grace period.

Registrants would still receive a refund of their domain registration fees, but the 20 cent annual fee that ICANN receives would remain with ICANN. While this may not seem to be a significant penalty to impose on those who take advantage of the add grace period, it is a much larger cost than the zero cost that is presently imposed for dropped registrations. And for a domain name kiter, it is a cost that will reassert itself every five days for each kited domain name in its portfolio, such that the yearly cost to kite a domain name would far exceed the annual cost of purchasing it.

Shortly after the ICANN announcement, Google entered the fray by announcing that it is going to stop allowing domains that it considers to be "kited" to run -- and profit from -- Google-placed ads on the kited sites. It is employing a new domain kiting detection system, and will block kited domains from displaying Google "Ad Sense" advertisements.

The combination of the two initiatives is likely to have a significant impact on both tasting and kiting.

Recently the [Public Interest Registry](#), which is responsible for registering domains in the .org domain, instituted a five-cent-per-deleted-domain surcharge against registrars that deleted more than 90 percent of their .org domain name registrations during the add grace period. The numbers of domains that were registered and then dropped during the grace period decreased dramatically thereafter: from 2.4 million in one month to 157,000 the next.

The Google system is in place now, and may have an effect on the ability of chronically kited domains to provide their owners with an income stream. The change to the ICANN registration procedures will not take place until at least the ICANN fiscal year beginning July 1, 2008; if implemented, that will substantially increase the cost associated with trying out a domain name for profit during the add grace period, even as it will act as only a minor penalty to those who legitimately change their mind after registering a domain name.

CLIENT STRATEGIES

Until these disincentives to instantly snapping up expired domains are fully in place, what are some of the strategies that a client can employ to recover a domain name that has been lost to a domain taster or kiter?

If the domain name includes the client's registered trademark, then, of course, there are the usual remedies of a Uniform Dispute Resolution Policy proceeding or a lawsuit.

If the domain name is not used by the client as a registered trademark, then relief becomes more difficult to achieve. For a single domain name, it may not be worth the effort and expense of engaging in legal proceedings where the recovery is uncertain. Where many domain names are involved, however, the potential recovery may justify bringing suit.

Another alternative is to engage counsel who have deep experience in this area. There are a relatively limited number of large domain holders who prefer to make a little bit of money on each of their thousands of other domains than to spend a lot of money fighting about one or two. It is not unusual for a domain to be transferred back to its former owner on the basis of an e-mail, letter or phone call, provided the communication is directed to the right person. Experienced counsel frequently know who those right people are.

The best cure, as in many cases, is an ounce of prevention. Clients should have in place procedures for keeping track of their domain name inventory, periodically reviewing their registration and contact information and making sure that all registrar account settings are in place so auto-renewals can happen and transfers do not occur without express permission.

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Kelly D. Talcott, a partner in the New York office of K&L Gates, practices intellectual property and technology law.

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